



# NEVADA Legal Update

Winter 2012

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 Adopts Learned-Intermediary Doctrine for Pharmacists in Negligence Actions**

The Nevada Supreme Court held that the learned-intermediary doctrine applies to pharmacists in Nevada. The doctrine will not, however, insulate a pharmacist from liability if the pharmacist knows of a customer-specific risk and does not warn the customer or notify the prescribing doctor.

### **Ophthalmologist Obtains Defense Verdict in Medical Malpractice Action**

Plaintiff in a medical malpractice action alleged that she was rendered blind following a LASIK procedure performed by Defendant ophthalmologist.

### **Plaintiff Awarded Punitive Damages but Fails to Beat the Arbitration Award on a Short Trial Appeal**

Plaintiff recovered a \$13,500.00 arbitration award following an alleged motor vehicle accident. On Defendant's appeal to the Short Trial program, the jury awarded Plaintiff only \$8,500.00 in compensatory damages and \$1,000.00 in punitive damages.

## NEVADA SUPREME COURT DECISIONS

### MEDICAL MALPRACTICE

#### **The Learned-Intermediary Doctrine Does Not Insulate a Pharmacist from Liability when the Pharmacist Knows of a Customer-Specific Risk**

In December 2005, Helen Klasch treated with Dr. Fredrick Tanenggee for the first time. In her initial paperwork, Ms. Klasch indicated that she might have a Sulfa allergy. Individuals with Sulfa allergies generally experience minor skin rashes but, in a small number of cases, the Sulfa exposure may cause a toxic reaction in the person's skin (e.g., Stevens-Johnson Syndrome or Toxic Epidermal Necrosis) potentially leading to death. Patients with a previous Sulfa reaction have a greater risk for toxic reactions in the event of future Sulfa exposure. Ms. Klasch's Sulfa allergy was recorded on her medical chart followed by a question mark, "Sulfa?"

Ms. Klasch returned to Dr. Tanenggee in July 2006 complaining of abdominal fullness and was diagnosed with a urinary tract infection. Dr. Tanenggee informed Ms. Klasch that her infection could be treated most effectively with Bactrim, a Sulfa-based antibiotic. Given the "Sulfa?" notation in the chart, Dr. Tanenggee asked Ms. Klasch to clarify how certain she was of her Sulfa allergy. Ms. Klasch reportedly downplayed the previous Sulfa reaction and asked Dr. Tanenggee to write the prescription for Bactrim. Dr. Tanenggee complied, and Ms. Klasch took

the prescription to Walgreens.

A Walgreens' pharmacist subsequently contacted Ms. Klasch to inform her that the prescription was "flagged" by Walgreens' computer system. Walgreens maintains a patient profile for each of its customers, which was meant to assist pharmacists in identifying potential allergic reactions, harmful interactions with other medications, or adverse side effects. Ms. Klasch's profile indicated that she was allergic to Sulfa based drugs. When contacted by the pharmacist, Ms. Klasch reported that she had taken Bactrim previously and did not experience any adverse reactions. Satisfied with this clarification, the pharmacist manually over-rode the computer system and the Bactrim prescription was released to Ms. Klasch. After taking the Bactrim that day, Ms. Klasch complained that she felt itchy.

The following day, Ms. Klasch contacted Dr. Tanenggee's office and left a voicemail message stating that she was

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wrong about not having a Sulfa allergy. Ms. Klasch's condition worsened and she was taken to the emergency room where she was diagnosed with Stevens-Johnson Syndrome or Toxic Epidermal Necrosis. Ms. Klasch began displaying burns over her entire body and was transferred to the burn care unit, where she eventually lapsed into a coma and passed away. At the time of her passing, she had burns covering 40 to 50 percent of her body.

Plaintiffs, Ms. Klasch's surviving children, brought a wrongful death action asserting that the Walgreens' pharmacist breached her duty of care by failing to adequately warn Ms. Klasch of the risks of taking Bactrim in light of her Sulfa allergy or, in the alternative, by failing to contact Dr. Tanenggee to clarify whether he really meant to prescribe a medication to which Ms. Klasch was allergic. Walgreens filed a motion for summary judgment arguing that, in a majority of jurisdictions, the learned-intermediary doctrine limits a pharmacist's duty to correctly filling prescriptions as written. Walgreens asserted that because the pharmacist provided Ms. Klasch with the correct medication and dosage she had, as a matter of law, fulfilled her duty. The district court agreed and granted Walgreens' motion for summary judgment. Plaintiffs appealed.

On appeal, the Nevada Supreme Court evaluated the learned-intermediary doctrine in the context of pharmacists as a matter of first impression in Nevada. The Court noted that the learned-intermediary doctrine has traditionally been used to insulate drug manufacturers from liability in products liability actions. Pursuant to this doctrine, a drug manufacturer is immune from liability to a patient, so long as the manufacturer provided the patient's doctor with all relevant safety information for a specific drug. It is the responsibility of the physician, who is presumably apprised of the patient's specific situation, to provide the patient with information the doctor deems relevant. Jurisdictions that have adopted this doctrine for pharmacists have found that, as between the doctor and pharmacist, the doctor is in the best

position to warn patients of a medication's generalized risks. The Nevada Supreme Court agreed with these traditional policy considerations and formally adopted the learned-intermediary doctrine as to pharmacists. The Court did not agree, however, that the scope of the doctrine should be so limited as to impose only a duty to correctly fill prescriptions as written.

Relying upon Illinois law, the Court noted that the purpose behind the learned-intermediary doctrine was to prevent a pharmacist from interjecting herself into the doctor-patient relationship, which would permit the pharmacist to practice medicine without a license. The Court found that this policy consideration was less persuasive in the instant case, where the pharmacist had knowledge of a customer-specific risk with respect to a prescribed medication. The Court therefore held that a pharmacist has a duty to inform a customer, or the prescribing doctor, of a known customer-specific risk. As such, the learned-intermediary doctrine did not insulate the Walgreens' pharmacist from liability when she knew of Ms. Klasch's allergy to Sulfa based medications. The district court's order granting Walgreens' motion for summary judgment was reversed and the case remanded for trial. *Klasch v. Walgreen Co.*, decided November 23, 2011.

## CIVIL PROCEDURE

### The Nevada Supreme Court Clarifies the Foreseeability Element of Nevada's Law Limiting Innkeeper Liability

A recent case allowed the Nevada Supreme Court to address a disconnect between Nevada's statutory limitation on innkeeper liability, codified at NRS § 651.015, and the Nevada Supreme Court decision rendered in *Doud v. Las Vegas Hilton Corp.*, 109 Nev. 1096 (1993). In *Doud*, the Nevada Supreme Court addressed the four elements a plaintiff must establish to succeed

on a negligence claim for innkeeper liability: duty, breach, proximate cause and damages. In determining whether an innkeeper owed a duty of care to its patrons, the Court recognized that the duty to prevent wrongful conduct by a third party occurs only when the wrongful conduct was foreseeable. In evaluating foreseeability, the Court set forth two distinct approaches: 1) evidence of prior similar acts; and 2) the totality of the circumstances.

Following the *Doud* decision, the Nevada Legislature enacted NRS § 651.015 to clarify that the judge, not the jury, is to determine whether an innkeeper had a duty to its patrons. In doing so, the Nevada Legislature created a general limitation on an innkeeper's civil liability. Pursuant to NRS § 651.015, an innkeeper is not liable unless the death or injury of a patron is caused by the foreseeable, wrongful act of a third party, and there is a preponderance of evidence to show a failure to exercise due care. If an injury is unforeseeable, the innkeeper owes no duty, and the district court has no occasion to consider the remaining negligence elements.

On the early morning of June 25, 2006, Daniel Ott entered the Silver Nugget Casino with two friends. The three proceeded into the Touchdown Lounge and joined a "boisterous" group around several pool tables near the bar. This group had already caught the attention of casino security, and within five minutes of Mr. Ott's arrival, the entire group was asked to leave. At this same time, Allen Tyrone Smith, Jr. was seated at a bar adjacent to the Touchdown Lounge. One of Mr. Smith's friends began arguing with one of Mr. Ott's friends as Mr. Ott and his friends were leaving the Touchdown Lounge. Mr. Smith rose from his barstool, pushed his way through the crowd, and punched Mr. Ott's friend in the face. In response, Mr. Ott brandished a concealed weapon and fatally shot Mr. Smith. Mr. Smith's Estate and surviving family filed suit against Silver Nugget Casino, alleging negligence, wrongful death, and loss of consortium.

While NRS § 651.015 provides that foreseeability may be determined by an owner's knowledge of prior similar acts, it does not provide any guidance as to which acts should be considered "similar." As such, Plaintiffs argued that all prior violent acts occurring anywhere on Silver Nugget Casino's premises, whether inside or outside the casino, should have been considered similar. The Plaintiffs pointed to multiple criminal incidents occurring in and around the Silver Nugget Casino, including fistfights and robberies not involving deadly weapons, which occurred five years prior to the subject incident. There were prior incidents in which deadly weapons were used, but those occurred four years prior to Mr. Smith's death, in or near the casino parking lot. Silver Nugget Casino argued that acts occurring outside the casino raised different safety concerns and were not similar to acts of violence within the confines of the casino. In addition, Defendant asserted that acts that do not involve firearms or deadly weapons are dissimilar from those that involve weapons. Silver Nugget Casino filed a motion for summary judgment, which was granted by the district court. The district court found that the Silver Nugget Casino did not owe Mr. Smith a duty of care, pursuant to NRS § 651.015. On appeal, the Plaintiffs argued that Mr. Smith's murder was foreseeable based upon prior incidents of similar wrongful acts at the Silver Nugget.

In evaluating "similar" acts, the Nevada Supreme Court looked to Nevada legislative history, which provided some hypothetical examples. One method of evaluating whether incidents were similar was to question whether the events involved similar security issues, noting that casinos in different towns should not be considered similar because they handle security in different ways. Other examples distinguished between events occurring in the inner versus outer areas of a casino, as well as contrasts in the different levels of violence. The Nevada legislative history also revealed that the "due care" language of NRS § 651.015 allowed a judge to look

beyond the existence of "similar wrongful acts," and to consider the basic minimum precautions reasonably expected of an innkeeper. The Court found that this authority was akin to the totality of the circumstances approach in *Doud*, where a judge could impose a duty as a matter of law when there was reason to anticipate a wrongful act, regardless of past experience.

The Nevada Supreme Court ultimately held that the prior incidents noted by Plaintiffs were not similar to the subject incident and did not establish a duty on the part of Silver Nugget Casino. The Court also disagreed with Plaintiffs' contention that the prior incidents were sufficient to put Silver Nugget Casino on notice that additional precautionary measures were necessary. Rather, the evidence established that the Silver Nugget Casino took basic precautionary measures to ensure the safety of its patrons. In addition, there was no evidence to suggest that Silver Nugget Casino should have known that Mr. Ott was carrying a concealed weapon. As such, the totality of the circumstances leading up to Mr. Smith's murder did not provide the requisite foreseeability to impose a legal duty upon Silver Nugget Casino. The order granting summary judgment by the district court was therefore affirmed. *Estate of Smith v. Mahoney's Silver Nugget, Inc.*, decided November 23, 2011.

## NEVADA JURY VERDICTS

### MEDICAL MALPRACTICE

#### Defendant Ophthalmologist Obtains Defense Verdict in Medical Malpractice Action

A 40 year-old female resident of Las Vegas, Nevada, underwent LASIK surgery performed by Defendant, a local ophthalmologist. Following the surgery, Plaintiff lost her sight. She filed a medical malpractice action, alleging

that Defendant fell below the medical standard of care when he performed her LASIK surgery.

At trial, Plaintiff presented expert testimony asserting that she was not a good candidate for LASIK surgery. Plaintiff alleged that Defendant knew she was not a good candidate, yet performed the surgery anyway. Plaintiff also claimed that Defendant failed to appreciate her severely dry eyes. As a result of the failed surgery, Plaintiff was reportedly unable to return to work.

Defendant asserted, through expert medical testimony, that Plaintiff was an appropriate candidate for the LASIK procedure, and that Plaintiff's abuse of anesthetic eye drops actually caused her blindness. Defendant also presented evidence, though a vocational rehabilitation expert, that Plaintiff could return to work if she so desired. Prior to trial, Plaintiff demanded \$5,900,000.00. After a 13 day trial, the jury returned a verdict for Defendant. *Leavitt v. Siems, M.D. d/b/a Siems Advanced LASIK and Refractive Surgery Center, May 9, 2011.*

#### Local Dentist Successfully Defends Against a Medical Malpractice Action

Plaintiff, a 45-year old female, was employed as a dental assistant when she underwent a root canal by Defendant dentist. While performing the procedure, Defendant treated Plaintiff with sodium hypochlorite, which was, according to Defendant, generally used for its germicidal and antiseptic qualities. Plaintiff claimed, however, that the use of the sodium hypochlorite resulted in the loss of her maxillary bone, as well as four teeth, which required reconstruction and grafting for implant placement. Plaintiff alleged that Defendant was negligent and that his conduct fell below the applicable standard of care in the community.

At trial, Plaintiff relied upon a maxillofacial surgery expert who testified that Plaintiff's maxillary necrosis was likely caused by Defendant's use of sodium hypochlorite. Plaintiff's expert

also testified that Plaintiff required an excision of the necrotic bone and four teeth, the maxillary grafting, and the implant reconstruction as a result of the procedure performed by Defendant.

Defendant denied liability and asserted that there were no reports citing sodium hypochlorite as the cause of injuries similar to those claimed by Plaintiff. Defendant also argued that Plaintiff's injuries were not the result of the procedure. According to Defendant's expert, the root canal was performed correctly and Plaintiff was properly referred to a specialist following the procedure. Defendant also relied on a maxillofacial and plastic surgeon, who disputed Plaintiff's claim that she required bone grafting as a result of the root canal.

Prior to trial, Plaintiff served an offer of judgment for \$199,000.00. Defendant did not make a settlement offer. During closing arguments, Plaintiff asked the jury to award compensatory damages, including \$98,000.00 in past medical expenses and \$8,000.00 for future medical procedures and treatment. The jury returned a verdict in favor of Defendant. *Williams v. Lasko*, DDS, May 13, 2011.

## PERSONAL INJURY

### Motor Vehicle Accident Results in Arbitration Award, which is Reduced by Short Trial Jury

Plaintiff, a 25 year-old female, was traveling westbound on Desert Inn Road, just east of the Sandhill Road intersection in Las Vegas. Plaintiff was proceeding west in the center turn lane, which divided eastbound and westbound traffic on Desert Inn. According to Plaintiff, the Defendant negligently exited a private driveway from the north, crossed eastbound traffic on Desert Inn Road, and executed a left turn into Plaintiff's path of travel, causing a collision. Plaintiff allegedly sustained cervical, thoracic, and lumbar soft tissue injuries and incurred approximately \$2,344.33 in past medical expenses. The case initially proceeded through Nevada's Mandatory Arbitration Program, and the

arbitrator found Defendant to be 100 percent at fault and awarded Plaintiff \$7,000.00. Defendant appealed the matter to Nevada's Short Trial Program.

At the Short Trial, Defendant denied liability and argued that the vehicles in the eastbound travel lanes on Desert Inn stopped to allow Defendant to cross Desert Inn and enter the center turn lane. Defendant argued that Plaintiff was speeding and attempting to circumvent the stopped traffic by traveling in the center lane. Defendant maintained that Plaintiff's conduct was the cause of the collision.

Prior to trial, Defendant extended a settlement offer of \$4,000.00, but Plaintiff demanded \$15,000.00 to resolve all claims. The jury awarded Plaintiff \$5,109.68 in compensatory damages and expenses, but found Plaintiff to be 20 percent at fault. Plaintiff's award was reduced to \$4,087.74, which was \$2,912.26 less than she received from the arbitration proceeding. *Vargas v. Munizmartinez*, April 29, 2011.

### Plaintiff Awarded Punitive Damages in Appeal of Arbitration Award

Plaintiff, a preschool teacher in her early 20's, was traveling to her uncle's funeral near the intersection of Lake East Drive and Starboard Drive, in Las Vegas. Plaintiff reportedly pulled out in front of the vehicle driven by Defendant, a tax preparer in his early 60's. According to Plaintiff, Defendant immediately became upset and began "ramming" the rear and sides of Plaintiff's vehicle. Plaintiff also claimed that when the vehicles stopped, Defendant spit on her window. Defendant denied liability and claimed that there was no contact between the vehicles. According to Defendant, Plaintiff attempted to cause Defendant to collide with her vehicle several times, but he was able to avoid contact.

The case first proceeded in Nevada's Mandatory Arbitration program where Plaintiff was awarded \$13,500.00. Defendant appealed the matter and at

the Short Trial, each party relied upon their version of the accident. Plaintiff also alleged that she sustained cervical, thoracic, and lumbar spine soft tissue injuries. Each party called their own medical experts who disputed causation. Defendant's primary argument was that because there was no contact or impact between the vehicles, there could be no injury to Plaintiff. Defendant also argued that Plaintiff's alleged injuries were related to a preexisting condition or caused by a subsequent incident, which occurred one week after the subject accident. Prior to trial, Plaintiff served a \$12,500.00 pretrial offer of judgment, and Defendant made a counter-offer of \$6,000.00. The jury awarded Plaintiff \$8,500.00 in compensatory damages and \$1,000.00 in punitive damages.

## INSURANCE BAD FAITH

### Local Manufacturing Company Obtains \$9,054,583.00 Verdict Against Insurance Company

Plaintiff, a plastic bag manufacturing company, moved its manufacturing plant to North Las Vegas, Nevada from Los Angeles, California in 2003, and allegedly sustained a loss from the installation of an electrical system. In its complaint for damages, Plaintiff alleged that its insurance company breached its contract with Plaintiff and acted in bad faith by improperly handling Plaintiff's claim.

Defendant denied liability and argued that it handled Plaintiff's insurance claim appropriately and paid all amounts owed under Plaintiff's insurance contract. Defendant also asserted that payments were made to Plaintiff as soon as, or even before, the necessary information was provided to the insurance company. In addition, Defendant claimed that Plaintiff failed to obtain the final regulatory inspection and approval for the electrical system and operating equipment.

At trial, Plaintiff sought compensatory and punitive damages. After a 25 day trial, the jury unanimously awarded Plaintiff

\$4,005,866.00 in compensatory damages on its breach of contract claim, and \$5,048,717.00 in compensatory damages for violation of the Nevada Unfair Claims Practice Act for a total award of \$9,054,583.00. *Coast Converters, Inc. v. Federal Insurance Company*, April 15, 2011.

## BREACH OF CONTRACT

### Plaintiff and Defendants Both Recover in Breach of Contract Action

Plaintiff Luxury Suites International, Inc. entered into a contract with Defendants, Annie the Maid, Inc. and ATM Commercial and Construction Cleaning Services, Inc., for housekeeping services. Pursuant to the contract, each Defendant was to clean four to five junior suites per hour and three to four bedroom suites per hour, with a leeway of ten percent. Defendant ATM was to provide storage for Plaintiff's linens and other related equipment, which was valued at more than \$60,000.00. In addition, Defendant ATM was to work exclusively for Plaintiff's properties and was not to accept employment from any other entity without Plaintiff's approval. This exclusivity provision was to extend one year beyond the contractual period.

In its breach of contract action, Plaintiff alleged that Defendants charged Plaintiff more than the agreed upon rate and actively sought other housekeeping and maintenance contracts. Plaintiff also claimed that Defendants sought to use Plaintiff's linens and equipment to fulfill their other contracts. When Plaintiff demanded the return of its linens, Defendants reportedly refused to release the property until a billing dispute was resolved. Defendants denied liability and counterclaimed for damages from Plaintiff's alleged breach of the agreement and breach of the covenant of good faith and fair dealing.

After a four day trial, the jury awarded Plaintiff compensatory damages in the amount of \$1.00 for its claim of breach

of contract and an additional \$1.00 for Defendants' breach of the covenant of good faith and fair dealing. Plaintiff was also awarded \$22,771.30 in compensatory damages on its conversion cause of action. Defendants were awarded \$11,826.50 on their counterclaim for breach of contract and breach of the covenant of good faith and fair dealing. *Luxury Suites International, Inc. v. Annie the Maid, Inc. and ATM Commercial and Construction Cleaning Services, Inc.*, March 11, 2011.

## PREMISES LIABILITY

### Inconsistencies in Short Trial Jury Award and the Special Verdict Form Negate a Defense Verdict

Plaintiff, age 21, was attending a movie at Defendant casino's movie theater. As Plaintiff was leaving with her family, she slipped and fell on a clear liquid on the floor and allegedly injured her back. As Plaintiff alleged only \$2,043.00 in medical expenses, her case proceeded in Nevada's Mandatory Arbitration Program where the arbitrator awarded \$4,038.00. Defendant appealed the arbitration award.

At trial, Plaintiff claimed she was not provided any warning of the dangerous condition in the theatre and that Defendant's maintenance personnel should have addressed the liquid prior to her fall. Plaintiff also claimed that she sustained a debilitating injury to her lumbar spine. Defendant denied liability and alleged that Plaintiff did not personally report the fall immediately and did not properly identify the location of the fall. Defendant called a safety expert who testified as to accident reporting procedures and the routes a patron would take if leaving the movie theater and proceeding to Defendant's parking lot.

Plaintiff made a pretrial demand of \$3,200.00. Defendant refused to make a settlement offer. During closing arguments, Plaintiff requested an award of \$9,000.00 to 10,000.00. The jury awarded Plaintiff \$4,038.00 in compensatory

damages, including \$2,738.00 for medical expenses and \$1,300.00 for pain and suffering, which was the same amount Plaintiff received at arbitration. Plaintiff was, however, found to be 60 percent at fault and, pursuant to Nevada's comparative negligence law, was to recover nothing.

An error was subsequently discovered in the jury's deliberations. On the special verdict form, the jury indicated that there was no negligence on the part of the Plaintiff, yet apportioned 60 percent of the liability to her. Plaintiff filed a motion to amend the verdict based on these inconsistencies. The Court proposed a judgment of \$4,038.00 in Plaintiff's favor. *Major v. Charleston Station, LLC d.b.a Red Rock Casino Resort Spa*, March 25, 2011.

### Plaintiff Slips on Algae and is Awarded \$2,181,750.00 from Defendant Realty Group

A 17 year-old, female Plaintiff alleged that Defendant realty group was negligent in allowing algae to grow on a sidewalk on which she slipped and fell. As a result of the fall, Plaintiff alleged that she sustained a herniated lumbar disk, which required surgical intervention. Plaintiff also alleged ongoing residual symptoms. Defendant denied liability.

Prior to trial, Plaintiff demanded \$950,000.00 to resolve all claims, and Defendant offered \$100,000.00. At trial, Plaintiff claimed \$74,000.00 in past medical expenses and \$750,000.00 in future medical expenses, plus \$300,000.00 in lost future wages. The jury awarded Plaintiff \$2,181,750.00 in compensatory damages. *Salinas v. Donahue Schriber Realty Group, LP*, March 11, 2011.

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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

### What is Best for a Defendant: Arbitration or Jury Trial

Arbitrators not only find in favor of the plaintiff more often, but they also award more money – our analysis shows.

We conducted a review of the 191 cases reported in Clark County during the years 2005 through 2010 which were submitted to arbitration and then later tried to a jury, and compared the results. The summary below shows that juries are over three times more likely to award a defense verdict than are arbitrators. In those cases where arbitrators awarded damages (88% of the time), the jury rendered a verdict of less damages 44% of the time, or no damages 33% of the time. In only 15% of the 191 cases did the plaintiff obtain a larger award from a jury.

Our survey results are as follows:

<u>Total Awards</u>	<u>Arbitration</u>		<u>Verdict</u>	
Plaintiff	168	88%	117	61%
Defendant	23	12%	74	39%
	<u>191</u>	<u>100%</u>	<u>191</u>	<u>100%</u>

There were 168 arbitration awards in favor of the plaintiff. Of these, the jury verdicts were as follows:

Verdict for defendant	56	33%
Verdict for plaintiff:		
more than arbitration award	29	17%
less than arbitration award	74	44%
no change	9	6%
	<u>168</u>	<u>100%</u>