

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

2 JAMES D. BALODIMAS, M.D., and
3 JAMES D. BALODIMAS, M.D., P.C.,

4 Petitioners,

5 vs.

6 THE EIGHTH JUDICIAL DISTRICT
7 COURT of the State of Nevada, in and for
8 the County of Clark, and the HONORABLE
9 JERRY A. WIESE, District Court Judge,

10 Respondents,

11 and

12 REPUBLIC SILVER STATE DISPOSAL,
13 INC., ANDREW M. CASH, M.D.;
14 ANDREW M. CASH, M.D., P.C. aka
15 ANDREW MILLER CASH, M.D., P.C.;
16 DESERT INSTITUTE OF SPINE CARE,
17 LLC, a Nevada Limited Liability Company;
18 LAS VEGAS RADIOLOGY, LLC, a
19 Nevada Limited Liability Company;
20 BRUCE A. KATUNA, M.D.; ROCKY
21 MOUNTAIN NEURODIAGNOSTICS,
LLC, a Foreign Limited Liability Company;
DANIELLE MILLER aka DANIELLE
SHOPSHIRE; and NEUROMONITORING
ASSOCIATES,

 Real Parties in Interest.

Supreme Court Case No.:

Dist. Ct. Case No. EA 16-738123-0
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PETITION FOR WRIT OF
MANDAMUS

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1. There is no such corporation that owns 10% or more of James D. Balodimas, M.D., P.C.'s stock.

JOHN H. COTTON & ASSOCIATES

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CONSTITUTIONAL PROVISIONS

Nevada Constitution, Art. 6, Sec. 41

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Petitioners request this Court for a Writ of Mandamus directing Respondent District Court to GRANT Defendant's Motion for Judgment on the Pleadings regarding Real Party in Interest Republic Silver State Disposal, Inc's claim for contribution against Dr. Balodimas and his corporation (joined by all other Defendants to the case).

The Complaint in this matter was filed on June 27, 2016, by real parties in interest Republic Silver State Disposal (“Republic”). Plaintiff alleges the following causes of action against Defendants: 1) medical negligence; 2) respondeat superior against various parties; 3) negligent supervision and retention; and 4) contribution. The District Court properly dismissed the first three causes of action, but denied the motion to dismiss the contribution claim.

Republic's claims all derive from care and treatment Dr. Balodimas (and the other health care providers named as Defendants) provided to Maria Gonzales in 2012/2013. Republic alleges that the named Defendants exacerbated/caused

1 Ms. Gonzales to suffer injuries for which Republic alleges it was liable. (Republic
2 caused the initial accident which led to the treatment at issue in the case). The
3 treatment at issue in this case all took place before Ms. Gonzales filed her
4 complaint against Republic in the personal injury action.

5 In July of 2014, Republic entered into a settlement agreement to resolve Ms.
6 Gonzales's claims for \$2,000,000. Despite the fact that neither Ms. Gonzales nor
7 Republic named Dr. Balodimas (or the other health care Defendants) in the
8 underlying personal injury action, and the statute of limitations had already
9 extinguished any potential claim by Ms. Gonzales against Dr. Balodimas before
10 Republic entered into a settlement with Ms. Gonzales, Republic claims that it is
11 entitled to contribution from Dr. Balodimas and the other Defendants in this case
12 because it paid more than its share of liability for the damages in the case.

13 The District Court manifestly abused its discretion by failing to follow
14 NRS 17.225(3) which precludes a settling tortfeasor from making a contribution
15 claim unless it extinguishes the liability of the non-settling tortfeasor. There was
16 not even theoretical liability to extinguish at the time of the settlement because the
17 statute of limitations had run on Ms. Gonzales's claims against Dr. Balodimas long
18 before the settlement agreement was reached between Ms. Gonzales and Republic.
19 Accordingly, NRS 17.225(3) precludes Republic's claim for contribution in this
20 case as a matter of law.

1 A Writ of Mandamus is proper to compel the performance of acts by
2 Respondent from the office held by respondent. Petitioner has no plain, speedy, or
3 adequate remedy at law to compel the Respondent to perform its duty.
4 Furthermore, this is an important issue of law, and there are no facts in dispute in
5 this case.

6 **I. STATEMENT OF CASE**

7 **A. PLAINTIFF'S COMPLAINT AND ALLEGATIONS**

8 This is an alleged medical malpractice/contribution case. Real Party in
9 Interest/Plaintiff Republic Silver State Disposal, Inc. ("Republic") injured Maria
10 Gonzales when its truck driven by its employee crashed into her causing her to
11 require surgery on her back. After receiving treatment from several health care
12 providers, including James Balodimas ("Dr. Balodimas"), the patient filed suit
13 against Republic. Ms. Gonzales never named Dr. Balodimas (or any of her other
14 treating providers) as defendants in her lawsuit; nor did Republic add them as third
15 party defendants. Before trial, in the underlying case, Republic entered into a
16 settlement agreement with Ms. Gonzales for \$2,000,000.

17 In this action, Republic alleges that its settlement was too high and the
18 health care providers are responsible for a portion of these damages. Republic
19 alleged four causes of action against the health care providers: 1) medical
20 negligence; 2) respondeat superior against various parties; 3) negligent supervision
21 and retention; and 4) contribution. The District Court properly found that Republic

1 Services had no standing to assert the first three causes of action and properly
2 dismissed them.

3 For the contribution action, the District Court denied the Motion to
4 Dismiss/Motion for Judgment on the pleadings even though there was never a
5 common liability between Republic and the health care provider defendants, and
6 the statute of limitations for any claims by the patient had expired prior to Republic
7 and Ms. Gonzales entering into their settlement agreement. Therefore, Republic
8 could not have extinguished the liability for Dr. Balodimas or any of the other
9 medical defendants, as liability had already been extinguished as a matter of law
10 by the expiration of the statute of limitations.

11 **II. STATEMENT OF UNDISPUTED FACTS**

12 On January 14, 2012, a commercial garbage truck owned and operated by
13 Republic and driven by its employee Deval Hatcher caused injuries to patient
14 Marie Gonzalez, resulting in a legal action brought by Ms. Gonzalez against
15 Plaintiff for personal injuries related to Plaintiff's negligence. *See Appendix page*
16 *5, 9.*

17 On January 29, 2013, Ms. Gonzalez underwent surgery by Defendant Cash,
18 M.D. *See Appendix 5.*

19 On February 12, 2013 a CT study of Ms. Gonzalez's spine was performed at
20 Las Vegas Radiology. *See Appendix 7-8.*

1 Defendant Balodimas, M.D., is alleged to have interpreted the report and is
2 alleged to have failed to appreciate misplacement of pedicle screws placed by
3 Defendant Cash, M.D. *Id.*

4 On or about June 7 and July 12, 2013, Ms. Gonzalez consulted with Dr.
5 Jason Garber and Stuart Kaplan of Western Regional Center for Brain and Spine
6 Surgery for continuing debilitating post-surgical pain. Plaintiff alleges that Dr.
7 Garber and Kaplan opined that the pain was in the L5 and S1 nerve distributions
8 and that the pedicle screws on the left at L4-L5 and L5-S1 had breached the
9 pedicles. *See Appendix 8.*

10 On or about September 13, 2013, Ms. Gonzales filed her complaint against
11 Republic. *See Appendix 9.*

12 Republic alleges that Ms. Gonzalez required additional care and treatment
13 related to the placement of the pedicle screws by Defendant Cash, M.D. *See*
14 *Appendix 9-10.*

15 On July 6, 2015, Republic settled the case involving Ms. Gonzalez and her
16 alleged injuries resulting from Republic's negligence for \$2,000,000. *See*
17 *Appendix 9.*

18 The language in the release pertinent to these issues reads as follows:

19 As part of their settlement and their mutual consideration stated
20 above, this SETTLEMENT AGREEMENT; RELEASE and
21 COVENANT NOT TO SUE shall discharge and extinguish any and
all claims or liabilities, including those for "economic" and
"noneconomic" damages as set forth in NRS ch 41A, RELEASOR

1 may possess against any of her medical treatment providers for
2 injuries she alleges to have sustained in the described incident of
January 14, 2012.

3 *See Appendix 153.*

4 On June 27, 2016, Republic filed an amended complaint for medical
5 negligence and medical malpractice against various health care providers involved
6 in Ms. Gonzales' care. *See Appendix 1-42.*

7 **III. PROCEDURAL HISTORY**

8 On October 4, 2016, the parties appeared before the District Court to argue
9 Defendant Cash's Motion to Dismiss; Defendant Balodimas's Motion for
10 Judgment on the Pleadings, and Danielle Miller's Motion to Dismiss, and all
11 related joinders. The Court entertained oral argument and took the matter under
12 advisement. Later, the District Court issued a minute order setting an Evidentiary
13 Hearing for November 9, 2016. *See Appendix 121-122.* The Evidentiary hearing
14 was to address the following questions/issues:

15 1. Do the terms of the settlement agreement between Gonzales and
16 Republic extinguish the liability of the Defendants named in the present litigation?

17 2. If the statute of limitations set forth in NRS 41A.097 applies, is there
18 sufficient evidence to determine for purposes of the pending motions, when the
19 statute of limitations expired as it relates to each Defendant?

20 At the evidentiary hearing, Republic Services produced a copy of the release
21 agreement between the injured patient and itself. After Oral argument, the District

1 Court issued a Decision and Order on December 13, 2016 granting in part the
2 motions to dismiss (all claims except the contribution claims were dismissed). *See*
3 *Appendix 193-203*.

4 **IV. ISSUE PRESENTED**

5 Does a settling tortfeasor have a claim for contribution against a non-
6 party/non-settling defendant, where operation of law extinguishes the potential
7 liability between the underlying Plaintiff and the non-party Defendant, prior to the
8 settlement between the settling tortfeasor and the underlying Plaintiff?

9 **V. REASONS WHY THE COURT SHOULD HEAR ISSUE**

10 Whether to consider a writ of mandamus is within the court's discretion.
11 *Libby v. Dist. Ct.*, 325 P.3d. 1276, 130 Nev. Adv. Rep. 39 (2014)(citing *Smith v.*
12 *Dist. Ct.*, 107 Nev. 674, 818 P.2d. 849 (1991)). As a general rule, the Nevada
13 Supreme Court will not exercise its discretion to challenge district court orders
14 denying summary judgment, but an exception applies when no disputed factual
15 issues exist and, pursuant to clear authority under a statute or a rule, the district
16 court is obliged to dismiss an action. *Id.*

17 In this case, there are no factual disputes and this is strictly an interpretation
18 of law. This is an important issue before the Court involving claims for
19 contribution against medical doctors alleged to have negligently exacerbated
20 injuries in personal injury cases. In this case, the District Court misinterpreted
21 Nevada law regarding contribution, as the legislature explicitly stated that a

1 settling tortfeasor does not have a claim for contribution unless the settling
2 tortfeasor extinguishes liability of the non-settling alleged tortfeasor.

3 Furthermore, there can be no question based upon the allegations contained
4 in Republic's Complaint that the statute of limitations for the patient's claim
5 against the Petitioners had run at the time she entered into the settlement with
6 Republic. Therefore, the settlement could not have extinguished a legally non-
7 existent liability of the Petitioners vis-à-vis the patient. The Court could use this
8 case as an opportunity to further clarify regarding application of these statutes to
9 contribution claims would be beneficial and would further justify the Court
10 entertaining this Petition for Writ of Mandamus.

11 **VI. REASONS WHY WRIT SHOULD ISSUE**

12 Contribution is defined as the right of one who had discharged a common
13 liability to recover of another also liable, the aliquot portion which he ought to pay
14 or bear. *Medallion Development v. Converse Consultants*, 113 Nev. 27, 930 P.2d.
15 115 (1997); *citing* BLACK'S LAW DICTIONARY 326 (6th Ed. 1991). Under the
16 principle of contribution, a tortfeasor against whom a judgment is rendered is
17 entitled to recover proportional shares of judgment from joint tortfeasors whose
18 negligence contributed to the injury and who are also liable to the plaintiff. *Id.*
19 (Citations omitted.) (Emphasis added.) Contribution is strictly a statutory remedy.
20 *TDC v. Vincent*, 120 Nev. 644, 98 P.3d. 681 (2004).

1 **A. APPLICABLE LAW**

2 The pertinent statute applicable to this issue is NRS 17.225. That statute
3 provides as follows:

4 Right to contribution.

5 1. Except as otherwise provided in this section and NRS 17.235 to
6 17.305, inclusive, *where two or more persons become jointly or*
7 *severally liable in tort for the same injury to person or property or*
8 *for the same wrongful death*, there is a right of contribution among
9 them even though judgment has not been recovered against all or any
10 of them.

11 2. The right of contribution exists only in favor of a tortfeasor who has
12 paid more than his or her equitable share of the common liability, and
13 the tortfeasor's total recovery is limited to the amount paid by the
14 tortfeasor in excess of his or her equitable share. No tortfeasor is
15 compelled to make contribution beyond his or her own equitable share
16 of the entire liability.

17 3. *A tortfeasor who enters into a settlement with a claimant is not*
18 *entitled to recover contribution from another tortfeasor whose*
19 *liability for the injury or wrongful death is not extinguished by the*
20 *settlement nor in respect to any amount paid in a settlement which is*
21 *in excess of what was reasonable.*

(Emphasis added).

16 **B. REPUBLIC DID NOT “EXTINGUISH THE LIABILITY” OF**
17 **DR. BALODIMAS THROUGH ITS RELEASE AND**
18 **THEREFORE, IS NOT ENTITLED TO CONTRIBUTION.**

19 *A tortfeasor who enters into a settlement with a claimant is not entitled to*
20 *recover contribution from another tortfeasor whose liability for the injury or*
21 *wrongful death is not extinguished by the settlement nor in respect to any*
 amount paid in a settlement which is in excess of what was reasonable. NRS

1 17.225(3). In other words, unless the settling tortfeasor extinguishes the liability
2 of the non-settling alleged tortfeasor by the settlement agreement, there is no
3 claim for contribution.

4 In this case, operation of law extinguished any of the patient's claims against
5 the Defendants prior to the settlement between Republic and Ms. Gonzales.
6 Petitioners' liability was not extinguished by the settlement between Republic
7 Services and the underlying Plaintiff. The statute of limitations had run on any
8 potential claim that Ms. Gonzalez brought against Defendants by the time the
9 Plaintiff entered into its release agreement with her. On the face of the Complaint,
10 Ms. Gonzalez had knowledge of a potential claim of malpractice by July 12, 2013
11 when Dr. Garber and Dr. Kaplan discovered the alleged misplacement of the
12 screws. Therefore, the statute of limitations on Ms. Gonzalez's claims against the
13 Defendants would have run on July 12, 2014. *See* NRS 41A.097(2).

14 Republic did not attempt to secure the release of any potential claims against
15 the health care Defendants until **July 6, 2015**, more than one year after the statute
16 of limitations had run on Ms. Gonzalez's potential claims for malpractice.
17 Therefore, Republic could not have "extinguished" even Defendants' theoretical
18 liability through the release because liability had already been extinguished by law
19 and the expiration of the statute of limitations. Therefore, because there was no
20 "common liability" either in fact or even theoretically at the time Plaintiff settled
21 with Ms. Gonzalez, there can be no contribution claim against the Defendants.

1 There can be no contribution where the injured person has no right of action
2 against the third-party defendant. The right of contribution is a derivative right and
3 not a new cause of action. *Oahu Ry & Land Co. v. United States*, 73 F.Supp. 707,
4 1947 U.S. Dist. LEXIS 2160 (1947). This is consistent with the legislature's
5 requirement that a settling tortfeasor seeking contribution from a non-settling
6 defendant extinguish the liability of the non-settling defendant. If there is nothing
7 to extinguish, because there is no viable claim, there can be no contribution from a
8 settling tortfeasor pursuant to NRS 17.225.

9 **VII. CONCLUSION**

10 In this case, there are two facts that prohibit a contribution action by
11 Republic against Dr. Balodimas: *(1) Dr. Balodimas was NOT liable in tort to the*
12 *patient Maria Gonzalez at the time of the release (and in fact, never was); and*
13 *(2) Republic Services did not “extinguish” liability for Dr. Balodimas as part of*
14 *its settlement with Ms. Gonzalez because it had already been extinguished prior*
15 *to the settlement.*¹

16
17 ¹ Petitioners believe that this is an “an action for injury or death against a health
18 care provider” and subject to NRS 41A.097, notwithstanding this Court's decision
19 in *Saylor v. Arcotta*, 126 Nev. 92; 225 P.3d. 1276 (2010). However, the fact that
20 Republic did not extinguish any claim by the patient against Dr. Balodimas is
21 dispositive of the case and warrants dismissal without addressing that issue.
Petitioners reserve all rights to ask the Court to revisit the statute of limitations
issue addressed in *Saylor*, as Petitioners believe that allowing a contribution claim
to proceed in violation of NRS 41A.097 undermines the clear legislative purpose
behind NRS 41A.097.

1 Nevada law is certainly clear that a settling tortfeasor does not have a
2 contribution claim if it does not extinguish the liability of the non-settling alleged
3 tortfeasors. Therefore, there is no basis under Nevada law for Republic to have a
4 contribution claim in this case.

5 Dated this 13th day of January 2017.

6 JOHN H. COTTON & ASSOCIATES

7
8 By: /s/Michael D. Navratil
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1 **DECLARATION OF MICHAEL D. NAVRATIL, ESQ. IN SUPPORT OF**
2 **PETITION FOR WRIT OF MANDAMUS**

3 Michael D. Navratil, Esq., declares as follows:

4 I am an attorney with the law firm of John H. Cotton & Associates, and
5 attorney of record for Petitioners, James D. Balodimas, M.D. and James D.
6 Balodimas, M.D., P.C., in the above-captioned case. I have personal knowledge of
7 the matters stated in this declaration, except for those stated upon information and
8 belief. To those matters stated upon information and belief, I believe them to be
9 true. I am competent to testify as to the facts stated herein in a court of law and
10 will do so if called upon.

11 This declaration is made by the undersigned attorney pursuant to
12 NRS 15.010, on the ground that the matters stated and relied upon in the foregoing
13 Petition are all contained in the prior pleadings and other records of the district
14 court, true and correct copies of which have been attached hereto.

15 I certify and affirm that the Petition is filed in good faith, and that the
16 Petitioners have no plain, speedy, and adequate remedy in the ordinary course of
17 law that the Petitioners could pursue in absence of the extraordinary relief
18 requested.

19 Dated this 13th day of January 2017.

20 /s/Michael D. Navratil
21 Michael D. Navratil, Esq.

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Dated this 13th day of January 2017.

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I hereby certify that the foregoing **PETITION FOR WRIT OF MANDAMUS** was filed electronically with the Nevada Supreme Court on the 13th day of January, 2017. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

n/a

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage prepaid, addressed to:

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/s/Katie Johnson
An employee of John H. Cotton & Associates