

*Atkinson v. MGM Grand Hotel, Inc.*, 120 Nev. Ad. Op. 71 (2004).<sup>1</sup>

**TORTS – NEGLIGENCE PER SE  
CIVIL PROCEDURE – JURY INSTRUCTIONS**

**Summary**

This case was an appeal from a final district court judgment, entered pursuant to a jury verdict in a personal injury case which denied appellant’s proffered jury instruction based on a Nevada statute that governs the erection of fences around holes, excavations and shafts.

**Disposition/Outcome**

The Nevada Supreme Court reversed the district court’s judgment and remanded the case for a new trial finding that the district court incorrectly denied appellant’s jury instruction and that the jury instruction should have been given.

**Factual and Procedural History**

In the later part of 1997, MGM Grand Hotel and Casino (“MGM”) began constructing “high roller suites” in an area that had previously been tennis courts and a swimming pool. MGM hired the construction company, Marnell Corrao (“Marnell”), for the project. Marnell secured the perimeter of the construction project with an eight-foot chain link fence and block walls. However, the fence did not extend to block an entrance through a stairway leading from outside of the construction site to the interior. Instead, planks and yellow caution tape were placed across the stairwell. In addition to the planks and caution tape, MGM had security personnel check the construction site on an hourly basis to ensure that the site was secured.

On New Year’s Eve 1997, appellant Cherie Atkinson (“Atkinson”) walked an unknown number of steps and fell approximately twenty feet into an excavation on the premises of the MGM construction site. Atkinson fractured her lumbar spine and incurred medical expenses in excess of \$110,000.

Atkinson filed a complaint against MGM and Marnell, seeking damages for personal injuries sustained from her fall. At the jury trial, Atkinson proposed a jury instruction<sup>2</sup> on the issue of negligence per se, based on NRS 455.010.<sup>3</sup> The district court refused Atkinson’s instruction and the jury returned a verdict for MGM and Marnell.

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<sup>1</sup> By Amanda Yen

<sup>2</sup> The proposed jury instruction provided:

A violation of [NRS 455.010] constitutes negligence as a matter of law. If you find that a party violated a law just read to you, it is your duty to find such violation to be negligence; and you should then consider the issue of whether that negligence was a proximate cause of injury or damage to the Plaintiff.

<sup>3</sup> NEV. REV. STAT. 455.010 states:

Any person or persons, company or corporation, who shall dig, sink or excavate, or cause the same to be done . . . shall, during the time they may be employed in digging, sinking or

## Discussion

### **I. Adequate Objection to Preserve on Appeal**

NRCP 51 states that “[n]o party may assign as error the giving or the failure to give an instruction unless he objects thereto . . . stating distinctly the matter to which he objects and the grounds of his objection.”<sup>4</sup> However, it is not always necessary to make a formal objection to preserve a jury instruction issue for appeal.<sup>5</sup>

Atkinson did not object immediately after the district court stated that it would not provide the proposed instruction to the jury. However, Atkinson did object to MGM’s jury instruction on the standard of care because she believed that NRS 455.010 provided the applicable standard of care that should have been set out in the jury instruction. Atkinson had also provided the district court with a written brief on the issue of NRS 455.010’s relevance in her opposition to MGM and Marnell’s motion in limine.

Due to Atkinson’s brief on the relevance of NRS 455.010 and her objection on the record that she believed NRS 455.010 supplied the applicable standard of care, the Nevada Supreme Court determined she sufficiently complied with NRCP 51 to preserve the issue for appeal.

### **II. The Jury Instruction**

Atkinson argued that a violation of NRS 455.010 constitutes negligence per se<sup>6</sup>. NRS 455.010 is intended to protect members of the public from falling into excavations. Atkinson entered a construction site and fell into an excavation pit and is therefore within the class of persons that the statute was designed to protect and her injury the type the statute was intended to prevent.

Although MGM contended that Atkinson’s proffered jury instruction was not required under *Boland v. Nevada Rock and Sand Co.*<sup>7</sup>, the court found that the *Boland* was factually distinguishable from the present case.<sup>8</sup>

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excavating, or after they may have ceased work upon or abandoned the same, erect, or cause to be erected, good and substantial fences or other safeguards, and keep the same in good repair, around such works or shafts, sufficient to guard securely against danger to persons and animals from falling into such shafts or excavations.

<sup>4</sup> NEV. R. CIV. P. 51 (2004).

<sup>5</sup> See *J.A. Jones Constr. v. Lehrer McGovern Bovis*, 120 Nev. 32, 38, 89 P.3d 1009, 1015 (2004); *Barnes v. Delta Lines, Inc.*, 99 Nev. 688, 690 n.1, 669 P.2d 709, 710 n.1 (1983) (holding that the requirements of NRCP 51 are satisfied as long as the district court is provided with a citation to the relevant legal authority that supports the giving of the instruction).

<sup>6</sup> A statutory violation is negligence per se if the injured party belongs to the class of persons whom the statute was intended to protect, and the injury suffered is the type the statute was intended to prevent. *Barnes*, 99 Nev. at 690, 669 P.2d at 710.

<sup>7</sup> 111 Nev. 608, 894 P.2d 988 (1995).

<sup>8</sup> In *Boland*, a dirt bike rider who had already entered the excavation area could not argue for the application of NRS 455.010 because he fell off the hill after he was already inside the excavation. The court held that it would not be reasonable to require fencing or other safety measures to be placed around a 320-acre gravel pit. *Id.* at 614, 894 P.2d at 992.

The court held that in the present case, MGM and Marnell were required to follow the provisions of NRS 455.010 and secure the excavation area by erecting a fence or other safeguard.

### **Conclusion**

Although NRCP 51 requires a distinct objection in order for an issue to be raised on appeal, a formal objection is not always necessary to preserve a jury instruction issue for appeal.

Further, NRS 455.010 is intended to protect members of the public from falling into excavations or work shafts. If the injured party proffering the proposed jury instruction belongs to the class of persons whom NRS 455.010 was intended to protect, and the injury suffered is the type the statute was intended to prevent, then the district court should give the instruction to the jury.