STATE OF NEVADA COMPENDIUM OF LAW

Prepared by
Brian K. Terry and Michael P. Lowry
Thorndal, Armstrong, Delk, Balkenbush & Eisinger
1100 E. Bridger Avenue
Las Vegas, NV 89125
(702) 366-0622
www.thorndal.com

Updated 2012

PRE-SUIT AND INITIAL CONSIDERATIONS

Pre-suit Notice Requirements

Nevada partially waived its sovereign immunity in NEV. REV. STAT. § 41.031 (2009) and does not require pre-suit notice to either the State or its subsidiaries prior to the commencement of suit. NEV. REV. STAT. § 41.036(3) (2009). Notice of potential claims to parties other than the state is required under several specific statutes, but is most frequently encountered in construction defect litigations under NEV. REV. STAT. § 40.010 *et seq.* (2009).

Relationship to Federal Rules of Civil Procedure

The Nevada Rules of Civil Procedures are substantially similar to the Federal Rules of Civil Procedure. Thus, federal court opinions discussing the federal rules are often a productive resource. "Federal cases interpreting the Federal Rules of Civil Procedure 'are strong persuasive authority, because the Nevada Rules of Civil Procedure are based in large part upon their federal counterparts.'" *Exec. Mgmt., Ltd. v. Ticor Title Ins. Co.*, 118 Nev. 46, 53, 38 P.3d 872, 876 (2002); *see also Cohen v. Mirage Resorts, Inc.*, 119 Nev. 1, 18, 62 P.3d 720, 732 (2003).

Organization of State Court System

A) **Judicial selection.** As described on the official Nevada Supreme Court website, judges at all levels in Nevada are directly elected. Most frequently, the public interacts with the Municipal and Justice Courts, as these are the courts that handle traffic and parking citations and lesser civil filings. The jurisdiction of these two courts is limited. THE NEVADA JUDICIARY, www.nevadajudiciary.us (last visited June 7, 2012).

B) **Structure.** The court's website also succinctly describes the other courts in the state:

> The Municipal Courts manage cases involving violations of traffic and misdemeanor ordinances that occur within the city limits of incorporated municipalities. Each of these courts are funded by the city and most of the funds collected by the Municipal Court go into the municipalities' general fund. In January 2007, Nevada had seventeen municipal courts that were presided over by thirty municipal judges with nine of them also serving as justices of the peace.
>
> The Justice Courts handle misdemeanor crime and traffic matters, small claims disputes, evictions, and other civil matters less than ten thousand dollars ($10,000.00). The justices of the peace also preside over felony and gross misdemeanor arraignments and conduct preliminary hearings to determine if sufficient evidence exists to hold suspects for trial at District Court. Each county funds the Justice Courts and the funds collected by the courts go to their respective county treasurer for disbursement to county and state entities. In January 2007, Nevada had forty-five justice courts presided over by sixty justices of the peace with nine of them also serving as municipal court judges.
>
> The District Courts have general jurisdiction over all legal disputes. These are the courts where criminal, civil, family, and juvenile matters are generally resolved through arbitration, mediation, and bench or jury trials. The judges also hear appeals from Justice and Municipal Court cases. The funding for District Courts is split between the state and

> counties. District Court judges' salaries are paid by the state while the county pays for support staff and court facilities. The seventeen county courts in Nevada are divided into nine Judicial Districts presided over by sixty-four judges.
>
> The Supreme Court is the state's highest court and its primary responsibility is to review and rule on appeals from District Court cases. Nevada does not presently utilize an intermediate court of appeals. The court, located in Carson City, is funded almost equally from the state general fund and from administrative assessments. The Supreme Court has seven justices.

About the Nevada Judiciary, THE NEVADA JUDICIARY, http://www.nevadajudiciary.us/index.php/aboutthenevadajudiciary (last visited June 7, 2012).

C) **Alternative dispute resolution.** Nevada also features several forms of alternative dispute resolution. Specific statutory requirements govern the mediation and/or arbitration of cases involving custody or visitation (NEV. REV. STAT. § 3.475 (2009)), claims relating to residential property within a common-interest community (NEV. REV. STAT. § 38.300 (2009)), and claims concerning construction defect disputes (NEV. REV. STAT. § 40.645 (2009)). Due to Nevada's high foreclosure rate, the Legislature has also enacted a specific Foreclosure Mediation program.

1) **Court annexed arbitration.** At the preliminary stage of litigation, claims valued at less than fifty thousand dollars ($50,000.00) are required to participate in a court annexed non-binding arbitration program. The Alternative Dispute Resolution Commissioner assigns a local attorney to serve as the arbitrator. However, the parties are required to split the arbitrator's fees and costs. The parties then meet with the arbitrator, who may limit the length and amount of discovery. After the close of discovery a case memorandum is filed with the arbitrator and a brief hearing is conducted during which witnesses may be examined. NEV. REV. STAT. § 38.250 (2009).

2) **Decision.** The arbitrator is permitted ten days after the hearing to issue a decision, which may not exceed fifty thousand dollars ($50,000.00). The parties then have thirty days after the decision to request a trial de novo. Although there are procedural disincentives to request trial de novo, it is commonly requested. The ADR Commissioner will then appoint a short-trial judge, who is a member of the local bar. Again, the short-trial judge's fees and costs are shared between the litigants. Procedurally, the short-trial functions much like the arbitration, but concludes with a full trial, which is limited in length to one day. The short-trial verdict is directly appealable to the Nevada Supreme Court. *Id.*; *see also* NEV. REV. STAT. § 38.258 (2009).

Service of Process

A) **Personal service.** A copy of the summons must be served together with a copy of the complaint to be effective. NEV. R. CIV. P. 4(d) (2009). Service upon individuals is

accomplished by personally serving papers upon the individual directly, or by leaving copies at defendant's residence with a person who resides there and is of suitable age and discretion, or by delivering copies to agents authorized by that individual defendant to accept service of process on his behalf. NEV. R. CIV. P. 4(d)(6).

B) **Domestic corporations.** Service is effective once copies of the summons and complaint are personally served. NEV. R. CIV. P. 4(d)(1) has recently been revised to specify precisely upon whom service may be effectuated for certain types of corporate entities. If personal service to the domestic corporation cannot be accomplished, service may be made by delivering copies of the summons and complaint to the Secretary of State and also posting legal process in the office of the clerk of court in which the case was filed or is pending; note, however, an affidavit of due diligence must be filed before service through the Secretary of State will be authorized and the plaintiff must demonstrate that service upon the entity cannot be had within the state. NEV. R. CIV. P. 4(d)(1).

C) **Foreign corporations.** NEV. R. CIV. P. 4(d)(2) was also recently revised. Suit may still be initiated by serving a resident agent, but may also now be initiated through service upon certain members of management located within Nevada. NEV. REV. STAT. § 14.020(2), (6) (2009).

D) **Secretary of State.** For both domestic and foreign corporations doing business in the state that have not appointed a resident agent and have no agent such as contemplated in NEV. R. CIV. P. 4(d)(1), (2) in Nevada to accept service of process, copies of the summons and complaint may be delivered to the Secretary of State. The legal process so served must expressly include citation to NEV. REV. STAT. § 14.030(1) (2009) and the Secretary of State may refuse to accept service if the proper citation is lacking; the process must also be accompanied by a ten dollar ($10.00) fee in order to be effective; also, if plaintiff has a last known address for the corporation or any officers, plaintiff must, in addition to and after serving the Secretary of State, mail copies of the summons and complaint to such address or addresses. *See* NEV. REV. STAT. §§ 14.030(1)(a)-(b), 14.030(4). In order to obtain authority to serve any domestic or foreign corporation through the Secretary of State in accordance with the provisions of NEV. REV. STAT. § 14.030, the plaintiff must first file an affidavit of due diligence demonstrating that direct or personal service on the corporation cannot be had. *See* NEV. REV. STAT. § 14.030(3).

E) **The State of Nevada.** The State of Nevada has partially waived its immunity from liability and suit, as well as the immunity of all of its political subdivisions. NEV. REV. STAT. § 41.031 (2009). Suits against the state must name the State of Nevada in relation to the particular department, commission, board or agency whose actions are the basis of the complaint. The action must be filed in the county where the cause arose, or in Carson City. To effect service of process in such actions, the summons and complaint must be served upon the Attorney General, or a person designated by the Attorney General, at the Office of the Attorney General in Carson City; and also served upon the person serving in the office of the administrative head of the named agency. NEV. REV. STAT. § 41.031.

F) **Foreign insurers.** Foreign insurance companies must appoint the Commissioner of Insurance for the State of Nevada as their attorney to receive service of process filed against the insurer; service of process must be made only by service upon the Commissioner. NEV. REV. STAT. § 680A.250(3) (2009). Note, however, that appointment of the Commissioner of Insurance as its statutory agent for service of process "does not in itself subject a nonresident insurer to the personal jurisdiction of Nevada courts." *Freeman v. Second Judicial Dist. Court*, 116 Nev. 550, 1 P.3d 963 (2000).

G) **Domestic Insurers.** NEV. REV. STAT. § 680A.250(4) (2009) provides that service of process upon domestic insurance companies "may be made by serving the Commissioner of Insurance pursuant to [this statute], or by any other means permitted by the Nevada Rules of Civil Procedure."

H) **Motorists.** If personal service upon the driver of a motor vehicle involved in an accident on a public roadway in this state cannot be made pursuant to NEV. R. CIV. P. 4(d)(6), which describes service of process upon individuals, then NEV. REV. STAT. § 14.070 (2009) sets forth a means of substituted service. The driver is deemed to have appointed the Director of the Department of Motor Vehicles as his true and lawful attorney for purposes of service of process. NEV. REV. STAT. § 14.070(1). Service is effected by delivering copies of the summons and complaint, along with a five dollar ($5.00) fee, to the Director of the Department of Motor Vehicles, and also sending copies by registered or certified mail to the defendant at the address provided in the accident report, or to the best available address. Personal service of notice and copy of process upon the defendant outside the State of Nevada is deemed to be the equivalent of mailing. NEV. REV. STAT. § 14.070(2). The statute expressly applies only to nonresident motorists and to resident motorists who have left the State or cannot be found within the State following an accident that is the subject of the action for which process is served pursuant to this section.

1) **Procedural due process.** Procedural due process requirements preclude resort to NEV. REV. STAT. § 14.070(6) prior to due diligence efforts to locate and personally serve the defendant. A plaintiff who knew the identity of defendant's employer and insurer, but made no effort to locate and serve defendant through these sources, did not exercise due diligence. Therefore default judgment based upon service of process through Department of Motor Vehicles was set aside. *Browning v. Dixon*, 114 Nev. 213, 954 P.2d 741 (1998).

I) **Publication.** Service of process by publication is governed by NEV. R. CIV. P. 4(e)(1). When the person to be served "resides out of state, or has departed from the state, or cannot, after due diligence, be found within the state, or by concealment seeks to avoid service of process," the court may grant an order that service be made by publication of the summons. The court's order is "to direct the publication to be made in a newspaper published, in the State of Nevada, to be designated by the court . . . for a period of 4 weeks, and at least once a week during that time." NEV. R. CIV. P. 4(e)(1)(iii). There is no objective, formulaic standard for determining what is, or is not, due diligence under NEV.

R. CIV. P. 4(e)(1)(i), or other substitute service of process provisions, such as NEV. REV. STAT. § 14.070 (2009) (operators of motor vehicles). "The due diligence requirement is not quantifiable by reference to the number of service attempts or inquiries into public records. Instead, due diligence is measured by the qualitative efforts of a specific plaintiff seeking to locate and serve a specific defendant." *Abreu v. Gilmer*, 115 Nev. 308, 313, 985 P.2d 746, 749 (1999).

J) **Actual notice.** Nevada Supreme Court has consistently held actual notice of a suit is not an effective substitute for service of process. *See C.H.A. Venture v. G.C. Wallace Consulting*, 106 Nev. 381, 794 P.2d 707 (1990); *see also Abreu v. Gilmer*, 115 Nev. 308, 985 P.2d 746 (1999).

K) **Time limit for service of process.** If service is not effected within 120 days, "the action shall be dismissed as to that defendant, without prejudice." Plaintiff may move to enlarge the time for service, but must show good cause why service was not made within 120 days. NEV. R. CIV. P. 4(i). The motion to enlarge must also be filed before the 120 day deadline expires. *Saavedra-Sandoval v. Wal-Mart Stores*, 126 Nev. Adv. Op. 55, 245 P.3d 1198, 1199 (2010).

Statutes of Limitations

A) **Construction/statutes of repose.** Construction defect cases are subject to both statutes of limitation and statutes of repose, of varying time periods and conditions. A statute of limitation forecloses an action after a fixed period of time after occurrence or discovery of injury; it is a procedural bar to the suit. A statute of repose "bars causes of action after a certain period of time, regardless of whether damage or an injury has been discovered." *Allstate Ins. Co. v. Furgerson*, 104 Nev. 772, 766 P.2d 902 (1988).

1) To be actionable, a claim involving improvements to real property, *i.e.*, a construction defect claim,

> must be brought within the time limit set forth in the statute of repose, which commences at time of substantial completion of building, and must also be brought within the time limit set forth in the statute of limitation for the particular cause of action, which commences at time the party knew or should have known of damage.

G & H Assocs. v. Ernest W. Hahn, Inc., 113 Nev. 265, 934 P.2d 229 (1997).

NEV. REV. STAT. § 11.203 (2009) bars causes of action for, among other things, personal injury or property damage allegedly caused by a deficiency in improvements to real property when the action is commenced more than ten years after "substantial completion" of improvements. If damage or injury occurs after the specified period, it is barred without regard to whether the statute of limitations has run on an injured party's claim. *Hahn*, 113 Nev. 265. NEV. REV. STAT. §§ 11.204, .205, respectively, set time limits of eight years for "latent" or

non-apparent deficiencies, and of six years for "patent" or apparent deficiencies. These statutes of repose protect "the owner, occupier or any person performing or furnishing the design, planning, supervision or observation of construction, or the construction of an improvement to real property." *See, e.g.*, NEV. REV. STAT. § 11.203(1).

B) **Contracts.** Actions premised on written contracts are barred six years from the date of the contract, unless the contract itself provides otherwise. NEV. REV. STAT. § 11.190(1)(b) (2009). Actions premised on oral contracts are barred four years from the date of the contract. NEV. REV. STAT. § 11.190(2)(c).

C) **Contribution.** NEV. REV. STAT. § 17.285 (2009) sets forth two methods of enforcing a right of contribution. A tortfeasor may seek to enforce his right of contribution in the same action by motion, once judgment has been entered against two or more tortfeasors for same injury or death; or a tortfeasor may file a separate action for contribution. If a separate action is filed, it must be filed within one year after judgment has become final by lapse of time for appeal or after appellate review. *Saylor v. Arcotta*, 126 Nev. Adv. Op. No. 9, 225 P.3d 1276 (2010).

D) **Employment.** Actions premised upon violations of terms of employment may be governed either by contract or by tort, depending upon the nature of the employment and the nature of the claim.

E) **Fraud.** Actions for fraud must be brought within three years of discovery of facts constituting fraud. NEV. REV. STAT. § 11.190(3)(d) (2009); *Hartford Acc. & Indem. Co. v. Rogers*, 96 Nev. 576, 613 P.2d 1025 (1980).

F) **Governmental Entities.** Generally actions brought against governmental entities are subject to the same statutes of limitation outlined herein. One exception concerns actions brought against the Nevada Department of Transportation regarding construction contracts.

> An action by a contractor against the Department of Transportation upon a contract for the construction, reconstruction, improvement or maintenance of a highway must be commenced within 3 years after the date of the: 1. Completion of the contract; or 2. Determination of the engineer or decision of the Board of Directors of the Department of Transportation on an appeal of a claim arising from the contract as provided in the standard specifications for construction of roads and bridges adopted by the Department, whichever occurs later.

NEV. REV. STAT. § 11.208 (2009).

G) **Improvements to realty.** See "Construction," this section.

H) **Indemnity.** An action by an insurer, as subrogee of its named insured, against an uninsured motorist to recover monies paid to its insured pursuant to uninsured motorist coverage, sounds in tort rather than in contract; thus, two-year statute of limitation

applies to the suit and begins to run from date of accident. *State Farm Mut. Auto. Ins. Co. v. Wharton*, 88 Nev. 183, 495 P.2d 359 (1972).

1) **Bad faith claims.** A bad faith claim is founded upon duty imposed upon insurer by law, not by contract; therefore, statute of limitations is four years pursuant to NEV. REV. STAT. § 11.190(2)(c) and "liability not founded on an instrument in writing." *Davis v. State Farm Fire & Cas. Co.*, 545 F. Supp. 370 (D. Nev. 1982).

I) **Personal injury.** The statute of limitations for personal injuries is two years. NEV. REV. STAT. § 11.190(4)(e) (2009).

J) **Professional liability.** Nevada employs a number of statutes of limitations for varying types of professional liability.

1) **Medical malpractice.** The applicable statute of limitations for medical malpractice will depend on whether the injury occurred prior to October 1, 2002. If so, the limitations period is either four years from date of injury or two years from date of discovery of injury, whichever occurs first. For injuries occurring after October 1, 2002, statute of limitations is three years from date of injury or one year from date of discovery of injury, whichever occurs first. NEV. REV. STAT. § 41A.097 (2009). Discovery of "injury" is referring to date when claimant knows, or reasonably should know, that physical injury has occurred and that it is the result of medical negligence. *Massey v. Litton*, 99 Nev. 723, 669 P.2d 248 (1983). In wrongful death medical malpractice cases, date of death is the earliest commencement date for statute of limitations. *Pope v. Gray*, 104 Nev. 358, 760 P.2d 763 (1988); *Gilloon v. Humana, Inc.*, 100 Nev. 518, 687 P.2d 80 (1984). The date of the patient's death is not to be included in computation of limitations period, by reason of NEV. R. CIV. P. 6. *Goldberg v. Charter Med. Corp.*, 98 Nev. 402, 651 P.2d 94 (1982).

2) **Legal malpractice.** For legal malpractice, again, the statute of limitations does not begin to run until client discovers, or reasonably should have discovered, all facts material to the cause of action, *i.e.* facts constituting all elements of the claim. *Sorenson v. Pavlikowski*, 94 Nev. 440, 581 P.2d 851 (1978). NEV. REV. STAT. § 11.207 (2009) governs actions for malpractice against both attorneys and veterinarians. An action, whether based on duty or contract, must be brought within four years after sustaining damage or two years after the claimant discovered or should have discovered the material facts relevant to his claim, whichever occurs first. The time limitation, however, is tolled during any time when the attorney or veterinarian "conceals any act, error, or omission upon which the action is founded."

3) **Accountants.** NEV. REV. STAT. § 11.2075 (2009) governs malpractice claims against certified public accountants. The action must be commenced within two years after the alleged act, error, or omission is discovered or should have been

discovered; four years after the service upon which the action is founded was completed; or four years after the date of the initial report prepared by the accountant, whichever of these three occurs first. Like legal malpractice, these limitations are tolled during any period during which the basis for the claim is concealed by the accountant.

4) **Survival.** NEV. REV. STAT. § 11.310 (2009) governs the survival of a decedent's causes of actions. Generally, the decedent's representatives must bring suit within one year of the death or prior to the termination of the applicable statute of limitations.

Venue

A) NEV. REV. STAT. § 13.010 (2009) provides that a contract action must be commenced in the county in which the obligation is to be performed or in which the performer resides. Suits involving real property must be commenced in the county where the property is situated. NEV. REV. STAT. § 13.040 (2009) provides:

> In all other cases, the action shall be tried in the county in which the defendants, or any one of them, may reside at the commencement of the action; or, if none of the defendants reside in the State . . . [the action] may be tried in any county which the plaintiff may designate in his complaint . . . .

B) **Transfer.** If the designated county is inappropriate, the defendant may file a demand to transfer before the time for filing an answer expires. Also, the court may, on motion, change the place of trial in the following cases: (1) "when the county designated in the complaint is not the proper county," (2) "when there is reason to believe that an impartial trial cannot be had therein," (c) "when the convenience of the witnesses and the ends of justice would be promoted by the change." NEV. REV. STAT. § 13.050 (2009).

NEGLIGENCE

Comparative Fault/Contributory Negligence

A) **Modified comparative negligence.** Nevada has adopted a modified comparative negligence statutory scheme. NEV. REV. STAT. § 41.141 (2009). The jury is instructed that the claimant may not recover if his comparative negligence is greater than the negligence of the defendant, or the combined negligence of multiple defendants. *State Farm Mut. Auto. Ins. Co. v. Comm'r of Ins.*, 114 Nev. 535, 958 P.2d 733 (1998). Negligence of plaintiff, however, will not reduce awards in actions based on willful and wanton misconduct, *Davies v. Butler*, 95 Nev. 763, 602 P.2d 605 (1979), or on strict products liability. *Young's Mach. Co. v. Long*, 100 Nev. 692, 692 P.2d 24 (1984).

B) **Named defendants.** The Nevada Supreme Court ruled in *Warmbrodt v. Blanchard*, 100

Nev. 703, 692 P.2d 1282 (1984) that NEV. REV. STAT. § 41.141 (2009) permits only a comparison of negligence among named defendants in the case. Once a party is dismissed from the suit the jury may no longer consider any alleged negligence of the non-party.

1) This, however, does not prevent a party defendant from attempting to establish either no negligence occurred or the entire responsibility for a plaintiff's injuries rests with non-parties, including those who have separately settled their liabilities with the plaintiff. *Banks v. Sunrise Hosp.*, 120 Nev. 822, 102 P.3d 52 (2004).

C) **Strict liability.** In a strict liability products case, the defense of contributory negligence is not permitted. This rule holds true even in cases where plaintiff's contributory negligence may go to causation. *Young's Mach. Co. v. Long*, 100 Nev. 692, 692 P.2d 24 (1984).

D) **Children.** Many jurisdictions establish a specific age under which a child is incapable of being contributorily negligent. Nevada, however, holds "the issue of a child's contributory negligence is one of fact for the jury upon proper instructions unless reasonable minds could come to but one conclusion from the evidence." *Galloway v. McDonald's Rest. of Nev., Inc.*, 102 Nev. 534, 728 P.2d 826 (1986).

E) **Obvious dangers.** The "obvious danger rule" survives the adoption of comparative negligence statutes because if a danger is open and obvious the defendant cannot be found guilty of failure to warn. *Harrington v. Syufy Enters.*, 113 Nev. 246, 944 P.2d 797 (1997). Additionally, Nevada has adopted the Uniform Contribution Among Joint Tortfeasors Act, NEV. REV. STAT. § 17.225 (2009). Contribution is allowed among vicariously liable tortfeasors. *Van Cleave v. Gamboni Constr. Co.*, 101 Nev. 524, 706 P.2d 845 (1985).

Exclusive Remedy in Workers' Compensation

A) **Exclusive remedy.** Nevada's workers compensation system provides the exclusive remedy of an employee against his employer for workplace injuries. NEV. REV. STAT. § 616A.020 (2009); *see Frith v. Harrah S. Short Corp.*, 92 Nev. 447, 552 P.2d 337 (1976). NEV. REV. STAT. § 616A.020 (2009) specifically states: "The rights and remedies provided in chapters 616A to 616D, inclusive, of NRS for an employee on account of an injury by accident sustained arising out of and in the course of the employment shall be exclusive . . . ."

B) **Third parties.** Nevada does allow an injured party who has recovered workers compensation to sue a third party who is not an employer or in the same employ. NEV. REV. STAT. § 616.110(1)(a) (2009). A common question then becomes how to define "in the same employ" for the purposes of immunity. Nevada courts use two different standards depending on the type of case.

1) **Construction.** In construction cases involving a licensed principal contractor, protection is given to all subcontractors, independent contractors, and the employees of either and co-employees. NEV. REV. STAT. § 616A.210(1) (2009).

2) **Non-construction.** In non-construction cases, the court employs the "normal work test" of *Meers v. Haughton Elevator*, 101 Nev. 283, 701 P.2d 1006 (1995). The *Meers* test considers whether the activity being performed by the party seeking protection from liability is, in that business, normally carried on through employees rather than independent contractors.

Indemnity

A) Where two or more persons become jointly and severally liable in tort for the same injury, there exists a right of contribution among them. NEV. REV. STAT. § 17.225 (2009); *see also Black & Decker v. Essex Group*, 105 Nev. 344, 775 P.2d 698 (1989); *Saylor v. Arcotta*, 126 Nev. Adv. Op. No. 9, 225 P.3d 1276 (2010). A release or covenant not to sue given in good faith to one of two or more persons liable in tort for the same injury or wrongful death discharges the tortfeasor to whom it is given from all liability for contribution and equitable indemnity. NEV. REV. STAT. § 17.245.

B) **Time limitation.** A party seeking contribution must commence an action within one (1) year after the judgment has become final. NEV. REV. STAT. § 17.285 (2009); *Saylor v. Arcotta*, 126 Nev. Adv. Op. No. 9, 225 P.3d 1276 (2010). A cause of action for indemnity or contribution accrues when payment is made. *Aetna Ins. & Sur. Co. v. Aztec Plumbing Corp*., 106 Nev. 474, 796 P.2d 227 (1990).

C) **Contribution.** "There is a clear distinction between contribution and indemnity: the former is an equitable sharing of liability while the latter is a complete shifting of liability to the party primarily responsible." *Medallion Dev. Inc. v. Converse*, 113 Nev. 27, 930 P.2d 115 (1997). A claim for contribution from a co-tortfeasor may be brought in the original action, even if a payment has not yet been made. *Pack v. LaTourette*, 128 Nev. Adv. Op. 25 (2012)

D) **Implied contractual indemnity.** Tortfeasors may bring claims of implied contractual indemnity against one another where a good-faith settlement has been reached between the injured plaintiffs and one or more of the tortfeasors. *Id.*

Joint and Several Liability

Liability among two or more tortfeasors is joint and several unless the plaintiff is found to be comparatively negligent, in which case liability is several only. *Buck v. Greyhound*, 105 Nev. 756, 783 P.2d 437 (1989). NEV. REV. STAT. § 41.141 does, however, permit "liability to be apportioned between a negligent tortfeasor and an intentional tortfeasor." *Cafe Moda v. Palma*, 128 Nev. Adv. Op. 7, 272 P.3d 137, 138 (2012).

Strict Liability

Nevada recognizes causes of action sounding in strict liability for both product defect and ultrahazardous activities claims. *Valentine v. Pioneer Chlor Alkali Co*., 109 Nev. 1107, 864 P.2d 295 (1993).

A) **Product defects.** When alleging product defect, to present a prima facie case for strict liability in tort, a plaintiff must establish that her injuries were caused by a defect in the product, and that the defect existed when the product left the defendant's control. *Allison v. Merck & Co.*, 110 Nev. 762, 878 P.2d 948 (1994); *Maduike v. Agency Rent-A-Car*, 114 Nev. 1, 6, 953 P.2d 24, 27 (1998).

1) **Unreasonably dangerous.** To recover for a defective product, it must be shown the defect made the product unreasonably dangerous and unsafe for its intended use. A product is unreasonably dangerous if it is dangerous to an extent beyond that which would be contemplated by ordinary consumer who uses the product with ordinary knowledge common to community as to its characteristics. *Ward v. Ford Motor Co.*, 99 Nev. 47, 657 P.2d 95 (1983). Unexpected, dangerous malfunction may constitute prima facie case of product defect; proof of specific defect is not necessary if alternative possibilities are ruled out under all of circumstances. *Stackiewicz v. Nissan Motor Corp., U.S.A.*, 100 Nev. 443, 686 P.2d 925 (1984).

B) **Ultra hazardous activities.** To recover in strict liability for an ultra hazardous activity, the Nevada Supreme Court has explicitly adopted RESTATEMENT (SECOND) OF TORTS § 520. *Valentine*, 109 Nev. at 1107. To determine whether an activity is ultra hazardous the fact finder must consider six factors:

> (a) existence of a high degree of risk of some harm to the person, land or chattels of others; (b) likelihood that the harm that results from it will be great; (c) inability to eliminate the risk by the exercise of reasonable care; (d) extent to which the activity is not a matter of common usage; (e) inappropriateness of the activity to the place where it is carried on; and (f) extent to which its value to the community is outweighed by its dangerous attributes.

Willful and Wanton Conduct

Nevada has consistently distinguished the concepts of ordinary or gross negligence from the concepts of willful or wanton misconduct.

> Gross negligence is manifestly a smaller amount of watchfulness and circumspection than the circumstances require of a prudent man. But it falls short of being such reckless disregard of probable consequences as is equivalent to a willful and intentional wrong. Ordinary and gross negligence differ in degree of inattention, while both differ in kind from willful and intentional conduct which is or ought to be known to have a tendency to injury.

Hart v. Kline, 61 Nev. 96, 101, 116 P.2d 672, 674 (1941).

"Wanton misconduct involves an intention to perform an act that the actor knows, or should know, will very probably cause harm." *Rocky Mt. Produce v. Johnson*, 78 Nev. 44, 51-52, 369 P.2d 198, 202 (1962). "To be wanton such conduct must be beyond the routine. There must be some act of perversity, depravity or oppression*." Bearden v. City of Boulder City*, 89 Nev. 106, 110, 507 P.2d 1034, 1036 (1973). "Willful or wanton misconduct is intentional wrongful conduct, done either with knowledge that serious injury to another will probably result, or with a wanton or reckless disregard of the possible result." *Boland v. Nev. Rock & Sand Co*., 111 Nev. 608, 612-13, 894 P.2d 988, 991 (1995) (quoting *Davies v. Butler*, 95 Nev. 763, 771, 602 P.2d 605, 610 (1979)).

DISCOVERY

Electronic Discovery

Nevada does not presently have any rules specifically addressing electronic discovery. Instead, requests for electronic discovery fall within the purview of preexisting discovery rules.

Expert Witnesses

A) **Lay witnesses.** Lay witnesses are defined by NEV. REV. STAT. § 50.265 (2009), which reads:

> If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are:
>
> 1. Rationally based on the perception of the witness; and
>
> 2. Helpful to a clear understanding of his testimony or the determination of a fact in issue.

B) **Expert witnesses.** Expert witnesses are governed by NEV. REV. STAT. § 50.275 (2009), which states, "[i]f scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by special knowledge, skill, experience, training or education may testify to matters within the scope of such knowledge." The Nevada Supreme Court has interpreted this status in a manner consistent with FED. R. EVID. 702. *Hallmark v. Eldridge*, 124 Nev. 492, 189 P.3d 646 (2008).

C) **Factors.** Although NEV. REV. STAT. § 50.275 governing expert testimony has been interpreted largely to track FED. R. EVID. 702, Nevada "has not adopted the United States Supreme Court's interpretation of FED. R. EVID. 702 in *Daubert v. Merrell Dow Pharms., Inc*. But, as we have stated, *Daubert* and the federal court decisions discussing it may provide persuasive authority in determining whether expert testimony should be admitted in Nevada courts." *Hallmark*, 189 P.3d at 650; *Higgs v. State*, 126 Nev. Adv. Rep. 1, 222

P.3d 648 (2010). Instead, to determine if an expert's testimony may be admitted under NEV. REV. STAT. § 50.275, the court has stated as follows:

> An expert's testimony will assist the trier of fact only when it is relevant and the product of reliable methodology. In determining whether an expert's opinion is based upon reliable methodology, a district court should consider whether the opinion is (1) within a recognized field of expertise; (2) testable and has been tested; (3) published and subjected to peer review; (4) generally accepted in the scientific community (not always determinative); and (5) based more on particularized facts rather than assumption, conjecture, or generalization. If the expert formed his or her opinion based upon the results of a technique, experiment, or calculation, then a district court should also consider whether (1) the technique, experiment, or calculation was controlled by known standards; (2) the testing conditions were similar to the conditions at the time of the incident; (3) the technique, experiment, or calculation had a known error rate; and (4) it was developed by the proffered expert for purposes of the present dispute. We again note that these factors are not exhaustive, may be accorded varying weights, and may not apply equally in every case.

Id.

D) **Qualification.** NEV. REV. STAT. § 50.295 (2009) explicitly permits experts to testify as to the ultimate issue in the litigation. NEV. REV. STAT. § 50.285 governs the facts considered by a witness and states:

> 1. The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing.
>
> 2. If of a type reasonably relied upon by experts in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Hallmark states:

> In determining whether a person is properly qualified, a district court should consider the following factors: (1) formal schooling and academic degrees, (2) licensure, (3) employment experience, and (4) practical experience and specialized training. We note that these factors are not exhaustive, may be accorded varying weights, and may not be equally applicable in every case.

189 P.3d at 650.

E) **Forms of disclosure.** NEV. R. CIV. P. 16.1(a)(2)(A) and 26(b)(4) govern discovery of expert witnesses. The time line for the disclosure of expert witnesses is established at the joint case conference between all parties. NEV. R. CIV. P. 16.1(c)(7) requires the initial expert designations to be "not later than 90 days before the discovery cut-off date . . . ." Rebuttal expert disclosures must "be made not later than 30 days after the 30 days after the initial disclosure of experts."

F) **Disclosure.** Expert witnesses who are anticipated for trial must be disclosed pursuant to

NEV. R. CIV. P. 16.1(a)(2)(A) and are discussed below. Regarding experts not expected to be used at trial, some question exists as to the discoverability of even the very identity of these experts without a "proper showing." The identity and opinions of experts informally consulted are not discoverable. In-house experts, who possess information not acquired in preparation for trial, are not specifically addressed by NEV. R. CIV. P. 16.1(a)(2)(A), however it is likely the courts will deem them ordinary witnesses.

G) **Expert's report.** The expert's report must, under NEV. R. CIV. P. 16.1(a)(2)(B), contain a complete statement of all opinions to be expressed and the bases for the opinions, the data or information the expert considered to form the opinion, exhibits to be used as a summary of or in support for the opinions, the expert's qualifications or curriculum vitae, which must include a list of publications for the previous ten years, the expert's fee schedule, and a list of cases in which the expert has previously testified at trial or deposition for the previous four years. NEV. R. CIV. P. 26(e)(1) imposes a duty to supplement information contained in the expert's report and to supplement information provided via an expert deposition.

H) **Opposing experts.** Finally, NEV. R. CIV. P. 26(b)(4)(B) explicitly permits a party to discover "facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances . . . ."

Non-Party Discovery

The discovery of materials from nonparties occurs via subpoenas, which are governed by NEV. R. CIV. P. 45. Subpoenas may be issued to command a personal appearance and production or inspection of documents. Nonparties served with a subpoena commanding production of documents or an inspection of premises must be provided at least fifteen days notice within which to respond.

Privileges

The scope of discovery in Nevada is very broad. NEV. R. CIV. P. 26(b)(1) states "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . ."

A) **Work product.** NEV. R. CIV. P. 26(b)(4) governs the discoverability of attorney work product. The party seeking to discover these materials must demonstrate a "substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means." When such discovery is granted, "the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other

representative of a party concerning the litigation."

1) **Privilege log.** When a litigant withholds otherwise discoverable information on the grounds the information is work product, the litigant must comply with NEV. R. CIV. P. 26(b)(5). Specifically, the litigant must provide a privilege log of sufficient detail to "enable other parties to assess the applicability of the privilege or protection."

Requests for Admission

Requests for admission are governed by NEV. R. CIV. P. 36. Requests may be served regarding "the truth of any matters within the scope of Rule 26(b) . . . ." Each party is limited to forty requests for admission "that do not relate to the genuineness of documents . . . ." NEV. R. CIV. P. 36(c). The rule explicitly states the respondent has thirty days from service of the request to serve a response or the request is deemed admitted. The respondent may object and, should the requesting party deem the objection insufficient, the court will determine the validity of the objection.

EVIDENCE, PROOFS, AND TRIAL ISSUES

Accident Reconstruction

Nevada has no distinct case law concerning accident reconstruction. Testimony of this nature is governed under expert testimony as discussed above.

Appeal

The Nevada Supreme Court is the state's only appellate court. The scope of its jurisdiction in civil matters is governed by NEV. R. APP. P. 3A(b). The court may consider appeals from final judgments, interlocutory judgments, and various other orders listed in the rule. A notice of appeal is required by NEV. R. APP. P. 3 and, under NEV. R. APP. P. 5(a) must generally be filed within thirty days after service of notice of entry of judgment or order which is the subject of the appeal.

Biomechanical Testimony

The Nevada Supreme Court

> has not yet judicially noticed the general reliability of biomechanical engineering or its ability to assess the cause of personal injuries in automobile accidents, nor has [Appellant] cited to any other jurisdictions that do so. On the other hand, scientific techniques like accident reconstruction, and scientific devices like radar detectors have been judicially recognized. Because of their wide recognition, radar devices generally no longer require expert testimony regarding their underlying scientific principles, methodology, and reliability. This is not yet the case, however, with

> biomechanical engineering.

Hallmark, 124 Nev. at 502, 189 P.3d at 653, n.27 (internal citations omitted).

In *Hallmark*, the court overturned the admission of testimony from a biomechanical engineer because the party "did not demonstrate that his opinion was the product of reliable methodology." Specifically, the court determined the expert's opinion was fundamentally flawed because it "was not supported by any tests or specific research." The court noted, however, sufficient foundation could be provided for the admission of biomechanical testimony.

Collateral Source Rule

Nevada formally adopted the collateral source rule in *Proctor v. Castelletti*, 112 Nev. 88, 911 P.2d 853 (1996). The court precluded evidence at trial that a plaintiff has already been reimbursed by insurance or other benefits for which he has paid a premium. This is a rule of evidence, however, and does not automatically apply to pre-trial settlements or arbitrations.

The court last discussed this issue in *Bass-Davis v. Davis*, 134 P.3d 103, 110 (2006). There the court forbade evidence that a plaintiff had received compensation from her employer during a leave of absence after her slip and fall. It noted:

> The collateral source rule prohibits the jury from reducing the plaintiff's damages on the ground that he received compensation for his injuries from a source other than the tortfeasor. In *Proctor v. Castelletti*, we adopted a per se rule prohibiting "the admission of a collateral source of payment for an injury into evidence for any purpose." Collateral source evidence is prohibited because it "inevitably prejudices the jury . . . [and] greatly increases the likelihood that a jury will reduce a plaintiff's award of damages because it knows the plaintiff is already receiving compensation.

Id. (quoting *Proctor v. Castelletti*, 112 Nev. 88, 90, n.1, 911 P.2d 853, 854 n.1 (1996)).

Convictions

A) **Criminal.** The admissibility of criminal convictions is governed by NEV. REV. STAT. § 41.133 (2009), which states, "[i]f an offender has been convicted of the crime which resulted in the injury to the victim, the judgment of conviction is conclusive evidence of all facts necessary to impose civil liability for the injury."

B) **Misdemeanors.** The Supreme Court held in *Langon v. Matamoros*, 121 Nev. 142, 111 P.3d 1077 (2005), however, that NEV. REV. STAT. § 41.133 (2009) does not apply to misdemeanor traffic offenses. It is unknown, however, whether a DUI offense is included within *Langon* to the extent it is not considered a misdemeanor traffic offense.

C) **Traffic Citations.** In *Frias v. Valle*, 101 Nev. 219, 698 P.2d 875 (1985) the Nevada Supreme Court held evidence showing a party received a traffic citation is inadmissible

in a civil action. The trial court had erroneously admitted the traffic accident report compiled by the police which contained the statements of third parties, the officer's conclusions as to the cause of the accident, and referenced the citation issued to one driver. The Supreme Court noted it is the function of the trier of fact to decide the cause of the accident, not the investigating officer, who was not an eyewitness but merely conducted a subsequent accident investigation.

The court next ruled in *Mendex v. Brinkerhoff*, 105 Nev. 157, 771 P.2d 163 (1989) that evidence of payment of a misdemeanor traffic citation is not a party admission and is not admissible as evidence in a civil action. Specifically, the court reasoned when the ticketed individual pays the ticket there is no interchange between the individual and the court. It is equally plausible the individual elected to pay the ticket "as a matter of convenience or sound economics" as it is the person was admitting guilt.

Day in the Life Videos

Nevada has no statutes or case law specifically governing such videos. Rather, they are subject to the same rules of evidence discussed herein.

Dead Man's Statute

NEV. REV. STAT. § 48.075 (2009) states, "[e]vidence is not inadmissible solely because it is evidence of transactions or conversations with or the actions of a deceased person."

Medical Bills

Generally, medical bills are admissible to quantify a party's damages. To the extent these bills may provide evidence of a collateral source, they must be redacted or otherwise restricted. *DuBois v. Grant*, 108 Nev. 478, 835 P.2d 14 (1992). As of the date of this compendium, the Supreme Court of Nevada was considering a case that would determine whether Nevada would follow the lead of California in *Howell v. Hamilton Meats* concerning the admissibility of the amount actually paid to satisfy the medical bills.

Offers of Judgment

Offers of judgment are governed by NEV. R. CIV. P. 68 and NEV. REV. STAT. § 17.115 (2009). As they are considered offers to compromise or settle, they are not admissible as evidence. Offers can be effective tools to seek settlement, as failure to obtain a more favorable result at trial raises the possibility of liability for the prevailing party's costs and fees incurred subsequent to the offer.

Offers of Proof

When an objection to evidence is sustained, the offering party should tender the excluded evidence to make an "offer of proof." Such an offer is necessary to preserve an issue for appeal only where it is "unclear what evidence the party claiming error would have introduced." Thus, where the parties fully briefed the issue in a pretrial motion, the court held a hearing and rendered a dispositive ruling prior to trial, an offer is unnecessary to preserve an issue on appeal. *Bronneke v. Rutherford*, 120 Nev. 230, 236, 89 P.3d 40, 45 (2004).

Prior Accidents

Evidence of prior accidents may be admissible in certain circumstances. It is most commonly used to demonstrate a defendant had prior notice of a hazardous condition existing at the accident scene. To be admitted, however, the moving party must demonstrate sufficient foundation, usually similarities between the prior condition and the condition that resulted in the subject accident. *Bass-Davis v. Davis*, 134 P.3d 103, 109 (Nev. 2006).

Relationship to the Federal Rules of Evidence

As with the Nevada Rules of Civil Procedure, Nevada courts generally consider the Federal Rules of Evidence and case law interpreting the same as persuasive authority. *Exec. Mgmt., Ltd. v. Ticor Title Ins. Co.*, 118 Nev. 46, 53, 38 P.3d 872, 876 (2002); *see also Cohen v. Mirage Resorts, Inc.*, 119 Nev. 1, 18, 62 P.3d 720, 732 (2003).

Seat Belt and Helmet Use Admissibility

A) **Seat belts.** The use of seat belts and other safety restraints is generally governed by NEV. REV. STAT. § 484.641 (2009). The nonuse of a seat belt or safety restraint is specifically governed by NEV. REV. STAT. § 484.641(4)(b) (2009) which states nonuse of safety belts "[m]ay not be considered as negligence or as causation in any civil action or as negligent or reckless driving under NRS 484.377."

B) **Helmets.** Helmet use is governed by NEV. REV. STAT. § 486.231 (2009). However, this statute does not ban admissibility of nonuse in civil litigation.

Spoliation

Spoliation occurs when relevant evidence is withheld, hidden, or destroyed. Nevada does not recognize spoliation of evidence as an independent cause of action. *Timber Tech Engineered Bldg. Products v. The Home Ins. Co.*, 118 Nev. 630, 55 P.3d 952 (2002).

A) **Example.** The Nevada Supreme Court addressed this precise issue in *Bass-Davis v. Davis*, 122 Nev. 442, 134 P.3d 103 (2006). There a customer of a 7-Eleven alleged she sustained injuries from a slip and fall after an employee had recently mopped but failed to post warning signs. *Id.* at 445-46, 134 P.3d at 105. The store used surveillance videotape

and the customer requested a copy of the relevant tape during discovery but was informed the tape had been lost. *Id.* The court concluded the videotape was relevant evidence, as it went directly to whether the warning signs were in place at the time of the fall. *Id.*

B) **Instructions.** There are two possible instructions pertaining to spoliation of evidence.

1) **Adverse inference.** The first is contained in NEV. REV. STAT. § 47.250(3) (2009) and creates a rebuttable presumption "[t]hat evidence willfully suppressed would be adverse if produced." The *Bass-Davis* court stated "willful or intentional spoliation of evidence requires the intent to harm another party through the destruction and not simply the intent to destroy evidence." 122 Nev. at 448; 134 P.3d at 106. If this intent is established it is the spoliator's burden to establish the destroyed evidence was not unfavorable. *Id.*, 134 P.3d at 107.

2) **Negligent spoliation.** The Nevada Supreme Court has also explicitly authorized a second spoliation instruction. "[A] permissible inference that missing evidence would be adverse applies when evidence is negligently lost or destroyed." *Id.* This instruction requires "a showing that the party controlling the evidence had notice that it was relevant at the time when the evidence was lost or destroyed." *Id.* at 449-50, 134 P.3d at 108. Was Plaintiff, as the spoliator, "under any obligation to preserve the missing or destroyed evidence?" To answer this question, the court noted:

> a party is required to preserve documents, tangible items, and information relevant to litigation that are reasonably calculated to lead to the discovery of admissible evidence. Thus, the pre-litigation duty to preserve evidence is imposed once a party is on 'notice' of a potential legal claim. While few courts have expounded on the concept of notice, those that have conclude that a party is on notice when litigation is reasonably foreseeable.

Id. (citations omitted).

Subsequent Remedial Measures

NEV. REV. STAT. § 48.095 (2009) governs in this area and states:

> 1. When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event.
>
> 2. This section does not require the exclusion of evidence of subsequent remedial measures when offered for another purpose, such as proving ownership, control, feasibility of precautionary measures, or impeachment.

As indicated by NEV. REV. STAT. § 48.095(2), subsequent remedial measures are admissible

when feasibility is contested. *Jacobson v. Manfredi*, 100 Nev. 226, 231, 679 P.2d 251, 254 (1984).

Use of Photographs

Photographs are admissible as an aid to help illustrate testimony and make a fact more or less likely. Photographs are subject to the same judicial balancing test imposed on all evidence.

DAMAGES

Caps on Damages

In 2004, Nevada enacted a statutory cap of three hundred and fifty thousand dollars ($350,000.00) for noneconomic damages in medical malpractice suits. NEV. REV. STAT. § 41A.035 (2009). This legislation also restricted each defendant to several liability for the plaintiff's economic and non-economic damages, based on the percentage of negligence attributable to the defendant. NEV. REV. STAT. § 41A.045(1). At present, no other such caps have been enacted for other types of litigation.

Calculation of Damages

Nevada permits recovery for a wide variety of damages where the plaintiff has actually been injured and can prove a subsequent loss. The most common form of damages is found in personal injury actions where plaintiffs may generally recover both economic and noneconomic damages. Economic damages may usually be determined by calculating the cost of past medical care, wage loss, and other measurable damages. Noneconomic damages are those recovered for injuries such as pain and suffering and are difficult to calculate.

Available Items of Personal Injury Damages

A) **Past medical bills.** Evidence of past medical bills is admissible, however any reference to a collateral source contained therein must be redacted. Past medical bills are generally one of the most common bases upon which damages are calculated. *DuBois v. Grant*, 108 Nev. 478, 835 P.2d 14 (1992). As of the date of this compendium, the Supreme Court of Nevada was considering a case that would determine whether Nevada would follow the lead of California in *Howell v. Hamilton Meats* concerning the admissibility of the amount actually paid to satisfy the medical bills.

B) **Future medical bills.** Nevada permits a recovery for the cost of future medical treatment, however, these "future medical expenses must be supported by sufficient and competent evidence." *Yamaha Motor Co., U.S.A. v. Arnoult*, 114 Nev. 233, 249, 955 P.2d 661, 672 (1998).

C) **Hedonic damages.** Expert testimony concerning the monetary range of hedonic or loss of enjoyment of life damages may be permitted into evidence within the discretion of the trial court. *Banks v. Sunrise Hosp.*, 120 Nev. 822, 102 P.3d 52 (2004).

D) **Increased risk of harm.** *See* "Lost Opportunity Doctrine."

E) **Loss of normal life.** *See* "Hedonic Damages."

F) **Past pain and suffering.** Recovery is permitted in Nevada, upon sufficient foundation, for such damages. No set off is permitted for amounts received from insurance proceeds. *Dugan v. Gotsopoulos*, 117 Nev. 285, 22 P.3d 205 (2001).

G) **Future pain and suffering.** *Krause Inc. v. Little*, 117 Nev. 929, 938, 34 P.3d 566, 572 (2001) states:

> [W]hen an injury or disability is subjective and not demonstrable to others (such as headaches), expert medical testimony is necessary before a jury may award future damages. We have also held that a shoulder injury causing a demonstrably limited range of arm motion is an objective injury which does not require expert testimony before a jury awards damages for future pain and suffering. We now hold that a broken bone is closer to the latter situation than the former, and accordingly a plaintiff need not present expert testimony before the district court instructs on future damages.

H) **Loss of society.** Otherwise known as "loss of consortium," this claim is recognized in Nevada with limitations. In *Gen. Elec. Co. v. Bush*, 88 Nev. 360, 498 P.2d 366 (1972), the court determined there is no right of recovery for consortium damages by a child for injury to a parent. In *Heidt v. Heidt*, 108 Nev. 1009, 842 P.2d 723 (1992) the court extended this holding to state a parent has no right of recovery for consortium damages arising from an injury to a child.

I) **Lost income, wages, earnings.** Similarly to past medical bills, if adequate foundation is provided, evidence of wage or earning loss is admissible for purposes of calculating damages. *St. Paul Fire & Marine Ins. Co. v. Emp'rs Ins. Co. of Nev.*, 122 Nev. 991, 146 P.3d 258 (2006).

Lost Opportunity Doctrine

This theory of recovery is recognized in Nevada as the "loss of chance" doctrine and was explicitly adopted in *Perez v. Las Vegas Med. Ctr.*, 107 Nev. 1, 7, 805 P.2d 589, 592 (1991). Considered in the context of a medical malpractice suit, a plaintiff

> cannot recover merely on the basis of a decreased chance of survival or of avoiding a debilitating illness or injury; the plaintiff must in fact suffer death or debilitating injury before there can be an award of damages. Additionally, the damages are to be discounted to the extent that a preexisting condition likely contributed to the death or serious debilitation. Specifically, the amount of

> damages recoverable is equal to the percent of chance of survival lost due to negligence multiplied by the total amount of damages which are ordinarily allowed in a wrongful death action.

Id. (internal quotations omitted).

Mitigation

An injured person cannot recover for damages that could have been avoided through reasonable care and diligence. *Automatic Merchandisers, Inc. v. Ward*, 98 Nev. 282, 646 P.2d 553 (1982). If evidence shows a plaintiff may have failed to exercise reasonable care to promote recovery, a defendant is entitled to give the fact finder an instruction to that effect. *Id.*

Punitive Damages

A) **Availability.** Punitive damages are available in Nevada, however it is well established that "tort liability alone is insufficient to support an award of punitive damages." *Wichinsky v. Mosa*, 109 Nev. 84, 89, 847 P. 2d 727 (1993). The conduct required to obtain an award of punitive damages in Nevada is malice, fraud or oppression. NEV. REV. STAT. § 42.005 (2009). Absent clear and convincing evidence of fraud, oppression or malice, punitive damages may not be awarded as a matter of law. *Id.*; *Countrywide Home Loans, Inc. v. Thitchener*, 124 Nev. Adv. 725, 740, 192 P.3d 243, 252-53 (2008).

B) **Standard.** NEV. REV. STAT. § 42.005(1) authorizes punitive damages against a party for its own conduct and states in relevant part:

Except as otherwise provided in NEV. REV. STAT. § 42.007, in an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud or malice, express or implied, the plaintiff, in addition to the compensatory damages, may recover damages for the sake of example and by way of punishing the defendant.

NEV. REV. STAT. § 42.001 defines each term of art in NEV. REV. STAT. § 42.005(1) and, before the jury may consider punitive damages, the court must make a threshold determination they are warranted. *Thitchener*, 124 Nev. at 740, 192 P.3d at 252-53.

Recovery of Pre- and Post-Judgment Interest

A) **Interest rate.** Prejudgment and post-judgment interest are collectible in Nevada. NEV. REV. STAT. § 17.130 (2009) sets the applicable interest rate to be awarded where no other rate of interest is set by contract or statute. Specifically, interest accrues on the future judgment from the time the summons and complaint are served through the satisfaction of the judgment. The applicable interest rate is calculated as the prime rate at the largest bank in Nevada on January 1 or July 1 immediately preceding the date of judgment, plus

two percent.

B) **Calculation.** When interest is awarded under NEV. REV. STAT. § 17.130(2) (2009) the court must calculate prejudgment interest at the rate in effect on the date of judgment. *Lee v. Ball*, 121 Nev. 391, 116 P.3d 64 (2005). Once judgment has been entered, the applicable rate is adjusted each successive January 1 and July 1 until the judgment is satisfied. Only post-judgment interest is permitted concerning awards of future and punitive damages.

Recovery of Attorneys' Fees

Nevada generally requires each party to bear its own attorney's fees. *See Smith v. Crown Fin. Servs.*, 111 Nev. 277, 281, 890 P.2d 769 (1995). Generally, attorney's fees are not recoverable absent a statute, rule, or contractual provision authorizing such an award. *Valley Elec. Ass'n v. Overfield*, 121 Nev. 7, 106 P.3d 1198 (2005). District courts do not have inherent power to impose attorney's fees as a condition to granting relief without statutory authorization. *See Sun Realty v. Eighth Judicial Dist. Court*, 91 Nev. 774, 542 P.2d 1072 (1975).

A) **Plaintiffs.** Frequently, Nevada plaintiffs file complaints alleging defendants' actions have forced them to retain an attorney and they are therefore entitled to recover fees. The Nevada Supreme Court, however, has stated fees are "rarely" awarded as damage and "the mere fact that a party was forced to file or defend a lawsuit is insufficient to support an award of counsel fees as damages." *Sandy Valley Assocs. v. Sky Ranch Estates Owners Ass'n*, 117 Nev. 948, 957, 35 P.3d 964, 970 (2001).

B) **Offers of judgment.** It must be remembered, however, that costs and attorneys fees may be recoverable should a party reject an offer of judgment that is more favorable than the final verdict. NEV. R. CIV. P. 68 (2009).

Taxation of Costs

NEV. REV. STAT. § 18.020 (2009) lists the instances in which a prevailing party may recover taxable costs as a matter of right. NEV. REV. STAT. § 18.050 permits a discretionary award of costs in other cases, however, should a more specific provision govern the costs, the specific provision controls. Even where an award of costs is mandatory, "[t]he district court retains discretion . . . in determining the reasonableness of the amounts and the items of cost to be awarded." *Schwartz v. Estate of Greenspun*, 110 Nev. 1042, 1050, 881 P.2d 638, 644 (1994). Also, costs cannot be awarded where the suit has not proceeded to judgment, as there is no prevailing party. *Berle v. State ex rel. Redfield Trust*, 108 Nev. 587, 836 P.2d 67 (1992).

This Compendium outline contains a brief overview of certain laws concerning various litigation and legal topics. The compendium provides a simple synopsis of current law and is not intended to explore lengthy analysis of legal issues. This compendium is provided for

general information and educational purposes only. It does not solicit, establish, or continue an attorney-client relationship with any attorney or law firm identified as an author, editor or contributor. The contents should not be construed as legal advice or opinion. While every effort has been made to be accurate, the contents should not be relied upon in any specific factual situation. These materials are not intended to provide legal advice or to cover all laws or regulations that may be applicable to a specific factual situation. If you have matters or questions to be resolved for which legal advice may be indicated, you are encouraged to contact a lawyer authorized to practice law in the state for which you are investigating and/or seeking legal advice.