

DIGEST OF INSURANCE LAW

NEVADA

Courtesy of

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Las Vegas, Reno & Elko, Nevada

CIVIL JUDICIAL SYSTEM

Courts of Original Jurisdiction

Inferior courts of limited original civil jurisdiction are Justice and Municipal Courts.

District Courts of Nevada are courts of general jurisdiction and have original jurisdiction in all cases in equity and in all cases at law except those in which exclusive jurisdiction is conferred upon Justice or other inferior courts. District Courts also have original jurisdiction in all matters relating to estates of deceased persons, of minors, and insane persons.

Appellate Courts

Supreme Court is state court of last resort, civil and criminal. Court's decisions are final except in cases involving federal question. Supreme Court has appellate jurisdiction in all civil cases arising in District Courts, and also on questions of law alone in all criminal cases in which offense charged is within original jurisdiction of District Court. Supreme Court also has power to issue writs of mandamus, certiorari, prohibition, quo warranto, habeas corpus and all other writs necessary or proper to complete exercise of its appellate jurisdiction. The Court consists of seven elected justices, divided into two panels.

LAW

Abbreviations

- Am. Rep. – American Reports.
- F. Supp. – Federal Supplement.
- F.2d – Federal Reporter, Second Series.
- L.R.A. (N. S.) – Lawyer's Reports Annotated, New Series.
- Nev. – Nevada Reports.
- Nev. Adv. Op. – Nevada Advance Opinions.
- NRS – Nevada Revised Statutes.
- N.A.R. – Nevada Arbitration Rules.
- NRCP – Nevada Rule of Civil Procedure
- P. – Pacific Reporter.
- P.2d – Pacific Reporter, Second Series.

S.L. – Session Laws.

U.S. – United States Reports (Supreme Court).

For insurance laws generally, see NRS, Title 57, and for industrial insurance see NRS, Chs. 616, 617.

ACCIDENT AND HEALTH INSURANCE

See also "ACCIDENTAL MEANS" and "DISABILITY."

Contract Law.

Cancellation. Companies must mail written notice of intent to cancel policy because of payment default to insured's last known address and to insured's agent at least 10 days before cancellation; if default is cured within 10 days, policy may not be cancelled. If default is not cured, cancellation notice with effective date of cancellation must be mailed to insured. NRS §686A.460.

Renewal. Insurer shall not cancel, refuse to renew, or increase a premium for renewal of a policy of motor vehicle insurance as a result of claims made under policy where insured was not at fault. NRS §687B.385. Insured has right to renewal unless notice of nonrenewal is mailed 60 days prior to expiration of commercial/business policies, and 30 days prior to expiration of all other policies (except where policy is expressly deemed nonrenewable, and where insured has accepted replacement coverage or has requested or agreed to nonrenewal). NRS §687B.340. In order to renew a policy on different terms, insurer shall provide insured, in writing, different terms or rates 30 days prior to expiration of the policy. If notice is not adequate or timely, then the policy shall be renewed at the expiring terms and rates for the expiring term or a maximum of one year. NRS §687B.350.

Notice. Where insurer asserts late notice defense from outset via a non-waiver agreement, subsequent denial of coverage on other grounds does not constitute waiver of notice defense. *Havas v. Atlantic Ins.*, 96 Nev. 586, 614 P.2d 1 (1980).

Health Insurance.



Nevada has an express statutory scheme pertaining to sale and delivery of health insurance. Basic health insurance statute is found under Uniform Health Policy Provision Law. NRS §689A.010. General requirements for health insurance are further defined by NRS §§689A.030-689A.460.

Nevada's statutes on portability and accountability are the subject of NRS §§689A.470-689A.740. The statutes were amended in 2001 to reflect consistency with federal plan into forming certain definitions for "credible coverage" under NRS §689A.505. These statutes encompass a definition for Group Health Plans which are the subject of employer sponsored benefit plans as defined by Employee Retirement Income Security Act of 1974 (ERISA). See NRS §689A.535.

Group and blanket health insurance is further defined by Chapter 689B. *et seq.* These statutes were amended in 2001 and represent a complex series of statutory construction. However, group health is generally defined as insuring coverage groups of two or more persons formed for purpose other than obtaining insurance under NRS §689B.020 *et seq.* Whereas, "blanket health insurance" is defined by NRS §689B.070; and typically, involves a common carrier an employer, a college, school, religious, charitable, educational, organizations, a sports program or a volunteer organization.

Statutory Requirements on Handling Health Insurance Claims. These particular health insurance codes require certain handling issues for claims on approval and denial. The primary statute is NRS §689A.410(1)(2). In Nevada, insurer must approve or deny a claim relating to a policy of health insurance within 30 days after insurer receives claim. If claim is approved, insurer shall pay claim within 30 days after it is approved. If insurer requires additional information to determine whether to approve or deny claim, it shall notify claimant of its request for additional information within 20 days after it receives claim.

The statute allows court to impose both attorney's fees and costs for failure to comply with this section, as well as to provide for payment of interest. Commissioner was also empowered to require insurer to provide evidence that demonstrates insured had substantially complied with requirements set forth in this section.

Insurance commissioner has ability to impose administrative fine in amount to be determined by commissioner for any violation of this section.

Similar statutory construction was added to NRS §695C.185 for health maintenance organizations.

RICO Exception to ERISA Preemption. Historically, claims presented against a health insurer or a

maintenance organization was subject to ERISA preemption.

For example, advancing theory of fraudulent inducement or misrepresentations on a summary plan typically fell within provisions of Act's catchall enforcement provisions under Employee Retirement Income Security Act of Section 404(a) 502(a)(1)(b)(a)(3). However, in *Humana, Inc. v. Forsyth*, 525 U.S. 299 (1999), U.S. Supreme Court granted certiorari to answer to questions of whether a "federal law which prescribed the same conduct as state law, but provides materially different remedies 'impairs' state law under the McCarran-Ferguson Act."

In that case, health insurance policyholders brought similar RICO claims alleging that Humana and hospital engaged in fraudulent scheme whereby insurance company secretly obtained discounts from hospital, but concealed those discounts from policyholders. See *Id.* at 303-304. The Court found that although RICO did not fall within business of insurance exception, neither did it 'invalidate' or supersede state law. The case therefore turned on definition of "impaired." Justice Ginsburg, writing for a unanimous court, formulated the following test for determining whether federal civil action impairs state law. "When federal law does not directly conflict with state regulation, and when application of the federal law would not frustrate any declared state policy or interfere with the state's administrative regime, the McCarran-Ferguson Act does not preclude its application." *Id.* at 309. Applying this standard to the case before it, the Court found that while federal and state law both regulate the same fraudulent insurance activity, the Nevada Unfair Insurance Practices Act authorizes private actions for victims of insurance fraud and provides remedies exceeding those available under RICO's civil provisions. Therefore, because RICO advances a state's interests in prohibiting insurance fraud and did not frustrate any articulated state policy, the McCarran-Ferguson Act did not bar the Plaintiff's claims. See *Id.* at 314.

Humana has been applied where statutory construction is similar in terms of creating a private cause of action to the victims of insurance fraud. See *e.g. In re Managed Care Litigation*, 185 F. Supp. 2d 1310 (S.D. Fla. 2002) (discussing those federal cases distinguishing *Humana*).

Disability Insurance. Disability insurance is not expressly governed by an applicable insurance code. Disability insurance is part of Nevada's individual health insurance act. There "total disability" is defined in NRS §689A.380(4) unless expressly defined in a subject policy. Furthermore, the statutory construction is applicable only to individual disability policies. These definitions have no application to group disability.

Nevada has no express case law or precedent on the definition of “occupation” or other clauses in disability insurance. However, a number of Nevada federal decisions can be found starting with *Markoff v. New York Life Ins.* 369 F. Supp. 308 (D. Nev. 1973). In that case, insured sought to recover present cash value of two life insurance policies on the grounds of wrongful cancellation. Prior state court litigation had involved plaintiff’s income protection insurance policy, which was eventually decided in favor of defendant insurance company based upon material misrepresentation. The case is significant insofar as the income protection policy contained a definition of total disability, which was in essence an occupational disability clause during the first six months of continuous disability. The definition falls within standard term “any occupation” definition.

Nevada continues to have no direct precedent discussing or adopting general definitions for “total disability,” “own occupation,” “any occupation,” or “regular attendance of a physician,” or defining the term “legal disability.” Initially, some definitions have been interpreted in context of group insurance or ERISA litigation. See, e.g. *Ehrensaff v. Dimension Works Inc. Long Term Disability Plan*, 120 F. Supp. 2d 1253 (D. Nev. 2000) (discussing requirements for physical injury under policy definition for “own occupation”). *Ehrensaff* was subsequently remanded by the Ninth Circuit in *Ehrensaff v. Dimension*, 2002 U.S. App. Lexis 7876 (9th Cir. Nev. 2002) (solely in regard to application of the treating physician rule).

For the most part, Nevada Federal courts and Ninth Circuit have adopted California authority as a matter of first impression when interpreting these definitions. See, e.g. *Eichacker v. Paul Revere Life Ins.*, 354 F.3d 1142 (9th Cir. Nev. 2004). *Eichacker* involved claim presented for disability by lawyer who maintained his own practice in Las Vegas, Nevada. Policies had two definitions for total disability. One was defined pursuant to “own occupation” definition and a second residual disability clause similar to “any occupation,” but required that he be disabled more than 80% of the time normally required by those duties and receiving physician’s care. The policy defined “physician’s care” to mean regular and personal care of a physician which is under prevailing medical standards appropriate for condition causing the disability. Ninth Circuit found there was factual basis to reverse grant of summary judgment entered on behalf of Paul Revere. Definition of total disability and residual disability were in dispute as to the “physician’s care” requirement. Although the Court found that there was no question he received regular care during a certain period, there was a factual dispute as to whether this care qualified as treatment from physician for condition causing disability. Ninth Circuit applied proximate causation

standard to find factual basis to reverse summary judgment. However, the Court also noted that many courts have taken the position the primary rationale for “physician’s care” requirement is to assure that claimant is actually disabled, is not malingering, and is not making a fraudulent claim. Ninth Circuit found none of these concerns present in dispute regarding Eichacker’s claim for total disability.

The most recent case by a Nevada Federal court is *Cranmore v. UNUM Provident Corp.*, 430 F. Supp. 2d 1143 (D. Nev. 2006). Here, plaintiff Cranmore was employee of Gordon Gaming Corporation dba The Sahara Hotel & Casino. In 1992, Cranmore purchased accident, sickness, and cancer insurance policies from Colonial. Accident policy further provided that it would pay benefits if insured was injured in accident which caused insured to become “totally disabled within 90 days after the accident.” The policy defined “total disability” as “you are unable to work at your job for pay or benefits and are under the care of a doctor...” The policy also provided for coverage for recurring total disability if same injury occurred within six months after person or individual returned to work. Plaintiff Mildred Cranmore was injured and disabled in December, 1999, and returned to work but claimed she was completely disabled again in April, 2001. The court was faced with adoption of “process of nature rule” as a matter of first impression. “Process of nature rule” provides that within meaning of the policy provisions requiring disability within a specified time after the accident, onset of disability relates back to time of accident itself whenever disability arises directly from the accident “within such time as the process of nature consumes in bringing the person affected to a state of total disability...” Federal court found that Nevada would adopt process of nature rule and applied it to the policy even though policy contained express time limitation.

ACCIDENTAL MEANS

Single Accident. Court applied the causal approach analysis and held incident constituted single accident when driver ran over and injured victim twice “in a continuous series of events closely linked in time and space.” *Bish v. Guaranty Nat’l Ins.*, 109 Nev. 133, 848 P.2d 1057 (1993).

Intentional Acts. Evidence of insanity did not negate intent to kill, therefore, policy exclusion for intentional acts applied. *Mallin v. Farmers*, 108 Nev. 788, 839 P.2d 105 (1992), distinguished in *Allstate Ins. v. Sanders*, 495 F. Supp. 2d 1104 (D. Nev. 2007). Where insured dies as a result of an intentional or expected act or event, but did not intend to or expect death to result, the death is “accidental” within contemplation of that

term, as utilized in policy providing for double recovery if death of insured results from bodily injury effected through accidental means. *Catania v. State Farm Life Ins.*, 95 Nev. 532, 598 P.2d 631 (1979). Although insured did not intend to inflict injury in sexual assault, intent to injure inferred from behavior. *State Farm v. Smith*, 907 F.2d 900 (9th Cir. 1990); *Rivera v. Nevada Medical Liab. Ins.*, 107 Nev. 450, 814 P.2d 71 (1991) (Physician's subjective intent to injure irrelevant in forcible rape action.)

ADJUSTERS

Definition. Any person who, for compensation as an independent contractor or for fees/commissions, investigates, settles, and reports to a principal claims arising under insurance contracts for property, casualty, or surety coverage on behalf of either the insured or the insurer, or against a self-insurer providing similar coverage (excepting industrial insurance claims). NRS §684A.020.

License procured upon application to commissioner. Application and license fee \$125.00, triennial renewal fee of \$125.00 for adjuster and associate adjuster; \$15.00 appointment fee. NRS §680B.010, 684A.160.

Must be 18 years of age; Nevada resident for 90 days; never convicted of, or entered a plea of guilty or nolo contendere to any crime involving moral turpitude; have two years recent experience in handling insurance loss claims; pass all examinations required; not concurrently licensed as a producer of insurance for property casualty or surety or surplus lines broker, except as bail agent. NRS §684A.070. Entitled to renewal as long as continues to meet requirements of this section. *See* NRS §684A.070.

Nonresident adjuster brought to Nevada by employer firm or corporation licensed as adjuster, or adjuster in adjoining state whose principal place of business is located within 50 miles of Nevada boundary, or adjuster applying for a limited license may have residency requirement waived by commissioner. NRS §684A.070 (2).

AGE

See "AUTOMOBILES"; "LIABILITY INSURANCE"; "NEGLIGENCE."

The age of majority is eighteen. NRS §129.010.

AGENTS AND BROKERS

See generally, NRS §683A.020 *et seq.* (Administrators, Agents and Producers of Insurance).

This Chapter no longer defines "agent," "broker," or "solicitor." These definitions were repealed in 2001. The only definition remaining is that of "Managing general agent." A managing general agent is a person who manages all or part of the insurance business of an insurer, including the management of a separate division, department of underwriting office. A managing general agent is one who acts as an agent for the insurer, who produces and underwrites an amount of gross premiums of 5 percent or more of the policyholder surplus, **and** who adjusts or pays claims in excess of an amount determined by the Commissioner. A managing general agent is one with authority to appoint and to terminate the appointment of an agent for an insurer. Employees of the insurer and underwriting managers are not managing general agents. NRS §683A.060. Managing general agents must be licensed. NRS §683A.090. Applications must be submitted in writing to the commissioner, along with the required fee, appointment of the applicant by each insurer or underwriting department, and the applicant's fingerprints. NRS §683A.160. The fee is \$125. NRS §680B.010.

The Chapter governs the actions of producers of insurance, but the term "producer of insurance" is never defined. Except as listed in NRS §683A.211, a person must be licensed to sell, solicit or negotiate insurance in Nevada. NRS §683A.201. Nevada applicants must pass a written examination, NRS §683A.241, and fulfill other prerequisites. NRS §683A.251. Non-resident applicants may also become licensed. NRS §§683A.271, 638A.281, 683A.291. A producer of insurance shall not act as an agent unless he is appointed as an agent by insurer. NRS §683A.321. A producer who is not acting as an agent is a broker who does not need to be appointed. *Id.* As used in this section, "agent" means a producer of insurance who is compensated by the insurer and sells, solicits or negotiates insurance for the insurer. As used in this section, "broker" means a producer of insurance who (a) is not an agent of insurer, (b) who solicits, negotiates or procures insurance on behalf of an insured or prospective insured, and (c) does not have the power to obligate an insurer. *Id.*

The Commissioner may refuse to issue a license, may revoke a license, or may refuse to renew a license for a number of improper actions by the licensee. NRS §683A.451. The Commissioner may also suspend a licensee for up to twelve (12) months for such actions, or may impose administrative fines, or both. *Id.* Producers must remit premiums which they receive to the carrier within thirty (30) days after the producer receives said premiums. NRS §683A.520. An insurer must report to the Commissioner any producer of insurance who fails to do so. *Id.* The Commissioner may suspend the producer's license until the remittance has been made. *Id.*

ARBITRATION

See Nevada Supreme Court Rules, Nevada Arbitration Rules (N.A.R.) 1-24 which are published as subpart B of the Nevada Rules Governing Alternative Dispute Resolution. All cases commenced in Washoe and Clark Counties on or after January 1, 2007, having probable jury award value of \$50,000 or less per plaintiff are subject to mandatory court annexed arbitration or short trial program with a cap on damages in this amount. N.A.R. 3. The purpose of the arbitration program is to provide a simplified procedure for obtaining a prompt and equitable resolution of certain civil matters. N.A.R. 2.

Probate proceedings, domestic proceedings, cases seeking judicial review of administrative decisions, cases seeking to quiet title to real property, cases seeking declaratory relief, cases presenting significant issues of public policy, cases seeking equitable or extraordinary relief, cases in which a party is incarcerated, and cases utilizing mediation are excluded from mandatory arbitration. N.A.R. 3.

After a case has been entered into the program, respective counsel are provided with a random list of potential arbitrators. This list is generated from a panel of selected local practitioners with a minimum of eight years of experience in the field. N.A.R. 7. The arbitrator is selected by the parties by a process of elimination. The arbitrator's fees are to be split equally among the parties. See N.A.R. 6 (b).

In the absence of permission from the court, an arbitration hearing must be held within nine months of the appointment of the arbitrator. All arbitrations shall take place within one year. See N.A.R.12 (B). Discovery in arbitration is limited and is within the sole discretion of the arbitrator, subject to review by the Discovery Commissioner. N.A.R. 11. Similarly, the arbitration hearing is conducted under the complete discretion of the arbitrator. N.A.R. 13. Thus, for example, otherwise applicable rules of evidence may be modified or suspended for purposes of the hearing.

The arbitration is non-binding and one or all of the parties may request a trial de novo within 30 days of the arbitrator's ruling. N.A.R. 18. However, a party who does not prosecute or defend the arbitration in "good faith" may waive the right to a trial de novo. N.A.R. 22. If there is a trial de novo it proceeds to a new trial in the short trial program. N.A.R. 21.

Good Faith Participation: Nevada Arbitration Rule 22(A) states: "The failure of a party or an attorney to either prosecute or defend a case in good faith during the arbitration proceedings shall constitute a waiver of the right to a trial de novo."

In *Casino Properties, Inc. v. Andrews*, 112 Nev. 132, 911 P.2d 1181 (1996), the Nevada Supreme Court held that "good faith participation" means "meaningful participation." The court struck the defendant's request for trial de novo, concluding that the defendant did not defend in good faith because defendant did not participate in a "meaningful manner." *Id.* at 1183.

In that case, a hotel locked some patrons out of their room because they had not paid their hotel bill. The court set forth three factors that formed the basis of its decision to strike plaintiff's request. The first and second are as follows: "[A]ppellants [defendant hotel] delivered their pre-arbitration statement to respondents the day before the arbitration. In their pre-arbitration statement, appellants informed respondents for the first time that O'Donnell, a key witness, would not be present in person but would be available for questioning via telephone." *Id.* at 1182.

The third factor is as follows: "Appellant impeded the arbitration proceedings by repeatedly failing to provide respondents with information in appellants' security and employment manuals regarding lock-out procedures. The information was requested on March 18, 1993, and only on August 2, 1993, ten days before the arbitration hearing, did appellants inform respondents that such information on lock-out procedures did not exist in written form. Appellants had various opportunities to inform respondents that such information did not exist but failed to do so until it was too late for respondents to act on such information. The late date of appellants' disclosure amounted to a lack of meaningful participation because it compromised respondents' ability to depose the proper parties and form an adequate arbitration strategy." *Id.* at 1183.

More recently, the Supreme Court expounded on the factors which would constitute bad faith in arbitration. In *Campbell v. Maestro*, 116 Nev. 380, 996 P.2d 412 (2000), the court stated: "Failure to meaningfully participate in the arbitration process on significant contested issues, dilatory tactics, changes in litigation tactics or strategy after seeking trial de novo in district court are also relevant." *Id.* at 385-386. For example, failure to depose, interview or investigate witnesses or to develop other evidence during arbitration proceedings may be relevant where no restrictions on such preparation have been imposed by the arbitrator. *Id.*

N.A.R. 18(A) states: "Within thirty (30) days after the arbitration award is served upon the parties, any party may file with the clerk of the court and serve on the other parties and the commissioner a written request for trial de novo of the action..."

N.A.R. 18(B) states: "The thirty (30) day filing requirement is jurisdictional; an untimely request for trial de novo shall not be considered by the district court.

N.A.R. 20 states that if a party seeking trial de novo does not better his client's position at trial, that party must pay to adverse parties, all recoverable costs and fees concerning de novo proceedings. Arbitration award shall be admitted as evidence in trial de novo. Awards of attorney's fees are limited to \$3,000 absent a finding of extraordinary circumstances unless: If arbitration award is \$20,000 or less and requesting party fails to improve its arbitration award by 20%, non-requesting party is entitled to fees and costs associated with proceedings following request for trial de novo. If arbitration award is over \$20,000 and requesting party fails to improve its arbitration award by 10%, non-requesting party is entitled to fees and costs associated with proceedings following request for trial de novo. Fees, costs, and interest are not included when comparing judgment to the award. Discovery from arbitration process is admissible. N.A.R. 20.

Nevada District Court's power of review of an arbitration decision is limited to statutory grounds, but when an arbitrator's decision manifestly disregards the law, a reviewing court may vacate the award. Courts are not at liberty to set aside arbitration awards because of arguable differences regarding applicability of laws. *Graber v. Comstock Bank*, 111 Nev. 1421, 905 P.2d 1112 (1995). After a request for a trial de novo, the matter proceeds to the Short Trial Program for trial, and not to District Court, unless it was successfully removed. N.A.R. 18 (D)(E).

Appellate courts lack jurisdiction to review a district court order that vacates an arbitration award, directs rehearing, and denies a motion to confirm the award. *Karcher Firestopping v. Meadow Valley Const.*, 125 Nev. Ad. Op. 11 (April 16, 2009).

Short Trial Program. Nevada has adopted a Short Trial Program. The Short Trial is a case that is decided and presented in a one day trial in front of a smaller jury (generally 4 jurors) with a presiding judge or judge pro tempore. Nevada has adopted Short Trial Rules (N.S.T.R.) that govern how the Short Trial operates. The purpose of the program is to expedite civil jury trials through procedures designed to control the length of the trial, including: restrictions on discovery, the use of smaller juries, and time limits for presentation of evidence. N.S.T.R. 1. Generally the Nevada Rules of Evidence and Civil Procedure apply in short trials. *Id.*

A trial de novo after arbitration will automatically be placed in the short trial program. N.S.T.R. 4. The party filing the request for trial de novo must comply with

N.A.R. 18 and must also pay to the district court clerk all applicable juror fees and costs at the time of filing of the request for trial de novo. In addition, the parties may stipulate to participation in the short trial program, this may include any case even if it is exempt from the mandatory arbitration. They may also stipulate to the short trial instead of going through the mandatory arbitration process. *Id.*

Each judicial district may appoint a short trial commissioner to administer the short trial program. N.S.T.R. 3. A short trial may be conducted by either a district court judge, a senior judge or justice, or a pro tempore judge. The commissioner will assign a short trial judge form a panel to preside over the case. The short trial judge may be selected by one of the following methods: stipulation of the parties, random selection, or random selection of senior judge or justice. *Id.*

ATTORNEYS

Attorneys are subject to Nevada Rules of Professional Conduct and Supreme Court Rules. S.C.R. 39. Rules governing professional conduct of attorneys are based upon ABA Model Rules of Professional Conduct, which may be consulted for guidance. Rule 1.0A.

Authority. An attorney has authority to bind client in procedural matters at any step of action/proceeding, and to receive money claimed by client during action or within one year after judgment; upon payment, attorney has authority to discharge claim or acknowledge satisfaction. S.C.R. 45.

Conflict of Interest. An attorney shall not represent a client if representation of client will be directly adverse to another client, unless attorney reasonably believes representation will not adversely affect other client and each client consents, in writing, after consultation. An attorney shall not represent a client if that representation would be materially limited by attorney's responsibilities to another client or a third person, or by attorney's interests, unless client consents, in writing, after consultation. Rule 1.7. Multiple representations in a single matter require that the consultation include an explanation of implications, advantages and risks. *See generally Id.*

Fees. Attorney's fees must be reasonable; reasonableness of fees will be determined by a number of factors; when attorney has not regularly represented client, basis or rate of fee should be in writing; before or within a reasonable time after commencing representation, contingent fee agreements must be in writing and must contain certain provisions in bold type; contingent fees are prohibited in any domestic relations cases and in representation of a criminal defendant. Division of fee agreements must comply with specific provisions. Rule 1.5.



AUTOMOBILES

See Law Digest Tables.

See "NEGLIGENCE" and "NO-FAULT."

Age. All operators or chauffeurs must be licensed. Minimum age 16 years after complying with the requirements in NRS §483.2521. Student licenses for drivers between 14 and 18 years of age. NRS §483.270. Application of person under 18 years of age must be signed by parent or custodian of applicant. NRS §483.300.

Agency. General principles of agency govern in torts of servant in operation of masters motor vehicle. *Wells Inc. v. Shoemaker*, 64 Nev. 57, 177 P.2d 451 (1947).

Negligent Entrustment. Under doctrine of "Negligent Entrustment," a plaintiff must prove that: 1) entrustment actually occurred; 2) the entrustment was negligent. *Zugel v. Miller*, 100 Nev. 525, 688 P.2d 310 (1984). For example, 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. *Id.* Parent or guardian having custody and control of minor child is liable for the willful misconduct of their minor up to \$10,000. NRS §41.470; *Roddick v. Plank*, 608 F. Supp. 229 (D. Nev. 1985).

Arbitration. No provision for arbitration in motor vehicle policy delivered or issued in this state is binding on named insured or any person claiming under policy. NRS §690B.017. Actions involving vehicles with controversy not exceeding \$50,000 subject to mandatory, non-binding arbitration. See N.A.R. 3.

Comparative Negligence, Contribution, Joint and Several Liability. Nevada has adopted Uniform Contribution Among Joint Tortfeasors Act (NRS §17.225). Contribution allowed among vicariously liable tortfeasors. *Van Cleave v. Gamboni Constr.*, 101 Nev. 524, 706 P.2d 845 (1985).

Compulsory Insurance Coverage. Liability coverage. Policy on each vehicle registered in state must provide minimum coverage of \$15,000 per person, \$30,000 per accident and \$10,000 property damage. NRS §485.185. Policy must cover all who use vehicle with permission of owner, even if that user is specifically excluded under the policy. *Federated American Ins. v. Granillo*, 108 Nev. 560, 835 P.2d 803 (1992); NRS §485.3091(1). Med-Pay Coverage (NRS §687B.145(3)) requires all casualty insurance policies issued in Nevada to contain Med-Pay coverage in the amount of \$1,000,

unless there is a written waiver of coverage. *Compare* NRS §690B.020.

Driving Under the Influence. It is unlawful for any person to drive while under the influence of intoxicating liquor or controlled substances, or to drive with a blood alcohol level of 0.08 percent or more, or to have a 0.08 percent level of alcohol in the blood within two hours of driving. NRS §484.3795.

Damages. Punitive damages are available where it has been proven by clear and convincing evidence that the defendant has been guilty of "oppression, fraud or malice." NRS §42.005. Punitive damages are improper unless there is willful wrong or damage occurs as intended or necessary consequence. *American Excess Ins. v. MGM Grand Hotels, Inc.*, 102 Nev. 601, 729 P.2d 1352 (1986). Standard for excessive punitive award: Punitives legally excessive when award is "clearly" disproportionate to blame worthiness and harmfulness inherent in tortfeasor's misconduct. *Ace Truck & Equip. Rentals, Inc. v. Kahn*, 103 Nev. 503, 746 P.2d 132 (1987). See *Ainsworth v. Combined Ins. of America*, 105 Nev. 237, 774 P.2d 1003 (1989).

NRS §42.010. Punitive damages allowable where defendant has caused injury through operation of motor vehicle after wilfully consuming or using alcohol or another substance, knowing that he would thereafter operate motor vehicle. Punitive damage limits inapplicable. NRS §42.010.

Purely economic loss is recoverable in action for tortious interference with contractual relations or prospective economic advantage, but interference must be intentional. *Local Joint Exec. Bd. of Las Vegas, Culinary Workers Union, Local No. 226 v. Stern*, 98 Nev. 409, 411, 651 P.2d 637 (1982). Economic losses are not recoverable in action for negligence or strict liability but are recoverable in action for breach of warranty. *Central Bit Supply, Inc. v. Waldrop Drilling & Pump, Inc.*, 102 Nev. 139, 140-141, 717 P.2d 35 (1986); *Local Joint Exec. Bd. of Las Vegas, Culinary Workers Union, Local No. 226 v. Stern*, 98 Nev. 409, 651 P.2d 637 (1982). Various exceptions to the Economic Loss Doctrine are discussed in *Terracon Consultants Western, Inc. v. Mandalay Resort Grp.*, 125 Nev. _____. 8, 206 P.3d 81, 88 (March 26, 2009).

Emotional distress damages may not be recovered in cases involving harm to property only. *Smith v. Clough*, 106 Nev. 568, 796 P.2d 592 (1990). A bystander who witnesses an accident may recover damages for N.I.E.D. if located near the scene, emotionally injured by the contemporaneous sensory observance of the accident and closely related to the victim by blood or



marriage. *Grotts v. Zahner*, 115 Nev. 339, 340, 989 P.2d 415.

Family Purpose Doctrine. NRS §41.440-41.460. Joint and several liability attaches when family member gives permission to drive vehicle. It is liability statute only and does not impute family member's contributory negligence to family member free from negligence. *White v. Yup*, 85 Nev. 527, 458 P.2d 617 (1969).

Guest Cases. Guest statute declared unconstitutional. Drivers are liable to guests for injury or death proximately resulting from ordinary negligence. *Laa-konen v. Eighth Judicial Dist. Ct.*, 91 Nev. 506, 538 P.2d 574 (1975).

Use. If person is given permission by insured owner to use motor vehicle in first instance, any subsequent use, including unconsented use, while still in possession of the vehicle, is insured under standard automobile liability policy. *USF&G v. Fisher*, 88 Nev. 155, 494 P.2d 549 (1972); NRS §485.3091.

Imputed Negligence. Any negligence or willful misconduct of minor when driving motor vehicle upon highway shall be imputed to person who has signed application of such minor, which person shall be jointly and severally liable with minor for any damages caused by such negligence or willful misconduct. NRS §483.300. Any person who has signed application of minor may thereafter file with department written request that license of minor be cancelled. The department shall cancel license of minor and person who signed application of such minor shall be relieved from liability on account of any subsequent negligence or willful misconduct of the minor. NRS §483.310. Negligence of driver not imputed to occupant, absent special relationship. *Campbell v. Baskin*, 69 Nev. 108, 242 P.2d 290 (1952).

Last Clear Chance Doctrine subsumed under Nevada's comparative negligence statute. *Davies v. Butler*, 95 Nev. 763, 776, 602 P.2d 605 (1979).

Pedestrians. In absence of traffic control devices, drivers shall yield to pedestrians in crosswalks on side of highway on which drivers are traveling; drivers to rear shall not overtake and pass stopped driver. NRS §484.325. Pedestrians outside of crosswalks shall yield to drivers. NRS §484.327. Pedestrians have duty to look in direction of an anticipated danger. *Fennell v. Miller*, 94 Nev. 528, 583 P.2d 455 (1978). Nevada does not require a driver to anticipate pedestrians will cross streets illegally, and will not be liable to an injured pedestrian, unless the pedestrian is observed in time for the defendant to stop. *Turnbow v. Wasden*, 608 F. Supp. 237 (D. Nev. 1985). However, this will not preclude the ability to recover for injuries caused by the motorist's negli-

gence. *Anderson v. Baltrusatis*, 113 Nev. 963, 965, 944 P.2d 797 (1997). Violation of municipal code, and failure to yield to pedestrian constitutes negligence per se. *See Del Piero v. Phillips*, 105 Nev. 48, 769 P.2d 53 (1989).

No-Fault. Nevada's No-fault insurance plan was repealed effective Jan. 1, 1980, returning to tort system. Plaintiff cannot recover in tort those damages plaintiff could have recovered under no-fault coverage if plaintiff had maintained such coverage. *Surman v. Griebel*, 439 F. Supp. 1118 (D. Nev. 1977).

Pedestrian who was injured when struck by motor vehicle entitled to claim basic reparation benefits from insurer of driver. Fact that pedestrian owns uninsured vehicle is irrelevant, and rationale of *Surman v. Griebel*, *supra*, denying basic reparation benefits to uninsured motorist is not applicable. *Nationwide Mut. Ins. v. Maurigi*, 98 Nev. 165, 643 P.2d 1216 (1982).

Motorized Bicycles. "Motorcycle" means every motor vehicle equipped with a seat or saddle designed to travel on not more than three wheels, including a power cycle but excluding a tractor or moped. NRS §486.041. "Moped" is a vehicle which produces not more than 2 gross brake horsepower and with a displacement of not more than 50 cubic centimeters and is capable of not more than 30 miles per hour on a flat surface, and also cannot have more than 3 wheels and is not a tractor. NRS §486.038. A person shall not drive a motorcycle without a driver's license or endorsement allowing same. NRS §486.061.

Seat Belts. NRS §484.641. (Repealed and replaced).

Service of Process Upon Non-resident Motorists. In any action growing out of use and operation by non-resident motorist of motor vehicle, plaintiff may serve Director of Department of Motor Vehicles with process by leaving copy of process with fee of \$5.00; provided that notice of such service and copy of process are sent by registered or certified mail by plaintiff to defendant at the address supplied by the defendant in his accident report, or if no address supplied to the best address available to the plaintiff, and plaintiff's affidavit of compliance is appended to original process and returned and filed in action. Personal service of process upon defendant outside of state is equivalent to mailing and may be proved by affidavit of person making service. NRS §14.070; *See Hayashida v. Second Judicial Dist. Ct.*, 76 Nev. 433, 357 P.2d 117 (1960).

Speed Limits. It is unlawful for any person to drive or operate a vehicle of any kind at a rate of speed greater than is reasonable or proper with due regard for traffic, surface, weather, width of highway, or other conditions,

or at a rate of speed which endangers life, limb, or property of any person, or at a rate greater than posted limit or greater than 75 miles per hour. Additional penalty for violation in a work zone. NRS §484.361.

Subrogation. Public policy prohibits auto insurer from subrogating for amounts paid under medical payments portion of policy. *Maxwell v. Allstate Ins. Companies*, 102 Nev. 502, 728 P.2d 812 (1986) (distinguished in *Canfora v. Coast Hotels & Casinos, Inc.*, 121 Nev. 771, 121 Nev. P.3d 599 (2005); called into doubt by *Rubin v. State Farm Mut. Auto. Ins.*, 222 F.3d 750 (9th Cir. 2000)). See also, *Rubin v. State Farm Mut. Auto. Ins.*, 118 Nev. 299, 43 P.3d 1018 (2002). No subrogation against underinsured motorist, but may subrogate against uninsured motorist. NRS §687B.145. Workers' compensation insurer has no subrogation rights against claimant's automobile insurer for payment made to claimant. See *Silvera v. Employers Ins. Co. of Nevada*, 118 Nev. 105, 40 P.3d 429 (Nev. 2002). See NRS §616C.215.

Trailers/Weight Limits. "Trailer" means every vehicle without motive power designed to carry property or passengers wholly on its own structure and to be drawn by a motor vehicle. NRS §482.125. "Utility trailer" means a vehicle, without motive, power, designed to carry property or passengers and may not exceed 8 feet in width nor 3,500 pounds in weight. NRS §482.134.

Uninsured and Underinsured Endorsements. Uninsured Motorist. Coverage is indicated as mandatory, but insured has option to reject such coverage in writing. NRS §690B.020. Cf. *State Farm Mut. Auto. Ins. v. Hinkel*, 87 Nev. 478, 488 P.2d 1151 (1971); *Ippolito v. Liberty Mut. Ins.*, 101 Nev. 376, 705 P.2 134 (1985). Any insurance policy that contravenes this statutory scheme is void and unenforceable. *Allstate Ins. v. Fackett*, 125 Nev. ___, 14, 206 P.3d 573, 577 (2009).

"Uninsured" motorist coverage includes "underinsured" motorist coverage. See generally NRS §687B.145. Insurance companies doing business in Nevada must offer uninsured motorist coverage equal to limits of bodily injury coverage or UM coverage will be increased by law to liability limits. See *Ippolito*, 101 Nev. at 376; see also *LoMastro v. Am. Family Ins.*, 124 Nev. ___, 89, 195 P.3d 339, 347 (2008). For policies written before January 1, 1990, "must offer" is defined by *Quinlan v. Mid Century Ins.*, 103 Nev. 399, 741 P.2d 822 (1987). For policies written on January 1, 1990 and after, NRS §687B.145(2) requires carriers to offer UM/UIM coverage on a state approved form. Failure to offer UM/UIM coverage to insured raises UM/UIM coverage to same amount as liability coverage by operation of law. See *Ippolito*, 101 Nev. at 376.

When a company is given notice of action by its insured against uninsured motorist, and has opportunity to intervene, company may be bound, despite contrary policy provision, to any judgment obtained against uninsured motorist in adversary proceeding. *Allstate Ins. v. Pietrosh*, 85 Nev. 310, 317, 454 P.2d 106 (1969).

Insured must prove "legal entitlement" against uninsured motorist. "Legal entitlement" does not require judgment against uninsured motorist. *Pemberton v. Farmers Ins. Exch.*, 109 Nev. 789, 858 P.2d 380 (1993).

Where insurer issues two automobile policies to its insured, each containing uninsured motorist coverage, extent of coverage is combined total amount of both policies even though each contains "other insurance" clause. *USAA v. Dokter*, 86 Nev. 917, 478 P.2d 583 (1970). Where multi-vehicle insurance policy or several policies are provided, insured may stack policies' uninsured or underinsured motorist coverage. *Beeny v. California State Auto Ass'n*, 104 Nev. 1, 752 P.2d 756 (1988). NRS §687B.145 permits insurers to prohibit stacking, but any such limiting language "must be in clear language and prominently displayed in the policy, binder or endorsement." *Neuman v. Standard Fire Ins.*, 101 Nev. 206, 699 P.2d 101 (1985). Insurer must be allowed to enforce provision limiting UM recovery to limits on a single insured vehicle. *Nationwide Mut. Ins. v. Coatney*, 118 Nev. 180, 42 P.3d 265 (2002). Guest passengers cannot stack UM or medical benefits of owners policies. *Beeny v. CSAA*, 104 Nev. 1, 752 P.2d 756 (1988). Multiple liability coverages cannot be stacked. *Rando v. CSAA*, 100 Nev. 310, 684 P.2d 501 (1984).

Where liability and UM coverages are contained under single policy, claim for UM coverage may not be made after liability limits have been exhausted because this would have effect of increasing liability coverage and acts to protect from payment of duplicative damages. *Peterson v. Colonial Ins.*, 100 Nev. 474, 686 P.2d 239 (1984).

Where two or more insurers provide first-party coverage on single vehicle on same level of priority, benefits thereunder can be stacked and conflicting "other insurance" clauses are void. *Travelers Ins. v. Lopez*, 93 Nev. 463, 567 P.2d 471 (1977). But compare NRS §687B.145: policy may provide that if insured has coverage available under more than one policy, or provision of coverage, recovery may not exceed higher of applicable limits, and recovery must be prorated on basis of aggregate limits. Any provision which limits benefits pursuant to this section must be in clear language and be prominently displayed in policy, binder or endorsement. Any limiting provision is void if named insured has purchased separate coverage on same risk and has paid premium calculated for full reimbursement under that

coverage. *See also Neumann v. Standard Fire Ins.*, 101 Nev. 206, 699 P.2d 101 (1985).

Rental car companies do not insure on the “same basis” as private automobile policies. As such, where “other insurance” clauses conflict, private casualty coverage is primary and rental car coverage is excess. *Alamo Rent-A-Car v. State Farm*, 114 Nev. 154, 953 P.2d 1074 (1998). Where a rental car lessee’s personal auto insurance policy has first been extinguished pursuant to *Alamo*, the secondary insurer may still be required to compensate victims up to an additional \$30,000, the statutory minimum for one accident pursuant to NRS §482.305(1), depending on proven damages. *Salas v. Allstate Rent-A-Car, Inc.*, 116 Nev. 1165, 14 P.3d 511 (2000).

NRS 687B.145(2) provides UM coverage for insureds who suffer bodily injury in an auto accident and does not provide coverage for claims an insured may have regarding a noninsured third party who is injured by an underinsured/uninsured driver. *Allstate Ins. Co. v. Fackett*, 125 Nev. ___, 14, 206 P.3d 573, 578 (2009). The limiting of UM/UIM coverage to insureds in its policy is not in contradiction with NRS 687B.145. *Id.*

Setoff clause in automobile policy requiring that insured agree to repay benefits paid under policy’s medical expenses coverage out of recovery made under policy’s liability and uninsured motorist coverages only operated to prevent double recovery for same elements of damage. *Sullivan v. Dairyland Ins.*, 98 Nev. 364, 649 P.2d 1357 (1982). *Cf. Maxwell v. Allstate Ins. Cos.*, 102 Nev. 502, 728 P.2d 812 (1986). (Called into doubt by *Rubin v. State Farm Mut. Auto. Ins.*, 222 F.3d 750 (9th Cir. 2000)).

Insurer may not offset no-fault benefits from uninsured motorist protection; but no double recovery. *Staten v. State Farm Mut. Auto. Ins.*, 94 Nev. 283, 579 P.2d 766 (1978). Insurer may not offset underinsured motorist benefits from liability coverage carried by adverse driver. *See* NRS §687B.145(2), which provides, in part: “Uninsured...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 which he is legally entitled to recover from the owner or operator of the vehicle to the extent that those damages exceed the limits of the coverage for bodily injury carried by that owner or operator.”

Where automobile liability policy contained “Household Exclusion” clause, such clause was void insofar as it attempted to eliminate minimum security for tort liability required by statute, but was otherwise enforceable in that liability was limited to statutory minimum. *Farmers Ins. Exch. v. Warney*, 103 Nev. 216, 737

P.2d 501 (1987); *Neal’s Estate v. Farmers Ins. Exch.*, 93 Nev. 348, 566 P.2d 81 (1977). Exclusion in UM Policy for owned but uninsured autos is void up to statutory minimum but is valid for coverage in excess of statutory minimum. *Zobrist v. Farmers Ins. Exch.*, 103 Nev. 104, 734 P.2d 699 (1987); *Nelson v. CSAA*, 114 Nev. 345, 956 P.2d 803 (1998). When Homeowner’s policy expressly excluded coverage for use of motor vehicle, no coverage was provided for injuries received in automobile accident. *Senteney v. Fire Ins. Exch.*, 101 Nev. 654, 707 P.2d 1149 (1985).

Umbrella Policies. Auto liability insurers who write umbrella policies covering motor vehicles in Nevada must offer UM/UIM motorist coverage in compliance with NRS §687B.145(2); *Delmue v. Allstate Ins.*, 113 Nev. 414, 936 P.2d 326 (1997).

AVIATION

Uniform Act. Uniform State Law for Aeronautics was adopted as NRS §§493.010 to 493.120, inclusive.

The right of eminent domain may be exercised on behalf of airports, facilities for air navigation and aerial rights of way. NRS §37.010.

An insurance policy may contain provisions excluding or restricting coverage as specified therein in the event of death as a result of aviation or any air travel or flight. NRS §688A.260.

Classes of insurance relating to insurance for aviation are exempt from the provisions of NRS §686B.010 to 686B.125, inclusive. Nevada Administrative Code 686B.530.

The liability of the owner of one aircraft to the owner of another aircraft, or to operators or passengers in either aircraft, for damage caused by a collision on land or in the air, must be determined by the rules of law applicable to torts on land. NRS §493.070.

For damages caused by a forced landing of an aircraft, the owner, lessee or operator of the aircraft is liable as provided in NRS §493.060. NRS §493.050.

BROKERS

See “AGENTS AND BROKERS.”

CANCELLATION

See “ACCIDENT AND HEALTH INSURANCE, Contracts”; “LIABILITY INSURANCE”; “FIRE INSURANCE, Contracts.”

Statutes and Cases. Nevada has adopted statutory provisions regarding cancellation and non-renewals in accordance with NRS §687B.310 (cancellations and

non-renewals); NRS §687B.320 (mid-term cancellation); and NRS §687B.330 (anniversary cancellation).

NRS §687B.320 for mid-term cancellation requires notice prior to termination for failure to pay a premium when due. An insurance contract which does not provide for notice prior to termination is against the public policy of the State of Nevada and thus is unenforceable. *Daniels v. National Home Life Assur.*, 103 Nev. 674, 678, 747 P.2d 897, 900 (1987).

Nevada has also adopted a statute that prevents an insurer from cancelling or refusing to renew a policy of casualty or property insurance as a result of any claims made under the policy with respect to which the insured was not at fault. NRS §687B.385.

Recent Insurance Code regulations that barred adverse action if the insured was not at fault and required insurers to pay covered claims when the insured's responsibility for an accident was 50% or more were deemed to be invalid. *See State Div. of Ins. v. State Farm*, 116 Nev. 290, 995 P.2d 482 (2000); *see also* NRS §41.141.

CHATTEL MORTGAGE

See "FIRE INSURANCE."

CONSTRUCTION OF POLICY

Ambiguity of Terms. An insurance policy is subject to the ordinary rules of contract law as applied to insurance contracts. Unambiguous language is construed according to its plain meaning and usage. The policy must be read as a whole to give a reasonable and harmonious reading and effect to all of its provisions. Provisions that are ambiguous in themselves or ambiguous when read together with other provisions of the policy must be construed against the drafter. *Nevada VTN v. General Ins. Co. of America*, 834 F.2d 770, 773 (9th Cir. 1987); *Capital Indem. Corp. v. Blazer*, 51 F. Supp. 2d 1080, 1084 (D. Nev. 1999).

There is a long-standing axiom that courts must apply a contract as written where the language is plain and unambiguous. *Transamerica Ins. Group v. State Farm Mut. Auto Ins.*, 492 F. Supp. 283 (D. Nev. 1980); *Healey v. Imperial Fire Ins.*, 5 Nev. 268 (1869).

The insurance contract should be given a reasonable interpretation in light of the particular subject matter, situation, and contemplation of the parties. *HKH v. American Mortg. Ins.*, 490 F. Supp. 1201, 1204-05 (D. Nev. 1980).

Conditional Receipt of Application. Conditional receipt of application for life insurance creates a temporary contract of insurance where an insurer issues a receipt

subject to determination of insurability prior to applicant's death and do not reject application prior to applicant's death. *Prudential Ins. of America v. Lamme*, 83 Nev. 146, 149, 425 P.2d 346, 348 (Nev. 1967).

Inconsistent Policy Terms and Endorsements. Insurance contracts will be construed so as to give effect, if possible, to every word and phrase. *Royal Indem. v. Special Service Supply*, 82 Nev. 148, 150, 413 P.2d 500, 502 (1966). When interpreting a specific exclusion, an insurer looking to restrict coverage should employ language that clearly and distinctly communicates to the insured the nature of the limitation. *National Union Fire Ins. v. Reno's Executive Air, Inc.*, 100 Nev. 360, 364, 682 P.2d 1380, 1382 (Nev. 1984); *Allstate Ins. v. Sanders*, 495 F. Supp. 2d 1104, 1109 (D. Nev. 2007). It is generally recognized that claims excluding coverage are interpreted narrowly against the insurance carrier who drafted the exclusion. *National Union Fire Ins., supra.*, citing *Harvey's Wagon Wheel v. MacSween*, 96 Nev. 215, 220, 606 P.2d 1098 (1980).

Oral Binders. An insurance contract need not be in writing in order to be valid. *Truck Ins. Exch. v. Whitaker*, 71 Nev. 1, 278 P.2d 277 (1955).

DAMAGES

Appellate Review-Excessive Verdicts. Punitive damage award of \$1,000,000 deemed excessive where delay of insurer in paying for independent medical examinations was found to constitute bad faith. Punitive damages are legally excessive when amount of damages awarded is clearly disproportionate to degree of blameworthiness and harmfulness inherent in oppressive, fraudulent or malicious misconduct of tortfeasor under circumstances of a given case. *Guaranty Nat'l Ins. v. Potter*, 112 Nev. 199, 912 P.2d 267 (1996).

Arbitration Awards-Collateral Estoppel. Arbitrator's decision in favor of insureds in action against insurer for breach of contract was not res judicata as to claim for breach of covenant of good faith and fair dealing for failure to pay arbitration award. Issues in first and second suits not identical and did not arise from same transaction since bad-faith claim was tort action and arose from delay in payment after settlement through arbitration. *Pulley v. Preferred Risk Mut. Ins.*, 111 Nev. 856, 897 P.2d 1101 (1995). In *Sosebee v. State Farm*, 164 F.3d 1215 (9th Cir.1999), the court notes that *Pulley* might be limited to its narrow context but generally affirms the above point.

Res Judicata and Collateral Estoppel. Nevada has adopted modern terminology of claim and issue preclusion, and has established separate tests for each. *Carstarphen v. Milsner*, 594 F. Supp. 2d 1201, 1208 (D.

Nev. 2009)(citing *Five Star Capital Corp. v. Ruby*, 194 P.3d 709 (Nev. 2008)). The Nevada Supreme Court set forth a three-part test for whether claim preclusion should apply: “(1) the parties or their privies are the same, (2) the final judgment is valid, and (3) the subsequent action is based on the same claims or any part of them that were or could have been brought in the first case.” *Id.*

NRS §40.170 applies to treble damages only to real property not personal property. *Countrywide Home Loans, Inc. v. Thitchener*, 124 Nev. __. __. 64, 192 P.3d 243 (2008).

The economic loss doctrine generally cuts off tort liability when no personal injury or property damage occurred, with traditionally recognized exceptions for certain classes of claims, including negligent misrepresentation and professional negligence actions against attorneys, accountants, real estate professionals, and insurance. *Terracon Consultants Western, Inc. v. Mandalay Resort Grp.*, 125 Nev. __. __. 8, 206 P.3d 81, 90 (2009).

Comparative Negligence. In any action to recover damages for death or injury to persons or for injury to property in which comparative negligence is asserted as a defense, comparative negligence of plaintiff or his decedent does not bar recovery if negligence was not greater than negligence or gross negligence of defendant(s). If plaintiff is entitled to recover, total amount of damages will be reduced by percentage of negligence attributed to plaintiff by special verdict form. NRS §41.141.

Indemnification. Where two or more persons are jointly or severally liable in tort for same injury or death, there is a right of contribution among them even if judgment has not been recovered against any or all of them. NRS §17.225. However, right of indemnity is not impaired under existing law. NRS §17.265.

Psychic Injuries. Mental Pain and Suffering. Mother who brought medical malpractice action against doctor based on failure to diagnose severe defects in fetus, resulting in deprivation of right to terminate pregnancy and birth of severely deformed child, may recover for past and future emotional distress without offset due to emotional benefits of child's birth as benefits are too speculative. *Greco v. United States*, 111 Nev. 405, 893 P.2d 345(1995).

Plaintiff may recover emotional distress damages from injury to others; factors considered are proximity to scene, actual observation of injury, and relationship between plaintiff and victim. *Greco v. United States*, 111 Nev. 405, 893 P.2d 345 (1995).

Purchaser could not sue savings and loan association, which acted as both vendor and lender, for intentional infliction of emotional distress due to nondisclosure of basement's tendency to leak because such nondisclosure was not proscribed by enunciated law, and therefore, the nondisclosure was not done intentionally or with reckless disregard for causing emotional distress. *Mackintosh v. California Fed. S&L Ass'n*, 113 Nev. 393, 935 P.2d 1154 (1997).

The district court is given wide discretion in calculating an award of damages, and this award will not be disturbed on appeal absent an abuse of discretion. *Diamond Enterprises, Inc. v. Lau*, 113 Nev. 1376, 1379, 951 P.2d 73 (1997).

A judgment in favor of joint plaintiffs should be joint if their cause of action is joint. Therefore husband and wife, as joint owners of property that was lost in real estate fraud scheme perpetrated by two real estate agents, shared common claims for relief against each real estate agent, and thus their uncollectible default judgments against agents were not separable between them, but were joint in nature, therefore entitling them to only two awards up to statutory limit from Real Estate Education, Research and Recovery Fund (ERRF), one for each original defendant. *Administrator of the Real Estate Ed., Research & Recov. Fund v. Buhecker*, 113 Nev. 1147, 945 P.2d 954 (1997).

Punitive Damages. NRS §42.001 defines “malice, express or implied” as “conduct which is intended to injure a person or despicable conduct which is engaged in with a conscious disregard of rights or safety of others.” “Conscious disregard” is defined as “knowledge of probable harmful consequences of a wrongful act and a willful and deliberate failure to act to avoid those consequences.” These provisions apply to actions brought after July 6, 1995.

Defendant's conscious violation of known safety procedures in handling chlorine cylinders in reckless disregard of possible results established malice for punitive damages. *Leslie v. Jones Chemical Co. Inc.*, 92 Nev. 391, 551 P.2d 234 (1976) (overruled in part by *Countrywide Home Loans, Inc. v. Thitchener*, 192 P.3d 243, 255 (Nev. 2008) (stating that *Leslie* is overruled to the extent it exemplifies the evidence needed to define conscious disregard)); *But see Hansen v. Harrah's*, 100 Nev. 60, 675 P.2d 394 (1984), in which punitive damages were reversed as unfair when imposed upon employer for retaliatory discharge because employer had no prior notice that such conduct was actionable.

Punitive damages in insurance bad faith actions are recognized. *See generally, USF&G v. Peterson*, 91 Nev. 617, 540 P.2d 1070 (1975); *See also* NRS §42.010

which deals with punitive damages available for DUI injuries. NRS §42.005 provides punitive damages in insurance bad faith actions (specifically NRS §42.005(2)(b)). Compensable damages for emotional distress are recoverable in bad faith action. *Farmers Home Mut. Ins. v. Fiscus*, 102 Nev. 371, 725 P.2d 234 (1986). “Bad faith” defined as failure to act reasonably under circumstances. *American Excess Ins. v. MGM Grand Hotels, Inc.*, 102 Nev. 601, 729 P.2d 1352 (1986).

NRS §42.007 is the controlling standard in Nevada regarding vicarious employer liability for punitive damages for acts or omissions of employers. *Countrywide Home Loans, Inc. v. Thitchener*, 192 P.3d 243, 257 (Nev. 2008).

Non-party to insurance contract has no standing to sue insurer for bad faith. *United Fire v. McClelland*, 105 Nev. 504, 780 P.2d 193 (1989); see also *Gunny v. Allstate Ins.*, 108 Nev. 344, 830 P.2d 1335 (1992); but see *Republic Ins. v. Hires*, 107 Nev. 317, 810 P.2d 790 (1991) (Power differential is crucial aspect of oppression).

Pre-Judgment Interest on Damages. Where no interest is provided by contract or law, prejudgment interest on damages runs at prime rate plus 2% from service of Summons and Complaint, except interest on future damages runs from date of judgment. NRS §17.130; *Wilkes v. Andersen*, 100 Nev. 433, 683 P.2d 35 (1984). The interest rate is then adjusted on each January 1 and July 1 until the judgment is satisfied. NRS §17.130(2). Where no interest rate is provided in a written express contract, it runs at prime rate plus 2% upon all money from time it becomes due. NRS §99.040; *Wilson v. Pacific Maxon, Inc.*, 102 Nev. 52, 714 P.2d 1001 (1986). Post judgment interest is allowed on punitive damages from the date judgment entered. *Powers v. USAA*, 114 Nev. 690, 962 P.2d 596 (1998), modified on denial of reh'g, 979 P.2d 1286 (1999).

Collateral Source Rule. See NRS §42.021 for Nevada's collateral source rule. NRS §42.021 deals specifically with medical malpractice. See *Proctor v. Castelletti*, 112 Nev. 88, 911 P.2d 853 (1996) for a more general discussion of other torts; see also *Winchell v. Schiff*, 124 Nev. ___, 80, 193 P.3d 946, 951 (2008).

Statutory Caps on Awards. In actions for breach of obligation not arising from contract, if defendant is guilty of oppression, fraud or malice, express or implied, plaintiff may recover punitive damages not to exceed three times compensatory damages of \$100,000 or more, or \$300,000 if compensatory damages are less than \$100,000. However, punitive damage limits do not apply to actions against (a) manufacturer, distributor or seller of defective product; (b) insurer acting in bad faith; (c)

person violating state or federal law prohibiting discriminatory housing practices if law provides for excess of limitation; (d) persons for damages of injury caused by emission, dismissal or spill of toxic, radioactive or hazardous material or waste (e) person for defamation. NRS §42.005; *Jeep Corp. v. Murray*, 101 Nev. 640, 708 P.2d 297 (1985); *Summa Corp. v. Greenspun*, 98 Nev. 528, 655 P.2d 513 (1982) (overruled in part by *Sandy Valley Assocs. v. Sky Ranch Estates Owners Ass'n*, 117 Nev. 948, 955 (2001) (disapproving language that attorneys fees were considered based upon a rule, statute, or agreement); *Ace Truck & Equipment Rentals, Inc. v. Kahn*, 103 Nev. 503, 746 P.2d 132, (1987); *Bader v. Cerri*, 96 Nev. 352, 609 P.2d 314 (1980); *Nevada Credit Rating Bureau v. Williams*, 88 Nev. 601, 503 P.2d 9 (1972). To the extent that *Bader* would allow admission of such evidence in “mitigation” of non-consequential damages, it is hereby expressly overruled. *Evans v. Dean Witter Reynolds, Inc.*, 116 Nev. 598, 5 P.3d 1043 (2000).

Economic Loss. Product liability plaintiff may not recover economic loss under theories of strict products liability or negligence, but purely economic loss may be recovered under a breach of warranty theory. *Arco Prods. v. May*, 113 Nev. 1295, 948 P.2d 263 (1997); see also *Gilles v. GMAC*, 494 F.3d 865(9th Cir. 2007).

DEATH

See Law Digest Tables.

Action for Wrongful Death - Parties in Interest. “Heir” means a person who would be entitled to succeed to the separate property of decedent if decedent had died intestate. NRS §41.085(1).

Statute of Limitations. Two-year statutory period for wrongful death does not begin to run until plaintiff discovers or reasonably should have discovered legal injury, that is, both fact of death and negligent cause thereof. *Pope v. Gray*, 104 Nev. 358, 760 P.2d 763 (1988). See also *Fernandez v. Kozar*, 107 Nev. 446, 814 P.2d 68 (1991).

Unexplained Absence. A disputable presumption of death arises after an unexplained absence of three years. NRS §47.250(14).

When death is caused by wrongful act or neglect of another, heirs and personal representatives of decedent may each maintain action for damages against wrongdoer or his personal representative. Damages to decedent's heirs include pecuniary loss for grief and sorrow, loss of probable support, companionship, society, comfort and consortium, and damages for pain and suffering or disfigurement of decedent prior to death. Personal representatives can only recover special damages and any penalties (*i.e.*, punitive damages) that decedent

would have recovered had he lived. Personal representatives cannot recover for pain, suffering or disfigurement of decedent. NRS §41.085; *Alsenz v. Clark County Sch. Dist.*, 109 Nev. 1062, 864 P.2d 285 (1993).

Workers' compensation statutes, which define "compensation" as "the money which is payable to an employee or to his dependents," do not authorize payment of workers' compensation benefits to non-dependent persons, including non-dependent heirs of a deceased claimant. *Sahara Hotel & Casino v. Patricia Holden*, 114 Nev. 135, 953 P.2d 268 (1998); see also NRS §616A.090.

Following death of plaintiff, a motion for substitution of parties should be filed within 90 days of when defendants filed notice of suggestion of plaintiff's death on the record. After the expiration of 90-day time period, a party may move the district court for relief and obtain an extension of time to substitute a proper party so long as excusable neglect is shown. NRCP 25; NRCP 6(b)(2); *Moseley v. County of Clark*, 188 P.2d 1136 (Nev. 2008).

Plaintiff not entitled to recover underinsured motorist benefits for wrongful death of her mother, as Nevada law permits a plaintiff to recover damages for injuries the insured personally suffers, not benefits for injuries to uninsured third parties. *Allstate Ins. Co. v. Fackett*, 206 P.3d 573 (Nev. 2009).

DISABILITY

Classifications. Partial and total disability classifications arising from work-related injuries are made by State Industrial Insurance System ("SIIS").

Partial Disability. Worker's acceptance of lump sum payment for permanent partial disability did not waive his right to receive vocational rehabilitation benefits. *Seader v. Clark Co. Risk Mgt.*, 111 Nev. 1399, 906 P.2d 255 (1995). But see NRS §616C.390(6), employee not entitled to vocational rehabilitation benefits for temporary total disability upon claim reopening if he retired or removed himself from workforce before reopening claim.

Total Disability. "Odd lot" doctrine permits a finding of total disability where a claimant is not altogether incapacitated for any kind of work, but is nevertheless so handicapped that he will not be able to obtain regular employment in any well-known branch of the competitive labor market absent superhuman effort, sympathetic friends or employers, a business boom, or temporary good luck. *SIIS v. Perez*, 116 Nev. 296, 298 n.1, 994 P.2d 723 (2000). NRS §616A-616D.

Odd lot doctrine does not require that each element is solely related to the industrial injury. Evidence of

claimant's advanced age, limited education, limited potential for transferability of job skills, and conclusion of nearly every physician examining him that he was not employable supported decision to grant him permanent total disability status for industrial insurance claim. *Ranieri v. Catholic Community Svcs.*, 111 Nev. 1057, 901 P.2d 158 (1995).

Administrative code sections providing that injured worker must be physically unable to return to job held before injury in order to receive benefits do not take precedence over statute allowing SIIS to reopen claim when change in circumstances warrants increase or rearrangement in compensation. NRS §616C.390; NAC 616C.595; *Jerry's Nugget v. Keith*, 111 Nev. 49, 888 P.2d 921 (1995).

The primary purpose of Nevada's workers' compensation laws is to provide economic assistance to persons who suffer disability or death as a result of their employment. *SIIS v. Lodge*, 107 Nev. 867, 871, 822 P.2d 664 (1991).

Since awards for permanent partial disability are normally to be made only after the healing period has been completed and the injury has become stabilized so that the degree of permanent impairment can be appraised, if the injured employee dies before stabilization has taken place, the degree of impairment should not be taken as that in effect at the moment of death. The proper procedure is to make the best possible medical estimate of the probable residual disability that would have remained if the employee had lived to complete his healing period. *Currier v. SIIS*, 114 Nev. 328, 956 P.2d 810 (1998).

Workers' compensation claimant has the burden of showing that the claimed disability or condition was in fact caused or triggered or contributed to by the industrial injury and not merely the result of the natural progression of the preexisting disease or condition. *Bally's Grand Hotel & Casino v. Reeves*, 113 Nev. 926, 937, 948 P.2d 1200 (1997).

In evaluating permanent total disability claims, the focus of the analysis is on the degree to which the physical impairment has hindered a worker's earning capacity. *SIIS v. Bokelman*, 113 Nev. 1116, 1120, 946 P.2d 179 (1997).

FINANCIAL RESPONSIBILITY LAW

See "AUTOMOBILES, Compulsory Coverage."

FIRE INSURANCE

Assignment. In *Engleman v. Royal Ins.*, 56 Nev. 319, 51 P.2d 417 (1935), it was held that where contract

of insurance provides that insured must furnish proof of loss and insured assigned his interest to another party (assignee) seven days after fire occurred, assignee is precluded from recovery when it was proved that it was possible for insured to comply with stipulation of policy and assignee was notified that any adjustment of loss must be made by company with insured. *See also Milwaukee Mechanics Ins. v. Questa*, 137 F.2d 942 (9th Cir. 1943). *But see Clark v. London Assur. Corp.*, 44 Nev. 359, 195 P. 809 (1921), where it was held that, absent an express forfeiture provision, proof of loss clause will be strictly construed and recovery will not be precluded where insured has attempted to substantially comply or insurer has waived its conditions. *See also Davenport v. Republic Ins.*, 97 Nev. 152, 625 P.2d 574 (1981).

In *Clark v. Truck Ins. Exchange*, 95 Nev. 544, 598 P.2d 628 (1979), it was held that a clause in fire policy requiring that suits against company be brought within twelve months after "inception of loss" allowed period of limitations to run from date of casualty, but period was tolled from time insured gave notice of loss until insurer denied coverage.

Subrogation. Absent express agreement to contrary, tenant is considered co-insured with landlord under fire policy so as to bar subrogation by landlords carrier against tenant. *Safeco Ins. v. Capri*, 101 Nev. 429, 705 P.2d 659 (1985).

See generally, NRS §687B "Contracts of Insurance."

Damages - Proof of Loss. Substantial compliance is sufficient to satisfy a proof of loss condition. Test for substantial compliance is "whether proof submitted by insured fulfilled purpose of proof of loss." *Walker v. American Bankers Ins.*, 108 Nev. 533, 537, 836 P.2d 59 (1992).

Doctrine of substantial compliance is recognized in Nevada in a wide-range of contexts and this doctrine includes substantial compliance with an insurance company's requirements of change of beneficiary to a life insurance policy *Fortis Benefits Co. v. Johnson*, 966 F. Supp. 987 (D. Nev. 1997).

GUEST CASES

See "AUTOMOBILES."

HOSPITALS

Evidence - Records. "Medical records" includes bills, ledgers, statements, and other accounts showing cost of services provided to patient. NRS §52.320. Custodian of records complies with subpoena calling for medical records if authenticated copy of records deliv-

ered with affidavit of custodian verifying that copy is true and complete. NRS §52.325.

Occurrence reports prepared by hospital concerning treatment of patient were made in ordinary course of business and were not prepared in anticipation of litigation, and thus were not privileged under attorney work product doctrine, even though counsel for hospital had sent letter to hospital's director of patient relations and risk management directing her to conduct any investigation at counsel's direction; reports would have been created without counsel's involvement, and did not become privileged merely by injecting attorney into investigative process. *Columbia/HCA Healthcare v. Eighth Judicial Dist. Ct. of State of NV*, 113 Nev. 521, 936 P.2d 844 (1997).

Liens. Hospitals have right to liens under NRS §108.590. Hospital's admitted tardiness in notifying insurer of lien made lien unperfected, not void, since existence of lien does not depend on notice to others. *Humana, Inc. v. Nguyen*, 102 Nev. 507, 509, 728 P.2d 816 (1986).

Immunity. Under NRS §41.035, a claimant, whether a paying patient or an indigent patient, can sue a county hospital and its employees acting within scope of employment for negligence and damages not to exceed \$75,000; employees are entitled to indemnification from County. *Gallegos v. Southern Nevada Mem. Hosp.*, 575 F. Supp. 824 (D. Nev. 1983).

Diagnostic and treatment decisions of a physician employed by a public hospital are not considered discretionary functions under NRS §41.032(2) and such a physician is not entitled to immunity from suit for malpractice concerning same. However, a physician working for a public hospital is considered a government employee for purposes of the application of the statutory cap on damages set forth in NRS §41.035. *See, Martinez v. Maruszczak*, 123 Nev. ____, 168 P.3d 720 (2007).

HUSBAND AND WIFE

See Law Digest Tables.

See "AUTOMOBILES—Family Purpose Doctrine."

Where husband was awarded disability retirement benefits after a personal injury, the Nevada Supreme Court held those benefits as community property and not separate property, and therefore, distributed to both spouses at the time of divorce. *See, Powers v. Powers*, 105 Nev. 514, 779 P.2d 91 (1989).

Cause of action for personal injuries to wife and proceeds of recovery are separate property of wife, and thus in action against third party, negligence of husband not imputed to wife. *Fredrickson & Watson Constr. v.*



Boyd, 60 Nev. 117, 102 P.2d 627 (1940); *see generally* NRS §123.130. Where husband and wife, whose matrimonial domicile was Idaho, were involved in automobile collision in Nevada, any recovery by wife would be community property under Idaho law and hence husband's contributory negligence was imputed to wife. *Choate v. Ransom*, 74 Nev. 100, 323 P.2d 700 (1958).

Common law interspousal tort immunity not applicable to cases involving motor vehicle accidents. *Rupert v. Stienne*, 90 Nev. 397, 528 P.2d 1013 (1974).

Right of child to sue parent in tort is without restriction or limitation. *Rupert, supra*.

Husband and wife, as joint owners of property that was lost in real estate fraud scheme perpetrated by two real estate agents, shared common claims for relief against each real estate agent, and thus their uncollectible default judgments against agents were not separable between them, but were joint in nature, therefore entitling them to only two awards up to statutory limit from Real Estate Education, Research and Recovery Fund (ERRF), one for each original defendant. *Real Estate Ed., Research & Recov. Fund v. Buhecker*, 113 Nev. 1147, 945 P.2d 954 (1997).

INDEMNITY AND CONTRIBUTION

Where two or more persons become jointly and severally liable in tort for the same injury, there exists a right of contribution among them. NRS §17.225. *See also Black & Decker v. Essex Group*, 105 Nev. 344, 775 P.2d 698 (1989).

A release or covenant not to sue given in good faith to one of two or more persons liable in tort for the same injury or wrongful death discharges the tortfeasor to whom it is given from all liability for contribution and equitable indemnity. NRS §17.245.

A party seeking contribution must commence an action within one (1) 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).

There is a clear distinction between contribution and indemnity: the former is an equitable sharing of liability while the latter is a complete shifting of liability to the party primarily responsible. *Medallion Dev. Inc. v. Converse Consultants*, 113 Nev. 27, 930 P.2d 115 (1997).

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

In Nevada, a good faith settlement immunizes the settling party from claims of contribution and non-contractual (implied) indemnification. NRS §17.245; NRS §17.265; *Doctors Co. v. Vincent*, 120 Nev. 644, 98 P.3d 681 (2004).

LIABILITY INSURANCE

Cancellation. *See* "ACCIDENT AND HEALTH INSURANCE"; "CANCELLATION."

Compromise of Claims.

Statutory Framework. Nevada expressly recognizes the right of an insured to pursue a claim for breach of statutory duty as to Nevada's Unfair Claims Settlement Practices Act codified in NRS §686A.310. By statutory definition, the following may constitute an unfair practice and establish a private cause of action for the insured: (a) Misrepresenting to insureds or claimants pertinent facts or insurance policy provisions relating to any coverage at issue; (b) Failing to acknowledge and act promptly upon communications with respect to claims arising under insurance policies; (c) Failing to adopt and implement reasonable standards for the prompt investigation and processing of claims arising under insurance policies; (d) 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; (e) Failing to effectuate prompt, fair and equitable settlements of claims in which liability of the insurer has become reasonably clear; (f) 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; (g) Attempting to settle a claim by an insured for less than the amount to which a reasonable person would have believed he was entitled by reference to written or printed advertising material accompanying or made part of an application; (h) Attempting to settle claims on the basis of an application which was altered without notice to, or knowledge or consent of, the insured, his representative, agent or broker; (i) Failing, upon payment of a claim, to inform insureds or beneficiaries of the coverage under which payment is made; (j) 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; (k) Delaying the investigation or payment of claims by requiring an insured or 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; (l) 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 policy; (m) Failing to comply with the provisions of NRS §§687B.310 to 687B.390, inclusive, or §687B.410; (n) 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 his claim or for an offer to settle or compromise his claim; (o) Advising an insured or claimant not to seek legal counsel; and (p) Misleading an insured or claimant concerning any applicable statute of limitations.

Statutory Duties. A cause of action for breach of statutory duty for unfair claims is not coextensive with a tortious breach of implied covenant of good faith and fair dealing. Each separate provision of Nevada's Unfair Claims Practices Act creates its own respective standard of conduct which does not require a finding of *mens rea* or knowing or reckless intent. *Hart v. Prudential Prop. & Cas. Ins.*, 848 F. Supp. 900, 905 (D. Nev. 1994); *Pioneer Chlor Alkali v. National Union Fire Ins.*, 863 F. Supp. 1237, 1243 (D. Nev. 1994). Bad faith, for example, exists when insurer denies claim without reasonable basis or with knowledge that no reasonable basis exists to deny claim. In contrast, provisions of NRS §686A.310 address manner in which insurer handles insured's claim whether or not claim is denied. *Schumacher v. State Farm Fire & Cas.*, 467 F. Supp. 2d 1090, 1095 (D. Nev. 2006). A finding of bad faith requires evidence of: (1) an insurer's denial of (or refusal to pay) an insured's claim; (2) without any reasonable basis; and (3) the insurer's knowledge or awareness of the lack of any reasonable basis to deny coverage, or the insurer's reckless disregard as to the unreasonableness of the denial. *Garcia v. Dawahare*, 608 F. Supp. 2d 1228, 1234 (D. Nev. 2008).

Duty to Act in Good Faith. Tortious breach of implied covenant of good faith and fair dealing is implied in cases involving special relationships characterized by elements of public interest, adhesion, fiduciary responsibility, including insurance agreements or contracts. *Great Amer. Ins. v. General Builders, Inc.*, 113 Nev. 346, 354, 934 P.2d 257, 262 (1997). Bad faith is an insurer's denial or refusal to pay insured's claim without any reasonable basis and insurer's knowledge or awareness of lack of reasonable basis to deny coverage or reckless disregard as to unreasonableness of denial. *American Excess Ins. v. MGM Grand Hotels, Inc.*, 102 Nev. 601, 605, 729 P.2d 1352, 1354 (1986); *Falline v. GNLV Corp.*, 107 Nev. 1004, 823 P.2d 888, 891 (1991); *Pioneer Chlor Alkali, Inc. v. National Union Fire Ins.*, 863 F. Supp. 1237, 1242 (D. Nev. 1994); *Schumacher v.*

State Farm Fire & Cas., 467 F. Supp. 2d 1090, 1095 (D. Nev. 2006).

Insurer's interpretation of its own contract as excluding coverage may render claim fairly debatable and thus a defense to tortious breach of implied covenant of good faith and fair dealing. Whether insurer's belief that claim is fairly debatable is one of law or one of fact depends in certain circumstances upon the court which is reviewing it. For the most part, the issue may be deemed one of fact for trier to determine. *Wohlers v. Bartgis*, 114 Nev. 1249, 1259, 969 P.2d 949, 956 (1999). *But see Schumacher, supra.* However, a finding by the court that there is a genuine dispute precluding bad faith does not necessarily bar a violation under Nevada's breach of statutory duty for unfair claims practices. *See also, Schumacher, supra*, citing with approval, *Pioneer Chlor.*

Preemption of Claims by ERISA. Claims for unfair insurance practices (*see* NRS §686A.310) are preempted by Employment Retirement Income Security Act (ERISA) when made with regard to valid ERISA plan. *Villescas v. CNA Ins. Cos.*, 109 Nev. 1075, 864 P.2d 288 (1993).

Right of Insurer to Settle. A general liability insurer in evaluating settlement must apply the doctrine of equal consideration which requires the evaluation a case should not be determined by looking to policy limits. Rather, the insurance company evaluates a claim without looking to policy limits and as though it alone would be responsible for payment of any judgment rendered on the claim. *Crystal Bay Gen. Imp. Dist. v. Aetna Cas. & Sur.*, 713 F. Supp. 1371, 1378 (D. Nev. 1989).

Coverage - Construction of Terms. See "CONSTRUCTION OF POLICY."

It is generally recognized that an ambiguity exists when a word or phrase is reasonably susceptible to more than one construction. Thus, if there is an ambiguity by definition, and in particular an exclusion, the general rule is that where a policy of insurance is framed to leave room for two constructions, the words should be interpreted most strongly against the insurer. *Montana Refining v. National Union Fire Ins.*, 918 F. Supp. 1395 (D. Nev. 1996). When extrinsic evidence does not resolve an ambiguity, the courts favor the doctrine of reasonable expectations of the insured. The reasonable expectation doctrine is defined by the principle that the policy language is construed in accordance with the objective reasonable expectations of the insured. *National Union Fire Ins. v. Reno's Executive Air*, 100 Nev. 360, 682 P.2d 1380 (1984).

Standard Provisions. *See generally*, NRS §§687B.140-687B.150.



Direct Action against Insurer. Nevada does not recognize a private right of action by a third-party claimant against an insurer. *Gunny v. Allstate Ins.*, 108 Nev. 344, 346, 830 P.2d 1335, 1336 (1992).

Duty to Defend. Insurance company's duty to defend and/or to indemnify its insured arises from provisions of the insurance policy. Insurer must defend any lawsuit brought against insured which potentially seeks damages within coverage of the policy. *Rockwood Ins. v. Federated Capital Corp.*, 694 F. Supp. 772, 776 (D. Nev. 1988); *Capital Indem. Corp. v. Blazer*, 51 F. Supp. 2d 1080, 1084 (D. Nev. 1999).

Duty to defend rule provides that insurer must defend any suit brought against its insured that potentially seeks damages within coverage of the policy; if facts are alleged which, if proven, would give rise to duty to indemnify. See *United Nat'l Ins. v. Frontier Ins.*, 120 Nev. 678, 686, 99 P.3d 1153, 1157 (2004); *Insurance Co. of N. Am. v. Hilton Hotels USA, Inc.*, 908 F. Supp. 809, 814 (D. Nev. 1995), *aff'd*, 110 F.3d 715 (9th Cir. Nev. 1997); See also *Great Am. Ins. v. N. Am. Specialty Ins. Co.*, 2008 U.S. Dist. LEXIS 34308, (D. Nev. 2008).

Duty to defend is analyzed based upon a careful review of the complaint. *Nevada VTN v. General Ins.*, 834 F.2d 770 (9th Cir. 1987); *Montana Refining v. National Union Fire Ins.*, 918 F. Supp. 1395, 1402 (D. Nev. 1996). However, focus of the examination should be the factual allegations in the complaint as well as any facts available from a reasonable investigation rather than causes of action. See *Rockwood, supra*.

Liability Between Insurers.

Garage Policy. If a garage lends a car to customer while customer's car undergoes repair, and if two or more policies of liability insurance covering same motor vehicle are in effect when motor vehicle is involved in an incident which results in a claim against policies, policy issued to customer and not to garage is primary policy. NRS §690B.025. This section applies only to policies of liability insurance, and not to uninsured motorist coverage. *Allstate Ins. v. Pilosof*, 110 Nev. 311, 871 P.2d 351 (1994).

Coinurance. As between two primary insurers, Nevada has adopted the *Lamb-Weston* rule which concludes that where the "other insurance" clause in one policy conflicted with a similar clause in another policy, the clause was null and void. In *Travelers Ins. v. Lopez*, 93 Nev. 463, 468, 567 P.2d 471, 474 (1977), Nevada adopted the reasoning in *Lamb-Weston, Inc. v. Oregon Auto Ins.*, 341 P.2d 110 (Oregon 1959). See *Hall v. Enter. Leasing Company-West*, 122 Nev. 685, 137 P.3d 1104 (2006). Nevada adopted the rule that mutually re-

pugnant escape, excess or pro rata clauses would be disregarded and losses would be pro-rated according to limits of both policies. However, as between a rental car agency and an insurer providing auto insurance to the renter, Nevada declined to apply the *Lamb-Weston* rule. Rental agencies acting as a self-insurer can by contract provide that the rental agency is secondary or excess to primary insurance offered to the renter. *Alamo Rent-A-Car, Inc. v. State Farm Mut. Auto. Ins.*, 114 Nev. 154, 953 P.2d 1074 (1998).

Exclusions.

Intentional Acts. As a general rule...one must look to the subjective intent of the insured, and if the insured did not intend to cause at least some injury, the exclusion is inapplicable. *Allstate Ins. v. Sanders*, 495 F. Supp. 2d 1104, 1106 (D. Nev. 2007)).

Insured's conduct in sexually molesting an 11-year-old adopted daughter is deemed excluded from a policy coverage under the "expected or intended" clause based upon the adoption of an objective standard as to the intent of the insured. *State Farm Fire & Cas. v. Smith*, 907 F.2d 900 (9th Cir. 1990).

The insured's intentional shooting of his estranged wife and two friends was not an "accident" covered by a homeowner's liability policy. The homeowner's policy provided coverage for damages from an accident defined as "sudden event...neither expected nor intended by the insured." *Mallin v. Farmers Ins. Exchg.*, 108 Nev. 788, 839 P.2d 105 (1992).

Assault. Under Nevada law, an assault and battery allegedly committed by bar patrons could constitute an "accident" from the perspective of the insured bar owner and thus could be an "occurrence" within the meaning of commercial general liability policy where focusing on the alleged tortfeasor's intent would be improper in determining whether an intentional tort was an accident. *Capital Indem. Corp. v. Blazer*, 51 F. Supp. 2d 1080, 1086 (D. Nev. 1999).

Miscellaneous Exclusions. Liquor liability exclusion of a commercial general liability insurance policy applies to allegations arising directly out of or dependent upon the sale of alcohol, the service of alcoholic beverage, or the causing of a person's intoxication, but not negligence claims which could arise in context completely unrelated to alcohol. *Blazer*, 51 F. Supp. 2d at 1088.

Hazardous substances remedial action exclusion under commercial general liability policy excludes coverage for clean-up costs sought by government for clean-up of hazardous waste spill; costs incurred involving removing chemical, monitoring site, performing soil

treatment and enclosing site. *Montana Refining v. National Union Fire Ins.*, 918 F. Supp. 1395 (D. Nev. 1996). The effect of certificate of liability insurance is a question of law. *See Id.*

Waiver. A waiver is a voluntary and intentional abandonment or relinquishment of a known right. *Aetna Cas. & Sur. v. L.K. Comstock & Co.*, 488 F. Supp. 732, 735 (D. Nev. 1980), *rev'd on other grounds*, 684 F.2d 1267 (9th Cir. 1982).

Implied waiver or equitable estoppel is defined by the following elements: 1) The party to be estopped must be apprised to the true facts; 2) He must intend that his conduct shall be acted upon or must elect that the party asserting estoppel has the right to believe that it is so intended; 3) The party asserting estoppel must be ignorant of the true state of facts; 4) He must have relied to his detriment on the conduct of the party to be estopped. *Collins v. Farmers Ins. Exchg.*, 61 F. Supp. 2d 1124 (D. Nev. 1999).

Reservation of Rights. Nevada requires through its Unfair Claims Practice Act that an insurer must promptly provide to its 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 and for any denial of his claim or for an offer to settle or compromise his claim. *See* NRS §686A.310(n). A reservation of rights letter may be employed where there are covered and uncovered claims as well as to seek reimbursement for costs incurred in defending non-covered claims related to costs of investigation and/or defense. *Blazer*, 51 F. Supp. 2d 1080.

Notice. Nevada law recognizes that the cooperation clause contained in the policy providing for notice and forwarding of suits is a condition precedent to indemnification. Nevada's doctrine does not require the demonstration of actual prejudice before invoking the clause as forfeiture to insurance indemnification. *SB Corp. v. Hartford Accident & Indem.*, 880 F. Supp. 751 (D. Nev. 1995), *aff'd*, 100 F.3d 964 (9th Cir. 1996); *Las Vegas Star Taxi, Inc. v. St. Paul Fire & Marine Ins.*, 102 Nev. 11, 714 P.2d 562 (1986); *State Farm Mut. Auto Ins. v. Cassinelli*, 67 Nev. 227, 216 P.2d 606 (1950).

Punitive Damages.

Public Policy on Insurability of Punitive Damages. An insurer may insure against legal liability for exemplary or punitive damages that do not arise from a wrongful act of insured committed with intent to cause injury to another. NRS §681A.095. However, as a matter of Nevada law, a commercial general liability insurance policy does not provide indemnification of punitive damages since the policy covers damages because of bodily injury caused by an occurrence, and the term

"bodily injury" encompasses compensatory damages only. *Lombardi v. Maryland Cas.*, 894 F. Supp. 369 (D. Nev. 1995). Nevada also recognizes on grounds of public policy that indemnification for punitive damages would be barred. *Siggelkow v. Phoenix Ins.*, 109 Nev. 42, 846 P.2d 303 (1993).

Standards for Imposition of Punitive Damages for Wrongful Conduct by Insurer. Nevada's current punitive damage statute amended in 1995 exempts the heightened definitions for the imposition of punitive damages where an action is brought against an insurer who acts in bad faith regarding its obligation to provide insurance coverage. *See* NRS §42.005(5). Nevada's adoption of the complicity theory for punitive damages also does not apply where an insurer has acted in bad faith. NRS §42.007(2). Nevada follows the rule that proof of bad faith, by and of itself, does not establish liability for punitive damages. To recover punitive damages, plaintiff must show by clear and convincing evidence oppression, fraud, malice, express or implied. *United Fire Ins. v. McClelland*, 105 Nev. 504, 512, 780 P.2d 193 (1989).

Substantial evidence will be used to evaluate the imposition of punitive damages when reviewing a decision by a jury. Substantial evidence supported a jury's determination that a marine insurer had made critical omissions in investigating a claim for loss of boat and attempted to ensure denial of claim that supported an award of punitive damages on grounds of fraud, oppression or malice. *Powers v. United Servs. Auto. Ass'n*, 114 Nev. 690, 962 P.2d 596 (1998). To establish a prima facie case of bad-faith refusal to pay a claim, one must establish that insurer had no reasonable basis for disputing coverage, and that the insurer knew or recklessly disregarded that fact. *Powers v. Nited Services Auto Assoc.*, 114 Nev. 690, 962 P.2d 596 (1998).

Substantial evidence supported an award of punitive damages for underinsured motorist carrier's delay in paying for insured's independent medical examinations. The evidence supported the conclusion that the carrier's conduct was willful and intentional and done in reckless disregard of consequences to insureds and with conscious disregard for their rights thereby subjecting them to cruel and unjust hardship. *Guaranty Nat. Ins. v. Potter*, 112 Nev. 199, 912 P.2d 267 (1996).

Nevada has defined the term of "oppression" as a "conscious disregard of the rights of others which constitutes an act of subjecting plaintiffs to cruel and unjust hardship." *United Fire Ins. v. McClelland*, 105 Nev. 504, 512-13, 780 P.2d 193, 198 (1989) (citing *Ainsworth v. Combined Ins.*, 104 Nev. 587, 590, 763 P.2d 673, 675 (1988), *cert. denied*, 493 U.S. 958 (1989)).

Punitive damages are legally excessive when the amount of damages awarded is clearly disproportionate to the degree of blame worthiness and harmfulness inherent in the oppressive fraudulent or malicious conduct of the tortfeasor under the circumstances of a given case. Punitive damages may be deemed excessive and thus reduced on appeal. Factors to determine if an award is excessive: (1) financial position of defendant, (2) culpability of tortfeasor, (3) vulnerability and injury suffered by offended party, extent of which conduct offends public's sense of justice, and (4) means necessary to deter future conduct. *Albert H. Wohlers & v. Bartgis*, 114 Nev. 1249, 1267, 969 P.2d 949, 962 (1998).

Nevada recognizes that an insured is entitled to an award of post-judgment interest on punitive damages awarded against the insurer. See NRS §17.130; *Albert H. Wohlers & Co., supra.*, 962.

LIMITATION OF TIME FOR COMMENCEMENT OF ACTION

See Law Digest Tables.

Action for personal injury or wrongful death, 2 years. NRS §11.190(4)(e).

Limitations in Contract. Six years in case of ordinary written contract, unless contract provides otherwise. NRS §11.190(1)(b). Four years for oral contracts. NRS §11.190(2)(c).

Limitations in Medical Malpractice. See NRS §41A.097 providing limitations on claims arising from medical care.

Accrual. In medical malpractice cases, "discovery rule" applies in both injury and death cases: action accrues as of date claimant discovers, or reasonably should have discovered, that legal injury has occurred, *i.e.* both fact of injury or death and negligent cause thereof. *Pope v. Gray*, 104 Nev. 358, 760 P.2d 763 (1988); extending discovery rule adopted for personal injury medical malpractice cases in *Massey v. Litton*, 99 Nev. 723, 669 P.2d 248 (1983), to wrongful death medical malpractice cases.

Medical Malpractice. Applicable statute of limitations will depend on whether injury occurred prior to October 1, 2002. If so, limitations period is either 4 years from date of injury or 2 years from date of discovery of injury, whichever occurs first. For injuries occurring after October 1, 2002, statute of limitations is 3 years from date of injury or 1 year from date of discovery of injury, whichever occurs first. NRS §41A.097. Discovery of "injury" is referring to date when claimant knows, or reasonably should know, that physical injury has occurred and that it is the result of medical negli-

gence. *Massey*, 99 Nev. 723. In wrongful death medical malpractice cases, date of death is the earliest commencement date for statute of limitations. *Pope*, 104 Nev. 358; *Gilloon v. Humana, Inc.*, 100 Nev. 518, 687 P.2d 80 (1984). Date of patient's death is not to be included in computation of limitations period, by reason of NRCP 6, not any statutory provision. *Goldberg v. Charter Med. Corp.*, 98 Nev. 402, 651 P.2d 94 (1982).

Legal Malpractice. Action must be commenced within in four years that damages were sustained or two years upon discovering cause of action exists. NRS §11.207. Statute of limitations does not begin to run until client discovers, or reasonably should have discovered, all facts material to the cause of action, *i.e.* facts constituting all elements of the claim. *Sorenson v. Pavlikowski*, 94 Nev. 440, 581 P.2d 851 (1978).

Action for libel, slander, assault, battery, false imprisonment or seduction: two years. NRS §11.190(4)(c).

Fraud. Action for fraud must be brought within three years of discovery of facts constituting fraud. NRS §11.190(3)(d); *Hartford Acc. & Indem. v. Rogers*, 96 Nev. 576, 613 P.2d 1025 (1980). See "WAIVER AND ESTOPPEL."

Improvements to Real Property. Construction defect cases are subject to statutes of limitation and statutes of repose, of varying time periods and conditions: to be actionable, a claim involving improvements to real property, *i.e.* a construction defect claim, must be brought within time limit set forth in statute of repose, which commences at time of substantial completion of building, and must also be brought within time limit set forth in statute of limitation for the particular cause of action, which commences at time the party knew or should have known of damage. *G and H Assocs. v. Ernest W. Hahn, Inc.*, 113 Nev. 265, 934 P.2d 229 (1997). Statute of limitation forecloses an action after a fixed period of time after occurrence or discovery of injury; it is a procedural bar to the suit. Statute of repose "bars causes of action after a certain period of time, regardless of whether damage or an injury has been discovered." *Allstate Ins. v. Furgerson*, 104 Nev. 772, 766 P.2d 902 (1988). NRS §11.203 bars causes of action for, among other things, personal injury or property damage allegedly caused by deficiency in improvements to real property when injury is discovered more than 10 years after "substantial completion" of improvements. If damage or injury occurs after the specified period, it is barred without regard to whether statute of limitations has run on injured party's claim. See *G and H Assocs. v. Ernest W. Hahn, Inc.*, 113 Nev. 265, 934 P.2d 229 (1997). NRS §§11.204 and 11.205, respectively, set time limits of 8 years for "latent" or non-apparent deficiencies, and of 6 years for "patent" or apparent deficiencies. These statutes of re-

pose protect “the owner, occupier or any person performing or furnishing the design, planning, supervision or observation of construction, or the construction of an improvement to real property.” See, *i.e.*, NRS §11.203(1).

Action to Enforce Right of Contribution Among Joint Tortfeasors. NRS §17.285 sets forth two methods of enforcing a right of contribution: tortfeasor may seek to enforce his right of contribution in the same action by motion, once judgment has been entered against two or more tortfeasors for same injury or death; or tortfeasor may file a separate action for contribution. If a separate action is filed, it must be filed within one year after judgment has become final by lapse of time for appeal or after appellate review.

Action by insurer, as subrogee of its named insured, against uninsured motorist to recover monies paid to its insured pursuant to uninsured motorist coverage, sounds in tort rather than in contract; thus, two-year statute of limitation applies to the suit and begins to run from date of accident. *State Farm Mut. Auto. Ins. v. Wharton*, 88 Nev. 183, 495 P.2d 359 (1972); see also *Torrealba v. Kesmetis*, 178 P.3d 716, 723 (Nev. 2008) (stating nature of grievance determines character of action).

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

Court may dismiss action not brought to trial two years after suit is filed. Court must dismiss action not brought to trial five years after suit was filed or three years after motion for new trial is granted, except when parties have stipulated to an extension in writing. NRCP 41 (e).

Insurance policy clause requiring insured to file suit over any disputed claim under the policy within twelve months of date of loss has been deemed valid. Although limitations period begins to run as of date of loss, the Court has held that limitations period is tolled once insured provides notice of loss to the insurer and continues to be tolled until insurer formally denies liability for loss. *Walker v. American Bankers Ins. Group*, 108 Nev. 533, 836 P.2d 59 (1992).

MALPRACTICE

Proposed Ballot Initiative Changes to NRS §41A. In November 2004, Nevada voters passed a ballot initiative that limits the fees an attorney can charge a person seeking damages against a negligent provider of health care in a medical malpractice action. The new law re-

moved the statutory exceptions for gross negligence and exceptional circumstances from the then existing \$350,000 cap on noneconomic, or pain-and-suffering damages and now limits the recovery of noneconomic damages to \$350,000 per action. Nev. Rev. Stat. §41A.035

The law also does not permit third parties to recover from the wrongdoer the expenses they have paid on behalf of a medical malpractice victim.

In addition, the new law changed how certain damages are paid by health care providers who have been found negligent. It requires that, when an award equals or exceeds \$50,000 in future damages, the court must allow the same to be paid in periodic payments instead of a lump sum, if requested by either party.

The statute of limitations for filing actions also changed under the new law. The old law provided that, if the injury was not immediately apparent, the injured person had 2 years from the time the person discovers or should have discovered the injury to file the lawsuit. The new law reduces that time to 1 year.

To prevail in a medical malpractice action, the plaintiff must establish the following: 1) that the doctor’s conduct departed from the accepted standard of medical care or practice; 2) that the doctor’s conduct was both the actual and proximate cause of the plaintiff’s injury; and 3) that the plaintiff suffered damages. *Prabhu v. Levine*, 112 Nev. 1538, 930 P.2d 103 (1996). Noneconomic damages may not exceed \$350,000 under NRS §41A.035, no exception for exceptional circumstances or “gross malpractice.”

Expert Testimony. District Court may dismiss a complaint if complaint is filed without an affidavit supporting allegations of complaint submitted by a medical expert of the same discipline. NRS §41A.071.

Standard of Care. The locality rule that a medical witness seeking to give opinion evidence in a malpractice action must first show knowledge of standards of locality is not standard to apply to board certified specialists; thus, to recover in medical malpractice action against board certified specialist, plaintiff need only demonstrate that defendant specialist failed to meet standard of skill and care expected of reasonably competent practitioner in same specialty wherever practicing. *Orcutt v. Miller*, 95 Nev. 408, 595 P.2d 1191 (1979).

Wrongful Birth. Mother who brought medical malpractice action against doctor based on failure to diagnose severe defects in fetus, resulting in deprivation of right to terminate pregnancy and birth of severely deformed child, may recover damages for extraordinary medical and custodial expenses associated with caring



for child during period of dependency and damages for past and future emotional distress; mother may not recover damages for lost services or companionship; child does not have personal cause of action for “wrongful life.” *Greco v. United States*, 111 Nev. 405, 893 P.2d 345 (1995).

Hospital - Damages. Under NRS §41.035, a claimant, whether a paying patient or an indigent patient, can sue a county hospital and its employees acting within scope of employment for negligence and damages not to exceed \$75,000; employees are entitled to indemnification from hospital. *See generally Gallegos v. Southern Nevada Mem. Hosp.*, 575 F. Supp. 824 (D. Nev. 1983).

Legal. See “ATTORNEYS.”

In an action for injury or death against a provider of health care based upon professional negligence, if the defendant so elects, the defendant may introduce evidence of any amount payable as a benefit to the plaintiff as a result of the injury or death pursuant to the United States Social Security Act, any state or federal income disability or worker’s compensation act, any health, sickness or income-disability insurance, accident insurance that provides health benefits or income-disability coverage, and any contract or agreement to any group, organization, partnership or corporation to provide, pay for or reimburse the cost of medical, hospital, dental or other health care services. If the defendant elects to introduce such evidence, the plaintiff may introduce evidence of any amount that the plaintiff has paid or contributed to secure his right to any insurance benefits concerning which the defendant has introduced evidence. A source of collateral benefits introduced pursuant to subsection one may not: (a) recover any amount against the plaintiff; or (b) be subrogated to the rights of the plaintiff against a defendant. NRS §42.021.

Diagnostic and treatment decisions of a physician employed by a public hospital are not considered discretionary functions under NRS §41.032(2) and such a physician is not entitled to immunity from suit for malpractice concerning same. However, a physician working for a public hospital is considered a government employee for purposes of the application of the statutory cap on damages set forth in NRS §41.035. *See, Martinez v. Maruszczak*, 123 Nev. ___, 43, 168 P.3d 720 (2007).

As to dentistry and dental hygiene, *see generally* NRS §631; nurses, *see* NRS §632; osteopathic medicine, *see* NRS §633; chiropractic, *see* NRS §634; Oriental medicine, *see* NRS §634A; podiatry, *see* NRS §635; optometry, *see* NRS §636; dispensing opticians, *see* NRS §637; hearing aid specialists, *see* NRS §637A; audiologists and speech pathologists, *see* NRS §637B; pharmacists, *see* NRS §639; physical therapists, *see* NRS §640;

psychologist, *see* NRS §641; and medical laboratories, *see* NRS §652.

NEGLIGENCE

See Law Digest Tables.

See “AUTOMOBILES.”

Negligence requires the Plaintiff to satisfy four elements; (1) existing duty of care, (2) breach, (3) legal causation, and (4) damages. *Turner v. Mandalay Sports Entm’t, LLC*, 124 Nev. ___, 20, 180 P.3d 1172, 1177 (2008).

Assumption of Risk. Nevada has adopted the limited duty rule in regard to the duty of care owed to spectators by owners and operators of stadiums. *See, Id.* Under this rule, stadium owners and operators must provide sufficient amount of protected seating for those spectators who may reasonably be anticipated to desire protected seats on an ordinary occasion and must provide protection for all spectators located in the most dangerous parts of the stadium; i.e. those that pose an unduly high risk of injury from foul balls. *Id.* at 1175.

Primary implied assumption of the risk arises when the plaintiff impliedly assumes those risks that are inherent in a particular activity. *Id.* at 1177. The primary implied assumption of the risk doctrine was not abolished by the enactment of Nevada’s comparative negligence statute. *Id.* Whether the primary implied assumption of the risk doctrine bars a plaintiff’s claim should be incorporated into the court’s initial legal analysis of the element of duty of due care, not treated as an affirmative defense to be decided by a jury. *Id.*

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

Comparative Negligence. Contributory negligence of plaintiff does not bar recovery if negligence of plaintiff was not greater than combined negligence of all persons against whom recovery is sought, but damages allowed shall be reduced in proportion to amount of negligence attributable to plaintiff. NRS §41.141. *Moyer v. United States*, 593 F. Supp. 145 (D. Nev. 1984); *State Farm Mut. Auto. Ins. v. Commissioner of Ins.*, 114 Nev. 535, 958 P.2d 733 (1998). Negligence of plaintiff, however, will not reduce awards in actions based on willful and wanton misconduct, *Davies v. Butler*, 95 Nev. 763, 602 P.2d 605 (1979), or on strict products liability. *Young’s Mac. v. Long*, 100 Nev. 692, 692 P.2d 24 (1984).

Contributory Negligence. *See* “Comparative Negligence.” The “obvious danger rule” survives the adoption of comparative negligence statutes because if a danger is



open and obvious the defendant cannot be found guilty of failure to warn. *Harrington v. Syufy Enterprises*, 113 Nev. 246, 944 P.2d 797 (1997); see also *Turner v. Mandalay Sports Entm't, LLC*, 180 P.3d 1172, 1177 (Nev. 2008).

In Nevada "duty" is defined as an obligation to which law will give recognition and effect, to comport to a particular standard of conduct toward another, and in negligence cases, the duty is invariably the same, one must confirm to legal standard of reasonable conduct in light of apparent risk. See *Merluzzi v. Larson*, 96 Nev. 409, 610 P.2d 739 (1980); *overruled on other grounds, Smith v. Clough*, 106 Nev. 568, 796 P.2d 592 (1990); *Ashwood v. Clark County*, 113 Nev. 80, 930 P.2d 740 (1997) (Foreseeable harm is a predicate to establishing an element of duty.)

Imputed Negligence. Negligence of husband is not imputed to wife. *Fredrickson & Watson v. Boyd*, 60 Nev. 117, 102 P.2d 627 (1940); *Los Angeles & S.L. v. Umbraugh*, 61 Nev. 214, 123 P.2d 224 (1942). Husband's negligence imputed to wife if wife's recovery would be community property. See *Choate v. Ransom*, 74 Nev. 100, 323 P.2d 700 (1958). NRS §483.300 imputes the negligence of a minor while driving a car to the person who signed the minor's application for driving permit.

Any liability imposed upon an immediate family member arising out of his or her operation of a car with permission of the owner, is imposed upon the owner as well, jointly and severally. NRS §41.440.

NRS §41.470 limits the liability of a parent to \$10,000 only with respect to a minor's willful misconduct.

Plaintiff sued parents of driver contending they negligently permitted their minor son to drive the vehicle. Plaintiff was a passenger on the motorcycle driven by defendant. Defendant was only 13 years old. Summary judgment in favor of parents was not appropriate. Genuine issues of material fact existed as to whether parents knowingly permitted son to drive motorcycle, so that they could be held liable for common law negligent entrustment. *Zugel v. Miller*, 100 Nev. 525, 688 P.2d 310 (1984).

Plaintiff sued father of driver. Summary judgment in favor of father was upheld. Father was not vicariously liable for son's negligence when he had transferred title to son prior to accident, even though vehicle was still registered to father. Father was not "owner" for purposes of NRS §41.440. *Barr v. Gaines*, 103 Nev. 548, 746 P.2d 634 (1987).

Intersections or Stop Signs. See NRS §484 (Traffic Laws). Driver on through or arterial highway is favored driver, and general rule that first automobile to enter intersection has right of way does not apply. *Botts v. Rush-ton*, 63 Nev. 426, 172 P.2d 147 (1946). See NRS §484.315(3).

Negligent Infliction of Emotional Distress. For purposes of bystander emotional distress claims, issues of standing based on the closeness of relationship between victim and bystander should, as a general proposition, be determined based upon family membership, either by blood or marriage. *Grotts v. Zahner*, 115 Nev. 339, 989 P.2d 415 (1999); *abrogating State Dept. of Transp. v. Hill*, 114 Nev. 810, 963 P.2d 480 (1998).

Negligence Per Se. Defendant's violation of statute designed to protect class of persons to which plaintiff belongs, proximately causing injury to plaintiff, is negligence per se unless violation is excused, and shifts burden of proof to defendant to prove excuse or justification. *Barnes v. Delta Lines*, 99 Nev. 688, 669 P.2d 709 (1983). Liability under negligence per se theory is in general, a question of fact for the trier of fact. *Anderson v. Baltrusaitis*, 113 Nev. 963, 944 P.2d 797 (1997).

Nevada does not recognize the liability of an establishment that provides alcohol to a person who subsequently commits an act resulting in an injury to a third person. See, *Hamm v. Carson City Nugget, Inc.*, 85 Nev. 99, 450 P.2d 358 (1969); *Snyder v. Viani*, 110 Nev. 1339, 885 P.2d 610 (1994), *cert. denied*, 117 S. Ct. 385 (1996).

Premises Liability. In Nevada the principles of landowner liability based upon status of person injured on the premises, such as whether that person is trespasser, licensee or invitee, have been abandoned. Instead owner or occupier of land is held to general duty of reasonable care when another is injured on his land. See *Rockwell v. Sun Harbor Budget Suites*, 112 Nev. 1217, 925 P.2d 1175 (1996); *Hall v. SSF, Inc.*, 112 Nev. 1384, 930 P.2d 94, 99 (1996). (Proprietor owes general duty to use reasonable care to keep premises in a reasonably safe condition and this duty extends to the hiring and supervision of employees).

Proximate Cause. For act to be proximate cause of injury it must appear that injury was natural and probable consequence of negligence or wrongful act, and that it ought to have been foreseen in light of attending circumstances. *Van Cleave v. Kietz-Mill Minit Mart*, 97 Nev. 414, 633 P.2d 1220 (1981).

Proof of negligence cannot be left to mere speculation or conjecture. *Levine v. Remolif*, 80 Nev. 168, 390 P.2d 718 (1964). Mere fact that there was accident and someone was injured is not of itself sufficient to predi-

cate liability. Negligence is never presumed but must be established by preponderance of evidence. *Gunlock v. New Frontier Hotel Corp.*, 78 Nev. 182, 370 P.2d 682 (1962); *See also, Peacock Jewelers Inc. v. Nevada State Bank*, 92 Nev. 654, 556 P.2d 1266 (1976).

District court erred in admitting expert testimony of biomechanical engineer on issue of causation of plaintiff's injuries to accident at issue because defendant did not demonstrate that his opinion was the product of reliable methodology. *Hallmark v. Eldridge*, 124 Nev. ___. 48, 189 P.3d 646, 653 (2008).

Res Ipsa Loquitur. Res Ipsa shifts burden of proof to defendant if accident ordinarily does not happen absent negligence, defendant has exclusive control over product and defendant can better explain accident. *Otis Elevator v. Reid*, 101 Nev. 515, 706 P.2d 1378 (1985).

Tortious conduct by employee in transit to or from work ordinarily will not expose employer to liability. Exception exists when employee is engaged in "special errands" for employer, even though not performed during usual working hours. *Connell v. Carl's Air Conditioning*, 97 Nev. 436, 634 P.2d 673 (1981).

Intentional acts of hotel employee held within scope of employment; employer liable. *Prell Hotel Corp. v. Antonacci*, 86 Nev. 390, 469 P.2d 399 (1970). In Nevada, an employer's liability extends beyond his actual or possible control over his employees and includes risks inherent in or created by the enterprise. *See generally, Id, see also National Convenience Stores v. Fantauzzi*, 94 Nev. 655, 657, 584 P.2d 689 (1978) (Acknowledging that one analysis of the policy underlying the doctrine of respondeat superior is that vicarious liability is simply one risk of the entrepreneur system).

Rockwell v. Sun Harbor Budget Suites, 112 Nev. 1217, 1223-1224, 925 P.2d 1175, 1179 (1996) (citing *National Convenience Stores v. Fantauzzi*, 94 Nev. 655, 657, 584 P.2d 689, 691 (1978)) states: "The employer can be vicariously responsible only for the acts of his employees not someone else, and one way of establishing the employment relationship is to determine when the 'employee' is under the control of the 'employer.'" "This element of control requires that the employer 'have control and direction not only of the employment to which the contract relates but also of all its details and the method of performing the work..." *Kennel v. Carson City School District*, 738 F. Supp. 376, 378 (D. Nev. 1990) (quoting 53 Am. Jr. 2d *Master and Servant* §2 (1970)).

"However, in the situation where a property owner hires security personnel to protect his or her premises and patrons, that property owner has a personal and non-delegable duty to provide responsible security personnel.

Therefore, we conclude as a matter of law that the security personnel are the employees of the property owner, even if the property owner engaged a third party to hire the security personnel. In such a situation, we find an employer-employee relationship without evaluating whether the security personnel were under the control of the property owner, noting that the control analysis is only one of the methods available to establish such a relationship. *Rockwell v. Sun Harbor Budget Suites*, 112 Nev. 1217, 1223, 925 P.2d 1175 (1996) (citing *National Convenience Stores*, 94 Nev. at 657, 584 P.2d at 691).

Reasonableness of regular maintenance/inspection schedule for slip and fall case is question of fact for jury. Summary judgment on this basis will no longer prevail. *Judson v. Camelot Food, Inc.*, 104 Nev. 324, 756 P.2d 1198 (1988).

PENALTY AND ATTORNEY FEES

Award of Attorney's Fees. The compensation of an attorney for his services is governed by agreement, express or implied, which is not restrained by law. In addition to the cases where an allowance is authorized by specific statute, the court may make an allowance of attorney's fees to a prevailing party: (a) When he has not recovered more than \$20,000; or (b) Without regard to recovery sought, when the court finds that the claim, counterclaim, cross-claim or third-party complaint or defense of the opposing party was brought without reasonable ground or to harass the prevailing party. NRS §18.010(1) - (2). The court may not make an allowance of attorney's fees to a prevailing party in any action arising out of a written instrument of agreement which entitles the prevailing party to an award of reasonable attorney's fees. NRS §18.010(4).

The court may award attorney's fees to prevailing party in connection with formal offer of judgment made pursuant to NRCP 68 and NRS §17.115.

Unfair practices in settling claims include: (1) failing to effectuate prompt, fair, and equitable settlements of claims in which liability of the insurer has become reasonably clear, and (2), failing to settle claims promptly where liability has become reasonably clear under one portion of the policy in order to influence settlements under other portions. NRS §686A.310(e) and (1). In addition to any rights or remedies available to the commissioner, an insurer is liable to its insured for any damages sustained as a result of such unfair practices. NRS §686A.310(2).

PRIVILEGED COMMUNICATIONS

Attorney/Client. A client has a privilege to refuse to disclose, and to prevent any other person from disclos-

ing, confidential communications between 1) himself or his representative and his lawyer or his lawyer's representative and 2) between his lawyer and the lawyer's representative. NRS §49.095. The person who was the lawyer at the time of the communication may also claim the privilege but only on behalf of the client. NRS §49.105. Acts or services performed by the attorney for the client which are accessible to others or the public are not privileged. *Cheyenne Constr., Inc. v. Hozz*, 102 Nev. 308, 312, 720 P.2d 1224, 1226 (Nev. 1986), citing NRS §49.385. The attorney-client privilege applies to statements taken by insurers only when the statement is taken by the insurer at the express direction of counsel for the insured. *Ballard v. Eighth Judicial Dist. Ct.*, 106 Nev. 83, 85, 787 P.2d 406, 407-408 (1990). The presence or involvement of an attorney in an investigation does not automatically invoke the attorney-client privilege with respect to documents located or created in the course of the investigation. The privilege does not apply if those same documents would have been created in the ordinary course of business regardless of counsel's presence or involvement. *Columbia/HCA Healthcare Corp. v. Eighth Judicial Dist. Ct.*, 113 Nev. 521, 936 P.2d 844 (1997).

Insurer/Insured. In the absence of a conflict, counsel represents both the insured and the insurer and owes duties to both. *Nev. Yellow Cab Corp. v. Eighth Judicial Dist. Court of Nev.*, 123 Nev. ___, 152 P.3d 737, 742 (2007)., the attorney-client privilege is applicable to statements of the insured taken by the insurer when it is taken at the express direction of counsel for the insured. *Ballard v. Eighth Judicial Dist. Ct.*, 106 Nev. 83, 85, 787 P.2d 406, 407-408 (1990).

Doctor/Patient. A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications among himself, his doctor or persons who are participating in the diagnosis or treatment under the direction of the doctor, including members of the patient's family. NRS §49.225. Member of organized hospital committee and committee of organizations providing emergency medical services having duties to evaluate and improve care and review committees of medical and dental societies cannot be compelled to testify concerning meetings, and proceedings of such meetings are not subject to discovery, however, no privilege exists as to statement by one in attendance who is party, person requesting staff privileges, or proceedings concerning action against insurance carrier alleging bad faith failure to settle. NRS §49.265. This privilege extends only to documents generated directly from the peer review process. *Columbia/HCA Healthcare Corp. v. Eighth Judicial Dist. Ct.*, 113 Nev. 521, 936 P.2d 844 (1997).

Spousal. A husband or wife cannot be examined as a witness for or against his spouse without the testifying spouse's consent nor can either spouse be examined during or after the marriage without the consent of the other as to any communication made by one to the other during marriage. NRS §49.295(1). Neither of these privileges works to keep out a spouse's hearsay statements offered at trial. *Franco v. The State of Nevada*, 109 Nev. 1229, 1244, 866 P.2d 247, 257 (Nev. 1993). A non-testifying spouse may not invoke the spousal privilege to prevent his or her spouse from testifying unless the testimony relates to a communication made during the marriage. *Meador v. The State of Nevada*, 101 Nev. 765, 768, 711 P.2d 852, 854 fn. 1 (1985), *overruled on other grounds*, *Talancon v. The State of Nevada*, 102 Nev. 294, 721 P.2d 764 (1986). Exceptions to the spousal privilege of NRS §49.295(1) are provided in NRS §49.295(2) & (3). Only "confidential" communications are protected; thus, communications made in the presence of others are not protected. *Foss v. The State of Nevada*, 92 Nev. 163, 547 P.2d 688 (1976).

Waiver. Any statutory privilege against disclosure of confidential matter is waived if holder of privilege or his predecessors while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the matter. Waiver does not apply if the disclosure itself is a privileged communication or made to an interpreter employed merely to facilitate communications. NRS §49.385. Evidence of a statement or other disclosure of privileged matter is inadmissible against the holder of the privilege if the disclosure was compelled erroneously or made without opportunity to claim the privilege. NRS §49.395.

PRODUCTS LIABILITY

Elements. To present a prima facie case for strict liability in tort, a plaintiff must establish that her injuries were caused by a defect in the product, and that the defect existed when the product left the defendant's control. *Allison v. Merck & Co.*, 110 Nev. 762, 878 P.2d 948 (1994). Nevada law places the burden of proof on the Plaintiff to prove causation in strict liability cases. *Rivera v. Philip Morris, Inc.*, 125 Nev. ___, 18 (June 4, 2009).

Damages. Purely economic loss will not support a claim under strict products liability. *Arco Products v. May*, 113 Nev. 1295, 1299, 948 P.2d 263, 266 (1997).

Strict liability in tort recognized to ultimate consumer of food. *Shoshone Coca-Cola Bottling v. Dolinski*, 82 Nev. 439, 420 P.2d 855 (1966). Extended to all products. *Ginnis v. Mapes Hotel Corp.*, 86 Nev. 408, 470 P.2d 135 (1970).

Townhomes were not “products,” for purposes of strict liability. *Calloway v. City of Reno*, 116 Nev. 250, 993 P.2d 1259 (Nev. Feb. 29, 2000), *superseded by statute on other grounds, as stated in Olson v. Richard*, 120 Nev. 240, 89 P.3d (2004).

Strict liability may be imposed even though product is faultlessly made if it was unreasonably dangerous to place product in hands of user without suitable and adequate warning concerning safe and proper use of product. *Outboard Marine Corp. v. Schupbach*, 93 Nev. 158, 561 P.2d 450 (1977). Warning not a shield from liability where defect could be remedied through commercially feasible design change. *Robinson v. G.G.C., Inc.*, 107 Nev. 135, 808 P.2d 522 (1991). Plaintiff’s own negligence does not reduce award; comparative negligence not applicable in strict liability cases. *Young’s Machine v. Long*, 100 Nev. 692, 692 P.2d 24 (1984).

A product is defective when it fails to perform in a manner reasonably to be expected in light of its nature and intended function. *VanDuzer v. Shoshone Coca Cola Bottling*, 103 Nev. 383, 741 P.2d 811 (1987).

Alternative design is a factor for jury consideration when evaluating whether a product is unreasonably dangerous. *McCourt v. J.C. Penney Co.*, 103 Nev. 101, 734 P.2d 696 (1987).

Implied Warranty. For actions based upon breach of implied warranties under U.C.C. “vertical” privity not required. *Hiles Co. v. Johnston Pump Co.*, 93 Nev. 73, 560 P.2d 154 (1977). “Horizontal” privity required unless plaintiff is member of buyer’s family or guest in buyer’s home. NRS §104.2318; *Zaika v. Del E. Webb Corp.*, 508 F. Supp. 1005 (D. Nev. 1981).

Duty to Warn. In Nevada, products must include warning that adequately communicates dangers that may result from its use or foreseeable misuse, or a product is defective. *Fyssakis v. Knight Equip. Corp.*, 108 Nev. 212, 826 P.2d 570 (1992).

Although manufacturer may assign its duty to warn of unsafeness of its product, manufacturer cannot be relieved of ultimate responsibility for assuring that its unsafe product is dispensed with proper warning. *Allison v. Merck & Co.*, 110 Nev. 762, 878 P.2d 948 (1994).

To recover for defective product, it must be shown that defect made product unreasonably dangerous and unsafe for its intended use; article is unreasonably dangerous if it is dangerous to extent beyond that which would be contemplated by ordinary consumer who uses product with ordinary knowledge common to community as to its characteristics. *Ward v. Ford Motor*, 99 Nev. 47, 657 P.2d 95 (1983). Unexpected, dangerous malfunction may constitute prima facie case of product

defect; proof of specific defect not necessary if alternative possibilities ruled out under all of circumstances. *Stackiewicz v. Nissan Motor Corp., U.S.A.*, 100 Nev. 443, 686 P.2d 925 (1984).

Where distributor was in privity with manufacturer and tendered its defense of product liability claim at start of litigation, and distributor was subsequently exonerated of liability at trial, distributor entitled to indemnity from manufacturer for attorney fees and costs incurred in defending primary action, insofar as such expenses related to preparation and presentation of evidence and arguments that were not primarily directed toward rebutting charges of active negligence. *Piedmont Equip., Inc. v. Eberhard Mfg.*, 99 Nev. 523, 665 P.2d 256 (1983).

Subsequent remedial measures admissible to show ownership, control, feasibility of precautionary measures, or impeachment. NRS §48.095(2). *Jacobson v. Manfredi*, 100 Nev. 226, 679 P.2d 251 (1983). This section not applicable to strict liability, only where negligence or other culpable conduct alleged. *Jeep Corp. v. Murray*, 101 Nev. 640, 708 P.2d 297 (1985).

Nevada does recognize the government contractor defense. *Allison v. Merck & Co.*, 110 Nev. 762, 878 P.2d 948 (1994).

Nevada has a long standing public policy ground for holding manufacturers and distributors of defective products responsible for injuries caused by defective products and has rejected the concept of “unavoidably unsafe products” as an exception to the rules of strict liability. *Allison v. Merck & Co.*, 110 Nev. 762, 878 P.2d 948 (1994).

Nevada has yet to adopt the learned intermediary doctrine. *Gennock v. Warner – Lambert*, 208 F. Supp. 2d 1156 (D. Nev. 2002).

Nevada does not recognize a leading presumption in strict products liability cases. *Rivera v. Phillip Morris*, 125 Nev. Ad. Op. 18 (June 4, 2009).

RELEASE

See Law Digest Tables.

Contract Law-General Consideration. Where release provision contained in draft unambiguously described payment as full tender of claim, and where payees endorsed such draft and received proceeds, summary judgment in favor of maker was appropriate. *Von Zenher v. Truck Ins. Exch.*, 99 Nev. 152, 155 659 P.2d 879, 882 (1983).

Accord and Satisfaction. In suit against contractor for failure to complete performance of contract, substantial evidence supported trial court’s conclusion that par-



ties intended contract with no maximum price, that contract was substantially performed, that contractor's acceptance of check marked "final payment" from plaintiff's bank was not intended to be accord and satisfaction, and that all but one promissory note from plaintiff to contractor did not represent actual debt. *Laughlin Recreational Enterprises, Inc. v. Zab Development, Inc.*, 98 Nev. 285, 646 P.2d 555 (1982).

Covenant Not To Sue. Statutory construction of NRS §17.245 provides that a release or covenant not to sue is effective when it is given in good faith. *Velsicol Chem. Corp. v. Davidson*, 107 Nev. 356, 811 P.2d 561 (1991).

Insured's release for automobile repairs not binding on insured where insurance agent, without authorization, filled in blank spaces for amount of loss, names of parties and dates. *Western Nat'l Ins. v. Trent*, 69 Nev. 239, 247 P.2d 208 (1952).

Infants/Capacity. In order to settle a minor's claim for damages, a guardian or parent must submit a petition to court setting forth certain information regarding facts of claim, nature of damages, and apportionment of proceeds of settlement; upon receiving proceeds of settlement, a blocked financial investment must be established in minor's name. Funds contained therein may not be withdrawn until minor reaches eighteen years of age or by court order. NRS §41.200.

Capacity to contract relates to status of person rather than to circumstances surrounding transaction, and involves person's inability to understand terms of agreement, not his actual understanding. *General Motors v. Jackson*, 111 Nev. 1026, 1031, 900 P.2d 345, 349 (1995).

Joint Tortfeasors. Release by injured party does not preclude recovery against negligent physician, where he is not party to release unless it is the intention of the injured person to so release him and unless compensation receive from the first tortfeasor is full compensation for the injury suffered. *Hansen v. Collett*, 79 Nev. 159, 380 P.2d 301 (1963).

Under the Uniform Contribution Among Tortfeasors Act, release by passenger of employee does not preclude recovery by passenger against employer unless release terms so provide. *Van Cleave v. Gamboni Constr.*, 101 Nev. 524, 529 706 P.2d 845, 849 (1985).

Plaintiff is entitled to only one satisfaction for injuries from joint tortfeasors; accordingly, amount paid for covenant or release by one of them reduces liability of other proportionally. *Whittlesea v. Farmer*, 86 Nev. 347, 469 P.2d 57 (1970). Good faith release of joint tortfeasor discharges released tortfeasor from all liability for con-

tribution to remaining tortfeasors. NRS §17.245. To preserve right of contribution against joint tortfeasor, settling party must include joint tortfeasor in release or right of contribution is waived. NRS §17.225(3).

Release of settling defendants on condition they remain in litigation as sham parties, allowing full prosecution of claim against remaining non-settling defendant, held champertous, contrary to law and public policy. *Lum v. Stinnett*, 87 Nev. 402, 488 P.2d 347 (1971).

REPRESENTATIONS AND WARRANTIES

Statutory Provisions. Policy cannot be rescinded for misrepresentation unless misrepresentations were fraudulent or material to acceptance of risk or if true facts had been known, insurer: would not have issued policy, would not have issued policy at same premium, would not have issued policy for as large and amount would not have covered hazard. NRS §687B.110. Oral contract by insurance agent that collision insurance on certain trucks used for highway business would also cover other vehicles not ordinarily used in revenue business held binding on insurance company since oral collateral agreement to cover trucks not listed in master policy was not integrated into contract and parol evidence rule did not apply. *Truck v. Whitaker*, 71 Nev. 1, 278 P.2d 277 (1955).

When false answer by insured in application is not incorporated into contract by reference or endorsement, such answer is not warranty or condition, but collateral representation. *Violin v. Fireman's Fund Ins.*, 81 Nev. 456, 406 P.2d 287 (1965). See also NRS §687B.100 & 687B.110.

Misrepresentations. Where application for accident insurance contains statements in form of answers to questions which parties stipulated should bar recovery under policy if statements were false and were material to acceptance of risk or hazard assumed, or made with intent to deceive, false answer that applicant was not afflicted with tuberculosis was material as matter of law and defeated recovery on policy. See also *Markoff v. New York Life Ins.*, 88 Nev. 319, 497 P.2d 904 (1972). If terms of a contract are reduced to writing, signed by one party and accepted by other at time premium of insurance was paid, neither party can abandon that instrument, as of no value, in ascertaining what the contract was, and resort to verbal negotiations, which were preliminary to its execution, for that purpose. The doctrine is too well settled that all previous negotiations and verbal statements are merged and excluded when parties assent to written instrument as expressing the agreement. *Bankers' Reserve Life v. Yelland*, 41 F.2d 684 (9th Cir. 1930).

Materiality. A representation is not a term of insurance contract; however, if a false representation is material, it may provide basis for rescission. *Violin v. Fireman's Fund Ins.*, 81 Nev. 456, 460, 406 P.2d 287 (1965).

Rescission. Where application for insurance did not specify that statements and answers contained therein were made a basis and condition of insurance policy, misrepresentation by insured did not become part of insurance contract and did not provide basis for voiding policy. *Universal Underwriters v. Snyder*, 81 Nev. 315, 402 P.2d 483 (1965).

SERVICE OF PROCESS

Upon Non-Resident Motorists. See "AUTOMOBILES."

Personal Service. A copy of the summons must be served together with a copy of the complaint to be effective. NRCPC 4(d). Service upon individuals is accomplished by personally serving papers upon the individual directly, or by leaving copies at defendant's residence with a person who resides there and is of suitable age and discretion, or by delivering copies to agent authorized by that individual defendant to accept service of process on his behalf. NRCPC 4(d)(6).

Domestic Corporations. Service is effective once copies of the summons and complaint are personally served upon resident agent, or upon president or other head of the corporation, secretary, cashier, or managing agent. NRCPC 4(d)(1). If service of the domestic corporation cannot be accomplished by these methods, then service can be made by delivering copies of the summons and complaint to the Secretary of State and also posting legal process in the office of the clerk of court in which the case was filed or is pending; note, however, that an affidavit of due diligence must be filed before service through the Secretary of State will be authorized and the plaintiff must demonstrate that service upon the officers, managing agent or resident agent cannot be had within the state. NRCPC 4(d)(1).

Foreign Corporations. Service of process upon a foreign corporation that does business in the State of Nevada and has appointed a resident agent may be made by personally serving the resident agent, or by leaving copies at the office maintained by that resident agent. NRCPC 4(d)(2); NRS §14.020(2) and (6). If the foreign entity has a managing agent, business agent, cashier, or secretary in this state, then service can be effected by delivering copies of the summons and complaint to them. NRCPC 4(d)(2).

For both domestic and foreign corporations doing business in the state that have not appointed a resident agent and have no designated agent in this state to accept

service of process, then copies of the summons and complaint can be delivered to the Secretary of State. The legal process so served must expressly include citation to NRS §14.030(1) and the Secretary of State can refuse to accept service if the proper citation is lacking; the process must also be accompanied by a \$10.00 fee in order to be effective; also, if plaintiff has a last known address for the corporation or any officers, plaintiff must, in addition to and after serving the Secretary of State, mail copies of the summons and complaint to such address or addresses. See NRS §14.030(1)(a) and (b); NRS §14.030(4). In order to obtain authority to serve any domestic or foreign corporation through the Secretary of State in accordance with the provisions of NRS §14.030, the plaintiff must first file an affidavit of due diligence demonstrating that direct or personal service on the corporation cannot be had. See NRS §14.030(3).

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

Foreign Insurers. Foreign insurance companies must appoint the Commissioner of Insurance for the State of Nevada, and his successors in office, as their attorney to receive service of process filed against the insurer; service of process must be made only by service thereof upon the Commissioner. NRS §680A.250(3). Note, however, that appointment of the Commissioner of Insurance as its statutory agent for service of process does not, in itself, subject a nonresident insurer to the personal jurisdiction of Nevada courts. *Freeman v. Second Jud. Dist. Court*, 116 Nev. 550, 558, 1 P.3d 963 (2000).

Domestic Insurers. NRS 680A.250(4) provides that service of process upon domestic insurance companies may be made by serving the Commissioner of Insurance pursuant to this statute, or by any other means permitted by the Nevada Rules of Civil Procedure.

Operators of Motor Vehicles Involved in Accidents on Public Roads, Streets and Highways in this State. If personal service upon the driver of a motor vehicle involved in an accident on a public roadway in this state

cannot be made pursuant to NRCP 4(d)(6), which describes service of process upon individuals, then NRS §14.070 sets forth a means of substituted service. Driver is deemed to have appointed the Director of the Department of Motor Vehicles as his true and lawful attorney for purposes of service of process. NRS §14.070(1). Service is effected by delivering copies of the summons and complaint, along with a \$5.00 fee, to the Director of the Department of Motor Vehicles, and also sending copies by registered or certified mail to the defendant at the address provided in the accident report, or to the best available address. NRS §14.070(2). Personal service of notice and copy of process upon the defendant outside the State of Nevada is deemed to be the equivalent of mailing. NRS §14.070(2). Note: This statute expressly applies only to nonresident motorists and to resident motorists who have left the State or cannot be found within the State following an accident that is the subject of the action for which process is served pursuant to this section. NRS §14.070(6). Procedural due process requirements preclude resort to this statute prior to due diligent efforts to locate and personally serve the defendant; plaintiff who knew identity of defendant's employer and insurer, but made no effort to locate and serve defendant through these sources, did not exercise due diligence; therefore, default judgment entered based upon service of process through Department of Motor Vehicles must be set aside. *Browning v. Dixon*, 114 Nev. 213, 954 P.2d 741 (1998)(followed by *Leven v. Frey*, 123 Nev. Adv. Rep. 40, 168 P.3d 712(2007)).

Service of Process by Publication. NRCP 4(e)(1). When person to be served resides out of state, or has departed from the state, or cannot, after due diligence, be found within the state, or by concealment seeks to avoid service of process, the court may grant an order that service be made by publication of the summons. The court's order is to direct the publication to be made in a newspaper published in the State of Nevada, designated by the court, for a period of 4 weeks, and at least once a week during that time. NRCP 4(e)(1)(iii). There is no objective, formulaic standard for determining what is, or is not, due diligence under this rule, NRCP 4(e)(1)(i), or other substitute service of process provisions, such as NRS 14.070 (operators of motor vehicles). "The due diligence requirement is not quantifiable by reference to the number of service attempts or inquiries into public records. Instead, due diligence is measured by the qualitative efforts of a specific plaintiff seeking to locate and serve a specific defendant." *Abreu v. Gilmer*, 115 Nev. 308, 313, 985 P.2d 746, 749 (1999).

Nevada Supreme Court has held, and reaffirmed its holding, that actual notice of a suit is not an effective substitute for service of process. *See C.H.A. Venture v.*

G.C. Wallace Consulting, 106 Nev. 381, 384, 794 P.2d 707 (1990); also, *Abreu v. Gilmer*, 115 Nev. 308, 314, 985 P.2d 746 (1999).

Time Limit for Service of Process. NRCP 4(i). If service is not effected within 120 days, the action shall be dismissed as to that defendant, without prejudice. Plaintiff may move to enlarge the time for service, but must show good cause why service was not made within 120 days.

SUBROGATION

In General. Subrogation is equitable doctrine created to accomplish what is just and fair between parties, arising when one party is compelled to satisfy obligation ultimately determined to be obligation of another. *AT&T Tech. v. Reid*, 109 Nev. 592, 855 P.2d 533 (1993).

Parties. Equitable subrogation exists independently of any contractual relation between parties. *Id.*

Surety. In case two or more insurers execute surety contract, each insurer is authorized and empowered to limit its liability to an amount less than the aggregate penalty of such instrument and to limit liability to a pro rata part of any and losses under instrument. NRS §691B.020(2).

Workers' Compensation. When worker's compensation insurer pays benefits to injured worker, it becomes subrogated to injured worker's right to recover damages from third-party tortfeasor. However, worker's compensation insurer may intervene in injured worker's litigation against third-party tortfeasor to protect its right to reimbursement only if it meets certain requirements, which include showing: 1) that it has sufficient interest in litigation's subject matter; 2) that it could suffer impairment of its ability to protect that interest if it does not intervene; 3) that injured worker cannot adequately represent insurer's interest in subject matter of the litigation; and 4) that its application for intervention is timely. *American Home Assurance v. District Court*, 122 Nev. Adv. Rep. 104, 147 P.3d 1120 (2006) (citing NRCP 24(a)(2); *overruling SIIS v. District Court*, 111 Nev. 28, 888 P.2d 911 (1995)). *See also*, NRS §616C.215.

Worker's compensation insurer is subrogated to the rights of the injured employee to recover UM/UIM benefits available under employer's automobile liability policy. NRS §616C.215(3). Any provision contained in a UM/UIM policy which: 1) limits the right of an employee to recover proceeds; 2) limits the subrogation rights of Insurers or Administrators; or 3) excludes coverage which inures to the direct or indirect benefit of the insurer or Administrator is void. NRS §616C.215(3)(c).

Worker's compensation insurer has independent right of action against UM/UIM coverage provided by employer, irrespective of any claims made by injured employee against such coverage. *St. Paul Fire and Marine Ins. v. EICON*, 122 Nev. Adv. Rep. 85, 146 P.3d 258, 262 (2006).

Lenders. Lender who pays off a prior note is equitably subrogated to former lender's priority lien position as long as intervening lien holder is not prejudiced. *Houston v. Bank of Am. Fed. Savings Bank*, 119 Nev. 485, 78 P.3d 71 (2003).

WAIVER AND ESTOPPEL

General Doctrine. A waiver is the voluntary and intentional relinquishment of a known right. Waiver may be express or may be implied from conduct which evidences an intention to waive a right, or by conduct which is inconsistent with any other intention than to waive the right. Equitable estoppel is a doctrine by which a person may be precluded by his act or conduct, or silence when it is his duty to speak, from asserting a right that he otherwise would have had. Equitable estoppel functions to prevent the assertion of legal rights that, in equity and good conscience, should not be available due to the party's conduct. *Teriano v. Nevada State Bank*, 121 Nev. 217, 112 P.3d 1058 (2005).

Under Nevada law, equitable estoppel is comprised of four elements, including: 1) party to be estopped must be apprised of true facts; 2) he must intend that his conduct shall be acted upon or must so act that party asserting estoppel has right to believe it was so intended; 3) party asserting estoppel must be ignorant of true state of facts; and 4) he must have relied to his detriment on conduct of the party to be estopped. Requirement of actual knowledge of true facts on part of the party to be estopped does not apply to a party whose affirmative conduct, consisting of either acts of representations, has misled another. Prejudice to other party is one of the essential elements of equitable estoppel, whereas there can be a waiver even where the party asserting it has not been misled to his or her detriment. Waiver is essentially unilateral involving the act and conduct of only one of the parties, that is, it depends upon what one himself intended to do regardless of the attitude assumed by, or the actions taken by, the other party. *Mahban v. MGM Grand Hotels*, 100 Nev. 593, 691 P.2d 421 (1984).

Whether party seeking to establish equitable estoppel has met his or her burden is generally a question of fact. Only when facts are undisputed or when only one inference can be drawn from the facts does existence of equitable estoppel become a question of law. *Teriano v. Nevada State Bank*, 121 Nev. 217, 112 P.3d 1058 (2005).

Waiver by Agent. The mere omission by an insurance agent regarding affording policy benefits or failing to provide family discount under an auto policy will not be sufficient to raise the defense of estoppel. The court will look to the intent of the insurer to induce reliance upon his conduct. The agent's failure to offer the insured a family discount can be deemed purely an administrative oversight, and estoppel will not apply. *Collins v. Farmers Ins. Exchg.*, 61 F. Supp. 2d 1124, 1128 (D. Nev. 1999).

Premiums. Insurer's acceptance of late payments from the insured on three occasions without declaring forfeiture may be sufficient to raise an estoppel or waiver of defense for non-payment of premium. *McKeeman v. General Am. Life Ins.*, 111 Nev. 1042, 899 P.2d 1124 (1995) (interpreting California law).

Proof of Loss. Nevada recognizes that insured may substantially comply with proof of loss requirements by submitting unsigned or unsworn list of destroyed personal property arising from fire loss. The information must be sufficient to enable the insured to investigate insured's losses, estimate its rights and liabilities and prevent fraud and unjust claims from being asserted. *Walker v. Am. Bankers Ins. Group*, 108 Nev. 533, 836 P.2d 59 (1992); *Fortis Benefits Ins. v. Johnson*, 966 F. Supp. 987 (D. Nev. 1997).

In regards to the submission of a proof of loss for a claim, an insured's post-loss misrepresentation concerning the cause of loss and whether or not the material misrepresentation is sufficient to invoke rescission is generally an issue of fact for the jury and not one of law. *Powers v. United Svcs. Auto. Ass'n*, 114 Nev. 690, 962 P.2d 596 (1998), *modified on denial of reh'g*, 115 Nev. 38, 979 P.2d 1286 (1999).

WORKERS' COMPENSATION

Statutory References. Two-fold purpose of Nevada Industrial Act as set forth in *Prescott v. United States*, 523 F. Supp. 918 (D. Nev. 1981), is 1) to guarantee that injured employee will receive compensation without being forced into litigation, and 2) to provide immunity to certain third parties from suit in tort. Act will be broadly and liberally construed to effectuate its purpose. *SIIS v. Buckley*, 100 Nev. 376, 682 P.2d 1387 (1984).

Original Jurisdiction. Under NRS §616A-616D, 617 the Nevada Industrial Insurance Act provides the exclusive remedy for workers injured on the job due to the actions of their employer. *McAffee v. Garrett Freightliners, Inc.*, 95 Nev. 483, 596 P.2d 851 (1979). If the Industrial Commission decides that employee injury is not compensable under act, common-law action for damages by employee against employer may be permis-

sible. *Las Vegas-Tonopah-Reno Stage Line v. Nevada Indus. Comm'n*, 81 Nev. 626, 408 P.2d 241 (1965).

District Court is not free to substitute its own judgment for that of the agency as to the weight of evidence on a question of fact in workers' compensation proceedings. NRS §233B.135(3). A court may not disturb decisions of appeals officers in industrial insurance cases if they are not clearly erroneous or otherwise amount to abuse of discretion. NRS §233B.135(3); *Stark v. SIIS*, 111 Nev. 1273, 903 P.2d 818 (1995).

District Court followed proper procedure by remanding issue where there was no evidence in record on issue to appeals officer for factual determination of workers' compensation claimant's capacity to enter into settlement agreement with employer and SIIS. Substantial evidence did not support appeals officer's decision to set aside stipulated settlement between claimant and employer and SIIS on ground of incapacity of employee. *General Motors v. Jackson*, 111 Nev. 1026, 900 P.2d 345 (1995).

Right of Review. Employer has exclusive administrative rights. Failure to obtain administrative review of previous disability award precluded review on appeal from second decision to provide benefits. *SIIS v. United Exposition Servs.*, 109 Nev. 28, 846 P.2d 294 (1993).

Medical Examination. Incarceration does not constitute refusal to receive or obstruction of required examination. *SIIS v. Campbell*, 109 Nev. 997, 862 P.2d 1184 (1993). Possibility does not equate to probability; therefore, the speculative nature of a doctor's opinion regarding medical causation does not support an appeals officer's determination that a claimant's current medical condition is industrially related. *Horne v. SIIS*, 113 Nev. 532, 358, 936 P.2d 839 (1997).

Benefits - Wages. Eligibility of workers' compensation claimant for rehabilitative services not measured only at time of industrial accident. SIIS can award benefits upon change in circumstances. *Jerry's Nugget v. Keith*, 111 Nev. 49, 53, 888 P.2d 921 (1995). The Federal government is not an employer as defined in former NRS §616.090 (*cf.* NRS §616A.230) and is not subject to the provisions of the NIIA for purposes of calculating the average monthly wage. *SIIS v. Prewitt*, 113 Nev. 616, 939 P.2d 1053 (1997).

Disability. SIIS officer did not commit abuse of discretion by granting claimant permanent and total disability status in industrial insurance claim, though claimant received job offer from former employer for sedentary employment, where claimant's family doctor concluded that because he could not sit or stand for appreciable length of time, even light duty would be impossi-

ble. NRS §233B.135(3); *Ranieri v. Catholic Cmty. Servs.*, 111 Nev. 1057, 901 P.2d 158 (1995).

Where insurer fails to object or to dispute surgery was reasonable and necessary, claimant may be entitled to benefits even without preauthorization. *SIIS v. Khweiss*, 108 Nev. 123, 825 P.2d 218 (1992). Cause of action can be maintained against self-insured employers and administrators of self-insured plans for negligent or bad faith delay in payment for worker's compensation benefits. *Falline v. GNLV*, 107 Nev. 1004, 823 P.2d 888 (1991). Self-insured successor employer was entitled to deny employee further benefits for work-related injury suffered in the course of employment with predecessor employer, to the extent of employee's recovery from third-party tortfeasor. NRS §616C.215 (former NRS §616.560). *AT&T v. Reid*, 109 Nev. 592, 855 P.2d 533 (1993).

To receive vocational rehabilitation benefits, industrial injury must render worker incapable of performing previous job. *SIIS v. Shirley*, 109 Nev. 351, 849 P.2d 256 (1993).

Notice. Oral notice did not excuse timely formal notice because claimant did not provide sufficient information to establish actual notice. *Brocas v. Mirage*, 109 Nev. 579, 854 P.2d 862 (1993). Actual notice of injury may excuse a failure to file timely notice of injury, not a claim for compensation. *Barrick Goldstrike Mine v. Peterson*, 116 Nev. 541, 2 P.3d 850 (2000).

Employment Defined. Test for determining compensability of injury sustained by employee embarked on trip off employer's premises for both business and personal reasons is that business nature of trip must be bona fide. *D&C Builders v. Cullinane*, 98 Nev. 67, 70, 639 P.2d 544 (1982). While injuries incurred by worker during transport to or from work normally not compensable, exception is found where worker is paid identifiable amount as compensation for travel. *Crank v. NIC*, 100 Nev. 80, 675 P.2d 413 (1984). However, the court has expressly modified any language in *Crank* which may be read to allow workers' compensation coverage for an accident occurring while commuting to and from work where an employee receives a mere travel stipend for the commute. An employee must be receiving wages for his travel time, and not merely a stipend or compensation for travel expenses, to have his or her daily commute considered to be in the course of employment. *Jourdan v. SIIS*, 109 Nev. 497, 501, 853 P.2d 99 (1993). Worker is entitled to compensation for injury from automobile accident which occurred while worker was traveling to receive treatment for work related injury. *Imperial Palace v. Dawson*, 102 Nev. 88, 91, 715 P.2d 1318 (1986). A consequential injury--physical or mental relative to its causal connection to the original

industrial accident is compensable. *Vredenburg v. Sedgwick CMS*, 124 Nev. ___. 53,188 P.3d 1084, 1088 (2008). However, if subsequent injury is from a willful act of employee then no coverage is afforded. *Id.*

For list of five factors used to determine whether putative employer exercised enough control over person to establish employee/employer relationship under NIIA, see *Willison v. Texaco*, 109 Nev. 141, 848 P.2d 1062 (1993). Successor employer was not entitled to reduce or cease employee's worker's compensation benefits until employee had recovered damages from third party tortfeasor. *AT&T v. Reid*, 109 Nev. at 596.

Exclusive Remedy. Nevada employees working outside State for less than six months have exclusive remedy under worker's compensation statutes for injuries or death. NRS §616C.190 (former NRS §616.520). Acceptance of compensation in another state constitutes irrevocable waiver of compensation otherwise payable in Nevada. NRS §616C.195; *NIC v. Underwood*, 79 Nev. 496, 387 P.2d 663 (1963).

Acceptance of compensation constitutes accord and satisfaction of any common law right against employer that might have existed and destroys any right of action. *First Nat'l Bank v. District Court*, 75 Nev. 77, 82, 335 P.2d 79 (1959); *But see Smith v. Garside*, 76 Nev. 377, 355 P.2d 849 (1960); *McGinnis v. Consol. Casinos*, 98 Nev. 396, 650 P.2d 806 (1982).

Negligence of employer in whatever degree short of intent to injure employee resulting in injury or death of employee does not remove occurrence from status of accident which is compensable under Nevada Industrial Insurance Act. *Kennecott Copper v. Reyes*, 75 Nev. 212, 337 P.2d 624 (1959). Requirements for incident to qualify as accident on worker's compensation statute: 1) an unexpected or unforeseen event; 2) happening suddenly or violently; and 3) producing at the time, or within a reasonable time, objective symptoms of injury. *Brocas v. Mirage Hotel & Casino*, 109 Nev. 579, 854 P.2d 862 (1993).

Worker's Compensation benefits for cardiac catheterization and coronary bypass denied, although worker suffered chest contusions in work-related accident 2 weeks earlier, where worker smoked heavily and was obese. No substantial evidence indicated that the need for surgery and industrial injury was causally connected. *United Exposition Svc. v. SIIS*, 109 Nev. 421, 851 P.2d 423 (1993). Claimant must demonstrate by preponderance of evidence a direct causal connection between work performed and disease. NRS §617.440 subd. 1 (a). *Seaman v. McKesson*, 109 Nev. 8, 10, 846 P.2d 280 (1993).

Claimant has burden of proving causal nexus in order to recover benefits. *United Exposition Svc. v. SIIS, supra.*

Disease allegedly caused by environmental tobacco smoke in casino not covered by Occupational Disease Act; environmental tobacco smoke not incidental to character of business. *Palmer v. Del Webb's High Sierra*, 108 Nev. 673, 838 P.2d 435 (1992).

Employer must compensate employee for any aggravation of employee's work related injury caused by medical malpractice. *Breen v. Caesar's Palace*, 102 Nev. 79, 82, 715 P.2d 1070 (1986).

Employee of subcontractor is precluded from maintaining action for damages against co-subcontractor or independent contractor on same job site. *Nolan v. Westinghouse Elec. Corp.*, 97 Nev. 268, 628 P.2d 1123 (1981); *Stolte Inc. v. Eighth Judicial Dist. Ct.*, 89 Nev. 257, 510 P.2d 870 (1973); NRS §616A.210 (former NRS §616.085); NRS §616A.320 (former NRS §616.115). *Cf. Meers v. Haughton Elevator*, 101 Nev. 283, 701 P.2d 1006 (1985). Relief from liability extends to co-employee who may have been liable to claimant on basis of some other role or status unrelated to such employment. *Watson v. G.C. Associates*, 100 Nev. 586, 691 P.2d 417 (1984). But compare former NRS §616.560 (*cf.* 616C.215(2)), which allows cause of action against third party for damages other than "employer or person in same employ." However, the grant of benefits from a third party administrator is equivalent to a grant of benefits from SIIS. *Browning v. Young Elec. Sign Co.*, 113 Nev. 420, 424, 936 P.2d 322 (1997).

The resulting condition of an employee who has a pre-existing condition from a cause of origin that did not arise out of or in the course of his current or past employment, and subsequently sustains an injury by accident arising out of and in the course of his employment which aggravates, precipitates or accelerates his pre-existing condition, shall be deemed to be an injury by accident that is compensable pursuant to the workers' compensation provisions of Chapters 616A to 616D, inclusive, unless the insurer can prove by a preponderance of the evidence that the subsequent injury is not a substantial contributing cause of the resulting condition. NRS §616C.175(1). See *Ross v. Reno Hilton*, 113 Nev. 228, 931 P.2d 1366 (1977) for a discussion of aggravate, precipitate and accelerate.

The resulting condition of an employee who sustains an injury by accident arising out of and in the course of his employment, and subsequently aggravates, precipitates or accelerates the injury in a manner that does not arise out of and in the course of his employment, shall be deemed to be an injury by accident that is

compensable pursuant to the provisions of 616A to 616D, inclusive, unless the insurer can prove by a preponderance of the evidence that the injury in question is not a substantial cause of the resulting condition. NRS §616C.175(2).

SIIS Lien attaches to employee's total recovery from tortfeasor less employer's proportionate share of attorney's fees and court costs. *Breen v. Caesar's Palace, supra*. "Last Injurious Exposure" rule adopted to establish liability in successive-employer, occupational disease cases. *SIIS v. Jesch*, 101 Nev. 690, 709 P.2d 172 (1985). Arising out of employment defined as more than merely being at work and suffering an injury. Examined by a totality of the circumstances. *Rio Suite Hotel & Casino v. Gorsky*, 113 Nev. 600, 939 P.2d 1043 (1997); see also *Mitchell v. Clark County Sch. Dist.*, 121 Nev. 179, 111 P.3d 1104 (2005).

Nevada has adopted the actual street risk rule in determining if a claim based on street travel is compensable. Under the actual street-risk rule, an injury is compensable so long as "(1) the employee's 'duties...require...[a]...presence upon the public streets,'

and (2) the 'injury arose from an actual risk of that presence upon the streets.'" *Bob Allyn Masonry v. Murphy*, 124 Nev. ___. 27, 183 P.3d 126, 130 (2008). Under *Bob Allyn Masonry* the special errand rule applies in coverage of workers' compensation claims. See Negligence.

Failure to Timely Appeal. If an employer fails to timely appeal a grant of benefits, it can still challenge an award if it can prove the employee knowingly misrepresented or concealed a fact in order to obtain benefits. *Browning v. Young Elec. Sign Co.*, 113 Nev. 420, 936 P.2d 322 (1997).

Equitable Estoppel and waiver can be applied in a workers' compensation suit to determine if coverage should be afforded to the claimant. *Dickinson v. Am. Med. Response*, 124 Nev. ___. 44, 186 P.3d 878 (2008). Self Insured Employers are defined by NRS 616A.305. A self insured employer may seek reimbursement from the Nevada Insurance Guaranty Association for monies that should have been paid by their insolvent excess carrier. *MGM Mirage v. Nevada Ins. Guaranty Ass'n*, 125 Nev. ___. 22 (June 25, 2009).