



HIGHLIGHTS

Nevada Supreme Court Clarifies Common Carrier Liability

The Nevada Supreme Court clarified that the additional care owed by common carriers was limited to providing care related to transportation risks, and not to extensively monitoring the health of the common carriers' passengers. The duty specifically owed to a disabled passenger was that of ordinary care due to the common-carrier special relationship between them.

Plaintiff Awarded Over \$1.8 Million for Head-On Collision

Plaintiff was ejected from his vehicle following a head-on collision with Defendant who was traveling the wrong way on the freeway. The jury awarded over \$1.8 million in damages, including past and future medical expenses. The court also awarded Plaintiff attorney's fees, costs and interest as the prevailing party.

Jury Awards \$250,000.00 in Class-Action Lawsuit against Psychiatric Facility

Plaintiffs alleged that a local psychiatric hospital had a habit of discharging patients without consent. Once discharged, the patients were placed on a bus to various locations, with a limited supply of anti-psychotic medication and nutrition shakes. The class members sought recovery for emotional distress.

NEVADA SUPREME COURT DECISIONS

COMMON-CARRIER LIABILITY

Heightened Standard of Care for Common Carriers Applies to Transportation Risks Only

Decedent, Harvey Chernikoff, a 51-year old male, was intellectually disabled. As he rode a paratransit bus owned by Defendant First Transit, he choked on a sandwich and began to exhibit distress. Noticing Mr. Chernikoff's apparent trouble, the bus driver pulled over to the side of the road, rendered some aid, and called 911. Mr. Chernikoff died despite these efforts. Subsequently, Mr. Chernikoff's parents brought a negligence claim against First Transit, arguing that it breached the common carriers heightened duty of care, which Plaintiffs defined as the "highest degree of care consistent with the mode of conveyance used and the practical operation of its business."

First Transit maintained that the heightened duty owed by common carriers only applied to transportation risks; risks such as a bus driver failing to prevent a passenger from choking to death fell outside of this category. It requested that the district court instruct the jury to consider the ordinary-negligence standard and not the heightened standard of care.

Also at issue were the closing arguments made by Plaintiffs' counsel at trial. Counsel suggested that the additional duty of care owed to disabled persons was "even higher" than the highest duty of care instruction. First Transit alleged that these conflated arguments warped the standard of care and seriously prejudiced the jury in its deliberations.

Following counsels' arguments, and over First Transit's objection, the district court gave the heightened-standard instruction, along with an "additional-care" instruction regarding the standard of care owed to persons with known disabilities. The jury decided, in a six to two decision, that First Transit was liable for negligence and awarded the Plaintiffs \$15 million. The verdict was appealed to the Nevada Supreme Court.

On appeal, the Nevada Supreme Court found that the jury instructions prejudiced the jury. It confirmed that a common carrier does owe a heightened duty of care to its passengers for transportation-related risks; however, the Court declined to extend this duty to non-transportation risks, such as those inherent in eating. It reasoned that a common carrier cannot always guarantee a passenger's safety and that there must be some connection between the common carrier's duty of transportation and the passenger's injury. Here, Mr. Chernikoff's death resulted because he choked on food; this injury was unrelated to a common carrier's duty of transportation and was one that could occur in the same manner outside of the transportation context. The duty of additional care was limited to providing

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care related to transportation risks, and not to extensively monitoring the health of its passengers. As such, First Transit did not owe a duty of heightened care.

Rather, the Court found that First Transit owed a general duty of reasonable care and a duty of additional care for a mentally disabled passenger. This duty of “additional care” was defined as the duty to provide “additional care which the circumstances reasonably require.” For example, a common carrier should assist passengers in boarding and leaving the bus if they have difficulty doing so. The Court found that the district court gave the correct instruction regarding this duty, but when combined with the erroneous heightened-care instruction, it prejudiced the jury and implied that First Transit had the duty to proactively monitor Mr. Chernikoff.

Because the jury was misled by the instructions provided and applied the incorrect standard, a new trial was ordered and the matter was remanded to the district court. *First Transit, Inc. v. Chernikoff*, 135 Nev. Adv. Op. 32 (Aug. 1, 2019).

PROFESSIONAL NEGLIGENCE

Court Affirms Summary Judgment in Professional Negligence Case Where No Evidence Was Proffered to Substantiate Claims

James and Maria Boesiger purchased a home in Las Vegas and signed a mortgage to finance their purchase. The mortgage company requested that a real estate appraisal company appraise the property and later relied on its valuation to determine the terms of the mortgage. The Boesigers later became aware of a discrepancy between the square footage as reported in the appraisal and as reported by the county assessor's office. After being unable to refinance their loan, they brought suit against the appraisal company and the employee appraiser who rendered the valuation. Plaintiffs specifically alleged that the appraiser was negligent in failing to

rely on the county assessor's square-footage estimate to value the property.

In their complaint, Plaintiffs initially designated an expert appraiser to testify, but later withdrew this designation as they failed to comply with Nevada's rules regarding expert disclosures as set forth in NRC 16.1(a)(2). They also failed to identify any other expert witnesses, despite Nevada explicitly requiring an expert witness to establish the professional standard of care when relevant. Plaintiffs' only evidence was two depositions, a purchase agreement, and the appraisal at issue. Plaintiffs arguably had two years to provide or produce evidence to support their claims before Defendants moved for summary judgment, but failed to develop their case.

In deciding Defendants' motion for summary judgment, the district court found that Plaintiffs failed to establish the professional-negligence standard based on the lack of expert witnesses, and that Plaintiffs' other claims either derived from the professional-negligence claim or were bereft of evidentiary support. Thus, it entered summary judgment in Defendants' favor and Plaintiffs appealed to the Nevada Supreme Court.

On appeal, the Nevada Supreme Court began its analysis by reciting the purpose of summary judgment, which was to prevent meritless claims from going to trial and to avoid wasting resources. Parties may only move for summary judgment when “there is no genuine dispute as to any material fact.” The nonmoving party must point to at least some specific fact that demonstrates a disputable issue. A court should look to the pleadings, depositions, and other court documents to determine whether they contain any of these specific facts which would present a triable issue.

The Court emphasized the importance of providing an expert when asserting the level of care that an appraiser should possess, noting that an average layperson would not know all of the industry approaches for

valuation. The Court rejected Plaintiffs' contention that an expert was unnecessary, as they failed to produce any legal authority to support their contention. The Court further noted that Plaintiffs provided no evidence of any breach of any duty of care, as they “utterly failed to produce any evidence.” The mere fact that a discrepancy existed between the appraisal report and the county records was not conclusory, and the depositions were unsubstantiated. The Court found that no reasonable jury could find for Plaintiffs on any of their claims.

The Court concluded by advising courts to be unafraid to grant summary judgment where parties provide less-than-barebones support for their claims, finding that in doing so courts “promote the important policy objectives of sound judicial economy and enhance the judiciary's capacity to effectively and efficiently adjudicate legitimate claims.” *Boesiger v. Desert Appraisals, LLC*, 135 Nev. Adv. Op. 25 (Jul. 3, 2019).

**NEVADA JURY
VERDICTS**

MEDICAL MALPRACTICE

Jury Finds that Cosmetic Surgeon Breached His Duty of Care

Plaintiff, a Nevada resident in her mid-fifties, went to Defendant physician for a cosmetic procedure. Defendant performed a J-Plasma laserabrasion treatment, which caused severe burning to the Plaintiff's face and neck, eventually resulting in permanent scarring and hypopigmentation. Plaintiff alleged that Defendant's actions fell below the standard of care and that this breach of duty caused Plaintiff's injuries. Defendant maintained that his actions were within the standard of care.

Plaintiff called two plastic-surgeon experts at trial and sought compensatory damages and medical expenses totaling

approximately \$130,000.00. After a six-day trial, the jury found for Plaintiff and awarded \$132,000.00 in compensatory damages. *Lanman v. Mall, M.D.*, October 17, 2018

Cardiologist Found Not Liable for Patient's Death during Medical Procedure

Decedent, a Nevada resident with no known respiratory issues, experienced an onset of chest palpitations and tightness. Defendant, a cardiologist at non-party hospital, recommended that Decedent undergo a medical procedure in which an angiogram would be performed followed by a stent placement. Defendant also prescribed respiratory depressants and opioids.

On the day of the procedure, Decedent's oxygen level remained low in spite of receiving the maximum amount of oxygen. Decedent died during the medical procedure. Plaintiff, Decedent's spouse, brought a wrongful-death claim on behalf of both himself and the Decedent's estate, alleging that Defendant fell below the standard of care in performing the procedure, and that this negligence caused Decedent's death. Specifically, he alleged that Defendant negligently started the procedure with Decedent's oxygen being too low and that he negligently administered the anesthesia himself despite warnings from staff. Plaintiff alleged that Defendant's actions constituted a conscious disregard for Decedent's life and requested over \$10,000.00 in damages.

Defendant denied performing the procedure negligently. After an eight-day trial and over an hour of deliberations, the jury unanimously found for Defendant and denied Plaintiff any award. *Sims v. Vohra*, October 3, 2018

PERSONAL INJURY

Jury Renders Verdict for Defendant Ski Resort

Plaintiff, a Nevada resident, was injured

while snowboarding at Mt. Charleston Ski Resort outside of Las Vegas. She alleged that, while snowboarding down the mountain, she crashed into an inadequately protected ski-lift brace. She further alleged that, before crashing, she noticed several other inadequately protected ski-lift braces. This, the plaintiff alleged, constituted a breach of the Defendant's duty to provide a safe environment for invitees.

Plaintiff suffered a laceration to her lower left leg plus other unspecified injuries, for which she sought compensatory damages plus an additional, unspecified amount in medical expenses. Defendant denied Plaintiff's allegations. After a short one-day trial, the jury unanimously found for Defendant. *Herrera v. Lee Canyon Ski Lifts, Inc.*, November 9, 2018

Plaintiff Recovers against Electric Company after High-Speed Automobile Accident

Plaintiff, age 39, was injured in an automobile accident. Plaintiff alleged that Defendant's employee, an electrician, rear-ended him while the employee was in the course of job-related duties. Plaintiff also alleged that the Defendant electrician was traveling at an excessively high rate of speed when the accident occurred. Plaintiff claimed that this caused severe spinal injuries, which were later treated through advanced spinal treatment. Plaintiff also alleged that he experienced distressing symptoms after the accident, such as depression, erectile dysfunction, numbness, and constant pain. Due to the extensive nature of his injuries, Plaintiff alleged that he became completely disabled due to the accident. Plaintiff called an orthopedist, a radiologist, and an economist to establish causation and damages; specifically, Plaintiff alleged through his economist expert that he would be permanently unemployed due to the accident. Prior to trial, Plaintiff made a demand in the amount of \$2,500,000.00.

Defendant did not contest that he was negligent but instead contended that he was

not traveling at a high rate of speed and that the impact between the two vehicles was not severe. Defendants called an orthopedist and a vocational rehabilitationist to establish that Plaintiff's injuries were subjective and that Plaintiff still had employment opportunities, thus mitigating any damages.

During trial, the jury was shown surveillance film of the accident. Plaintiff sought \$14,000,000.00 in damages. Defendant countered that damages between \$91,136.00 and \$136,136.00 would adequately compensate Plaintiff. After an eleven-day trial and over 9 hours of deliberations, the jury awarded Plaintiff \$550,250.00 in compensatory damages. *Ramirez v. Morse Electric, Inc.*, November 7, 2018

Patients Prevail in Class-Action Lawsuit against Psychiatric Facility

Plaintiff, age 48 and destitute, was a patient of Defendant psychiatric hospital when Defendant allegedly discharged him without Plaintiff's consent. Defendant put Plaintiff on a bus to Sacramento, California, and provided him a three-day supply of anti-psychotic medication and several bottles of a nutrition shake.

After arriving in Sacramento, Plaintiff spent time in a homeless shelter and at the University of California's emergency medical department before eventually landing in a Sacramento group home. A Sacramento newspaper later picked up the story and reported that the hospital had previously discharged patients under similar circumstances.

Plaintiff brought a class-action lawsuit on behalf of himself and others who had been involuntarily discharged and transported to other states in similar fashion. He alleged that Defendant discharged the patients despite their need for continued psychiatric care, thus violating its statutory duty of care and its own policies. Plaintiff also alleged that the damage done was exacerbated by the fact that sending the patients away to seemingly



random cities without a plan regarding who would receive them, or ensuring that the patients would receive adequate care, made the patients more likely to suffer harm. Plaintiff sought recovery for emotional distress on behalf of the class.

Defendant countered, arguing that Plaintiff was experienced in traveling alone and that putting Plaintiff on a bus was reasonable under the circumstances. Further, Defendant argued that it had not breached its duty of care, as it could not have hospitalized Plaintiff anyway; it could only hospitalize patients who posed a risk either to themselves or others and Plaintiff posed no such risk.

After more than three hours of deliberations, the jury rejected Defendant's arguments, finding that Defendant failed its duty toward discharged patients, including failing to send them to the correct locations, to provide adequate travel arrangements, to provide adequate housing upon arrival in out-of-state locations, to properly document arrangements in medical records, and to provide follow-up care. Plaintiff was awarded \$250,000.00. *Brown v. Southern Nevada Mental Health Services*, November 1, 2018

Plaintiff Denied Award for Accident in Intersection

Plaintiff, age 45, was involved in an automobile accident with Defendant while traveling northbound through a controlled intersection. Plaintiff alleged that Defendant made a negligent left turn at the intersection causing a collision. The collision caused Plaintiff to strike his head, lose consciousness, and sustain head, thoracic, cervical, and lumbar soft tissue injuries. Defendant, on the other hand, denied liability, alleged that he had the right of way through the intersection, and alleged that Plaintiff entered the intersection on a red light.

At trial, Plaintiff called his physician, an emergency medicine specialist, and a physical therapist who opined that Plaintiff's

treatment was both necessary and appropriate for the injuries sustained. Defendant's expert orthoped performed an independent examination on Plaintiff and opined that Plaintiff's treatments were excessive and should have only lasted eight weeks.

Approaching the close of trial, Plaintiff requested between \$74,995.00 and \$85,000.00 in damages. Defendant reiterated that Plaintiff was over 50% negligent by running the red light and that Plaintiff should be awarded nothing; in the alternative, Defendant requested that he only be held liable in the amount of \$27,457.22. After a five-day trial and over one hour of deliberations, the jury found for Defendant unanimously and awarded Plaintiff nothing. *DePhillips v. Huballa*, October 19, 2018

Head-on Collision Results in Verdict for Ejected Driver

Plaintiff, age 35, was involved in an automobile accident with Defendant. Plaintiff alleged that, while traveling on the freeway, Defendant was driving on the wrong side of the road. Plaintiff and Defendant collided head-on and Plaintiff was ejected from the vehicle. Plaintiff further alleged that Defendant was intoxicated and acted recklessly. Plaintiff sought compensatory damages, punitive damages, past and future medical expenses of \$1,003,700.00, and \$800,000.00 in lost wages.

Defendant called an orthopedist and economist to contest Plaintiff's damages claim. After a five-day trial, the jury unanimously found for Plaintiff and awarded \$1,865,700.80. Plaintiff was also subsequently awarded \$458,561.00 in attorney's fees, costs, and interest. *Abernathy v. Fenske*, October 15, 2018

PREMISES LIABILITY

No Award for Plaintiff in Scooter Accident

Plaintiff required the use of a mobility

scooter during her stay at Defendant hotel and casino. While at the hotel, Plaintiff ran over a table leg, which tipped the scooter and caused her to fall to the ground. As a result of the fall, Plaintiff's pre-existing injuries to her left leg were exacerbated. Plaintiff also suffered a stroke during her hospital stay and her condition worsened considerably. Plaintiff alleged she suffered complete loss of independent mobility, cognitive deficits, was unable to perform daily activities, and developed severe depression.

Plaintiff asserted claims against both the hotel and the scooter dealer. Plaintiff alleged that the hotel inadequately maintained its premises by allowing a configuration of tables and chairs that contributed to her fall. Plaintiff also alleged that the scooter dealer failed to install adequate safeguards on the scooter to prevent the fall from occurring. After a nine-day trial, the jury returned a verdict for Defendants. Following the trial, the court awarded Defendants \$109,285.28 in attorney fees and costs. *Harrison v. Ramparts, Inc.*, December 20, 2018

Over \$500,000.00 Awarded for Accident Involving an Arch Collapse

Plaintiff, a Nevada visitor, was a guest at Defendant resort. During Plaintiff's stay, Defendant was in the process of setting up an arch for a special event it was hosting by the pool area. As Plaintiff passed by the arch while walking toward the pool entrance, a wind gust caused the arch to fall and pin Plaintiff to the ground. Plaintiff alleged that Defendant negligently erected the arch without proper safeguards to prevent it from falling and that this failure actually and proximately caused Plaintiff's injuries. Plaintiff allegedly suffered traumatic brain injury, as well as damage to his cervix, knees, hips, and other areas of his body.

Defendant argued that Plaintiff could not establish proximate cause as the fall or collapse of the arch was unforeseeable. Defendant also argued that Plaintiff's injuries

were not actually caused by the arch collapse but rather by Plaintiff's preexisting medical conditions.

Both Plaintiff and Defendant called expert witnesses at trial. Plaintiff called his treating doctor, a neuropsychologist, while Defendant called a neuropsychologist and an orthopedist. Specifically, Defendant's orthopedist testified that Plaintiff's injuries were due to preexisting conditions.

Plaintiff sought compensatory damages and Plaintiff's wife sought damages for loss of consortium. After a 19-day trial and more than five hours of deliberations, the jury awarded Plaintiff \$524,086.00 in damages, but declined to provide any award related to the alleged loss of consortium. After the trial, the court awarded Plaintiff \$432,658.16 in attorney's fees and costs. *Richardson v. Mandalay Corporation*, November 19, 2018.

Plaintiff Recovers after Concrete Gives Way

Plaintiff, age 37, fell and injured herself when part of a concrete step collapsed, allegedly caused by her landlord's failure to maintain the step and remedy a dangerous condition. Plaintiff alleged that Defendant landlord failed to remedy the broken concrete step despite having notice of its danger. To substantiate these allegations, Plaintiff called a structural engineer and an OSHA expert to testify at trial. Plaintiff alleged that, as a result of the fall, she suffered multiple spinal injuries and was required to receive extensive chiropractic treatment, physical therapy, and other medical treatment. Plaintiff called an orthopedist and a physiatrist to testify regarding the medical procedures that she would have to undergo throughout the remainder of her life.

Defendant denied having notice of the dangerous step and maintained that it acted as a reasonable landlord in maintaining the premises. Further, Defendant contended that all tenants had his personal cellphone number, but that he had not received

notice from Plaintiff regarding the step. To substantiate his defense, Defendant called an orthopedist as an expert witness.

Plaintiff made a pretrial offer in the amount of \$299,999.00, which Defendant rejected and countered with a \$150,001.00 offer, which Plaintiff rejected. At trial, Plaintiff requested compensatory damages in excess of \$10,000.00 and medical expenses in the amount of \$548,000.00. After a five-day trial and over two hours of deliberations, the jury found for Plaintiff and awarded Plaintiff \$20,000.00 in compensatory damages. *Robertson v. Ytrurbide Family, L.L.C.*, October 5, 2018.

BREACH OF CONTRACT

Jury Awards Damages after Mechanic Fails to Repair Engine

Plaintiff, age 39, brought his car into a mechanic for repairs. Plaintiff alleged that, due to Defendant's negligence in installing an oil-filter housing, his engine subsequently failed.

Defendant countered, arguing that he properly installed the housing. Defendant called an engineer to testify as an expert, who opined that the failure to install the housing could not cause the engine to fail in the manner that it did.

Plaintiff demanded \$37,599.00 to settle prior to trial; Defendant offered \$20,000.00. After a one-day trial, a unanimous four-panel jury returned a verdict for Plaintiff, awarding \$29,774.78. *Jowers v. All Imports and Domestic Auto Service, L.L.C.*, December 7, 2018.

COMMENTS

Erin Truman has been selected as the new Discovery Commissioner for the Eighth Judicial District Court for Clark County. She will be replacing Judge Bonnie Bulla, who was recently appointed to the Nevada Court of Appeals. Judge Bulla served as Discovery Commissioner for 12 years, having been appointed in January 2007. Ms. Truman will assume all of Judge Bulla's previous duties.

Ms. Truman graduated from J. Reuben Clark Law School (Brigham Young University) in 1991. Since then, she has practiced law in Las Vegas, including work as the head of the ADR department for a local law firm. She has also worked as a court-appointed arbitrator, judge pro tempore, and lead counsel for Allstate Insurance Company. Approximately two years ago, in May 2017, she was appointed to the position of ADR Commissioner in Clark County. She will now work concurrently as both Discovery Commissioner and ADR Commissioner.

As Discovery Commissioner, Ms. Truman is tasked with regulating the discovery process and addressing discovery disputes in civil matters. This system is designed to promote efficiency in the judicial system, as it frees up the district court to handle other aspects of the cases and to focus on the trial stage of litigation.

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Alverson Taylor & Sanders
6605 Grand Montecito Pkwy., Ste 200
Las Vegas, NV 89149
(702) 384-7000 • Fax (702) 385-7000
www.alversontaylor.com

■ Alverson Taylor & Sanders
6605 Grand Montecito Pkwy., Ste. 200
Las Vegas, NV 89149

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