IN THE SUPREME COURT OF THE STATE OF NEVADA

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JAMES D. BALODIMAS, M.D., and JAMES D. BALODIMAS, M.D., PC,

Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT of the State of Nevda, in and for the County of Clark, and the HONORABLE JERRY A. WIESE, District Court Judge,

Respondents,

and

REPUBLIC SILVER STATE DISPOSAL, INC., ANDREW M CASH, M.D.; ANDREW M. CASH, M.D., P.C. aka ANDREW MILLER CASH, M.D., P.C.; DESERT INSTITUTE OF SPINE CARE, LLC, a Nevada Limited Liability Company LAS VEGAS RADIOLOGY, LLC, a Nevada Limited Liability Company; BRUCE A. KATUNA, M.D.; ROCKY MOUNTAIN NEURODIAGNOSTICS, LLC, a Foreign Limited Liability Company; DANIELLE MILLER

Supreme Court Case No. 72123

District Case No. A-16-738123-C

BRUCE A. KATUNA, M.D. AND ROCKY MOUNTAIN NEURODIAGNOSTICS, LLC'S JOINDER TO JAMES D. BALODIMAS, M.D. AND JAMES D. BALODIMAS, M.D. REPLY TO REPUBLIC SILVER STATE'S DISPOSAL'S ANSWER TO PETITION FOR WRIT OF MANDAMUS

aka DANIELLE SHOPSHIRE; and NEUROMONITORING ASSOCIATES, INC.,

Real Parties in Interest.

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Rocky Mountain Neurodiagnostics, LLC

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Other Authorities

I. INTRODUCTION

Real Parties in Interest, Bruce A. Katuna, M.D. and Rocky Mountain Neurodiagnostics, LLC ("Katuna"), by and through their attorneys of record, OLSON, CANNON, GORMLEY, ANGULO & STOBERSKI, hereby respectfully submit this Joinder to Petitioners James D. Balodimas, M.D. and James D. Balodimas, M.D., P.C.'s Response to Answer for Writ of Mandamus.

By way of this Joinder, Katuna wishes to submit a recent unpublished decision to the Court for review that is pertinent to this matter. *Discount Tire Co. of Nevada, Inc. v. Fisher Sand & Gravel, Co.*, No. 69103 (Nev. filed Apr. 17, 2017) (unpublished disposition). APP1-8. This case may be cited for its persuasive value and was published after January 1, 2016. NRAP 36(c)(3). This case distinguishes between joint and successive tortfeasors, which Katuna submits to the Court affects the contribution statutes with regards to medical providers and subsequent alleged malpractice.

II. DISCUSSION

A. Joint vs. Successive Tortfeasors

In *Discount Tire Co. of Nevada, Inc. v. Fisher Sand & Gravel, Co.*, the Court analyzed joint and successive tortfeasors and offered a clear definition for

each term. The case explained the definition of "joint tortfeasors" as "[t]wo or more tortfeasors who contributed to the claimant's injury and who may be joined as defendants in the same lawsuit." *Id.*, citing *Black's Law Dictionary* (10th ed. 2014). The Court further relied upon the explanation that "joint tortfeasors act negligently - either in voluntary, intentional concert, or *separately and independently* - to produce *a single indivisible injury*." *Id.*, citing 74 Am. Jur 2d *Torts* § 64 (2012) (emphasis in original).

On the other hand, "successive tortfeasors must produce acts 'differing in time and place of commission as well as in nature, [causing] *two separate injuries* [that] gave rise to two distinct causes of action'." *Id.*, citing *Hansen v. Collett*, 79 Nev. 159, 167, 380 P.2d 201, 305 (1963) (emphasis in original). The case again relied upon the definition of "successive tortfeasors" as "[t]wo or more tortfeasors whose negligence occurs at different times and causes *different* injuries to the same third party." *Id.*, citing *Black's Law Dictionary* (10th ed. 2014) (emphasis in original).

The unpublished decision discusses contribution among joint tortfeasors and in the context of both contribution and equitable indemnity; however, the definitions of joint and successive tortfeasors are persuasive as to the issues in

this case.

B. There Is No Right to Contribution Among Successive Tortfeasors

The distinction between joint and successive tortfeasors becomes pertinent in the context of contribution claims. Contribution among tortfeasors is a creation of statute. Statutes in derogation of the common law are strictly construed. *Orr Ditch & Water Co. v. Justice Court of Reno Tp., Washoe County*, 64 Nev. 138, 162, 178 P.2d 558, 570 (1947).

NRS 17.225 provides:

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

The statute, by its plain language, comports with the definitions given to joint and successive tortfeasors. That is, the statute only applies to joint tortfeasors, or tortfeasors who have acted negligently to produce a **single, indivisible injury**. This is supported by the statute's language "where two or more persons become jointly or severally liable in tort **for the same injury** to person..." NRS 17.225(1) (emphasis added). Conversely, given the Court's

recent opinion, the statute does not apply to successive tortfeasors, or tortfeasors who cause different injuries at different times to a party. Given that successive tortfeasors cannot, by definition, cause the same injury, the contribution statute simply does not apply.

This is further supported by caselaw interpreting NRS 17.225 where joint and several liability is examined. *See Humphries v. Eighth Jud. Dist. Ct.*, 129 Nev. Adv. Op. 85, 312 P.3d 484 (2013). Joint and several liability only applies to damages caused jointly by multiple tortfeasors. *Id.* at 488. NRS 41.141 altered joint and several liability in derogation of the common law to provide that in a case alleging comparative negligence, each negligent party is severally liable, subject to certain exceptions.[1] The statute is typically interpreted as applying to co-tortfeasors causing the same injury. *Id.*

This is further bolstered by the NRS 41A statutory framework, specifically because NRS 41A.045 abrogates joint and several liability and provides that physicians can only be severally liable for the damages caused by them individually, never jointly. By definition and the current statutory

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[1]There are no exceptions that apply to medical malpractice. It should be noted that health care providers are specifically excluded from the exceptions to joint and several liability in subsection (d) for the concerted acts of defendants.

framework of NRS 17.225, NRS 41.141 and NRS 41A.045, Republic and Katuna were not and are not joint tortfeasors; they could never be held jointly liable for plaintiff's injuries. Indeed, any subsequent alleged malpractice would have caused a separate, distinct, and successive injury, and not the "same injury" required by Nevada's contribution statute.

Based upon this recent clarification offered by the Court, Katuna submits that the Court should examine whether Nevada's contribution statutes even apply to successive tortfeasors, especially in the context of subsequent alleged medical malpractice. By doing so, the Court can conclude that excluding successive tortfeasor physicians, who have allegedly caused a separate and distinct injury, is supported by the common law principle that an initial tortfeasor is liable for the reasonably foreseeable consequences of his tortious act. *Hansen v. Collett*, 79 Nev. 159, 174, 380 P.2d 301, 309. This result is further supported by the principle that a plaintiff has a right to elect the tortfeasor he will proceed against. *Humphries* at 487. Finally, this conclusion is supported by decisions from sister jurisdictions and their interpretation of their own contribution statutes.

For instance, in *City of College Park v. Fortenberry*, 271 Ga.App. 446,

609 S.E.2d 763 (2005), the court examined whether their contribution statute applied to successive treating physician tortfeasors. The court held:

> As a subsequent tortfeasor, of course, Fortenberry would have no right to contribution from the City, since he did not cause the earlier harm to the plaintiff and cannot be held liable for it. *Phillips v. Tellis*, 181 Ga.App. 449, 451, 352 S.E.2d 630 (1987)...[W]e hold that the City has no right of contribution against Fortenberry. *See United States Lines v. United States*, 470 F.2d 487, 491-492 (5th Cir.1972) (barring contribution action against subsequently negligent treating physician on ground that defendants are not joint tortfeasors).

Id. at 450, 766.

Similarly, in *J.B. Hunt Transport, Inc. v. Forrest General Hosp.*, 34 So.3d 1171 (Miss. 2010), the court discussed contribution from a successive treating physician. The court held that the contribution statute only provided for contribution among joint tortfeasors, not among successive and distinct tortfeasors. *Id.* Subsequent malpractice from a treating physician was considered a successive and distinct tort.

Likewise, the court in *Gibson v. City of St. Louis*, 349 S.W.3d 460 (App. Ct. E.D. Mo. 2011), explored this rationale further. It held that "[w]hen 'separate torts result in both an original injury and an aggravation thereof, such as when a physician negligently treats the original injury, the successive tortfeasor, e.g., the physician, is not liable for the underlying injury and is only

responsible for the harm flowing from his own negligence.'" *Id.* at 467, *citing Walihan v. St. Louis–Clayton Orthopedic Grp., Inc.*, 849 S.W.2d 177, 180 (Mo.App.1993). *See also State ex rel. Baldwin v. Gaertner*, 613 S.W.2d 638, 640 (Mo. banc 1981)).

It has been aptly stated that: "An initial tortfeasor and a subsequently negligent physician act independently of each other; their several wrongs were committed at different times; and the tort of each, being several when committed did not become joint [merely] because its consequences united with the consequences of another. *Id.* (internal citations omitted), citing *State ex rel. Normandy Orthopedics, Inc. v. Crandall*, 581 S.W.2d 829, 831 n. 1 (Mo. banc 1979). "[T]he initial tortfeasor and the subsequently negligent physician are not joint tort-feasors." *Id.* In *Gibson*, the City's negligence caused plaintiff's injuries from the accident and the medical malpractice defendants subsequently caused plaintiff's injury from the negligent rotation of the femur. The court determined this was not the "same injury", and the City could not seek contribution from the physician. *Id.*

These sister jurisdictions' definitions of successive tortfeasors and the inapplicability of contribution between initial and successive tortfeasors, the

collective statutory framework of NRS 17.225, NRS 41.141, and NRS 41A.045, and the recent unpublished decision defining joint and successive tortfeasors all lead to the conclusion that subsequent treating physicians are successive tortfeasors in Nevada. Treating physicians are not subject to joint liability. Therefore, in accordance with the common law principle, any subsequent malpractice by a successive tortfeasor is due to the original tortfeasor's actions and would be a separate and distinct injury. Because alleged subsequent malpractice would cause a separate and distinct injury, the injuries the result from that alleged malpractice cannot be considered the same injury as required by NRS 17.225. Therefore, Nevada's contribution statute does not apply.[2]

III. CONCLUSION

Based upon the foregoing, Katuna requests the Court to analyze the recent unpublished decision in *Discount Tire Co. of Nevada v. Fisher Sand &*

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[2]Jurisdictions that have held otherwise either have pure comparative fault statutes, or their contribution statutes expressly apply to joint and successive tortfeasors. *See, e.g., Cramer v. Starr*, 240 Ariz. 4 (2016) (holding that the Uniform Contribution Among Tortfeasors Act allows a jury to apportion fault between the driver causing collision and treating physicians subsequently committing malpractice); *see also Evans v. Tabernacle No. 1 God's Church of Holiness in Christ*, 283 Ill.App.3d 101 (1996) (holding that Illinois' contribution act applies to joint, concurrent and successive tortfeasors).

Katuna submits that the contribution statute must be strictly construed, and based upon that strict construction, excludes successive tortfeasors. Therefore, no action for contribution against Katuna may lie.

DATED this 2 day of May, 2017.

OLSON, CANNON, GORMLEY
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VERIFICATION

Under penalty of perjury, the undersigned declares that he is the attorney of record for Real Party in Interest Katuna 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 them to be true. This verification is made by the undersigned attorney pursuant to NRS 15.010, on the grounds that the matter stated, and relied upon, in the foregoing Petition are all contained in prior pleadings and other records of the District Court, true and correct copies of which have been attached to James D. Balodimas, M.D. and James D. Balodimas, M.D., P.C.'s Petition for Writ of Mandamus.

DATED this 2 day of May, 2017.

JAMES R. OLSON

SUBSCRIBED AND SWORN to before me this 2nd day of May, 2017

NOTARY PUBLIC in and for said County and State

NOTARY PUBLIC
STATE OF NEVADA
County of Clark
CHERYL K. HARTLE
Appt. No. 92-0386-1
My Appt. Expires Dec. 3, 2020

CERTIFICATE OF COMPLIANCE

I hereby certify that this Motion for Leave to Join James D. Balodimas, M.D. and James D. Balodimas, M.D., P.C.'s Petition for Writ of Mandamus complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the typestyle requirements of NRAP 32(a)(6) because this Motion has been prepared in a proportionally spaced typeface using WordPerfect X4 Times New Roman 14 pt. font. I further certify that this Motion complies with the page or type volume limitations of NRAP 32(a)(7).

I hereby certify that I have read this Motion, 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 Motion complies with all applicable Nevada Rules of Appellate Procedure, in particular, NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to

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. . .

sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 2 day of May, 2017.

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LLC

CERTIFICATE OF SERVICE

On the 2nd day of May, 2017, the undersigned, an employee of Olson, Cannon, Gormley, Angulo & Stoberski, hereby served a true copy of Real Parties In Interest BRUCE A. KATUNA, M.D. and ROCKY MOUNTAIN NEURODIAGNOSTICS, LLC's JOINDER TO JAMES D. BALODIMAS, M.D. AND JAMES D. BALODIMAS, M.D., PC REPLY TO REPUBLIC SERVICE STATE'S DISPOSAL'S ANSWER TO PETITION FOR WRIT OF MANDAMUS, to the parties listed below via the EFP Program, pursuant to the Court's Electronic Filing Service Order (Administrative Order 14-2) effective June 1, 2014, and or mailed:

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