

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

McDONALD CARANO WILSON  
LLP, a Nevada limited liability  
partnership,

Appellant,

vs.

THE BOURASSA LAW GROUP, LLC,  
a Nevada limited liability corporation;  
OASIS LEGAL FINANCE, LLC, an  
Illinois limited liability company;  
CALIFORNIA BACK SPECIALISTS  
MEDICAL GROUP, INC., a California  
corporation; CALIFORNIA  
MINIMALLY INVASIVE SURGERY  
CENTER, INC., a California  
corporation; THOUSAND OAKS  
SPINE MEDICAL GROUP, INC., a  
California corporation; CONEJO  
NEUROLOGICAL MEDICAL  
GROUP, INC., a California corporation;  
and MEDICAL IMAGING MEDICAL  
GROUP INC., a California corporation,

Respondents.

Supreme Court No. 64658

District Court Case No. 22 2014 04:45 p.m.  
A-07-553070-C  
Electronically Filed  
Tracie K. Lindeman  
Clerk of Supreme Court

**APPEAL FROM ORDER**

The Eighth Judicial District Court  
In and For the County of Clark  
THE HONORABLE RONALD J. ISRAEL  
DISTRICT COURT JUDGE

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**REPLY IN SUPPORT OF APPELLANT'S OPENING BRIEF**

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## I. INTRODUCTION

Although the Bourassa Firm and McDonald Carano both claim they are entitled to attorney fees for representing Robert Cooper, the Bourassa Firm argues that equity favors the Bourassa Firm while simultaneously accusing McDonald Carano of seeking a windfall. See Respondent's Answering Brief ("Resp. Brief") at 8. The Bourassa Firm argues this despite implicitly acknowledging that McDonald Carano:

- Filed the initial pleadings in Cooper's case;
- Represented Cooper almost five times as long as the Bourassa Firm;
- Incurred over \$100,000 in legal fees;<sup>1</sup>
- Incurred \$13,500 in litigation costs compared to \$30.89 incurred by the Bourassa Firm;
- Completed all of the discovery in Cooper's case, including numerous out-of-state depositions;
- Engaged in substantial settlement negotiations with the defendants;
- Completed all of the substantive pre-trial motion practice; and
- Completed most, if not all of the substantive trial preparation;

See Resp. Brief at 2; see also Joint Appendix ("J.A.") at 3-8. Nor does the Bourassa Firm challenge that McDonald Carano properly recorded and noticed its attorney's lien. See Resp. Brief at 2; see also J.A. at 42-45. Instead, the Bourassa Firm's entire argument is premised upon the fact that McDonald Carano withdrew for good cause just before trial and upon the fiction that McDonald Carano's

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<sup>1</sup> Even if McDonald Carano recovers the entire amount of the Settlement Proceeds, it will not be made whole.

withdrawal rendered McDonald Carano's lien unenforceable under Nevada law once it withdrew.

Quite the contrary. Both Nevada's charging lien statute and this Court's jurisprudence confirm that an attorney's lien survives voluntary withdrawal for good cause. Additionally, equity and fundamental fairness favor enforcement of McDonald Carano's lien because the firm did the overwhelming majority of the work in Cooper's case. Although the Bourassa Firm argues it solely and "undisputedly obtained" Cooper's settlement, that argument relies on technicality over common sense. See Resp. Brief at 6. If not for McDonald Carano filing the complaint, vigorously conducting discovery, and obtaining favorable rulings in pretrial motion practice, each of which laid the foundation for Cooper's case, then Cooper would not have obtained such a favorable settlement. Thus, McDonald Carano played a substantial role in obtaining the Settlement Proceeds.

And so both law and equity reach the same conclusion in this matter: McDonald Carano has an enforceable attorney's lien, and the district court erred in denying McDonald Carano's charging lien.

## **II. ARGUMENT**

### **A. Both NRS 18.015 and this Court's jurisprudence confirm a properly recorded and noticed attorney's lien survives voluntary withdrawal for good cause.**

The Bourassa Firm does not dispute that Cooper placed his claim in McDonald Carano's hands and that McDonald Carano filed suit on Cooper's behalf. See Resp. Brief at 2. Nor does the Bourassa Firm challenge that McDonald Carano served written notice of the lien upon Cooper and the defendant's counsel. Id. Thus, under the first two provisions of NRS 18.015, there is no doubt that McDonald Carano had a perfected charging lien.

But the Bourassa Firm argues, and the district court accepted, that NRS 18.015(3) prevented that court's enforcement of McDonald Carano's charging lien because McDonald Carano did not represent Cooper at the time he ultimately settled his case. The Bourassa Firm argues that McDonald Carano did not "recover" the Settlement Proceeds and so McDonald Carano's lien could not attach to the Settlement Proceeds.

The plain language of NRS 18.015(3) suggests otherwise. The Nevada legislature wrote the phrase "which is recovered" in the passive voice in the statute, indicating that it intended courts to broadly construe the provision. See Convention Properties v. Washoe Cnty. Assessor, 106 Nev. 400, 403, 793 P.2d 1332, 1334 n. 2 (1990) (noting possible ambiguity in using passive voice); see also Peke Res., Inc. v. Fifth Judicial Dist. Court, 113 Nev. 1062, 1070, 944 P.2d 843, 849 n. 1 (1997) (noting that use of passive voice created a "general statement"). By using the passive voice, the legislature left open the question of who recovered the money or property to which the lien attaches: the client or the attorney?

The Bourassa Firm's narrow interpretation of that question means that the attorney of record recovers the money or property, and prevents a withdrawing attorney from enforcing a charging lien, without regard for the work that the withdrawing attorney did to obtain the settlement or judgment. Had the legislature wished such a narrow interpretation, it could have expressly drafted the provision in the active voice and included the phrase "attorney of record:" "the lien attaches . . . to any money or property the attorney of record recovers on account of the suit or other action." That the legislature did not do so illustrates the incorrectness of the Bourassa Firm's narrow interpretation.

The more sensible interpretation of the legislature's use of the passive voice in NRS 18.015(3) is that the client is the person who recovered the money or property. Thus, in effect, the provision reads that a charging lien attaches to any

money or property the client recovers on account of the suit or other action that the client placed in the attorney's hands. Under this interpretation, any withdrawing attorney with a perfected charging lien would have a claim to some portion of the client's ultimate settlement proceeds. If multiple attorneys represented the client throughout litigation, each of them could have an enforceable attorney's lien that attached to the money or property the client recovered from that litigation.

In fact, this more sensible interpretation has guided the Nevada Supreme Court in previous cases involving attorney liens. In Earl v. Las Vegas Auto Parts, Inc., which is almost directly on point in this case, the client fired his attorneys on the eve of trial. 73 Nev. 58, 307 P.2d 781 (1957). After the client fired the attorneys and two weeks before he settled the case, the fired attorneys perfected a charging lien on any potential settlement proceeds. The client then hired new counsel and reached a \$25,000 settlement. Id. at 61, 307 P.2d at 782. Five weeks after the fired attorneys perfected their lien and three weeks after the client settled the case, the trial court heard argument regarding the fired attorney's charging lien and enforced that lien at \$2,500. Id. The fired attorneys appealed, arguing that the trial court lacked jurisdiction to enforce their charging lien. Id.

On appeal, the Nevada Supreme Court affirmed. The Court noted that the trial court had "jurisdiction over the subject matter of the [fired attorneys'] charging lien for services performed" in the underlying lawsuit. Id. at 63, 307 P.2d at 783. This jurisdiction gave the trial court "power to act in the establishment and enforcement of [the fired attorneys'] charging lien." Id. Thus, contrary to the Bourassa Firm's argument, the Earl court recognized that the fired attorneys' withdrawal did not extinguish their charging lien. Instead, under the Nevada charging lien statute, the Earl attorneys' perfected lien remained enforceable against any settlement proceeds their client ultimately recovered even though their representation ended before settlement. So too does McDonald Carano's perfected



charging lien remain enforceable against the Settlement Proceeds even after the firm's voluntary withdrawal for good cause.

In trying to evade the clear implication of Earl, the Bourassa Firm cites to a single line from Argentina Consolidated Mining Company v. Jolley Urga Wirth Woodbury & Standish stating that a charging lien attaches to a "judgment or settlement the attorney has obtained for the client." 125 Nev. 527, 532, 216 P.3d 779, 782 (2009); see also Resp. Brief at 6-7. The Bourassa Firm claims that "obtained" necessarily means that the attorney must be counsel-of-record at the time the client settles the case.<sup>2</sup> In essence, in cases where multiple attorneys prosecuted the client's case but are not counsel-of-record when the case settles, these prior attorneys did not "obtain" the settlement for the client and so their attorney's liens cannot attach to the settlement proceeds.

But such an approach is detached from the plain meaning of the verb "obtain." To obtain something is to "gain or get (something) usually by effort." Merriam-Webster.com, Merriam-Webster Online Dictionary, <http://www.merriam-webster.com/dictionary/obtain> (last visited Dec. 19, 2014). Even the most skeptical view of McDonald Carano's work for Cooper must concede that the firm expended great effort in helping Cooper settle his case. Although McDonald Carano was not the attorney of record when Cooper settled his case, the firm incurred over \$100,000 in legal fees and \$13,000 in costs to prosecute his matter. McDonald Carano conducted all of the discovery, much of the pre-trial motion practice, and engaged in early settlement negotiations which produced Cooper's

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<sup>2</sup> The Bourassa Firm also cites to the approach of courts in other jurisdictions that have enforced charging liens when the settlement proceeds are the "fruits of the attorney's skill and labor." Resp. Brief at 11. There is no credible argument that Cooper's settlement is not the "fruit" of McDonald Carano's skill and labor. But for McDonald Carano litigating Cooper's case for nearly three years, there would be no settlement.

ultimate settlement amount. Thus, even though the Bourassa Firm was representing Cooper at the time of settlement, the settlement would not have been possible without McDonald Carano's work. And so enforcing McDonald Carano's charging lien is permissible under Argentina because its attorneys "obtained" the settlement for Cooper even though they were not attorneys of record at the time Cooper settled the case.

Moreover, interpreting the word "obtained" to include both the attorney of record at the time of settlement **and** prior counsel whose work helped produce settlement is the only way to square Argentina with Earl. The Earl court held that the fired attorneys had an enforceable charging lien which attached to settlement proceeds even though they were not attorneys of record at the time of settlement. 73 Nev. at 63, 307 P.2d at 783. In other words, the Earl attorneys' charging lien survived despite their representation ending before settlement. If, however, Argentina is read narrowly to exclude counsel whose representation ends before settlement, as the Bourassa Firm urges, then the fired attorneys in Earl could not have had an enforceable charging lien and the Nevada Supreme Court improperly affirmed the trial court's enforcement of that lien. Such an interpretation creates conflict between Argentina and Earl, and it is inconsistent with the Court's historical practice of harmonizing the applicable case law. See Miller v. Burk, 124 Nev. 579, 597, 188 P.3d 1112, 1124 (2008) (noting that the Court's previous rulings "hold positions of permanence in this court's jurisprudence"); see also Smith v. Kirozin USA, Inc., 127 Nev. Adv. Op. 37, 254 P.3d 636, 640 (2011) ("[T]his court has a duty to construe statutes as a whole, so that all provisions are considered together and, to the extent practicable, reconciled and harmonized."); Black's Law Dictionary 1443 (8th Ed. 2004) (defining "stare decisis" as the "doctrine of precedent, under which it is necessary for a court to follow earlier judicial decisions when the same points arise again.").

In this case, both the statute and the Court's previous holdings support the conclusion that an attorney's perfected charging lien survives voluntary withdrawal for good cause and attaches to the client's ultimate settlement proceeds. Accordingly, the district court erred in this case when it ruled that McDonald Carano's perfected charging lien ended when the firm withdrew for good cause from representing Cooper.

**B. Equitable principles reinforce that McDonald Carano's charging lien attaches to Cooper's settlement.**

The Bourassa Firm concedes, as it must, that the Court reaffirmed in its most recent analysis of NRS 18.015 that a charging lien is "based on natural equity—the client should not be allowed to appropriate the whole of the judgment without paying for the services of the attorney who obtained it." Resp. Brief at 8 (quoting Levanthal, 305 P.3d at 908). And yet, by demanding McDonald Carano's exclusion, the Bourassa Firm is arguing that Cooper should escape with his settlement proceeds without paying for McDonald Carano's services.<sup>3</sup>

Additionally, the Bourassa Firm's argument turns equity onto its head by rewarding the Bourassa Firm for minimal work in Cooper's case while simultaneously accusing McDonald Carano of seeking a windfall for doing almost all of the work. McDonald Carano filed the complaint, completed discovery, and conducted nearly all of the pretrial motion practice. See Resp. Brief at 2. After McDonald Carano voluntarily withdrew for good cause and Cooper hired the Bourassa Firm, the case was nearly over. The Bourassa Firm's only work on the case was to file a motion to extend the trial and continue settlement discussions

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<sup>3</sup> The Bourassa Firm argues that McDonald Carano can still proceed in quantum meruit against Cooper. Resp. Brief at 14. Not only is this illusory because Cooper is judgment proof, but that rationale ignores the very purpose of an attorney's lien: to prevent clients from absconding with settlement proceeds without paying for their attorney's services.

that McDonald Carano had previously initiated. Surely equity cannot favor an attorney's lien for a firm who performs minimal work on a case while simultaneously rejecting the same for a firm who performed almost all of the work.

The Bourassa Firm also argues that public policy supports its position and that allowing withdrawing attorneys to enforce charging liens would encourage "unscrupulous attorneys" to take advantage of their ability to enforce charging liens by performing virtually no work before withdrawing and claiming the full amount of their contractual contingency fee once the client settled the case. See Resp. Brief at 12. This argument is misguided for at least two reasons.

First, the dire factual circumstances that the Bourassa Firm illustrates are not present here. The Bourassa Firm admits that McDonald Carano did far more than "performing virtually no work." See Resp. Brief at 2. McDonald Carano performed almost all of the work, and it is the Bourassa Firm if anyone who is unjustly profiting from McDonald Carano's foundational work.

Second, even assuming these "unscrupulous attorneys" exist, the procedural mechanism to prevent their unjust enrichment is the very interpleader action that the Bourassa Firm filed in this matter. After full briefing in such action, the district court judge is in perfect position to determine the appropriate lien amount for any attorney claiming one. The judge can reduce the unscrupulous attorney's lien by an amount that reasonably reflects the value of the attorney's work before withdrawing from the case. In fact, this is precisely what the judge in Earl did when the attorneys claimed a lien for \$12,500 but the judge only enforced the lien for \$2,500. 73 Nev. at 61, 307 P.2d at 782.

In sum, equity is the "recourse to principles of justice to correct or supplement the law as applied to particular circumstances." Black's Law Dictionary 579 (8th Ed. 2004). Even assuming that the Bourassa Firm and the district court's literal interpretation of Argentena's definition is technically

accurate, these circumstances compel clarification of the charging lien statute, namely by enforcing McDonald Carano's attorney's lien for the substantial work that it provided Cooper in prosecuting his case. Without McDonald Carano's work, Cooper would not have settled the case. And thus, contrary to the Bourassa Firm's claim that McDonald Carano "obtained nothing" on Cooper's behalf, McDonald Carano's work established the foundation on which Cooper built his entire case. Justice requires that McDonald Carano be fairly compensated for that foundation.

### III. CONCLUSION

The district court erred in holding that McDonald Carano's perfected charging lien was rendered unenforceable when it voluntarily withdrew for good cause from representing Cooper. Nevada's charging lien statute and this Court's precedent both recognize that perfected liens survive withdrawal. Long-held principles of equity confirm that conclusion. Accordingly, McDonald Carano respectfully requests that the Court enter an order reversing the district court's final disbursement order.

Dated: December 22, 2014.

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## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 with 14-point Times New Roman font. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more and contains 2,571 words. Finally, I certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the Nevada Rules of Appellate Procedure.

Dated: December 22, 2014.

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**CERTIFICATE OF MAILING**

I hereby certify that I am an employee of the law firm of McDonald Carano Wilson LLP and, on December 22, 2014, I caused a copy of the foregoing **REPLY IN SUPPORT OF APPELLANT'S OPENING BRIEF** was electronically filed with the Clerk of the Court for the Nevada Supreme Court by using the Nevada Supreme Court's E-Filing system (EFlex). Participants in this case who are registered with EFlex as users will be served by EFlex.

/s/ Sally Wexler  
An employee of McDonald Carano Wilson LLP