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BEFORE THE SUPREME COURT OF THE STATE OF NEVADA

ALI PIROOZI, M.D.,

Petitioner,

v.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE JAMES BIXLER, DISTRICT COURT JUDGE,

Respondent.

TIFFANI D. HURST and BRIAN ABBINGTON, jointly and on behalf of their minor child, MAYROSE LILI-ABBINGTON HURST,

Real Parties in Interest.

Supreme Court Case No.: 64946

PETITIONER'S REPLY TO REAL PARTIES IN INTEREST, TIFFANI HURST, BRIAN ABBINGTON AND MAYROSE LILI-ABBINGTON HURST'S ANSWER TO PETITIONER'S EMERGENCY PETITION FOR WRIT OF MANDAMUS

Petitioner, Ali Piroozi, M.D., by and through counsel of record Cotton, Driggs, Walch, Holley, Woloson & Thompson hereby brings this Petitioner's Reply to Real Parties in Interest, Tiffani Hurst, Brian Abbington and MayRose Lili-Abbington Hurst's Answer to Petitioner's Emergency Petition for Writ of Mandamus. The issue in the Petition is limited in scope to the questions of: (1) Whether or not settling former defendants in a medical malpractice case who were

alleged to be negligent can be placed on the jury verdict form so that a jury can properly allocate fault to the settling defendants per NRS 41A.045; and (2) whether or not remaining defendants in a medical malpractice case can do more than simply argue no negligence or 100% negligence of settling defendants. Respondent in this case improperly Ordered that, pursuant to NRS 41.141 and Banks v. Sunrise Hospital, 120 Nev. 822, 102 P.3d 52 (2004), the remaining Defendants could not: (1) Allocate fault to settling defendants; nor (2) place the settling defendants on the verdict form. Respondent further held that, the remaining Defendants could only argue to a jury that they were not at fault and/or that the settling defendants were 100% at fault.

DATED this 18th day of February, 2014.

COTTON DRIGGS, WALCH, HOLLEY, WOLOSON & THOMPSON

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VERIFICATION

Under penalty of perjury, the undersigned declares that he is the attorney for Petitioner named in the foregoing Petition and knows the contents thereof; that the pleading is true of his own knowledge, except as to those matters stated on information and belief, and that as such matters he believes to be true. This verification is made by the undersigned attorney pursuant to NRS 15.010, on the ground that the matters stated, and relied upon, in the foregoing Petition are all contained in the prior pleadings and other records of the District Court, true and correct copies of which have been attached hereto.

Executed this 18th day of February 2014.

Christopher G. Rigler, Esq.

SUBSCRIBED AND SWORN to before me

this 18th day of February, 2014

NOTARY PUBLIC in and
for said County and State

NOTARY PUBLIC
T. BUCOMBE-BRYSON
STATE OF NEVADA - COUNTY OF CLARK
MY APPOINTMENT EXP. AUGUST 21, 2016
No. 02-77157-1

REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS

I. INTRODUCTION

As this Court knows, this is a case involving an extremely premature child who was in the care of Petitioner, Ali Piroozi, M.D. (hereinafter "Petitioner Piroozi"), and various other physicians at former Defendant, Sunrise Hospital and Medical Center (hereinafter "Sunrise"), for a period of 80 days being treated for various ailments. The child was discharged with instructions to the pediatrician, former Defendant Ralph Conti, M.D. (hereinafter "Conti"), at former Defendant, Foothills Pediatrics (hereinafter Foothills"), to follow-up with blood testing. Such tests were not done over a period of nearly three months which included six visits with either Conti or other physicians at Foothills. The child eventually went into anemic shock and was later diagnosed with brain injury and, eventually, a rare condition called Diamond Blackfan Anemia. Conti and Foothills settled the case with Real Parties in Interest (hereinafter "Hurst").

Despite evidence in discovery establishing breach and causation of damages as to Conti and Foothills through Hurst's expert affidavits/reports and expert deposition testimony, Respondent found that Conti and Foothills could not be placed on the verdict form. Respondent also found that the current Defendants, Petitioner Piroozi and Martin Blahnik, M.D. (hereinafter "Defendant Blahnik"), could only argue that Conti and Foothills were one hundred percent at fault or that no one was at fault.

An Emergency Petition for Writ of Mandamus was filed on February 5, 2014 due to the fact that trial was set to proceed in this matter on February 18, 2014. On February 10, 2014, this Court issued an Order directing Hurst to Answer the Petition. On February 11, 2014, Hurst filed their Answer. This Court also denied Petitioner's request for stay on the grounds that Petitioner comply with NRAP 8(a). Since that time, Petitioner filed a Motion to Stay with Respondent and, on February 12, 2014, Respondent vacated the trial date pending resolution of this Petition. This Reply follows.

II. STATEMENT OF FACTS

Petitioner incorporates by reference the Statement of Facts asserted in the Petition.

In their Answer, Hurst provided a detailed factual summary of the admission at Sunrise.[1] (Answering Brief at 3-14). In the Statement of Facts, Hurst does not deny that Conti and other physicians at Foothills did not follow the discharge instructions nor does Hurst contest the assertion that there is expert testimony from their own experts to establish fault on behalf of Conti and Foothills. Of note, these particular uncontested facts were provided with citation proving such facts in the

[1] Of note, there is nearly a complete lack of direct record citation in Hurst's Statement of Facts in violation of NRAP 28(b) (incorporating NRAP 28(a)(7) which requires citation to the record). In addition, although Hurst indicates that, in the Petitioner, Petitioner, "blatantly misrepresents" facts (Answering Brief at 3), such is not true as nearly every sentence in Petitioner's Statement of Facts is followed by citation to the record to support such statements in accordance with NRAP 28(a)(7).

original Petition and will not be unnecessarily reiterated herein. (Petition at 5-8).

III. ISSUES PRESENTED

Whether Respondent manifestly abused its discretion by: (1) Prohibiting the remaining Defendants from allocating fault to Conti and/or Foothills and placing Conti and Foothills on the verdict form; and (2) only allowing the remaining Defendants to argue that they are not at fault and/or Conti and/or Foothills are 100% at fault.

IV. STATEMENT OF REASONS WHY THIS COURT SHOULD ISSUE A WRIT OF MANDAMUS

A. Petition Review Is Appropriate Because This Case Presents An Issue Where Nevada Law Requires Clarification, There Is An Issue Of First Impression, A Determination On These Issues Can Serve To Avoid Future Litigation And Petitioner Has No Plain, Speedy And Adequate Remedy In The Ordinary Course Of Law

In their Briefing, Hurst primarily relies upon the standard for granting a Petition for Writ of Mandamus arguing: (1) This Court generally does not review Motions in Limine through a Petition for Writ of Mandamus; (2) none of the exceptions to allow for review of a Motion in Limine apply here; (3) Petitioner has a plain, adequate and speedy remedy at law; and (4) judicial economy requires that the issues in the Petition should be resolved post-verdict. (Answering Brief at 14-29).

Regarding review of Motions in Limine, Hurst provides the correct standard that Motions in Limine can be reviewed at this Court's discretion when: (1) An

important issue of law needs clarification and public policy is served by the Court's intervention; (2) when there is an issue of first impression and fundamental public importance; and (3) when resolution of the writ will mitigate or resolve related or future litigation. Williams v. Eighth Judicial District Court, 127 Nev.Adv.Rep. 45, ___, 262 P.3d 360, 365 (2011) (citing Sonia F. v. Dist. Ct., 125 Nev. 495, 498, 215 P.3d 705, 707 (2009); County of Clark v. Upchurch, 114 Nev. 749, 753, 961 P.2d 754, 757 (1998)). All three of the above provided exceptions are present here.

As will be further discussed in the next section (*infra* at 6-13) and, as previously referenced in the original Petition (Petition at 16-18), the Court has not reviewed a case regarding apportionment of fault under a pure several liability standard in a medical malpractice case since NRS 41A.045 was enacted. Hurst argues that in Banks v. Sunrise Hospital, 120 Nev. 822, 102 P.3d 52 (2004) this Court addressed the issue in this Petition head on. (Answering Brief at 19-23). However, as noted in the Petition, it appears as though Banks was analyzing the law on joint and several liability prior to the abrogation of such and creation of pure several liability in medical malpractice cases through NRS 41A.045. (Petition Brief at 16-18).

In addition, Hurst argues that NRS 41.141 is applicable here because the language in the statute is similar to language in NRS 41A.045. (Answering Brief at 22-26). However, as will be explained in the next section (*infra* at 6-13), in a

pure several liability case, offset and/or contribution is not possible because a jury apportions who is responsible for what damages so no party pays for another's fault. In addition, it does not appear that contributory negligence is a bona fide issue in this case so NRS 41.141 has no application. Given the rather complicated quagmire that is created by these issues of first impression, Petition review is important to allow this Court to clarify current law and, in doing such, it will avoid future litigation on the issues.

Finally, with regard to Hurst's contention that there is an adequate and speedy legal remedy; waiting for appeal will simply not do in this case. There is a fundamental error that needs to be addressed now. Should this error not be addressed now, Petitioner, in the event of a verdict, will have to wait one or two years to get this issue resolved while the appeal is pending. In such time, Petitioner will be irreparably harmed by reports to the National Practitioner Databank, state agencies and hospital boards which affect a physician's licensing and hospital privileges. All parties (along with many other litigants in Nevada) will benefit from a resolution of the instant issues this Court has before it because of the incredible amount of time and funds that will be expended on a trial which will have to be redone based on a fundamental error of law. Given all of this, there is no plain, speedy and adequate legal remedy available and judicial economy requires that this Court determine this issue now rather than wait for direct appeal.

B. In A Pure Several Liability Case, Apportionment Is The Only Option Regardless Of The Negligence Of A Plaintiff Or Settlement With A Former Defendant

This Court does not have a case directly dealing with the pure several liability nature of NRS 41A.045. Hurst contends in their Answer that Banks dealt with this question currently before the Court and that NRS 41.141 can be used to prohibit apportionment and allow adequate protection through off-set post verdict. (Answering Brief at 19-26). As is discussed below, such an argument is not in alignment with cases involving pure several liability.

1. Sister Jurisdiction Case Law Regarding Pure Several Liability

A case from the Kentucky Supreme Court appears to have the most astute analysis of the current issues at hand. Dix & Assoc. Pipeline Contrs. v. Key, 799 S.W.2d 24 (Ken. 1990). Dix has a rather complicated factual history but, a brief summary is as follows.

An employee of a pipeline contractor (Dix & Associates, hereinafter "Dix") was killed by a driver employed by a grain company (Bardstown Mills, Inc., hereinafter "Bardstown") who was driving a grain truck owned by the Bardstown. Dix, 799 S.W.2d at 25. The family of the deceased filed a worker's compensation claim against Dix and a wrongful death action was again Bardstown. Id. Bardstown then filed a third party negligence/contribution complaint against Dix in the wrongful death action. Id. Thereafter, the estate settled the wrongful death

claim against Bardstown for $250,000. Id. Dix also paid $36,949.54 in worker's compensation benefits to the estate. Id. Dix then filed a counterclaim against Bardstown to receive contribution for the workers compensation benefits paid to the estate. Id. at 25-26. The action wherein Bardstown sought contribution for the $250,000 settlement and Dix sought contribution for the $36,949.54 went to trial. Id. at 26. At trial, a jury found that Bardstown was 95% negligent for the death and Dix was 5% negligent for the death. Id. Despite the specific apportionment of fault in connection with the wrongful death action, the lower court ordered Dix to pay 50% of the settlement amount to Bardstown but that the order was limited to the amount Dix paid for the workers compensation benefits. Id. The lower court also ordered that Bardstown was to pay the full amount of the workers compensation benefits that Dix had paid to the estate. Id. In the end, it was a wash.

Despite the above rather complicated set of facts, the Kentucky Supreme Court used this particular case to clarify the law on pure several liability in its state. Specifically, the Kentucky Supreme Court started by stating:

> At common law, each one of jointly negligent persons was held to be entirely responsible for a single indivisible injury because it was thought that the injury could not be divided into parts to determine the responsibility of each negligent actor.

Id. at 27.

The Kentucky Supreme Court then went on to state that, through statutes and

case law, their state eventually abrogated joint and several liability and then finally adopted pure several liability. Id. The Kentucky Supreme Court summarized the current state of their law on pure several liability as follows:

> Because the liability is several to each negligent joint tort-feasor, it is necessary to apportion a specific share of the liability to each of them, and by necessity, that includes joint tort-feasors brought into the action as a third-party defendant as well as **a defendant named in the original complaint**.

Id. (emphasis added).

The Kentucky Supreme Court continued by stating, in part:

> ...it is...fundamentally unfair to require one joint tort-feasor who is only 5 percent at fault to bear the entire loss when another tort-feasor has caused 95 percent of the loss.

Id.

The Kentucky Supreme Court concluded by stating:

> The law has now developed to the point that in tort actions involving the fault of more than one party, including third-party defendants **and persons who have settled the claim against them**, an apportionment instruction, if requested, must be given whereby the jury will determine the amount of the plaintiff's damage and the degree of fault to be allocated to each claimant, defendant, third party defendant, and person who has been released from damage. The extent of the liability of each is a several liability and is limited to the degree of fault apportioned to each.

Id. at 28-29 (quoting Stratton v. Parker, Ky., 793 S.W.2d 817 (Ken. 1990)) (emphasis added).

In analyzing the case before it, the Kentucky Supreme Court found that, since the jury had properly allocated fault in the case, pursuant to pure several

liability principles, Bardstown's contribution claim in connection with the settlement amount was not proper. Id. at 30. Specifically, the Kentucky Supreme Court found that, Bardstown only paid for its 95% and not Dix's 5% liability through its settlement. Id.

The very same Kentucky Supreme Court went on to further clarify the law under its pure several liability structure ten years later by holding:

> As summarized in Dix, liability among joint tortfeasors in negligence cases is no longer joint and several, but is severally only; and because the liability is several as to each joint tortfeasor, it is necessary to apportion a specific share of the total liability to each of them, whether joined in the original complaint or by third-party complaint, and the several liability of each joint tortfeasor with respect to the judgment is limited by the extent of his/her fault...the apportionment of causation and the requirement of several liability obviates any claim for contribution among joint tortfeasors whose respective liabilities are determined in the original action...

Degener v. Hall Contr. Corp., 27 S.W.3d 775 at 779 (2000) (internal citations omitted).

Of note, although not pure several liability states, both California and Idaho courts have found that apportionment by a jury as to parties and non-parties is required if evidence is presented to prove negligence. Wilson v. Ritto, 105 Cal.App.4th 361, 367, 129 Cal.Rptr.2d 336, 340 (Cal. 2003) (holding, "A defendant may attempt to reduce his or her share of liability for noneconomic damages by seeking to add nonparty joint tortfeasors. But unless there is substantial evidence that an individual is at fault, there can be no apportionment of damages to that individual."); Le'Gall v. Lewis County, 129 Idaho 182, 185, 923 P.2d 427, 430

(1996) (citing Hickman v. Fraternal Order of Eagles, 114 Idaho 545, 547, 758 P.2d 704, 706 (Idaho 1988)) (holding "...the jury should consider the negligence of all actors involved in the event giving rise to the negligent action, even if the actors are not parties to the particular action or they cannot be liable to the plaintiff by operation or law or settlement...If the jury could conclude, based on the evidence, that an actor negligently contributed to the plaintiff's injury, then the actor must be included on the special verdict form").

Hurst simply ignored these principles in their Answer (Le'Gall was cited in the Petition and not addressed in the Answer) and just provided that this Court has already dealt with these issues in Banks through analysis of NRS 41.141. This is not as simple of an issue and it requires a thorough analysis by this Court under principles of pure several liability.

2. Application Of NRS 41A.045 In Light Of Principles Of Pure Several Liability

NRS 41A.045 provides as follows:

> In an action for injury or death against a provider of health care based upon professional negligence, **each defendant is liable to the plaintiff for economic damages and noneconomic damages severally only, and not jointly, for that portion of the judgment which represents the percentage of negligence attributable to the defendant.**
>
> This section is intended to **abrogate joint and several liability** of a provider of health care in an action for injury or death against the provider of health care based upon professional negligence.

(emphasis added).

As will be explained below, this statute creates pure several liability regardless of any contributory negligence in any medical malpractice case.

Hurst believes that the following portion of NRS 41.141 allows for them to keep Conti and Foothills off the verdict form and prohibit Petition for arguing to a jury for apportioned fault:

> 3. If a defendant in such an action settles with the plaintiff before the entry of judgment, the comparative negligence of that defendant and the amount of the settlement must not thereafter be admitted into evidence nor considered by the jury. The judge shall deduct the amount of the settlement from the net sum otherwise recoverable by the plaintiff pursuant to the general and special verdicts.

See NRS 41.141(3).

What Hurst fails to even address is the fact that, as was recognized by the Kentucky Supreme Court in Dix, in a case wherein a jury apportions fault to parties, there is no right to off-set or contribution when several liability is absolute. Specifically, NRS 41A.045 creates pure several liability regardless of whether or not a plaintiff is determined to have contributed to the injury.[2] Once the allocation

[2] Of note Hurst alleges in their briefing that contributory negligence is an issue in this case because Petitioner joined Sunrise's Opposition to Hurst's Motion for Summary Judgment on the issue of contributory negligence. (Answering Brief at 23-24). However, such was only to preserve the issue. Petitioner still has the right to waive such an allegation should this Court find it is a requirement to get relief. In addition there is still a question as to whether contributory negligence is a "bona fide" defense as the true plaintiff in this case is the child given that Hurst is only seeking damages for MayRose. See Buck v. Greyhound Lines, 105 Nev. 756, 764, 783 P.2d 437, 442 (1989) (holding that the contributory negligence claims against the children sleeping in the car were not bona fide as a matter of law). The alleged

is complete, the remaining parties pay what the jury says they owe and any claim for contribution/offset is obviated.

In addition, as this Court has previously noted:

> Under common law, liability was joint and several where two or more tortfeasors caused the injury through their combined or concurrent tortious conduct...Thus, any one of several tortfeasors who comportment contributed to a plaintiff's injuries could be tapped for the entire amount of damages. However, the Nevada Legislature modified the common law rule [of joint and several liability] in situations where the injured plaintiff was partly responsible for his own injuries. Under NRS 41.141...actions involving injuries to persons or property 'in which contributory negligence may be asserted as a defense' imposed several liability on defendants against whom judgments were entered.

Buck, 105 Nev. at 763, 783 P.2d at 442 (internal citations omitted).

What occurs with NRS 41.141 is that there is a distinction wherein parties can escape joint and several liability if there is bona fide contributory negligence on behalf of the plaintiff. Conversely, NRS 41A.045 does not make such a distinction and, as such, all cases, whether there is contributory negligence or not, must have allocation of fault by a jury.[3] To read NRS 41A.045 any differently

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(continued)

contributory negligence was in connection with parents not getting the tests ordered by Dr. Weber completed until four days after she ordered them (one day prior to the anemic shock). That is third party negligence, not true contributory negligence and, as such, NRS 41.141 is not applicable in this instance.

[3] This Court has held that, "[w]hen interpreting a statutory provision, this court looks first to the plain language of the statute...'This court avoids statutory interpretation that renders language meaningless or superfluous and if the statute's language is clear and unambiguous, this court will enforce the statute as written. Likewise, this court will interpret a rule or statute in harmony with other rules and statutes.'" Clay v. Eighth Judicial Dist. Court, 129 Nev. Adv. Rep. 48, ____ 305

would make its terms completely meaningless in the context of medical malpractice cases wherein a plaintiff is alleged to be negligent.

NRS 41A.045 creates pure several liability in medical malpractice cases. Given this, whether there is contributory negligence or not, a jury must be able to allocate fault. There is evidence from Hurst's own experts establishing fault on behalf of Conti and Foothills and, as such, Petitioner must have the right to argue for allocation to the jury and those former defendants must be placed on the jury verdict form.

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P.3d 898, 902 (2013) (internal citations omitted).

V. CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant the Petition for Writ of Mandamus. Specifically, the Court should Order Respondent to: (1) Place Conti and Foothills on the verdict form so that the jury can allocate appropriate fault to them; and (2) allow for the remaining Defendants to argue that the jury should allocate fault to Conti and Foothills and that the remaining Defendants are not limited to only arguing that no negligence occurred or that Conti and Foothills are 100% negligent.

Dated this 10th day of February, 2014.

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CERTIFICATE OF COMPLIANCE

1. 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:

[x] It has been prepared in proportionally spaced typeface using Microsoft Word in 14 point Times New Roman font.

2. 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:

[X] Proportionally spaced, has a typeface font of 14 points or more, and contains 4960 words.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not friviolous 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

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requirements of this Nevada Rules of Appellate Procedure.

DATED this 10th day of February, 2014.

COTTON DRIGGS, WALCH, HOLLEY, WOLOSON & THOMPSON

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CERTIFICATE OF MAILING

I HEREBY CERTIFY that, on the 18th day of February, 2014, and pursuant to NRCP 5(b), I deposited for mailing in the U.S. Mail a true and correct copy of the foregoing **PETITIONER'S REPLY TO REAL PARTIES IN INTEREST, TIFFANI HURST, BRIAN ABBINGTON AND MAYROSE LILI-ABBINGTON HURST'S ANSWER TO PETITIONER'S EMERGENCY PETITION FOR WRIT OF MANDAMUS**, postage prepaid and addressed to:

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