ERICKSON, THORPE & SWAINSTON, LTD.

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Some of what happens in Las Vegas ...

By Ann Alexander, Esq.

In June 2005, Richard Boorman, a 29-year-old citizen of the United Kingdom, died from excessive consumption of alcohol and drugs while visiting Las Vegas for a bachelor party. Mr. Boorman's body was taken to the Clark County Coroner for an autopsy. During the autopsy, the coroner removed Mr. Boorman's internal organs for examination. The coroner stated he placed the organs in a plastic bag and placed the plastic bag between Mr. Boorman's legs before releasing the body to the Nevada Memorial Cremation Society for embalming. When Mr. Boorman's body was returned to England, authorities opened up Mr. Boorman's body and discovered that all of the internal organs had been removed and replaced with a rolled up cloth sheet. As of the 2010 date of the Nevada Supreme Court decision, the organs had not been found.

Family members sued the Clark County Coroner and the Nevada Memorial Cremation Society in the federal district court in Nevada, bringing several claims including one for damages for the "negligent infliction of emotional distress." Because Nevada had not addressed the elements of this claim in the context of the mistreatment of human remains, the federal district court certified questions to the Nevada Supreme Court aimed at determining who under Nevada state law could bring emotional distress claims based on the mistreatment of a loved one's remains, whether those persons must witness the insult to their loved one's body,

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and whether they must manifest physical symptoms or allege a physical impact to bring a claim of emotional distress.

The Nevada Supreme Court issued its ruling after reviewing decisions in other state courts where the negligent handling of a deceased person's remains is a commonly recognized tort. As to the question of who may bring a claim, the Court concluded that because the duty of a county coroner is different from the duty of a mortuary, the persons who may bring a claim for negligent infliction of emotional distress differ depending upon the identity of the defendant. The Court held that "a mortuary voluntarily undertakes a duty to competently prepare the decedent's body for the benefit of the bereaved." According to the Court, a special relationship is created between a crematory or mortuary, obligating them to perform services in the "dignified and respectful manner the bereaved expect."

Because the bereaved to whom this duty is owed includes close family members (but not distant relatives or close friends) in addition to the person with the right to dispose of the body, the Court concluded that "close family members who are aware of both the death of a loved one

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and that mortuary services were being performed may bring an action for emotional distress resulting from the negligent handling of the deceased's remains." Further, because the work of the mortuary most often occurs behind closed doors, the Court held that the persons who bring a claim of negligent infliction of emotional distress do not need to observe or perceive the negligent conduct. The Court also held that because "we need not question the trustworthiness of an individual's emotional anguish in cases involving desecration of a loved one's remains," there is no requirement for the plaintiff to demonstrate any physical manifestation of the individual's emotional distress.

The Court saw the duty of the county coroner differently, stating "unlike a mortuary, which voluntarily undertakes a duty to perform funeral services on behalf of the bereaved, a county coroner is obligated by law to perform its services." Even though no "special relationship" has been created, the Court stated that the coroner does have "a narrow limited duty to account for a deceased person's remains." But the duty to account for the remains is owed only to the person with the statutory right to dispose of the deceased's body, not to other family members no matter how closely related they are to the deceased. Just as in suits against a mortuary or crematory, the plaintiff need not observe or perceive the negligent conduct, and there is no requirement to demonstrate any physical manifestations of emotional distress.

In a final ruling, the Court was asked to decide whether a claim for conversion of a deceased human body or its parts exists in Nevada. Conversion involves "a distinct act of dominion wrongfully exerted over another's personal property." The Court, in reaching its conclusion that no such claim exists, stated that there is no property right in a deceased human body or its remains. As the Court pointed out, "[c]oncluding otherwise may create morbid consequences, setting up an incentive for the person with the right to disposition of the body to sell his or her loved one's remains for profit."

Boorman v. Nevada Mem'l Cremation Society, 236 P.3d 4 (2010).
Boorman v. Nevada Memorial Cremation Society, Inc., 772 F.Supp.2d 1309 (2011).

ADA Website Accessibility

By Charity Felts, Esq.

Most, if not all, of us are familiar with the American's with Disabilities Act ("ADA") in the context of employment and physical accessibility to public accommodations, but, with the advancement of technology, a new area of ADA compliance has recently emerged – website accessibility. The ADA forbids discrimination against people with disabilities in major areas of life including employment (Title I), public services (Title II), and public accommodations (Title III). Under Title III of the ADA, individuals with disabilities are entitled to full and equal enjoyment of public accommodations. Traditionally, access to public accommodations has been viewed with an eye toward accessibility of brick-and-mortar physical locations. The United States Department of Justice (DOJ), the agency responsible for enforcing Title III of the ADA, has recently indicated a shift in focus from physical barriers to website accessibility.

The movement toward making the company website more accessible is driven largely by legal developments, publicity from public interest groups, and new developments in technology. There have been several cases involving disability rights groups challenging the accessibility of websites such as Southwest.com, AOL,Target, Amazon.com, Hilton Hotels, and Hotels.com.

In *Access Now, Inc. v. Southwest Airlines*, Co., 227 F.Supp.2d 1312 (S.D.Fla 2002), the court dismissed the case in which it was alleged that Southwest.com was not accessible to the blind. The court in the Southwest case held that a place of public accommodation must be physical and a website is not a physical place. In contrast, in *National Federation of the Blind v. Target*, 452 F.Supp.2d 946 (N.D.Cal. 2006), blind patrons complained that the Target.com website was not accessible to those who use screen reader technology and the court ruled that portions of the Target.com website had a nexus to the physical stores and were therefore covered by the ADA.

In many instances, companies are settling ADA website accessibility lawsuits and agreeing to make their websites accessible to people with disabilities. Website accessibility improvements can include adding a text equivalent to every image posted, posting documents in a format compatible with assistive technology such as screen readers, adding "skip navigation" links, minimizing the use of blinking and flashing features, and addition of visual notification and transcripts for sounds.

In an effort to advance the concept of making websites ADA compliant, the DOJ has issued an Advanced Notice of Proposed Rulemaking. This is the DOJ's first attempt to codify its long-held opinion that the ADA applies to websites. The DOJ's proposed rules would apply to both websites with a connection to a physical location and websites that operated exclusively on the web. The proposed regulations would require, among other things, new websites to comply with accessibility rules but would also permit existing websites a grace period within which to comply with the new regulations. However, as it stands today, the DOJ has stated that website accessibility rules are a "long-term item" and further action

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is not expected until December 2012. Even with a lack of codified rules, the DOJ is not abandoning its position that disabled individuals should be able to access websites. Therefore, a review of the company website and an evaluation of its accessibility can be a useful first step in determining your level of compliance with the ADA as applied to websites.

Howell v. Hamilton Meats

By John Aberasturi, Esq.

In *Howell v. Hamilton Meats & Provisions*, Inc., 257 P.3d 1130 (Cal. 2011), Ms. Howell was injured in an auto accident. Her providers billed about $174,000, but accepted as payment in full from her insurers about $41,000. The jury was allowed to hear evidence about the billed amounts. Pursuant to post-trial motion, the trial court reduced the medical damages award identified in a special verdict to the billed amount. The court of appeal reversed, but the Supreme Court reversed the court of appeal and remanded for further proceedings.

The court ruled that "when a medical care provider has, by agreement with the plaintiff's private health insurer, accepted as full payment for the plaintiff's care an amount less than the provider's full bill, evidence of that amount is relevant to prove the plaintiff's damages for past medical expenses and, assuming it satisfies other rules of evidence, is admissible at trial." The court further held that evidence of the higher billed amount was irrelevant "on the issue of past medical expenses," though because the issue was not presented by the defendant in this case, the court expressed "no opinion as to its relevance or admissibility on other issues, such as noneconomic damages or future medical expenses."

The court rejected plaintiffs' argument that evidence of the amounts actually paid violated the "collateral source" rule, pursuant to which a plaintiff's recoverable damages are not reduced simply because somebody else (e.g., insurance) paid expenses. "The rule, however, has no bearing on amounts that were included in a provider's bill but for which the plaintiff never incurred liability because the provider, by prior agreement, accepted a lesser amount as full payment. Such sums are not damages the plaintiff would otherwise have collected from the defendant." Although the rule is "implicated" where someone else pays a plaintiff's bills, it is also satisfied: "Plaintiff . . . receives the benefits of the health insurance for which she paid premiums: her medical expenses have been paid per the policy, and those payments are not deducted from her tort recovery."

This 6-1 ruling is likely to impact many pending and future personal injury and wrongful death cases in the state.

The Nevada Supreme Court will be hearing argument on a very similar issue this November. After the California ruling in the Howell case the Nevada court entered an order directing the attorneys to be prepared to discuss many of the positions taken by the California court in *Howell*. It is hoped that the Nevada court will see the logic of the California position and allow juries to hear evidence of the amount actually paid for medical treatment rather than the amount of the original bill.

A decision should be received from the Nevada Supreme Court early in 2012.

Erickson, Thorpe & Swainston was founded in 1969. Since that time, the Firm has efficiently and successfully represented its clients in state and federal courts in Nevada and Northern California. As experienced trial and appellate attorneys, we vigorously advocate our clients' interests while remaining committed to the principles of the highest legal ethics.

Erickson, Thorpe & Swainston offers committed support in all phases of commercial and civil litigation, including labor and employment law and associated preventative employment services. We provide the experience necessary to meet our clients' expectations for an effective, efficient and timely resolution of their conflicts and issues. Our continued success in this highly competitive market demonstrates our widely recognized ability to deliver satisfaction and positive outcome to those who give us their trust – our clients.

Nevada's Uniform Interstate Depositions and Discovery Act

By Brent Ryman, Esq.

In past years, out-of-state depositions, subpoenas duces tecum and other discovery have been laborious and sometimes confusing for attorneys seeking to prove – or defend – their clients' cases. Since this past October, however, Nevada has adopted the Uniform Interstate Depositions and Discovery Act, which should prove very helpful in facilitating out-of-state discovery, and also streamlining discovery sought from Nevada-based clients regarding out-of-state cases.

According to the National Conference of Commissioners on Uniform State Laws, who completed a draft of the proposed Act in 2007, the Act is intended to implement "a procedure that can be easily and efficiently followed, that has a minimum of judicial oversight and intervention, that is cost-effective for the litigants, and is fair to the deponents." In drafting the proposed Act, the commissioners paid special attention to the multiple functions of subpoenas: (1) to secure witness depositions; (2) to obtain documents and other information; and (3) to gain entry for the inspection of premises.

Under the Act, an attorney practicing in another state's jurisdiction seeking to issue a subpoena in Nevada must first identify the county in which the discovery will be sought (i.e., the county in which the individual or entity in possession of the information or documents resides). The "foreign" attorney must then submit the subpoena to the clerk of the court for the appropriate county, and request that the clerk then "issue" the subpoena. For Nevada attorneys seeking discovery from residents of other states, the same procedure will apply in reverse.

The Act directs the county court clerks to then "promptly" issue a subpoena "for service upon the person to which the foreign subpoena is directed." This does not mean that the Court itself will serve the subpoena; instead, the subpoena will be issued by the Court for service by the attorney or her agents.

The Act should prove to greatly ease non-party, cross-jurisdictional discovery.

ETS News

We congratulate our partner and friend, **William G. Cobb**, on his appointment to the federal bench as a United States Magistrate Judge for the District of Nevada. Judge Cobb assumes his new role after 33 years with Erickson, Thorpe & Swainston, Ltd. His formal investiture occurred on October 5, 2011, and was well attended by his friends, family and colleagues. As noted by Tom Beko at the investiture, "[Bill's] knowledge of the law and the respect that he will show the attorneys, the parties, the witnesses and the court staff will undoubtedly earn him the corresponding respect that he will most certainly deserve." Best of luck, Bill.

Rebecca Bruch

Congratulations to **Rebecca Bruch** and **Ann Alexander** for their recent trial success. In the case of *Pahl v. Regional Transportation Commission of Washoe County, et al.*, Ms. Pahl claimed she was injured while boarding a bus in Incline Village. She alleged that the defendants were negligent in starting the bus before she took her seat, causing her to fall. At trial, Becky and Ann were able to demonstrate that Ms. Pahl had a history of pre-existing conditions, illness and other healthcare treatment. Ms. Pahl's own treating orthopedist testified in deposition that none of her reported injuries could be tied to the alleged bus incident to a reasonable degree of medical certainty. The jury empanelled before Judge Jerome Polaha found in favor of the defendants.

Ann Alexander