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Nevada Law *Bulletin*

A REVIEW OF LEGAL NEWS AND DEVELOPMENTS AFFECTING THE NEVADA LAW FIRM AND OUR CLIENTS.

ERICKSON, THORPE & SWAINSTON, LTD.

The attorneys of Erickson, Thorpe & Swainston, Ltd., are available to discuss any questions or concerns their clients and friends may have concerning the information contained in the NEVADA LAW BULLETIN. We may be contacted via telephone at (775) 786-3930 or through the web at www.etsreno.com.

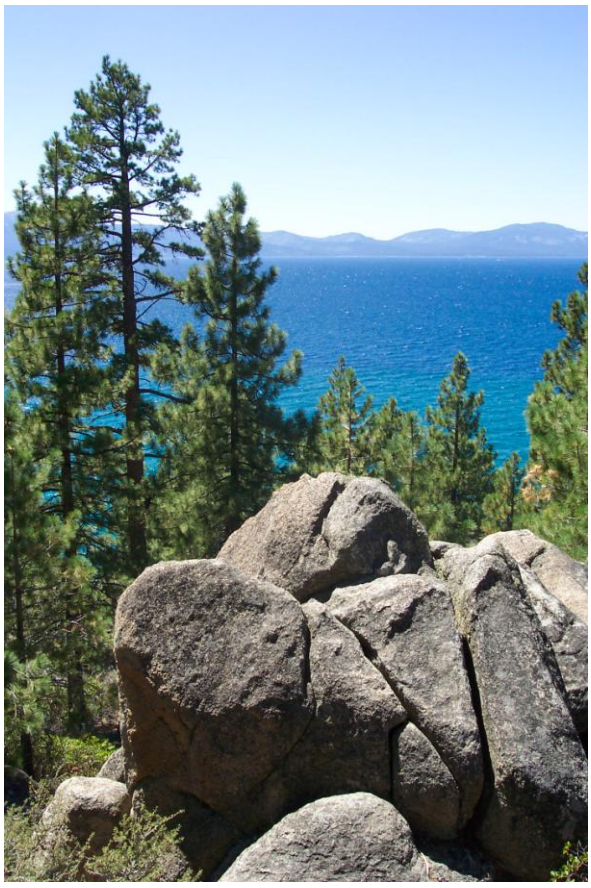
Amendments to Nevada Rules of Civil Procedure

The Nevada Supreme Court undertook what amounts to a major overhaul of the Nevada Rules of Civil Procedure (NRCP). While most of the rule revisions will only have bearing on the civil practitioners, some will impact parties to litigation. As you are aware, several years ago the court adopted a rule (NRCP 16.1) which required the parties to participate in a pre-discovery disclosure process.

The Court has expanded this "voluntary" disclosure process to parallel the corresponding Federal Rules of Civil Procedure. Parties now must disclose and produce, without any formal request from the opposing party, documents which are "relevant to the subject matter," an obviously broad standard. All persons with discoverable knowledge must be disclosed.

Expert witnesses (other than treating physicians) must prepare formal reports of their opinions which are to be exchanged. Rebuttal expert witnesses must be identified thirty days thereafter and their reports must be exchanged within that time period.

There are many more rule changes which will mainly impact your counsel; the courts have been directed to take a more active role in case management which will likely result in more frequent status conferences with the court.



EMPLOYMENT WATCH: *Pennsylvania State Police v. Suders*

In a significant federal antidiscrimination employment law ruling, the U.S. Supreme Court held last year that the important *Faragher/Ellerth* affirmative defense may be unavailable where a plaintiff establishes constructive discharge. Constructive discharge occurs when an employee self-terminates because of intolerable working conditions, such as a hostile workplace. The *Faragher/Ellerth* affirmative defense allows an employer to avoid liability so long as the employer proves that (1) Plaintiff failed to take advantage of appropriate, available in-house opportunities to stop the harassment, and (2) employer took no "tangible employment actions" against the employee based on the harassment. (*Suders*, cont. Page 2).

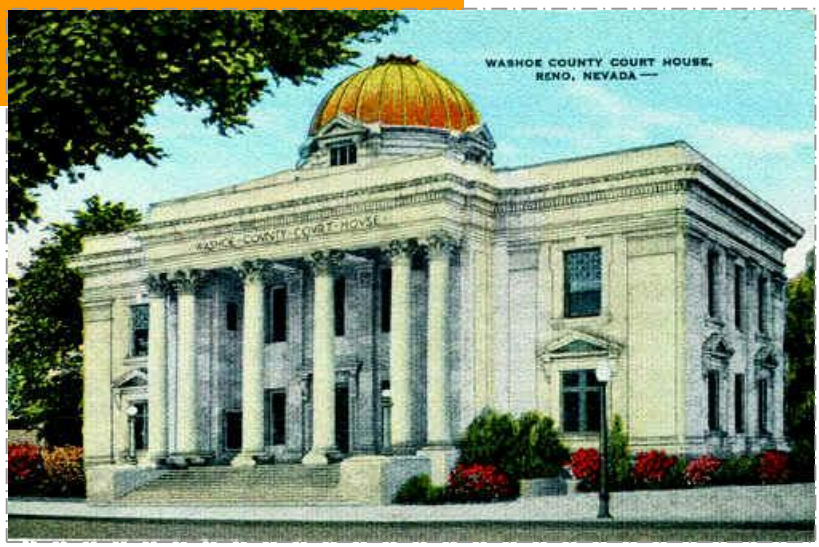
(*Suders*, cont. from Page 1)

In light of the *Suders* decision, however, the *Faragher/Ellerth* defense will no longer be available in situations where a plaintiff proves constructive discharge – even when an employee fails to take advantage of reporting measures made available by the employer. This limitation applies as long as the plaintiff is able to demonstrate that the constructive discharge involves some management-level misconduct.

The lesson to be learned from *Suders* is that employers must be careful to enunciate their sexual harassment policies, to discipline sexual harassment where appropriate, to monitor employee behavior to ensure that any offensive actions do not rise to the level of a constructive discharge and to conduct and document an exit interview with employees who self-terminate.

Nevada Legal Roundup:

A brief review of decisions shaping Nevada law



Doctor's Company v. Vincent

The plaintiff brought suit against an insurance company and agent. Prior to trial, the plaintiff settled with the insurance company for $2.75 million and with the insurance agent for $20,000, which settlements were both approved by the district court as settlements in good faith under NRS 17.245. On appeal, the insurance company challenged the good faith settlement determination as to the insurance agent on the basis it barred the insurance company's rights to contribution and/or implied indemnity causes of action against the agent.

The Nevada Supreme Court held that in order to be able to maintain a contribution claim, the settling party which is seeking partial reimbursement from another party must first have extinguished that party's potential liability to the claimant. The Court also held that the insurance company failed to perfect its contribution rights because the insurance company's settlement and release documents did not, by their terms, expressly extinguish the insurance agent's liability or preserve any of the company's claims against the agent.

D.R. Horton, Inc. v. Green

An arbitration clause in a home purchase agreement compelling arbitration was held to be "unconscionable" and thus unenforceable even though the Court noted that "strong public policy favors arbitration because arbitration generally avoids the higher costs and longer time periods associated with litigation."

The clause at issue was first found to be "*procedurally* unconscionable" because it was not conspicuous and did not advise the purchaser that by signing the agreement he or she is "waiving important rights under Nevada law." The clause at issue was also held to be "*substantively* unconscionable" because on the "one-sidedness" of the contract (the home buyer was waiving rights which the seller was not).

Amendments to Arbitration & Short Trial Rules; Mediation

As you may be aware, cases which have a value of less than $40,000 (exclusive of considerations of liability) are assigned to the Court-annexed arbitration program. The Nevada Supreme Court has now adopted a mediation program as an alternative to the arbitration process. Rather than going through the arbitration process which still involves litigation expenses, the parties now have the option of electing to go to mediation. Both parties must agree to do so but we suspect that many will choose this option.

If the mediation is not successful, or if a party desires to pursue a trial *de novo* from an arbitration decision, rather than entering traditional litigation these cases will be assigned to the "Short Trial Program." Basically, what this involves is a one-day trial where each party is assigned a limited amount of time within which to present the party's case. Rules of evidence are relaxed. The intent is to try to dispose of the smaller case more expeditiously and less expensively.


Justice Unblindfolded
Virginia City Courthouse

The "Short Trial Rules" have been in effect for several years, mainly for those who elect to utilize this option after an unsatisfactory arbitration. It has been utilized successfully in Clark County (Las Vegas) for several years; fewer cases have been tried in Washoe County. The process will now be mandatory for all cases which proceed to trial after an unsuccessful mediation or arbitration.

Continental Insurance Company v. Murphy; State Farm v. Fitts

The Supreme Court issued two decisions involving uninsured and underinsured motorist insurance issues. In *Continental*, the Court held that Continental's attempt to enforce an exclusion that restricted UM/UIM coverage to a specific automobile was void under NRS 690B.020, at least to the extent that the exclusion attempted to negate statutorily mandated minimum required insurance ($15,000). The Court held the distinctions between an "owner's policy" (which solely covers accidents involving the insured vehicle) and an "operator's policy" (which covers the insured with the use of any vehicle) was irrelevant in resolving the dispute as such distinctions only apply to liability policies.

In *State Farm*, the Court voided State Farm's attempts to enforce a two-year time period within which the State Farm policy stated a UM claim must be submitted to the company. The Court reiterated an earlier decision that UM/UIM benefits are contractually based and governed by Nevada's six-year statute of limitations and also again held that UIM claims accrue for statute of limitation purposes from the date of the *claim denial* (not from when the accident occurs).

The Nevada Law Firm

The Nevada law firm of ***Erickson, Thorpe & Swainston, Ltd.*** *was founded in 1969. It has been awarded the prestigious "AV" rating of the Martindale Hubbell Law Directory and has been recognized for its high legal standards and ethics by its listing in The Bar Register of Preeminent Lawyers. The firm also appears in A.M. Best's Directory of Recommended Insurance Attorneys, a unique and reputable study of the premier defense trial firms. The firm emphasizes civil litigation and practices in all state and federal courts of Nevada and the Eastern Sierra counties of California.*

Erickson, Thorpe & Swainston, Ltd. offers committed support in all phases of commercial and civil litigation, including labor and employment law and associated preventative employment services. We provide the experience necessary to meet our clients' expectations for an effective, efficient and timely resolution of their conflicts and issues. Our continued success in this highly competitive market demonstrates our widely recognized ability to deliver satisfaction and positive outcome to those who give us their trust – our clients.

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Banks v. Sunrise Hospital

NEVADA HIGH COURT ENDORSES "HEDONIC" DAMAGE AWARDS

In a decision likely driven by tragic circumstances (patient remains in coma following routine surgery), the Court approved of a trial instruction which allowed the jury to draw an adverse inference from Sunrise's disposition of anesthesia equipment – even though Sunrise disposed of the machinery as a routine equipment replacement several years before a claim had been made to the hospital for the patient's injuries occurring during anesthesia. The Court adopted this position even though such inferences are traditionally reserved for cases where a party *willfully* suppresses or destroys evidence, thus the jury was allowed to draw an inference that the evidence had it been produced would have been adverse to Sunrise.

The Court noted that this holding was limited to the facts of this case and should be "narrowly construed." Nevertheless, the 2004 decision in *Bohlmann v. Printz* also affirmed a rebuttable presumption that evidence willfully suppressed would be adverse if produced.

The *Banks* Court also approved of what are called "Hedonic damages," i.e., damages intended to "compensate injured persons for their noneconomic loss of life's pleasures or the loss of enjoyment of life." These damages are characterized as a component of pain and suffering, but in this instance the Court found that allowing the jury to award a separate sum for such damages was not error.

More significantly, the Court approved of the use of expert witness testimony on the subject of the "monetary value of the pleasure of living that the plaintiff will be denied as a result of his injury," which in the *Banks* case was estimated as being between $2.5 and $8.7 million (the jury awarded $4.5 million for both pain & suffering and hedonic damages).

The specter of hedonic damages in a catastrophic injury case obviously presents the potential for a huge award, and must be carefully considered.

CONSTRUCTION DEFECT LAW: *Olson v. Richard*

In this "construction defect" case, the Court held that a homeowner can pursue a negligence case against a contractor even though it is for purely economic loss with no accompanying personal injury or property damage other than to the structure itself. This decision makes a negligence claim much easier to plead and prove. There does not need to be damage to the work of "other" trades. This decision may also make it more difficult for an insurance company to deny coverage for a "construction defect" case as securing any pre-trial dismissal of a negligence claim will be nearly impossible to obtain.

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