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Overview of the State of Nevada Court System

A. Trial Courts

1. District Courts – Have general jurisdiction over all legal disputes that are generally resolved through arbitration, mediation, and bench or jury trials.

   a. General Jurisdiction

      (1) Article 6 §6 of the Nevada Constitution provides that the District Courts have original jurisdiction in all cases excluded by law from the original jurisdiction of the Justice Courts.

      (2) They also have final appellate jurisdiction in cases arising in the Justice Courts and such other inferior tribunals as the legislature may establish. Nev. Const. art. VI, § 6.

      (3) NRS 3.221 provides that if a District Court determines that the action is properly within the jurisdiction of the Justice Court under NRS 4.370, it may transfer original jurisdiction of the action to the Justice Court.

      (4) Types of Cases:

         (a) Real Property – Cases that deal with ownership or rights in real property excluding construction defect or negligence (includes landlord/tenant disputes, title to property, condemnation, eminent domain, and other real property cases).

         (b) Construction Defect.

         (c) Negligence Torts – Cases that deal with an alleged omission to perform an act or use care to perform an act that causes personal injury, property damage, or wrongful death (inclues auto, medical, dental, premises liability, and other negligence tort cases).

         (d) Probate – Cases that deal with the probate of a will or estate of a deceased person.

         (e) Other Civil – Cases heard at District Court that include breach of contract, civil petition for judicial review, appeals from lower courts, civil writs, and all other civil matters that do not fit in one of the

above case types.

(f) Domestic, Juvenile, and Other Family-Related Matters.

(g) Criminal.

b. Composition: Article 6 § 5 of the Nevada Constitution and NRS 3.010 divide the 17 County Courts of Nevada into 10 judicial districts as follows:

(1) First Judicial District Court – Storey County and Carson City Courts

(2) Second Judicial District Court – Washoe County Court

(3) Third Judicial District Court – Lyon County Court

(4) Fourth Judicial District Court – Elko County Court

(5) Fifth Judicial District Court – Esmeralda, Nye, and Mineral County Court

(6) Sixth Judicial District Court – Humboldt, Lander, and Pershing County Courts

(7) Seventh Judicial District Court – Eureka, White Pine, and Lincoln County Courts

(8) Eighth Judicial District Court – Clark County Court

(9) Ninth Judicial District Court – Douglas County Court

(10)Tenth Judicial District Court – Churchill County Court

c. Procedure

(1) Jury Trial

(a) A party may demand a trial by jury of any triable issue by filing and serving a written demand on all parties. The failure to do so constitutes a waiver of the right. NRCP 38.
(b) The parties may stipulate that the jury shall consist of 4 jurors rather than 8 jurors. NRCP 48.

(2) Bench Trial -- Issues not demanded for trial by jury shall be tried by the court. NRCP 39(b). The parties may stipulate to trial by the court or the court may order a bench trial if it finds that a right of trial by jury of some or all of the issues does not exist under the Nevada Constitution.

NRCP 39(a).

(3) Alternative Dispute Resolution – All civil actions filed in District Court in which the amount of damages does not exceed $50,000 per plaintiff (except for certain types of cases as listed in NRS 38.255(3)), exclusive of attorney's fees, interest, and court costs, must be submitted to non-binding arbitration, unless the parties have otherwise agreed to submit the action to an alternative method of resolving disputes, including a settlement conference, mediation, or a short trial. NRS 38.250(1)(a).

A party can appeal an arbitration award by requesting a trial de novo NAR 18. The arbitration award is admissible evidence and if the appealing party does not receive a verdict that is better than the award, it may be responsible for the other side's attorneys' fees and costs. NAR 20.

2. Justice Courts

a. Limited Jurisdiction

(1) Article 6 § 8 of the Nevada Constitution provides that the Legislature determines the limits of the Justice Courts' jurisdiction according to the amount in controversy, the nature of the case, and the penalty provided or any combination thereof.

(2) NRS 4.370 limits the jurisdiction of the Justice Courts to the following types of civil actions:

(a) General Civil – Cases that do not exceed $10,000.

(b) Small Claims – Cases governed by NRS Chapter 73 that do not exceed $7,500.

(c) Landlord/Tenant – Cases that deal with the exclusion of tenant for default of rent or specific categories of unlawful detainer.

(d) Temporary Protective Orders – Cases that deal with temporary orders for protection.

(3) If an action is transferred from the District Court to the Justice Court pursuant to NRS 3.221, the transfer of the action does not constitute a new filing that requires a party to pay a new filing fee and will not be construed to affect any period of limitation concerning the filing of the action. NRS 4.371.

(4) Appeals to District Court – Any aggrieved party has standing to appeal any appealable judgment or order in a civil action or proceeding. The District Court may consider errors of law and the sufficiency of evidence. Justice Court Rules of Civil Procedure 73A(a).

b. Procedure

(1) Trial by Jury – The Justice Court Rule of Civil Procedure ("JCRCP") preserve the right of trial by jury. JCRCP 38(a).

(a) Any party may demand a trial by jury of any issue triable of right by a jury by filing and serving upon the other parties a demand in writing. JCRCP 38(b). The demand may request trial by jury on all or some of the issues and if not specified, the party will be deemed to have demanded a jury trial for all triable issues. JCRCP 38(c).

(b) Pursuant to the Justice Court Rules of Civil Procedure, the jury may consist of any number not more than 6 and not less than 4. NRS 67.020(2).

i. The standard jury size is 4, but upon a showing of good cause, a party may request a jury of 6 members. JCRCP 47(a).

ii. For a 4 member jury, a majority verdict requires a verdict or finding of 3 of the jurors. JCRCP 48.

iii. For a 6 member jury, a majority verdict requires a verdict or finding of 5 of the jurors. JCRCP 48.

(c) The jury trial is a short form trial---the plaintiffs and the defendants are each allotted 2 hours to present their cases, unless otherwise granted by the court. All plaintiffs and all defendants are collectively treated as a single plaintiff and a single defendant. JCRCP 39A(c).

(2) Bench Trials – Issues not demanded for trial by jury shall be tried by the court. JCRCP 39(b). The parties may stipulate to trial by the court or the court may order a bench trial if it finds that a right of trial by jury of some or all of the issues does not exist under the Nevada Constitution. JCRCP 39(a).

(3) Alternative Dispute Resolution ("ADR")

(a) Voluntary, Binding ADR – A civil action may be submitted to binding arbitration or to an alternative method of resolving disputes,

including a settlement conference or mediation, if the parties agree to the submission. NRS 38.250(1)(b).

3. Municipal Courts

a. Limited Jurisdiction

(1) Article 6 § 9 of the Nevada Constitution provides that the jurisdiction of the Municipal Courts shall be made by law prescribing the powers, duties, and responsibilities so as not to conflict with that of other courts.

(2) NRS 5.010 dictates that each city must have a Municipal Court presided over by a municipal judge.

(3) NRS 5.050 provides that Municipal Courts have jurisdiction of civil actions or proceedings for the violation of any ordinance of their respective cities and certain civil matters where the matter does not exceed $2,500.

b. Appeals to District Court

(1) NRS 5.073 provides that an appeal perfected transfers the action to the District Court for trial anew, unless the Municipal Court is designated as a court of record pursuant to NRS 5.010.

(2) NRS 5.090 requires that when an appeal of a civil case from a Municipal Court to a District Court has been perfected and the District Court has rendered a judgment on the appeal, the District Court must give written notice to the Municipal Court of the disposition of the appeal within 10 days from the date of such judgment.

B. Appellate Courts

1. Supreme Court

a. Jurisdiction

(1) Article 6 §4 of the Nevada Constitution provides the Supreme Court with appellate jurisdiction in all civil cases arising in the District Courts.

(2) NRS 2.090(1) dictates that the Court has jurisdiction to review on appeal a judgment from the District Courts and also any intermediate order or decision involving the merits and necessarily affecting the judgment.

(3) NRS 2.090(2) also provides the Court with jurisdiction to review on appeal from the District Courts an order granting or refusing a new trial, an order in a civil case changing or refusing to change the place of trial, and from an order granting or refusing to grant an injunction or mandamus in the case provided for by law.

b. Composition

(1) There are 7 justices total, consisting of a Chief Justice and six associate justices, all of whom are elected and commissioned by the Governor. Nev. Const. art. VI, § 4; NRS 2.010.

(a) A full Court consists of all 7 members and a panel consists of 3 members. NRAP 25A(b)(2).

(2) The justices are chosen at the general election and serve a term of six years. NRS 2.030.

(3) Vacancies are filled by the Governor, who grants a commission to the temporary justice, which expires at the next general election and upon the qualification of his successor. At the next general election a justice shall be chosen by the people for the balance of the unexpired term. NRS 2.040.

(4) NRS 2.135 permits the Court to assign any case over which it has jurisdiction to a panel of 3 justices to hear and decide the case. Concurrence of a majority of the justices sitting on the panel is necessary to decide a case. The full Court must reconsider any case decided by a panel if any two justices so request. NRS 2.135.

(5) In cases not decided by a panel, four justices constitute a quorum for the transaction of business and the concurrence of four justices who heard an argument is necessary to pronounce a judgment. NRS 2.140.

c. Appellate Procedure

(1) Appeals from a District Court to the Supreme Court and applications for extraordinary writs in the Supreme Court are governed by the Nevada Rules of Appellate Procedure ("NRAP"). NRCP 81(a).

(2) An appeal permitted by law from a District Court to the Supreme Court may be taken only by filing a notice of appeal with the District Court clerk within the time allowed. NRAP 3(a)(1).

(3) Standing – NRAP provides that a party who is aggrieved by an appealable judgment or order as defined in NRAP 3B may appeal from it.

(4) Extraordinary Relief – NRAP 21 provides for writs of mandamus, or prohibition and other extraordinary writs.

(a) Certiorari – NRS 34.01020 dictates that a writ shall be granted:

i. In all cases when an inferior tribunal, board or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board or officer and there is no appeal, nor, in the judgment of the court, any plain, speedy and adequate remedy.

ii. In any case prosecuted for the violation of a statute or municipal ordinance wherein an appeal has been taken from a Justice Court or from a Municipal Court, and wherein the District Court has passed upon the constitutionality or validity of such statute or ordinance, the writ shall be granted by the Supreme Court upon application of the State or municipality or defendant, for the purpose of reviewing the constitutionality or validity of such statute or ordinance, but in no case shall the defendant be tried again for the same offense.

(b) Mandamus – NRS 34.160 provides that a writ may be issued by the Supreme Court … to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station; or to compel the admission of a party to the use and enjoyment of a right or office to which the party is entitled and from which the party is unlawfully precluded by such inferior tribunal, corporation, board or person.

This writ shall be issued in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law. It shall be issued upon affidavit, on the application of the party beneficially interested. NRS 34.170.

(c) Prohibition – NRS 34.320 provides that a writ of prohibition is the counterpart of the writ of mandate. It arrests the proceedings of any tribunal, corporation, board or person exercising judicial functions, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person.

i. The writ may be issued only by the Supreme Court or a District Court to an inferior tribunal, or to a corporation, board

or person, in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law. It is issued upon affidavit, on the application of the person beneficially interested. NRS 34.330.

ii. The writ must be either alternative or peremptory: The alternative writ must state generally the allegation against the party to whom it is directed and command such party to desist or refrain from further proceedings in the action or matter specified therein, until the further order of the court from which it is issued, and to show cause before such court, at a specified time and place, why such party should not be absolutely restrained from any further proceedings in such action or matter.

The peremptory writ must be in a form similar to the alternative writ, except that the words requiring the party to show cause why the party should not be absolutely restrained from any further proceedings in such action or matter, must be omitted and a return day inserted. NRS 34.340.

(d) Whether a writ of mandamus or prohibition will be considered is purely discretionary with the Supreme Court. *Smith v. District Court*, 107 Nev. 674, 677, 818 P.l2d 849, 851 (1991). Neither writ is appropriate when the petitioner has a plain, speedy, and adequate remedy at law, NRS 34.170; NRS 34.330, and the Supreme Court has consistently held that an appeal is generally an adequate legal remedy precluding writ relief. *Pan v. Dist. Ct*., 120 Nev. 222, 224, 88 P.3d 840, 841 (2004).

(5) Bond – Civil Cases

(a) Unless an appellant is exempted by law, or has filed a supersedes bond or other undertaking which includes security for the payment of costs on appeal, the appellant must file a bond for costs on appeal or equivalent security in the District Court with the notice of appeal. A bond is not required of an appellant who is not subject to costs. NRAP 7(a).

(b) The bond or equivalent security shall be in the sum or value of $500 unless the District Court fixes a different amount. NRAP 7(b).

(6) Interest on Judgments – Unless the law provides otherwise, if a money judgment is affirmed, whatever interest is allowed by law is payable from the date when the District Court's judgment was entered. NRAP 37.

2. There are no intermediate court of appeals in Nevada; however, the District Court, judges may hear appeals from the Justice and Municipal Courts in certain cases.

Procedural

A. Venue

1. Where Actions Are to be Commenced:

   a. Contractual Obligations – Venue is proper in the county in which the obligation is to be performed or in which the person resides. The county in which the obligation is, is also the county in which it is to be performed, unless there is a special contract to the contrary. NRS 13.010(1).

   b. Certain Actions Involving Real Property – For certain actions involving real estate, venue is proper in the county in which the subject of the action is situated. NRS 13.010(2).

   c. Other Cases – Under NRS 13.010, in all cases not specifically provided for by statute, venue is proper:

      (1) In the county in which the defendants or any one of them resides at the commencement of the action;

      (2) In any county with the plaintiff may designate in the complaint if none of the defendants reside in the State or their residence is unknown to plaintiff;

      (3) In any county where either of the parties reside or service may be had if any of the defendants is about to depart from the State.

2. Changing Venue

   a. Transfer for Improper Venue – If venue is improper, the action may still be tried therein, unless: (1) the defendant files a written demand to change venue before the time for answering expires, (2) the parties consent to change venue, or (3) the court orders the venue be changed. NRS 13.050(1).

   b. Permissive Transfer -- On motion, the court may change venue in cases where: (1) the designated county is improper, (2) there is reason to believe that an impartial trial cannot be had therein, or (3) to promote the convenience of the witnesses and the ends of justice. NRS 13.050(2).

B. Statute of Limitations

1. Miscellaneous Rules:

a. Accrual – When dealing with statutes that do not specify when a cause of action accrues, the discovery rule applies. See *Bemis v. Estate of Bemis*, 114 Nev. 1021, 1025 n.1 (1998).

b. Discovery Rule – Generally, a cause of action accrues on the date of injury or the date the party should reasonably have discovered the injury and its causal relationship to some action of the defendant. See *Beazer Homes Nev., Inc. v. Eighth Judicial Dist. Court*, 120 Nev. 575, 585, 97 P.3d 1132 (2004); *Pope v. Gray*, 104 Nev. 358, 760 P.2d 763 (1988).

c. Disabilities that Toll Running of a Statute – Other than actions to recover real property, if the person entitled to bring the action is either a minor (under 18 years of age), insane, or was a minor in the custodial care of the State (except when the person is imprisoned, paroled, or on probation) when the action accrued, the applicable time is tolled until all disabilities are removed. NRS 11.250; NRS 11.360; NRS 11.370.

2. Statutory Limitations:

a. Bodily Injury & Wrongful Death – Within 2 years. NRS 11.190(4)(e).

b. Personal Property Damage – Within 3 years. NRS 11.190(3)(c).

c. Real Property Damage – Actions for waste or trespass of real property must be brought within 3 years. NRS 11.190(3)(b). A 4 year limitation period applies to suits concerning tortious damage to real property (other than waste or trespass). *Oak Grove Investors v. Bell & Gossett Co*., 99 Nev. 616, 621, 668 P.2d 1075, 1078 (1983).

d. Contractual Obligations in Writing – Within 6 years. NRS 11.190(1)(b). Nevada courts have determined various causes of action fall under the 6 year limitations period:

(1) Uninsured Motorist – Because insurance policies are contracts, NRS 11.190(1)(b)'s 6-year period of limitation applies to actions for breach of an insurance policy. A claim for breach of an insurance contract does not accrue until a claimant calls on the insurer to satisfy its duties under the contract and thereafter the insurer fails to do so. See *Grayson v. State Farm Mut. Auto. Ins*., 114 Nev. 1379, 971 P.2d 798 (1998).

(2) Additional Insured – The period begins to run on the date the contract was breached, i.e., when the insurer formally denies coverage benefits. See *State Farm Mut. Auto. Ins. Co. v. Fitts*, 120 Nev. 707, 711, 99 P.3d 1160, 1162 (2004).

(3) Express Indemnity -- As is the general rule for statutes of limitation, a breach of contract cause of action accrues at the time the "litigant discovers, or reasonably should have discovered, facts giving rise to the action." *Beazer Homes Nev., Inc. v. Eighth Judicial Dist. Court*, 120 Nev. 575, 585, 97 P.3d 1132 (2004).

e. Contract Obligations Not in Writing – Within 4 years. NRS 11.190(2)(c). Nevada courts have determined various causes of action fall under the 4 year limitations period:

(1) Equitable Indemnity – The applicable statute of limitation for an equitable indemnity claim is that of implied contract, not of the underlying tort. *Saylor v. Arcotta*, 126 Nev. Adv. Rep. 9, 225 P.3d 1276, 1278 (2010). A cause of action for indemnity or contribution accrues when payment is made. *Aetna Ins. & Sur. v. Aztec Plumbing Corp.*, 106 Nev. 474, 476, 796 P.2d 227 (1990).

f. "Catch-All" Statute – For actions not specifically provided for by statute, a 4 year statute of limitation applies. NRS 11.220.

g. Special Statutes of Limitation/Miscellaneous Claims:

(1) Contribution – A party seeking contribution by separate action must commence the action within one year after the judgment has become final. NRS 17.285. A cause of action for indemnity or contribution accrues when payment is made. *Aetna Ins. & Sur. v. Aztec Plumbing Corp.*, 106 Nev. 474, 476, 796 P.2d 227 (1990).

(2) Declaratory Actions – NRS 30.040(1) allows "[a]ny person interested under a deed, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder." The prescriptions of the Nevada Rules of Civil Procedure apply to requests for declaratory judgment. NRCP 57.

As a declaratory judgment does not carry with it the element of coercion, merely determining the legal rights of the parties without undertaking to compel either party to take some affirmative act, a request for declaratory relief does not present a "cause of action" as contemplated by NRS Chapter 11, Nevada's statutes of limitation. See *Aronoff v. Katleman*, 75 Nev. 424, 345 P.2d 221 (1959); *Dredge Corp. v. Wells Cargo*, 80 Nev. 99, 102, 389 P.2d 394, 396 (1964). Rather, the Nevada Supreme Court has held such requests to be similar to the

nature of defense, noting that "[l]imitations do not run against defenses." *Dredge Corp*., 80 Nev. at 102, 389 P.2d at 396.

(3) Medical or Dental Malpractice – Actions for injury or death against a provider of health care may not be commenced more than 3 years after the date of injury or 1 year after the plaintiff discovers or reasonably should have discovered the injury, whichever occurs first. NRS 41A.097. The time limitation is tolled during any period during which the health care provider conceals any act, error, or omission upon which the action is based and which it knows or reasonably should know. NRS 41A(3).

(4) Residential Construction Defect Claims – Must satisfy both the applicable statutes of limitations and the applicable statutes of repose (discussed below). The 4 year limitation period begins to run at the time the plaintiff learns, or in the exercise of reasonable diligence should have learned, of the harm to the property caused by a construction defect. See *Tahoe Village Homeowners Ass'n v. Douglas County*, 106 Nev. 660, 662-663, 799 P.2d 556, 558 (1990).

3. Statutes of Repose – Under Nevada law, claims involving construction of improvements to real property are subject to both the statutes of limitation and the statutes of repose.

   a. The applicable statutes of repose commence when an improvement has been "substantially completed" and establish an outside limit by which claims must be brought, regardless of whether damage or an injury has been discovered. See *G & H Assocs. v. Ernest W. Hahn, Inc*., 113 Nev. 265, 272, 934 P.2d 229 (1997).

   b. Substantial Completion -- Occurs upon the latter of: (a) the date of the final building inspection, (b) the date the notice of completion is issued, or (c) the date of the Certificate of Occupancy. NRS 11.2055(1). If none of these dates apply, the date of substantial completion is determined by common law rules. NRS 11.2055(2).

   c. The applicable statutes of repose are as follows:

      (1) Known Deficiencies – After 10 years, NRS 11.203(1) bars causes of action for damages caused by a deficiency in an improvement to real property that was known or should have been known through the use of reasonable diligence by the defendant.

      (2) Latent Deficiencies – After 8 years, NRS 11.204 bars causes of action for damages caused by latent deficiencies in an improvement to real property.

(3) Patent Deficiencies – After 6 years, NRS 11.205 bars causes of action for damages caused by patent deficiencies in an improvement to real property.

(4) Savings Statute – If an injury occurs in the last year of any of the above repose periods, the injured party may bring a claim within 2 years after the date of such injury. See NRS 11.203(2); 11.204(2); 11.205(2).

(5) Willful Misconduct or Fraudulently Concealed Deficiencies -- These claims may be pursued within the appropriate statute of limitations at any time after substantial completion. NRS 11.202.

C. Time for Filing An Answer

1. In general, a defendant must file an Answer within 20 days after service of the Summons and Complaint. NRCP 12(a)(1). Whenever a statute provides for service, service of process and the time for answering may be governed by the statute. Id.; NRCP4(e)(3).

2. Computation of Time – Governed by NRCP 6.

   a. The actual date of service is not included.

   b. The last day of the computed period is included unless it is a Saturday, Sunday, or a nonjudicial day, in which case the next day when the court is open shall be the due date.

   c. Weekends and holidays are not included when the prescribed period is less than 11 days.

   d. When a party is authorized to serve by mail or electronic means, 3 days are added to the prescribed period. NRCP 5(b)(2)(D) governs service by electronic means, which includes facsimile and electronic-mail.

3. Rule 12(b) Affirmative Defenses – A defendant must assert these defenses in its first responsive pleading or they are considered waived, except for the following defenses:

   a. Lack of Subject Matter Jurisdiction
   b. Failure to State a Claim Upon Which Relief Can be Granted
   c. Failure to Join a Necessary Party. NRCP 7(h).

D. Dismissal Re-Filing of Suit

1. Voluntary Dismissal – NRCP 41(a).

a. By Plaintiff or Stipulation – Subject to other statutory provisions, a plaintiff may dismiss an action upon repayment of defendant's filing fees without order of court by filing:

(1) A notice of dismissal at any time before service of the adverse party's answer or of a motion for summary judgment, whichever is first; or

(2) A stipulation of dismissal signed by all parties who have appeared.

(3) The notice of dismissal is presumed without prejudice unless otherwise stated.

b. By Court Order -- Except as provided above, an action shall not be dismissed at the plaintiff's instance unless the court so orders. If defendant pleaded a counterclaim prior to plaintiff serving its motion to dismiss, the action cannot be dismissed against the defendant's objection unless the court can independently adjudicate the counterclaim.

2. Involuntary Dismissal – Under NRCP 41(b), a defendant may move for dismissal of any claim against it for plaintiff's failure to comply with the NRCP or any court order. The dismissal is an adjudication on the merits unless it is for lack of jurisdiction, improper venue or failure to join a necessary party.

3. Failure to Prosecute:

a. Discretionary Dismissal – If plaintiff fails to bring the action to trial within 2 years of filing the complaint, the court may dismiss the action on motion by any party or at the court's discretion after notice to the parties.

b. Mandatory Dismissal – If plaintiff has failed to bring the action to trial within 5 years of filing the complaint, the court must dismiss the action, unless the parties stipulate to continue the trial date.

4. Refiling -- For actions dismissed without prejudice for lack of subject matter jurisdiction, NRS 11.500 allows a plaintiff to recommence the action one time within the applicable period of limitation or 90 days after dismissal, whichever is later.

Liability

A. Negligence

1. Common Law Negligence

a. Definition – Negligence is the failure to exercise the degree of care that an ordinarily careful and prudent person would exercise under the same or similar circumstances to avoid injury to themselves or to others. Failure to exercise ordinary care amounts to legal fault if it is found that it caused or contributed to the injury or damage suffered by plaintiff.

b. Elements – Plaintiff must prove 4 elements: (1) an existing duty of care, (2) breach of the duty, (3) legal causation, and (4) damages. *Turner v. Mandalay Sports Entm't, LLC*, 124 Nev. 213, 217, 180 P.3d 1172, 1175 (2008).

2. Statutory Negligence – Nevada imposes a modified comparative fault standard (no recovery if plaintiff's fault is found to be 51% or greater). NRS 41.141:

   a. When comparative negligence is asserted as a defense, a plaintiff may not recover if their negligence is found to be greater than the combined negligence of all persons against whom recovery is sought.

   b. If plaintiff's fault is found to be equal to or less than all defendants' fault, plaintiff may recover, but the total amount of damages will be reduced by the percentage of plaintiff's own negligence determined by special verdict form.

   c. A plaintiff's damages award, however, will not be reduced 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. v. Long*, 100 Nev. 692, 692 P.2d 24 (1984).

   d. Note: In cases where comparative negligence is asserted as a defense, NRS 41.141(2)(a) requires a trial court to instruct the jury on modified comparative fault, whether a party requests the instruction or not.

   e. NRS 41.141 applies only to situations where the plaintiff's contributory negligence may be properly asserted as a bona fide issue in the case. *Buck v. Greyhound Lines, Inc.*, 105 Nev. 756, 764, 783 P.2d 437, 442 (1989).

B. Negligence Defenses

1. Assumption of the Risk

   a. Express Assumption of Risk – Occurs when a plaintiff consents in exposing itself to a defendant's negligence. Express assumption of risk stems from a contractual undertaking expressly relieving the potential defendant from liability and remains a viable defense following the enactment of Nevada's comparative negligence statute. *Turner v. Mandalay Sports Entm't, LLC*, 124 Nev. 213, 220, 180 P.3d 1172, 1177 (2008).

   b. Primary Implied Assumption of Risk – Arises when plaintiff impliedly

assumes those risks that are inherent in a particular activity. *Turner v. Mandalay Sports Entm't, LLC*, 124 Nev. 213, 220, 180 P.3d 1172, 1177 (2008). The doctrine is typically applied in cases involving athletic events. This doctrine was not abolished by the enactment of Nevada's comparative negligence statute. *Id*. The question whether the doctrine bars a plaintiff's claim should be incorporated into a court's initial legal analysis of the element of duty of due care and should not be treated as an affirmative defense to be decided by a jury. *Id*.

c. Secondary Implied Assumption of Risk – Arises where a plaintiff knowingly encounters a risk created by the defendant's negligence. *Turner v. Mandalay Sports Entm't, LLC*, 124 Nev. 213, 220 Fn. 22, 180 P.3d 1172, 1177 Fn.22 (2008)(quoting *Davenport v. Cotton Hope Plantation*, 508 S.E.2d 565, 571 (S.C. 1998)). The doctrine is a question of comparative negligence and does not bar recovery by a plaintiff, unless the plaintiff's degree of fault is greater than the negligence of the defendant. See *Kerns v. Hoppe*, 2012 Nev. Unpub. LEXIS 1103 (Nev. Unpub. 2012).

d. Assumption of risk remains a defense to strict products liability. *Centel Tele. v. Fixtures Mfg.*, 103 Nev. 298, 738 P.2d 510 (1987).

e. Exculpatory Clauses – Nevada Courts routinely uphold exculpatory clauses as a "valid exercise of the freedom of contract." *Miller v. A & R Joint Venture*, 97 Nev. 580, 582 (1981). When the exculpatory language is unambiguous, the contract must be strictly construed. *Agricultural Aviation Eng'g Co. v. Board of Clark County Comm'rs*, 106 Nev. 396, 399-400 (1990). There is no opposing public policy in Nevada that prevents voluntary transactions in which one party agrees to assume a risk which the law may otherwise place on the other party. *Id*.

"Parties may agree to assume risks by contract, and in Nevada, the issue of assumption of the risk is a question for the court, not a jury." *Burnett v. Tufguy Prods*., 2010 U.S. Dist. LEXIS 112539 (D. Nev. Oct. 14, 2010). Express assumption of the risk "stems from a contractual undertaking that expressly relieves a putative defendant from any duty of care to the injured party; such a party has consented to bear the consequences of a voluntary exposure to a known risk. *Mizushima v. Sunset Ranch*, 103 Nev. 259, 262 (1987) (overruled on other grounds). In order for a person to have assumed a risk, there must have been: (1) voluntary exposure to the danger, and (2) actual knowledge of the risk assumed. *Renaud v. 200 Convention Ctr*., 102 Nev. 500, 501 (Nev. 1986) (citing *Sierra Pacific v. Anderson*, 77 Nev. 68, 73 358 P. 2d 892, 894 (1961)). A person can voluntarily assume a risk if they knew and fully appreciated the danger.

2. Comparative Negligence (discussed above).

3. Last Clear Chance Doctrine – The Nevada Supreme Court has recognized the "Last Clear Chance" doctrine is inapplicable in light of Nevada's comparative negligence statute. *Davies v. Butler*, 95 Nev. 763, 776, 602 P.2d 605, 613 (1979).

4. Consent – To be effective, consent must be: (a) by one who has the capacity to consent and (b) to the particular conduct, or substantially the same conduct (i.e., the act must not exceed the scope of the consent). Furthermore, capacity to consent requires the mental ability to appreciate the nature, extent and probable consequences of the conduct consented to. If the plaintiff is known to be incapable of giving consent (e.g., because of intoxication), his failure to object, or even his active manifestation of consent will not protect the defendant. *Davies v. Butler*, 95 Nev. 763, 774, 602 P.2d 605 (1979).

C. Gross Negligence, Recklessness, Willful and Wanton Conduct

1. The Nevada Supreme Court has consistently distinguished the concepts of ordinary or gross negligence from the concepts of willful or wanton misconduct:

   a. Gross Negligence: Such 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 injure. *Davies v. Butler*, 95 Nev. 763, 776, 602 P.2d 605, 613 (1979).

   b. Wanton Misconduct: Involves an intention to perform an act that the actor knows, or should know, will very probably cause harm. To be wanton, such conduct must be beyond the routine. There must be some act of perversity, depravity or oppression. Id.

      Willful and Wanton Conduct – 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 results. *Davies v. Butler*, 95 Nev. 763, 769, 602 P.2d 605 (1979).

D. Negligent Hiring and Retention

1. Negligent Hiring

   a. In Nevada, the tort of negligent hiring imposes a general duty on the employer to conduct a reasonable background check on a potential employee to ensure that the employee is fit for the position. *Burnett v.*

C.B.A. Security Service, Inc., 107 Nev. 787, 789, 820 P.2d 750, 751 (1991) (per curiam). An employer breaches this duty when it hires an employee even though the employer knew or should have known of that employee's dangerous propensities. *Hall v. SSF, Inc.* 112 Nev. 1384, 1392, 930 P.2d 94, 98, 99 (1996). Whether the employer conducted a reasonable background check is the central inquiry in negligent hiring cases.

b. Elements: "'The tort of negligent hiring imposes a general duty on the employer to conduct a reasonable background check on a potential employee to ensure that the employee is fit for the position.' An employer breaches this duty when it hires an employee even though the employer knew, or should have known, of that employee's dangerous propensities." *Hall v. SSF, Inc.,* 112 Nev. 1384, 1392 (Nev. 1996) (internal citations omitted).

2. Negligent Retention

a. A cause of action for negligent retention turns on the employer's duty to use reasonable care to make sure that the employees are fit for their positions. Id. at 99 (citing 27 Am. Jur. 2d Employment Relationship §§ 475-76 (1996)).

Once an employee is hired, the employer still owes a duty to ensure the employee is still proper for the position. "In Nevada, a proprietor owes a general duty to use reasonable care to keep the premises in a reasonably safe condition for use. *Moody v. Manny's Auto Repair*, 110 Nev. 320, 331-33, 871 P.2d 935, 942-43 (1994).

b. Standard: "As is the case in hiring an employee, the employer has a duty to use reasonable care in the training, supervision, and retention of his or her employees to make sure that the employees are fit for their positions." *Hall*, 112 Nev. At 1393, 930 P.2d at 100.

E. Negligent Entrustment

1. Elements:

a. Whether an entrustment actually occurred, and

b. Whether the entrustment was negligent. *Zugel v. Miller*, 100 Nev. 525, 528, 688 P.2d 310, 313 (1984).

2. Vehicles: The person entrusting the vehicle knew or should have known that the person being entrusted, because of his youth, inexperience or otherwise,

is incompetent to operate a vehicle. Id. A parent who entrusts his child with motor vehicle is liable even when parent expressly instructs child not to use vehicle on public roadway. *Zugel v. Miller*, 100 Nev. 525, 528. A parent or guardian having custody and control of minor child is liable for the willful misconduct of their minor up to $10,000. Nev. Rev. Stat. § 41.470; *Roddick v. Plank*, 608 F. Supp. 229 (D. Nev. 1985).

F. Dram Shop

1. Nevada does not recognize dram-shop liability. See *Rodriguez v. Primadonna Co.*, LLC, 125 Nev. Adv. Op. No. 25, 216 P.3d 793, 799 (2009).

2. A person who serves, sells or otherwise furnishes an alcoholic beverage to another person who is 21 years of age or older is not liable in a civil action for any damages caused by the person to whom the alcoholic beverage was served, sold or furnished as a result of the consumption of the alcoholic beverage. NRS 41.1305.

G. Joint and Several Liability

1. General Rule:

   a. Each defendant is severally liable to the plaintiff only for that portion of the judgment that represents the percentage of its own negligence. NRS 41.141(4).

   b. This general rule does not apply and defendants will be held jointly liable in actions based upon: (a) strict liability; (b) intentional torts; (c) the emission, disposal or spillage of a toxic or hazardous substance; (d) the concerted acts of the defendants; or (e) products liability. NRS 41.141(5).

      (1) Concert of Action Exception -- To be jointly and severally liable under NRS 41.141(5)(d), the defendants must have agreed to engage in conduct that is inherently dangerous or poses a substantial risk of harm to others. *GES, Inc. v. Corbitt*, 117 Nev. 265, 271, 21 P.3d 11, 15 (2001).

      This requirement is met when the defendants agree to engage in an inherently dangerous activity with a known risk of harm that could lead to the commission of a tort. *Id.* Mere joint negligence, or an agreement to act jointly, does not suffice. *Id.*

2. Contribution – Where two or more persons become jointly or severally liable in tort for the same injury to person or property or for the same wrongful death, there is a right of contribution among them even though judgment has

not been recovered against all or any of them. NRS 17.225.

a. The right of contribution exists only in favor of a tortfeasor who has paid more than his equitable share of the common liability, and the tortfeasor's total recovery is limited to the amount paid by the tortfeasor in excess of his equitable share. No tortfeasor is compelled to make contribution beyond his own equitable share of the entire liability.

b. A tortfeasor who enters into a settlement with a claimant is not entitled to recover contribution from another tortfeasor whose liability for the injury or wrongful death is not extinguished by the settlement nor in respect to any amount paid in a settlement which is in excess of what was reasonable.

c. The recovery of a judgment for an injury or wrongful death against one tortfeasor does not of itself discharge the other tortfeasors from liability for the injury or wrongful death unless the judgment is satisfied. The satisfaction of the judgment does not impair any right of contribution. NRS 17.235.

d. A release or covenant not to sue or not to enforce judgment to one of multiple tortfeasors does not discharge any other tortfeasor from liability, but it reduces the claim against the others to the greater of any amount stipulated or the amount paid in consideration for the release. NRS 17.245. It discharges the tortfeasor to whom it is given from all liability for contribution and for equitable indemnity to any other tortfeasor.

e. There is no right of contribution in favor of any tortfeasor who has intentionally caused or contributed to the injury or wrongful death. NRS 17.255.

f. The right of contribution does not impair any right of indemnity under existing law; however, where one tortfeasor is entitled to indemnity from another, the indemnitee is entitled to indemnification and not contribution. NRS 17.265.

H. Wrongful Death and/or Survival Actions

1. Recovery – In a case where a death is caused by a wrongful act or neglect, NRS 41.085 provides the exclusive remedy for claimants in a wrongful death action, permitting only the decedent's heirs or the personal representative to maintain an action for damages against the person who caused the death. The heirs and personal representative of the estate may both maintain an action and the claims may be consolidated. An heir may not maintain such an action if found responsible for the decedent's death.

2. Recoverable Damages:

a. Heir – May be awarded pecuniary damages for grief and sorrow over the loss, loss of probably support, companionship, society, consortium, and damages for the pain and suffering and disfigurement of the decedent. Hedonic damages, such as loss of enjoyment of life are recoverable, but are limited to the damages and loss the decedent could experience prior to death. The proceeds of any such recovery are not liable for any debt of the decedent.

b. Personal Representative – May be awarded special damages, the decedent's medical expenses, funeral expenses, and any punitive or exemplary damages the decedent would have recovered if he/she had lived. No pain and suffering may be awarded. The estate's recovery may be liable for the debts of the decedent.

I. Vicarious Liability

1. Vicarious Liability for a Minor's Willful Misconduct – NRS 41.470 imposes liability for any act of willful misconduct that results in any injury or death to another person or injury to private or public property to the parents or guardian having custody and control of the minor for all purposes of civil damages, and the parents or guardian having custody or control are jointly and severally liable with the minor for all damages resulting from the willful misconduct.

   a. Monetary Limitation – The joint and several liability of one or both parents or guardian having custody or control of a minor cannot exceed $10,000 for any such act of willful misconduct of the minor.

   b. Such liability is in addition to any other liability imposed by law.

   c. Regarding the term "willful misconduct", the statute is not implicated unless there is evidence that the minor either intended to do harm or that the minor knew or should have known that the actions would very probably cause harm. *Roddick v. Plank*, 608 F. Supp. 220 (D. Nev. 1985).

2. Respondeat Superior

   a. Statute: NRS 41.130 provides that whenever any person suffers personal injury by wrongful act, neglect, or default of another, the person causing the injury is liable to the person injured for damages; and where the person causing the injury is employed by another person or corporation responsible for his conduct, that person or corporation so responsible is liable to the person injured for damages.

   b. Standard & Elements: *Respondeat superior* liability attaches only when

the employee is under the control of the employer and when the act is within the scope of employment." *Molino v. Asher,* 96 Nev. 814, 817, 618 P.2d 878, 879 (1980). Therefore, an actionable claim on a theory of *respondeat superior* requires proof that: (1) the actor at issue was an employee, and (2) the action complained of occurred within the scope of the actor's employment. *Rockwell v. Sun Harbor Budge Suites*, 112 Nev. 1217, 295 P.2d 1175 (1996).

Generally, an employee who is traveling to or from work is outside the scope of his or her employment unless the employee is performing an errand for the employer or otherwise conferring a benefit upon the employer. Id.; *National Convenience Stores v. Fantauzzi*, 94 Nev. 655, 658-59, 584 P.2d 689, 691-92 (1978); see also *Burnett v. C.B.A. Security Service, Inc*., 107 Nev. 787, 820 P.2d 750 (1991) (employer was not liable for injuries caused by employee when employee's actions were not furthering the business interests of the employer).

Evans v. Southwest Gas, 108 Nev. 1002, 1006, 842 P.2d 719, 722 (1992). The court has also stated "[u]nder the modern rationale for *respondeat superior*, the test for determining whether an employer is vicariously liable for the tortious conduct of his employee is closely related to the test applied in workers' compensation cases for determining whether an injury arose out of or in the course of employment." *Wood v. Safeway, Inc*., 121 Nev. 724, 740, 121 P.3d 1026, 1037 (2005).

The determination as to whether an employee was within the "course and scope" of employment is a fact-intensive question. Generally "whether an employee was acting within the scope of his or her employment for the purposes of *respondeat superior* liability is a question to be determined by the trier of fact. However, where undisputed evidence exists concerning the employee's status at the time of the tortious act, the issue may be resolved as a matter of law." *Evans*, 108 Nev. at 1006, 842 P.2d at 721.

c. Intentional Acts:

(1) Standard: An employer is not liable for harm or injury caused by the intentional conduct of an employee if the conduct of the employee:

(a) Was a truly independent venture of the employee;
(b) Was not committed in the course of the very task assigned to the employee; and
(c) Was not reasonably foreseeable under the facts and circumstances of the case considering the nature and scope of his employment.

Conduct of an employee is reasonably foreseeable if a person of ordinary intelligence and prudence could have reasonably anticipated

the conduct and the probability of injury. NRS 41.475. Furthermore, nothing imposes strict liability on an employer for any unforesseable intentional act of his employee. NRS 41.475(2).

J. Exclusivity of Workers' Compensation

1. Generally: The Nevada Industrial Insurance Act ("NIIA"), NRS Chapters 616A to 616D, provides the exclusive remedy for employees injured on the job, and an employer is immune from suit by an employee for injuries "arising out of and in the course of the employment." NRS 616A.020(1), (2); *Wood v. Safeway, Inc.* 121 Nev. 724, 121 P.3d 1026, 1032 (2005). This provision not only bars a suit brought by the employee, but also those by his or her legal representative and dependents. NRS 616A.020(1); *Wood*, 121 P.3d at 1031-32.

2. Court Treatment: The Nevada Supreme Court has recognized that the NIIA does not make an employer absolutely liable and, therefore, absolutely immune from suit for any and all on-the-job injuries suffered by its employees. Id. (citing *Rio Suite Hotel & Casino v. Gorsky*, 113 Nev. 600, 605, 939 P.2d 1043, 1046 (1997). Instead, injuries that fall within the ambit of the NIIA's coverage are those that both arise out of the employment and occur within the course of that employment. *Id*.; NRS 616A.020(1). An injury arises out of an employee's employment when there is a causal connection between the employee's injury and the nature of the work or workplace. *Id*. (comparing *Gorsky*, 113 Nev. At 604, 939 P.2d at 1046. In contrast, whether an injury occurs within the course of the employment refers merely to the time and place of employment: whether the injury occurs at work, during working hours, and while the employee is reasonably performing his or her duties. *Id*.

Damages

A. Statutory Caps on Damages

The most common damage limitations are for punitive damages and medical and dental malpractice claims.

1. Non-Contract Cases: NRS 42.005(1) provides that Nevada law allows a claim for punitive or exemplary damages in non-contract cases and limits an exemplary damage award to three times the compensatory damages awarded, if the compensatory damages awarded $100,000 or more, or limited to $300,000 if the award of compensatory damages is less than $100,000.

2. Exemplary Damages: NRS 42.005(2) provides that there is no limit on an exemplary damage award in the following types of cases:

   a. A products liability claim against a manufacturer, distributor or seller of the

product.

b. A bad faith action against an insurer.
c. A claim against a person for violating Federal and State law regarding discriminatory housing practices.
d. A claim made for damage caused the emission, disposal and spilling of a toxic, radioactive or hazardous substance.
e. A claim for defamation.

3. Injury Caused by Intoxicated Driver: NRS 42.010 provides that there is a right to punitive damages, without limitation, in a claim for injury caused by driving under the influence.

4. *Respondeat Superior*: NRS 42.007 provides that an employer is not liable for wrongful conduct of its employee with regard to exemplary damages unless:

   a. The employer had advance notice of that the employee was unfit for the purposes of employment and employed the employee with the conscious disregard of the safety of others.
   b. The employer expressly authorized or ratified the employee's wrongful conduct.
   c. The employer is guilty of oppression, fraud, and malice whether express or implied.

5. Dental & Medical Malpractice Cases: NRS 41A.035 provides a limitation of $350,000 for non-economic damages in dental and medical malpractice cases. Further, in such cases, there is no joint liability among healthcare providers; all such defendants/tortfeasors are severally liable. See NRS 41A.045.

B. Compensatory Damages for Bodily Injury

1. Generally: Compensatory damages are awarded to attempt to make the aggrieved party whole. *Hornwood v. Smith's Food King No. 1*, 107 Nev. 80 (1991). Any loss actually or proximately caused by the negligence of another can be included under this category, including medical and hospital bills, ambulance charges, loss of wages, property repair, replacement costs or loss of use. *Id.*

2. Loss of Consortium – Damages intended to compensate the injured plaintiff's spouse. Loss of consortium damages anticipate the possibility that injury to a plaintiff may cause damage to that person's marital relationship. Loss of consortium is considered to be a derivative claim---the claim is dependent on

and must be joined with the injured person's claim. *General Electric Co. v. Bush*, 88 Nev. 360, 498 P.2d 366 (1972); *Gunlock v. New Frontier Hotel*, 78 Nev. 182, 185 n.1, 370 P.2d 682, 684 n.1 (1962). Therefore, the same defenses available against the injured person's claim (e.g. the statute of limitations, comparative negligence, assumption of risk) can be brought to defeat a derivative claim.

a. Requirements:

(1) Must be a valid marriage. A meretricious relationship is insufficient.

(2) The claim is only valid if it is joined with a claim for damages by the injured party.

b. Children may not recover under this theory. *General Electric Co. v. Bush*, 88 Nev. 360, 368, 498 P.2d 366 (1972).

C. Collateral Source

1. Admission Barred *Per Se*: Nevada has adopted a *per se* rule that bars the admission of a collateral source of payment for a loss or injury into evidence for any purpose. *Proctor v. Castelletti*, 112 Nev. 88, 90, 911 P.2d 853, 854 (1996). Under this rule a plaintiff may claim the entire amount billed by their treating physician. However, Nevada has a pattern jury instruction, NEV J.I. 10.02, which limits recovery to the amount plaintiff **incurred** as a result of the accident. Generally, this rule could allow a plaintiff to recover medical bills that were written off by a medical provider. In a case where a third-party carrier paid medical bills, the plaintiff would only recover for the amount that was not paid by the third-party carrier.

   However, the Nevada Supreme Court recently noted that the issue of whether or not a medical provider's discounts fall within the scope of the collateral source rule is an unresolved legal question left for future analysis. *Tri-County Equip. & Leasing, LLC v. Klinke*, 128 Nev. Adv. Rep. 33 (June 28, 2012). Further, Nevada jury instruction 1.07 seems to indicate that plaintiffs can only recover for actual paid amounts. Trial courts have not, however, interpreted it that way.

2. Exception for Worker's Compensation: The Nevada Legislature has carved out a small exception to the collateral source rule with regards to worker's compensation payments. NRS 616C.215(10) required that in all cases involving injuries incurred through third person parties at the workplace specific jury instruction were to be supplied to inform the jury that an injured employee would be required to repay any worker's compensation benefits

received. See *Cramer v. Peavy.* 116 Nev. 575, 580, 3 P.3d 665, 669 (2000). NRS 616C.215(10) prohibits a jury from deducting the amount of any compensation benefits paid to or for the plaintiff.

D. Pre-Judgment/Post judgment Interest

1. Pre-Judgment Interest

a. Generally:

Pursuant to NRS 17.130(1) prejudgment interest is awarded on judgments "for any debt, damages, or costs." *Schiff v. Winchell*, 237 P.3d 99 (2010). Further, NRS 17.130(2) allows for the award of prejudgment interest, and provides that "When no rate of interest is provided by contract or otherwise by law, or specified in the judgment, the judgment draws interest from the time of service of the summons and complaint until satisfied, except for any amount representing future damages, which draws interest only from the time of the entry of the judgment until satisfied, at a rate equal to the prime rate at the largest bank in Nevada as ascertained by the Commissioner of Financial Institutions on January 1 or July 1, as the case may be, immediately preceding the date of judgment, plus 2 percent. The rate must be adjusted accordingly on each January 1 and July 1 thereafter until the judgment is satisfied." *Id*.

This court has said that "until satisfied" in NRS 17.130(2) occurs upon the entry of the judgment in the District Court. *Id*., citing *Lee v. Ball*, 121 Nev. 391, 396, 116 P.3d 64, 67 (2005).

b. Calculating the Time for Pre-Judgment Interest: Under NRS 17.130(2), "the judgment draws interest from the time of service of the summons and complaint until satisfied, except for any amount representing future damages." *Albios v. Horizon Communities, Inc*., 132 P. 3d 1022, 1034-35 (Nev. 2006). The general rule is that it is error to award prejudgment interest on an entire verdict if "it is impossible to determine what part of the verdict represented past damages." *Id.* But when there is nothing in the record to suggest that future damages were included in the verdict, prejudgment interest on the entire verdict is allowed. *Id.*

c. Pre-Judgment Interest on Judgments Awarding Costs: Under the plain language of NRS 17.130(1), prejudgment interest is recoverable on judgments awarding costs. *Id.* at 1035. Prejudgment interest runs on costs from the time when the costs were incurred. Therefore, the recovering party must prove when the costs were incurred and, if the party fails to do so, interest on the costs is awarded only from date of the

judgment. *Id.*

d. Pre-Judgment Interest on Attorney's Fees: The plain language of NRS 17.130(1) states that prejudgment interest is awarded on judgments "for any debt, damages or costs." *Id.* at 1036. Thus, when attorney fees are awarded as damages, they fall within the plain language of NRS 17.130(1). *Id.* Thus, when attorney fees are awarded as an element of damages, the prevailing party is entitled to recover prejudgment interest on the attorney fees. *Id*. As the attorney fees are awarded as an element of past damages, attorney fees draw interest from the time of service of the summons and complaint, as specified in NRS 17.130(2). *Id*.

e. Date of Judgment:

In *Winchell*, the Nevada Supreme Court first looked to statutory authority to determine which judgment date triggers the applicable interest rate. *Winchell,* 237 P.3d at 101. NRS 17.130(2) provides, in relevant part, that the interest rate to be applied to any prejudgment interest is the rate that is established "immediately preceding the date of judgment."

Appeals: NRAP 37 establishes the judgment date for purposes of the accrual of post-judgment interest when an appeal has been decided by a court. The judgment date is the same for purposes of determining the appropriate rate of prejudgment interest. Pursuant to NRAP 37(a), "[u]nless the law provides otherwise, if a money judgment in a civil case is affirmed, whatever interest is allowed by law is payable from the date when the District Court's judgment was entered."

Further, NRAP 37(b) states, "[i]f the Court modifies or reverses a judgment with a direction that a money judgment be entered in the District Court, the mandate must contain instructions about the allowance of interest."

Turning to the issue of whether a modification to the amount of a money judgment constitutes an affirmation or a reversal of the original judgment, the Court then analyzed the law of neighboring states and adopted their determination that when a judgment is modified on appeal, the modification is treated as an affirmation of judgment and interest accrues from the date of entry of the original judgment. Any modification on appeal, whether upward or downward, is considered as an affirmation of the original judgment. *Id*. at 101-02.

f. Damage Award: Prejudgment interest on a damage award is only allowed where the damage award is known or ascertainable at a time prior to entry of judgment, either by reference to amounts fixed by the contract, or from

established market prices. *Jeaness v. Besnilian,* 101 Nev. 536, 541, 706 P.2d 143, 147 (1985).

2. Post-Judgment Interest: NRAP 37, which provides:

   a. When the Court Affirms. Unless the law provides otherwise, if a money judgment in a civil case is affirmed, whatever interest is allowed by law is payable from the date when the District Court's judgment was entered.

   b. When the Court Reverses. If the Court modifies or reverses a judgment with a direction that a money judgment be entered in the District Court, the mandate must contain instructions about the allowance of interest.

E. Damages for Emotional Distress

1. Emotional Distress: In order to recover for intentional infliction of emotional distress, a plaintiff must show that the defendant committed an extreme and outrageous conduct with either intention or reckless disregard, resulting in emotional distress. *Luckett v. Doumani*, 121 Nev. 44, 110 P.3d 30 (2005). Nevada also allows an award for damages even if the emotional distress was negligently caused and if the defendant's actions result in physical symptoms caused by apprehending the death or serious injury of a loved one due to the defendant's negligence. *State v. Eaton,* 101 Nev. 705, 718, 710 P.2d 1370, 1379 (1985). General physical or emotional discomfort are insufficient damage to satisfy the requirement for physical symptoms. *Chowdhry v. NLVH,* 109 Nev. 478, 482-83, 851 P.2d 459, 462 (1993) (citations omitted).

   In *State v. Eaton,* 101 Nev. 705, 710 P.2d 1370 (1985), the Nevada Supreme Court first recognized a cause of action for *negligent* infliction of emotional distress where a bystander suffers "serious emotional distress which results in physical symptoms caused by apprehending the death or serious injury of a loved one due to the negligence of the defendant." 101 Nev. at 718, 710 P.2d at 1379. The Court then recognized that other jurisdictions require "physical impact" where the negligent act is alleged to have been committed directly against the plaintiff. *Id.*

   In the context of *intentional* infliction of emotional distress, Nevada case law dictates that "[t]he less extreme the outrage, the more appropriate it is to require evidence of physical injury or illness from the emotional distress." *Nelson v. City of Las Vegas,* 99 Nev. 548, 555, 665 P.2d 1141, 1145 (1983). Insomnia and general physical or emotional discomfort are insufficient to satisfy the physical impact requirement. *Chowdhry v. NLVH,* 109 Nev. 478, 482-83, 851 P.2d 459, 462 (1993) (citations omitted). In cases where emotional distress damages are not secondary to physical injuries, but rather, precipitate physical symptoms, either a physical impact must have occurred

or, in the absence of physical impact, proof of "serious emotional distress" causing physical injury or illness must be presented.
Id. at 447-48, 956 P.2d at 1386-87.

2. If a plaintiff can prove these elements of emotional distress, the plaintiff may be awarded special damages to compensate for the cost of going to the doctor to treat the physical symptoms and may also recover general damages for the pain and suffering caused by the injury and the treatment.

F. Wrongful Death and/or Survival Action Damages

1. Wrongful Death Actions: Governed by NRS 41.085.

   a. Generally: Wrongful death is a cause of action created by statute, having no roots in the common law. *Wells, Inc. v. Shoemake*, 64 Nev. 57, 66, 177 P.2d 451, 456 (1947). In Nevada, such causes of action are governed by NRS 41.085. *Alsenz v. Clark Co. School District*, 864 P.2d 285, 286 (Nev. 1993). Under this statute, both the decedent's heirs and representatives can maintain a cause of action for wrongful death. In this respect, NRS 41.085 is bifurcated. *Id.* The act also separately describes the types of damages available to the heirs and the estate respectively. In pertinent part, NRS 41.085 lists damages as follows:

   The heirs may prove their respective damages in the action brought pursuant to subsection 2 and the court or jury may award each person pecuniary damages for his grief or sorrow, loss of probable support, companionship, society, comfort and consortium, and damages for pain, suffering or disfigurement of the decedent. The proceeds of any judgment for damages awarded under this subsection are not liable for any debt of the decedent.

   b. Recoverable Damages: The damages recoverable by the personal representatives of a decedent on behalf of his estate include:

      (1) Any special damages, such as medical expenses, which the decedent incurred or sustained before his death, and funeral expenses; and

      (2) Any penalties that the decedent would have recovered if he had lived, but do not include damages for pain, suffering or disfigurement of the decedent. The proceeds of any judgment for damages awarded under this subsection are liable for the debts of the decedent unless exempted by law.

2. Survival Actions: Governed by NRS 41.100, which provides that:

   a. No cause of action is lost by reason of the death of any person, but may

be maintained by or against the person's executor or administrator.

b. In an action against an executor or administrator, any damages may be awarded which would have been recovered against the decedent if the decedent had lived, except damages awardable under NRS 42.005 or 42.010 or other damages imposed primarily for the sake of example or to punish the defendant.

c. Except as otherwise provided in this subsection, when a person who has a cause of action dies before judgment, the damages recoverable by the decedent's executor or administrator include all losses or damages which the decedent incurred or sustained before the decedent's death, including any penalties or punitive and exemplary damages which the decedent would have recovered if the decedent had lived, and damages for pain, suffering or disfigurement and loss of probable support, companionship, society, comfort and consortium. This subsection does not apply to the cause of action of a decedent brought by the decedent's personal representatives for the decedent's wrongful death.

d. The executor or administrator of the estate of a person insured under a policy of life insurance may recover on behalf of the estate any loss, including, without limitation, consequential damages and attorney's fees, arising out of the commission of an act that constitutes an unfair practice pursuant to subsection 1 of NRS 686A.310.

e. This statute does not prevent subrogation suits under the terms and conditions of an uninsured motorists' provision of an insurance policy.

In an action where an estate brought both a wrongful death cause of action and survival actions, the Nevada Supreme Court determined that under Nevada law, wrongful death actions must proceed under Nevada's wrongful death statute, NRS 41.085. *Alsenz v. Clark Co. School Dist*., 864 P.2d 285, 288 (1993). Furthermore, because NRS 41.085 provides that the decedent's heirs are entitled to wrongful death type damages (e.g., "loss of probable support, companionship, society, comfort and consortium, and *damages for pain, suffering or disfigurement of the decedent*...." (emphasis added)), allowing the estate to recover these same damages outside NRS 41.085 would result in double recovery because statutory interpretation does not allow for such an unreasonable proposition. *Id*.

G. Punitive Damages

1. Generally: NRS 42.005 dictates that 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.

2. Case Law:

In Nevada, a plaintiff is not entitled to punitive damages as a matter of right. *Dillard Department Stores v. Beckwith*,115 Nev. 372, 980 P.2d 882 (1999). Instead, a plaintiff must offer substantial evidence of malice or oppression, express or implied, to support a claim for punitive damages. *Countrywide Home Loans, Inc. v. Thitchner*, 192 P.3d 243, 254-55 (2008).

NRS 42.005 requires a plaintiff to prove by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice in order to obtain an award of punitive damages. *Id*. at 245. Pursuant to NRS 42.001(3), malice, express or implied, is defined as "conduct which is intended to injure a person or despicable conduct which is engaged in with a conscious disregard of the rights or safety of others." With respect to oppression, NRS 42.001(4) defines it as "despicable conduct that subjects a person to cruel and unjust hardship and conscious disregard of the rights of the person." Both definitions utilize conscious disregard as a common mental element. NRS 42.001(1) defines conscious disregard as "the knowledge of the probable harmful consequences of a wrongful act and a willful and deliberate failure to act to avoid those consequences."

Thus, the *Countrywide* Court determined that the defendant must act "with a culpable state of mind" and his conduct "*must exceed mere recklessness or gross negligence*." *Countrywide Home Loans v. Thitchner*, (2008) 192 P.3d 243, 255. (emphasis added). Therefore, in simple, or even gross negligence cases, the plaintiff cannot seek punitive damages unless he or she pleads that defendant's actions were malicious and oppressive and exceeded that of mere negligence or gross negligence.

Employer's Liability for an Employee's Wrongful Acts: NRS 42.007 governs claims for punitive or exemplary damages against an employer for the wrongful acts of its employee. The statute also specifically addresses claims for punitive or exemplary damages against an employer that is a corporation. NRS 42.007 provides, in pertinent part:

> Except as otherwise provided in subsection 2, in an action for the breach of an obligation in which exemplary or punitive damages are sought pursuant to subsection 1 of NRS 42.005 from an employer for the wrong act of his employee, the employer is not liable for the exemplary or

punitive damages unless:

(a) The employer had advance knowledge that the employee was unfit for the purposes of the employment and employed him with a conscious disregard of the rights or safety of others;

(b) The employer expressly authorized or ratified the wrongful act of the employee for which the damages are awarded; or

(c) The employer is personally guilty of oppression, fraud or malice, express or implied. If the employer is a corporation, the employer is not liable for exemplary or punitive damages unless the elements of paragraph (a), (b) or (c) are met by an officer, director or managing agent of the corporation who was expressly authorized to direct or ratify the employee's conduct on behalf of the corporation.

NRS 42.007 (emphasis added).

In *Countrywide*, the Nevada Supreme Court determined that the director or managing agent of a corporation *must act with conscious disregard* for punitive damages to be appropriate. *Countrywide Home Loans, Inc. v. Thitchener* (2008) 192 P.3d 243, 254-55. Further, the director or managing agent of a corporation must possess a culpable state of mind and conduct must exceed mere recklessness or gross negligence. *Id*.

3. Limitations on Award Amount: Except as otherwise provided in this section or by specific statute, an award of exemplary or punitive damages made pursuant to this section may not exceed:

   a. Three times the amount of compensatory damages awarded to the plaintiff if the amount of compensatory damages is $100,000 or more;

   b. Three hundred thousand dollars if the amount of compensatory damages awarded to the plaintiff is less than $100,000.

   c. The limitations on the amount of an award of exemplary or punitive damages do not apply to an action brought against:

      (1) A manufacturer, distributor or seller of a defective product;

(2) An insurer who acts in bad faith regarding its obligations to provide insurance coverage;

(3) A person for damages or an injury caused by the emission, disposal or spilling of a toxic, radioactive or hazardous material or waste; or

4. Trier of Fact Determines Whether to Assess Punitive Damages: If punitive damages are claimed, the trier of fact shall make a finding of whether such damages will be assessed. If such damages are to be assessed, a subsequent proceeding must be conducted before the same trier of fact to determine the amount of such damages to be assessed. The trier of fact shall make a finding of the amount to be assessed according to the provisions of this section. The findings required by this section, if made by a jury, must be made by special verdict along with any other required findings. The jury must not be instructed, or otherwise advised, of the limitations on the amount of an award of punitive damages.

5. Evidentiary Limitations: Evidence of the financial condition of the defendant is not admissible for the purpose of determining the amount of punitive damages to be assessed until the commencement of the subsequent proceeding to determine the amount of exemplary or punitive damages to be assessed.

6. Bad Faith Actions: For the purposes of an action brought against an insurer who acts in bad faith regarding its obligations to provide insurance coverage, the statutory definitions of fraud, malice, and oppression are not applicable and the corresponding provisions of the common law apply.

H. Diminution in Value of Damaged Vehicle

1. Nevada has no case law or statute directly dealing with diminution in value of a damaged vehicle.

2. However, the Nevada Pattern Jury Instructions provide four methods to calculate damage paid to a plaintiff for loss of property:

   a. If the property has no market value after the loss, then the amount paid to plaintiff would be the fair market value of the property before it was destroyed. NPJI 10.10.
   b. If the property can be repaired, but the repairs will cost more than the fair market value, then the amount to be paid will be the fair market value prior

to the loss. NPJI 10.08.

c. If the repairs will cost less than the fair market value and the repairs will fully restore the value of the item, then amount to be paid is the costs of the repairs. NPJI 10.08.

d. Finally, if the repairs will not fully restore the value of the property, then amount paid is the difference between pre-loss fair market value and post-repair fair market value, plus the costs of repairs. NPJI 10.09.

I. Loss of Use of Motor Vehicle

1. Recovery Generally: In Nevada, a party may recover loss of use damages for the time period in which that party has lost use of her personal vehicle as a result of damages to the automobile. *Dugan v. Gotsopoulos*, 117 Nev. 285, 289, 22 P.3d 205, 207-208 (2001).

   a. Measure: These damages may be measured by reasonable rental car costs for a reasonable period within which to repair the vehicle. *Id.* A party need not actually rent a vehicle to recover loss of use damages if that party is financially unable to rent a substitute vehicle. *Id.* "The owner has suffered compensable inconvenience and deprivation of the right to possess and use her chattel whether or not a substitute was obtained." *Id.* (quoting *Graf v. Don Rasmussen Co.*, 39 Or. App. 311, 592 P.2d 250, 254 (1979).

   b. Expert Testimony Not Required: To establish loss of use damages, expert testimony is not required. *Id.* None of the cases involving loss of use damages requires expert testimony to establish value, and courts have permitted the party to testify about rental car rates as long as that person had some basis for the valuation. *Id.* Loss of use damages may also be awarded for the inconvenience of loss of use based on individual circumstances, to which the party can testify. *Id.* Thus, a party may testify to establish the value of rental car rates as long as an adequate basis for her knowledge was presented. *Id.*

Evidentiary Issues

A. Preventability Determination

Nevada Courts have not directly addressed the admissibility of preventability determinations. However, such evidence may not be admissible under Nevada evidentiary rules as a subsequent remedial measure (NRS 48.095) or because of the danger of unfair prejudice (NRS 48.035).

Generally, safety measures taken after an accident by a defendant are inadmissible to prove antecedent negligence or an admission of negligence. See

Bomar v. United Resort Hotels, 88 Nev. 344 (Nev. 1972). "The rationale underlying this statute, which is similar to others adopted in many jurisdictions, is that tort-feasors will be deterred from taking remedial measures after an accident if they believe that evidence of such measures may later be used against them." *Jeep Corporation v. Murray*, 101 Nev. 640, 708 P.2d 297 (1985), superseded by statute on other grounds as stated in *Countrywide Home Loans v. Thitchener*, 124 Nev. 725, 192 P.3d 243 (2008).

Because preventability determinations involve consideration of a multitude of causal factors, the analysis of which likely goes far beyond the applicable standard of care for torts, admissibility of this evidence carries with it the danger of unfair prejudice and could potentially be excluded under NRS 48.035. However, the production of any preventability determinations would not constitute privileged material under Nevada law. See NRS 49.015(1) (providing that there are no testimonial privileges other than those required by the United States or Nevada Constitutions or provided by statute).

B. Traffic Citation from Accident

1. Generally Inadmissible:

The trier of fact determines who and what caused the motor vehicle accident. *Frias v. Valle*, 101 Nev. 219 (1985). In *Frias*, a taxicab owned and operated by ABC Union Cab rear-ended a small pick-up truck. The trial court admitted the traffic accident report into evidence, which was prepared by the investigating officer. The jury awarded the truck driver damages and ABC Cab appealed.

On appeal, ABC Cab argued that the trial court erred in admitting the officer's traffic accident report into evidence. The Nevada Supreme Court ultimately agreed with ABC Cab and ruled that "the conclusions of [the] Officer, based upon statements of third parties and a cursory inspection of the scene, did not qualify him to testify as to who was at fault." *Frias*, at 221. The Court went on to rule that "evidence of the traffic citation was also inadmissible." *Id*. Regarding the investigating officer's statements, the Court determined that they are still admissible as percipient witness testimony. *Frias,* however, places limits on an officer's testimony as to who was at fault when the officer's conclusions rely on hearsay statements and not based on first-hand knowledge.

In *Langon v. Matamoros*, 121 Nev. 142 (2005), plaintiff sued defendant for personal injuries stemming from a motor vehicle accident. The police issued defendant a citation for failure to yield the right of way. At trial, defendant pleaded no contest, forfeited bail, and paid a fine in connection with the citation. *Id*. at 142. The jury returned a defense verdict in favor of defendant and plaintiff appealed.

On appeal, plaintiff argued that under NRS 41.133, defendant's no contest plea and forfeiture of bail is conclusive evidence that she is liable for Langon's

alleged injuries. NRS 41.133 states, "If an offender has been convicted of a 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." The Court did not agree with plaintiff, finding that plaintiff's interpretation was not consistent with the Legislative intent of NRS §41.133, which was intended to protect victims of violent crimes, and directly conflicted with NRS §41.141, Nevada's modified comparative negligence statute that insulates a defendant from liability when the plaintiff's comparative negligence is ruled more than 50%. *Id*. at 145. The Court determined that if NRS 41.133 were applied as plaintiff suggested, discretionary police decisions to issue traffic citations, regardless of potential evidence of comparative negligence, would serve to conclusively override the basic statutory construct governing the law of negligence. Such an approach would render the comparative negligence scheme of NRS 41.141 meaningless in this context.

The Court then held that because NRS §41.133 does not apply to misdemeanor traffic offenses, convictions entered upon traffic citations may not be used to conclusively establish civil liability.

Although NRS 41.133 cannot be used to establish civil liability as a matter of law for misdemeanor traffic convictions, opposing counsel may still comment on the misdemeanor at the time of trial.

C. Failure to Wear a Seat Belt

1. Nevada law requires the driver and all passengers who are 6 years of age or older or who weigh more than 60 pounds, regardless of age, to wear a seatbelt in the front and back seats of a motor vehicle. NRS 484D.495(2).

2. Failure to wear a seatbelt is not admissible as evidence. NRS 484D.495(4) provides:

   A violation of [Nevada's seat belt law]:
   (a) Is not a moving traffic violation under NRS 483.473.[2]
   (b) May not be considered as negligence or as causation in any civil action or as negligent or reckless driving under NRS 484B.653.
   (c) May not be considered as misuse or abuse of a product or as causation in any action brought to recover damages for injury to a person or property resulting from the manufacture, distribution, sale or use of a product.

   Although not directly interpreting the statute, the Nevada Supreme Court considered this statute in *BMW v. Roth*, 127 Nev. Adv. Op. 11 (2011). The Court recognized that NRS 484D.495(4) addresses causation, in addition to negligence and abuse or misuse of product. However, unlike some seatbelt statutes, NRS 484D.495(4) does not say that "evidence of failure to wear a seat belt shall not be admissible" in any proceeding. *Id.* (quoting *Barron v. Ford Motor Co. of Canada, Ltd.,* 965 F.2d 195, 198 (7th Cir.1992) (quoting N.C. Gen.Stat. § 20–135.2A(d) and noting that, read literally, that statute would hold that, "if an irate passenger ripped off his seat belt, tore it from its moorings, and used it to strangle the driver, in the ensuing murder trial the prosecution would be forbidden to identify the murder weapon because to do so would be to show that the defendant had not been wearing his seatbelt")).

   Rather, NRS 484D.495(4)(b) and (c) say that "[a] violation of section 2" (the vehicle code provision requiring adults to wear seatbelts when riding in cars) "[m]ay not be considered as negligence or as misuse or abuse of a product or as causation" in any civil action. The Court determined that this wording suggests that NRS 484D.495(4)(b) and (c) only bar evidence in a civil action that a party's conduct constituted a statutory violation of law, not evidence of the underlying conduct and that this would prevent use of the seatbelt statute to establish duty or fault but not the admissibility of the underlying fact the seatbelt was not being worn. The Court, however, declined to resolve these issues.

D. Failure of Motorcyclist to Wear a Helmet

1. NRS 486.231 requires the driver and passenger of any motorcycle (except a trimobile or moped) to wear protective headgear securely fastened on the head and protective glasses or face shields.

2. Minors and Vicarious Liability: NRS 486.101 dictates that the application of any person under the age of 18 years for a motorcycle driver's license must be signed and verified, before a person authorized to administer oaths, by either or both the father or mother of the applicant, if either or both are living and have custody of him, or if neither parent is living, then by the guardian having custody, or by an employer of the minor, or if there is no guardian or employer, then by any responsible person who is willing to assume the obligation imposed pursuant to NRS 486.011 to 486.381, inclusive, upon a person signing the application of a minor.

   Any negligence or willful misconduct of a minor under the age of 18 years when driving a motorcycle upon a highway is imputed to the person who signed the application of the minor for a license. That person is jointly and severally liable with the minor for any damages caused by negligence or willful misconduct.

E. Evidence of Alcohol or Drug Intoxication

NRS 484C.150(1)(a)(b) states that:
"Any person who drives or is in actual physical control of a vehicle on a highway or on premises to which the public has access shall be deemed to have given his or her consent to a preliminary test of his or her breath to determine the concentration of alcohol in his or her breath when the test is administered at the direction of a police officer at the scene of a vehicle accident or collision or where the police officer stops a vehicle, if the officer has reasonable grounds to believe that the person to be tested was:

(a) Driving or in actual physical control of a vehicle while under the influence of intoxicating liquor or a controlled substance; or
(b) Engaging in any other conduct prohibited by NRS 484C.110, 484C.120, 484C.130 or 484C.430."

NRS 484C.150(3) states that:

"The result of the preliminary test must not be used in any criminal action, except to show there were reasonable grounds to make an arrest."

NRS 484C.250 discusses admissibility of results of blood tests in hearing or criminal action:

1. The results of any blood test administered under the provisions of NRS 484C.160 or 484C.180 are not admissible in any hearing or criminal action arising out of acts alleged to have been committed by a person who was

driving or in actual physical control of a vehicle while under the influence of intoxicating liquor or a controlled substance or who was engaging in any other conduct prohibited by NRS 484C.110, 484C.120, 484C.130 or 484C.430 unless:

(a) The blood tested was withdrawn by a person, other than an arresting officer, who:
  (1) Is a physician, physician assistant licensed pursuant to chapter 630 or 633 of NRS, registered nurse, licensed practical nurse, emergency medical technician or a phlebotomist, technician, technologist or assistant employed in a medical laboratory; or
  (2) Has special knowledge, skill, experience, training and education in withdrawing blood in a medically acceptable manner, including, without limitation, a person qualified as an expert on that subject in a court of competent jurisdiction or a person who has completed a course of instruction described in subsection 2 of NRS 652.127; and

(b) The test was performed on whole blood, except if the sample was clotted when it was received by the laboratory, the test may be performed on blood serum or plasma.

2. The limitation contained in paragraph (a) of subsection 1 does not apply to the taking of a chemical test of urine, breath or other bodily substance.
3. No person listed in paragraph (a) of subsection 1 incurs any civil or criminal liability as a result of administering of a blood test when requested by a police officer or the person to be tested to administer the test.

Evidence of a party's possible intoxication may be probative of the issues of causation and comparative negligence; however, evidence of intoxication should not be admitted if there is no support for finding a causal link between the alleged impairment and the injury. *FGA, Inc. v. Giglio*, 278 P.3d 490 (Nev. 2012); *Holderer v. Aetna Cas. & Sur. Co.*, 114 Nev. 845 (Nev. 1998). Evidence of intoxication is also relevant to a person's ability to perceive and, thus, may be "admissible to attack a witness on [his or] her ability to perceive and remember." *FGA, Inc. v. Giglio*, 278 P.3d 490 (Nev. 2012). This evidence need not be limited to expert testimony. See *FGA, Inc.*, 278 P.3d 490 (Nev. 2012); *Holderer*, 114 Nev. 845 (Nev. 1998); *Sheriff v. Burcham*, 124 Nev. 1247 (Nev. 2008).

In worker's compensation cases, NRS 616C.230(1)(d) provides that any amount of a controlled substance creates a rebuttable presumption that the controlled substance was a proximate cause of a claimant's injuries. *Constr. Indus. Workers' Comp. Group v. Chalue*, 119 Nev. 348 (Nev. 2003). However, the Nevada Supreme Court has determined the statute does not require expert testimony to rebut the presumption. *Id*.

The Nevada Supreme Court has held that "[o]ther criminal acts of a defendant are admissible if substantially relevant and if not offered for the purpose of showing the likelihood that he committed the act of which he is accused in conformity with a trait of

character. " *Santillanes v. State*, 104 Nev. 699 (Nev. 1988) Thus, evidence of possession of illegal narcotics may be admissible where there is no proof of intoxication if its probative value must outweighs any prejudicial effect. *Id*.

F. Testimony of Investigating Police Officer

In *Frias v. Valle*, 101 Nev. 219, 221 (1985), the Nevada Supreme Court ruled that the conclusions of an Officer, based upon statements of third parties and a cursory inspection of the scene, did not qualify him to testify as to who was at fault." The Court determined that the investigating officer's statements are still admissible as percipient witness testimony; however, *Frias* places limits on an officer's testimony as to who was at fault when the officer's conclusions rely on hearsay statements and are not based on first-hand knowledge.

G. Expert Testimony

1. NRS 50.275 dictates that "If 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."

2. Nevada adherence to any Federal standard: In *Higgs v. Nevada*, 222 P.3d 648 (Nev. 2010), the Nevada Supreme Court expressly disavowed adherence to the *Daubert* standard. The Court further stated that although it looks favorably to Federal cases as a limitation on the factors considered for admissibility of expert witness testimony, NRS 50.275 provides the standard for admissibility of expert witness testimony in Nevada.

   To testify as an expert under NRS 50.275, the expert must first satisfy three requirements: (1) the qualification requirement, (2) the assistance requirement, and (3) the limited scope requirement. *Hallmark v. Eldridge,* 124 Nev. 492, 497, 189 P.3d 646, 650 (2008).

   (a) Qualification Requirement -- To testify as an expert, the District Court must first determine whether the expert is qualified in an area of scientific, technical, or other specialized knowledge. Id. at 650-651. In determining whether a person is properly qualified, the court considers such factors as: (1) formal schooling and academic degrees, (2) licensure, (3) employment experience, and (4) practical experience and specialized training. *Id*.

   (b) Assistance Requirement -- Regarding the assistance requirement, the expert's specialized knowledge must "assist the trier of fact in understanding the evidence or determining a fact in issue." *Id.* at 651. The *Hallmark* Court further explained that to assist the trier of fact, the expert's

opinion must be based upon reliable methodology:

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. *Id*. at 651-52.

(c) Limited Scope Requirement -- The final *Hallmark* requirement necessitates that a witness' testimony be limited "to matters within the scope of [his or her specialized] knowledge" (the limited scope requirement)." *Hallmark v. Eldridge*, 189 P.3d at 650.

H. Collateral Source

1. Generally: The collateral source rule provides that where "'an injured party received some compensation for his injuries from a source wholly independent of the tortfeasor, such payment should not be deducted from the damages which the plaintiff would otherwise collect from the tortfeasor.'" *Proctor v. Castelletti*, 911 P.2d 853, 854 (Nev. 1996) (quoting *Hrnjak v. Graymar, Incorporated*, 484 P.2d 599, 602 (Cal. 1971)). A tortfeasor cannot claim an offset or credit for medical bills paid by the injured party's own insurance. That insurance is considered a collateral source. *Proctor v. Castelletti,*112 Nev. 88, 90, 911 P.2d 853, 854 (1996).

2. NRS 42.021 governs the introduction of certain evidence relating to collateral benefits and restrictions on source of collateral benefits.

3. Nevada has adopted a *per se* rule that bars the admission of a collateral source of payment for a loss or injury into evidence for any purpose. *Proctor*, 911 P.2d at 854. The purpose of the collateral source rule is to prevent "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." *Bass-Davis v. Davis*, 134 P.3d 103, 110 (Nev. 2006).

4. Worker's Compensation Exception: The Nevada Legislature has carved out a small exception to the collateral source rule with regards to worker's compensation payments. The statute required that in all cases involving injuries incurred through third person parties at the workplace specific jury instruction were to be supplied. The instruction informs the jury that an injured employee would be required to repay any SIIS benefits received.

In *Cramer v. Checker Cab*, the Nevada Supreme Court explored the impact

NRS 616C.215(10) had on the collateral source rule. *Cramer*, 3 P.3d 665, 669 (Nev. 2000). The Court noted the legislature's concern for injured workers. They explained that cases involving SIIS benefits are unique from other insurance cases because the jury already knew that the plaintiff had received SIIS benefits when the injury was work related. The Legislature considered evidence that the jury was usually under the mistaken belief that the plaintiff was not required to repay SIIS from any damage award. Thus, the Legislature instituted NRS 616C.215(10) to dispel erroneous jury speculation that may ultimately cause them to reduce an award.

Accordingly, NRS 616C.215(10) cannot be used by the defense to imply that the plaintiff has already been compensated, or will receive a double recovery if awarded a judgment.

I. Recorded Statements

NRS 47.120 states that when any part of a writing or recorded statement is introduced by a party, the party may be required at that time to introduce any other part of it which is relevant to the part introduced, and any party may introduce any other relevant parts. The statute does not limit cross-examination.

J. Prior Convictions

NRS 50.095(1) states: For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime is admissible but only if the crime was punishable by death or imprisonment for more than 1 year under the law under which he was convicted.

Mere arrests and convictions for misdemeanors may not ordinarily be admitted even for the limited purpose of attacking a witness's credibility. *Sheriff, Washoe County v. Hawkins*, 752 P.2d 769 (1998).

Conviction of a felony may be admitted to attack credibility, but even as to felony convictions, a trial court may properly exercise discretion to exclude such evidence. *See* NRS 48.035(1), (2).

K. Driving History

NRS 48.045(2) provides: Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Before admitting prior bad act evidence, the District Court must determine whether the evidence is relevant and proven by clear and convincing evidence. *Bongiovi v. Sullivan*, 122 Nev. 556 (Nev. 2006). However, the evidence is inadmissible "if its probative value is substantially outweighed by the danger of unfair prejudice." *Id*.

L. Fatigue

No Nevada cases specifically address the admissibility of "hours of service" violations or evidence concerning "fatigue" as a contributing factor to an accident.

M. Spoliation

NRS 47.250(3), which governs disputable presumptions, includes one for the willful destruction of evidence.: "That evidence willfully suppressed would be adverse if produced

In *Bass-Davis v. Davis*, 134 P.3d 103 (Nev. 2006), the Nevada Supreme Court articulated the standard for a jury assessing negligent or intentional spoliation of evidence relevant to litigation. The Court held that the jury was entitled to an instruction permitting a negative inference that the missing evidence was unfavorable to the defendants who negligently lost it. The Court held further that where an opposing party demonstrates that evidence was intentionally lost or destroyed to cause harm or gain a tactical advantage in litigation, a rebuttable presumption arises that the evidence is unfavorable to the party who destroyed it or intentionally lost it. The party that intentionally lost/destroyed the evidence bears then bears a shifted burden of rebutting the presumption of adverseness by a preponderance of the evidence. The Court concluded that because the evidence was apparently negligently lost in the case, the jury could infer it was unfavorable to the defense and should be instructed as such at a new trial; however, the burden of disproving adverseness would not shift to the defense.

Settlement

A. Offer of Judgment

1. Purpose: The purpose of an Offer of Judgment ("OOJ") is to promote and encourage settlement. *Mujie v. A N. North Las Vegas Cab Co.*, 106 Nev. 664, 667, 799 P.2d 559, 561 (1990). OOJs reward a party who makes a reasonable offer to settle and punish the party who refuses to accept such an offer. *Dillard Dep't Stores, Inc. v. Beckwith*, 115 Nev. 372, 382, 989 P.2d 882, 888 (1999).

2. Statutory Relief: In Nevada, Offers of Judgment can be made pursuant to NRS 17.115, NRCP 68 or both:

   a. NRS 117.115 expressly governs judgment offers, but varies from NRCP 68 in that it allows the recovery of only costs and expert witness fees and not attorney's fees. *Beattie v. Thomas*, 99 Nev. 579, 668 P.2d 268 (1983).

      Once made, the offeree has 10 days to accept or reject the offer. This is designed to give the offeree time to carefully consider the likely value of pursuing a claim in light of the Offer of Judgment and the possible penalties that flow from rejections *Nava v. Second Jud. Dist. Ct. ex rel. County of Washoe*, 118 Nev. 396, 46 P.3d 60 (2002).

3. Prejudment Interest and Costs: An Offer of Judgment may include or exclude prejudgment interests and costs. When an Offer of Judgment is silent regarding prejudgment interest, the assumption is that the offer includes prejudgment interest. See *State Drywall v. Rhodes Design & Dev.*, 122 Nev. 111, 119, 127 P.3d 1082 (2006); *Albios v. Horizon Communities, Inc.*, 122 Nev. 409, 426, 132 P.3d 1022, 1033 (2006); *McCrary v. Bianco*, 122 Nev. 102, 110 n. 16, 131 P.3d 573, 578 n. 16 (2006). Although NRCP 68 is silent regarding prejudgment interest, it should be considered harmoniously with the more specific provisions of NRS 117.115. *Bowyer v. Taack*, 107 Nev. 625, 817 P.2d 1176 (1991). The Offer of Judgment must specifically preclude a separate award of costs. If the offer excludes costs or is silent regarding costs, the party accepting the offer can then move the court for an award of costs. NRS 17.115(2)(b); NRCP 68(g).

4. Attorney's Fees: When attorney fees are recovered as a cost of litigation, as opposed to special damages, attorney fees are not typically added to the judgment to determine whether a more favorable judgment is obtained. *Bowyer v. Taack*, 107 Nev. 625, 817 P.2d 1176 (1991). If there are independent grounds to recover attorney fees, the same presumptions that apply to costs and interest should apply to attorney fees.

5. Construction Defect Actions: In order for an offer of judgment to be valid in construction defect cases governed by NRS 40.600, the offer must consider all the damages that a claimant is entitled to under NRS 40.655. In *Albios*, The court reasoned that the attorney fees were proximately caused by the construction defects and the court treated attorney's fees as special damages. Thus, in construction defect cases the attorney fees need to be calculated as being part of the principal judgment to determine the appropriate amount of the offer of judgment.

6. Joint Unapportioned Offers: Joint unapportioned Offers of Judgment are generally invalid because an individual party cannot properly evaluate the risks and benefits of rejecting or accepting the offer without knowing the individual amount. *Parodi v. Budetti*, 115 Nev. 236, 984 P.2d 172 (1999). A joint unapportioned offer is only valid if: (1) there is a single common theory of liability; (2) the liability or recovery of damages of one or more of the parties is entirely derivative of the liability of the remaining parties; (3) the liability or recovery of damages is entirely derivative of an act or injury to another person; or (4) the same person or entity is authorized to decide whether to settle the claims. *See* NRS.115(9) and NRCP 68(c).

   Joint apportioned offers may be made where each party is assigned a specific amount. There is an option to make the acceptance of the offer contingent on the other parties accepting their separate Offers of Judgment.

7. Timing: An Offer of Judgment must be served at least 10 days prior to trial. Service must be made pursuant to NRCP 5(b). However, the offer must not be too soon or in an unreasonable amount. In considering whether to award fees and costs pursuant to an offer of judgment, the court must consider the following factors: 1) whether the claim was brought in good faith; 2) whether the defendants' offer of judgment was reasonable and in good faith in both its timing and amount; 3) whether the plaintiff's decision to reject the offer and proceed to trial was grossly unreasonable or in bad faith; and 4) whether the fees sought by the offeror are reasonable and justified in amount. *Beattie v. Thomas*, 99 Nev. 579 (Nev. 1983); *Uniroyal Goodrich Tire Co. v. Mercer*, 111 Nev. 318 (Nev. 1995); *Yamaha Motor Co., U.S.A. v. Arnoult*, 114 Nev. 233 (Nev. 1998).

8. Effect: A party that obtains a judgment can compare its Offer of Judgment to determine if the judgment was more favorable that the offer. If the offer included, or was silent regarding prejudgment interest, the pre-offer amount of the pre-offer prejudgment interest must be added to the judgment. The same must be done with the pre-offer prejudgment costs in accordance with NRS 18.110 and the pre-offer, prejudgment attorney fees. When the rejected offer of judgment is greater than the final judgment including the applicable attorney's fees, costs and interest, the trial judge is authorized to make awards of attorney fees, costs and interest on the judgment to the offeror. *Uniroyal Goodrich Tire Co. v. Mercer*, 111 Nev. 318, 891 P.2d 785 (1995).

9. Last in Time Offer Controls: Although a party may make successive Offers ofJjudgment, the Supreme Court determined that a successive Offer of Judgment will extinguish all prior Offers of Judgment. See *Albios*, 132 P.3d at 1032-33.

B. Liens

1. Hospital Liens: NRS 108.590 dictates that whenever any person receives hospitalization on account of any injury, and the injured person, or a personal representative after the person's death, claims damages from the person responsible for causing the injury, the hospital has a lien upon any sum awarded the injured person or the personal representative by judgment or obtained by a settlement or compromise to the extent of the amount due the hospital for the reasonable value of the hospitalization rendered before the date of judgment, settlement or compromise.

   a. A notice of the lien must be recorded and a certified copy of the notice of lien must be sent by registered or certified mail upon the alleged tortfeasor before the date of judgment, settlement or compromise. NRS 108.160.

   b. In Nevada, attorney liens take priority over those of medical service providers. NRS 108.600(2); *Michel v. Eighth Judicial District Ct.,* 117 Nev.

Adv. Op. No. 16 (February 22, 2001).

c. This statutory lien provision does not extend to underinsured motorist coverage. *Washoe Medical Center, Inc. v. Reliance Ins. Co.*, 112 Nev. 494 (1996). The Court noted that the express language of NRS 108.590 does not authorize attachment to UM coverage, instead referring to "damages from the person responsible for causing the injury." An injured party's own insurance provider, through which it received UM coverage, cannot be included as a person responsible for causing the injury. The Court concluded that "hospital liens do not attach unless an injured person claims damages from the third-party tortfeasor and the injured person is subsequently awarded damages pursuant to a judgment, settlement or compromise with the third-party tortfeasor or the third-party tortfeasor's insurance carrier."

2. Motor Vehicle Repair/Towing Liens – NRS 108.300 dictates that any insurance company, having outstanding and in effect appropriate insurance coverage therefor, which has been given notice in writing of a debt or obligation incurred for the towing or repair of any motor vehicle damaged by an insured of the company for which the insured is legally responsible becomes, subject to the conditions and provisions of the insurance policy, indebted to the claimant for such towing or repair services, for the reasonable expenses incurred for towing or repair of the vehicle, if the claimant has given notice to the company or its agent at least 3 days before the date of any settlement or award effected by the company in connection therewith.

C. Minor Settlement

NRS 41.200 sets out the procedure for compromising the claims of a minor. Subsection 1 of the statute provides that when a minor has a claim for money against a third person, either of the minor's parents or a guardian *ad litem* has the right to compromise the claim. NRS 41.200(1); *Haley v. Eighth Judicial District Court*, 273 P.3d 855 (Nev. 2012). A compromise is not effective until approved by the District Court upon a verified petition in writing. *Id.*

NRS 41.200(1) grants the District Court broad authority to approve the proposed compromise of a minor's claim. This approval process expressly encompasses a review of the statutory requirements for the petition and the documentation required for court approval of the compromise. Additionally, NRCP 17(c) provides the District Court with general authority to issue any "order as it deems proper for the protection" of a minor. Thus, there is no minimum settlement amount that triggers the duty to petition for court approval, the duty to seek court approval is present in all cases where a third party seeks to compromise the damage claim of a minor.

Taking into account Nevada's preference to consider a minor's best interest, the Nevada Supreme Court has concluded that NRS 41.200 allows the District Court to assess the reasonableness of a petition to approve the compromise of a minor's claim and to ensure that approval of the proposed compromise is in the minor's best interest. This review necessarily entails the authority to review each portion of the proposed compromise for reasonableness and to adjust the terms of the settlement accordingly, including the fees and costs to be taken from the minor's recovery. *Haley v. Eighth Judicial District Court*, 273 P.3d 855 (Nev. 2012).

D. Negotiating Directly With Attorneys

1. In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order. Nevada Rules of Professional Conduct 4.2.

2. However, settlement negotiations with persons other than parties' attorneys have been held by the Nevada Supreme Court to be the unauthorized practice of law under certain circumstances. In *Re Discipline of Lerner*, 197 P.3d 1067, 1074 (Nev. 2008) (holding that an Arizona attorney unlicensed in Nevada had engaged in the unauthorized practice of law sending settlement demand letters to insurance carriers and negotiating with adjusters).

E. Confidentiality Agreements

1. NRS 613.200(4)(b) provides that a person, association, company, corporation, agent or officer may negotiate, execute, and enforce an agreement with an employee of the person, association, company or corporation which, upon termination of the employment, prohibits the employee disclosing any trade secrets, business methods, lists of customers, secret formulas or processes or confidential information learned or obtained during the course of his or her employment with the person, association, company or corporation.

2. However, the agreement must be supported by valuable consideration and be reasonable in its scope and duration.

F. Releases

1. NRS 17.245 dictates that when a release or a covenant not to sue or not to

enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death:

a. It does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide, but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater; and

b. It discharges the tortfeasor to whom it is given from all liability for contribution and for equitable indemnity to any other tortfeasor.

2. The determination of good faith is a matter left to the trial court's discretion based upon all relevant facts available, and that, in the absence of an abuse of that discretion, the trial court's findings will not be disturbed on appeal. *The Doctors Company v. Vincent,* 98 P.3d 681, 686 (Nev. 2004) (citing In *re MGM Grand Hotel Fire Litigation*, 570 F. Supp. 913, 927 (D. Nev. 1983); *Velsicol Chem. Corp. v. Davidson*, 811 P.2d 561, 563 (Nev. 1991).

3. Factors to be considered by the Court in assessing whether a settlement is in good faith are:

a. The amount paid in settlement;
b. The allocation of the settlement;
c. The proceeds among plaintiffs;
d. The insurance policy limits of the settling defendants;
e. The financial condition of the settling defendants; and
f. The existence of collusion, fraud or tortious conduct aimed to injure the interests of non-settling defendants. *Id.*

G. Voidable Releases

Under Nevada law, settlement agreements are contracts and are governed by principles of contract law. *Kahn v. Dodds (In re AMERCO Derivative Litig.)*, 252 P.3d 681 (Nev. 2011). Nevada courts have reasoned that a release agreement may be rescinded if obtained by mutual mistake or inadequate consideration. *Chwialkowski v. Sachs*, 108 Nev. 404 (Nev. 1992). Moreover, a unilateral mistake can be the basis of a rescission if the other party had reason to know of the mistake. Oh v. Wilson, 112 Nev. 38 (Nev. 1996). In *Oh v. Wilson*, the Nevada Supreme Court identified the following factors as relevant in determining whether a party knew or should have known of a misunderstanding by the other party: (1) the haste (or lack thereof) with which the release was obtained, (2) the amount of consideration, (3) the circumstances surrounding the release, including the conduct and intelligence of both the releasor and the releasee, and (4) the actual presence of an issue of liability. *Oh*, 112 Nev. 38 (Nev. 1996).

Transportation Law

A. State DOT Regulatory Requirements

1. In 1983 the State of Nevada adopted Federal Motor Carrier Safety Regulations. NAC 706.247.

2. Motor Vehicle laws in Nevada are governed by both the Nevada Revised Statutes and the Nevada Administrative Code, which can be found at the following link: http://www.dmvnv.com/codebook.htm

B. State Speed Limits

1. Nevada law provides the Nevada Department of Transportation to establish the following speed limits guidelines for motor vehicles, vesting authority to establish speed limits in various public authorities:

   a. School Zones – 15 MPH (NRS 484B.363).

   b. Unincorporated Towns – Varies (NRS484B.610).

      1) Generally, the town board or county commissioners may limit the speed as may be deemed proper. NRS 484B.610(1).

      2) For highways within the boundaries of any unincorporated town that are constructed and maintained by the Nevada Department of Transportation ("NDOT"), the NDOT may establish the speed limits. NRS 484B.610(2).

   c. Highways Constructed & Maintained by NDOT – Varies (NRS 484B.617). NDOT may establish speeds not to exceed 75 MPH and may establish a lower speed.

   d. Rural Areas – Varies (NRS 484B.617). Determined by the public authority with control over the portion of the highway being traversed.

C. Overview of State CDL Requirements

1. Nevada's CDL Manual may be obtained online at: http://www.dmvnv.com/pdfforms/dlbookcomm.pdf

2. Classifications

   a. Class A – Any combination of motor vehicles with a gross combination

weight rating (GCWR) of 26,001 pounds or more provided the vehicle being towed has a gross vehicle weight rating (GVWR) in excess of 10,000 pounds.

b. Class B – Any single vehicle with a GVWR of 26,001 or more pounds, or any such vehicle towing a vehicle not in excess of 10,000 pounds GVWR.

c. Class C – Any single vehicle, or combination of vehicles that does not meet the definition of Class A or Class B, but that either is designed to transport 16 or more passengers including the driver, or is placarded for hazardous materials.

d. Certain exceptions apply, including some farming vehicles, recreational vehicles used for non-commercial purposes, military vehicles, and firefighter emergency equipment.

e. Hazard Materials Endorsements -- Hazardous materials endorsement holders are required to pass the hazardous materials test, in addition to passing the Federally required background check or provide documentation evidencing a background check has been completed with an approval from TSA.

3. CDL Qualifications:

a. Legal Age – Must be at least 21 years of age to receive a CDL to operate a commercial motor vehicle in interstate commerce and 25 years of age or older to drive an over-length combination vehicle (over 70 feet).

b. Medical Exam – Must be physically examined by a U.S. licensed physician every 2 years and issued a signed medical certificate from that doctor, which must then be filed with the DMV.

c. Driving Record – Before issuing the CDL license, the DMV staff must run a nationwide driving record check.

d. Instruction Permit – A Nevada commercial instruction permit is issued for a 1 year period for the purpose of behind-the-wheel training on public roads or highways.

(1) Applicants for a commercial instruction permit must be at least 21 years of age and pass the vision and written examinations.

(2) Applicants between 18 and 20 years of age may be granted a CDL instruction permit to operate a CMV in intrastate commerce. However, this age group will not be allowed to transport passengers or hazardous materials requiring placards.

(3) The holder of an instruction permit must have a medical examiner's certificate in possession dated within 2 years and must be accompanied at all times by a driver who is: (1) At least 25 years of age; (2) Seated next to the driver; and (3) Licensed for the same commercial classification as the permit holder and who has had the license for at least one year.

e. Air Brake Test – As part of the pre-trip inspection portion of the CDL driving examination, the person seeking a CDL license must perform all 3 components of the air brake check correctly or will automatically fail the vehicle inspection test.

Insurance Issues

A. State Minimum Limits of Financial Responsibility

1. NRS 485.185 dictates that every owner of a motor vehicle that must be registered in Nevada shall continuously provide, while the motor vehicle is present or registered in this State, insurance for the payment of tort liabilities arising from the maintenance or use of a motor vehicle, from a state licensed insurance company authorized to do business in Nevada with the following minimum limits:

   a. In the amount of $15,000 for bodily injury to or death of one person in any one accident;

   b. Subject to the limit for one person, in the amount of $30,000 for bodily injury to or death of two or more persons in any one accident; and

   c. In the amount of $10,000 for injury to or destruction of property of others in any one accident,

2. NRS 485.187 dictates that it is unlawful to operate a motor vehicle without the aforementioned insurance or to operate the vehicle without having evidence of such insurance.

B. Uninsured Motorist Coverage

1. UM/UIM Coverage Permissive, Not Mandatory: Insurance companies transacting motor vehicle insurance in Nevada must offer uninsured and underinsured vehicle coverage in an amount equal to the limits of coverage for bodily injury sold to an insured under a policy of insurance covering the use of a passenger car. NRS 687B.145(2).

    a. UM and UIM coverage must include a provision that enables the insured to recover up to the limits of his own coverage any amount of damages for bodily injury from his insurer which he is legally entitled to recover from the owner or operator of the other vehicle to the extent that those damages exceed the limits of the coverage for bodily injury carried by that owner or operator.

    b. If an insured suffers actual damages subject to the limitation of liability provided pursuant to NRS 41.035, underinsured vehicle coverage must include a provision which enables the insured to recover up to the limits of his own coverage any amount of damages for bodily injury from his insurer for the actual damages suffered by the insured that exceed that limitation of liability.

2. An insurer who makes a payment to an injured person on account of underinsured vehicle coverage is not entitled to subrogation against the underinsured motorist who is liable for damages to the injured payee. NRS 687B.145(4). This limitation does not affect the right or remedy of an insurer with respect to uninsured vehicle coverage.

3. An insurer need not offer, provide or make available uninsured or underinsured vehicle coverage in connection with a general commercial liability policy, an excess policy, an umbrella policy or other policy that does not provide primary motor vehicle insurance for liabilities arising out of the ownership, maintenance, operation or use of a specifically insured motor vehicle. NRS 687B.145(5).

C. No Fault Insurance

Nevada is an “at fault” state and does not recognize no fault insurance.

NRCP 16.1(a)(1)(D) mandates that a party provide to the other parties:

For inspection and copying as under Rule 34 any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment and any disclaimer or limitation of coverage or reservation of rights under any such insurance agreement.

However, NRS 48.135(1) specifies that "[e]vidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully." The evidence may be admissible, however, if "relevant for another purpose, such as proof of agency, ownership or control, or bias or prejudice of a witness." NRS 48.135(2).

D. Unfair Claims Practices

1. Generally: Nevada's Unfair Claims Practices Act (NRS 686A.310(2)) creates a private right of action against an "insurer" for violations of the act.

   a. The statute provides that an insurer is liable to its insured for any damages sustained by the insured as a result of the commission of any act specified in the statute as an unfair practice.

   b. Acts that Constitute Unfair Practice:

      1) Misrepresenting to insureds or claimants pertinent facts or insurance policy provisions relating to any coverage at issue;
      2) Failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies;
      3) Failing to adopt and implement reasonable standards for the prompt investigation and processing of claims arising under insurance policies;
      4) Failing to affirm or deny coverage of claims within a reasonable time after proof of loss requirements have been completed and submitted by the insured;
      5) Failing to effectuate prompt, fair and equitable settlements of claims in which liability of the insurer has become reasonably clear;
      6) Compelling insureds to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by such insureds, when the insureds have made claims for amounts reasonably similar to the amounts ultimately recovered;
      7) Attempting to settle a claim by an insured for less than the amount to

which a reasonable person would have believed he or she was entitled by reference to written or printed advertising material accompanying or made part of an application;

8) Attempting to settle claims on the basis of an application which was altered without notice to, or knowledge or consent of, the insured, or the representative, agent or broker of the insured;
9) Failing, upon payment of a claim, to inform insureds or beneficiaries of the coverage under which payment is made;
10) Making known to insureds or claimants a practice of the insurer of appealing from arbitration awards in favor of insureds or claimants for the purpose of compelling them to accept settlements or compromises less than the amount awarded in arbitration;
11) Delaying the investigation or payment of claims by requiring an insured or a claimant, or the physician of either, to submit a preliminary claim report, and then requiring the subsequent submission of formal proof of loss forms, both of which submissions contain substantially the same information;
12) Failing to settle claims promptly, where liability has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage;
13) Failing to comply with the provisions of NRS 687B.310 to 687B.390, inclusive, or 687B.410;
14) Failing to provide promptly to an insured a reasonable explanation of the basis in the insurance policy, with respect to the facts of the insured's claim and the applicable law, for the denial of the claim or for an offer to settle or compromise the claim;
15) Advising an insured or claimant not to seek legal counsel.
16) Misleading an insured or claimant concerning any applicable statute of limitations.

c. No Third-Party Private Right of Action: In *Gunny v. Allstate Ins. Co.*, 108 Nev. 344, 346 830 P.2d 1335 (1992), the Supreme Court said that a third-party "has no private right of action as a third-party claimant under NRS 686A.310." However, the third-party claimant can submit complaints to the Nevada Division of Insurance. The statute does not give third-parties the right to sue the insurer directly to recover damages for those violations.

E. Bad Faith Claims

1. Generally: Nevada law recognizes the existence of an implied covenant of good faith and fair dealing in every contract. An insurer fails to act in good faith when it refuses, without proper cause, to compensate the insured for a loss covered by the policy. Such conduct gives rise to a breach of the covenant of good faith and fair dealing. This breach or failure to perform constitutes bad faith where the relationship between the parties is that of insurer and insured. *Pulley v. Preferred Risk Mut. Ins. Co.*, 111 Nev. 856, 859 (Nev. 1995).

2. Cause of Action: A bad-faith claim requires a showing that the insurer acted in deliberate refusal to discharge its contractual duties. Thus, if the insurer's actions resulted from "'an honest mistake, bad judgment or negligence,'" then the insurer is not liable under a bad-faith theory. *Allstate Ins. Co. v. Miller*, 212 P.3d 318, 330 (Nev. 2009) (quoting *Careau & Co. v. Security Pacific Business Credit, Inc.*, 222 Cal. App. 3d 1371, 272 Cal. Rptr. 387 (Ct. App. 1990)); see *Pemberton v. Farmers Ins. Exchange*, 109 Nev. 789, 793, 858 P.2d 380, 382 (1993) (holding that bad faith exists when an insurer acts without proper cause); *Feldman v. Allstate Ins. Co.*, 322 F.3d 660, 669 (9th Cir. 2003) (interpreting and applying California law and holding that to prove bad faith, plaintiff must show insurer unreasonably or without cause withheld benefits due under the policy).

3. Refusal to Settle Basis for Bad Faith Claim: A bad-faith action applies to more than just an insurer's denial or delay in paying a claim. *Guaranty Nat'l Ins. Co. v. Potter*, 112 Nev. 199, 206, 912 P.2d 267, 272 (1996). An insurer's failure to adequately inform an insured of a settlement offer may also constitute grounds for a bad-faith claim. *Allstate Ins. Co. v. Miller*, 212 P.3d 318, 325 (Nev. 2009). The following factors address whether the insurer acted in bad faith when refusing to settle: (1) the probability of the insured's liability; (2) the adequacy of the insurer's investigation of the claim; (3) the extent of damages recoverable in excess of policy coverage; (4) the rejection of offers in settlement after trial; (5) the extent of the insured's exposure as compared to that of the insurer; and (6) the nondisclosure of relevant factors by the insured or insurer.

4. Third-Party Bad Faith Claims: There is no third party right to assert bad faith claims against insurers in Nevada. The right to assert the claim is founded in the implied covenant of good faith and fair dealing, which arises only from a contract. Because third parties do not have contractual privity with the insurer, no duties are owed under a policy of insurance by the insurer and a third party has no standing to make the claim. See *United Fire Insurance v.*

McClelland, 105 Nev. 504, 780 O.2d 193 (1989); *Gunny v. Allstate Insurance Company*, 108 Nev. 344, 830 P.2d 1335 (1992).

It should be noted, however, that based upon a 2011 decision by the Nevada Supreme Court, a third party may easily obtain a right of action against a tortfeasor's insurer in the event of a verdict in excess of the policy of insurance where the insurer had the opportunity to settle the case within the policy prior to trial. In the past, the third party was required to obtain an assignment of the bad faith right of action against the insurer from the defendant in the case. In August 2011, the Nevada Supreme Court ruled that the plaintiff in such a case may obtain a judicial assignment by motion as part of the process of executing on the judgment. See *Gallegos v. Malco Enterprises*, 255 P.3d 1287 (Nev. 2011).

F. Coverage – Duty of Insured

1. Compliance with Conditions Precedent in Policy: When an insurance policy explicitly makes compliance with a term in the policy a condition precedent to coverage, the insured has the burden of establishing that it complied with that term. *Insurance Co. v. Cassinelli*, 67 Nev. 227, 244–45, 216 P.2d 606, 615 (1950); *Lucini–Parish Ins. v. Buck*, 108 Nev. 617, 620, 836 P.2d 627, 629 (1992).

   a. Notice: Nevada has adopted the "notice-prejudice" rule. *Las Vegas Metropolitan Police Department v. Coregis Insurance Company*, 127 Nev. Adv. Op. 47, 256 P.3d 958 (2011).

      The rule requires that in order for an insurer to deny coverage of a claim based on the insured party's late notice of that claim, the insurer must show: (1) that the notice was late and (2) that it has been prejudiced by the late notice. Prejudice exists "where the delay materially impairs an insurer's ability to contest its liability to an insured or the liability of the insured to a third party." *Id.* (citing *West Bay Exploration v. AIG Specialty Agencies*, 915 F.2d 1030, 1036–37 (6th Cir.1990) (internal quotation omitted)). The issue of prejudice is an issue of fact. *Id*. (citing See *Mutual of Enumclaw Ins. Co. v. USF Ins. Co*., 191 P.3d 866, 876 (Wash.2008)).

      The Court placed the burden to show prejudice on the insurer because it determined that it is more practical and equitable to require the insurer to prove it has been prejudiced than it would be to place that burden on the insured party and require him or her to prove a negative, namely, that the insured had not been prejudiced. Additionally, because insurance policies are generally adhesion contracts, equity principles support placing the burden to prove prejudice on the insurer because it is trying to deny its obligations under a contract of adhesion.

This rule is consistent with NAC 686A.660(4), which states: No insurer may, except where there is a time limit specified in the insurance contract or policy, require a claimant to give written notice of loss or proof of loss within a specified time or seek to relieve the insurer of the obligations if the requirement is not complied with, unless the failure to comply prejudices the insurer's rights.
G. Fellow Employee Exclusions
Nevada has no case law directly dealing with the enforceability of fellow employee exclusions.