JULY 2020

NEVADA BAR EXAM

QUESTION NO. 1: ANSWER IN LIGHT BLUE BOOKLET

Addison, Blake and Chad are Nevada-licensed associates at a mid-sized law firm in Reno, Nevada. Addison is a newly licensed attorney and has only practiced probate law. Blake and Chad have been licensed for several years and primarily practice employment law and criminal law, respectively.

Addison recently met with Stacy and Tracy, who were the driver and passenger in a vehicle involved in an automobile accident. After discussing the matter with her supervising partner, Addison agreed to represent them against the driver of the other vehicle on a contingent fee basis. The fee agreement provided for: (1) a 50% contingency fee; (2) an advance from the firm for the court costs, litigation expenses and living expenses of the clients; and (3) a limitation of liability for malpractice. After Addison filed a complaint, the defendant's attorney filed a counterclaim against Stacy. Addison also received notice of a $10,000 medical lien filed by a doctor who treated Tracy. When the defendant's attorney offered a $100,000 settlement, Addison immediately accepted without speaking to her clients. Upon receipt of the funds, she mailed checks in the amount of $25,000 each to Stacy and Tracy and deposited the remaining $50,000 in her personal account.

Blake met with the CEO of Tech Co., who wanted to bring an antitrust lawsuit against XYZ Corp. Blake, who had been the in-house counsel for XYZ Corp. before he joined the firm, agreed to accept the matter. After the CEO left, Blake called his friend who was in charge of marketing at XYZ Corp. to see if his friend knew anything about the issue. Blake then called

Antitrust Attorney, who specialized in antitrust litigation, to request his assistance with the lawsuit. Antitrust Attorney replied "Sure!" and filed the complaint soon thereafter.

Chad is representing Defendant in a widely publicized criminal trial. A few days before the trial, the District Attorney announced to news reporters at a press conference the time and location of Defendant's arrest. He added, "It's obvious that Defendant is guilty since he refused to take a polygraph examination." Chad later responded to a reporter, stating, "Defendant does not have a prior criminal record and is innocent!"

During the trial, despite numerous requests by Defendant, Chad refused to call Defendant to the stand to testify because Chad had serious doubts about the truthfulness of his testimony. After Defendant was found guilty and the jury was discharged, Chad called the jury foreman, demanding, "How could you have reached that ridiculous verdict? What were you thinking?" The foreman responded that the jury was confused about the legal standard for the crime with which Defendant was charged, so one of the jurors called her cousin who is an attorney and he provided an explanation of the standard.

Fully discuss the ethical issues raised by the conduct of each attorney in the situations described above under the Nevada Rules of Professional Responsibility.

JULY 2020

NEVADA BAR EXAM

QUESTION NO. 2: ANSWER IN RED BOOKLET

Guitars For Stars ("GFS") is a Nevada corporation in the business of selling guitars to individuals for personal use and student guitars to charter schools by special order. GFS procures its guitars from music suppliers and occasionally accepts rare guitars on consignment.

On January 1, GFS borrowed $10,000 from Bank as working capital for its business. Bank signed and filed a financing statement on January 5 with the Nevada Secretary of State that described the collateral as "all inventory now owned or hereafter acquired." On February 1, Bank realized it had failed to obtain a security agreement from GFS and, at Bank's request, GFS signed a valid security agreement covering the collateral on that date.

On January 15, GFS borrowed $7,500 from Finance to purchase student guitars for a special charter school order. GFS signed a valid security agreement the same day granting Finance a security interest in "all inventory now owned or hereafter acquired." Finance filed a valid financing statement on January 20 with the Nevada Secretary of State and properly notified Bank.

On March 1, GFS purchased 50 student guitars from Supplier for $10,000. GFS paid $5,000 borrowed from Finance, with the remainder on credit from Supplier, and signed a valid security agreement covering the student guitars. Supplier filed a valid financing statement with the Nevada Secretary of State on March 2 and delivered the student guitars to GFS on March 3. Supplier sent appropriate notices to Bank and Finance of its security interest, which were received on March 5.

On April 1, GFS agreed to sell two rare guitars worth $2,000 each. GFS held the rare guitars from Trader Bob, a respected guitar trader, on consignment. On April 3, the parties signed a valid security agreement covering the collateral, and Trader Bob properly filed a valid financing statement. Trader Bob sent appropriate notices to Bank, Finance and Supplier of its security interest, which were received on April 4. The rare guitars were delivered to GFS on April 5. On April 10, GFS sold one of the rare guitars to Joe on credit for his personal use.

GFS defaulted on its loans to Bank and Finance, failed to pay Supplier and Trader Bob, and closed its business that same year. At the time of closure, GFS had in its inventory 25 student guitars, other non-student guitars and the one rare guitar from Trader Bob. GFS also had accounts receivable of $2,000 due from credit buyers of non-student guitars and $1,000 due from Joe.

Please fully discuss the following:

1. **What are Bank's rights and interests?**
2. **What are Finance's rights and interests?**
3. **What are Supplier's rights and interests?**
4. **What is the order of priority of security interests among Bank, Finance and the Supplier in the remaining student guitars, other non-student guitars and the $2,000 account receivable?**
5. **Can GFS or any of its creditors enforce a security interest in the rare guitar purchased by Joe or in the $1,000 account receivable due from Joe?**

JULY 2020

NEVADA BAR EXAM

QUESTION NO. 3: ANSWER IN DARK GREEN BOOKLET

Bella and Abby are friends from college. Bella is a resident of California, and Abby is a resident of Nevada. One weekend, they went downhill snow skiing in Utah. While skiing a treacherous run, Bella ran into Abby and severely lacerated Abby's leg. Abby flew home immediately to seek medical treatment for her leg.

A few days after the accident, Abby's lawyer filed an action in a Nevada state court against Bella and the ski resort. The complaint alleged a negligence claim against Bella under state law, and a federal claim against the ski resort under the U.S. Forest Service Ski Safety Act. The Act allows a cause of action for anyone harmed at ski resorts that are located on U.S. Forest Service land. The ski resort is incorporated and doing business only in Utah and partially located on U.S. Forest Service land. The complaint alleged damages for Abby's past and future medical expenses, which are estimated to be $30,000, plus damages for her pain and suffering.

About a week after the accident, Abby's lawyer asked Bella to visit Abby at her home to raise her spirits. When Bella arrived at Abby's house, Abby refused to see Bella because she was so upset with her. Abby's lawyer was also at Abby's house and served Bella with the summons and complaint, along with an offer of judgment for $75,000. Abby's lawyer then mailed the summons, complaint and the necessary forms for waiver of service to the ski resort's ticket office in Utah.

Please fully discuss the following:

1. Is Abby's action properly removable to Nevada federal district court?

2. **Does the Nevada state court have personal jurisdiction over Bella and the ski resort?**

3. **Under the applicable state court rules, did Abby properly serve the summons and complaint on Bella and the ski resort?**

4. **Under the applicable state court rules, what are the consequences if Bella fails to respond to the offer of judgment?**

JULY 2020

NEVADA BAR EXAM

QUESTION NO. 4: ANSWER IN ORANGE BOOKLET

Gamblers Best Hotel & Casino ("Casino") is located in Nevada. Paul and his wife Jenny arrived at the casino for a business conference. David was employed at the casino as a casino host and greeted Paul and Jenny as they checked into the hotel.

Once checked into their room, Paul and Jenny headed down to the casino restaurant for dinner. On their way to the restaurant, while responding to a text message on his phone, Paul tripped on an uneven floor, fell and twisted his knee. Jenny stayed to find the manager and Paul limped back to the room. When she reported the incident, the manager responded by saying "I told those guys to fix that floor after a customer fell last week."

As Paul entered the hallway, he saw David exit Paul's room with Paul's laptop. Paul screamed, "What are you doing in my room?" David ran and pushed Paul out of the way causing him to fall down the stairs. Paul hit his head on the stairs and became very dizzy but was able to stand up and get to his room. Paul immediately called Jenny to tell her about the altercation and David stealing his laptop. After he hung up with Jenny, Paul collapsed and died of a heart attack.

Jenny then saw David on the casino floor holding Paul's laptop. Jenny angrily confronted David, while waving her fists and throwing chairs that were in her way. David lunged at Jenny and attempted to knock her to the ground. Jenny moved out of the way and David ran out of the casino. Jenny filed a report with the manager and told him, "I was scared

to death when David lunged at me, I really thought he was going to hit me." The manager replied, "I never should have hired David after finding out he was fired from his last job for fighting with a customer. I even gave him a second chance when he stole from a customer last month."

Please fully discuss:

1. **What claims against David and Casino does Jenny have for her injuries and what defenses can be asserted?**
2. **What claims can be made as a result of Paul's injuries and demise, and who can assert those claims?**

JULY 2020

NEVADA BAR EXAM

QUESTION NO. 5: ANSWER IN PURPLE BOOKLET

A police dispatcher received a call describing a hit-and-run accident in Reno. The unidentified caller described a blue SUV that drove at least 65 miles-per-hour in a 35 mile-per-hour zone, ran a red light, hit a sedan in the intersection and fled the scene. The caller sobbed, "Please hurry, I can see the sedan driver is hurt really bad."

Several minutes later, a few blocks away from the accident scene, Bob saw his neighbor Dan whip his blue SUV into his driveway at a high rate of speed. Bob yelled at Dan, "You are always speeding! You're going to kill somebody one day." Dan replied to Bob, "I just witnessed a terrible accident and I need to call the police right away."

Once inside, Dan told his wife Esther, "I think I hit something with my car, and the police may be coming soon." Esther immediately called her best friend, Lucy, a retired officer from the Reno Police Traffic Division who had conducted over 100 accident investigations and reconstructions during her career. Esther asked Lucy what the criminal penalty was for a hit-and-run accident. Lucy, concerned about Esther's call, rushed to Dan and Esther's house. Before entering their house, Lucy carefully examined the damage to Dan's SUV, which was still parked in the driveway.

Dan was charged with crimes related to the accident and injuries to the sedan driver.

Please fully discuss the admissibility under Nevada law of the following evidence offered by the prosecution at Dan's criminal trial.

1. **The police dispatcher's testimony about the caller's description of the SUV driver's rate of speed and running the red light.**
2. **Bob's testimony that Dan was always speeding dangerously fast around their neighborhood.**
3. **Esther's testimony that Dan told her he thought he hit "something" with his car.**
4. **Lucy's testimony that on the day of the accident Esther called and asked what the penalties were for a hit-and-run accident.**

Please fully discuss the admissibility under Nevada law of the following evidence offered by Dan at his criminal trial.

5. **Bob's testimony that Dan told Bob that he had just witnessed an accident and was in a rush to call the police.**
6. **Lucy's testimony that the damage she observed to Dan's SUV on the day of the accident was too minor to have resulted from his SUV impacting the sedan at 65 miles-per-hour.**

JULY 2020

NEVADA BAR EXAM

QUESTION NO. 6: ANSWER IN YELLOW BOOKLET

Henry and Wendy were married in 2005. Henry, who worked for the State of Nevada, began participating in the Public Employees Retirement System ("PERS") in 2000. Henry's monthly PERS payments when he retires will be based on his length of employment and highest years of salary. It is uncertain when he will retire.

Wendy started and contributed to a 401(k) retirement account from her salary during the marriage. She deposited the rest of her salary into an account held in her name alone.

Wendy owned a home with modest equity at the time of the marriage. Henry and Wendy lived in the home during the marriage. Title remained in Wendy's name alone. The home increased in value during the marriage.

Henry owned a condo at the time of the marriage. He used the condo as a rental property during the marriage. The rent he received exceeded the costs of ownership, including the mortgage loan payments. The mortgage loan was fully paid off in 2015. In 2018, Henry obtained a line of credit, secured by the condo. The following week, he conveyed title of the condo to himself and Wendy jointly. He used the line of credit to pay for an expensive golf trip to Scotland with his buddies.

Henry maintained a bank account in his name alone during the marriage. He deposited his salary and the rental income from the condo into the account. He used his account to pay bills and living expenses, including the mortgage loan payments on the home and condo, and

the line of credit. In 2019, Henry inherited $35,000 and deposited it into his bank account. The following day, he paid $34,999 for a travel trailer he titled in his name alone.

In 2020, when she discovered Henry was having an affair, Wendy filed a complaint for divorce in a Nevada state court. At that time, $20,000 was owed on the line of credit, there was $50,000 in Henry's bank account and $100,000 in Wendy's 401(k). The day before she filed her complaint for divorce, Wendy purchased an expensive car using funds from her personal account.

Please fully discuss the parties' respective rights and obligations in:

1. **Henry's PERS benefits and Wendy's 401(k);**
2. **The net equity in the home titled in Wendy's name;**
3. **The equity in the condo;**
4. **The line of credit;**
5. **The money in Henry's bank account, the travel trailer titled in Henry's name and car titled in Wendy's name.**

JULY 2020

NEVADA BAR EXAM

QUESTION NO. 7: ANSWER IN DARK BLUE BOOKLET

When Jane pulled into her driveway, she was shocked to find an SUV backed half-way into her garage. From her car, Jane saw a skinny young male run from the back of the garage and jump into the driver's seat of the SUV. Suddenly, a taller older male came running out of her house. He was carrying a handgun and a backpack. He screamed at Jane to move her car and threatened to shoot her if she did not. She moved her car as he jumped into the passenger side of the SUV. The SUV then pulled out of the garage and sped away. Scared and shaken, Jane called the police.

About an hour later, while an officer was taking a report of Jane's missing property, another officer told Jane that "they had caught a couple of guys." He asked if she could try and identify the people they had caught. At a location a few miles away from her home, the officer had Jane stand behind a police vehicle that was 30 to 40 feet away from the suspects. She was instructed to look through the vehicle's tinted windows so "the suspects could not see her." Meanwhile, other officers brought David, the skinny young male, and Richard, the taller older male, out from behind other police vehicles and had them stand together in handcuffs between the officers. Jane told the officers she was certain that Richard was the older man with the gun and backpack, and that she was kind of sure that David was the driver of the SUV since he was standing next to Richard.

David and Richard were placed under arrest based on Jane's identification. Officer Smith searched David's person, finding a piece of women's jewelry in David's sock. The jewelry was

later identified as belonging to Jane. Officer Smith instructed David as follows:

> You are in custody man. You have rights, okay. So I just want you to know that you don't have to talk to me. You have the right to remain silent, you know, and if we do talk about stuff, you know, we can use that stuff against you. Obviously if you can't afford an attorney, or something like that, regardless of what charges we have for you, we can always provide one of them for you as well. Now, do you understand your rights and everything I just said?

David answered, "Yes, I heard you." Thereafter, in response to questions posed by Officer Smith, David confessed to parking the SUV in Jane's garage and taking jewelry from the house. He also told the officer exactly where Richard had thrown his backpack and gun. Based on David's statements, Richard's backpack and gun were recovered. More of Jane's jewelry was found inside the backpack.

David and Richard are being tried together on multiple felony counts. Based on these facts, please identify and fully discuss any and all possible constitutional challenges David and Richard can bring pretrial, and fully explain how the trial court should resolve them.

JULY 2020

NEVADA BAR EXAM

QUESTION NO. 8: ANSWER IN LIGHT GREEN BOOKLET

Wanting to have her house painted, Alice requested a quote from Bob. After inspecting the house, Bob sent the following email to Alice: "Have inspected your house and I can paint the exterior for a total of $2,000, work to be completed within one week of your advance payment of $500, final payment due five days after final invoice." Alice called Bob and left a voicemail stating: "You must proceed immediately. I want you to use Decorator's White paint, and I cannot pay more than $1,750." Bob responded that afternoon by email stating: "Can start next week, understand you want Decorator's White, price not negotiable. Please confirm by email." The next day Alice texted the following to Bob: "Next week will be okay but I cannot pay more than $1,750." On Friday, Bob received in the mail a $500 check from Alice that he immediately deposited into his bank account.

Bob showed up the following Monday and commenced painting Alice's house with Basic Brand Decorator's White paint. Although Bob and Alice saw each other at the house every day, they did not discuss the project during the entire week of work. On Thursday, as he was leaving the house, Alice told Bob that he used the wrong paint. She expected Acme Brand Decorator's White, which is a few shades darker than Basic Brand Decorator's White. Alice ordered Bob to stop work and to immediately get off her property and never return.

Bob gathered his equipment and left Alice's house. Approximately 85% of the house had been painted when Bob stopped work. Bob sent Alice an invoice for $1,500. Alice refused to pay and demanded return of her $500 deposit claiming she must have the house repainted with the right color.

Please fully discuss:

1. **Is there a contract and, if so, what are the terms?**
2. **What are Bob's claims and defenses**
3. **What are Alice's claims and defenses?**

Materials to be used for the Nevada Performance Test are contained in a "File" and a "Library." The first document in the File is a memorandum that contains the instructions and a summary of the problem. Other documents in the File contain factual information, which may or may not be relevant to the issues.

The Library contains the legal authority. It is your responsibility to determine what legal authority is pertinent. The legal authorities include statutory provisions and cases.

You will be graded on your responsiveness to the instructions and on the content, thoroughness and organization of your document. Time management is also a critical factor. You reasonably should expect to use half the time reading and analyzing the materials and organizing your document. The remaining time should be sufficient time to write it.

July 2020 Nevada Bar Exam

Performance Test File

From: Senior Partner
To: Examinee
Date: July 29, 2020
Re: Minden Ranches, LLC. TC with George Elliott, owner/CEO and TC with Patricia Armor, attorney

Our client, Minden Ranches, LLC ("MR") raises cattle on 20 acres of land it owns just outside the city limits of Minden, Douglas County, Nevada. George Elliott is MR's CEO and is our client contact. MR's 20 acres abuts federally owned Bureau of Land Management ("BLM") land to the west and a two-acre parcel within the Minden City limits to the east. MR leases the adjoining two-acre parcel within the Minden city limits for its operations. MR grazes cattle on the BLM land pursuant to its grazing rights obtained from the BLM. MR had entered into a five-year lease of the two-acre parcel. Per my request, Mr. Elliott has asked his CFO to look into the status of the lease. The Carson River flows through the two-acre parcel and the 20 acres owned by MR and continues through the BLM property. On either side of the river is a fairly steep canyon that is frequented by mountain bike riders from around the world.

In May of this year two mountain bikers were seriously injured in separate unrelated accidents when the trails they were riding on suddenly collapsed due to storm damage the winter before sending them down a cliff into the river. One of the riders, Nancy Brown, was on the two-acre parcel and the other, Joan Smith, on the 20-acre parcel. Both have retained counsel and threatened to file a complaint in the Nevada Ninth Judicial District Court against MR.

The client file contains notes of my conversations with Mr. Elliott, a demand letter from one of the mountain biker's counsel and a local newspaper article covering the accidents.

Please draft a memorandum to me analyzing our client's potential liability in view of NRS 41.510. Your memorandum should objectively address all arguments for and against the statute's applicability in these circumstances. I am looking to your conclusion based on your research and analysis.

From: Senior Partner
To: file
Date: July 5, 2020
Re: Minden Ranches, LLC. TC with George Elliott, owner/CEO and TC with Patricia Armor, attorney

At 2:15 p.m. on Monday July 5th, I received a call from George Elliott, CEO of Minden Ranching, LLC, ("MR").

MR raises cattle on 20 acres of land it owns just outside the city limits of Minden, Douglas County, Nevada. MR's 20 acres abuts federally owned Bureau of Land Management ("BLM") land to the west and a two-acre parcel within the Minden city limits to the east. MR leases the adjoining two-acre parcel for its ranching operations. MR grazes cattle on the 20-acre parcel and on the BLM land pursuant to BLM grazing rights. MR had a five-year lease of the two-acre parcel, which Elliott recalls expired two years ago. Elliott explained that the Carson River flows through the two-acre parcel and the 20 acres owned by MR and continues through the BLM property. He said that on either side of the river there is a fairly steep canyon. He said that he recalls seeing mountain bike riders on trails in the canyon from time to time.

Elliott said he had just received a letter from a local attorney representing Nancy Brown demanding payment of $1,000,000 in damages for injuries his client suffered in a mountain biking accident on the 2-acre parcel. Elliott will drop off a copy of the letter later today. Elliott also said there was a voice message from Patricia Armor, who said she represented Joan Smith regarding some accident "on our 20 acres." Elliott provided the attorney's name and number.

Elliott recalled having "no trespassing" signs posted where the trail heads adjoin the public road. He has not been out there for a while and cannot say for certain if they are still up.

I spoke with Patricia Armor at 3:30 p.m. Patricia told me that she represents Joan Smith and is in the process of filing suit against our client, ML. Ms. Armor said her client was seriously injured in a mountain bike accident on our client's property. Ms. Armor said

she wanted to reach out to ML's counsel in hopes of settling the matter prior to filing the complaint. Ms. Armor said that her client suffered a broken collar bone and cracked three vertebrae. She said that she estimates the medications alone will exceed $250,000. She is not certain if or when her client will be able to return to work as an emergency room physician at Carson Valley General Hospital. Ms. Armor said she has hired an expert to reconstruct the accident and to document the conditions at the site of the accident. She said that based on her investigation there were no warning signs and no "no trespassing" signs. She said that when she visited the site, the mountain bike trail suddenly dropped straight off to the river some 50 feet below.

July 2, 2020

George Elliott
CEO, Minden Ranches, LLC

Dear Mr. Elliott:

I am writing on behalf of my client, Nancy Brown, who suffered serious injuries on May 8th when the mountain bike trail she was riding on collapsed, causing her to plunge more than fifty feet down into the Carson River.

Ms. Brown's accident occurred on a two-acre parcel of land on which Minden Ranch grows alfalfa as part of its cattle grazing operations. The trail collapsed due to serious erosion from extreme snowfall and rain in the winter of 2018-19. Minden Ranch, LLC failed to keep the trail safe or post any warning.

Ms. Brown's fall required her to be airlifted to the hospital, where her treatment lasted several days. Her medical bills are extensive, and Ms. Brown has been unable to work due to the accident. We are prepared to file a complaint in the Nevada Ninth Judicial District Court seeking damages from Minden Ranch in the amount of $1,000,000.

We hope that we can reach an agreement about this matter without the need to file suit. If you or your counsel, if you have one, could please contact me at your convenience to discuss this important matter. I will provide documentation of my client's damages at that time.

Sincerely,

Allyson Clark
Senior Partner,
Clark & Davidson, LLC
100 Washington St., Ste. 200,
Reno, Nevada

M E M O R A N D U M

TO: GEORGE ELLIOTT, CEO OF MINDEN RANCH, LLC

FROM: JANET MARTIN, CFO

RE: OWNERSHIP OF TWO-ACRE PARCEL

DATE: JULY 1, 2020

You have asked me to confirm the status of the two-acre parcel ("Parcel") owned by the Robinson Family Trust ("RFT") which is adjacent to our 20-acre parcel located just inside the Minden city limits. Minden Ranch, LLC ("MR") previously entered into a written five-year lease with the RFT, which lease expired two and a half years ago. MR continued to make monthly rental payments to the RFT for two years after the written lease expired and MR continued to use the Parcel. MR has not made monthly rental payments to the RFT for the past six months due to cash flow issues, but MR still uses the Parcel for cattle ranching and raising alfalfa. The RFT has not contacted MR about the delinquent rent.

Two Mountain Bikers Hospitalized After Trail Collapse

By Penny Prather

An area woman and a visitor to Douglas County were both seriously injured on the afternoon of May 8th when separate portions of the Carson River Trail on which they were riding mountain bikes collapsed. Each woman fell approximately fifty feet down the steep canyon next to the Carson River. Officials said that the trail, which attracts mountain biker riders from around the world, collapsed in both places because of heavy erosion from record-breaking snow and rain in the winter of 2018-19.

Ms. Nancy Brown, 36, a resident of Minden, was airlifted to the Douglas County Hospital where she was treated for multiple fractures. The other injured mountain biker, Joan Smith 27, is a resident of Reno. Ms. Smith declined to discuss her injuries with The Douglas Press.

Both women were participating in a mountain bike tour led by Carson Valley Mountain Bike Expeditions. The tour company offers regular mountain bike tours on Bureau of Land Management (BLM) within the Carson Valley in Douglas County. The owner of the tour company, George Tapu, told The Douglas Press that the women's tour started in downtown Minden and accessed the BLM lands on public roads.

The two women suffered remarkably similar falls the same afternoon at two different places on the trail. Ms. Brown's fall occurred just inside the Minden City limits on a well-known short-cut on the trail that passes through a two-acre parcel leased to Minden Ranch for its ranching operations. Ms. Smith's accident occurred where the trail crosses a twenty-acre parcel owned by Minden Ranch and used to grow alfalfa. Minden Ranch grazes cattle on the

Bureau of Land Management (BLM) land pursuant to an agreement with the BLM.

The Carson River flows through the two-acre parcel and the 20 acres owned by Minden Ranch and continues through the BLM property. The trails within the Carson River canyon through Minden Ranch's 20 acres and the two-acre parcel are the most challenging in the area.

Mr. Tapu, the tour company owner, blamed Minden Ranch for having caused both accidents by failing to fix the trails after the erosion. Mr. Tapu said that Minden Ranch ignored a letter he sent in May 2019 that warned about the dangerous condition of the trail.

George Elliott, longtime CEO of Minden Ranch, acknowledged having received Mr. Tapu's letter but said that he took no action because Minden Ranch uses the properties for ranching, not mountain bike tours. Mr. Elliott also said that Minden Ranch has never granted public access through its property, although it is aware that mountain bikers frequently use the Carson River canyon trails to access the public lands. In 2018 Minden Ranch posted "No Trespassing" signs where public roads provide access to the canyon. The exceptionally heavy snow and rain on the winter of 2018/19 that damaged many of the trails also washed out the "No Trespassing" signs which, Minden Ranch did not repost.

July 2020 Nevada Bar Exam

Performance Test Library

LIABILITY OF OWNERS, LESSEES AND OCCUPANTS OF PREMISES TO PERSONS USING PREMISES FOR RECREATIONAL PURPOSES

NRS 41.510 Limitation of liability; exceptions for malicious acts if consideration is given or other duty exists.

1. Except as otherwise provided in subsection 3, an owner of any estate or interest in any premises, or a lessee or an occupant of any premises, owes no duty to keep the premises safe for entry or use by others for participating in any recreational activity, or to give warning of any hazardous condition, activity or use of any structure on the premises to persons entering for those purposes.

2. Except as otherwise provided in subsection 3, if an owner, lessee or occupant of premises gives permission to another person to participate in recreational activities upon those premises:

(a) The owner, lessee or occupant does not thereby extend any assurance that the premises are safe for that purpose or assume responsibility for or incur liability for any injury to person or property caused by any act of persons to whom the permission is granted.

(b) That person does not thereby acquire any property rights in or rights of easement to the premises.

3. This section does not:

(a) Limit the liability which would otherwise exist for:

(1) Willful or malicious failure to guard, or to warn against, a dangerous condition, use, structure or activity.

(2) Injury suffered in any case where permission to participate in recreational activities was granted for a consideration other than the consideration, if any, paid to the landowner by the State or any subdivision thereof. For the purposes of this subparagraph, the price paid for a game tag sold pursuant to NRS 502.145 by an owner, lessee or manager of the premises shall not be deemed consideration given for permission to hunt on the premises.

(3) Injury caused by acts of persons to whom permission to participate in recreational activities was granted, to other persons as to whom the person granting permission, or the owner, lessee or occupant of the premises, owed a duty to keep the premises safe or to warn of danger.

(b) Create a duty of care or ground of liability for injury to person or property.

4. As used in this section, “recreational activity” includes, but is not limited to:

(a) Hunting, fishing or trapping;

(b) Camping, hiking or picnicking;

(c) Sightseeing or viewing or enjoying archaeological, scenic, natural or scientific sites;

(d) Hang gliding or paragliding;

(e) Spelunking;

(f) Collecting rocks;

(g) Participation in winter sports, including cross-country skiing, snowshoeing or riding a snowmobile, or water sports;

(h) Riding animals, riding in vehicles or riding a road or mountain bicycle;

(i) Studying nature;

(j) Gleaning;

(k) Recreational gardening; and

(l) Crossing over to public land or land dedicated for public use.

(Added to NRS by 1963, 799; A 1971, 192; 1973, 898; 1981, 157; 1991, 185, 2156; 1993, 1191; 1995, 54, 790; 2007, 631)

Note: Deletions indicated by bracketed red
Insertions indicated by italicized blue

1995, 790

Section 1. **NRS 41.510** is hereby amended to read as follows:

41.510 1. Except as otherwise provided in subsection 3, an owner **[**,**]** *of any estate or interest in any premises, or a* lessee or *an* occupant of *any* premises , owes no duty to keep the premises safe for entry or use by others for **[**crossing over to public land, hunting, fishing, trapping, camping, hiking, sightseeing, hang gliding, para-gliding or for any other recreational purposes,**]** *participating in any recreational activity,* or to give warning of any hazardous condition, activity or use of any structure on the premises to persons entering for those purposes.

2. Except as otherwise provided in subsection 3, if an owner, lessee of occupant of premises gives permission to another *person* to **[**cross over to public land, hunt, fish, trap, camp, hike, sightsee, hang glide, para-glide or**]** participate in **[**other**]** recreational activities, upon his premises:

(a) He does not thereby extend any assurance that the premises are safe for that purpose **[**, constitute the person to whom permission is granted an invitee to whom a duty of care is owed,**]** or assume responsibility for or incur liability for any injury to person or property caused by any act of persons to whom the permission is granted.

(b) That person does not thereby acquire any property rights in or rights of easement to the premises.

3. This section does not:

(a) Limit the liability which would otherwise exist for:

(1) Willful or malicious failure to guard, or to warn against, a dangerous condition, use, structure or activity.

(2) Injury suffered in any case where permission to **[**cross over to public land, hunt, fish, trap, camp, hike, sightsee, hang glide, para-glide or**]** participate in **[**other**]** recreational activities, was granted for a consideration other than the consideration, if any, paid to the landowner by the state or any subdivision thereof. For the purposes of this subparagraph, the price paid for a game tag sold pursuant to NRS 502.145 by an owner, lessee or manager of the premises shall not be deemed consideration given for permission to hunt on the premises.

(3) Injury caused by acts of persons to whom permission to **[**cross over to public land, hunt, fish, trap, camp, hike, sightsee, hang glide, para-glide or**]** participate in **[**other**]** recreational activities was granted, to other persons as to whom the person granting permission, or the owner, lessee or occupant of the premises, owed a duty to keep the premises safe or to warn of danger.

(b) Create a duty of care or ground of liability for injury to person or property.

4. As used in this section, "recreational activity" includes, but is not limited to:

(a) Hunting, fishing or trapping;

(b) Camping, hiking or picnicking;

(c) Sightseeing or viewing or enjoying archaeological, scenic, natural or scientific sites;

(d) Hang gliding or para-gliding;

(e) Spelunking;

(f) Collecting rocks;

(g) Participation in winter sports, including riding a snowmobile, or water sports;

(h) Riding animals or in vehicles;

(i) Studying nature;

(j) Gleaning;

(k) Recreational gardening; and

(l) Crossing over to public land or land dedicated for public use.

2007, 631

Section 1. **NRS 41.510** is hereby amended to read as follows:

41.510 1. Except as otherwise provided in subsection 3, an owner of any estate or interest in any premises, or a lessee or an occupant of any premises, owes no duty to keep the premises safe for entry or use by others for participating in any recreational activity, or to give warning of any hazardous condition, activity or use of any structure on the premises to persons entering for those purposes.

2. Except as otherwise provided in subsection 3, if an owner, lessee or occupant of premises gives permission to another person to participate in recreational activities, upon his premises:

(a) He does not thereby extend any assurance that the premises are safe for that purpose or assume responsibility for or incur liability for any injury to person or property caused by any act of persons to whom the permission is granted.

(b) That person does not thereby acquire any property rights in or rights of easement to the premises.

3. This section does not:

(a) Limit the liability which would otherwise exist for:

(1) Willful or malicious failure to guard, or to warn against, a dangerous condition, use, structure or activity.

(2) Injury suffered in any case where permission to participate in recreational activities ~~[,]~~ was granted for a consideration other than the consideration, if any, paid to the landowner by the State or any subdivision thereof. For the purposes of this subparagraph, the price paid for a game tag sold pursuant to NRS 502.145 by an owner, lessee or manager of the premises shall not be deemed consideration given for permission to hunt on the premises.

(3) Injury caused by acts of persons to whom permission to participate in recreational activities was granted, to other persons as to whom the person granting permission, or the owner, lessee or occupant of the premises, owed a duty to keep the premises safe or to warn of danger.

(b) Create a duty of care or ground of liability for injury to person or property.

4. As used in this section, "recreational activity" includes, but is not limited to:

(a) Hunting, fishing or trapping;

(b) Camping, hiking or picnicking;

(c) Sightseeing or viewing or enjoying archaeological, scenic, natural or scientific sites;

(d) Hang gliding or para-gliding;

(e) Spelunking;

(f) Collecting rocks;

(g) Participation in winter sports, including ***cross-country skiing, snowshoeing or*** riding a snowmobile, or water sports;

(h) Riding animals ~~[or]~~ ***, riding*** in vehicles ~~[;]~~ ***or riding a road or mountain bicycle;***

(i) Studying nature;

(j) Gleaning;

(k) Recreational gardening; and

(l) Crossing over to public land or land dedicated for public use.

Sec. 2. The amendatory provisions of this act apply to a cause of action that accrues on or after October 1, 2007.

Gard v. United States
United States District Court, N.D. California, 1976

This is an action brought under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b) and 2671 *et seq*. to recover damages for injuries plaintiff suffered from falling down a vertical shaft inside an abandoned mine on United States Government land in Churchill County, Nevada. Plaintiff claims that his injuries resulted from the Government's negligence in failing to take measures to protect the public from the danger presented by this mine. Defendant has moved to dismiss the case for failure to state a claim or, in the alternative, for summary judgment. A hearing was held on January 20, 1976.

In December, 1972, plaintiff and three friends, all California college students, embarked upon a short vacation drive through parts of Nevada. As the group was returning to California on December 30, 1972, along Interstate 50, their attention was caught by an A-frame apparatus covering an old mine located approximately 200 yards from the highway. The mine had a vertical shaft, and three of the four men, including plaintiff, descended a wooden ladder to the bottom. It was apparent that the mine was old and deserted and that it had not been kept in a state of repair.

After exploring the vertical A-frame mine, the group decided to explore other mines in the area. The mine in which the accident occurred (hereinafter "the mine") was approximately the same distance from the highway as the A-frame mine, but it was not as noticeable. This mine also appeared to be old, deserted, and not kept in a state of repair. The four entered the mine single file through a horizontal shaft cut into the side of a hill, with plaintiff second in line. Their only equipment was a single flashlight. About 50 feet into the mine, the third man, Rarig, complained that he was not receiving enough light. The flashlight was given to him and the group proceeded further along the horizontal shaft. At approximately 100 feet into the mine the men discovered a horizontal tunnel to the left. They discussed which branch to take and decided to go straight ahead. Plaintiff then took the lead, and the third man in line kept the flashlight. Almost immediately, plaintiff either tripped or stepped into a vertical shaft and fell to the bottom. The impact of the fall caused plaintiff to become a permanent quadriplegic.

The Federal Tort Claims Act allows plaintiffs to recover damages for injury

> "caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b).

It is undisputed that plaintiff was engaged in "sightseeing" or other "recreational" activities when he incurred his injuries, and that he had not received permission from the United States to enter the mine. Nevada law provides that:

> "An owner * * * of premises owes no duty to keep the premises safe for entry or use by others for * * * sightseeing, or for any other recreational purposes, or to give warning of any hazardous condition, activity or use of any structure on such premises to persons entering for such purposes, except as provided in subsection 3 of this section." Nevada Revised Statutes ("NRS") 41.510.

Subsection 3 provides that:

> "3. This section does not limit the liability which would otherwise exist for:

> "(a) *Willful or malicious* failure to guard, or to warn against, a dangerous condition, use, structure or activity." *Ibid.* (emphasis supplied).

Thus, plaintiff cannot recover damages under Nevada law,[1] and, hence, the Federal Tort Claims Act, unless he can show that a federal employee willfully or maliciously failed to guard or warn against the danger presented by the mine.

Forty-three states have "sightseer" statutes similar to NRS 41.510. The purpose of such a statute is

> "to encourage owners of land within rural areas to make land and water areas available for recreational purposes by limiting their liability towards persons entering thereon for such purposes." Colorado Rev.Stat., Title 33, Art. 41, § 101.

The Nevada legislature clearly envisioned limiting liability under its statute to landowners who intentionally allow dangerous structures to remain unguarded and without warning, with the knowledge that someone will be injured. Under Nevada law, in order for a defendant to commit a willful injury, "`there must be design, purpose and intent to do wrong and inflict the injury * * *.'" *Crosman v. Southern Pacific Co.*, 44 Nev. 286, 194 P. 839, 843 (1921); *Rocky Mountain Produce Trucking Co. v. Johnson*, 78 Nev. 44, 369 P.2d 198, 201 (1962). Similarly, malicious acts are those done intentionally without justification or excuse. *See Linkhart v. Savely*, 190 Or. 484, 227 P.2d 187, 197 (1951).

The undisputed facts of this case fail to show that defendant or any of its employees willfully or maliciously failed to guard or warn against the mineshaft that caused plaintiff's injuries. There is no evidence that any employee of the United States had ever even inspected the mine. Defendant submitted affidavits from Robert T. Webb, the Supervisory Mining Engineer for the Nevada State Office of the United States Bureau of Land Management, and Richard M. McAlexander, a mining engineer employed by the Mining Enforcement and Safety Administration, United States Bureau of Mines. Both Webb and McAlexander stated that they had never personally viewed the mine before the accident, and they had only suspected that it existed because of nearby mine dumps visible from the highway. Moreover, Webb stated that in the 10 years he has overseen the Bureau's mineral management program in Nevada, he has never noticed any activity or persons in the vicinity of the two mines involved here, has never received any other expression of concern about the mines' safety from members of the public or federal employees, and has never heard of any other accident involving either mine. He also states that to his knowledge no Bureau of Land Management employee had ever been in either mine before the accident in this case.

There is no dispute as to any material fact in this case, and plaintiff has, as a matter of law, failed to show that the United States willfully or maliciously failed to guard or warn against the dangerous condition existing within the mine where plaintiff was injured.

Blair v. United States of America
United States District Court, D. Nevada
1977

Plaintiff instituted this wrongful death action against the United States under the Federal Tort Claims Act after plaintiff's decedent drowned in a pool constructed by private persons on land under the care and operation of the Bureau of Land Management. Defendant has now filed a motion for summary judgment relying on the Nevada Sightseer Statute, NRS 41.510. It must therefore be determined if the Sightseer Statute precludes liability, for plaintiff may recover under the Federal Tort Claims Act only if she has a right of recovery under Nevada law.

The facts of the instant case, as gleaned from an uncontroverted record, indicate that plaintiff's decedent, an 11-year-old boy, traveled approximately 25 miles to use the facility. After swimming in the pool for a period of time, his body was thereafter found on the bottom of the pool, a victim of drowning.

NRS 41.510 provides as follows:

> "1. An owner, lessee or occupant of premises owes no duty to keep the premises safe for entry or use by others for hunting, fishing, trapping, camping, hiking, sightseeing, or for any other recreational purposes, or to give warning of any hazardous condition, activity or use of any structure on such premises to persons entering for such purposes, except as provided in subsection 3 of this section.
>
> "2. When an owner, lessee or occupant of premises gives permission to another to hunt, fish, trap, camp, hike, sightsee, or to participate in other recreational activities, upon such premises:
>
> (a) He does not thereby extend any assurance that the premises are safe for such purpose, constitute the person to whom permission is granted an invitee to whom a duty of care is owed, or assume responsibility for or incur liability for any injury to person or property caused by any act of persons to whom the permission is granted, except as provided in subsection 3 of this section.
>
> (b) Such person does not thereby acquire any property rights in or rights of easement to such premises.
>
> "3. This section does not limit the liability which would otherwise exist for:
>
> (a) Willful or malicious failure to guard, or to warn against, a dangerous condition, use, structure or activity.
>
> (b) Injury suffered in any case where permission to hunt, fish, trap, camp, hike, sightsee, or to participate in other recreational activities, was granted for a consideration other than the consideration, if any, paid to the landowner by the state or any subdivision thereof.
>
> (c) Injury caused by acts of persons to whom permission to hunt, fish, trap, camp, hike, sightsee, or to participate in other recreational activities was granted, to other persons as to whom the person granting permission, or the owner, lessee or occupant of the premises, owed a duty to keep the premises safe or to warn of danger.

> "4. Nothing in this section creates a duty of care or ground of liability for injury to person or property."

It is clear that the plaintiff's decedent entered the land in question for recreational purposes. There is no evidence (a) of a willful or malicious failure to guard; (b) that any consideration was paid to use the premises; or (c) that the injury was caused by a third person to whom permission was granted to use the facility to a plaintiff that was owed a duty. Accordingly, by the terms of the statute, the defendant owed no duty to plaintiff or plaintiff's decedent.

Plaintiff attempts to avoid the operation of this statute by categorizing this action as one under the attractive nuisance doctrine. However, nothing in the statute itself indicates that a special duty owed to children cuts across its clear meaning. See *Heider v. Michigan Sugar Co.*, 375 Mich. 490, 134 N.W.2d 637 (1965).

Moreover, the attractive nuisance doctrine has apparently not been adopted in Nevada. *Kimberlin v. Lear,* 88 Nev. 492, 494, 500 P.2d 1022 (1972). Even where the doctrine is in force, "the mere presence of a body of water ... is held by the great majority of the authorities not to be an attractive nuisance." *Orr Ditch Co. v. District Court,* 64 Nev. 138, 178 P.2d 558 (1947). In the instant case, the record reveals no evidence of a trap within the pool or other dangerous condition. Also, the pool is located in a desolate area some 19 miles from sparsely-populated Austin, Nevada. Inaccessibility of the location is an important factor in denying application of the doctrine. See *Phipps v. Mitze,* 116 Colo. 288, 180 P.2d 233 (1947).

It must be concluded that the defendant may not be held liable as a matter of law. Both the Nevada Sightseer Statute and the lack of an attractive nuisance serve to preclude recovery in this case.

Accordingly,

IT HEREBY IS ORDERED that the defendant's motion for summary judgment be, and it hereby is, granted.

Neal v. Bently Nevada Corporation
United States District Court, D. Nevada, 1991

On December 4, 1989, plaintiff Treg Neal (Neal) (Plaintiff) filed a diversity action in this Court alleging that on or about August 1, 1987, he and other members of the public used property, owned by defendant Bently Nevada Corporation (Bently) (Defendant), for recreational use. Neal swung from a rubber hose tied to a tree and dove into a shallow part of the Carson River. He landed on his head and sustained "serious and permanently disabling injuries."

Neal claimed that Bently negligently, consciously and recklessly controlled its premises, allowing the rope to be tied to a tree next to the river. Neal further claimed that Bently's actions "constitute a willful and malicious failure to guard or warn against a known dangerous condition, use and activity."

Bently claimed no liability for plaintiff's injuries in an amended answer on December 20, 1989. Defendant alleged as an affirmative defense Nevada Revised Statute § 41.510 — Nevada's recreational use statute.

On September 14, 1990, Bently filed a motion for summary judgment.

The uncontroverted facts are as follows. Neal was seventeen years old on the date of the accident, August 1, 1987. He was visiting, from his residence in Southern California, his older brother in Carson City, Nevada. Neal went to the Carson River that day with his brother (David) and his brother's friend (Shawn). David and Shawn had made numerous rope swing dives that day before Neal's accident, which occurred on Neal's third swing. The water was about ten feet deep.

When Neal used defendant's property on the day of the accident he did not know who owned the land on which the tree-rope swing was situated. Nor had he obtained permission to enter upon the land or paid consideration to use the land or the rope swing.

Bently's principal place of business is in Douglas County, Nevada. Bently owns approximately 12,000 acres of primarily undeveloped property in western Nevada. Defendant has owned since 1978, the 520 acre parcel of property in Carson City, Nevada, on which the tree-rope swing was located. The tree is directly next to the Carson River, which runs through defendant's property. Bently has never used this parcel for any purpose. The area had been used as a rope swing site since 1957. It is commonly known within Carson City that people have used the Carson River for recreational purposes over the past 45 years.

There is no corporate policy to monitor activity on Bently's undeveloped property or to restrict public access to the property that housed the rope swing. Bently took no steps to guard or warn the public against using the property as a rope swing site. Bently's CEO recognizes that rope Swinging by teenagers into shallow water is a dangerous activity.

Defendant has never received any complaints regarding this parcel. The sheriff and watch commander who responded to the accident had no knowledge of any previous accidents on the Carson River stemming from a tree-rope swing.

Access to the accident site is only by two narrow bumpy dirt roads. No evidence exists that any Bently officer visited the property prior to the accident or was aware of any use of the property, of a rope swing or of any previous accidents. Bently's Construction Manager visited the northern end of the property, not the southern end where the accident occurred, in the spring of 1984 concerning a mineral survey. He was the only Bently employee to visit the property for business purposes as of the accident date.

Bently's President, however, has visited the area twice for recreational purposes. He has not

seen a rope swing. He does not know whether, during those visits, he was on the Bently property or near the rope swing site. Bently's President does not know if any effort has been made to determine whether any Bently officers or employees knew of a tree with a rope swing on the Carson River. Nor has Bently's CEO made any effort to determine whether any Bently officers or employees had any prior knowledge of recreational use of the Carson River in Carson City. He has, however, heard stories of a raft race on the Carson River.

The Court must apply Nevada law since in a diversity action, such as this, the court must apply the law of the state in which the federal court sits.

The premises and activity in this case come within Nevada's recreational use statute. Recreational use statutes generally apply to premises in rural, semi-rural or non-residential areas and to injuries incurred by an activity enumerated in the statute that can be pursued in the "true outdoors." 62 Am.Jur.2d *Premises Liability* § 124 (1990).

The location of the site is rural — next to the Carson River; access is by dirt road, ten to twenty minutes off the main highway. Rope swinging from a tree into the river can only be pursued in the "true outdoors" and is covered under "any other recreational purposes."

Nevada's recreational use statute provides:

> 1. An owner, lessee or occupant of premises owes no duty to keep the premises safe for entry or use by others for crossing over to public land, hunting, fishing, trapping, camping, hiking, sightseeing, or for any other recreational purposes, or to give warning of any hazardous condition, activity or use of any structure on the premises to persons entering for those purposes, except as provided in subsection 3.
>
> 2. ...
>
> 3. This section does not limit the liability which would otherwise exist for: (a) Willful or malicious failure to guard, or to warn against, a dangerous condition, use, structure or activity....
>
> 4. ...

Nev.Rev.Stat.Ann. § 41.510 (Michie 1986).

The purpose of recreational use statutes is "to encourage owners of land within rural areas to make land and water areas available for recreational purposes by limiting their liability towards persons entering thereon for such purposes." *Ducey v. United States*, 523 F.Supp. 225, 229-230 (D.Nev.1981) (quoting Colo.Rev.Stat., Title 33, Art. 41, § 101).

Unless willful or malicious failure to guard or warn against the dangerous condition can be shown, a landowner does not owe a duty even to inspect its rural, semirural or non-residential property to persons who may enter thereon for the recreational purposes within the statute.

We must determine whether a genuine issue of material fact exists regarding Bently's control of its premises. We must ascertain whether Bently willfully and maliciously failed to guard or warn against a known dangerous condition, use and activity.

Defendant claims it had no authority to exclude the public from the river. The State of Nevada holds title to the Carson River. *State v. Bunkowski*, 88 Nev. 623, 633, 503 P.2d 1231 (1972). The river, however, runs through the defendant's property. Anyone near the river on defendant's property may come into contact with the river simply by being on the property. Moreover, plaintiff used defendant's property to propel himself into the river. Defendant cannot disclaim responsibility based on not owning the area where plaintiff landed while it owns the

premises from which plaintiff initiated the activity that resulted in injury.

The Court notes that though plaintiff alleges willful *and* malicious misconduct, he only sets forth in his oppositions to the motion for summary judgment facts concerning willful misconduct. Malice is separate from will. *McMurray v. United States*, 918 F.2d 834, 837 n. 3 (9th Cir.1990) (United States held liable for willful failure to guard or warn against hot springs with temperature from 160 to 180 degrees Fahrenheit). Plaintiff does not set forth facts from which malice can be inferred. Hence, the Court does not review the motion for summary judgment on that basis.

It is undisputed that defendant did not guard or warn against use of the property. Thus, we must determine whether Bently's failure to guard or warn against use of its property as a rope swing site was willful, whether the condition of, use of and activity on the property as a rope swing site were known to Bently, and whether the condition, use and activity were dangerous.

According to Nevada law, willful misconduct is "... intentional wrongful conduct, done either with knowledge that serious injury to another will probably result, or with a wanton or reckless disregard of the possible results." *Davies v. Butler*, 95 Nev. 763, 769, 602 P.2d 605 (1979). *See also Van Cleave v. Kietz-Mill Minit Mart*,97 Nev. 414, 416, 633 P.2d 1220 (1981) (Willful misconduct is an act "that the actor knows, or should know, will very probably cause harm") (quoting *Rocky Mountain Produce v. Johnson*, 78 Nev. 44, 51-52, 369 P.2d 198 (1962)); *Bell v. Alpha Tau Omega Fraternity*, 98 Nev. 109, 112, 642 P.2d 161 (1982) ("Willful misconduct requires a consciousness that one's conduct will very probably result in injury").

On the basis of Nevada Supreme Court decisions in *Davies*, *Van Cleave*, and *Bell*, the Ninth Circuit Court of Appeals holds that intent to injure has been removed from Nevada's definition of willful. *McMurray*, 918 F.2d at 836-37. We conclude that no intent to injure requirement exists within Nevada's definition of willful misconduct.

The plaintiff submitted reports of seven other prior accidents of the same nature. He also submitted an expert's evaluation that the lack of warning or guarding was not in accordance with widely accepted state-of-the-art highway safety engineering practice.

Plaintiff has set forth facts from which a reasonable jury could infer defendant's constructive knowledge of rope swing use. However, plaintiff has not raised a genuine issue of material fact because he has not set forth any information regarding constructive knowledge of danger at the rope swing site from which injury would probably result.

Constructive knowledge of use, hence, would not affect the outcome of the case because the danger and probable injury issue remains. A reasonable jury could not return a verdict for the plaintiff without also finding in favor of the plaintiff regarding defendant's constructive knowledge of a dangerous condition which would probably result in injury.

Boland v. Nevada Rock and Sand Co.
Nevada Supreme Court (1995)

On March 4, 1989, Jonathan D. Boland ("Boland"), Marc H. Cram ("Cram"), and Kent E. Wilson ("Wilson") drove to an area outside Henderson, Nevada, to ride a dirt bike (motorcycle).

Cram and Wilson each took a turn on the dirt bike. Boland, an experienced dirt bike rider, then took the dirt bike and went on the same route as his companions. Later, Cram suspected there might be a problem when Boland did not come back and Cram could not hear any noise. Cram and Wilson went looking for Boland and found him lying at the bottom of a hill.

Boland apparently rode to the top of the hill and, seeing that it was level, proceeded to pick up speed to ten or fifteen miles per hour. Boland then saw that there was a drop-off, but he could not stop in time.

As a result of Boland's fall, he is a paraplegic. Boland sued, claiming all respondents had an interest in the property where his injury occurred. He further contends that respondents were responsible for his injuries because they knew or should have known the property was used by dirt bikers, and respondents failed to warn of possible dangers.

Most of the area where the men were riding, a 320-acre mining basin, is owned by respondent Stewart Brothers Company. However, some of the land is owned by either respondent Nevada Rock & Sand Company ("Nevada Rock") or respondent Nevada Ready Mix Corporation ("NRM"). ...

The area was described by Wilson as being "[j]ust big piles of sand in the middle of flat nowhere, no houses around." In fact, Boland stated that he did not realize that they were riding in a commercial gravel pit...

Both Boland and respondents filed motions for summary judgment. The district court held a hearing on both motions and granted respondents' motion for summary judgment primarily based on NRS 41.510.

DISCUSSION

In certain instances, NRS 41.510 may immunize defendants from liability and therefore justify a grant of summary judgment. See Neal v. Bently Nevada Corp., 771 F.Supp. 1068 (D.Nev.1991), affirmed, 5 F.3d 538 (9th Cir.1993); Blair v. United States, 433 F.Supp. 217 (D.Nev.1977); Gard v. United States, 420 F.Supp. 300 (D.Nev.1976), affirmed, 594 F.2d. 1230 (9th Cir.1979), cert. denied, 444 U.S. 866, 100 S.Ct. 138, 62 L.Ed.2d 90 (1979).

NRS 41.510 states, in relevant part:

1. Except as otherwise provided in subsection 3, an owner, lessee or occupant of premises owes no duty to keep the premises safe for entry or use by others for crossing over to public land, hunting, fishing, trapping, camping, hiking, sightseeing, hang gliding, para-gliding or for any other recreational purposes, or to give warning of any hazardous condition, activity or use of any structure on the premises to persons entering for those purposes.

2. Except as otherwise provided in subsection 3, if an owner, lessee or occupant of premises gives permission to another to cross over to public land ... or participate in other recreational activities, upon his premises:

(a) He does not thereby extend any assurance that the premises are safe for that purpose, constitute the person to whom permission is granted an invitee to whom a duty of care is owed, or assume responsibility for or incur liability for any injury to person or property caused by any act of persons to whom the permission is granted.

....

3. This section does not:

(a) Limit the liability which would otherwise exist for:

(1) Willful or malicious failure to guard, or to warn against, a dangerous condition, use, structure or activity.

All that is required in order for NRS 41.510 to apply is that (1) respondents must be the owners, lessees, or occupants of the premises where Boland had been injured; (2) the land where Boland had been injured must be the type of land the legislature intended NRS 41.510 to cover; and (3) Boland must have been engaged in the type of activity the legislature intended NRS 41.510 to cover. We conclude that the district court correctly applied NRS 41.510.

All respondents were either owners, lessees or occupants of the land in question when Boland was injured. Boland argues that Nevada Rock and NRM could not claim immunity under the statute because they both only hold licenses to use the property, but are not owners, lessees or occupants.

This argument fails as to Nevada Rock because Boland alleged in his complaint that Nevada Rock has an ownership interest in the property where he was injured. It is disingenuous that Boland would argue that a company is liable because it has an ownership interest, and yet the company cannot be immune under the statute because it does not have an ownership interest. Nevertheless, Nevada Rock has mined the land in question for over twenty-five years creating a "degree of permanence." See Labree v. Millville Manufacturing, Inc., 195 N.J.Super. 575, 481 A.2d 286 (1984) (holding that "occupant" means "an entity with a degree of permanence").

This argument also fails as to NRM. Once again, Boland alleged in his complaint that NRM has an ownership interest in the property where he was injured. Boland acknowledges that NRM had been operating the sand and gravel pit for three months before his accident and to date. ... We conclude that NRM occupied the land as a matter of law. See, e.g., Smith v. Sno Eagles Snowmobile Club, Inc., 823 F.2d 1193, 1197 (7th Cir.1987) (occupant should be interpreted to encompass a resident of land who is more transient than either a lessee or an owner). In Smith, defendants simply blazed a trail for recreational snowmobilers, and they were considered "occupants" within the meaning of the recreational use statute. See also Ward v. State, 178 Ariz. 164, 871 P.2d 711 (1993).

We also conclude that the land where Boland was injured was the type of land intended to be covered by the statute. Although the Nevada statute does not specify what type of property is covered, the intent of the legislature is that the property be used for recreation. Therefore, the type of property should be rural, semi-rural, or nonresidential so that it can be used for recreation. See Neal, 771 F.Supp. at 1971-72. In addition, the only case this court has decided that addresses NRS 41.510 applied the statute to "open" land. See Brannan v. Nevada Rock & Sand, 108 Nev. 23, 25, 823 P.2d 291, 292 (1992).

In addition, we conclude that Boland was engaged in the type of activity the legislature intended the statute to cover. This court stated in Brannan that "Brannan's motorcycle-riding was undisputedly a recreational use." Id. at 25, 823 P.2d at 292. ...o

Although NRS 41.510 applies, respondents are immune under the statute only if they were not engaged in willful or malicious conduct that caused Boland's injury. See NRS 41.510(3)(a)(1). "Wilful or wanton misconduct is intentional wrongful conduct, done either with knowledge that serious injury to another will probably result, or with a wanton or reckless disregard of the possible result." Davies v. Butler, 95 Nev. 763, 769, 602 P.2d 605, 609-10 (1979) (emphasis in original).

We conclude that the district court did not err in finding respondents did not act willfully as a matter of law. Although the issue of willfulness is generally a question of fact, Boland presented no evidence that respondents willfully acted to cause Boland's injury. In Neal, the United States

District Court found that even if a jury could find that defendant had knowledge of a rope swing used on his property, the jury could not find that defendant had knowledge that injury was probable. The court reasoned that the rope swing site had been in use since 1957, and there was no evidence that defendant had knowledge of previous accidents. Neal, 771 F.Supp. at 1073-74; cf. McMurray v. U.S., 918 F.2d 834, 837 n. 2, 838 (9th Cir.1990) (defendant acted willfully where defendant, knowing that other persons had actually been burned, failed to prevent the public from entering an area where there were dangerous hot springs.) This case is similar to Neal because there is absolutely no evidence in the record that respondents, although aware that dirt bikers had used the property, were aware of any accidents on the sand piles since the gravel pit's existence in the 1960s. Therefore, the district court did not err in determining that respondents did not act willfully as a matter of law.

Boland's other contentions have been considered and rejected. The order of the district court is affirmed.

Lee v. Lamar Central Outdoor, LLC.
Nevada Supreme Court, 2014

Appellant Clayton Lee was riding a motor scooter around Las Vegas late in the evening. After visiting an abandoned campground to see a BMX or motocross race track, he intended to ride to an abandoned church. Lee planned to cross respondent Lamar Central Outdoors property in order to proceed to the church.

Lamar's property is mostly vacant. It features only a fence and two billboards visible from the nearby freeway. The property is bounded by two bike paths. According to Lee, Lamar's property appeared to be a "public attraction" with a gravel park that looked to be "well-traveled" by BMX riders.

Lee intended to enter Lamar's property through what looked to be a break in the fence. In fact, there was no break in the fence. The area that appeared open was sealed off by barbed wire. Lee crashed his motor scooter directly into the barbed wire portion of the fence and sustained multiple injuries. He sought medical attention immediately after the accident.

Lee then filed suit against Lamar, alleging negligence on the grounds of premises liability. After Lee's deposition, Lamar moved for summary judgment. Lamar argued that it was immune from liability under Nevada's recreational use statute, NRS 41.510. The district court granted summary judgment in favor of Lamar. Lee appeals that decision.

Under Nevada's recreational use statute, NRS 41.510, property owners or occupants do not owe any duty to keep their property safe for others using it for recreational purposes unless the owners or occupants granted permission to the users in exchange for consideration. This court has held that NRS 41.510 applies where (1) the defendant is the owner, lessee, or occupant of the premises where the plaintiff was injured; (2) the land where the plaintiff was injured is the type of land the Legislature intended NRS 41.510 to cover; and (3) the plaintiff was engaged in the type of activity the Legislature intended NRS 41.510 to cover. *Boland v. Nev. Rock & Sand Co.*, 111 Nev. 608, 611, 894 P.2d 988, 990 (1995). The statute, however, does not limit an owner or occupant's liability where the owner or occupant engaged in a "[w]illful or malicious failure to guard, or to warn against, a dangerous condition, use, structure or activity." NRS 41.510(3)(a)(1).

Lee does not question that Lamar was the owner of the property or that he was engaged in the type of activity covered by the statute. Instead, he argues that the district court erred because Lamar's property, as urban or suburban property, is not the type of land covered by the statute and because an issue of material fact exists as to whether Lamar acted willfully or maliciously.

Whether NRS 41.510 covers Lamar's property

By its own terms, NRS 41.510 applies to "any estate" or "any premises." We have specified that, because the statute regards property used for recreation, "the type of property should be rural, semi-rural, or nonresidential so that it can be used for recreation." *Boland,* 111 Nev. at 612, 894 P.2d at 991. Accordingly, we have held that "a commercial gravel pit," *id.* at 610, 894 P.2d at 990, and "an uninhabited area of desert," *Brannan v. Nevada Rock & Sand Co.*, 108 Nev. 23, 24, 823 P.2d 291, 291-92 (1992), were types of land covered by NRS 41.510.

Because NRS 41.510 uses the broad language of "any estate" and "any premises," the statute requires us to apply a broad construction. The nonresidential, urban property at issue here is covered by the statute. We note that Nevada's recreational use statute can be distinguished from those in other states, which specify the type of property covered. *See, e.g.*, Alaska Stat. § 09.65.200 (2012) (specifying that "unimproved" property is covered by statute). Without any specification in the statute, there is no reason to construct NRS 41.510 narrowly so as to exclude urban land. *See Palmer v. United States,* 945

F.2d 1134, 1136 (9th Cir. 1991) ("We see nothing in the language of Hawaii's statute that makes a distinction between urban and rural properties. If the legislature wished to deprive urban property holders of qualified immunity, it could have easily done so.").

Furthermore, the existence of improvements on Lamar's property, such as the fence or the billboards, does not disqualify Lamar from the immunity granted by the statute. NRS 41.510 expressly contemplates the "use of any structure on the premises" as a covered activity. One court has held that property "does not lose its immunity" where a softball field, complete with dugouts and fences, was constructed on the property. *Miller v. City of Dayton*, 537 N.E.2d 1294, 1297 (Ohio 1989). Courts have also held that property is covered under a recreational use statute even where the landowner has taken actions to prevent others from using the property. *White v. City of Troy*, 735 N.Y.S.2d 648, 650 (App. Div. 2002) ("It is now well settled that [New York's recreational use statute] applies . . . to those who attempt to prevent members of the public from using their lands." (citing *Bragg v Genesee Cnty. Agric. Soc'y*, 644 N.E.2d 1013, 1017-18 (N.Y. 1994))). Hence, the fence and other improvements on Lamar's property do not disqualify Lamar from protection under NRS 41.510.

Whether there exists an issue of material fact as to whether Lamar acted maliciously or willfully

An owner or occupant of property is immune from liability only if he did not act willfully or maliciously. NRS 41.510(3)(a)(1). "Although the issue of willfulness is generally a question of fact," this court has held that summary judgment is appropriate where the plaintiff has presented no evidence of willful or malicious conduct. *Boland*, 111 Nev. at 613, 894 P.2d at 991-92; *see also Kelly v. Lady wood Apartments*, 622 N.E.2d 1044, 1049 (Ind. Ct. App. 1993) (holding that summary judgment under a recreational use statute is appropriate where the plaintiff failed to allege malice or willfulness).

Here, not only did Lee not provide any evidence of malice, but he also did not allege malice. Lee's complaint is focused solely on negligence and does not "set forth sufficient facts to demonstrate the necessary elements," *W. States Constr., Inc. v. Michoff*, 108 Nev. 931, 936, 840 P.2d 1220, 1223 (1992), of any other claim for relief that might involve malicious or willful acts. "Willfulness and negligence are contradictory terms. If conduct is negligent, it is not willful; if it is willful, it is not negligent." *Rocky Mountain Produce Trucking Co. v. Johnson*, 78 Nev. 44, 51, 369 P.2d 198, 201 (1962) (citations omitted). Therefore, because Lee only alleged negligence and failed to otherwise set forth evidence of willfulness, we conclude that the district court did not err in finding no issue of material fact on the issue of willfulness or malice.

Escobal v. Howard Hughes Company
Court of Appeals of the State of Nevada, 2016

Appellant Don M. Escobal argues summary judgment was improper because, as a matter of law, NRS 455.010 creates an affirmative duty on Respondent Howard Hughes to fence a drainage wash on its property. Howard Hughes argues that it is afforded immunity from suit under NRS 41.510, and that the exception to statutory immunity does not apply. Having considered the parties' arguments and reviewed the record on appeal, we conclude that Escobal failed to establish grounds for reversal.

First, we reject Escobal's claim that Howard Hughes' failure to fence in the wash pursuant to NRS 455.010 establishes a genuine issue of material fact regarding whether Howard Hughes engaged in willful conduct. Escobal offered evidence that Howard Hughes knew of dirt bike trails, but offered no evidence that Howard Hughes knew of previous injuries. As a result, Escobal failed to show willful misconduct as a matter of law and NRS 41.510(3)(a)(1) affords Howard Hughes immunity from liability in this instance. *See Boland v. Nev. Rock & Sand Co.*, 111 Nev. 608, 613, 894 P.2d 988, 991-92 (1995) (affirming the grant of summary judgment where a plaintiff did not offer any evidence that the defendant knew of prior accidents at a gravel pit and therefore failed to establish willful conduct under NRS 41.510(3)(a)(1)); *Neal v. Bently Nev. Corp.*, 771 F. Supp. 1068, 1072-73 (D. Nev. 1991) (knowledge that an injury is probable is required to show willful misconduct under NRS 41.510(3)(a)(1)).

Second, we conclude that even if Howard Hughes' drainage wash was an excavation under NRS 455.010, the failure to erect fencing constitutes only negligence per se and does not meet the NRS 41.510(3)(a)(1) standard. *See Gard v. United States*, 594 F.2d 1230, 1232 (9th Cir. 1979) (affirming the grant of summary judgment and holding that a failure to erect a fence under NRS 455.010 establishes, at most, negligence per se, which is insufficient to overcome NRS 41.510's immunity provisions). Thus, Escobal failed to establish a genuine dispute of material fact as to Howard Hughes' immunity under NRS 41.510.

We therefore,

ORDER the judgment of the district court AFFIRMED.