

PUBLICATION UPDATE

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Nevada Civil Practice Manual

Publication 67233

Release 25

November 2021

HIGHLIGHTS

Removal

- Ch. 8, Removal and Remand has been extensively updated including the Ninth Circuit's position on snap removals.

Discovery Rules

- Ch. 12, *Discovery Planning*, has been further updated with coverage of the 2019 discovery rules changes.

Attorney's Fees

- Nevada has adopted the “no suit, no fee” rule, which requires the initiation of litigation before attorney's fees can be recovered. See Ch. 27.

Mootness. A case is moot if it “seeks to determine an abstract question which does not rest upon exist-

ing facts or rights.” A case is not moot if our ruling would affect the parties’ legal rights. *Duong v. Fielden Hanson Isaacs Miyada Robinson Yeh, Ltd.*, 136 Nev. Adv. Op. 87, 478 P.3d 380, 382 (2020). Ch. 2, *Pre-Suit Considerations*, § 2.06[4].

Derivative Actions. Nevada considers these factors when determining the adequacy of representation in a derivative action: (1) indications that the plaintiff is not the true party in interest; (2) the plaintiff’s unfamiliarity with the litigation and unwillingness to learn about the suit; (3) the degree of control exercised by the attorneys over the litigation; (4) the degree of support received by the plaintiff from other shareholders; (5) the lack of personal commitment to the action on the part of the representative plaintiff; (6) the remedy sought by plaintiff in the derivative action; (7) the relative magnitude of plain-

tiff's personal interests as compared to his interest in the derivative action itself; and (8) plaintiff's vindictiveness toward the defendants. *Cotter on behalf of Reading Int'l, Inc. v. Kane*, 136 Nev. Adv. Op. 63, 473 P.3d 451, 456 (2020). See Ch. 4, *Parties and Class Actions*, § 4.10.

Removal. Ch. 8, *Removal and Remand*, has been extensively edited and supplement in this update, including coverage of a split in the Ninth Circuit on "snap removals"; that is, removals that occur before other defendants have been served with process, require service on at least one defendant prior to removal. See, e.g., *Wells Fargo Bank, N.A. v. Fid. Nat. Title Gr., Inc.*, No. 2:20-cv-01849, 2020 U.S. Dist. LEXIS 235986 (D. Nev. 2020). Ch. 8, *Removal and Remand*, § 8.03.

Impleader. A new discussion has been added on the use of joinder versus impleader. See Ch. 10, *Counterclaims, Cross-Claims and Third-Party Practice*, § 10.04[3].

Nunc Pro Tunc Orders. The discussion of nunc pro tunc orders has been revised for improved clarity. See Ch. 11, *Motions, Affidavits, Declaration, Stipulations, and Orders*, § 11.15.

Discovery Planning. Ch. 12, *Discovery Planning*, has been extensively revised following from the 2019 Discovery Rule amendments. See Ch. 12, *Discovery Planning*.

Deposition Subpoenas. If a subpoena requires production of documents and things or the inspection of

premises, then a notice and copy of the subpoena must be served on all parties at least seven days before it is served on the person to whom it is directed. NRCP 45(a)(4)(A). The purpose of this rule is to allow the other parties to object to the subpoena and seek a protective order during the seven days before the subpoena is served. A party who receives a notice of a subpoena under NRCP 45(a)(4)(A) that requires disclosure of privileged, confidential, or other protected matters may file and serve written objections to the subpoena and a motion for a protective order within seven days of receiving the notice. NRCP 45(a)(4)(B)(i), (ii). If a party timely files and serves such objections and a motion for protective order, the subpoena may not be served until the court has ruled on the objections and motion, unless the subpoena is revised to eliminate the objected-to requests. NRCP 45(a)(4)(B)(iv). See Ch. 15, *Depositions*, § 15.02[4].

Out-of-State Depositions. Nevada has adopted the Uniform Interstate Depositions and Discovery Act regarding the service of out-of-state deposition and discovery subpoenas for matters pending in another state's court. NRS Chapter 53. If a deposition is sought in Nevada for an out-of-state case, a foreign subpoena must be submitted to the clerk of the court in the county in which the deposition is sought to be conducted in Nevada. NRS 53.170(1). The clerk will then issue a subpoena for service on the person to which the foreign subpoena is directed. NRS

53.170(2). A subpoena issued pursuant to NRS 53.170 must be served in compliance with NRCp 45. See Ch. 15, *Depositions*, § 15.02[7].

Offer of Judgment. The Nevada Court of Appeal has explained that “only conditions that call the effectiveness of the offer [of judgment] itself into question—not any conditions at all—render an offer of judgment impermissibly conditional. *Bank of N.Y. Mellon v. Lamplight Cottages at Santoli Homeowners’ Ass’n*, 477 P.3d 1132 n.6 (Nev. Ct. App. 2020). An offer of judgment may include language providing that acceptance of the offer would preclude the offeree from seeking additional attorney fees, acceptance would resolve all claims between the parties, the offer is not an admission of liability, etc. See Ch. 18, *Offers of Judgment*, § 18.04[1].

Summary Judgment. Summary judgment may be affirmed on appeal if the appellant waives challenges to summary judgment either expressly or implicitly by failing to meaningfully address the arguments in support of summary judgment. *Droge v. AAAA Two Star Towing, Inc.*, 136 Nev. Adv. Op. 33, 468 P.3d 862, 880 (Nev. App. 2020). See Ch. 19, *Summary Judgment*, § 19.32[3].

Voluntary Dismissal. Although voluntary dismissal is often invoked for strategic purposes such as forum shopping, there are limits, and a plaintiff may not use Rule 41 to engage in “judge shopping.” *Barra-gan v. Clarity Services, Inc.*, 2021 U.S. Dist. LEXIS 62487 (D. Nev.

Mar. 31, 2021). See Ch. 20, *Dismissal of Actions*, § 20.03[2]

Scope of Doctor’s Testimony. Under NRCp 16.1(a)(1)(D), a treating physician will be deemed a retained expert witness subject to the written report requirement of Rule 16.1(a)(2)(B) only if the party is asking the treating physician to provide opinions outside the course and scope of the treatment provided to the patient. Thus, practitioners must decide early if a treating physician will be used for opinions beyond the scope of treatment, and should timely supplement any treating physician opinions in accordance with NRCp 16.1(a)(2)(B). See Ch. 21, *Pretrial Practice Procedures*, § 21.05[5][d].

Expert Witness Fees. In determining appropriate expert witness fees, a court’s discretion is not limitless. In *Cotter on Behalf of Reading International, Inc. v. Kane*, 136 Nev. Adv. Op. 63, 473 P.3d 451, 457–58 (2020), a trial court abused its discretion in awarding more than the statutory maximum of \$1,500 per expert as costs for a corporate director’s expert in a shareholder derivative action challenging director’s conduct, where the action was resolved at the dispositive motion stage, without the Court relying on the director’s expert reports. See Ch. 23, *Evidence*, § 23.03[2].

Arbitration. The FAA applies to arbitration clauses when the underlying agreement involves interstate commerce and references the FAA. See *United States Home Corp. v. Ballesteros Trust*, 134 Nev. 180, 186,

415 P.3d 32, 38 (2018) (“By its terms, the FAA applies to contracts evidencing a transaction involving interstate commerce”). Under the FAA, arbitration agreements are treated as “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2 (2012); *see also* *CVSM, Ltd. Liab. Co. v. Doe*, 435 P.3d 659 (Nev. 2019) (unpublished). The FAA also “pre-empts state laws that single out and disfavor arbitration.” *Ballesteros*, 134 Nev. at 188, 415 P.3d at 40. See Ch. 24, *Trial Practice*, § 24.02[2][e].

Removal From Short Trial Program. A motion to remove a case from the Short Trial Program filed and served after 10 days may be granted for good cause shown. Parties that have removed cases from the Program must ensure that subsequent stipulations regarding the proceedings in district court do not subject them to the Program’s rules. *Crane v. Marolf*, No. 80591-COA, 2021 Nev. App. Unpub. LEXIS 244 (Nev. App. Apr. 28, 2021). See Ch. 25, *Nevada Short Trial Program*, § 25.07.

Attorney’s Fees. In *Jesseph v. Digital Ally, Inc.*, 136 Nev. Adv. Op. 51, 472 P.3d 674, 679 (2020), the Nevada Supreme Court adopted the “no suit, no fee” approach, which requires predicate litigation before a party can pursue a claim for attorney’s fees incurred that provide a substantial benefit to others. See Ch. 27, *Fees, Costs, and Interest*, § 27.0[2].

Relief From Final Order. NRCP

60(b) provides relief from a final order (not just a final judgment), such as an order granting case-ending sanctions. *See Willard v. Berry-Hinckley Indus.*, 136 Nev. Adv. Op. 53, 469 P.3d 176, 179 (Nev. 2020) (clarifying that NRCP 60(b) applies to “a final judgment, order, or proceeding”). See Ch. 29, *Judgments*, § 29.12[1].

Bankruptcy Exemption. For the homestead exemption to apply in a bankruptcy, the judgment debtor owner must *own and be in actual possession of* the property. *In re Nilsson*, 129 Nev. 946, 951, 315 P.3d 966, 969 (2013) (quoting NRS 115.020(2)(a)). See Ch. 31, *Enforcement of Judgments*, § 31.10.

Unlawful Detainer. The time frame and notice provisions regarding a commercial unlawful detainer have been revised under NRS 40.2542. Certain provisions for residential unlawful detainer have also been chained. See Ch. 32, *Pre-Judgment Remedies*, § 32.06.

Extraordinary Writs. Mandamus is not appropriate to challenge “a discretionary lower court decision [that] results from a mere error in judgment” unless there is a showing the decision was “manifestly unreasonable” or a result of partiality. *Walker v. Second Judicial Dist. Court*, Nev. Adv. Op. 80, 476 P.3d 1194 (Dec. 10, 2020). See Ch. 35, *Extraordinary Writs*, § 35.02[2].

Property Liens. A court may expunge a lien on two grounds: “either because it was frivolously asserted with no legal basis whether or not it

was perfected, or because it was not perfected in accordance with the statutory requirements whether or not there existed a legal right to assert the lien.” 4620 *Eaker St. LLC v. RL Jaehn Grp. Constr. LLC*, 2021 Nev. App. Unpub. LEXIS 31 at *8 (Nev. Ct. App. Jan. 25, 2021). See Ch. 37, *Nevada Bond and Lien Law*, § 37.10[2].

Liening Tribal Lands. A new section discusses the factors in determining whether tribal lands can be liened under Nevada law, generally concluding they cannot. See Ch. 37, *Nevada Bond and Lien Law*, § 37.16.

Guardianship Preliminary Care Plan. On the filing of a petition for the appointment of a guardian, the court may require the proposed

guardian to file a preliminary care plan and proposed monthly budget for the care of the proposed protected person. NRS 159.0445, 159A.0445. See Ch. 38, *Guardianships*, § 38.06[9].

Construction Defect Litigation. The Federal Arbitration Act preempts Nevada case law on the procedural unconscionability of an arbitration clause in a construction defect case. *United States Home Corp. v. Ballesteros Trust*, 134 Nev. 180, 415 P.3d 32 (2018). See Ch. 40, *Construction Defect Disputes*, § 40.08.

Finding Aids. The Table of Cases, Table of Statutes, and Index are updated in this release.

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