

HIGHLIGHTS

Insurer Liability for Breach of Duty to Defend May Exceed Policy Limits

The Nevada Supreme Court adopted the minority view when asked to determine an insurer's potential liability for the breach of the duty to defend. The Court agreed that damages for a breach of the duty to defend should not automatically be limited to the applicable policy limits. The insurer may be liable for damages necessary to put the insured in the same position he would have been had the insurance company fulfilled the insurance contract.

Verdict for Oral Surgeon in Malpractice Action

As a result of Defendant's alleged failure to biopsy and diagnose oral squamous cell carcinoma, Plaintiff allegedly required multiple surgical procedures, including extraction of multiple teeth and a partial mandibulectomy. Defendant maintained that he treated a lesion in a different location than the cancer that was diagnosed three years later. The jury returned a verdict in Defendant's favor.

Plaintiff Orthopedic Surgeon Prevails in Contract Dispute

After closing his practice in New Mexico and relocating to Las Vegas to join Defendant's orthopedic practice, Plaintiff filed a suit claiming Defendant breached their contract, was unjustly enriched and was guilty of fraud when he failed and refused to pay Plaintiff what he was owed. Plaintiff ultimately prevailed against Defendant's counterclaims and was awarded compensatory damages.

NEVADA SUPREME COURT DECISIONS

MEDICAL MALPRACTICE

Anesthesia-Caused Injury Was Not Proximate to Hysterectomy Surgery

Plaintiff Susan Dolorfino underwent an emergency hysterectomy at University Medical Center (UMC). The anesthesiologist, Dr. Robert Harper Odell, Jr., performed the endotracheal intubation, which involved passing a plastic tube through Plaintiff's mouth and trachea to maintain an open airway while she was under general anesthesia. During a power outage and subsequent blackout, Dr. Odell allegedly dropped a medical instrument onto Plaintiff's tooth, causing injury. Prior to surgery, Plaintiff signed a consent form acknowledging that "injury to teeth/dental appliances" was a risk associated with general anesthesia.

Plaintiff sued Defendants UMC and Dr. Odell to recover for damages to her tooth. Defendants moved for dismissal, arguing that Plaintiff's complaint must be dismissed pursuant to NRS 41A.071 because it was not accompanied by a supporting affidavit from a medical expert. The district court held that the NRS 41A.071 affidavit requirement applied to all of Plaintiff's claims and because she lacked an affidavit, the court dismissed her case. Plaintiff appealed to the Nevada Supreme Court. The issue on appeal was whether Plaintiff's medical malpractice suit required her to provide a supporting affidavit, or if she was exempt

from the requirement because a tooth injury was not "directly involved" or "proximate" to her hysterectomy.

NRS 41A.071 requires medical malpractice suits be dismissed if the complaint was filed without a supporting affidavit from a medical expert, although the statute set forth specific exceptions. The Supreme Court of Nevada recounted the history of the statute, noting that it was meant to deter baseless medical malpractice litigation, fast track medical malpractice cases, and encourage doctors to practice in Nevada while respecting an injured plaintiff's right to litigate her case and receive full compensation for her injuries. Citing *Zohar v. Zbiegien*, 130 Nev. 733, 738, 334 P.3d 402, 405-406 (2014). The affidavit requirement was specifically intended to lower costs, reduce frivolous lawsuits, and ensure that medical malpractice actions were filed in good faith based upon competent expert medical opinion.

NRS 41A.100(1) specifically provides that there is no affidavit requirement in a case based on *res ipsa loquitur*. When a plaintiff would not have been injured

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but for some negligent act, and that fact speaks for itself, an affidavit was not required. Pursuant to NRS 41A.100(1)(d), an “injury was suffered during the course of treatment to a part of the body not directly involved in the treatment or proximate thereto” fell within this exception. Plaintiff argued that since her tooth was not directly involved or proximate to her hysterectomy, her case was exempt from the NRS 41A.071 affidavit requirement. Defendant UMC argued that Plaintiff’s tooth injury was “proximate to her endotracheal intubation which necessarily accompanied her hysterectomy.” Defendant Dr. Odell argued that accepting Plaintiff’s position would mean that anesthesiologists would be seldom protected by the NRS 41A.071 affidavit requirement.

The Supreme Court of Nevada cited several cases which supported Plaintiff’s position, focusing in large part on *Banks v. Sunrise Hospital.*, 120 Nev. 822, 833, 102 P.3d 52, 60 (2004). In *Banks*, a patient suffered permanent brain damage during a rotator cuff surgery. During the surgery, there was a drop in the patient’s blood pressure which was caused by an error in the anesthesia. The five-justice majority reasoned that the “brain was not directly or proximately related to the rotator cuff surgery” and therefore the NRS 41A.100(1)(d) instruction was appropriate and the affidavit was not required.

Based on this reasoning, the Court held that Plaintiff’s tooth injury was not “directly involved” or “proximate” to her hysterectomy for purposes of NRS 41A100(1)(d) and Plaintiff was not required to file a supporting affidavit with her Complaint. The district court therefore erred in dismissing Plaintiff’s complaint and the matter was reversed and remanded for further proceedings. *Dolorfino v. Univ. Med. Ctr. of S. Nevada*, 134 Nev. Adv. Op. 79, 427 P.3d 1039 (2018).

INSURANCE/DUTY TO DEFEND

Nevada Accepts Minority View Regarding Potential Recovery on Duty to Defend

Plaintiff initiated a personal injury action in state court after a truck owned and driven by Defendant Michael Vasquez struck Plaintiff, causing significant brain injuries. Defendant Vasquez used the truck for personal use and for his mobile auto detailing business. At the time of the incident, Defendant was insured under a personal auto liability policy issued by Progressive, and his business, Blue Streak Auto Detailing, LLC, was covered under an insurance policy issued by Century Surety Company. The Progressive policy had a \$100,000.00 policy limit and the business policy had a \$1 million policy limit. The Supreme Court of Nevada was asked to determine whether, in cases where an insurer breaches its contractual duty to defend, the insurer’s liability was capped at the policy limits plus the insured’s defense costs, or whether the insurer may also be liable for consequential damages caused by its breach.

Upon receiving the accident report, Century Surety Company conducted an investigation and concluded that Defendant Vasquez was not driving in the course and scope of his employment with Blue Streak at the time of the accident, and therefore the accident was not covered under its insurance policy. Century Surety therefore rejected

Plaintiff’s demand to settle the claim within the policy limit. Subsequently, Plaintiff sued Vasquez and Blue Streak in state district court, alleging that Vasquez was driving in the course and scope of his employment with Blue Streak at the time of the accident. Plaintiff notified Century Surety of the suit, but Century Surety refused to defend Blue Streak. Defendants were defaulted in the state court action and the notice of default was provided to Century Surety Company who maintained that the claim was not covered under its policy.

The district court subsequently entered a default judgment against Defendants Vasquez and Blue Streak for \$18,050,183.00. The district court’s factual findings stated that “Vasquez negligently injured Plaintiff, that Defendant Vasquez was working in the course and scope of his employment with Blue Streak at the time of the incident and consequently Blue Streak was also liable.” As an assignee of Blue Streak, Plaintiff filed suit in state district court against Century Surety for breach of contract, breach of the implied covenant of good faith and fair dealing, and unfair claims practices.

The Nevada Supreme Court held that in Nevada, the applicable insurance policies were treated like contracts, and thus legal principles applicable to contracts were generally applicable to insurance policies. When an injured party sought to recover via breach of contract, pursuant to the Second Restatement of Contracts §347, the injured party had a right to damages based on his expectation interest as

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measured by incidental or consequential losses caused by the breach.

The insurance policy created two contractual duties between the insurer and the insured: the duty to indemnify and the duty to defend. The duty to indemnify arose when an insured became legally obligated to pay damages in the underlying action that gave rise to a claim under the policy. The duty to defend was generally broader and an insurer has a duty to defend its insured whenever it ascertains facts which give rise to the potential of liability under the policy.

In a case where the duty to defend does arise, and the insurer breaches that duty, the insurer is liable for the insured's reasonable costs in mounting a defense in the underlying action.

Several other states have considered an insurer's liability for a breach of its duty to defend. While no court would disagree that the insurer is liable for the insured's defense costs, courts have taken two different views when considering whether the insurer may be liable for an entire judgment that exceeds the policy limits in the underlying action. The majority view allows that where there is no opportunity to compromise the claim and the only wrongful act of the insurer is the refusal to defend, the liability of the insurer is ordinarily limited to the amount of the policy plus attorneys' fees and costs. The minority view is that damages for a breach of the duty to defend are not automatically limited to the amount of the policy; instead, the damages awarded depend on the facts of each case. The insurer may be liable for damages necessary to put the insured in the same position he would have been had the insurance company fulfilled the insurance contract. Thus, a party aggrieved by an insurer's breach of its duty to defend is entitled to recover all damages naturally flowing from the breach, including consequential damages.

The Nevada Supreme Court adopted

the minority view. The obligation of the insurer to defend its insured is purely contractual and a refusal to defend is considered a breach of contract. Consistent with general contract principles, the minority view provided that the insured may be entitled to consequential damages resulting from the insurer's breach of its contractual duty to defend. Thus, an insurer's liability for the breach of the duty to defend was not capped at the policy limits, even in the absence of bad faith. *Century Sur. Co. v. Andrew*, 134 Nev. Adv. Op. 100, 432 P.3d 180 (2018)

NEVADA JURY VERDICTS

MEDICAL MALPRACTICE

Jury Renders a Defense Verdict in Case Involving Faulty Implant

Plaintiff, age 67 and a retired police officer, had preexisting Peyronie's disease (fibrous scar tissue inside the penis that causes curved and painful erections), with erectile dysfunction. Plaintiff agreed to a penile implant and alleged that Defendant urologist fell below the standard of care during the surgery. Plaintiff specifically alleged that Defendant performed a more risky infrapubic incision entry technique and lacerated the right dorsal nerve. Plaintiff also alleged that the two cylinders implanted were three to four centimeters too short, and therefore, failed to properly support Plaintiff's entire penis. Additionally, Plaintiff alleged that he experienced severe genital post-operative pain for ten weeks and suffered total loss of sensation along the right distal shaft. Defendant denied falling below the standard of care.

Plaintiff sought compensatory damages and an undisclosed amount for

medical expenses. Plaintiff's spouse also asserted a claim for loss of consortium. After an eight-day trial, the jury returned a verdict for Defendant. *Cummings v. Grigoriev, M.D.*, May 3, 2018.

Jury Unconvinced by Plaintiff's Claim of Malpractice by Oral Surgeon

Plaintiff, in her sixties, alleged that Defendant oral surgeon fell below the standard of care when he failed to biopsy an oral abrasion in 2009 and 2010. Plaintiff claimed that the biopsy would have revealed oral squamous cell carcinoma that was subsequently diagnosed in 2013. As a result of Defendant's alleged negligence, Plaintiff allegedly required multiple surgical procedures, including extraction of multiple teeth, an initial removal of a margin of the jaw bone, additional partial mandibulectomy, and removal of several lymph nodes.

Defendant denied falling below the standard of care and maintained that performing a biopsy, in light of the improvement of the abrasion, was not required and would have been contraindicated. Defendant also argued that the improvement of the abrasion after treatment established that there was no cancer or pre-cancerous condition present in 2009 or 2010. Additionally, Defendant argued that the rapid progression of the clinical presentation in 2013, as well as pathology slides from the cancer-affected area, revealed an aggressive cancerous process that would not have remained dormant for approximately three years. Defendant also argued that the cancer diagnosed in 2013 was in a different location and appearance than the abrasion in 2009 and 2010. Defendant relied on the expert testimony of an oral and maxillofacial surgeon, and a pathologist.

Plaintiff sought to recover approximately \$137,000.00 in medical expenses. After a six-day trial and

less than one hour of deliberation, the jury unanimously found for Defendant. *Michael v. Frank, D.D.S.*, March 14, 2018.

PERSONAL INJURY

School Bus Driver Not Liable for Injuries to Minor Plaintiff Struck by Bus

Plaintiff, a minor, attended an elementary school within Defendant's school district. After exiting the school building, he was allegedly struck by Defendant Malloy-Brechheisen who was in the course and scope of her occupational duties, operating a school bus for Defendant school district. Plaintiff claimed that the convex mirror on Defendants' school bus was cloudy and obstructed Defendant's view of the right side of the bus. As a result of the impact, Plaintiff allegedly sustained injuries to his hip and pelvis. After a one-day trial, the jury returned a verdict for Defendants. *Role v. Clark County. Sch. Dist. & Malloy-Brechheisen*, April 6, 2018.

Security Scuffle Results in Defense Verdict for Defendant Nightclub

Plaintiff, a 28-year old Nevada resident and business consultant alleged that he and a friend were welcomed as "complimentary guests" at Defendant nightclub. At approximately 4:00 a.m., while standing on the dance floor Plaintiff used his cellular phone to take a picture of Metta World Peace, a professional basketball player, who was approximately twenty to twenty-five feet away. Metta World Peace then stepped onto the dance floor from the VIP/DJ stage area and began dancing, acting rowdy, and pacing immediately in front of Plaintiff, thereby making Plaintiff feel uncomfortable and somewhat threatened.

Later, as Plaintiff was leaving the

nightclub, he was grabbed, restrained, and forcefully pushed down a spiral staircase and subsequently thrown to the floor. As he continued down the spiral staircase, Plaintiff was followed closely by Defendant nightclub's personnel, who allegedly made contact with Plaintiff's body. After telling them to "back off," Plaintiff stopped, turned around, and mildly pushed one of Defendant's personnel. Thereafter, Plaintiff was allegedly grabbed around his neck and put in a choke hold. When the nightclub's security guards arrived, he was released and allowed to leave the premises. Additionally, Plaintiff alleged that Defendant's employees wrongfully accused him of shattering a \$3,000.00 mirror and made false statements to third parties. As a result of these encounters, Plaintiff allegedly sustained unspecified injuries and emotional trauma. Defendant denied liability, maintaining that its security hosts acted within their right to use force against Plaintiff.

Plaintiff made a pretrial demand of \$250,000.00 and Defendant offered \$25,000.00. During closing arguments, Plaintiff asked the jury to award \$250,000.00, while Defendant argued liability. After a four-day trial and deliberations of less than one hour, the jury returned a unanimous verdict for Defendant. *Abouramadan v. Chateau Nightclub, L.L.C.*, May 24, 2018.

PRODUCT LIABILITY

Verdict for Las Vegas Magician against Volunteer Allegedly Injured During Act

Plaintiff and his spouse were guests at Defendant MGM Grand Hotel and attended Defendant David Copperfield's show at the hotel's Hollywood Theater. Plaintiff was in the audience and was selected at random to participate in the final act of the show called the

"Lucky 13." During the act, Plaintiff was allegedly hurried, not provided guidance or instruction and was in a dark area which was under construction. He alleged that during or immediately after the act he slipped and fell.

Plaintiff alleged that Defendants failed to maintain the premises inside and outside of the theater and failed to warn Plaintiff of the ongoing construction and ramp outside the building which Plaintiff was required to utilize. Plaintiff further claimed that Defendants failed to clear the walkways of debris and dust, failed to maintain adequate lighting, failed to devise a trick that would be safe for audience participants, and failed to adequately warn or instruct audience participants prior to obtaining consent for participation. According to Plaintiff prior, similar incidents had occurred and Defendants knew of the hazards.

Defendants denied liability and relied on the testimony of a lighting expert and a mechanical engineer. The jury was permitted to view the incident site. The trial was bifurcated and the liability portion of the trial required 14 days. The jury deliberated for only two hours and returned a verdict in favor of Defendants. *Cox v. MGM Grand Hotel, et al.*, May 29, 2018.

Jury Does Not Believe Plaintiff's Alleged Damages Caused by Television

Plaintiff, an insurance agent and financial planner, alleged that while shopping in Defendant's store an unsecured, heavy television being transported in a shopping cart by Defendant's employee fell off of the cart and onto Plaintiff's foot. Plaintiff alleged that Defendant's employee was negligent and failed to secure the television. Defendant denied liability and maintained that the incident occurred through no fault of its employee.

As a result of the incident, Plaintiff

allegedly suffered a fractured left foot, a severely injured left ankle, medial and lateral meniscus tears to the left knee, slipped and bulging spinal discs, and three fractured vertebrae. She further alleged that she experienced significant residual left leg atrophy, nerve damage, and ongoing pain. Plaintiff relied on the testimony of two orthopedic physicians. Plaintiff sought \$43,011.33 in past medical damages, \$100,000.00 in future medical expenses, \$330,000.00 in past lost wages, and \$3,000,000.00 in future lost wages.

The jury was able to view the subject incident on videotape. After a three-day trial, the jury deliberated for approximately two hours and returned a verdict for Defendant. *Morgan v. Best Buy Company, Inc.*, May 23, 2018.

Defendant Had No Notice of Liquid on Grocery Store Floor

Plaintiff, age 70, alleged that she slipped and fell on water or some other clear liquid on the floor of Defendant grocery store as she was walking toward the checkout cashiers. As a result of the fall, Plaintiff allegedly sustained cervical, thoracic and lumbar soft tissue injuries, as well as injuries to her arm, hand, and knee.

Plaintiff alleged that Defendant was negligent in its maintenance of the premises and failed to provide business invitees a safe means of ingress and egress. Defendant denied liability and maintained that it had no notice of water or another liquid on the floor.

Plaintiff sought approximately \$19,000.00 in medical expenses. The matter was tried as a one-day short trial. After fifteen minutes of deliberation, the jury found for Defendant. *Viray v. Smith's Food & Drug Centers, Inc.*, April 13, 2018.

BREACH OF CONTRACT

Plaintiff Awarded \$368,085.74 in Compensatory Damages for Breach of Contract, Fraud, and Unjust Enrichment

Plaintiff, an orthopedic surgeon, alleged that Defendant, also an orthopedic surgeon, recruited Plaintiff to join Defendant's medical practice. Defendant offered Plaintiff a salary of \$250,000.00 per year for two years.

Plaintiff closed his practice in Albuquerque, New Mexico, and joined Defendant's practice in Nevada. Shortly thereafter, Defendant allegedly informed Plaintiff that he was unable to pay Plaintiff what had been promised. Defendant therefore agreed to a new compensation arrangement whereby Plaintiff would take a draw against a percentage of his collections. Plaintiff alleged Defendant breached the contract, was unjustly enriched, and was guilty of fraud when he failed and refused to pay Plaintiff what he was owed.

Defendant denied liability and argued that Plaintiff breached the contract, breached the covenant of good faith and fair dealing, and was unjustly enriched. The Court granted Plaintiff's motion to strike Defendant's counterclaim for unjust enrichment.

After a six-day trial and two-plus hours of jury deliberation, the jury found for Plaintiff on Defendant's counterclaim. The jury also awarded Plaintiff \$368,085.74 in compensatory damages. *Quesada, M.D. v. Crovetti, D.O., dba Crovetti Bone & Joint Institute of Southern Nevada, Ltd.*, May 3, 2018.

COMMENTS

Changes to the Nevada Court of Appeals and Supreme Court of Nevada

Bonnie Bulla has been serving as the Discovery Commissioner for the Eighth Judicial District Court for Clark County, Nevada, since 2007. She earned her law degree in 1987 from Arizona State University and was admitted to practice in Nevada in the same year. As the Discovery Commissioner, she was responsible for resolving disputes that arose during discovery in civil litigation. The Commissioner was appointed by and responsible to the District Court Judges. Ms. Bulla was recently appointed to the Nevada Court of Appeals by Governor Steven Sisolak, filling the vacancy left by Justice Abbi Silver, who was recently elected to the Supreme Court of Nevada.

With the changes to the Justices serving in the Supreme Court of Nevada and the Nevada Court of Appeals, a new Chief Justice was also appointed. Current Chief Justice Mark Gibbons will serve through the remainder of 2019, and will be joined by Associate Chief Justice Kristina Pickering. The Chief Justice is the administrative head of the Nevada Judiciary and the public voice of the Nevada Supreme Court. Under the Nevada Constitution, only Justices in the last two years of their current six-year term of office are eligible to serve as Chief Justice. Chief Justice Gibbons and Justice Pickering chose to share the duties, with Justice Pickering assuming the position of Chief Justice in 2020.

Chief Justice Mark Gibbons was first elected to the Nevada Supreme Court in 2002 and was elected to his third six-year term in 2014. He attended the University of California at Irvine where he earned his Bachelor's Degree. He continued his education at Loyola University School of Law in Los Angeles, California, where he received his Juris Doctorate. He had a long career as a private attorney specializing in real estate related litigation. Justice Gibbons served as Presiding Judge of the civil division of the Clark County District Court in 1998, and was elected Chief Judge of the Clark County District Court in 2001 where he served until he assumed his duties as a Supreme Court Justice.

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