



# NEVADA Legal Update

Fall 2011

A I v e r s o n T a y l o r M o r t e n s e n & S a n d e r s • N e v a d a ' s L a w F i r m

## HIGHLIGHTS

### **Nevada Supreme Court Clarifies Role of Nurses as Expert Witnesses and Burden of Proof for Defense's Alternate Theories of Causation**

The Nevada Supreme Court held that a nurse can testify as an expert witness as to medical causation if he or she has obtained the requisite knowledge necessary to identify cause. The Court also held that a defendant's alternate theories of causation need only be relevant and competent if they are merely used to contradict plaintiff's theories.

### **Homeless Plaintiff Recovers Over \$4 Million in Personal Injury Case**

An unemployed and homeless male resident of Nevada recovered more than \$4 million against a sanitation company after being hit by a garbage truck. The plaintiff sustained multiple injuries and may lose one or both of his lower extremities.

### **Security Company Found Liable for Decedent's Death in Parking Lot**

The decedent was assaulted while changing his car's headlight in a Wal-Mart parking lot. The decedent's estate and survivors claimed that the security company failed to provide a safe and secure area. The jury awarded the estate and survivors over \$1 million in damages.

## NEVADA SUPREME COURT DECISIONS

### MEDICAL MALPRACTICE

### **Nevada Supreme Court Reviews Nurses' Ability to Testify as Experts and Appropriate Burden of Proof for Alternative Theories of Causation in Medical Malpractice Case**

In 2007, after an outbreak of Hepatitis C at the Endoscopy Clinic of Southern Nevada (ECSN) in Las Vegas, Plaintiffs sued several pharmaceutical companies for strict products liability. Plaintiffs alleged that Defendants were at fault for product design defect, failure to warn and breach of warranty.

Plaintiffs claimed that the distribution of large vials of Propofol invited multiple uses and increased the chances of contamination. More specifically, Plaintiffs alleged that clinic personnel used needles contaminated with Hepatitis in the vials of Propofol, contaminating the entire vial. These contaminated vials were allegedly reused to administer Propofol to other patients, thus infecting subsequent patients with the virus.

Defendants Baxter Healthcare Corporation, Sicor, Inc., Teva

Parenteral Medicines, Inc., and McKesson Medical-Surgical, Inc. offered several expert opinions rebutting Plaintiffs' theory regarding the cause of the outbreak. Among the expert witnesses were registered nurse, David Hambrick, and professor of medicine, Jonathan Cohen, M.D. Both witnesses testified that while improper cleaning and disinfection techniques could have caused Plaintiffs to contract Hepatitis C, there was no way to identify the specific instrument that transmitted the virus.

Plaintiffs filed motions to exclude the expert testimony of both Nurse Hambrick and Dr. Cohen. Plaintiffs first claimed that Nurse Hambrick's testimony regarding causation should be excluded because under Nevada law,

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Nurse Hambrick could not be qualified as an expert. Second, Plaintiff's claimed that Dr. Cohen's testimony of an alternate theory of causation should be excluded because he could not prove his theory to a reasonable degree of medical probability. The district court denied both motions. The court explained that NRS 632.019 did not preclude a nurse from testifying as an expert provided that he had the requisite skill, knowledge, or expertise. The district court further held that the alternative theory of causation offered by Defendants need only be relevant and competent and did not need to meet the higher standard of "reasonable medical probability."

On appeal, the Nevada Supreme Court reversed in part and upheld in part the lower court's decision. First, the Court granted Plaintiff's motion to exclude testimony from Nurse Hambrick. The Court explained that there is not a per se rule precluding nurses from testifying as expert witnesses regarding medical causation; however, nurses must have obtained particular knowledge, skill or expertise relevant to identify cause. In this case, the Court concluded that Nurse Hambrick, while sufficiently qualified to testify as an expert regarding cleansing and disinfecting procedures of certain instruments, did not have the requisite knowledge to identify medical causation. As such, the district court erred in allowing testimony from Nurse Hambrick as to how Plaintiffs may have contracted Hepatitis C.

The Court then addressed the appropriate standard of proof for Defendants' alternate theories of causation. Plaintiffs alleged that

Defendants failed to prove their theory of causation to a reasonable degree of medical probability. Defendants argued that the higher standard of medical probability only applied to Plaintiffs' experts.

The Nevada Supreme Court held that the standard for defense expert testimony regarding medical causation depends not on who is presenting the theory, but rather on how the defense uses the testimony. The Court stated: "When a defense expert traverses the causation theory offered by the plaintiff and purports to establish an independent causation theory, the testimony must be stated to a reasonable degree of medical probability." The Court further explained, however, that when an expert's alternative theory of causation merely controverts the plaintiff's theory and is not an independent theory the testimony need only be "relevant and supported by competent medical research." The Court also made sure to clarify that even though there was a lower standard for rebuttal expert testimony regarding medical causation, such testimony must still meet certain threshold requirements, such as avoiding speculation. *Williams v. Dist. Ct.*, decided July 28, 2011.

## CIVIL PROCEDURE

### **Supreme Court Holds Plaintiff May Amend Complaint to Add Defendant's Estate if Insurer has Sufficient Knowledge and Notice of Institution of an Action**

In 2007, Plaintiff Debbie Costello and Defendant Philip Casler were involved in an automobile accident.

Two months after the accident, Defendant Casler died of unrelated causes and his son, Michael, was appointed administrator of his estate. Prior to learning of Defendant Casler's death, Costello filed a claim with her insurance provider for injuries sustained in the accident. After months of negotiation, the parties were unable to resolve the claim and Costello filed a personal injury suit against Casler. When Costello attempted to serve Casler with the complaint she was informed that Casler had passed away.

Upon learning of the death of Casler, and pursuant to Rule 25 of the Nevada Rules of Civil Procedure, Costello filed a Suggestion of Death Upon the Record and mailed a copy to Casler's insurance company, American Family Insurance. Two months later the statute of limitations on the personal injury cause of action expired. Costello subsequently filed a motion to substitute and name a Special Administratrix of the Estate of Casler in the complaint. American Family Insurance filed a motion for summary judgment, arguing that Costello's attempt to amend the complaint was time-barred because the statute of limitations had expired and that substitution pursuant to NRCP 25 was only appropriate for a person who was already a party to the pending action.

The district court denied Costello's motion to substitute and amend and granted American Family's motion for summary judgment. Costello filed a motion for reconsideration, asserting that the proposed amendment should relate back to the original filing

date, pursuant to NRC 15(c). Rule 15(c) provides that an amendment relates back to the date of the original complaint if the proper defendant receives actual notice of the action. Costello argued that American Family Insurance had notice and knowledge of the action and such notice should be imputed to Casler's Estate, thus allowing the amendment to survive the expiration of the statute of limitations.

The Nevada Supreme Court acknowledged that there are certain situations where imputation for purposes of relating back to the original date is appropriate. Typically, there must be a special relationship between the original defendant and the new defendant, such that they share an "identity of interest." The original defendant and the new defendant must be so closely related that the institution of an action against one serves to provide notice of the litigation to the other. The Court further recognized that while this was a case of first impression in Nevada, several other jurisdictions have recognized that the insurer-insured relationship meets the requirements of this "identity of interest." The Court concluded that this approach was "consistent with the liberal construction we give to relation back in Nevada, and it furthers the mandate that the rules of procedure are intended to allow cases to be decided on the merits rather than on mere technicalities."

American Family Insurance Company's notice and knowledge of the pending action was imputed to the Estate of Casler. Costello was therefore allowed to both amend her complaint, adding Casler's Estate as a party, and

have the amendment relate back to the date of the original pleading, thus surviving the expiration of the statute of limitations. *Costello v. Casler*, decided July 7, 2011.

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## NEVADA JURY VERDICTS

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### PERSONAL INJURY

#### **Jury Finds for Defendant in Moped vs. SUV Collision**

A 48 year-old Nevada resident operating a moped alleged that Defendant, who was driving an SUV, failed to yield the right-of-way and caused a collision. At trial, Plaintiff called an accident reconstructionist who testified that foliage and garbage dumpsters in Defendant's driveway obstructed Plaintiff's view, preventing her from seeing Defendant entering the intersection until it was too late for her to stop.

Defendant, a self-employed 58 year old male, denied liability and asserted that he entered the intersection first and had the right-of-way. Additionally, Defendant alleged that Plaintiff had sufficient time to avoid the collision but failed to do so due to her 20/100 vision which she never attempted to correct. Defendant called an accident reconstructionist who was of the opinion that Defendant had the right-of-way and an ophthalmologist who testified to Plaintiff's visual acuity. Defendant also called an orthopedic physician to testify that some of Plaintiff's injuries were not related to

the accident and that Plaintiff failed to seek medical attention for her alleged injuries until more than five months after the accident.

Plaintiff sought compensatory damages and made a pretrial demand of \$60,000.00. Defendant offered \$20,000.00. During closing arguments, Plaintiff's counsel argued Defendant was 100% at fault and asked the jury to award \$214,810.72. Counsel for Defendant contended that Defendant was not liable for the accident. After a five day trial and approximately one hour of jury deliberation, the jury found for the Defendant. *McGuire v. Martin*, decided February 4, 2011.

#### **Homeless Plaintiff Receives Over \$4 Million in Personal Injury Case Against Sanitation Company**

Plaintiff, a 54 year old, unemployed and homeless Nevada resident, alleged that while crossing the roadway in a crosswalk he was struck by Defendant's garbage truck. Defendant admitted negligence and the trial court granted summary judgment as to the issue of liability.

Plaintiff sustained multiple fractures of the lower legs and feet, a degloving injury to the left lower leg, and crush injuries to both legs. Plaintiff alleged that he had a permanent impairment, chronic edema, and could potentially lose one or both of his lower legs. Plaintiff called a physiatrist and trauma surgeon who were both of the opinion that Plaintiff's injuries were causally related to the accident. Both experts further testified that Plaintiff suffered a permanent impairment which limited his ability to walk

without suffering pain and caused spinal muscular atrophy of the lower portion of the legs. Moreover, both experts opined that Plaintiff faced the possibility of losing one or both of his lower limbs.

Plaintiff made a pretrial demand of \$2 million and Defendants offered \$1.5 million. After a three day trial and three hours of deliberation, the jury awarded Plaintiff \$4,063,314.91 in compensatory damages. The total included \$558,314.91 for past economic loss, \$405,000.00 for past non-economic loss, \$1 million for future economic loss, and \$2.1 million for future non-economic loss. *Walls v. Capital Sanitation Company and Waste Management, Inc.*, decided February 16, 2011.

## MEDICAL MALPRACTICE

### Plaintiff Seeks Over \$10 Million in Medical Malpractice Case

Plaintiff, father of 2-year-old son diagnosed with acute lymphocytic leukemia at four weeks of age, brought a medical malpractice suit against Sunrise Hospital and Medical Center and two of its treating physicians. Plaintiff alleged that hospital staff and doctors fell below the standard of care after his son was admitted to the pediatric intensive care unit with varicella (chicken pox).

Plaintiff's son ("Patient") was transferred from the general pediatric unit to the intensive care unit after his chicken pox caused his eyes to swell and was affecting his breathing. While in the pediatric intensive care unit, plaintiff's son experienced continual

labored breathing, likely caused from varicella lesions in his upper airway. Plaintiff's son was treated with racemic epinephrine through a central line.

Two days before the incident in question, Defendant Doctor replaced Patient's central line. While replacing the line, the doctor noticed some acidosis in the blood line, indicating that Patient was having difficulty oxygenating his blood. Defendant Doctor chose not to intubate at this time. The next morning, hospital staff noticed that Patient's breathing had worsened and continued to worsen throughout the day, although Patient's oxygen saturation levels never fell below 91%. Nonetheless, based upon Patient's worsening condition, Defendant Doctor elected to intubate. Before intubation could occur, Patient experienced acute hemorrhaging from his oropharynx. Defendant Doctor intubated but the tube became dislodged due to secretions and large clots. Defendant Doctor had to remove the tube and bag Patient while he attempted to reintubate. Reintubation was successful and Patient was sedated and placed on a ventilator to prevent bronchospasms and loss of airway. Plaintiff alleges that hospital staff failed to report and Defendant Doctors failed to timely respond to his son's blood clots, resulting in hemorrhaging and brain damage.

At trial, Plaintiff called several expert witnesses to testify that hospital staff and Defendant Doctors fell below the standard of care. In particular, experts testified that hospital staff failed to properly document their care

of Patient, adequately inform doctors of Patient's condition, and initiate the chain of command after Defendant Doctor refused to intubate upon learning of Patient's acidosis. Experts also testified that a more timely intubation would have prevented the acute hemorrhage and brain damage.

Defendants' expert testified that Patient's clinical presentation did not warrant intubation until the acute hemorrhage began and that, given the blood gas results following the code, Patient did not suffer a hypoxic-ischemic event causing brain damage.

Plaintiff sought \$2.5 million in past medical expenses, \$4.5 million for future medical expenses, \$4.5 million in lost income, and \$75,000.00 for emotional distress. Plaintiff made a pretrial demand for \$10 million. Defendant Hospital served a \$25,000.00 offer of judgment. During Plaintiff's case-in-chief, Defendant Hospital verbally offered \$2 million. That offer was withdrawn at the close of Plaintiff's case. After a 12 day trial and five hours of deliberation, the jury found for the Defendants. *Gyer v. Sunrise Hospital and Medical Center*, decided March 15, 2011.

## CONTRACT

### Insurance Provider Pays for Breach of Contract and Breach of Covenant of Good Faith

Plaintiff, a 36 year old female Nevada resident, was involved in an automobile accident with an intoxicated driver. The insurance carrier for the drunk driver paid its \$25,000.00 policy limits. Plaintiff then

filed a claim with her insurance carrier, the Defendant, for underinsured motorist coverage, which was denied. Plaintiff filed suit against Defendant, alleging that it acted unreasonably in handling her claim and breached their contract.

Defendant denied liability asserting that Plaintiff's injuries were an aggravation of her preexisting sacroiliac osteoarthritic condition. Defendant further asserted that it based its valuation on Plaintiff's treating physician's statements and an independent medical examination.

Plaintiff made a pretrial demand of \$7 million. Defendant offered \$150,000.00. After a nine day trial and three hours of deliberation, Plaintiff was awarded \$437,901.05 in compensatory damages, including \$187,907.05 for breach of contract and \$250,000.00 for breach of the covenant of good faith and unfair insurance practices. *Tierney v. Farmers Insurance Company*, decided January 28, 2011.

## PREMISES LIABILITY

### Resort Pays for Injuries Caused by Collapsing Bed

Plaintiff, a male Nevada resident and business owner, alleged that Defendant negligently inspected the beds at its resort. As a result, the bed in Plaintiff's room collapsed when he sat on it, allegedly exacerbating Plaintiff's preexisting cervical disk degeneration and prior lumbar surgery. Defendant denied liability and asserted that it conducted reasonable inspections of all beds through its housekeeping and

engineering departments.

Plaintiff called a pain management specialist who opined that all of Plaintiff's injuries and treatment were caused by the bed collapse, until the time that Plaintiff was involved in a subsequent motor vehicle accident. The physician apportioned 50 percent of Plaintiff's ongoing complaints to the bed collapse and 50 percent to the subsequent automobile accident.

Defendant called an orthopedic physician who testified that all of Plaintiff's injuries, and the treatment administered after six to twelve weeks following the incident, were related to Plaintiff's preexisting conditions.

Plaintiff sought to recover compensatory damages plus past and future medical expenses. Prior to trial, Plaintiff demanded \$65,000.00 and Defendant offered \$50,000.00. After a five day trial, the jury awarded Plaintiff \$165,000.00 in compensatory damages representing \$50,000.00 for past medical expenses, \$10,000.00 for future medical expenses, \$100,000.00 for past pain and suffering and \$5,000.00 for future pain and suffering. *Poloniecki v. Mandalay Bay Resort and Casino*, decided January 28, 2011.

### Estate and Survivors of Decedent Receive Compensatory Damages Against Security Company in Wrongful Death Suit

The decedent, a 56 year old retired Air Force Major, was survived by three children who brought suit for his wrongful death. Plaintiffs alleged that Defendants failed to provide adequate security in a Wal-Mart parking lot and, as a result, the decedent was assaulted while

changing a light bulb in his car. The decedent died as a result of injuries sustained in the assault. Plaintiffs further claimed that Defendants failed to constantly monitor exterior surveillance cameras in order to identify and report suspicious activity, failed to patrol the grounds, and failed to intervene in order to avoid the assault.

Defendants denied liability, claiming that the standard of care for parking lot security had been met. Defendants argued that patrol personnel were properly trained and complied with all necessary duties and responsibilities. Defendants also asserted that the random, spontaneous crime was unforeseeable and undeterrable, as the assailant was only on the property for 12 minutes prior to the assault.

Prior to trial, Plaintiffs demanded \$1 million and Defendants made a \$125,000.00 joint offer. After a 13 day trial and over five hours of deliberation, the jury awarded a total of \$1,026,000.00. This included an award of \$125,000.00 to the Estate and \$250,000.00 in compensatory damages to each of the three children. *Born and Estate of Born v. Wal-Mart and Wackenhut of Nevada, Inc.*, decided February 15, 2011.

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Sanders  
7401 W. Charleston Blvd.  
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(702) 384-7000 • Fax (702) 385-7000  
www.alverson-taylor.com



**Alverson Taylor Mortensen  
& Sanders**  
7401 W. Charleston Blvd.  
Las Vegas, Nevada 89117

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*The information included in this newsletter is not a substitute for consultation with an attorney. Specific circumstances require consultation with appropriate legal professionals.*

## COMMENTS

During the 2011 Legislative session, Nevada enacted three laws intended to assist homeowners facing foreclosure. Each of the three bills place stricter requirements on banks pursuing foreclosure proceedings. Senate Bill 414, which is already in effect, prohibits lending institutions from unreasonably delaying short sales. A lending institution is now required to respond to a short sale offer within 90 days of receipt of that offer. The bill also precludes lending institutions from obtaining deficiency judgments if the property was the owner's primary residence.

Assembly Bill 273, which also went into effect in June 2011, prevents lending institutions from "double dipping," or collecting deficiency amounts in excess of what was paid for the property. The bill also requires that any deficiency amount be reduced by insurance proceeds the lending institution may have received. Finally, the bill reduced the time available for creditors to pursue a civil action against homeowners for deficiency amounts from six years to six months after foreclosure. This provision provides substantial additional protection to homeowners.

Assembly Bill 284, which will take effect in October 2011, is designed to stall foreclosure proceedings by

requiring that lending institutions prove ownership of the note in question. During the housing crisis, a lack of accurate records and paper trails was a significant issue. Assembly Bill 284 requires that any default notice include an affidavit containing information regarding the amounts due, the possession of the note, and the authority to foreclose. The bill also adds new requirements for foreclosure trustees, creates a right of civil action against those who do not comply with the recording laws, and increases the criminal penalties for mortgage lending fraud and misrepresentation of title.