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The Writ

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Wednesday, September 11, 2019
12:00 p.m.
Harrah's Convention Center, 3rd Floor

"Reciprocity: The Conversation Continues"
1 Hour CLE General Credit

Should Nevada be in lock step with the national trend and adopt reciprocity as an avenue to practice law within our border? Or, is reciprocity a solution in search of a problem?

Join the State Bar of Nevada's Vice-President and former Washoe County Bar Association President Ann Morgan as we discuss the topic of reciprocity in Nevada. This engaging seminar will feature a video of a recent Lincoln-Douglas style debate on reciprocity and explore the responses the state bar received to its statewide survey, and ask you to form your own opinions as well.

Thank you to our lunch sponsors:

RSVP by September 9, 2019. $25 per person for members and $35 for non-members.
Register online at www.wcbar.org or call 786-4494.

APPELLATE BRIEFS

By Adam Hosmer-Henner, McDonald Carano

SHORT HISTORY OF "NO SET OF FACTS"

While the federal court system has "*Twombly*" and "*Iqbal*," Nevada state courts have "*Buzz Stew*." Practitioners in Nevada are very used to seeing *Buzz Stew, LLC v. City of North Las Vegas* cited for the legal standard on a motion to dismiss brought pursuant to NRCP 12(b)(5). 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008). *Buzz Stew's* talismanic words are that a complaint "should be dismissed only if it appears beyond a doubt that [the plaintiff] could prove no set of facts, which, if true, would entitle [it] to relief." 124 Nev. at 228. The Nevada Supreme Court alone has cited *Buzz Stew* in approximately 240 opinions and orders, making it one of the most commonly cited cases at the appellate level. Two recent opinions though have perhaps signaled the beginning of the end for *Buzz Stew's* ubiquity. In *Schiller v. Fidelity National Title Insurance Co.*, 2019 WL 3202204, *1, 444 P.3d 459 (Nev. 2019) (unpublished), the Supreme Court cited instead to *Fitzgerald v. Mobile Billboards, LLC*, 134 Nev. Adv. Op. 30, 416 P.3d 209, 210 (2018) but included a parenthetical indicating that *Buzz Stew* was being quoted. In *Kim v. Dickinson Wright, PLLC*, 135 Nev. Adv. Op. 20, 442 P.3d 1070, 1073 (2019), the Supreme Court cited to *Szymborski v. Spring Mountain Treatment Center*, 133 Nev. 638, 641, 403 P.3d 1280, 1283 (2017) and simply stated "internal quotation marks omitted."

Landmark cases that reach the level of *Buzz Stew's* notoriety typically establish a new precedent or have lasting historical or legal significance. *Buzz Stew* does not fall into these categories. The "no set of facts" standard was not a novel holding even for Nevada as *Buzz Stew* specifically cited *Blackjack Bonding v. Las Vegas Municipal Court*, 116 Nev. 1213, 1217, 14 P.3d 1275, 1278 (2000). And the same standard has remained in place in Nevada since at least 1985. *Edgar v. Wagner*, 101 Nev. 226, 228, 699 P.2d 110, 112 (1985) ("The complaint cannot be dismissed for failure to state a claim unless it appears beyond a doubt that the plaintiff could prove no set of facts which, if accepted by the trier of fact, would entitle him to relief."). In *Edgar*, the Court cited, apparently for the first time[1], the iconic language of *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957), where the "no set of facts" language was confirmed by the United States Supreme Court.

The same general principles can be found in Nevada law even before the adoption of the Rules of Civil Procedure in the early 1950s. Prior to NRCP 12(b)(5) motions, demurrers were considered under a standard where the "pleadings as alleged [are] for the purposes of the demurrer, admitted to be true." *Levy v. Ryland*, 32 Nev. 460, 109 P. 905, 909 (1910) (holding that the statute

of limitations "cannot be successfully pleaded by demurrer" where the pleading states that the discovery of the alleged defect occurred in March 1908 and the complaint was filed in June 1909); *see also Knox v. Kearney*, 37 Nev. 393, 142 P. 526, 529 (1914) (holding that "facts pleaded in a complaint are considered as true" and a pleading need only contain "sufficient facts to constitute a cause of action"). While these decisions do not use the precise language of *Buzz Stew*, it appears that the courts would have reached the same result in each decision regardless of the formulation of the legal standard.

Buzz Stew though aimed to promote consistency and engage in light error correction by clarifying that the standard "requires a showing of proof beyond a doubt" instead of "beyond a reasonable doubt." 124 Nev. at 228 n.6 ("disavow[ing]" a series of cases that purportedly required "a showing of proof beyond a reasonable doubt"). Accordingly, *Buzz Stew's* usefulness as an authority is likely because it served as a clear break from a period of ambiguity in the Supreme Court's opinions and because it directly and clearly restated the legal standard. A move away from the citation of *Buzz Stew* without an intervening change in the law is probably unnecessary and neither *Fitzgerald v. Mobile Billboards, LLC* nor *Szymborski v. Spring Mountain Treatment Center* are catchy enough titles to warrant a stylistic change. Still, if the Nevada Supreme Court begins to cite to either of these other cases as a clearer restatement of the legal standard for dismissal for failure to state a claim, it will only be a matter of time before *Buzz Stew* is fully replaced by "internal quotation marks omitted."

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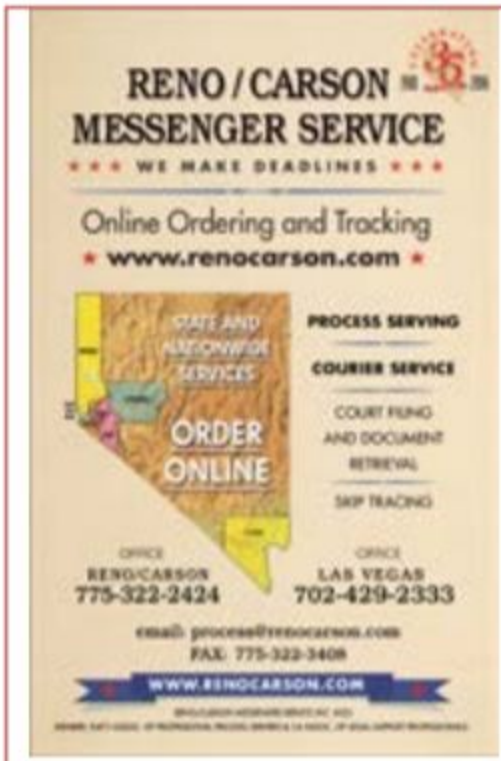
[1]The Nevada Supreme Court did use the phrase "any set of facts" and cited to another case using the phrase "no set of facts" in 1965 but as dicta in a decision based on an appeal from summary judgment. *Zalk-Josephs Co. v. Wells Cargo, Inc.*, 81 Nev. 163, 169, 400 P.2d 621, 624 (1965) ("[A] complaint should not be dismissed for insufficiency, for failure to state a cause of action, unless it appears to a certainty that plaintiff is entitled to no relief under any set of facts which could be proved in support of the claim.")

Adam Hosmer-Henner is a partner at McDonald Carano and practices primarily in the areas of commercial litigation and appellate law. He regularly handles appeals and writ proceedings at the Nevada Supreme Court and the United States Court of Appeals for the Ninth Circuit.



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Specialty Courts Continued

Big Brothers/Big Sisters, for example. Encourage participants to share their child-care services with one another, to allow an SUD parent both a respite and some "me time" for counseling or treatment.

One presenter, The Honorable Michael Montero, a District Court Judge in Winnemucca, described how his team spent 18 months helping a participant get her kids back, including sending staff with her on a trip to California to attend family court there. That was truly a family-centered approach.

Judge Dorothy Nash Holmes *presides over Dept. 3 in Reno Municipal Court. She is adjunct faculty at TMCC and UNR, and teaches a course on Specialty Courts for the online Justice Management Master's Degree Program at UNR.*