

HIGHLIGHTS

Nevada Supreme Court Upholds Arbitration Clause in CC&R Agreements

In overturning the District Court's finding of unconscionability, the Nevada Supreme Court determined that the arbitration clauses were proper and that the Court could not require arbitration agreements to be more conspicuous than other provisions in a contract. Although CC&R agreements were not traditional contracts, they created binding obligations in the parties, including the obligation to arbitrate disputes.

Appeal to Short Trial Proves Beneficial to Defendant

Plaintiff allegedly suffered cervical, thoracic, and lumbar soft tissue injuries as a result of a rear-end collision and was awarded over \$8,000.00 in damages at arbitration. During the one day short trial, Plaintiff sought \$4,407.85 in medical expenses plus pain and suffering. The jury found unanimously for Defendant.

Defense Verdict in Medical Malpractice Claim Based on Prescription Opioids

A surviving daughter claimed that her mother died from an overdose of OxyContin and Xanax improperly provided by a physician's assistant. At trial, Defendants relied on a number of expert witnesses who opined that the Decedent was tolerant of opiates, had not been diagnosed with an opioid addiction, and did not actually die of an overdose. The jury found in favor of Defendants.

NEVADA SUPREME COURT DECISIONS

CONTRACTS

Subsequent Request for Default against Specific Defendants Did Not Negate the Terms of a Valid Settlement Agreement and Release

Plaintiffs Peggy and Jeffery Cain, owners of Heli Ops International, entered into a Joint Venture Agreement (JVA) with Defendant C4 Worldwide, Inc., in which the Cains agreed to loan C4 \$1,000,000.00 in exchange for the first \$20,000,000.00 of C4's profits. When C4 subsequently failed to distribute profits to the Cains, the parties entered into a "Settlement and Release of all Claims" in which C4 agreed to pay the Cains \$20,000,000.00 by February 25, 2010, and the Cains agreed to release C4 and its officers from any liability related to the original JVA.

C4 subsequently failed to tender the \$20,000,000.00 to the Cains by the February 25, 2010 deadline. The Cains then proceeded to file suit against C4 and six of its officers alleging breach of the settlement agreement, civil conspiracy, fraud, negligence, conversion and intentional interference with contractual relations. Default judgment was entered against C4 and three of its officers on all claims, and another officer settled with the Cains shortly thereafter. Price and Shackelford, the two remaining

officers, moved for summary judgment, claiming that the Cains agreed to release them from liability under the original JVA with C4 when they entered into the Settlement Agreement. The District Court granted summary judgment, finding that the Cains were bound to the Agreement's release provisions. The court based its decision on a determination that the Cains decision to enforce the default judgment negated their ability to rescind the settlement agreement. The Cains appealed the order granting summary judgment.

The Nevada Supreme Court first analyzed whether or not the settlement agreement was valid. To be legally enforceable, a contract must be supported by consideration, meaning that there must be an "exchange of a promise or performance, bargained for by the parties." *Jones v. SunTrust Mortg., Inc.*, 128 Nev. 188, 191, 274 P.3d 762, 764 (2012). A party's mere affirmation of an already existing duty is not adequate consideration to support the enforceability of a contract. *See Cty. Of Clark v. Bonanza*

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No. 1, 96 Nev. 643, 650, 615 P.2d 939, 943 (1980). If a party offers a new or different promise, however, there is sufficient consideration. *Id.* The Nevada Supreme Court determined that the settlement agreement was a separately enforceable and legally binding contract because new consideration was offered. The original agreement between the parties contained an implicit condition precedent that the Cains would only receive the \$20,000,000.00 once C4 generated that amount in proceeds and profits. The settlement agreement, by contrast, did not contain any condition precedent to C4's obligation to pay the \$20,000,000.00. The Court concluded that the elimination of the condition precedent from the original agreement was sufficient consideration and the settlement agreement was legally enforceable.

The Court next analyzed whether or not C4's breach of the agreement released the Cains from their obligations under the settlement and release agreement. When parties exchange promises to perform, one party's material breach of its promise discharges the non-breaching party's duty to perform. Restatement (Second) of Contracts, § 237 (Am. Law Inst. 1981). If the non-breaching party owed its duty under the contract to a third-party beneficiary, the breaching party's "failure of performance" discharges the third-party beneficiary's right to enforce the contract. While there are some exceptions to this rule, no exceptions were implicated in this case. Furthermore, the Cains' enforcement of the default judgment did not amount to a rejection of the option to rescind the settlement agreement, because the award was for monetary damages rather than for specific performance, as the District Court erroneously assumed.

The Nevada Supreme Court concluded that C4's failure to pay the sum promised in the settlement

agreement released the Cains from their promise not to hold any of C4's officers liable for breach of the original Joint Venture Agreement. The Supreme Court reversed the District Court's grant of summary judgment and remanded the matter for further proceedings. *Cain v. Price*, 134 Nev. Adv. Op. No. 26 (April 2018).

ARBITRATION CLAUSES

Nevada Supreme Court Upholds Arbitration Agreements in Community Covenants and Restrictions for Construction Defect Cases

Defendant U.S. Home Corporation was the developer of 12 homes located in a Southern Nevada community-interest property. When a group of homeowners in the community brought a construction defect action against Defendant in Nevada District Court, Defendant responded by filing a motion to compel arbitration. Defendant's motion was based on an arbitration clause contained in the community's Covenants, Conditions and Restrictions (CC&Rs). Defendant argued that the arbitration provision was enforceable under the Federal Arbitration Act (FAA), under which written arbitration agreements are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. §2. The District

Court denied the motion, finding that the FAA did not apply because the underlying transaction did not involve interstate commerce, and that the arbitration clauses were unenforceable due to unconscionability. Defendant subsequently appealed.

The Nevada Supreme Court first analyzed whether or not the arbitration clause in the CC&Rs was binding on Plaintiff homeowners. Plaintiffs argued that the CC&Rs were covenants, not contracts, and thus the arbitration clause contained therein could not be binding. The Court dismissed this argument, stating that the Uniform Arbitration Act adopted in Nevada as NRS 38.206 to 38.248 does not require any specific formalities to create a binding arbitration agreement. The Court noted that arbitration agreements frequently arise in written records outside of conventional contracts, and can be contained in either signed or unsigned agreements. *Tallman v. Eighth Judicial Dist. Ct.*, 131 Nev. Adv. Op. 71, 359 P.3d 113, 119 (2015). The Court also noted that the California Supreme Court recognized the validity of arbitration clauses in CC&Rs, a point which the Court found persuasive given the similarities between Nevada and California's statutory schemes. *Pinnacle Museum Tower Ass'n v. Pinnacle Market Development, LLC.*, 282 P.3d 1217 (Cal. 2012). The Court ultimately determined that the arbitration clause in the CC&Rs was binding on Plaintiff homeowners.

Nevada Legal Update is published quarterly by

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The Court next considered whether the FAA was applicable to the arbitration agreement contained in the CC&Rs. The FAA applies only to contracts “evidencing a transaction involving [interstate] commerce.” 9 U.S.C. § 2 (2012). Plaintiff homeowners argued that the underlying transaction involved purely intrastate commerce, and therefore the FAA, as federal law, did not apply. In reviewing the issue, the Court noted that a transaction sufficiently “involves” interstate commerce if Congress could regulate the transaction through the commerce clause. *Allied-Bruce Terminex Cos. v. Dobson*, 513 U.S. 265, 274-275 (1995). Although land and property disputes are traditionally local concerns, the transaction still involved interstate commerce sufficient to fall under the authority of the FAA. The larger purpose of the CC&Rs was to create a common-interest community and stable use homes and amenities, all considerations which can have an effect on interstate commerce. Furthermore, the underlying construction defect dispute involved multiple out-of-state businesses who provided supplies and services over the course of the construction of the homes at issue.

Finally the Court addressed the FAA’s application to the arbitration clause. The U.S. Supreme Court has made it clear that when the FAA applies, it preempts state laws that disfavor arbitration. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341 (2011). In this case, the District Court found the arbitration clause unenforceable due to unconscionability. The court noted that FAA preemption arises when a “doctrine normally thought to be generally applicable, such as duress, or, as relevant here, unconscionability, is alleged to have been applied in a fashion that disfavors arbitration. *Concepcion* 563 U.S. at 341. Moreover, under the FAA a state court may not rely on the unique nature of arbitration

agreements to support a finding that enforcement of such an agreement would be unconscionable. *Id.*

The District Court’s finding of unconscionability rested on a determination that the arbitration clauses were not conspicuous enough, and that they abrogated procedural rights. The Nevada Supreme Court determined that the FAA preempted both of these arguments against enforcement of the arbitration agreements. The arbitration clauses were printed in the same font and size as all other provisions in the CC&R’s. Under the FAA, courts cannot require arbitration agreements to be more conspicuous than other provisions in a contract. Furthermore, although the arbitration clauses differed from the Nevada requirements for filing a construction defect claim, that fact alone was insufficient to invalidate an arbitration clause because all arbitration clauses involve forgoing some procedural protections.

The Court concluded that although CC&R agreements were not traditional contracts, they created binding obligations on the parties, including the obligation to arbitrate disputes if an arbitration clause was included in the agreement. Furthermore, arbitration clauses in CC&Rs were “transactions involving commerce” which fell within the purview of the FAA. The matter was therefore reversed and remanded for entry of an order directing the parties to arbitration in accordance with the CC&Rs. *U.S. Home Corp. v. Michael Ballesteros Trust*, 134 Nev. Adv. Op. No 25 (April 2018)

NEVADA JURY VERDICTS

BREACH OF CONTRACT

Jury Finds for Defendant

in Alleged Contract Misrepresentation

Plaintiff, a retired male age 77, contracted with Defendants to establish a limited liability company in Mexico. Plaintiff claimed that Defendants subsequently breached the contract and made intentional misrepresentations by failing to prepare the necessary documents within 24 hours, as agreed. Plaintiff also alleged that although Defendants refunded Plaintiff’s fee, they were guilty of inducement based on Defendants’ website.

Defendants denied liability, arguing that they prepared the necessary documents within the required time frame, but Plaintiff was still required to submit the paperwork himself. Plaintiff alleged that as a result of Defendants’ breach of contract, he lost a third-party consulting contract valued at \$30,000.00.

Plaintiff initially sought \$27,500.00 in compensatory damages and \$100,000.00 in punitive damages. Prior to trial, Plaintiff demanded \$20,000.00 and Defendants replied with an offer for \$10,000.00. After a five day trial and three hours of deliberation, the jury found unanimously in favor of Defendants. *Weinstein v. Nevada Corporate Headquarters, Inc. and Valle*, January 26, 2018.

PERSONAL INJURY

Defense Verdict in Rear-End Accident Tried as a Short Trial

Plaintiff, who was in his early fifties and worked as a casino dealer, was rear-ended by Defendant, who was operating a 1996 Toyota Camry. Plaintiff allegedly suffered cervical, thoracic, and lumbar soft tissue injuries, including bilateral injuries to his shoulders. He also reported residual pain, dizziness, sleep disturbance, and nervousness.

At arbitration, Plaintiff was awarded \$8,480.00 in damages. Defendant appealed the arbitration decision and the case proceeded through the Nevada Short Trial Program.

During the short trial, Plaintiff sought \$4,407.85 in medical expenses and made a pretrial settlement demand of \$8,480.00. Defendant served a \$1,001.00 Offer of Judgment. During closing arguments, Plaintiff requested at least \$4,000.00 for his pain and suffering. Defendant argued that the impact was minimal and that the plaintiff was not injured. The four jurors found unanimously for Defendant. *NG v. TRAN*, December 1, 2017.

PREMISES LIABILITY

Verdict for Defendant Movie Theater Following Alleged Slip and Fall

Plaintiff, a female Nevada resident, was leaving Defendant's theater after a movie ended. Plaintiff alleged that, as she was leaving the theater and was moving down the stairs, she abruptly slipped and fell down the remaining four steps to the landing. She claimed that the stairway had no lighting, which created a dangerous condition, and Defendant was on notice of the issue.

As a result of the fall, Plaintiff allegedly sustained injury to the ligaments and tendons in her right ankle, and sought unspecified medical damages. Defendant denied liability. After a six day trial, the jury deliberated for two days before returning a verdict for Defendant. *Cortex v. American Multi-Cinema, Inc., dba AMC Theaters Town Square 18*, December 18, 2017.

MEDICAL MALPRACTICE

Plaintiffs Awarded More than \$2.5 Million for

Alleged Wrongful Death

The male Decedent, age 34, was survived by his father, two adult brothers, and his fiancé, who brought suit for his wrongful death. Plaintiffs alleged that the urgent care facility and Dr. Eichenlaub, a family/general practitioner, fell below the standard of care during treatment of the Decedent. Plaintiffs also alleged that Defendant Eichenlaub failed to provide oxygen when the Decedent presented with an oxygen saturation level of 68 percent, failed to recheck the Decedent's oxygen level, and failed to send Decedent to the hospital. Plaintiffs maintained that as a result of Defendants' negligence, Decedent died the day following his visit to the urgent care facility. According to Plaintiffs, Dr. Eichenlaub also subsequently falsified Decedent's medical records to cover up his conduct.

Plaintiffs retained an emergency medicine specialist from Columbus, Ohio, who opined that Dr. Eichenlaub fell below the standard of care when he failed to read Decedent's x-ray, which indicated that Decedent had pneumonia, until three days after the x-ray was obtained. Plaintiffs also called a documents expert, who opined that based upon several testing methods, Dr. Eichenlaub made fraudulent entries into Decedent's medical records, including statements that Defendant administered oxygen and advised Decedent to go to the hospital.

Dr. Eichenlaub denied that he fell below the standard of care and argued that he administered oxygen to Decedent, administered a breathing treatment, obtained an x-ray, and prescribed antibiotics. Defendant also maintained that he advised Decedent to go to the hospital or he might die, but Decedent refused to go, stating that he did not have medical insurance. Additionally, Defendants argued that Decedent's medical records were not altered.

Defendants relied on an emergency medicine specialist, who opined that Defendants met the standard of care and that even if Decedent had gone to the hospital immediately after seeing Dr. Eichenlaub at the urgent care facility, he still would have died.

Defendants also retained a documents examiner and forensic chemist, who opined that the gas chromatography/mass spectrometry method used by Plaintiffs' expert was not a reliable method, based upon the age of the ink. Although the questioned sections of the medical records were in a different ink, a person could not determine when the entries were made.

Plaintiffs also called an economist to testify at trial, who opined that Decedent's future lost income was approximately \$444,444.00. Defendants' economist opined that there was no value in the Plaintiff father's claim for lost support.

Plaintiffs sought compensatory damages, including \$250,000.00 in lost economic support. Plaintiffs served a \$485,000.00 pretrial offer of judgment and Defendant offered \$35,000.00. The trial lasted nine days and the jury deliberated for four hours before returning a verdict for \$2,875,000.00. The jury was not unanimous in its decision. *Baker et al v. Las Vegas Pain Institute and Medical Center, et al.*, January 19, 2018.

Jury finds Unanimously for Defendant Doctor Following Knee Surgery

Plaintiff, a 42 year old female casino worker, alleged that Defendant, an orthopedic physician, fell below the standard of care when he negligently applied a tourniquet during knee surgery, which led to a foot injury including a foot drop. Plaintiff retained an orthopedic expert from Irvine, California, to testify as to the doctor's treatment and the standard of care. Plaintiff also retained experts to testify

as to nursing standards and practices, vocational costs, and her alleged, future lost wages.

Defendant denied falling below the standard of care and argued the tourniquet pressure used was appropriate and that an injury to the foot was a known risk of knee surgery. Plaintiff had undergone prior surgeries and therefore was at an increased risk for complications.

Plaintiff sought \$373,000.00 in past medical expenses, \$171,000.00 in future medical expenses, and \$450,000.00 in future lost wages. Plaintiff made a pretrial settlement demand of \$990,000.00; however, Defendant refused to make an offer. After a six day trial, the jury deliberated for less than one hour and found unanimously for Defendant. *Zavala v. Quesada, M.D.*, January 29, 2018.

Plaintiffs Seek Compensation after Death Allegedly Resulted from Prescription Opioids

Decedent, a 35 year old female, was survived by her minor daughter who brought suit for Decedent's alleged wrongful death. Plaintiff argued that Decedent was addicted to prescription drugs, engaged in drug-seeking behavior, and had a history of admission to a mental health facility due to an overdose of prescription opioids. Defendants were therefore negligent in administering treatment to Decedent.

Plaintiff specifically alleged that Defendant Malin, a physician assistant who was under the supervision of Defendant Tannoury, M.D., an internist, fell below the standard of care. Plaintiff alleged that Defendant Malin, who had been advised by a non-party physician not to prescribe any opioids or other controlled substances to Decedent, prescribed opioids and other controlled substances to Decedent on multiple occasions which ultimately resulted in Decedent's death. Plaintiff

alleged that Dr. Tannoury was negligent in his supervision of the assessment and treatment provided by Defendant Malin. Plaintiff argued that Decedent's death could have been prevented if Dr. Tannoury appropriately intervened. Instead, as a result of Defendants' alleged negligence, Decedent died from an overdose of OxyContin and Xanax.

To support her claim, Plaintiff retained a pain management specialist, who testified regarding the "red signs" of addiction and opined that Defendants should have seen and recognized the signs that Decedent was addicted to the prescription medication. Defendants similarly retained a pain management specialist, who reviewed Decedent's medical records and opined that Decedent, who was never diagnosed with an addiction, was tolerant to opiates.

Defendants also relied on the testimony of an expert in toxicology and pharmacology, who opined that a patient who was tolerant of opiates would not experience respiratory issues. Additionally the expert testified regarding the importance of obtaining a proper blood sample to ensure reliable results and that the level of opiates in Decedent's blood was too low to cause her death. A pathologist from Louisville, Kentucky, also opined that the medication in Decedent's bloodstream was not lethal and she did not die from an overdose.

Defendants also retained a second pain management specialist who testified regarding the different levels of medication prescribed to Decedent and specifically testified that the two prescriptions provided by Defendant Malin would not have caused Decedent's death.

Plaintiff sought both compensatory and punitive damages. After a nine day trial, the jury found for Defendants. *Marty et al. v. Tannoury, M.D. et al.*, December 9, 2016.

COMMENTS

Recent Nevada Legislation Addresses Issues of Domestic Violence and Prescription Drug Abuse

Nevada Senate Bill 361, effective January 1, 2018, requires employers to give leave and reasonable accommodations to employees affected by domestic violence. The Bill requires all Nevada employers to provide up to 160 hours of leave per year to any employee who has (1) been employed for at least 90 days, and (2) is a victim of domestic violence, or whose household or family member is a victim of domestic violence. The Bill limits this leave of absence to certain purposes, including the diagnosis or treatment of a health condition related to domestic violence, to obtain counseling, to participate in court proceedings, or to establish a personal safety plan. Employers are also required to provide any employee affected by domestic violence reasonable employment accommodations, which may include transfer, reassignment, a new telephone number, or a modified schedule.

The Nevada Legislature, hoping to combat opioid abuse within the State of Nevada also passed the Nevada Prescription Drug Abuse Prevention Act, which went into effect January 1, 2018. The act limits all opioid prescriptions to no more than 14 days for acute pain, and prohibits first-time opioid patients from receiving more than a 90 day supply of medication. Furthermore, for first-time prescriptions, physicians must provide evidence of their relationship with the patient as well as a diagnosis and treatment plan. After a patient has been given opiates for longer than 90 days, physicians must further provide an evidence-based diagnosis and a complete risk-of-abuse assessment. The Act also requires hospitals and physicians to document drug overdoses and suspected overdoses.

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