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New Nevada Law Limits Duty Owed To Trespassers

On May 30, 2015, Nevada Governor Brian Sandoval signed Senate Bill 160 (“SB 160”), which significantly limits the duty of care owed to trespassers by landowners.

For many years in Nevada, the duty owed to persons on one's property varied depending on the visitors' status. Under common law, a person on another's property was considered either an invitee (a person invited onto the property for the benefit of the property owner), a licensee (a person with permission to use the property), or a trespasser (a person with no permission to use the property).

Landowners owed the highest duty to an invitee because that person was on the property for the landowner's benefit. A landowner was subject to liability to an invitee if the landowner knew or should have known of a dangerous condition and failed to exercise ordinary care to ensure the premises was safe or failed to warn of the dangerous condition. In stark contrast,

a landowner was only subject to liability to a trespasser if the landowner willfully or wantonly injured the trespasser, or the landowner failed to prevent the trespasser's injuries after the landowner discovered the trespasser's presence in a place of danger.

In 1994, however, the Nevada Supreme Court eliminated these categories and instead decreed that a landowner owes a duty of reasonable care to all persons on their premises. Under this ruling, it was substantially easier for an injured trespasser to prevail against a landowner even though the landowner did not invite, or want, the injured party on the premises.

SB 160 will effectively reverse the Nevada Supreme Court's 21-year-old holding. Under this statute, landowners no longer owe a duty of care to a trespasser. Thus, a landowner is no longer liable to an injured trespasser for failing to exercise reasonable care.

However, a landowner is liable to a trespasser if the landowner willfully or wantonly injures the trespasser, or the landowner fails to exercise reasonable care to prevent injury after the trespasser's presence in a place of danger is discovered.

The statute also codifies an exception for trespassing children, commonly referred to as the “attractive nuisance doctrine.” A landowner will be liable for injuries caused to a trespassing child by an artificial condition on the premises under certain conditions set forth in the statute.

Nevada's return to a common-sense approach - eliminating the duty owed to trespassers except in limited circumstances - is a welcome decrease in potential liability for property owners.

For more information about the new law and its potential impact, please contact [Jennifer DelCarmen](#) in LGC's Las Vegas office.

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Appellate Courts Split On Right To Repair Act

Under California's Right to Repair Act (Civil Code section 895, et seq.), before a homeowner who claims defective residential construction can file an action against the builder in court, the homeowner must give notice of the claimed defects to the builder and engage in a non-adversarial pre-litigation procedure, which affords the builder an opportunity to attempt to repair the defects. These pre-litigation procedures must be completed before filing suit under the Act.

4 The Act also sets forth construction standards, which “are intended to address every function or component of a structure.” Section 943

further provides: “Except as provided in [the Act], no other cause of action for a claim covered by [the Act] or for damages recoverable under Section 944 [of the Act] is allowed.”

Two years ago in *Liberty Mutual Ins. Co. v. Brookfield Crystal Cove, LLC*, the Fourth District Court of Appeal limited the applicability of the Act by holding that the requirements of the Act apply only when a plaintiff expressly alleges a cause of action for violation of the Act.

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Durable Power Of Attorney And Third-Party Reliance Issues

A power of attorney is an important estate planning tool. The person you choose to act as your agent should be able to step in and take care of your financial affairs. A power of attorney is a *durable* power of attorney if it survives the incapacity of the principal. Without a durable power of attorney, if you become incapacitated, no one could represent you unless a court appointed a conservator over your estate.

That court process takes time and money, and the judge may not choose the person you would prefer. In addition, under a guardianship or conservatorship, your representative may have to seek court permission to take planning steps that she could implement immediately under a simple durable power of attorney.

One of the reasons powers of attorney are so popular is the flexibility one has in drafting them. A power of attorney can be limited in scope, such as only granting the power to the agent to sell a specific piece of real estate. Or, the power of attorney could

be extremely broad, in which the agent is granted the power to do almost anything and everything, including change the beneficiaries of life insurance policies and retirement accounts, create or modify trusts, and give away all of the principal's property. Of course, the agent is limited by his fiduciary duty to the principal.

Many agents and principals, however, have experienced increased difficulty in getting banks or other financial institutions to recognize the authority of an agent under a durable power of attorney. Banks are often reluctant to accept powers of attorney for fear of being sued if the power of attorney is not valid.

While each bank and institution is different and has its own set of regulations and requirements, it is important to ensure that your power of attorney is properly drafted and addresses all possible expected issues to assist the institutions to which you are presenting the powers in being confident in their reliance on same.

Having a lawyer assist you in drafting your power of attorney will aid in this process. Working with an attorney will also help avoid any ambiguities that could create unintended consequences in the future.

If a bank or other institution refuses to accept a power of attorney, you should contact an attorney for assistance. If the situation cannot be resolved amicably, California Probate code section 4406 allows an agent to bring an action against a third party who refuses to honor a valid power of attorney, and requires the court to award attorney's fees to the agent if the court finds that the third person acted unreasonably in refusing to accept the agent's authority under the power of attorney.

For more information on durable powers of attorney, contact [Darcie Colihan](#) in LGC's San Diego office.

Dillon Coil Named To List Of Legal Elite

LGC is pleased to announce that Las Vegas associate [Dillon Coil](#) has been named to Nevada Business Magazine's [list of legal elite for 2015](#).

The list features top attorneys as chosen by their peers. Over 7,000 attorneys were nominated, with only 300 ultimately selected. Nominated lawyers were scored based on the number and types of votes they received, with in-firm votes receiving one point and outside firm votes receiving three points.

Dillon's selection shows the high level respect he has garnered with other attorneys in the community.

Dillon received his undergraduate degree in political science from Brigham Young University. He then attended University of New Hampshire School of Law, where he served on the Moot Court Board.

Since joining LGC, Dillon has focused on handling a wide variety of civil litigation matters, including personal injury, product

liability, and construction matters. He also represents a number of Las Vegas businesses in transactional and business litigation matters.

Dillon is also an active participant in Las Vegas Defense Lawyers, an organization founded by LGC partner Tom Lincoln to provide a balanced perspective regarding civil litigation in the Las Vegas area.

Congratulations to Dillon on his selection.



Dillon Coil

Appellate Courts Split On Right To Repair Act

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Two months ago, however, another appellate court, the Fifth District Court of Appeal, issued a new decision in *McMillan Albany, LLC v. Superior Court*, criticizing the reasoning of the *Liberty Mutual* decision and reaching the opposite conclusion.

In *McMillan*, Plaintiffs' complaint included several causes of action, including negligence, strict products liability, and alleged violations of the Act. Plaintiffs did not give the developer notice of the alleged defects before filing suit. Plaintiffs then dismissed the cause of action alleging violations of the Act, and argued the homeowners were no longer required to comply with the statutory pre-litigation procedures because that cause of action was no longer alleged.

The developer filed a motion to stay the case and compel compliance with the statutory pre-litigation procedures. The trial court denied the motion, concluding the homeowners were entitled to plead common law causes of action in lieu of a cause of action for violation of the building standards set forth in section 896, and they were not required to submit to the pre-litigation process of the Act when their complaint did not allege any cause of action for violation of the Act. The developer appealed.

On appeal, the homeowners relied on *Liberty Mutual* and argued that they were permitted to pursue common law causes of action for construction deficiencies that caused damage and, once they dismissed their third cause of action for violation of the Act, they were not required to comply with the requirements of the Act, including the pre-litigation procedures.

The *McMillan* court rejected the *Liberty Mutual* holding and concluded it was not consistent with the express language of the Act. The *McMillan* court reasoned that the Act, "[b]y its plain language . . . applies to any action for damages related to construction deficiencies, and limits a claimant's claims or causes of action to claims of violation of the statutory standards . . . [N]o other cause of action is allowed to recover for repair of the defect itself or for repair of any damage caused by the defect."

The *McMillan* court further held:

"[T]he Legislature intended that all claims arising out of defects in residential construction, involving new residences sold on or after January 1, 2003, be subject to the standards and the requirements of the Act; the homeowner bringing such a claim must give notice to the builder and

engage in the pre-litigation procedures in accordance with the provisions of Chapter 4 of the Act prior to filing suit in court. Where the complaint alleges deficiencies in construction that constitute violations of the standards set out in Chapter 2 of the Act, the claims are subject to the Act, and the homeowner must comply with the pre-litigation procedures, regardless of whether the complaint expressly alleges a cause of action under the Act."

Because the homeowners did not comply with the requirements of the Act and accommodate the developer's absolute right to attempt repairs, the developer was entitled to a stay of the action until the statutory pre-litigation process had been completed.

The *McMillan* and *Liberty Mutual* decisions are clearly inconsistent with one another, and it will not be surprising to see the California Supreme Court take up the issue to address this inconsistency. In the meantime, it will be up to trial courts to decide whether to follow the reasoning in *McMillan* or the holding of *Liberty Mutual*.

For more information about the decision, please contact [Rich Reese](#) in LGC's San Diego office.

LGC Hosts Successful Small-Business Seminar

On October 22, LGC, along with Back Office Support Solutions (BOSS), hosted a successful seminar for local small businesses and employers. The seminar was the first in a series to be hosted by LGC and BOSS.

The seminar, entitled "Real Talk," focused on key legal and human resources issues faced by small businesses.

Partner [Jill Chilcoat](#) led the presentation, which included discussions of new regulations in California, and the policies and procedures businesses need to implement to ensure compliance and avoid exposure under these regulations.

For more information on upcoming seminars and events, check out LGC's [blog](#).

Click [here](#) to read about upcoming events, news, and important legal developments.

LGC To Provide *Pro Bono* Representation To Children In Las Vegas

LGC is proud to announce that its Las Vegas office has begun working with the [Legal Aide Center of Southern Nevada](#) to help provide representation to children in the Las Vegas area.

LGC has teamed up to provide help through the Children's Attorney Project (CAP). Founded in 1999, the goal of CAP is to provide abused and neglected children with a voice in court to speak out in support of their future.

Children who have fallen into the CAP program and are seeking representation are those that have been removed from their homes and most of the time do not understand or comprehend what is occurring. Nevada law requires Child Protective Services (CPS) to investigate reports of child abuse or neglect. CPS has the authority to place the child into protective custody, petition the court for custody of the child, or offer services to the family of the child.

However, CPS does not represent the child or present the child's wishes during any legal hearing with the courts. Right now, less than 50% of all children removed from their homes in Southern Nevada are represented by counsel. This means that in over 50% of cases, the court never hears the voices of these children and their views on decisions that will permanently affect their lives.

LGC is proud to be a part of providing a voice for these children.

Change In Nevada Law Eliminates Insurers' Obligation To Disclose Policy Limits

For the last 20 years, insurance companies operating in Nevada have been required to disclose their insured's policy limits to plaintiffs' attorneys if certain conditions are met. Previously, pursuant to NRS 690B.042, if a plaintiff's attorney provided to the insurance company a copy of all medical records and medical bills in the attorney's possession, then the insurance company was required to provide the policy limits for the insured.

If the insurance company failed to provide the policy limits, the insurance company was subject to certain penalties. On the opposite end, if the plaintiff's attorney failed to provide all medical records or failed to timely provide updated records, the Nevada statute did not provide for any penalties against the plaintiff or the attorney.

In a perfect world, a plaintiff attorney would provide all the medical records and medical bills in a timely fashion to allow an insurance carrier sufficient time to evaluate the claim and the insurance carrier would timely provide the insurance limits, which would allow both sides to evaluate the claims and possible settlement opportunity with the goal to avoid unnecessary litigation. But this is not a perfect world.

In reality, a plaintiff's attorney typically provided a small portion of the medical bills and requested a copy of the policy limits. After obtaining the policy limits, all too often a plaintiff attorney would not provide any additional records, and then on the eve of the statute of limitations would provide a pile of new medical records and bills, drastically increasing the medical bills and damages, and make a policy limits settlement demand in an attempt to set up a bad faith claim and uncap the previously disclosed policy limits.

Initially, in the 2015 legislative session, Senate Bill 162 proposed a change to the law to level the playing field by providing penalties for not only the insurance company that does not comply with the law, but also penalties for a plaintiff who does not comply with the law. The lobbyists for the plaintiff's bar opposed

any such change, and instead of working to a happy medium to institute fairness to both sides, the Nevada Legislature chose to repeal NRS 690B.042 altogether.

As a result, insurance companies are no longer are required to disclose the liability limits of their insured before a lawsuit is filed. Many personal injury attorneys are upset and argue this change will result in an increase in the number of law suits being filed as well as an increase in defense fees. On the other end of the spectrum, some suggest the change in law will keep medical costs down and lead to reasonable settlements because an attorney will not have an incentive to inflate costs and treatment based on a higher policy limit.

Although it is unclear how the change will play out in the actual practice of law, a plaintiff's attorney will now need to convince the insurance company why it would be beneficial to its insured to disclose the policy limits. There may be valid reasons in some situations, which should be considered. However, an insurance company may need to consult and gain approval of their insured before the disclosure is made.

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