STATE OF NEVADA
RETAIL COMPENDIUM OF LAW

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Nevada's Judicial System

Nevada's long history as a predominantly rural state has kept its judicial system relatively constrained despite the explosive growth of Las Vegas over the last 50 years. For retail and hospitality businesses, most civil complaints are typically filed in a District Court. District Court's have jurisdiction over all matters where the plaintiff alleges damages in excess of $10,000. In Nevada's population centers of Las Vegas and Reno, all discovery related disputes are heard by Discovery Commissioners.

At present, Nevada's only appellate court is the Supreme Court. The Court consists of seven justices and hears cases both in Carson City and Las Vegas. The Court is perpetually backlogged and the average time to disposition is two to three years. An initiative to create a three justice Court of Appeals to help alleviate this backlog is to appear on the 2014 general election ballot.

Some complaints, most frequently concerning landlord/tenant disputes, are filed in a Justice Court. The Justice Courts' jurisdiction is limited to amounts less than $10,000. The rules of procedure for a Justice Court are substantively similar to those in District Court. Within the Justice Courts is also a small claims program which hears cases concerning less than $7,500. The small claims program is sometimes a preferred method for smaller cases as it does not permit discovery and most claims are tried within 60 days of an answer being filed. All appeals from Justice Court matters are filed with a District Court. There is no right of appeal a Justice Court case to the Supreme Court of Nevada.

Nevada has one federal court that hears cases in Reno and Las Vegas. All appeals are to the Court of Appeals for the Ninth Circuit, based in San Francisco.

Dram Shop/Alcohol Liability

Nevada generally does not permit dram shop liability.[1] A limited exception exists if alcohol is provided to a minor, who then causes damages.[2] Even this exception is narrow as it does not apply to licensed businesses and their employees,[3] instead apparently only applying to

[1] NEV. REV. STAT. 41.1305(1) (2014).
[2] NEV. REV. STAT. 41.1305(2) (2014).
[3] NEV. REV. STAT. 41.1305(3) (2014).

social host situations. If the exception is satisfied, the potential exposure can be significant as attorneys' fees and punitive damages are explicitly recoverable.[4]

The Supreme Court has also rejected attempts to hold proprietors liable for alcohol related damages arising from "negligent eviction." "Nevada subscribes to the rationale underlying the nonliability principle--that individuals, drunk or sober, are responsible for their torts."[5] When a proprietor "rightly evicts a disorderly, intoxicated patron, the … proprietor is not liable for any torts that an evicted patron commits after he or she is evicted that result in injury."[6] When evicting an intoxicated customer, "so long as a proprietor does not use unreasonable force in evicting a patron, the … proprietor is not required to consider a patron's level of intoxication in order to prevent speculative injuries that could occur off the proprietor's premises."[7] Once the eviction is completed, a proprietor does not "have the duty to arrange safer transportation, prevent an intoxicated driver from driving, or prevent … a passenger from riding with a drunk driver."[8]

Indemnification

It is relatively common, if not standard, for retail and hospitality businesses to have mutual indemnification language in their leases and contracts. This language is strictly construed in Nevada.

Nevada generally will not require one party to indemnify another from its own negligence. "[T]he contract must expressly or explicitly reference the indemnitee's own negligence before an indemnitee may be indemnified for his or her own negligence."[9] "Any and all" language is not sufficient for this purpose. "Where the indemnification clause does not specifically and expressly include indemnity for the indemnitee's own negligence, an indemnification clause 'for any and all liability' will not indemnify the indemnitee's own

[4] NEV. REV. STAT. 41.1305(4) (2014).
[5] *Rodriguez v. Primadonna Co., LLC*, 125 Nev. 578, 585, 216 P.3d 793, 798 (2009).
[6] *Id*. at 585, 216 P.3d at 799.
[7] *Id*. at 586, 216 P.3d at 799.
[8] *Id*. at 587, 216 P.3d at 800.
[9] *George L. Brown Ins. Agency, Inc. v. Star Ins. Co.*, 126 Nev. Adv. Op. 31, 237 P.3d 92, 93 (2010).

negligence."[10] The same strict interpretation requirements apply where a party seeks indemnification for its own comparative negligence.[11]

Indemnity agreements also often contain duties to defend. "An indemnity clause imposing a duty to defend is construed under the same rules that govern other contracts. However, the duty to defend is broader than the duty to indemnify because it covers not just claims under which the indemnitor is liable, but also claims under which the indemnitor could be found liable."[12] The duty to defend "is limited to those claims directly attributed to the indemnitor's scope of work and does not include defending against claims arising from the negligence of other subcontractors or the indemnitee's own negligence."[13] "[W]hile the duty to defend is broad, it is not limitless. Unlike an insurance agreement, which typically requires an insurer to defend all claims against the insured regardless of the claim's merit, the duty to defend outlined in an indemnification provision is subject to strict construction of the contract language."[14]

If the contractual indemnification is unavailable, equitable indemnity is still sometimes available. First, equitable indemnity is only available when the party asserting it has committed no independent wrong.[15] Second, there must be "a nexus or special relationship between" the indemnitee and indemnitor.[16] "'[I]n order for one tortfeasor to be in a position of secondary responsibility vis-a-vis another tortfeasor, and thus be entitled to indemnification, there must be a preexisting legal relation between them, or some duty on the part of the primary tortfeasor to protect the secondary tortfeasor.'"[17]

Negligent Security

Retail and hospitality businesses also owe a duty to offer a reasonably safe shopping experience from criminal activities.

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[10] *Id*. at 96.
[11] *Reyburn Lawn & Landscape Designers, Inc. v. Plaster Dev. Co.*, 127 Nev. Adv. Op. 26, 255 P.3d 268, 274 (2011).
[12] *Id*. at 277.
[13] *Id*. at 278.
[14] *United Rentals Highway Techs., Inc. v. Wells Cargo, Inc.*, 128 Nev. Adv. Op. 59, 289 P.3d 221, 228 (2012).
[15] *Pack v. LaTourette*, 128 Nev. Adv. Op. 25, 277 P.3d 1246, 1247 (2012).
[16] *Rodriguez v. Primadonna Co., LLC*, 125 Nev. 578, 591-92, 216 P.3d 793, 803 (2009).
[17] *Doctors Company v. Vincent*, 120 Nev. 644, 654, 98 P.3d 681, 688 (2004) (*quoting Black & Decker v. Essex Group*, 105 Nev. 344, 346, 775 P.2d 698, 699-700 (1989)).

General Standard

The owner or occupant of property owes a general, non-delegable duty of security. This duty varies depending upon the nature and history of the property. This duty does not change even when the property owner hires a third-party security company.[18] The property owner is still often held liable for the negligence of the security company.

Innkeepers' Standard

The Nevada Legislature created a specialized legal standard for negligent security claims against the "owner or keeper of any hotel, inn, motel, motor court, boardinghouse or lodging house…."[19] Innkeepers are not responsible damages caused by a non-employee assailant unless the assailant's wrongful act was foreseeable or if the innkeeper did not exercise due care.[20] The same statute requires the district court to determine as a matter of law whether the wrongful act was foreseeable or if the innkeeper did not exercise due care.[21] Further, a wrongful act is not foreseeable unless the innkeeper failed to use due care or the innkeeper knew of prior, similar wrongful acts.[22] The Supreme Court has provided guidance as to what prior, similar acts qualify under this standard, as well as the requirements of due care.[23]

Course and Scope of Employment

Negligent security claims sometimes raise questions as to whether the employee involved was within the course and scope of his employment. If the employee was not within the course and scope of employment, an employer might not be liable to pay for the employee's damages.[24] The question of whether an employee was within the course and scope of employment is often a question a fact for trial.

Some states have held if the employer admits the employee was within the course and scope of employment at the time of the allegedly negligent conduct, then claims for negligent hiring, training, supervision, retention and/or entrustment are eliminated as a matter of law. This

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[18] *Rockwell v. Sun Harbor Budget Suites*, 112 Nev. 1217, 1223-24, 925 P.2d 1175 (1996).
[19] NEV. REV. STAT. 651.015(1) (2014).
[20] NEV. REV. STAT. 651.015(1)(a); (b) (2014).
[21] NEV. REV. STAT. 651.015(2) (2014).
[22] NEV. REV. STAT. 651.015(3) (2014).
[23] **Error! Main Document Only.***Estate of Smith v. Mahoney's Silver Nugget, Inc.*, 127 Nev. Adv. Op. 76, 265 P.3d 688 (2011).
[24] *Rockwell*, 112 Nev. at 1225-1226, 925 P.2d at 1180-81.

ruling is designed to help focus the case on the questions truly in dispute. As of this compendium, the Supreme Court of Nevada has not ruled on this topic.

Shoplifting

Loss prevention is an important concern of all retail and hospitality businesses. It is also a frequent source of litigation. Nevada has codified what is frequently called the shopkeeper's privilege.[25] "The legislation is consistent with the desire of society to assist the store owner in reducing the mounting problem of loss from shop lifting. Without the protection of the statute a store owner in detaining a suspected shoplifter to recover property which may be worth only a few dollars risks liability in much greater sums in damages."[26]

Despite this, the question as to whether a detention was "reasonable" and therefore privileged must typically be resolved via trial. The shopkeeper's loss prevention manual is usually admissible at the trial to determine what is "reasonable."[27]

Slip/Trip and Falls

Nevada has rejected the traditional analysis that determined the standard of care owed by a premises owner or occupier based upon whether a plaintiff is a trespasser, licensee, or invitee.[28] Instead "all persons in this society have an obligation to act reasonably and … an owner or occupier of land should be held to the general duty of reasonable care when another is injured on that land."[29]

Beyond this distinction, Nevada law concerning slip or trip and fall events is similar to other jurisdictions. First, Nevada has long rejected strict liability for these cases. "The owner or occupant of property is not an insurer of the safety of an invitee thereon, and in the absence of negligence, there is no liability."[30] "The mere fact that there was an accident or other event and

[25] **Error! Main Document Only.** NEV. REV. STAT. 597.850 (2014).
[26] **Error! Main Document Only.***Lerner Shops of Nev., Inc. v. Marin*, 83 Nev. 75, 78-79, 423 P.2d 398, 400-01 (1967).
[27] **Error! Main Document Only.***K-Mart Corp. v. Washington*, 109 Nev. 1180, 866 P.2d 274 (1993).
[28] *Moody v. Manny's Auto Repair*, 110 Nev. 320, 333, 871 P.2d 935, 943 (1994).
[29] *Id.*
[30] *Gunlock v. New Frontier Hotel Corp.*, 78 Nev. 182, 185, 370 P.2d 682, 684 (1962).

someone was injured is not of itself sufficient to predicate liability. Negligence is never presumed but must be established by substantial evidence."[31]

Negligence can be proven for a slip or trip and fall event if the proprietor was on notice of the hazard. When a foreign substance or hazard on the floor causes a patron to slip or trip and fall, liability will lie only where 1) the business owner or one of its agents caused the substance or hazard to be on the floor; 2) if the foreign substance or hazard is the result of the actions of persons other than the business or its employees, liability will lie only if the business had actual notice of the condition and failed to remedy it; or 3) the business had constructive notice of the condition and failed to remedy it.[32] Most litigation frequently focuses on constructive notice. Proving constructive notice in Nevada requires a virtually continuous condition.[33] For instance, constructive notice was established in one case where the evidence demonstrated that spills occurred 30 or 40 times a day and that the floor had to be swept several times an hour.[34] Under those facts, the spills were so frequent that they constituted an ongoing, continuous hazard.[35]

Abutting Public Property

As a general rule, a private landowner has no duty to maintain an adjacent public sidewalk.[36] This general rule does not apply, however, if the landowner puts the public sidewalk to special use.[37] For instance, a special use occurred where a pedestrian slipped and fell due to snow and ice and evidence showed that traffic entering and exiting the defendant service station had caused the formation of the snow and ice upon which the plaintiff fell.[38] Liability does not always result. A hotel who had cleaned the city owned sidewalk leading to its main entrance every morning for 15 years was not liable when a guest slipped and fell on ice that had not yet been removed.[39] The Supreme Court determined the hotel's gratuitous cleaning of the sidewalk

[31] *Id.*
[32] *Sprague v. Lucky Stores, Inc.*, 109 Nev. 247, 250, 849 P.2d 320, 322 (1993).
[33] *Id.* at 251, 849 P.2d at 323.
[34] *Id.* at 249, 849 P.2d at 322.
[35] *Id.*
[36] **Error! Main Document Only.***Herndon v. Arco Petroleum Co.*, 91 Nev. 404, 536 P.2d 1023 (1975).
[37] *Id.*
[38] *Id.* at 406, 536 P.2d at 1024.
[39] **Error! Main Document Only.***Wiseman v. Hallahan*, 113 Nev. 1266, 945 P.2d 945 (1997).

could only result in liability "where the property owner's negligence increases the risk of harm, or if the injuries sustained were the product of a reliance on the owner's assumption of duty."[40]

Distinctions Between Franchisors and Franchisees

Franchise agreements are commonplace in the retail and hospitality industry. When customers are injured at a franchise business, they sometimes sue both the franchisor and franchisee. In cases where both have been sued, many jurisdictions have ruled upon circumstances when the franchisor itself may be held liable for the negligence of the franchisee. To date, the Supreme Court of Nevada has not ruled on this topic.

Distinctions Between Landlords and Tenants

Retail and hospitality businesses are often located in leased space such as shopping centers. The lease agreement will define the mutual responsibilities of the landlord and tenant as to maintenance of the leased space and common areas. In some jurisdictions, this lease can decide liability for certain events. For instance, if a plaintiff slipped and fell in the parking lot near a store and the lease provided that the parking lot was the exclusive responsibility of the landlord, some jurisdictions would preclude suit against the store.

Nevada rejects this theory. "[J]ust as technical distinctions between trespasser, invitee, and licensee do not determine an owner's or occupier's duty of reasonable care, distinctions between common areas and leased premises or between control and noncontrol of areas do not determine the duty of lessors and lessees to act reasonably towards third persons."[41] The lease agreement may be relevant to determining what duty was owed and whether it was breached, but the lease itself does not determine the issue.

Individual Liability of Store Employees

Lawyers representing customers injured in slip or trip and fall suits sometimes name not only the store, but also an individual store employee as a defendant. The purpose of doing so is typically to prevent removing the case to federal courts. Certain jurisdictions have ruled

[40] *Id*. at 1271, 945 P.2d at 948.
[41] *Coblentz v. Hotel Emples. & Restaurant Emples. Union Welfare Fund*, 112 Nev. 1161, 1170, 925 P.2d 496, 501 (1996).

individual store employees cannot be sued in these circumstances. The Supreme Court of Nevada has not yet ruled on this issue.

Open & Obvious

A frequently utilized defense to slip or trip and fall cases is the hazard that caused the fall was "open and obvious." This defense is recognized in Nevada, however it cannot be used as a basis to seek summary judgment. The question of whether the hazard was open and obvious, therefore relieving the retailer's duty of care, is a question of fact for trial.[42]

Res Ipsa Loquitur

Res ipsa loquitur is a Latin phrase still used by some courts. It is "an exception to the general negligence rule, and it permits a party to infer negligence, as opposed to affirmatively proving it, when certain elements are met."[43] Many jurisdictions have recognized a conflict between *res ipsa loquitur* and the requirement that negligence be affirmatively proven. The Supreme Court of Nevada has not yet ruled upon this apparent conflict.

Snow & Ice

Although snow and ice are relatively rare in Las Vegas, they are typical during winter in northern Nevada. Some jurisdictions have ruled property owners and occupants have no duty to remove snow and ice while a storm is ongoing. Others have ruled owners and occupants are not liable for injuries caused by "natural" accumulations of snow and ice. The Supreme Court of Nevada has not issued a published decision on this point.

Spoliation of Evidence

Spoliation of evidence is an increasingly litigated issue that can ruin an otherwise defendable claim. Nevada does not recognize spoliation of evidence as an independent cause of action.[44] It does permit two alternative jury instructions when spoliation occurs. The first instruction creates a rebuttable presumption "[t]hat evidence willfully suppressed would be

[42] *Foster v. Costco Wholesale Corp.*, 128 Nev. Adv. Op. 71, 291 P.3d 150 (2012).
[43] *Woosley v. State Farm Ins. Co.*, 117 Nev. 182, 188, 18 P.3d 317, 321 (2001) (citation omitted).
[44] *Timber Tech Eng. Build. Products v. The Home Ins. Co.*, 118 Nev. 630, 55 P.3d 952 (2002).

adverse if produced."[45] "[W]illful or intentional spoliation of evidence requires the intent to harm another party through the destruction and not simply the intent to destroy evidence."[46] If this intent is established it is the spoliator's burden to establish the destroyed evidence was not unfavorable.[47] The second instruction permits "a permissible inference that missing evidence would be adverse applies when evidence is negligently lost or destroyed."[48]

Both instructions require "a showing that the party controlling the evidence had notice that it was relevant at the time when the evidence was lost or destroyed."[49] It must be determined if the alleged spoliator was "under any obligation to preserve the missing or destroyed evidence?"[50] When is this obligation triggered?

> 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.[51]

There is relatively little guidance from the Supreme Court of Nevada as to when spoliation jury instructions are appropriate. In one case, a customer of a 7-Eleven alleged injuries from a slip and fall after an employee had recently mopped but failed to post warning signs.[52] The store used surveillance videotape and the customer requested a copy of the relevant tape during discovery but the 7-Eleven's insurance carrier had lost the tape.[53] These facts supported a permissible inference jury instruction. The same instruction was also permitted in another case where the Court ruled litigation was reasonably foreseeable when the plaintiff suffered a broken hip and left the premises in an ambulance, therefore the defendant had a duty to preserve evidence.[54]

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[45] NEV. REV. STAT. 47.250(3) (2014).
[46] *Bass-Davis v. Davis*, 122 Nev. 442, 448, 134 P.3d 103, 106 (2006).
[47] *Id*. at 448, 134 P.3d at 107.
[48] *Id*. at 445, 134 P.3d at 105.
[49] *Id*. at 449-50, 134 P.3d at 108.
[50] *Id*.
[51] *Id*. at 450, 134 P.3d at 108 (citations omitted).
[52] *Id*. at 445-46, 134 P.3d at 105.
[53] *Id*. at 446, 134 P.3d at 105.
[54] *Reingold v. Wet 'n Wild Nev., Inc.*, 113 Nev. 967, 944 P.2d 800 (1997).

Workers' Compensation

This section briefly addresses when Nevada's workers' compensation system bars suit against an employer but does not address the intricacies of the system. In Nevada "workers' compensation is an employee's only remedy against his employer and co-employees for an industrial injury; however, the injured worker may pursue a common law tort action against any tortfeasor who is not his statutory employer or co-employee."[55] The most frequently litigated question is who qualifies as a "co-employee." Nevada's case law attempting to resolve this question has been best described as "historically convoluted…."[56]

There is presently a two part test to determine co-employee status. The first test applies where the injured employee's employer is a licensed contractor.[57] If this test does not apply, a "normal work test" controls. This test offers immunity to the third-party "only if it was in the same trade, business, profession or occupation as" the injured employee's employer.[58]

[55] *GES, Inc. v. Corbitt*, 117 Nev. 265, 268, 21 P.3d 11, 13 (2001).
[56] *Richards v. Republic Silver State Disposal, Inc.*, 122 Nev. 1213, 1225, 148 P.3d 684, 692 (2006) (Maupin, J., concurring).
[57] *Richards*, 122 Nev. at 1224-25, 148 P.3d at 691.
[58] *Id*. at 269, 21 P.3d at 14.