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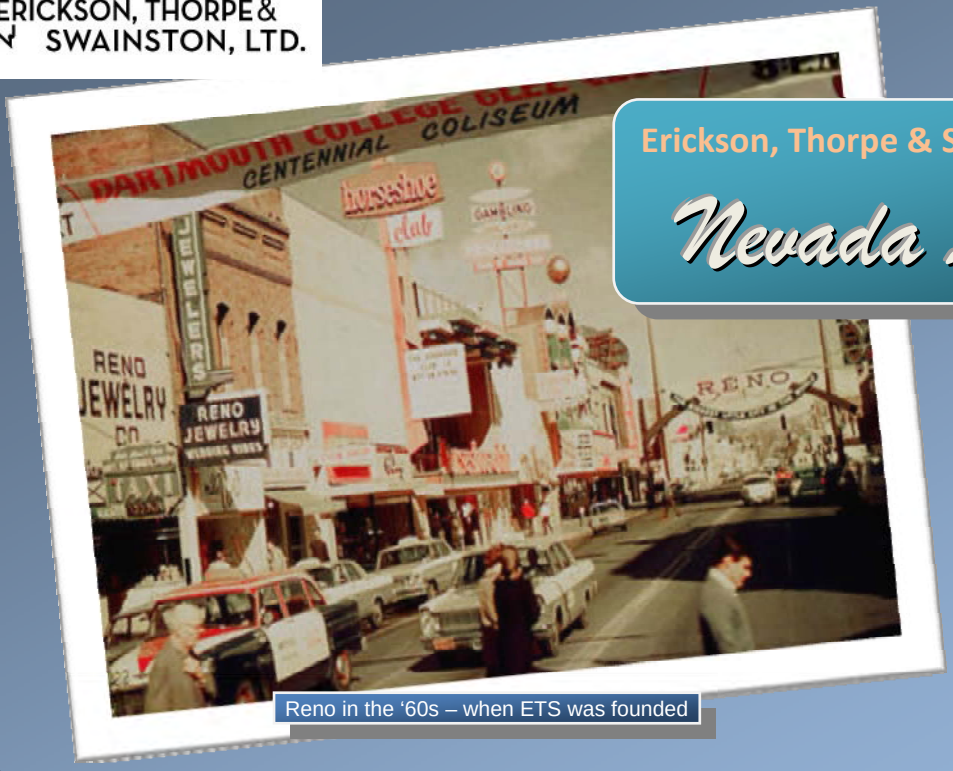

Reno in the '60s – when ETS was founded

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Nevada Law Bulletin

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Construction Defect Case Law Update

The Nevada Supreme Court has been active in the construction litigation arena, authoring several recent opinions that impact Nevada's construction defect statutes. Discussed below are two such cases.

Several recent Nevada Supreme Court opinions have impacted Nevada's construction defect statutes. These statutes, known among lawyers and contractors as "Chapter 40," are the laws enacted by the Nevada legislature to govern disputes between homeowners and contractors. Located specifically at NRS 40.600 through 40.695, these laws have significantly impacted the construction world in Nevada, causing many contractors to go out of business, due to geometric increases in insurance premiums, and have also led some insurance carriers to drop their Nevada business.

The Nevada Supreme Court is now seeing some of the issues that arise in these cases and is making rulings that provide some benefit to contractors.

In **Westpark Owners' Ass'n v. District Ct.**, 123 Nev. Ad. Op. 37 (September 20, 2007), a homeowner association sued the general contractor, claiming a host of construction defects. One of the important facts of the case was that the units at issue had been apartments that were converted into condominiums. The vast majority of the condominium owners, therefore, were people who had purchased an apartment that had been turned into a condominium. Given this situation, the developer moved to dismiss the case, arguing among other things that the units were not "new" because they had previously been apartments. The developer argued that Chapter 40 only pertains to "new"

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Attorneys Fees in Civil Rights Suits Brought in State Court

For many years, defending parties have feared civil rights actions founded upon 42 United States Code, Section 1983 (commonly referred to as §1983 claims). One of the primary reasons why such claims are so concerning is because they inevitably carry with them a potential for enormous attorney fee awards to a prevailing plaintiff. These fee awards are based upon the companion section, 42 USC 1988, which provides that "[i]n any action or proceeding to enforce . . .

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Humboldt County Courthouse
Winnemucca, Nevada

Religious Discrimination in the Nevada Workplace

Employers in Nevada are prohibited from discriminating against their employees under both federal and state law. With that backdrop, it is not uncommon these days to see employees in the public and private workplace who are obviously from different cultures and religious backgrounds, and openly displaying indicia of those beliefs. More employers are recognizing the benefits of relaxing grooming policies and allowing the nondisruptive display of religious beliefs.

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Revisions to Nevada's Dram Shop Act

Over the years, the question has often arisen as to whether one who provides alcohol to another can be held civilly liable when the other person consumes the alcohol and then injures himself and/or others. The Nevada Supreme Court has historically held that the person providing the alcohol cannot be civilly liable for the injury, basing this result on the analysis that the act of providing alcohol is not the proximate cause of the subsequent injury. Creative litigators tried various approaches to circumvent this rule, including the argument that one providing alcohol to an underage person has violated a criminal code and thus should be held liable under a negligence per se analysis.

In 1995, the Nevada legislature adopted a Dram Shop Act in NRS 41.1305. In that 1995 version, the legislature specifically precluded liability for one who serves or sells an alcoholic beverage to one who later consumes the alcohol and causes injury. The statute specifically adopted the proximate cause analysis previously used by the Nevada Supreme Court.

The 1995 version also included a section to make it clear that negligence per se could not be a basis for recovery even in those circumstances where the alcohol is provided to a minor. Therefore, under the 1995 version, the rule was uniform that the provider of alcohol would not be held civilly liable for the intoxicated person's torts, even in those circumstances where the intoxicated person was a minor.

In 2007, the Nevada legislature substantially revised this statute. Under the current version, one who "serves, sells or furnishes" alcohol to another who is 21 years of age or older cannot be held civilly liable for any injury resulting from the consumption of the alcohol. However, if

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…Attorneys Fees in Civil Rights Suits

. . . 1983 . . ., the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

On its face, this section appears to guarantee to whatever party prevails the right to an award of attorneys fees. However, according to the United States Supreme Court, this provision must be interpreted in accordance with the underlying policy behind Section 1983, which is to promote the enforcement of civil rights. Therefore, according to the Supreme Court, while a prevailing plaintiff is presumed to be entitled to an award of attorneys' fees, a prevailing defendant is only entitled to an award of attorneys' fees if the court finds that his claim was frivolous, unreasonable, groundless, or that the plaintiff continued to litigate the claim after it clearly became so.

In most instances, civil rights plaintiffs bring such claims in federal court where the courts are required to follow the aforementioned standards. However, on occasion, plaintiffs bring such action in state court. Previously, in such circumstances, the state court judges determine the right to an award of attorney's fees under Nevada law, rather than federal law. See, NRS 18.010. Nevada had not interpreted its statute in accordance with this federal double standard. However, in **Cuzze v. University** and **Community College System of Nevada**, 123 Nev. Adv. Op. 55 (December 13, 2007), the Nevada Supreme Court seemingly adopted the federal standard, at least where the claim for fees was based upon 42 USC 1988.

While at first blush this decision might not seem to be a major departure from existing law, since under Nevada law, a prevailing defendant would not be entitled to an award of fees unless he actually recovered a money judgment against a plaintiff, the concern is that the Nevada Supreme Court might apply this double standard when a prevailing defendant would other be entitled to an award of attorneys fees because that defendant had previously served a valid offer of judgment. Considering the reasoning offered by the Nevada Court in the Cuzze decision, one must assume that a state court judge will apply the more liberal (from a plaintiff's standpoint) test for an award of defendant's fees.

It should, however, be noted that the Nevada Supreme Court did, nonetheless, approve of the trial court's award of the defendant's attorney fees finding that the plaintiff's claims were "frivolous, vexations and without foundation" even though the Nevada Supreme Court found the trial court's reasons for that conclusion erroneous. It is firmly believed that were this action pending in federal court, there is little likelihood that the federal court would have reached this same conclusion. Thus, there remains a strong reason why actions such as this should not be removed to the federal court system.

Nelson v. Heer

As most Nevada home buyers and sellers will recall, sellers are required to disclose defects in the property if the seller is aware of those defects. A defect is "a condition that materially affects the value or use of residential property in an adverse manner." The law does not require a seller to disclose a defect in residential property if the seller "is not aware" of the defect. But what about the situation where a seller's home in the past had water damage, but she repaired it prior to the sale and did not know that an elevated amount of mold existed in the property at the time of the sale? A 2007 decision by the Nevada Supreme Court provides an answer to this question.

In 1990, Judy Nelson purchased a cabin in Mt. Charleston, near Las Vegas, Nevada. In 1998, a water pipe burst on the third floor, and the cabin was flooded. A number of structural repairs were made, but no mold was discovered by her contractor and no mold remediation was performed.

Four years later in 2002, Ms. Nelson listed the cabin for sale. She completed the disclosure form specified in NRS Chapter 113 (the "Seller's Real Property Disclosure Form" [SRPD]), but she did not disclose the 1998 water damage.

Scott Heer made an offer to purchase the cabin. Prior to the close of escrow, Mr. Heer obtained several property inspections, but no environmental inspection.

After Mr. Heer purchased the cabin, his homeowner's insurance company canceled his policy citing the prior water damage as the reason for the cancellation. Mr. Heer hired a mold and radon service to conduct mold inspections and he obtained an estimate from a contractor for $81,000 to make necessary repairs.

Mr. Heer filed a district court complaint against Ms. Nelson and others, alleging, among other things, breach of contract under NRS Chapter 113. A jury awarded Mr. Heer $361,399.20, which included a "treble damages" award calculated by multiplying the actual repair damages ($81,849.80) times a factor of three ($245,549.40). Ms. Nelson appealed, contending that she was not required to disclose the water damage in the disclosure statement and that she had no knowledge of the presence of the mold.

The Nevada Supreme Court agreed with Ms. Nelson. With regard to the existence of prior water damage and its repair, the Court held that once the damage was repaired, it no longer constituted a "condition that materially lessened the value or use of the cabin"–and thus was not a "defect." Because the prior damage was not a defect, there was no duty to disclose it. Regarding the mold, the Court stated that a seller has no duty to disclose defects if the seller is not aware of those defects. As the Court pointed out, "it is impossible for a seller to disclose conditions in the property of which he or she has no realization, perception, or knowledge," and in this case, there was no evidence that Ms. Nelson was aware of the existence of the mold.

The Court concluded "because repaired water damage does not constitute a defect under NRS Chapter 113 and Nelson did not know of the presence of elevated amounts of mold in the cabin, she did not violate the disclosure requirements contained in NRS 113.130 when she completed the SRPD." The money judgment against Ms. Nelson was reversed.

…Religious Discrimination

Those benefits include not only protecting employers from religious discrimination lawsuits, but can also help increase morale. With the challenges of trying to recruit and retain employees, increased tolerance for those displays can also go a long ways in adding to the available pool of potential applicants.

Accommodations can be easy, and often don't cost much. The reality is that if an accommodation is easy and does not cause an undue burden on the employer, then it likely must be granted. Consider the Muslim employee who requests specific prayer times during the regular workday. Is it an undue burden on the operation of the company to allow the adjustment of break times or lunch hours to accommodate the practice? Or to provide a quiet place for the employee to do their prayers?

What if an employee requests an accommodation? How should the employer react? An employer must engage in an interactive process to arrive at a determination as to whether the request presents an undue burden on the business. The process is not unlike the process an employer would participate in when a disabled employee makes a request. Ask the employee what accommodation he or she is requesting. Participate in a discussion about alternatives if the accommodation the employee is requesting is not feasible.

Remember, it is not a valid interactive process if the employer simply puts the burden on the employee to figure out what might work. Denying every version of a requested accommodation puts the employer at a high risk of a NERC/EEOC complaint and defending a lawsuit, not to mention the effect on morale at the company.

The most important part of the interactive process is documenting those efforts. Memorialize the discussions with the employee about the various accommodations considered during the dialogue. Document the reasons why the accommodations would not work, specifying the burden each would place on the employer. List the various reasons the employee gives for rejecting the accommodations offered by the employer. Don't reject a requested accommodation based on hypothetical hardships.

As part of the interactive process, don't ignore the fact that allowing an accommodation for one employee may unduly prejudice another one. And be sure that one employee's religious accommodation doesn't violate a collective bargaining agreement that may exist.

All of these considerations can be a bit unnerving, especially when it comes to having a frank and open discussion with employees about a requested accommodation. Consider the possibility that employees may be able to practice their religious beliefs at work without disrupting the business at hand. Invaluable benefits can come with sending a message that the employer is open to accommodating its employees' spiritual as well as physical needs. Not to mention the added benefit of going a long way in protecting the employer from a lawsuit.

…Dram Shop Act Revisions

one knowingly serves, sells or furnishes alcohol to another person who is under the age of 21, then the person providing the alcohol is civilly liable for damages caused by the under aged person as a result of the consumption of the alcoholic beverage.

Furthermore, one who knowingly allows an underage person to consume an alcoholic beverage on premises or in a vehicle he owns or over which he has control, is also liable for civil damages resulting from the consumption of the alcoholic beverage. Therefore, even if the person does not provide the alcohol, he may still be liable if he permits underage alcohol consumption in those circumstances over which he has control.

Nevada's oldest watering hole -- Genoa

The statutory provision was also revised to include a provision that permits not only the recovery of actual damages by the person injured, but also attorneys' fees, costs and any punitive damages warranted by the facts.

The new statute provides an exemption for persons who are licensed to serve, sell or furnish alcohol, to the extent that the provision of alcohol occurs within the scope of licensed activity. In order to impose civil liability, it is necessary to demonstrate that the person providing the alcohol to the underage person did so knowingly. This opens up the possibility of a defense based upon lack of actual knowledge of the age of the minor or based upon a mistaken belief as to the minor's actual age. It would appear to be a deficiency in proof to show only that the provider of the alcohol "should have known" that the person to whom the alcohol was furnished was underage.

There are also separate provisions imposing civil liability against those who knowingly and unlawfully serve, sell or otherwise furnish a controlled substance to another person, after which injury or damage occurs. This liability applies regardless of the age of the person to whom the controlled substance is unlawfully supplied.

Immunity from Suit for Public Employees

The Nevada Supreme Court recently clarified Nevada law regarding immunity from suit for public employees and adopted the federal *Berkovitz-Gaubert* two-part test in determining whether NRS 41 immunity applies to negligence claims against government employees. In **Martinez v. Maruszczak**, 123 Nev. Adv. Op. No. 43 (October 11, 2007), a patient at the University Medical Center in Las Vegas died of accidental injuries while in the care of a doctor who worked under contract for the State.

The patient's estate brought suit against the doctor and claimed, amongst other things, that the practice of medicine is not a governmental function protected by notion of sovereign immunity, and that a doctor was not entitled to the protection of statutorily capped damages of $50,000.00 (in effect at that time). The lower court declared that the doctor was not entitled to sovereign immunity.


Elko County Courthouse – 1940's

However, the Nevada Supreme Court reversed the lower court's declaratory judgment. In applying the *Berkovitz-Gaubert* two-part test, the court found that (1) while the doctors medical decisions were discretionary, (2) the decisions were not a matter of public policy. As such, the court held that while the doctor was not immune from liability under NRS 41.032(2), any award of damages against him was limited to $50,000.00 by NRS 41.035(1) because he was a contracted State employee. The court rejected the estate's argument that medical treatment was governed by distinct obligations discrete to the doctor-patient relationship and that governmental immunity should not apply. The court noted that stripping State doctors of immunity would not somehow ensure that they will exercise appropriate care in the treating of their patients.

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...Construction Defect

residences, as indicated in the statute, and that this case should not go forward under Chapter 40 because these condominiums were not "new" as they were apartments that had been renovated. The plaintiff condominium owners disagreed, claiming the units were still residences and subject to Chapter 40.

Notably, the Supreme Court ruled that apartments are not subject to Chapter 40. This has been a longstanding grey area – whether apartments are subject to the confines of a Chapter 40 action. The statute does not address this, and in fact there is some confusing language on this issue in the statute, but the Supreme Court has now announced that apartment buildings are not subject to a Chapter 40 claim. The reason given was that individuals residing in apartments do not own the units, and have no "title" to them. Certainly, this ruling can be considered a win for contractors.

The Supreme Court also opined that the condominiums were not considered "new" residences, and thus not subject to Chapter 40. The Supreme Court indicated that these units had been lived in and occupied before the conversion, and that they could no longer be considered "new" as the statute requires. While this is generally favorable for contractors, the Court tempered this opinion with the additional ruling that the condominium owners were still allowed to proceed under Chapter 40 on those construction defects that existed regarding the "modifications" made in the conversion from apartments to condominiums. Consequently suit would be allowed on any construction defects arising from the conversion process.

In another recent case, **DR Horton v. Dist. Ct.**, 123 Nev. Ad. Op. 45 (October 11, 2007), the Nevada Supreme Court addressed the issue of the sufficiency of the original Chapter 40 notice provided to the developer or general contractor. Chapter 40 cases are initiated by a letter from the homeowners to the developer outlining the various alleged construction defects. Under Chapter 40 this letter is supposed to provide "reasonable detail" of the alleged defects. In this particular case the developer argued that the detail provided was not sufficient, and that it could not attempt to repair any of the defects, as is its right, given the vague notice provided by plaintiffs.

The Supreme Court set about addressing this issue by creating a brand new rule, which it dubbed the "Reasonable Threshold Test." District courts must employ this test when a developer challenges the sufficiency of the initial notice. The test focuses mainly on how extrapolation can be used. If the plaintiffs are extrapolating defects in the subdivision (as they frequently do), the Supreme Court now mandates that such extrapolation must specify the subset to which the defect applies. The Court explained this further by saying that the plaintiffs, when identifying a defect, needed to also state the address of the house, its location in the house, the floor plan in which it was found, the product used, and anything else that helps identify the alleged problem, such that one could understand the defect and make a repair. It is not enough to claim that all houses in the subdivision are subject to a defect if it was found in one house. Plaintiffs are going to have to be more specific, and will have to show that at least one house in each category or subset suffers from that defect. This is generally helpful for contractors.

Finally, the Court enunciated one other terrific ruling, requiring that plaintiffs turn over their expert reports generated in support of the Chapter 40 notice. Instead of waiting to produce these reports, as is often done, the plaintiffs now have to produce them immediately, to allow the defense an opportunity to view what an expert has concluded up to that point. This is a helpful ruling for contractors and will do away with much of the cloak of secrecy often employed by plaintiffs in these cases.