IN THE SUPREME COURT OF

THE STATE OF NEVADA

REPUBLIC SILVER STATE DISPOSAL, INC., A NEVADA CORPORATION, Appellant, vs. ANDREW M. CASH, M.D.; ANDREW M. CASH, M.D., P.C., A/K/A ANDREW MILLER CASH, M.D., P.C.; AND DESERT INSTITUTE OF SPINE CARE, LLC, A NEVADA LIMITED LIABILITY COMPANY, Respondents.	Supreme Court No. 78572 District Court Case No. A738123

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On Appeal from Judgment of the Eighth Judicial District Court, Clark County, Nevada

The Honorable Jerry A. Wiese II

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DISTRICT COURT

CLARK COUNTY, NEVADA

REPUBLIC SILVER STATE DISPOSAL, INC., a Nevada Corporation

Plaintiff,

vs.

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; JAMES D. BALODIMAS, M.D.; JAMES D. BALODIMAS, M.D., P.C.; LAS VEGAS RADIOLOGY, LLC, a Nevada Limited Liability Company; BRUCE A. KATUNA, M.D.; ROCKYMOUNTAIN NEURODIAGNOSTICS, LLC, a Colorado Limited Liability Company; DANIELLE MILLER aka DANIELLE SHOPSHIRE; NEURO-MONITORING ASSOCIATES, INC., a Nevada Corporation; DOES 1 - 10, inclusive; and ROE CORPORATIONS 1 - 10 inclusive,

Defendants.

CASE NO.: A-16-738123-C
DEPT. NO.: XXX

DEFENDANT LAS VEGAS RADIOLOGY'S MOTION TO "CAP" NON-ECONOMIC DAMAGES PER NRS 41A.035

Date of Hearing:
Time of Hearing:

COMES NOW, Defendant, LAS VEGAS RADIOLOGY, LLC, by and through their counsel of record, Kim Irene Mandelbaum, Esq., Marie Ellerton, Esq. and Sherman B. Mayor, Esq. of MANDELBAUM ELLERTON & ASSOCIATES, and moves this Honorable Court for an order capping non-economic damages to $350,000 per NRS 41A.035.

This Motion is made and based on the papers and pleadings on file herein, the Points and Authorities attached hereto and any oral argument which may be adduced at a hearing set for this matter.

Dated this 1st day of March, 2018.

MANDELBAUM, ELLERTON & ASSOCIATES

KIM IRENE MANDELBAUM, ESQ.
Nevada Bar No. 318
MARIE ELLERTON, ESQ.
Nevada Bar No. 4581
SHERMAN B. MAYOR, ESQ.
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Las Vegas, Nevada 89106
Attorneys for Defendant
Las Vegas Radiology, LLC

NOTICE OF MOTION

TO: ALL PARTIES AND THEIR COUNSEL OF RECORD:

YOU, AND EACH OF YOU WILL PLEASE TAKE NOTICE that Defendant will bring the above motion on for hearing on the 5th day of APRIL, 2018, at 9:00 A.M./P.M., in the above Department in the above-entitled Court, or as soon thereafter as counsel can be heard.

Dated this 1st day of March, 2018.

MANDELBAUM, ELLERTON & ASSOCIATES

KIM IRENE MANDELBAUM, ESQ.
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Prefatory Note

This Defendant, Las Vegas Radiology, is a "provider of health care" within the meaning of NRS Chapter 630. Nevada law obligates a plaintiff seeking contribution from Las Vegas Radiology, by asserting claims for professional negligence, to satisfy the requirements of NRS Chapter 41A. One of the provisions of NRS Chapter 41A is the $350,000 cap for non-economic damages (regardless of the number of health care providers who are named as defendants in a case).

POINTS AND AUTHORITIES

FACTS

This case stems from a January 14, 2012 motor vehicle accident involving a garbage truck owned and operated by Republic Silver State Disposal (Republic) and Marie Gonzales. Marie Gonzales allegedly suffered personal injuries in the accident and filed a lawsuit against Republic and its driver, Deval Hatcher. Marie Gonzales was treated by a number of health care providers following the accident. On July 6, 2015, Republic settled its underlying case with Ms. Gonzales paying the amount of $2,000,000.00.

In the settlement agreement executed between and among Marie Gonzales, Republic and Deval Hatcher, there is a release which includes the following language:

> ". . . this SETTLEMENT AGREEMENT RELEASE and 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 may possess ***against any of her medical treatment providers*** for injuries she alleges to have sustained in the described incident of January 14, 2012."

Republic, having settled with the underlying plaintiff, Marie Gonzales, then filed a lawsuit on June 8, 2016, (Amended Complaint filed on June 27, 2016) which included a claim for "contribution"

against all of the named Defendants in the instant case.[1] Republic asserts, essentially, that although it injured the Plaintiff in the motor vehicle accident of January 14, 2012, that Plaintiff suffered further injury due to the alleged medical malpractice of her subsequent treating health care providers.

Republic then states in paragraph 85 of its Amended Complaint that it (Republic) should be required to pay no more than its equitable share of the common liability for all the personal injuries suffered by Marie Gonzales. Republic contends that it is entitled to receive contribution from this Defendant, Las Vegas Radiology, and all other health care providers named as Defendants in this case per NRS 17.225 ("Right to contribution").

For the sum of $2,000,000.00, Republic claims that it has settled all claims of the underlying Plaintiff, Marie Gonzales, against itself and has also settled any potential claims that Ms. Gonzales might have against any of her medical treatment providers including claims for "economic" and "noneconomic" damages ". . . as set forth in NRS 41A."

Republic unilaterally settled any "potential" claims that Marie Gonzales might have against any of her subsequent treating medical providers. That is, Republic has admitted, in response to this Defendant's Second Set of Requests for Admission, that it did **not** " . . . consult with or obtain consent from any of the medical treatment providers (or their counsel) in settling Gonzales' damage claims against such medical treatment providers. . . ."[2]

This Court (the Honorable Jerry A. Wiese, II) granted Defendants' Motions to Dismiss Republic's medical malpractice claims in this case as part of the Court's December 2, 2016 Order. In doing so, the Court found that the Plaintiff, Republic, did not have a " . . . stand alone" right under NRS Chapter 41A to directly pursue Marie Gonzales' claim of medical malpractice. Nevertheless, the Court did allow Republic to pursue a contribution action against the medical provider Defendants in this case based upon allegations of professional negligence, respondeat superior and negligent supervision and retention.

---

[1] By Order dated December 2, 2016, this Court (the Honorable Jerry A. Wiese, II, District Court Judge) dismissed all claims contained in Republic's lawsuit against the instant Defendants except the pending "contribution" claim.

[2] And although this Motion is brought to cap non-economic damages, there is no concession that Plaintiff, Republic, has a viable cause of action for contribution against Las Vegas Radiology (an issue that may be developed later as discovery matures).

In its Order, this Court, stated point blank, that in pursuing its professional negligence contribution action, Plaintiff, Republic, must " . . . satisfy the requirements of NRS Chapter 41A. . . .":

> With regard to the first argument, that the Plaintiff does not have standing, even the Plaintiffs Opposition concedes that Plaintiff has "no stand-alone right under NRS Ch.41A to pursue Marie Gonzales' — or anyone else's — claim of medical malpractice." (See Plaintiffs Opposition to the Cash Motion to Dismiss at pg. 7). Plaintiff simply argues that its claim is for contribution, based upon claims for professional negligence, respondeat superior, and negligent supervision and retention. With this understanding, this Court agrees that the Plaintiff does not have standing to bring these claims directly against the Defendants. **The Court acknowledges that the Plaintiffs claim for contribution is based upon the Defendants' alleged professional negligence, respondeat superior, and negligent supervision and retention. As noted by the Plaintiff, Nevada law obligates a Plaintiff seeking contribution from health care providers, asserting claims for professional negligence, to satisfy the requirements of NRS Chapter 41A. (See Plaintiffs Opposition to the Cash Motion to Dismiss at pg. 8).** (Excerpt of December 2, 2016 Order of this Court)(Emphasis added.)

Accordingly, even presuming Republic may maintain a professional negligence contribution action against Las Vegas Radiology and the other health care provider Defendants, Republic, in pursuing such claim, must comply with the requirements of NRS Chapter 41A. Chapter 41A of the Nevada Revised Statutes is entitled "Actions for Professional Negligence". One of the requirements set forth in Chapter 41A mandates a limitation on the amount of an award for non-economic damages. Non-economic damages in a professional negligence/medical malpractice action " . . . must not exceed $350,000 regardless of the number of defendants, plaintiffs or theories of liability."

The sole purpose of this Motion is to limit any recovery by Republic for payment of non-economic damages against any or all health care provider Defendants to a total of $350,000.

ARGUMENT

Republic's Contribution Action Based upon Allegations of Professional Negligence must Satisfy the Requirements of NRS 41A

This Court stated that " . . . Nevada law obligates a plaintiff seeking contribution from health care providers, asserting claims for professional negligence, to satisfy the requirements of NRS Chapter 41A." (Page 2 of December 2, 2016 Order.) In allegedly settling the underlying Plaintiff, Marie Gonzales' claims against her health care providers, as part of an overall settlement, such agreement does not strip

away or eliminate the defenses available to the health care providers had Ms. Gonzales directly sued them.

Had Marie Gonzales attempted to sue her health care providers following her accident with the Republic garbage truck, she would have been limited to non-economic damages of $350,000 against any or all of such health care providers. *Tam v. Eighth Judicial District Court*, 131 Nev. Adv. Rpt. 80, 358 P.3d 234 (2015). Indeed, the Plaintiff, Republic, was asked to admit this very fact in Request for Admission No. 16 in Defendant Las Vegas Radiology's Requests for Admission (Second Set). Republic was asked to admit (and did admit) the following:

> **REQUEST NO. 16:**
> Admit that any potential non-economic claims or liabilities Plaintiff Marie Gonzales may have asserted against her treating medical providers are capped at a total amount of $350,000 per NRS 41A.035.
>
> **RESPONSE TO REQUEST NO. 16:**
> Republic admits[sic] that NRS 41A.035 would have applied had Marie Gonzales sued any or all of her negligent health care providers.

When Republic unilaterally (and without notice) settled Marie Gonzales' potential claims against her health care providers, neither Republic nor Gonzales had the legal right in a direct action or an action for contribution to avoid the statutory defenses available to the health care providers. In *Pack v. LaTourette*, 128 Nev. 264, 277 P.3d 1246 (Nev. 2012), a plaintiff, David Zinni was struck and injured by Thomas Pack, who was a Sun cab driver. Eventually, Zinni sought medical treatment for his injuries from Dr. Gary LaTourette.

Sun Cab asserted that Dr. LaTourette may have aggravated Zinni's injuries and filed a third-party complaint against him including a claim for contribution. The Nevada Supreme Court dismissed the contribution claim because Sun Cab failed to attach an expert affidavit, required by NRS 41A.071, to their third-party complaint for contribution. That is, in pursuing the health care provider for a contribution action based upon professional negligence, the third-party plaintiff failed to comply with a requirement contained in NRS Chapter 41A. In *Pack*, the Nevada Supreme Court cited to *Truck Insurance Exchange v. Tetzlaff*, 683 F.Supp. 233 (Nev. 1988) for the proposition that a mandatory prerequisite for bringing a medical malpractice action extended to indemnity actions which were grounded in alleged medical malpractice.

The law of this case, respectfully, is such that Republic, as the Plaintiff, must satisfy the requirements of NRS 41A.035 in pursuing its contribution action against Las Vegas Radiology (and the other Nevada licensed professional health care providers). One of the requirements is the application of a $350,000 cap for non-economic damages.

CONCLUSION

For the reasons set forth above, Las Vegas Radiology respectfully requests that this Court issue an Order limiting any recovery for non-economic damages in the instant contribution action to $350,000 per NRS 41A.035.

Dated this 1st day of March, 2018.

MANDELBAUM, ELLERTON & ASSOCIATES

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SHERMAN B. MAYOR, ESQ.
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Attorneys for Defendant
Las Vegas Radiology, LLC

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of March, 2018, I forwarded a copy of the above and foregoing **DEFENDANT LAS VEGAS RADIOLOGY'S MOTION TO "CAP" NON-ECONOMIC DAMAGES PER NRS 41A.035** as follows:

__X__ served on all parties electronically pursuant to mandatory NEFCR 4(b);

___ by depositing in the United States Mail, first-class postage prepaid, at Las Vegas, Nevada, enclosed in a sealed envelope; or

_____ both U.S. Mail and facsimile TO:

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Las Vegas Radiology, LLC

DISTRICT COURT

CLARK COUNTY, NEVADA

REPUBLIC SILVER STATE DISPOSAL, INC., a Nevada Corporation

Plaintiff,

vs.

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; JAMES D. BALODIMAS, M.D.; JAMES D. BALODIMAS, M.D., P.C.; LAS VEGAS RADIOLOGY, LLC, a Nevada Limited Liability Company; BRUCE A. KATUNA, M.D.; ROCKYMOUNTAIN NEURO-DIAGNOSTICS, LLC, a Colorado Limited Liability Company; DANIELLE MILLER aka DANIELLE SHOPSHIRE; NEURO-MONITORING ASSOCIATES, INC., a Nevada Corporation; DOES 1 - 10, inclusive; and ROE CORPORATIONS 1 - 10 inclusive,

Defendants.

CASE NO.: A-16-738123-C
DEPT. NO.: XXX

LAS VEGAS RADIOLOGY'S MOTION IN LIMINE TO PERMIT COLLATERAL SOURCE PAYMENT EVIDENCE PER NRS 42.021

Date of Hearing:
Time of Hearing:

Defendant, LAS VEGAS RADIOLOGY, LLC, by and through their counsel of record, Kim Irene Mandelbaum, Esq., Marie Ellerton, Esq. and Sherman B. Mayor, Esq. of MANDELBAUM ELLERTON & ASSOCIATES, hereby files its Motion in Limine to Permit Collateral Source Payment Evidence Per NRS 42.021.

This Motion is made and based on the papers and pleadings on file herein, the attached Memorandum of Points and Authorities, and any argument which may be heard at a hearing set for this matter.

Dated this 13th day of March, 2018.

MANDELBAUM, ELLERTON & ASSOCIATES

KIM IRENE MANDELBAUM, ESQ.
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Attorneys for Defendant
Las Vegas Radiology, LLC

NOTICE OF MOTION

TO: ALL PARTIES AND THEIR COUNSEL OF RECORD:

YOU, AND EACH OF YOU WILL PLEASE TAKE NOTICE that Defendants will bring the above motion on for hearing on the 17th day of April, 2018, at 9:00 A.M./P.M., in the above Department in the above-entitled Court, or as soon thereafter as counsel can be heard.

Dated this 13th day of March, 2018.

MANDELBAUM, ELLERTON & ASSOCIATES

KIM IRENE MANDELBAUM, ESQ.
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2012 Hamilton Lane
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Attorneys for Defendant
Las Vegas Radiology, LLC

Prefatory Note

The sole purpose of this Motion is to obtain a Court determination that the requirements of NRS 42.021 will apply to discovery and the trial of this case. Nevada has adopted a per se rule barring admission of collateral source payments for injury. *Proctor v. Castelletti,* 911 P.2d 853 (Nev. 1996). However, Nevada enacted an exception to that general collateral source rule for medical malpractice litigation (NRS 42.021). NRS 42.021 permits discovery and the admission of evidence of insurance payments and contractual reimbursements for medical expenses.

FACTS

This case stems from a January 14, 2012 motor vehicle accident involving a garbage truck owned and operated by Republic Silver State Disposal (Republic) and Marie Gonzales. Marie Gonzales allegedly suffered personal injuries in the accident and filed a lawsuit against Republic and its driver, Deval Hatcher. Marie Gonzales was treated by a number of health care providers following the accident. On July 6, 2015, Republic settled its underlying case with Ms. Gonzales paying the amount of $2,000,000.00.

In the settlement agreement executed between and among Marie Gonzales, Republic and Deval Hatcher, there is a release which includes the following language:

> ". . . this SETTLEMENT AGREEMENT RELEASE and 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 may possess ***against any of her medical treatment providers*** for injuries she alleges to have sustained in the described incident of January 14, 2012."

Republic, having settled with the underlying plaintiff, Marie Gonzales, then filed a lawsuit on June 8, 2016, (Amended Complaint filed on June 27, 2016) which included a claim for "contribution"

against all of the named Defendants in the instant case.[1] Republic asserts, essentially, that although it injured the Plaintiff in the motor vehicle accident of January 14, 2012, that Plaintiff suffered further injury due to the alleged medical malpractice of her subsequent treating health care providers. Such claims are denied by Las Vegas Radiology.

In Marie Gonzales' lawsuit against Republic, claim was made for $1,108,510.16 and also claim was made for future medical expenses for $2,980,907.34 to $3,502,858.34. Republic contends that its $2,000,000.00 of Marie Gonzales' claims was well founded given, in part, these millions of dollars in medical expenses claimed by Marie Gonzales.

When Republic settled with Marie Gonzales, it did so also settling all of Marie Gonzales' alleged potential claims against her subsequent medical treatment providers. Now Republic claims it overpaid for its share of Marie Gonzales' injuries and it should be limited to paying only its equitable share of the $2,000,000.00 settlement. (Republic Settled on behalf of the medical treatment providers without consulting the providers or obtaining their consent for the settlement.)

A major problem with Republic's analysis is that it was not in an equal position with the medical treatment providers at the time of its settlement. Specifically, while Republic might have had a personal injury exposure (non economic damages) in excess of $1,000,000.00, the medical treatment providers had a personal injury exposure cap at $350,000.00 (per NRS 41A.035). Further, while Republic may have had millions of dollars in exposure for Marie Gonzales' gross medical expenses (economic damages), the medical treatment providers' exposure is greatly limited by NRS 42.021 because the actual amount of insurance paid or reimbursement made to resolve all medical expenses is admissible into evidence.

As such, when deciding what an equitable share would be to apportion Marie Gonzales' claims, **one has to also consider the incoming exposure of the settling defendants**[2]. To establish that

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[1] By Order dated December 2, 2016, this Court (the Honorable Jerry A. Wiese, II, District Court Judge) dismissed all claims contained in Republic's lawsuit against the instant Defendants except the pending "contribution" claim.

[2] If the medical treating Defendants' exposure, in total, was far less than Republic's settlement, then Republic's equitable share of the settlement necessarily has to be larger.

incoming exposure this Defendant, Las Vegas Radiology, would like to do discovery to determine the actual amounts paid to resolve Marie Gonzales' medical expenses (which undoubtedly will be an amount far less than the many millions claimed).

As stated, NRS 42.021 allows a Defendant in a professional negligence action for injury or death to introduce evidence of any amount payable as a benefit to the Plaintiff. That includes evidence of any contract or agreement to provide for or pay or reimburse the cost of medical hospital or other healthcare services. *See* NRS 42.021. To introduce such evidence requires discovery of same. This Motion seeks an order that such discovery may be pursued, and that NRS 42.021 will apply during the trial of this case for the admittance of such evidence.

ARGUMENT

1. Republic's Contribution Action Against Las Vegas Radiology is Based Upon Allegations of Professional Negligence and Respondeat Superior.

In allowing Republic to pursue a contribution action against the medical treatment providers, the Court, in its Order dated December 2, 2016, specifically stated that such action was " . . . based upon the defendants' alleged professional negligence . . ."

2. In an Action for Injury Against a Provider of Healthcare Based Upon Professional Negligence, the Defendant May Admit Evidence of Actual Insurance Payment or Reimbursement of Costs of Medical Expenses. *See* NRS 42.021.

Nevada has adopted a per se rule barring the admission of a collateral source payment for an injury into evidence for any purpose. *See*, *Proctor v. Castelletti,* 911 P.2d 853 (Nev. 1996). The State of Nevada enacted a statute (NRS 42.021) which was created as an exception to that general rule for actions for injury based upon professional negligence. Specifically, NRS 42.021(1) provides as follows:

> "1. In an action for injury or death against a provider of health care based upon professional negligence, if the defendant so elects, the defendant **may introduce evidence of any amount payable as a benefit** to the plaintiff as a result of the injury or death pursuant to the United States Social Security Act, any state or federal income disability or worker's compensation act, any health, sickness or income-disability insurance, accident insurance that provides health benefits or income-disability coverage, **and any contract or agreement of any group, organization, partnership or corporation to provide, pay for or reimburse the cost of medical, hospital, dental or other health care services.** If the defendant elects to introduce such evidence, the plaintiff may

> introduce evidence of any amount that the plaintiff has paid or contributed to secure the plaintiff's right to any insurance benefits concerning which the defendant has introduced evidence." (Emphasis added.)

In this case, it appears that some of Marie Gonzales' medical expenses may have been paid by private insurance. Such payments including write downs and discounts are both discoverable and admissible per NRS 42.021. Further, it appears that many of the account receivables for all of Marie Gonzales' medical care were purchased by a company known as DCP Services, LLC. That company purchased all signed payment agreements and assignment of lien, medical bills and records for Marie Gonzales. *See* Exhibit **"A"**, 6/25/13 document from DCP Services, LLC.

The medical treatment providers for whom Republic settled are entitled to discover and know the amounts actually paid by Marie Gonzales' private insurance and DCP Services, LLC to pay for and reimburse Marie Gonzales' medical expenses.

Recently, the Nevada Supreme Court in McCrosky v. Carson Tahoe Regional Medical Center, 133 Nev.Adv.Op. 115 (December 28, 2017) determined that NRS 42.021 would not be applied as to federal collateral source payments including Medicaid. In making such ruling, however, the Court specifically stated as follows:

> " . . . we note, however, that NRS 42.021 remains intact with respect to state or private collateral source payments. . . ."

By this Motion, this Defendant, Las Vegas Radiology seeks a Court order applying the requirements of NRS 42.021 to this case. Such an Order will allow discovery to determine the actual amount paid by Marie Gonzales' private healthcare insurance and/or medical lien care provider to resolve all of her outstanding medical expenses. Such discovery and evidence is relevant to this case because Republic claims it overpaid its equitable share of the settlement of Marie Gonzales. If Republic's actual legal exposure for Plaintiff's claimed medical expenses was far greater than the actual exposure of the treating medical providers, then, Republic's claims of inequity would have no merit.

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CONCLUSION

For the reasons set forth above, NRS 42.021 should, respectfully, apply to this case and to the discovery permitted during the case.

Dated this 13th day of March, 2018.

MANDELBAUM, ELLERTON & ASSOCIATES

KIM IRENE MANDELBAUM, ESQ.
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CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of March, 2018, I forwarded a copy of the above and foregoing **LAS VEGAS RADIOLOGY'S MOTION IN LIMINE TO PERMIT COLLATERAL SOURCE PAYMENT EVIDENCE PER NRS 42.021** as follows:

__X__ served on all parties electronically pursuant to mandatory NEFCR 4(b); or

___ by depositing in the United States Mail, first-class postage prepaid, at Las Vegas, Nevada, enclosed in a sealed envelope.

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Rebecca Daly
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Exhibit A

to

Las Vegas Radiology's Motion in Limine
to Permit Collateral Source Payment Evidence Per NRS 42.021

in the case of

Republic Silver State Disposal, Inc. v. Cash, M.D., et al.

Case No.: A-16-738123-C

6/25/13 Document from DCP Services, LLC

Exhibit A

DCP Services, LLC

Valley Health Systems
8801 W. Sahara Ave., Ste. 100
Las Vegas, NV. 89117

6/25/2013

RE: Marie Gonzales
Surgeon: Dr. Kaplan
Facility: Spring Valley Hospital

Dear Mr. Dorsky,

This letter is to verify that DCP Services, LLC has agreed to purchase the account receivable for Marie Gonzales for all medical care, including surgery.

Please forward all signed Payment Agreements and Assignment of Lien, Medical Bills and Records for this patient to DCP at 10300 W. Charleston Blvd., Ste. 13-348, Las Vegas, NV. 89135.

Thank you for your cooperation in this matter. If you have any questions, please contact me at (702) 491-7516.

Sincerely,

Mark Jaget
DCP Services, LLC
702-724-1900

905248794-35294396
GONZALES, MARIE G
DOB: 12/26/1957 55 Y SX: F SUR
MRN: 35294396 ADM/REG DT: 07/15/2013
Spring Valley Hospital

10300 W. Charleston Blvd., Ste. 13-348, Las Vegas, NV 89135
Tel: 702-724-1900 Fax: 702-242-5726

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Aka Andrew Miller Cash, M.D., P.C.; &
Desert Institute of Spine Care, LLC

DISTRICT COURT

CLARK COUNTY, NEVADA

REPUBLIC SILVER STATE DISPOSAL, INC., a Nevada Corporation,

Plaintiff,

vs.

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; JAMES D. BALODIMAS, M.D.; JAMES D. BALODIMAS, M.D., P.C.; LAS VEGAS RADIOLOGY, LLC, a Nevada Limited Liability Company; BRUCE A. KATUNA, M.D.; ROCKY MOUNTAIN NEURODIAGNOSTICS, LLC a Colorado Limited Liability Company; DANIELLE MILLER aka DANIELLE SHOPSHIRE; NEUROMONITORING ASSOCIATES, INC., a Nevada Corporation; DOES 1-10 inclusive; and ROE CORPORATIONS 1-10 inclusive,

Defendants.

CASE NO.: A-16-738123-C
DEPT: XXIII

DEFENDANTS ANDREW M. CASH, M.D., ANDREW M. CASH, M.D., P.C. AKA ANDREW MILLER CASH, M.D., P.C. AND DESERT INSTITUTE OF SPINE CARE, LLC'S JOINDER TO DEFENDANT LAS VEGAS RADIOLOGY, LLC'S MOTION TO "CAP" NON-ECONOMIC DAMAGES PER NRS 41A.035

Date of Hearing: 04/05/2018

Time of Hearing: 9:00 A.M.

Defendants ANDREW M. CASH, M.D., ANDREW M. CASH, M.D., P.C. aka ANDREW MILLER CASH, M.D., P.C. and DESERT INSTITUTE OF SPINE CARE, LLC, by

and through their counsel of record, Robert C. McBride, Esq. and Heather S. Hall, Esq. of the law firm of Carroll, Kelly, Trotter, Franzen, McBride & Peabody and hereby submit their Joinder to Defendant Las Vegas Radiology, LLC's Motion to "Cap" Non-Economic Damages per NRS 41A.035.

This Joinder is made and based upon the papers and pleadings on file herein, the Memorandum of Points and Authorities attached hereto, such other documentary evidence as may be presented and any oral arguments at the time of the hearing of this matter.

Defendants ANDREW M. CASH, M.D., ANDREW M. CASH, M.D., P.C. AKA ANDREW MILLER CASH, M.D., P.C. AND DESERT INSTITUTE OF SPINE CARE, LLC, expressly adopt and incorporate by reference, as if fully set out herein, all of the Points and Authorities set forth in Defendant Las Vegas Radiology, LLC's Motion to "Cap" Non-Economic Damages per NRS 41A.035. By reason of this Joinder, these Defendants request that this Honorable Court grant the Motion and apply the cap on non-economic damages pursuant to NRS 41A. 035.

DATED this 14th day of March, 2018.

CARROLL, KELLY, TROTTER,
FRANZEN, McBRIDE & PEABODY

Anna Kierbacher #14387

ROBERT C. MCBRIDE, ESQ.
Nevada Bar No.: 7082
HEATHER S. HALL, ESQ.
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Attorneys for Defendants, 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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 14th day of March, 2018, I served a true and correct copy of the foregoing **DEFENDANTS ANDREW M. CASH, M.D., ANDREW M. CASH, M.D., P.C. AKA ANDREW MILLER CASH, M.D., P.C. AND DESERT INSTITUTE OF SPINE CARE, LLC'S JOINDER TO DEFENDANT LAS VEGAS RADIOLOGY, LLC'S MOTION TO "CAP" NON-ECONOMIC DAMAGES PER NRS 41A.035** addressed to the following counsel of record at the following address(es):

☒ **VIA ELECTRONIC SERVICE by mandatory electronic service (e-service), proof of e-service attached to any copy filed with the Court; or**

☐ **VIA U.S. MAIL:** By placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, addressed as indicated on the service list below in the United States mail at Las Vegas, Nevada

☐ **VIA FACSIMILE:** By causing a true copy thereof to be telecopied to the number indicated on the service list below.

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Aka Andrew Miller Cash, M.D., P.C.; &
Desert Institute of Spine Care, LLC

DISTRICT COURT

CLARK COUNTY, NEVADA

REPUBLIC SILVER STATE DISPOSAL, INC., a Nevada Corporation,

Plaintiff,

vs.

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; JAMES D. BALODIMAS, M.D.; JAMES D. BALODIMAS, M.D., P.C.; LAS VEGAS RADIOLOGY, LLC, a Nevada Limited Liability Company; BRUCE A. KATUNA, M.D.; ROCKY MOUNTAIN NEURODIAGNOSTICS, LLC a Colorado Limited Liability Company; DANIELLE MILLER aka DANIELLE SHOPSHIRE; NEUROMONITORING ASSOCIATES, INC., a Nevada Corporation; DOES 1-10 inclusive; and ROE CORPORATIONS 1-10 inclusive,

Defendants.

CASE NO.: A-16-738123-C
DEPT: XXIII

DEFENDANTS ANDREW M. CASH, M.D., ANDREW M. CASH, M.D., P.C. AKA ANDREW MILLER CASH, M.D., P.C. AND DESERT INSTITUTE OF SPINE CARE, LLC'S JOINDER TO DEFENDANT LAS VEGAS RADIOLOGY, LLC'S MOTION TO PERMIT COLLATERAL SOURCE PAYMENT EVIDENCE PER NRS 42.021

Date of Hearing: 04/07/2018

Time of Hearing: 9:00 A.M.

Defendants ANDREW M. CASH, M.D., ANDREW M. CASH, M.D., P.C. aka ANDREW MILLER CASH, M.D., P.C. and DESERT INSTITUTE OF SPINE CARE, LLC, by

and through their counsel of record, Robert C. McBride, Esq. and Heather S. Hall, Esq. of the law firm of Carroll, Kelly, Trotter, Franzen, McBride & Peabody and hereby submit their Joinder to Defendant Las Vegas Radiology, LLC's Motion to Permit Collateral Source Payment Evidence Per NRS 42.021.

This Joinder is made and based upon the papers and pleadings on file herein, the Memorandum of Points and Authorities attached hereto, such other documentary evidence as may be presented and any oral arguments at the time of the hearing of this matter.

Defendants ANDREW M. CASH, M.D., ANDREW M. CASH, M.D., P.C. AKA ANDREW MILLER CASH, M.D., P.C. AND DESERT INSTITUTE OF SPINE CARE, LLC, expressly adopt and incorporate by reference, as if fully set out herein, all of the Points and Authorities set forth in Defendant Las Vegas Radiology, LLC's Motion to Permit Collateral Source Payment Evidence Per NRS 42.021. By reason of this Joinder, these Defendants request that this Honorable Court grant the Motion and apply NRS 42.021.

DATED this 20th day of March, 2018.

CARROLL, KELLY, TROTTER,
FRANZEN, McBRIDE & PEABODY

/s/ Heather S. Hall

ROBERT C. MCBRIDE, ESQ.
Nevada Bar No.: 7082
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Attorneys for Defendants, 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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 20th day of March, 2018, I served a true and correct copy of the foregoing **DEFENDANTS ANDREW M. CASH, M.D., ANDREW M. CASH, M.D., P.C. AKA ANDREW MILLER CASH, M.D., P.C. AND DESERT INSTITUTE OF SPINE CARE, LLC'S JOINDER TO DEFENDANT LAS VEGAS RADIOLOGY, LLC'S MOTION TO PERMIT COLLATERAL SOURCE PAYMENT EVIDENCE PER NRS 42.021** addressed to the following counsel of record at the following address(es):

☒ **VIA ELECTRONIC SERVICE by mandatory electronic service (e-service), proof of e-service attached to any copy filed with the Court; or**

☐ **VIA U.S. MAIL:** By placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, addressed as indicated on the service list below in the United States mail at Las Vegas, Nevada

☐ **VIA FACSIMILE:** By causing a true copy thereof to be telecopied to the number indicated on the service list below.

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DISTRICT COURT

CLARK COUNTY, NEVADA

*****

REPUBLIC SILVER STATE DISPOSAL, INC., a Nevada Corporation,

Plaintiff

vs.

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; JAMES D. BALODIMAS, M.D.; JAMES D. BALODIMAS, M.D., P.C.; LAS VEGAS RADIOLOGY, LLC, a Nevada Limited Liability Company; BRUCE A. KATUNA, M.D.; ROCKY MOUNTAIN NEURODIAGNOSTICS, LLC, a Colorado Limited Liability Company; DANIELLE MILLER aka DANIELLE SHOPSHIRE; NEUROMONITORING ASSOCIATES, INC., a Nevada Corporation; DOES 1-10 inclusive; and ROE CORPORATIONS 1-10 inclusive

Defendants.

CASE NO.: A-16-738123-C

DEPT.: XXX

HEARING DATE: 4/5/18
TIME: 9:00 AM

PLAINTIFF'S OPPOSITION TO LAS VEGAS RADIOLOGY'S MOTION TO "CAP" NON-ECONOMIC DAMAGES PER NRS 41A.035 and JOINDERS

REPUBLIC SILVER STATE DISPOSAL, INC., by and through its counsel BARRON & PRUITT, LLP, submits the following Opposition to Defendant Las Vegas Radiology's Motion to "Cap" Damages per NRS 41A.035:

///

///

///

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MEMORANDUM OF POINTS AND AUTHORITIES

PREFATORY STATEMENT

Although styled otherwise, Las Vegas Radiology's motion to limit Republic's potential damage recovery for "non-economic loss" under NRS 41A.035 is in fact a Rule 56(d)[1] motion for so-called "partial summary judgment," or "summary adjudication" as it is also known. See Schwarzer et al., *The Analysis and Decision of Summary Judgment Motions*, 139 F.R.D 441, 486 (1992) ("[S]ummary judgment is not an all-or-nothing proposition: Rule 56 permits courts to grant 'partial summary judgment'-resolving certain issues or claims while leaving others for trial"). Because the motion seeks dispositive relief over "the extent to which the amount of damages or other relief is not in controversy," NRCP 56(d), the court is constrained—as in any other Rule 56 motion—to grant summary judgment "only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, that no genuine issue remains for trial, and that the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try." *Short v. Hotel Rivera, Inc.*, 79 Nev. 94, 103, 378 P.2d 979, 984 (1963).

For the reasons now discussed, the pending motion is unmeritorious, both as a matter of law and because it implicates fact issues unsuitable for summary adjudication.

ARGUMENT

1. NRS 41A.035 has no application as a matter of law unless there is an "action for injury or death"; against a statutorily defined "provider of health care"; brought by an "injured plaintiff."

Without so much as citing the provisions of NRS 41A.035—or offering any rationale for the

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[1] NCRP 56(d) states in full:

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

proposition—Las Vegas Radiology argues that simply because medical practitioners (and their business entities) have been sued in this contribution action, *a fortiori* the $350,000 limitation for "non-economics loss" set out in NRS 41A.035 applies. That notion can be dispelled for a number of reasons, beginning with a fair reading of NRS 41A.035, which says in full:

> In an action for injury or death against a provider of health care based upon professional negligence, the injured plaintiff may recover noneconomic damages, but the amount of noneconomic damages awarded in such an action must not exceed $350,000, regardless of the number of plaintiffs, defendants or theories upon which liability may be based.

For legitimate reliance on the "non-economic" damage limitation in NRS 41A.035, the "professional negligence" defendant must first show the suit is "an action for injury or death"; second, that the defendant is a "provider of health care"; and finally that the lawsuit is brought by "the injured plaintiff." *Id.* So simply stated, not every case involving a physician or other health care defendant automatically gets NRS 41A.035's damage limitation.

A recent example is *Goldenberg v. Woodard*, 2014 WL 2882560 (Nev. 2014), where our Supreme Court clarified the distinction between professional negligence and other causes of action for the purposes of applying the statutory damages cap. There, the plaintiff was injured in a negligently performed colonoscopy. The physician was sued for "professional negligence" because he had botched the procedure; and the plaintiff added a fraud claim because the doctor falsely represented he was trained and qualified to perform colonoscopies. At trial, the plaintiff was awarded $610,000 for "economic loss," and $1 million in noneconomic damages, a substantial percentage of which was the fraud recovery. *Id.*, *1.

The physician filed post-trial motions seeking to limit the noneconomic damages to the statutory $350,000 cap, which the trial court denied finding the damages cap had no application to a recovery for fraud. The *Goldenberg* court agreed and held that the damages cap in NRS 41A.035 did

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not apply because fraud was "*qualitatively different* from the professional negligence claim," *id.* *2, and that "[w]hether a cause of action brought against a health care provider under an intentional tort theory is 'qualitatively different' than a claim for professional negligence subject to NRS Chapter 41A's limitations should be evaluated on a case-by-case basis." *Id.* *3 (citing to *Smith v. Ben Bennett, Inc.*, 35 CalRptr.3d 612 (Cal. App. 2005) for the proposition that "whether professional negligence statutes are applicable to claims grounded on other legal theories must be examined on a case-by-case-basis").

The teaching of *Goldenberg* is that the medical malpractice damages cap does not always apply, even where the facts of the case clearly implicate negligent medical treatment. And here, contribution is not only "qualitatively different" from negligence, but *categorically* different. Negligence is a tort, whereas contribution is an equitable *remedy* which can be pursued as a stand-alone cause of action to redistribute an already-paid loss, as provided by NRS 17.225, et seq. Said differently, the crucial distinction between contribution and medical malpractice claims is that while medical malpractice claimants attempt to recover in tort for their own injuries, contribution plaintiffs seek reimbursement from others also responsible for those jointly cause damages, to the extent that the contribution-plaintiff has paid more than its equitable share of the common liability. NRS 17.225(3).

2. Republic's claim is for contribution under the *Uniform Contribution Among Tortfeasors Act*, NRS 17.225, et seq., and not for injuries suffered by Marie Gonzales under NRS Chapter 41A.

After extensive briefing, and two rounds of oral argument during the latter part of 2016, this Court held in a December 13, 2016 order[2] that Republic's lawsuit against all defendants was brought under Nevada's adaptation of the *Uniform Contribution Among Tortfeasor's Act* (UCATA).[3] *See* NRS

[2] See Order Re: the Cash Defendants' Motion to Dismiss, the Balodimas Defendants' Motion for Judgment on the Pleadings, and Danielle Miller's Motion to Dismiss and all Joinders.

[3] Nevada traditionally followed the common law and disallowed two or parties responsible for the same injury to seek contribution from one another to equitably distribute their common liability. See *Reid v. Royal Ins. Co.*, 80 Nev. 137, 142, 390 P.2d 45, 47 (1964). Contribution was only permitted by statute in 1973 with the state legislature's passage of

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17.225, et seq. In denying the multiple Rule 12 motions and their joinders, the Court found:

> All the pending motions essentially make the same arguments—1) that [Republic] does not have standing to assert a direct claim of medical malpractice (now known in Nevada as "professional negligence"); 2) that [Repbulic] failed to bring its claims for professional negligence, respondeat superior, and negligent supervision and retention, within the applicable statutes of limitations; and 3) that [Republic's] contribution claim fails pursuant to NRS 17.225(3), as [Republic's] settlement with Mari[e] Gonzales did not extinguish any liability on the part of the Defendants in this case.
>
> With regard to the first argument, that [Republic] does not have standing, even the Plaintiff's Opposition concedes that [Republic] has "no stand-alone right under NRS Ch. 41A to pursue Marie Gonzales'—or anyone else's—claim for medical malpractice." (See Plaintiff's Opposition to the Cash Motion to Dismiss at p.7). Plaintiff simply argues that its claim is for contribution, based on claims for professional negligence, respondeat superior and negligent supervision and retention. With this understanding, this Court agrees that the Plaintiff does not have standing to bring these [professional negligence] claims directly against the Defendants. The Court acknowledges that the Plaintiff's claim for contribution is based upon the Defendants' alleged professional negligence, respondeat superior, and negligent supervision and retention. As noted by the Plaintiff, Nevada law obligates a Plaintiff seeking contribution from health care providers, asserting claims for professional negligence, to satisfy the requirements of NRS Chapter 41A. (See Plaintiff's Opposition to the Cash Defendants Motion to Dismiss at pg.

AB 743, and adoption of the *Uniform Contribution Among Tortfeasors Act* (UCATA). See 1973 Statutes of Nevada, p. 1303.

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8.)

The rest of the court's December 13, 2016 order went on to reject the remaining two arguments—that the "professional negligence" limitation set out in NRS 41A.097 applied instead of the 1-year limitation period for contribution actions under NRS 17.285; and that the defendants' liability had not been extinguished by the Republic/Gonzales release. A full revisitation of those elements of the Court's written order is unnecessary. What is important, however, is that neither remaining determination could be made without the foundational decision that Republic was asserting its own right to contribution under the UCATA, and not Marie Gonzales' right to recover for her treatment-related injuries under NRS Ch. 41A.

The effect of the Court's predicate decision that Republic was *not* a "med-mal" plaintiff under NRS Ch.41A was first the disposal of the defendants' argument regarding statute of limitations. The defendants, of course, argued Republic's contribution action could not proceed because the "professional negligence" statute, NRS 41A.097(2), barred claims "more than 3 years after the date of injury or 1 year after plaintiff discovers or through reasonable diligence should have discovered the injury, whichever occurs first[.]" Rejection of that argument was somewhat mechanical since the Nevada Supreme Court had itself rejected that very contention twice. In each instance, contribution-plaintiffs had brought UCATA claims against treating health care professionals, only to have their contribution actions dismissed at the trial level based upon NRS 41A.097(2). See *Saylor v. Arcotta*, 126 Nev. 92, 225 P.3d 1276 (2010), *Pack v. LaTourette*, 128 Nev. 264, 277 P.3d 1246 (2012).

Both *Saylor* and *Pack* hold that, *even if* the contribution-defendant is a health care provider, the contribution-plaintiff has 1 year under NRS 17.285 to bring the claim. See *Saylor*, 126 Nev. at 96, *Pack* 128 Nev. at 267, 277 P.3d at 1248. The triggering event is (as the case may be) satisfaction of a judgment, or a settlement resolving a common liability. See NRS 17.285(2)-(4); cf. *Aetna Cas. & Surety v. Aztec Plumbing*, 106 Nev. 474, 476, 796 P.2d 227, 229 (1990) ("[a] claim for indemnity or contribution accrues when payment has been made").

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But deciding that Republic's claim accrued, not when Marie Gonzales was injured during treatment, but when Republic settled with her still begged the question—had the Republic/Gonzales settlement indeed "extinguished" a "common liability"? Here again, the answer implicated the law of contribution, not the law of medical malpractice.

As part of a November 9, 2016 hearing on the dispositive motions, the Court reviewed the Republic/Gonzales release, and construed the following language in its December 13, 2016 order as an extinguishment of any liabilities arising from the defendants' respective treatment of Marie Gonzales:

> ...this Settlement Agreement, Release and 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 [Gonzales] may possess ***against any of her medical treatment providers*** for injuries she alleges to have sustained in the described accident of January 12, 2012.

See Plaintiff's Brief Re: Evidentiary Hearing, Exhibit 3, p.2 (emphasis is the Court's).

Finding that "the Release is very clear that it was the intent of the parties that the Release would extinguish any claims or liabilities that Ms. Gonzales had against her medical treatment providers, relating to the injuries she alleged as a result of the subject accident," the Court next addressed "whether any of the medical treatment providers (particularly those named as Defendants in the present case) had any liability to Ms. Gonzales that could have been extinguished" when the release was signed on July 6, 2015. Order, p. 9.

Again rejecting the defendants' argument that because NRS 41A.097 had already expired before the contribution action was filed, there were no claims to extinguish, this Court held *Saylor* and *Pack* were dispositive regarding the timeliness of Republic's action[4]; and that NRS 17.225(3) "refers

[4] In Answer to the Balodimas writ petition (in substance to reverse the court's December 13, 2016 order) Republic pointed out that for the defendants' argument regarding the preclusive effect of NRS 41A.097 to have any validity it would have to have been intended as a statute of repose, foreclosing not only a plaintiff's remedy under Chapter 41A, but, but the plaintiff's right to bring a malpractice claim altogether—a position expressly rejected in *Libby v. District*

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to the need for the parties to extinguish liability in the Settlement Agreement, and that was done in this case."

The three holdings just discussed—that Republic is not a Chapter 41A plaintiff; that Chapter 41A's statute of limitation had no effect on when Republic's claim arose, or when it would be time-barred; and that the Republic/Gonzales release, as a matter of law, extinguished the defendants' liability to Ms. Gonzales for treatment related to her January 14, 2012 accident (and thus triggered the right to contribution under NRS 17.225(3))—are the law of this case. How then does Las Vegas Radiology justify superimposing Chapter 41A damage limitation in an action where it has no currency?

Las Vegas Radiology seizes on the following verbiage to contend—as a *fait accompli*—all provisions of NRS Ch. 41A control the outcome of this litigation, including the "non-economic" damage limitations in NRS 41A.035:

> As noted by the Plaintiff, Nevada law obligates a Plaintiff seeking contribution from health care providers, asserting claims for professional negligence, to satisfy the requirements of NRS Chapter 41A. (See Plaintiff's Opposition to the Cash Defendants Motion to Dismiss at pg. 8.)

December 13, 2016 Order, p. 2.

What Las Vegas Radiology fails to mention is that what Republic was actually discussing at page 8 of its Opposition to the Cash defendants' Motion to Dismiss was *Pack*'s extension of the Supreme Court's holding in *Saylor* that a pleading seeking contribution against a health care provider must include an statutorily-required affidavit:

> The suggestion that a contribution lawsuit is transfigured into a garden-variety

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Court, 130 Nev. ___, 325 P.3d 1276, 1278 (2014) (distinguishing a statute of repose as one that "bar[s] causes of action after a certain period of time, regardless of whether damage or an injury has been discovered," from statutes of limitation which "foreclose[] suit after a fixed period of time following the occurrence or discovery of an injury" and squarely typified NRS 41A.097 as the latter.

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"med-mal" case simply because it names statutory health care providers, see NRS 41A.017, and complies with NRS Ch. 41A, is, to put it kindly, wrong. In fact Nevada law obligates a plaintiff seeking contribution from "health care providers" to "establish ...medical malpractice" and "satisfy the statutory [NRS Ch. 41A] prerequisites in place for a medical malpractice action before bringing its contribution claim." Pack v. LaTourette, 128 Nev. ___, 277 P.3d 1246, 1250 (2012). So not to put too fine a point on it, but the contribution remedy doesn't change a lick just because a doctor is a defendant, and the contribution plaintiff has been NRS Ch.41A-observant.

So again, the only Chapter 41A imperative discussed in *Pack* are those imposed by NRS 41A.071[5]:

> While this court has not yet considered the applicability of NRS 41A.071 to third-party claims for contribution, we have recognized that statutory limitations should apply to protect doctors from frivolous claims where a given action requires proof of malpractice before relief may be granted. *See Fierle v. Perez,* 125 Nev. 728, 738, 219 P.3d 906, 912 (2009) (applying the affidavit requirement to a claim of negligent supervision and explaining that malpractice statutes were intended "to extend the legislative shield that protects doctors from frivolous lawsuits"); *see also Truck Ins. Exchange v. Tetzlaff,* 683 F.Supp. 223, 224–26 (D.Nev.1988) (concluding that a

[5] NRS 41A.071 states in full:

> If an action for professional negligence is filed in the district court, the district court shall dismiss the action, without prejudice, if the action is filed without an affidavit that:
> 1. Supports the allegations contained in the action;
> 2. Is submitted by a medical expert who practices or has practiced in an area that is substantially similar to the type of practice engaged in at the time of the alleged professional negligence;
> 3. Identifies by name, or describes by conduct, each provider of health care who is alleged to be negligent; and
> 4. Sets forth factually a specific act or acts of alleged negligence separately as to each defendant in simple, concise and direct terms.

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former mandatory prerequisite for bringing a medical malpractice action extended to indemnity actions grounded in alleged medical malpractice).

Here, Sun Cab's complaint rested upon the theory that LaTourette's negligence had contributed to Zinni's injuries. In other words, to establish a right to contribution, Sun Cab would have been required to establish that LaTourette committed medical malpractice. Thus, Sun Cab is required to satisfy the statutory prerequisites in place for a medical malpractice action before bringing its contribution claim. Fierle, 125 Nev. at 736–38, 219 P.3d at 911–12.

Pack v. LaTourette, supra, 126 Nev. at 270, 226 P.3d at 1250; (emphasis supplied).

Las Vegas Radiology's argument regarding imposition of an NRS Ch. 41A damage limitation on a lawsuit which has been definitively established as being brought under the UCATA is that "Republic, as the Plaintiff, must satisfy the requirements of NRS 41A.035 in pursuing its contribution action against Las Vegas Radiology (and the other licensed professional health care providers)." Motion at 7. The reasoning (such as it is) offered for that statement is NRS 41A is "the law of this case." But as was just discussed, the December 13, 2016 Order's reference to Republic's opposition to the Cash motion to dismiss was in connection with *Pack* as the only Nevada Supreme Court case addressing what part of Chapter 41A specifically *does* apply to contribution actions against health care providers. Conversely, *Saylor* and *Pack* definitively held Chapter 41A's limitation period is inapplicable to contribution (and equitable indemnity) lawsuits because the former and latter are entirely different types of claims, triggered by different events. *Saylor* 126 Nev. at 95, 225 P.3d at 1278 ("a cause of action for equitable indemnity [and contribution are] separate and distinct from the underlying cause of action and carry [their] own limitations period[s]"); cf. *Libby*, supra n. 4, 325 P.3d at 1277 ("NRS 41A.097(2)'s three-year limitation period begins to run when a plaintiff suffers appreciable harm, regardless of whether the plaintiff is aware of the injury's cause"); *Aetna Cas. & Sur. v. Aztec Plumbing*, 106 Nev. 474, 476, 796 P.2d 227, 229 (1990) ("A cause of action for indemnity

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or contribution accrues when payment [of the joint liability] has been made").

Next, NRS 41A.035's damage limitation has nothing to do with asserting or "pursuing" a claim against a negligent treatment provider, as Las Vegas Radiology suggests. Rather, NRS 41A.035 is not a part of an "injured plaintiff's" claim—it is an affirmative affirmative defense. See *Primus v. Galgano,* 329 F.3d 236, 246-247 (1st Cir. 2003) (defense counsel's decision to forego a request for an instruction limiting a medical-malpractice plaintiff's recovery to $500,000 under the applicable Massachusetts statute, see Mass. Gen. Laws Annot., ch. 231, §60H, was "strategic"; experienced "med-mal" lawyers are "habitually" allowed by trial courts to decide "whether to request the §60H instruction, and defense counsel often opt *not* to request it, for fear that juries will misinterpret it as a $500,000 floor rather than a ceiling"; therefore the plaintiff's judgment well in excess of the "damage cap" would not be reduced to $500,000 since the defense waived the opportunity for the statutory instruction; (emphasis is the court's)).

Nor does Las Radiology's motion give a rationale as to why Chapter 41A's damage provisions should have primacy over the *Uniform Contribution Among Tortfeasors Act*—which of course has its own damage limitation, allowing recovery against a contribution-defendant only to the extent that the contribution-plaintiff has (in extinguishing the common liability) paid more than his or her "equitable share." NRS 17.225. Certainly nothing in either Chapter 41A or the UCATA suggests that one statutory scheme (and damage limitation) must kowtow to the other. In fact they serve different purposes: Chapter 41A strikes a balance between the interests of patients and physicians (as well as other "providers of health care") by shielding medical defendants from frivolous lawsuits by requiring affidavits from a knowledgeable experts providing reasonable specificity as to how the health care provider was negligent. NRS 41A.071(4) (mandating that the affidavit state facts supporting the negligence allegations). Health care providers are also protected against unlimited "pain and suffering" damage exposures by a $350,000 "cap" for "non-economic" recoveries. NRS 41A.035. On the other hand, "injured plaintiffs" bringing actions for "injury or death" against at-fault "providers of

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health care," *id.*, are no longer funneled through time-consuming and expensive "Medical-Legal Screening Panels," while still being permitted to prove and recover their full economic losses resulting from the malpractice.

The UCATA on the other hand abolishes the common law rule of "no contribution among tortfeasors," *Reid*, supra, by creating a remedy between and among at-fault parties allowing a liquidated loss to be distributed among them based upon principles of equity. And even here, the UCATA strikes its own balance by imposing a relatively short limitation period on contribution-plaintiffs to bring their suits, which at the same time protects potential contribution-defendants from stale claims.[6]

And just as important, there is nothing—in a written order that runs over 10 pages of text, explaining in detail the reasons for each of the Court's multiple decisions—that definitively says Chapter 41A, "soup to nuts," applies to this case (or if such a decision was being made in the December 13, 2016 order, how it was reached). If "past is prelude," whatever decision is reached on this motion is likely wind up before our state Supreme Court. So the merits of a determination on whether NRS 41A.035 does or does not apply in this contribution action should be based on more than a one-line comment, taken out of context.

There are other defects in the pending motion which are discussed momentarily. But as a final point at least one defendant made clear that dismissal of the "med-mal" cause of action was beneficial to the defendant(s) since the claim would not need to be officially "reported." So the moving defendant(s), by insisting entitlement to a damage limitation unique to "professional negligence" actions, want it both ways: Republic's claim does not allege "professional negligence" for purposes of having to report litigation, but they are nonetheless entitled to rely on whatever part of Chapter 41A

[6] See *Uniform Contribution Among Tortfeasors Act* (1955), Commissioner's Comment, §3(c), that "Some compromise apparently must be made between a reasonable time to pay the [common obligation] and unduly extended liability for contribution. One year seems about the right compromise."

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that suits them.

3. Not all defendants under the facts of this case are entitled to the Chapter 41A damage limitation.

While the Court is aware of the underlying facts, because of the passage of time it may be well to briefly revisit them.

Republic's contribution claim stems from a January 14, 2012 traffic accident between Marie Gonzales and a Republic garbage truck driven by Republic's then-employee, Deval Hatcher. Ms. Gonzales claimed a significant low back injury and began treating with Dr. Andrew Cash and DISC during April of that same year.

After several months' treatment with Dr. Cash and others, Cash recommended Ms. Gonzales undergo extensive spinal surgery to remove the L4-5 and L5-S1 discs and fuse her low back. The recommended procedure occurred on January 29, 2013, and included instrumentation requiring placement of so-called "pedicle screws." Without unneeded detail, the screws are placed within the affected vertebral bodies for mechanical stabilization. Should the screws efface or contact near-by nerve roots, substantial neurological injury can occur. To avoid that risk, a procedure known as "intraoperative neurophysiological monitoring" (or "neuromonitoring") is performed in the operating room to assure the screws have not gone into the neuroforamen and exposed the nerve roots to a purely treatment-related, or "iatrogenic" injury.[7]

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[7] The theory behind neuromonitoring is succinctly described in the following passage:

> The principle of pedicle screw stimulation technique is that the electrical resistance of bone is higher than that of surrounding fluid and soft tissue. If an implanted pedicle screw is completely surrounded by bone, the screw is electrically shielded and electrical stimulation of the screw will fail to activate the nerve. However, if there is a breach in the medial wall of the pedicle, a low resistance pathway is formed between the screw and the adjacent tissue. Application of electrical current to the screw will result in stimulation of the nerve root which is recorded [on EMG] as a CMAP [compound muscle action potential].

And in the evaluation of lumbosacral pedicle screws:

> It appears there is a close correlation between intensity of screw stimulation to elicit CMAPs and the risk of neurological injury associated with screw placement. A stimulation threshold of 10-15 mA was associated with adequate screw position [in a study of patients implanted with pedicle screws] but exploration of the pedicle was recommended. A stimulation threshold of greater than 15 mA indicated adequate screw placement.*** *A stimulation threshold of less than 5 mA was associated with a significant cortical perforation and direct contact with a nerve root.*

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Here, the neuromonitoring technician was Danielle Miller (who has since wed and goes by her married name, Shopshire). She was (and apparently still is) an employee of her co-defendant, Neuromonitoring Associates, Inc. The data she gathered in the operating room was evaluated (in real time) by Dr. Bruce Katuna at Rocky Mountain Neurodiagnostics in Colorado.[8]

We know from a one-page (and quite possibly incomplete) neuromonitoring report attributed to Ms. Miller, that pedicle screw stimulation yielded values of no more than 4 mA. Cf. Chung, et al, *supra*, n. 2 ("stimulation threshold of less than 5 mA was associated with a significant cortical perforation and direct contact with a nerve root.") Yet there is no indication a stimulation level of 4mA was interpreted by Dr. Cash, Dr. Katuna, or Ms. Miller as concern for a possible pedicle screw breach. And when Dr. Katuna issued his report on March 6, 2013, he blandly wrote that "[p]edicle screw testing demonstrated thresholds suggesting low likelihood of pedicle breach."

Ms. Gonzales reported agonizing post-operative pain in the recovery room, but Dr. Cash supposedly assumed it was common post-operative discomfort.[9] When the pain had not abated, Dr. Cash referred her to Las Vegas Radiology, where Dr. James Balodimas performed a CT study on February 12, 2013. Drs. Cash and Balodimas consulted with one another that day and concluded the scan showed no evidence of pedicle screw breach, and (at least insofar as Dr. Cash was concerned) no necessity to reposition the pedicle screws.

After several months of unproductive symptomatic treatment, Ms. Gonzales effectively "fired" Dr. Cash and consulted with Drs. Stuart Kaplan and Jason Garber, who recognized that the screws had broken through the pedicles, and entered the neuroforamina where they were irritating the left L5 and

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Chung et al., *EMG and Evoked Potentials in the Operating Room During Spinal Surgery*, Ch. 17, §§3.3.2.1, 3.3.2.2, (Georgia Neurological Institute/Mercer Univ. School of Medicine), http://cdn.intechweb.org/pdfs/25866.pdf. (Emphasis added.)

[8] This is known as "remote" monitoring, a practice frowned upon by some (including Medicare) because a single physician monitoring multiple operations at the same time escalates the potential for error.

[9] This in itself seems far-fetched since Gonzales subjectively reported10-out-of-10 pain radiating past her knee on the left—a symptom not reported prior to the operation, and strongly indicating nerve root irritation at the operative site.

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S1 nerve roots.[10] Dr. Kaplan completely revised Dr. Cash's "repair" during July 2013 (including removal of the offending hardware). Although Ms. Gonzales got some relief from removal of the Cash-implanted pedicle screws, they had been left in place too long; had caused permanent damage to the L5 and S1 nerve roots; and she was now suffering from chronic radiculopathy. In early 2015, Dr. Kaplan implanted a spinal cord stimulator to alleviate her intractable back and left leg pain.

The bulk of Ms. Gonzales $1.1 million in past medical specials was incurred after the botched January 29, 2013 operation. During discovery in *Gonzales v. Hatcher et al.*, Ms. Gonzales' produced expert reports opining she would incur another $2.9 million to $3.5 million future medical expenses, as well anywhere from $730,000 to $982,000 in lost earning capacity and loss of household services.[11] Republic settled the Gonzales claim for $2 million on July 6, 2015, based in no small part on the defendants' errors and omissions, and filed this lawsuit for contribution on June 8, 2016.

a. NRS 41A.035 to applies only to a "provider of health care."

At the time of the January 29, 2013 operation, NRS 41A.017 defined a "provider of health care" as a:

> physician licensed under chapter 630 or 633 of NRS, dentist, licensed nurse, dispensing optician, optometrist, registered physical therapist, podiatric physician, licensed psychologist, chiropractor, doctor of Oriental medicine, medical laboratory technician, licensed dietician or a licensed hospital and its employees.

NRS 41A.017 was amended by the 2015 state legislature and now reads:

> "Provider of health care" means physician licensed under chapter 630 or 633 of NRS, **physician assistant**, dentist, licensed nurse, dispensing optician, optometrist, registered physical therapist, podiatric physician, licensed psychologist, chiropractor, doctor of Oriental medicine, medical laboratory technician, licensed dietician or a

[10] When Ms. Gonzales first presented to Dr. Garber on June 7, 2013 he reviewed the February 12, 2013 CT and described a "medial breach of the pedicle" from the pedicle screws at L5 and S1 on the left. See Republic 002732-2733.

[11] These past and future damages were a substantial consideration, n in reaching the $2 million settlement.

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licensed hospital, **clinic, surgery center, physician's professional corporation or group practice that employs any such person** and its employees.

NRS 41A.017 (amended Laws of Nevada 2015, c. 439, §2 eff. June 9, 2015). The amended verbiage is shown in **bold.**[12]

On the date of Ms. Gonzales' surgery, neither a "physician's professional corporation" nor a neuromonitoring technician (or the neuromonitoring technician's employer) was defined as a "provider of health care" under NRS 41A.017. Here, in addition to Ms. Miller, Republic has sued the professional corporations of Drs. Andrew Cash, James Balodimas, and Bruce Katuna, as well as the movant, Las Vegas Radiology, a Nevada limited liability company. So simply put, *even if* NRS 41A.035 had application in a contribution lawsuit under NRS 17.225 et seq., none of these defendants is specifically defined as a "provider of health care" and thus entitled to the protections of NRS 41A.035 as of January 29, 2013.

In *Segovia v. Dist. Ct.*, 133 Nev ___, 403 P.3d 783 (2017), our state Supreme Court unequivocally held that the 2015 amendment to NRS 41A.017 does not apply retroactively. There, Jocelyn Segovia was acting as a physician's assistant during a February 2012 spinal surgery performed by a local physician, Dr. Michael Elkanich. The patient died when her abdominal aorta was cut, and both Dr. Elkanich and Ms. Segovia were sued for medical malpractice.

Segovia contended that NRS 41A.017 was amended in 2015 to include "physician's assistants" as "providers of health care" and so she, too, was entitled to rely on NRS 41A.035's damage limitation and NRS 41A.045's abolition of joint and several liability for "professional negligence." The trial court disagreed and the *Segovia* plaintiffs were granted summary to the effect that the 2015

[12] In the unpublished decision of *Stipp v. Beasley*, 2017 WL 1788647, *1 (Nev. App.), the Nevada Court of Appeals held in reference to the amended NRS 41A.035 that it applied "only to claims accruing 'on or after'" the amendment's effective date, June 5, 2015, and that "[g]enerally, an action will accrue when the wrong occurs and the party sustains an injury." Here, the Court has held Republic's contribution claim "accrued" upon payment of the $2 million settlement proceeds on July 6, 2015. So if NRS 41A.035 were to apply, it would be in its amended form. Of course if the defendants' rationale held sway, and Ms. Gonzales' "injury" were the triggering event, NRS 41A.035 in its previous form would have been the appropriate one to use. Republic prefers legal consistency to expediency and goes along with the amended statute.

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amendment to NRS 41A.017 had only prospective effect.

On a petition for an extraordinary writ, the Supreme Court rejected the contention that the 2015 amendment provided a mere "clarification" of NRS 41A.017, and held instead:

> [T]he district court correctly found that the 2015 amendments adding physician assistants to NRS 41A.017 do not apply retroactively. Not only does the statutory amendment face a strong presumption of prospectively, but the text of the senate bill itself contains language in section 11 specifically stating that "[t]he amendatory provisions of this act apply to a cause of action that accrues on or after the effective date of this act." 2015 Nev. Stat., ch. 439, § 11, at 2529; S.B. 292, 78th Leg. (Nev. 2015). Accordingly, we hold that at the time of the 2012 surgery, physician assistants were not "[p]rovider[s] of health care" under NRS 41A.017.

403 P.3d at 788.

But preceding *Segovia* was the unpublished decision of *Zhang v. Barnes*, 2016 WL 4926325 (Nev. S. Ct.). It also addressed NRS 41A.035 (both before and after amendment) and whether a "provider of health care['s]" corporation was also entitled to the NRS 41A.035 damage limitation. In substance the *Zhang* followed *Fierle v. Perez*, 125 Nev. 728, 219 P.3d 906 (2009), *reversed on other grounds*, *Egan v. Chambers*, 129 Nev. 239, 299 P.3d 364 (2013), to the effect that the NRS 41A.035 had to be read in conjunction with NRs ch. 89 (governing professional corporations). See *Segovia,* 407 P.3d at 787 ("*Zhang*...required NRS Chapters 41A and 89 to be read together in harmony so that professional entities, when vicariously liable for a doctor's actions, are also protected by the $350,000 damage cap").

But the *Segovia* court then rejected that NRS 41A.035's amendment also "clarified" other aspects of the statute and the "*Zhang* decision does not necessarily mean that every part of the 2015 amendments clarified the original statute's intent and applies retroactively" in spite of Segovia's urging that "physicians assistants" should also get retroactive benefit of the amendment. *Id.* So where does

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the back-and-forth of *Fierle* to *Egan* to *Zhang* to *Segovia*, and the pre and post-amendment verbiage of NRS 41A.035 leave us?

This much is clear: NRS 41A.035 does not contemplate neuromonitoring technicians, or their employers, leaving Ms. Miller and Neuromonitoring Associates outside the statute's purview. Next, assuming NRS 41A.035 contemplates the Nevada-licensed physicians and their "PC's," the "odd-men out" are Rocky Mountain Neurodiagnostics and the movant, Las Vegas Radiology, though for separate reasons.

Under NRS 89.020(7) "means a corporation organized under *this* chapter to render a professional service." Rocky Mountain Neurodiagnostics, however, is a Colorado limited liability company, formed under Colorado law, and not NRS Chapter 89[13] and is thus outside the scope of NRS 41A.035.

Nor is Las Vegas Radiology, LLC a NRS Chapter 89 corporation.[14] There are, however, other issues that preclude its efforts for summary adjudication. According to the Nevada Secretary of State, Prem Kumar Kittusamy, Las Vegas Radiology, LLC's only officer resigned on June 28, 2016—one day after Republic filed its amended complaint. Attached as EXHIBIT 2 is Secretary of State's printout for Las Vegas Radiology, LLC confirming its "revoked" status. Las Vegas Radiology, LLC nonetheless answered the Amended Complaint on March 7, 2017 by alleging it had insufficient knowledge to admit or deny its own status as a Nevada limited liability company with the apparent knowledge that it was no longer a viable entity. See Amended Complaint, ¶8; Answer, Las Vegas Radiology, LLC, ¶8. Troubling, however, is Las Vegas Radiology, LLC's recent production of Premier Physicians Insurance Company Policy #RRG-062027, purportedly providing coverage for claims asserted in this litigation. The policy's "Schedule A" lists the "Insured" as "Kittusamy, LLP," and "Kittusamy, LLP & Prem Kittusamy dba: Las Vegas Radiology" as "Additional Insureds." A

[13] Attached as EXHIBIT 1 are documents from the Colorado Secretary of State confirming that Rocky Mountain Neurodiagnostics, Professional LLC is a Colorado limited liability company, organized under the laws of that state.
[14] Nevada limited liability companies are in fact organized and subject to the provisions of NRS ch. 86.

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copy of "Schedule A" is attached as EXHIBIT 3. Complicating things further is that Kittusamy, LLP filed for Chapter 11 bankruptcy reorganization on July 2, 2015. See U.S. Bankruptcy Ct., Dist. of Nev. (L.V.) Petition #15-13868-abl; *In re: Kittusamy, LLP* (Case #2:15-bk-13868).

At this juncture, Las Vegas Radiology, LLC's status is unclear. Though dissolution of a limited liability company does not affect its ability to prosecute or defend lawsuits, or "impair any remedy or cause of action available to or against its managers or members arising before its dissolution and commenced within 2 years after the date of the dissolution," NRS 86.505, the Premier Physicians policy lists "Las Vegas Radiology, LLC" as a Kittusamy, LLP "dba." So without further clarification it is uncertain if "Las Vegas Radiology, LLC" was indeed the "dba" of the debtor in bankruptcy; whether the Premier Physicians policy is an asset of the bankruptcy estate; and if so whether the automatic bankruptcy stay is in effect. These factors all preclude summary adjudication.

b. Because Danielle Mille is not a statutory "provider of health care," there is an issue of fact as whether Cash/Disc and Katuna/Rocky Mountain Neurodiagnostics are vicariously liable under notions of *respondeat superior* if Miller is found to have stand-alone liability.

In *Zhang*, the Nevada Supreme Court held that a "case-by-case" analysis was needed to determine if a "truly...independent tort" had been committed where both a negligent physician and his corporate employer were statutory "providers of health care. But where "negligent hiring, training and supervision claims" against the employer are "based upon the underlying negligent medical treatment, the liability [of the two statutory providers of health care] is coextensive." *Zhang*, *7. Thus, "[n]egligent hiring, training, and supervision claims cannot be used as a channel to allege professional negligence against a provider of health care to avoid the statutory caps on such actions." *Id.*

But is there a different rule where the "provider of health care" has control over a negligent defendant who is not protected by Chapter 41A's damage limitation? The answer should be yes, and it's the same one a Nevada court would apply in other cases where *respondeat superior* is alleged: Irrespective of whether the vicariously responsible party was at fault, if he or she had control over

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the active tortfeasor's activities at the time of the harm, the wrong-doer's liability can be vicariously imposed.[15]

As recently as December 2017, the Nevada Supreme Court held "vicarious liability survives in the several liability scheme created by NRS 41A.045." *McCrosky v. Carson Tahoe Regional Medical Center*, 133 Nev. ___, 408 P.3d 149, 153 (2017) (reversing partial summary judgment to a hospital where a physician was alleged to have been the hospital's ostensible agent, and the trial court erroneously held the physician's "several" liability under NRS 41A.045 could not be imposed vicariously imposed on the hospital). In other words, just because a provider of health care is severally liable for his or her own liability, does not preclude imposition of another's liability under *respondeat superior* theory under appropriate circumstances.

Here, there is a fact question whether Danielle Miller was negligent in performance of her duties as a neuromonitoring technician. Whether her negligence—which is "joint and several" since she does not come within the purview of NRS Chapter 41A—can be imposed upon the Cash and Katuna defendants is likewise a fact issue precluding summary adjudication. *Nichter v. Edmiston*, 81 Nev. 606, 610, 407 P.2d 721, 724 (1965), held that surgeons can indeed be vicariously liable for the negligence of others if the at-fault party is "under the [surgeon's] *special supervision and control* during the operation." (Emphasis is original.)

In this case, Neuromonitoring Associates (Ms. Miller's employer) produced a document containing his "preferences" for how neuromonitoring was to occur during his procedures. A copy of the Cash preferences is attached as EXHIBIT 4, which indicates that Dr. Cash not only had the right to control the details of neuromonitoring during the Gonzales procedure, but that Ms. Miller was in fact under his "special supervision and control." The same can be said of Dr. Katuna if he also had a supervisory role in the neuromonitoring procedure, which it itself a fact question.

[15] See *National Convenience Stores v. Fantauzzi*, 94 Nev. 655, 584 P.2d 689 (1978) and the seminal decision of *Wells v. Shoemake*, 64 Nev. 57, 177 P.2d 451 (1947), both of which hold *respondeat superior* liability is premised on the vicariously liable party's control over the active wrong-doer.

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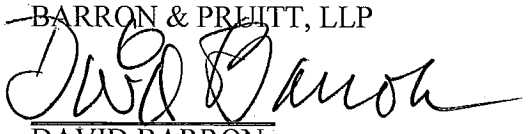
CONCLUSION

For the reasons stated the instant motion and its joinders should be denied. Respectfully submitted,

BARRON & PRUITT, LLP



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JOHN D. BARRON
Nevada Bar No. 14029
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North Las Vegas, Nevada 89031
Attorneys for Plaintiff
Republic Silver State Disposal, Inc.

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TELEPHONE (702) 870-3940
FACSIMILE (702) 870-3950

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 21st day of March, 2016\8, I served the foregoing as follows:

OPPOSITION TO MOTION:

☐ US MAIL: by placing the document(s) listed above in a sealed envelope, postage prepaid, in the United States Mail at Las Vegas, Nevada, addressed to the following:

☐ BY FAX: by transmitting the document(s) listed above via facsimile transmission to the fax number(s) set forth below.

☐ BY HAND-DELIVERY: by hand-delivering the document(s) listed above to the address(es) set forth below.

☐ BY EMAIL: by emailing the document(s) listed above to the email address(es) set forth below.

☒ BY ELECTRONIC SERVICE: by electronically serving the document(s) listed above with the Eighth Judicial District Court's WizNet system upon the following:

BARRON & PRUITT, LLP
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Robert C. McBride, Esq. Heather S. Hall, Esq. CARROLL, KELLY, TROTTER, FRANZEN, MC KENNA & PEABODY 8329 West Sunset Road, Suite 260 Las Vegas, NV 89113 Facsimile: (702) 796-5855 Email: rcmcbride@cktfmlaw.com Email: hshall@cktfmlaw.com *Attorneys for Defendants* *Andrew M. Cash, M.D.* *Andrew M. Cash, M.D., P.C. a/k/a* *Andrew Miller Cash, M.D., P.C.; and* *Desert Institute of Spine Care*	James R. Olson, Esq. Max E. Corrick, II, Esq. Stephanie M. Zinna, Esq. OLSON, CANNON, GORMLEY, ANGULO & STOBERSKI 9950 West Cheyenne Avenue Las Vegas, NV 89129 Facsimile: (702) 383-0701 Email: jolson@ocgas.com Email: mcorrick@ocgas.com Email: szinna@ocgas.com *Attorneys for Defendants* *Bruce Katuna, M.D. and* *Rocky Mountain Neurodiagnostics, LLC*
John H. Cotton, Esq. Michael D. Navratil, Esq. JOHN H. COTTON & ASSOCIATES, LTD. 7900 West Sahara Avenue, Suite 200 Las Vegas, NV 89117 Facsimile: (702) 832-5910 Email: jhcotton@jhcottonlaw.com Email: mdnavratil@jhcottonlaw.com *Attorneys for Defendants* *James D. Balodimas, M.D. and* *James D. Balodimas, M.D., P.C.*	James Murphy, Esq. Daniel C. Tetreault, Esq. LAXALT & NOMURA, LTD. 6720 Via Austi Parkway, Suite 430 Las Vegas, NV 89119 Facsimile: (702) 388-1559 Email: jmurphy@laxalt-nomura.com Email: dtetreault@laxalt-normura.com *Attorneys for Defendant Neuromonitoring Associates, Inc.*
Kim Irene Mandelbaum, Esq. Marie Ellerton, Esq. MANDELBAUM, ELLERTON & ASSOCIATES 2012 Hamilton Lane Las Vegas, NV 89106 Facsimile: (702) 367-1978 Email: filing@meklaw.net *Attorneys for Defendant* *Las Vegas Radiology, LLC*	Anthony D. Lauria, Esq. LAURIA TOKUNAGA GATES & LINN, LLP 1755 Creekside Oaks Drive, Ste. 240 Sacramento, CA 95833 601 South Seventh Street Las Vegas, NV 89101 Facsimile: (702) 387-8635 Email: alauria@lgtlaw.net *Attorneys for Defendant Danielle Miller a/k/a Danielle Shopshire*

/s/ MaryAnn Dillard
An Employee of BARRON & PRUITT, LLP

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OFFICE OF THE SECRETARY OF STATE
OF THE STATE OF COLORADO

CERTIFICATE OF FACT OF GOOD STANDING

I, Wayne W. Williams, as the Secretary of State of the State of Colorado, hereby certify that, according to the records of this office,

Rocky Mountain Neurodiagnostics, Professional LLC

is a

Limited Liability Company

formed or registered on 05/12/2014 under the law of Colorado, has complied with all applicable requirements of this office, and is in good standing with this office. This entity has been assigned entity identification number 20141298354 .

This certificate reflects facts established or disclosed by documents delivered to this office on paper through 03/15/2018 that have been posted, and by documents delivered to this office electronically through 03/19/2018 @ 18:12:59 .

I have affixed hereto the Great Seal of the State of Colorado and duly generated, executed, and issued this official certificate at Denver, Colorado on 03/19/2018 @ 18:12:59 in accordance with applicable law. This certificate is assigned Confirmation Number 10788261 .

Wayne W. Williams

Secretary of State of the State of Colorado

**********End of Certificate**********

Notice: A certificate issued electronically from the Colorado Secretary of State's Web site is fully and immediately valid and effective. However, as an option, the issuance and validity of a certificate obtained electronically may be established by visiting the Validate a Certificate page of the Secretary of State's Web site, http://www.sos.state.co.us/biz/CertificateSearchCriteria.do entering the certificate's confirmation number displayed on the certificate, and following the instructions displayed. Confirming the issuance of a certificate is merely optional and is not necessary to the valid and effective issuance of a certificate. For more information, visit our Web site, http://www.sos.state.co.us/ click "Businesses, trademarks, trade names" and select "Frequently Asked Questions."

EXHIBIT 1

E-Filed

Colorado Secretary of State
Date and Time: 05/12/2014 09:02 AM
ID Number: 20141298354

Document number: 20141298354
Amount Paid: $50.00

Document must be filed electronically.
Paper documents are not accepted.
Fees & forms are subject to change.
For more information or to print copies
of filed documents, visit www.sos.state.co.us.

ABOVE SPACE FOR OFFICE USE ONLY

Articles of Organization

filed pursuant to § 7-80-203 and § 7-80-204 of the Colorado Revised Statutes (C.R.S.)

1. The domestic entity name of the limited liability company is

Rocky Mountain Neurodiagnostics, LLC

(The name of a limited liability company must contain the term or abbreviation "limited liability company", "ltd. liability company", "limited liability co.", "ltd. liability co.", "limited", "l.l.c.", "llc", or "ltd.". See §7-90-601, C.R.S.)

(Caution: The use of certain terms or abbreviations are restricted by law. Read instructions for more information.)

2. The principal office address of the limited liability company's initial principal office is

Street address: 1511 Onyx Circle *(Street number and name)*

Longmont *(City)* CO *(State)* 80504 *(ZIP/Postal Code)*

(Province – if applicable) United States *(Country)*

Mailing address
(leave blank if same as street address)

(Street number and name or Post Office Box information)

(City) *(State)* *(ZIP/Postal Code)*

(Province – if applicable) *(Country)*

3. The registered agent name and registered agent address of the limited liability company's initial registered agent are

Name
(if an individual): Katuna *(Last)* Bruce *(First)* Alan *(Middle)* *(Suffix)*

or

(if an entity)

(Caution: Do not provide both an individual and an entity name.)

Street address: 1511 Onyx Circle *(Street number and name)*

Longmont *(City)* CO *(State)* 80504 *(ZIP Code)*

Mailing address
(leave blank if same as street address): 1511 Onyx Circle *(Street number and name or Post Office Box information)*

Longmont (City) CO (State) 80504 (ZIP Code)

(The following statement is adopted by marking the box.)

☑ The person appointed as registered agent has consented to being so appointed.

4. The true name and mailing address of the person forming the limited liability company are

Name
(if an individual) Katuna (Last) Bruce (First) Alan (Middle) (Suffix)

or

(if an entity) _____

(Caution: Do not provide both an individual and an entity name.)

Mailing address 1511 Onyx Circle
(Street number and name or Post Office Box information)

Longmont (City) CO (State) 80504 (ZIP/Postal Code)

_____ (Province – if applicable) United States (Country)

(If the following statement applies, adopt the statement by marking the box and include an attachment.)

☐ The limited liability company has one or more additional persons forming the limited liability company and the name and mailing address of each such person are stated in an attachment.

5. The management of the limited liability company is vested in
(Mark the applicable box.)

☑ one or more managers.

or

☐ the members.

6. *(The following statement is adopted by marking the box.)*

☑ There is at least one member of the limited liability company.

7. *(If the following statement applies, adopt the statement by marking the box and include an attachment.)*

☐ This document contains additional information as provided by law.

8. *(Caution: Leave blank if the document does not have a delayed effective date. Stating a delayed effective date has significant legal consequences. Read instructions before entering a date.)*

(If the following statement applies, adopt the statement by entering a date and, if applicable, time using the required format.)

The delayed effective date and, if applicable, time of this document is/are _____
(mm/dd/yyyy hour:minute am/pm)

Notice:
Causing this document to be delivered to the Secretary of State for filing shall constitute the affirmation or acknowledgment of each individual causing such delivery, under penalties of perjury, that the document is the individual's act and deed, or that the individual in good faith believes the document is the act and deed of the person on whose behalf the individual is causing the document to be delivered for filing, taken in conformity with the requirements of part 3 of article 90 of title 7, C.R.S., the constituent documents, and the organic statutes, and that the individual in good faith believes the facts stated in the document are true and the document complies with the requirements of that Part, the constituent documents, and the organic statutes.

This perjury notice applies to each individual who causes this document to be delivered to the Secretary of State, whether or not such individual is named in the document as one who has caused it to be delivered..

9. The true name and mailing address of the individual causing the document to be delivered for filing are

Katuna	Bruce	Alan	
(Last)	*(First)*	*(Middle)*	*(Suffix)*

1511 Onyx Circle
(Street number and name or Post Office Box information)

Longmont	CO	80504
(City)	*(State)*	*(ZIP/Postal Code)*

(Province – if applicable) United States. *(Country)*

(If the following statement applies, adopt the statement by marking the box and include an attachment.)

☐ This document contains the true name and mailing address of one or more additional individuals causing the document to be delivered for filing.

Disclaimer:
This form/cover sheet, and any related instructions, are not intended to provide legal, business or tax advice, and are furnished without representation or warranty. While this form/cover sheet is believed to satisfy minimum legal requirements as of its revision date, compliance with applicable law, as the same may be amended from time to time, remains the responsibility of the user of this form/cover sheet. Questions should be addressed to the user's legal, business or tax advisor(s).

OFFICE OF THE SECRETARY OF STATE
OF THE STATE OF COLORADO

CERTIFICATE OF FACT OF TRADE NAME

I, Wayne W. Williams, as the Secretary of State of the State of Colorado, hereby certify that, according to the records of this office, a Statement of Trade Name for:

Rocky Mountain Neurodiagnostics

(Entity ID # 20101562446)

was filed in this office on 10/12/2010 with an effective date of 10/12/2010 .

This certificate reflects facts established or disclosed by documents delivered to this office on paper through 03/19/2018 that have been posted, and by documents delivered to this office electronically through 03/21/2018 @ 14:37:08 .

I have affixed hereto the Great Seal of the State of Colorado and duly generated, executed, and issued this official certificate at Denver, Colorado on 03/21/2018 @ 14:37:08 in accordance with applicable law. This certificate is assigned Confirmation Number 10792943 .

Secretary of State of the State of Colorado

**********End of Certificate**********

Notice: A certificate issued electronically from the Colorado Secretary of State's Web site is fully and immediately valid and effective. However, as an option, the issuance and validity of a certificate obtained electronically may be established by visiting the Validate a Certificate page of the Secretary of State's Web site, http://www.sos.state.co.us/biz/CertificateSearchCriteria.do entering the certificate's confirmation number displayed on the certificate, and following the instructions displayed. Confirming the issuance of a certificate is merely optional and is not necessary to the valid and effective issuance of a certificate. For more information, visit our Web site, http://www.sos.state.co.us/ click "Businesses, trademarks, trade names" and select "Frequently Asked Questions."

Document must be filed electronically
Paper documents will not be accepted.
Document processing fee $20.00
Fees & forms/cover sheets are subject to change.
To access other information or print copies of filed documents, visit www.sos.state.co.us and select Business Center.

E-Filed

Colorado Secretary of State
Date and Time: 10/12/2010 10:07 AM
ID Number: 20101562446

Document number: 20101562446
Amount Paid: $20.00

ABOVE SPACE FOR OFFICE USE ONLY

Statement of Trade Name of an Individual

filed pursuant to §7-71-103 of the Colorado Revised Statutes (C.R.S)

1. The true name of the individual delivering this statement is

Katuna (Last) Bruce (First) Alan (Middle) _____ (Suffix).

2. The principal address of such individual is

Street address

2217 Harvard Ct.
(Street number and name)

Longmont (City) CO (State) 80503 (Postal/Zip Code)

_____ (Province – if applicable) United States (Country – if not US)

Mailing address
(**leave blank** if same as street address)

_____
(Street number and name or Post Office Box information)

_____ (City) _____ (State) _____ (Postal/Zip Code)

_____ (Province – if applicable) _____ (Country – if not US).

3. The trade name under which such individual transacts business or contemplates transacting business in this state is

Rocky Mountain Neurodiagnostics.

4. A brief description of the kind of business transacted or contemplated to be transacted in this state under such trade name is

Remote intraoperative neurophysiologic monitoring.

5. *(If the following statement applies, adopt the statement by marking the box and include an attachment.)*
☐ This document contains additional information as provided by law.

6. ***(Caution:** Leave blank if the document does not have a delayed effective date. Stating a delayed effective date has significant legal consequences. Read instructions before entering a date.)*

(If the following statement applies, adopt the statement by entering a date and, if applicable, time using the required format.)
The delayed effective date and, if applicable, time of this document are _____.
(mm/dd/yyyy hour:minute am/pm)

Notice:

Causing this document to be delivered to the Secretary of State for filing shall constitute the affirmation or acknowledgment of each individual causing such delivery, under penalties of perjury, that such document is such individual's act and deed, or that such individual in good faith believes such document is the act and deed of the person on whose behalf such individual is causing such document to be delivered for filing, taken in conformity with the requirements of part 3 of article 90 of title 7, C.R.S. and, if applicable, the constituent documents and the organic statutes, and that such individual in good faith believes the facts stated in such document are true and such document complies with the requirements of that Part, the constituent documents, and the organic statutes.

This perjury notice applies to each individual who causes this document to be delivered to the Secretary of State, whether or not such individual is identified in this document as one who has caused it to be delivered.

7. The true name and mailing address of the individual causing this document to be delivered for filing are

Katuna	Bruce	Alan	
(Last)	*(First)*	*(Middle)*	*(Suffix)*

2217 Harvard Ct.
(Street number and name or Post Office Box information)

Longmont	CO	80503
(City)	*(State)*	*(Postal/Zip Code)*

	United States
(Province – if applicable)	*(Country – if not US)*

(If the following statement applies, adopt the statement by marking the box and include an attachment.)

☐ This document contains the true name and mailing address of one or more additional individuals causing the document to be delivered for filing.

Disclaimer:

This form/cover sheet, and any related instructions, are not intended to provide legal, business or tax advice, and are furnished without representation or warranty. While this form/cover sheet is believed to satisfy minimum legal requirements as of its revision date, compliance with applicable law, as the same may be amended from time to time, remains the responsibility of the user of this form/cover sheet. Questions should be addressed to the user's legal, business or tax advisor(s).

LAS VEGAS RADIOLOGY, LLC

Business Entity Information

Status:	Revoked	File Date:	8/8/2006
Type:	Domestic Limited-Liability Company	Entity Number:	E0588142006-5
Qualifying State:	NV	List of Officers Due:	8/31/2016
Managed By:	Managers	Expiration Date:	
NV Business ID:	NV20061202724	Business License Exp:	8/31/2016

Additional Information

Central Index Key:	

Registered Agent Information

Registered Agent resigned

Financial Information

No Par Share Count:	0	Capital Amount:	$ 0

No stock records found for this company

Officers

☑ Include Inactive Officers

Manager - PREM KUMAR KITTUSAMY			
Address 1:	7241 W. SAHARA AVE, SUITE 120	Address 2:	
City:	LAS VEGAS	State:	NV
Zip Code:	89117	Country:	USA
Status:	Historical	Email:	
Manager - PREM KUMAR KITTUSAMY			
Address 1:	7241 W. SAHARA AVE, SUITE 120	Address 2:	
City:	LAS VEGAS	State:	NV
Zip Code:	89117	Country:	USA
Status:	Resigned	Email:	

Actions\Amendments

Action Type:	Articles of Organization		
Document Number:	20060508523-21	# of Pages:	4
File Date:	8/8/2006	Effective Date:	
(No notes for this action)			
Action Type:	Initial List		
Document Number:	20060669012-42	# of Pages:	1

EXHIBIT 2

File Date:	10/16/2006	Effective Date:	
ILO			
Action Type:	Amendment		
Document Number:	20070176330-69	# of Pages:	2
File Date:	3/12/2007	Effective Date:	
(No notes for this action)			
Action Type:	Registered Agent Change		
Document Number:	20070176331-70	# of Pages:	1
File Date:	3/12/2007	Effective Date:	
(No notes for this action)			
Action Type:	Annual List		
Document Number:	20070764928-55	# of Pages:	1
File Date:	11/7/2007	Effective Date:	
(No notes for this action)			
Action Type:	Annual List		
Document Number:	20080580624-05	# of Pages:	1
File Date:	8/29/2008	Effective Date:	
(No notes for this action)			
Action Type:	Annual List		
Document Number:	20090784335-41	# of Pages:	1
File Date:	10/29/2009	Effective Date:	
09-10			
Action Type:	Registered Agent Change		
Document Number:	20090911301-56	# of Pages:	1
File Date:	12/22/2009	Effective Date:	
(No notes for this action)			
Action Type:	Annual List		
Document Number:	20100515680-68	# of Pages:	1
File Date:	7/13/2010	Effective Date:	
(No notes for this action)			
Action Type:	Annual List		
Document Number:	20110425819-43	# of Pages:	1
File Date:	6/7/2011	Effective Date:	
(No notes for this action)			
Action Type:	Annual List		
Document Number:	20120600749-31	# of Pages:	1
File Date:	8/30/2012	Effective Date:	
(No notes for this action)			
Action Type:	Registered Agent Change		
Document Number:	20130141850-55	# of Pages:	1
File Date:	2/28/2013	Effective Date:	

(No notes for this action)			
Action Type:	Annual List		
Document Number:	20130532719-43	# of Pages:	1
File Date:	8/13/2013	Effective Date:	
(No notes for this action)			
Action Type:	Registered Agent Change		
Document Number:	20140262651-29	# of Pages:	1
File Date:	4/8/2014	Effective Date:	
(No notes for this action)			
Action Type:	Annual List		
Document Number:	20140592794-33	# of Pages:	1
File Date:	8/18/2014	Effective Date:	
2014-2015			
Action Type:	Commercial Registered Agent Resignation		
Document Number:	20150365829-61	# of Pages:	1
File Date:	8/14/2015	Effective Date:	
(No notes for this action)			
Action Type:	Acceptance of Registered Agent		
Document Number:	20150380451-29	# of Pages:	1
File Date:	8/26/2015	Effective Date:	
(No notes for this action)			
Action Type:	Annual List		
Document Number:	20150404051-02	# of Pages:	1
File Date:	9/10/2015	Effective Date:	
(No notes for this action)			
Action Type:	Commercial Registered Agent Resignation		
Document Number:	20160161328-00	# of Pages:	1
File Date:	4/8/2016	Effective Date:	
(No notes for this action)			
Action Type:	Resignation of Officers		
Document Number:	20160288889-62	# of Pages:	1
File Date:	6/28/2016	Effective Date:	
(No notes for this action)			

PREMIER PHYSICIANS
INSURANCE COMPANY
A Risk Retention Group

PREMIER PHYSICIANS INSURANCE COMPANY, INC.

SCHEDULE A

INSURED:
Kittusamy, LLP
7241 W. Sahara Avenue, #120
Las Vegas, NV 89117

POLICY NUMBER: RRG-062027
Medical Specialty: Cardiology/Radiology

Policy Term: 08/01/2015 to 08/01/2016

Schedule A: Additional Insureds

Name	Retroactive Date	Liability Limits
Kittusamy, LLP & Prem Kittusamy dba: Las Vegas Radiology	08/01/2007	$1M/$3M Shared Limits

BY: **K. Warren Volker MD, PhD**
Chairman

DATE ISSUED: **August 07, 2015**

PPIC-DEC-Schedule A -Ver.3 - Rev 10/08

EXHIBIT 3

Dr. Andrew Cash:

- Wants MEP testing for procedures at L1 and above: cervical, thoraco-lumbar and SSEPs and EMG's for all procedures.
- For thoracic fusions, remind him **before** the procedure starts that we cannot test above T7, but T6 can **maybe** show stimulation when tested
- Remind him to test screws on Lumbars.
- He wants MEPs tested regularly AND after every cage placement, so please ask him.
- Probe for screw testing should be dropped during draping before incision.
- During screw testing, respond with "above 20" or stating the actual response number, if it was below 20 mA. See/record CMAP, turn stimulus off, then report response. Do not continue with stimulation or dial down the mA. The order of this process is important to Cash.

EXHIBIT 4

- For spinal cord stimulators only do external obliques for monitoring the T6-T12 ab muscles. He does not want electrodes showing up on x-ray images.
- At Dr. Cash's surgery center; run your pods along the pain managment bed under the mattress or tape them to the underside. The cases are primarily Lien's. You may have to ask the patient for attorney contact information if it's not on their facesheet.
- Procedures are primarily OLIFs. Rep is Maryann, she provides the probe for testing.
- OLIF's (oblique approach) dialator testing, surgeon has requested we all test the approach in the same way; 1) slowly test from 0 mA to 3mA (go up in 0.1mA increments) 2) turn stim off (do not dial down the mA), 3) inform him of mA response saying "no response at 3mA" or "response at ___mA". Make sure to stop the stim as soon as you see a response so you don't depolarize the nerve. He wants you to stop the stim before you tell him what the response was. He said anything over 3mA is safe.
- Cash has requested we do NOT cut through the patient stockings.

RIS
Kim Irene Mandelbaum, Esq.
Nevada Bar No. 318
Marie Ellerton, Esq.
Nevada Bar No. 4581
Sherman B. Mayor, Esq.
Nevada Bar No. 1491
MANDELBAUM, ELLERTON & ASSOCIATES
2012 Hamilton Lane
Las Vegas, Nevada 89106
Telephone: (702) 367-1234
Fax No.: (702) 367-1978
E-mail: filing@meklaw.net
Attorneys for Defendant
Las Vegas Radiology, LLC

DISTRICT COURT

CLARK COUNTY, NEVADA

REPUBLIC SILVER STATE DISPOSAL, INC., a Nevada Corporation

Plaintiff,

vs.

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; JAMES D. BALODIMAS, M.D.; JAMES D. BALODIMAS, M.D., P.C.; LAS VEGAS RADIOLOGY, LLC, a Nevada Limited Liability Company; BRUCE A. KATUNA, M.D.; ROCKYMOUNTAIN NEURODIAGNOSTICS, LLC, a Colorado Limited Liability Company; DANIELLE MILLER aka DANIELLE SHOPSHIRE; NEURO-MONITORING ASSOCIATES, INC., a Nevada Corporation; DOES 1 - 10, inclusive; and ROE CORPORATIONS 1 - 10 inclusive,

Defendants.

CASE NO.: A-16-738123-C
DEPT. NO.: XXX

REPLY IN SUPPORT OF DEFENDANT LAS VEGAS RADIOLOGY'S MOTION TO "CAP" NON-ECONOMIC DAMAGES PER NRS 41A.035

Date of Hearing: 04/05/17
Time of Hearing: 9:00 a.m.

COMES NOW, Defendant, LAS VEGAS RADIOLOGY, LLC, by and through their counsel of record, Kim Irene Mandelbaum, Esq., Marie Ellerton, Esq. and Sherman B. Mayor, Esq. of MANDELBAUM ELLERTON & ASSOCIATES, and files this Reply in Support of its Motion for an order capping non-economic damages at $350,000 per NRS 41A.035.

This Reply is made and based on the papers and pleadings on file herein, the Points and Authorities attached hereto and any oral argument which may be adduced at a hearing set for this matter.

Dated this 28th day of March, 2018.

MANDELBAUM, ELLERTON & ASSOCIATES

KIM IRENE MANDELBAUM, ESQ.
Nevada Bar No. 318
MARIE ELLERTON, ESQ.
Nevada Bar No. 4581
SHERMAN B. MAYOR, ESQ.
Nevada Bar No. 1491
2012 Hamilton Lane
Las Vegas, Nevada 89106
Attorneys for Defendant
Las Vegas Radiology, LLC

STATEMENT OF FACTS

1. REPUBLIC "STEPS INTO THE SHOES" OF MARIE GONZALES

On January 14, 2012, a garbage truck owned and operated by Republic Silver State Disposal (Republic) struck the vehicle being operated by Marie Gonzales. Marie Gonzales claimed she suffered personal injury in the accident and filed suit against Republic and its driver, Deval Hatcher. Marie Gonzales, the plaintiff, was treated by a number of health care providers following the accident. At no time did Marie Gonzales bring an action against any of her health care providers contending they caused, contributed to, or exacerbated injuries she sustained when struck by Republic's garbage truck.

In a hasty maneuver, on July 6, 2015, Republic decided to settle Marie Gonzales' claims against Republic and its driver for the total sum of $2,000,000.00[1]. In that settlement, Republic prepared a release with the following language:

> ". . . this SETTLEMENT AGREEMENT RELEASE and 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 may possess ***against any of her***

[1] In settling with Marie Gonzales for any potential claims she might possess against her medical treatment providers, Republic did not contact the treatment providers or consult with them, in any manner, when "settling" Gonzales' claims against the providers.

> ***medical treatment providers*** for injuries she alleges to have sustained in the described incident of January 14, 2012." [Emphasis added.]

Then, on June 8, 2016, Republic filed a lawsuit against a number of Marie Gonzales' subsequent medical treatment provider for "contribution". Republic's Amended Complaint was filed 19 days later on June 27, 2016. Notwithstanding the injuries plaintiff Marie Gonzales sustained in her collision with Republic's garbage truck, Republic asserts Marie Gonzales sustained additional injury due to alleged medical malpractice from the instant defendants.

It does not appear that the underlying plaintiff, Marie Gonzales, had personally settled, or extinguished any claims she potentially might have against any of her medical treatment providers. Instead, Marie Gonzales settled with Republic resolving any exposure Republic had to Ms. Gonzales along with any potential claims Ms. Gonzales may possess against any of her medical treatment providers.

Republic now sues the subsequent medical treatment providers of Marie Gonzales for contribution claiming that its $2,000,000.00 settlement exceeded Republic's liability for Marie Gonzales' injuries. Republic seeks "contribution" from the medical treatment providers including this provider, Las Vegas Radiology. However, as the law set forth later in this brief demonstrates, **When Republic settled with Marie Gonzales for any potential claims she may possess against any of her medical treatment providers, Republic gained only those rights which the injured plaintiff (Marie Gonzales) may have had against those same providers.**

That is, in settling any potential claims Marie Gonzales may have possessed against any of her medical treatment providers, Republic " . . . stepped into the shoes . . ." of Marie Gonzales in bringing its contribution action.

2. THE ONLY CLAIM AGAINST LAS VEGAS RADIOLOGY IS VICARIOUS LIABILITY.

Republic spends about 4 pages of its opposing brief exploring whether this defendant, Las Vegas Radiology, is a provider of healthcare, as defined by NRS 41A.017, Republic goes to great lengths in filibustering/discussing whether Las Vegas Radiology is defined as a provider under the original NRS 41A.017 (2013 version) or whether Las Vegas Radiology becomes a provider of healthcare only in the 2015 version of that same statute.

As the argument set forth below will demonstrate, it is immaterial which version of NRS 41A.017 applies to Las Vegas Radiology (or whether the statute applies to Las Vegas Radiology at all). Las Vegas Radiology is only a named defendant in this case, per paragraph 69 or Republic's Amended Complaint, based upon the theory of vicarious liability (NRS 41.130). Specifically, there is no independent claim of negligence against Las Vegas Radiology in Plaintiff's Amended Complaint. Las Vegas Radiology is only a defendant for the alleged negligence and damages caused by James D. Balodimas, M.D. (Paragraph 69 of Republic's Amended Complaint).

Dr. Balodimas is a "provider of healthcare" within the meaning of NRS 41A.017 (in either the 2013 or 2015 versions of the statute). Because Dr. Balodimas is defined as a "provider of healthcare", actions against him sounding in medical malpractice are"capped" at $350,000 (non-economic damages) per NRS 41A.035. As such, the alleged vicarious liability of Las Vegas Radiology for any negligence of Dr. Balodimas is also necessarily "capped" at $350,000 for non-economic damages.[2]

POINTS AND AUTHORITIES

ARGUMENT

1. Republic's Recovery in this Contribution Action is Limited to the Amount that Marie Gonzales (Plaintiff) Could have Recovered had She Directly Sued her Medical Treatment Providers for Medical Malpractice.

Marie Gonzales was injured in her collision with the Republic garbage truck on January 14, 2012. Ms. Gonzales received medical care subsequent to her accident from a number of healthcare providers. If Ms Gonzales believed that she sustained additional injury as the result of alleged medical malpractice, she could have directly pursued claims against her medical treatment providers.

In this case, one of the Defendants is James D. Balodimas, M.D. (licensed by the Nevada State Board of Medical Examiners on August 4, 2000). Dr. Balodimas is a "provider of healthcare" licensed pursuant to Chapter 630 of the NRS within the meaning of NRS 41A.017. Dr. Balodimas was so licensed at the time he rendered care to Marie Gonzales (CT scan interpretation of February 12, 2013). Dr. Balodimas' liability exposure for non-economic damages is "capped" or limited to a total of $350,000 per NRS 41A.035. *See Tam v. Eighth Judicial District Court*, 131 Nev. Adv. Rpt. 80, 358 P.3d 234

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[2] Hence, Republic's tortured analysis regarding NRS 41A.017 is irrelevant to the "cap" issue germane to this motion.

(2015).

This moving Defendant, Las Vegas Radiology, is asserted to be vicariously liable for the care rendered by James D. Balodimas, M.D. to Marie Gonzales. There is no claim of independent negligence against Las Vegas Radiology. Since Dr. Balodimas' non-economic damage liability exposure is $350,000, then, the maximum liability exposure Las Vegas Radiology can have, for non-economic damage is $350,000.[3]

However, Marie Gonzales did not file a direct action lawsuit against Dr. Balodimas or Las Vegas Radiology. Instead, Ms. Gonzales chose to enter into a $2,000,000 settlement on July 6, 2015 with Republic. In that settlement, Marie Gonzales settled all of her claims against Republic **and** any potential claims she might possess against any of her medical treatment providers. As such, Republic purchased Ms. Gonzales' potential claims against her healthcare providers as part of its settlement. Republic now seeks subrogation by way of an action for "contribution" to recover some portion of its $2,000,000 settlement from Ms. Gonzales' medical treatment providers.

The source of contribution in a "contribution" action is subrogation. *Lebleu v. Southern Silica of Louisiana*, 554 So.2d 852 (3rd Cir. Ct.App. Louisiana 1989). In *In re W.R. Grace & Company*, 212 U.S.Dist. LEXIS 88887 (D.Del. 2012), BNSF Company sought contribution from W.R. Grace " . . . for personal injury lawsuits it previously defended or will defend . . . related to the Grace asbestos". BNSF paid claimants' damages which were due, in part, to the negligence of Grace. The court found that BNSF's recovery against Grace was limited to the amount a direct claimant (underlying injured plaintiff) could have recovered had that plaintiff brought a direct claim against Grace:

> " . . . An indirect claimant must first prove that it paid all, or a significant portion, of a liability that Grace owed to a direct claimant. The indirect claimant can then pursue an indemnity and/or ***contribution claim*** against the trust. At this point, the indirect claimant assumes the same position as a direct claimant and is entitled to recover from the trust **the same amount that a direct claimant could have recovered had it brought a direct *claim* against the trust itself.**" (Emphasis added to last sentence only.)

As such, BNSF was limited in its recovery for contribution against Grace to the maximum amount

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[3] It is denied that Dr. Balodimas is an "employee" of Las Vegas Radiology, and it is also denied that even if Dr. Balodimas is an employee, that he was negligent in the care provided to Marie Gonzales.

that the underlying plaintiff could have obtained from Grace. In *Bowers v. NCAA*, 171 F.Supp.2d 389 (U.S. Dist. N.J. 2001), the court, in discussing elements of a "contribution claim" noted that if a third party defendant " . . . would have been immune from suit by the principal plaintiff, there can be no claim for contribution. . . ." Here, there is not a claim of total immunity by Dr. Balodimas or Las Vegas Radiology per Nevada Statute. There is a claim that these Defendants are "capped" at $350,000 for non-economic damages. The claim for contribution by Republic, then, is limited to the capped amount.

Perhaps this concept is best stated in *Cleary Brothers Construction Co. v. Upper Keys Marine Construction, Inc.*, 526 So.2d 116 (Ct.App. Fla. 3rd Dist. 1988) where the court stated as follows:

> "Subrogation rights place a party . . . in the legal position of one who has been paid money because of the acts of a third party. Thus, the subrogee "stands in the ***shoes***" of the subrogor and is entitled to all of the rights of its subrogor, but also suffers all of the liabilities to which the subrogor would be subject."

In this case, Republic claims that it paid money to Marie Gonzales because of the acts of her subject treating medical providers. Republic "stands in the shoes" of Marie Gonzales in bringing its contribution action against the medical providers. While Republic is entitled to all the rights of Marie Gonzales, it also suffers " . . . all of the liabilities. . ." for which Marie Gonzales would be subject. *See Cleary*. One of the liabilities Marie Gonzales would have suffered in a direct action against her medical treatment providers is a $350,000 cap on non-economic damages per NRS 41A.035.

Nevada law is consistent with this sound legal principle. In *Pack v. LaTourette*, 128 Nev. 264, 277 P.3d 1246 (Nev. 2012), plaintiff, David Zinni, was injured in an automobile accident struck by Sun Taxi driver, Thomas Pack. Zinni sought medical treatment from Dr. Gary LaTourette. Sun Taxi brought a contribution claim against Dr. LaTourette asserting that he exacerbated Zinni's injuries by negligently treating him after the car accident. However, Sun Taxi did not attach an expert affidavit to its Complaint for contribution against Dr. LaTourette. The Nevada Supreme Court dismissed the action per NRS 41A.071. The Court stated in pertinent part as follows:

> "Here, Sun Cab's complaint rested upon the theory that LaTourette's negligence had contributed to Zinni's injuries. **In other words, to establish a right to contribution, Sun Cab would have been required to establish that LaTourette committed medical malpractice. Thus, Sun Cab is required to satisfy the statutory prerequisites in place for a medical malpractice action before bringing its contribution claim.** *Fierle*, 125 Nev. at 736-38, 219 P.3d at 911-12." (Emphasis added.)

Similarly, in *Truck Ins. Exch. v. Tetzlaff, M.D.*, 683 F.Supp.223, (U.S.Dist.Ct. Nev. 1988) a plaintiff, Jamie Liston sued and settled with St. Francis Medical Center. The medical center brought an indemnity action against Thomas Tetzlaff, M.D. contending that its settlement with Mr. Liston was caused by Dr. Tetzlaff's negligence. The U.S. District Court of Nevada found that even though St. Francis's claim against Dr. Tetzlaff was an "indemnity" action, the claim was clearly grounded in alleged medical malpractice. As a result, the court found that NRS 41A.016 applied (screening panel provision) and required compliance. In fact, the U.S. District Court of Nevada found that the court had " . . . no discretion to refuse to apply NRS 41A.016. . . ."

As in *Pack* and *Tetzlaff*, Republic's action for contribution against Las Vegas Radiology and Dr. Balodimas is clearly grounded in alleged medical malpractice. In fact, in allowing Republic to pursue its contribution claim based upon Defendants' alleged professional negligence, this Court (The Honorable District Court Jerry A. Wiese) specifically stated that the requirements of NRS 41A had to be satisfied. (Order of December 2, 2016.)

The Nevada Supreme Court in *Pack v. LaTourette*, specifically noted that even in a contribution action statutory limitations should apply to protect doctors from frivolous claims (*citing to Fierle v. Perez*, 125 Nev. 728, 219 P.3d 906 (Nev. 2009)). As is so eloquently stated in *Cleary Brothers Construction Co. v. Upper Keys Marine Construction, Inc.*, 526 So.2d 116 (Ct.App. Fla. 3rd Dist. 1988), subrogation rights place a party ". . . in the legal position of one who has been paid money because of the acts of a third party. Thus, the subrogee 'stands in the shoes' of the subrogor is entitled to all of the rights of its subrogor but also suffers all of the liabilities to which the subrogor would be subject."

Here, had Marie Gonzales sued Dr. Balodimas and Las Vegas Radiology, directly, she would have had a $350,000 non-economic damage cap per NRS 41A.035 as a limitation. Republic, in bringing a contribution action clearly grounded in alleged medical malpractice does not get to avoid that same damage cap. To the contrary the court is required to apply the same statutory limitations.

2. Since the Only Claim Against Las Vegas Radiology Is Vicarious Liability for Dr. Balodimas' Treatment Rendered to Plaintiff, it Is Immaterial Whether the Radiology Group Is a Healthcare Provider per NRS 41A.017.

The only liability exposure to Republic's contribution action as to this Defendant, Las Vegas Radiology, is for alleged vicarious liability of Dr. Balodimas per NRS 41.130. *See* Plaintiff's Amended

Complaint paragraph 69. There is no independent claim of negligence against Las Vegas Radiology.

Las Vegas Radiology's liability exposure, then, mirrors the liability exposure of Dr. Balodimas. Dr. Balodimas, as a defined provider of healthcare per NRS 41A.017, is subject to a maximum of $350,000 for any professional negligence claim with regard to non-economic damage. As such, Las Vegas Radiology's exposure for vicarious liability for non-economic damage is also $350,000.[4]

Plaintiff argues, somehow, that NRS 41A.035 does not apply in this case since that statute pertains to "professional negligence" in "an action for injury or death" brought against a "provider of healthcare" by an "injured plaintiff". In response, Republic "steps into the shoes" of Marie Gonzales in pursuing its contribution action which is clearly grounded in medical malpractice. *In re W.R. Grace & Company*, 212 U.S.Dist. LEXIS 88887 (D.Del. 2012); *Bowers v. NCAA*, 171 F.Supp.2d 389 (U.S. Dist. N.J. 2001); *Cleary Brothers Construction Co. v. Upper Keys Marine Construction, Inc.*, 526 So.2d 116 (Ct.App. Fla. 3rd Dist. 1988).

Republic purchased by settlement the potential direct action lawsuit Marie Gonzales may have brought against her medical treatment providers. By purchasing Marie Gonzales' direct action claims, the claims do not, then, improve after purchase. Instead, Republic in a contribution action grounded in medical malpractice is left to pursue those same claims. Marie Gonzales, as a malpractice plaintiff, would have been "injured" for "personal injury" by "professional negligence" by a physician, Dr. Balodimas who was a "provider of healthcare" within the meaning of NRS 41A.017. As such, NRS 41A.035 applies to the claims Republic purchased from Marie Gonzales notwithstanding that the claims are now called an action for "contribution".[5]

3. Las Vegas Radiology's Exposure, if Any, is for the Vicarious Liability, Only, of a "Provider of Healthcare" (Dr. Balodimas).

Plaintiff, Republic, spends 4-5 pages of its opposing brief arguing that some Defendants in this

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[4] Per *Tam v. Eighth Judicial District Court*, 131 Nev. Adv. Rpt. 80, 358 P.3d 234 (2015), a Plaintiff is only entitled to a single $350,000 cap on non-economic damage per case regardless of how many healthcare providers are Defendants.

[5] When Republic purchased, by settlement, Marie Gonzales' potential direct action claims, the claims don't improve as a result of the purchase. Further, when Las Vegas Radiology is sued for vicarious liability for Dr. Balodimas, Las Vegas Radiology's exposure does not increase beyond the exposure of Dr. Balodimas. Arguments to the contrary are essentially nonsensical.

action are not "providers of healthcare" within the meaning of NRS 41A.035 (and therefore are not entitled to a $350,000 non-economic damage cap). Such argument, respectfully, is irrelevant to this Motion, as this Motion pertains to Las Vegas Radiology and its vicarious liability for James Balodimas, M.D. who is a "provider of healthcare" as a physician licensed per Chapter 630 of the NRS.

CONCLUSION

Had Marie Gonzales, the underlying Plaintiff, sued James Balodimas, M.D. for medical malpractice and also sued Las Vegas Radiology contending it is vicariously liable for Dr. Balodimas, such action would have been capped at $350,000 for non-economic damages (*see Tam*).

Republic, in purchasing Marie Gonzales' potential direct action claim against these two Defendants, gains only those rights which injured plaintiff Marie Gonzales had against these same two providers. That is, an action grounded in medical malpractice which has a "cap" for non-economic damages. The $350,000 non-economic damage cap must, respectfully, be applied to Republic's claims against Las Vegas Radiology and James Balodimas, M.D. per the requirements of NRS 41A.035.

Dated this 28th day of March, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of March, 2018, I forwarded a copy of the above and foregoing **REPLY IN SUPPORT OF DEFENDANT LAS VEGAS RADIOLOGY'S MOTION TO "CAP" NON-ECONOMIC DAMAGES PER NRS 41A.035** as follows:

__X__ served on all parties electronically pursuant to mandatory NEFCR 4(b);

___ by depositing in the United States Mail, first-class postage prepaid, at Las Vegas, Nevada, enclosed in a sealed envelope; or

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DISTRICT COURT

CLARK COUNTY, NEVADA

*****

REPUBLIC SILVER STATE DISPOSAL, INC., a Nevada Corporation,

Plaintiff

vs.

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; JAMES D. BALODIMAS, M.D.; JAMES D. BALODIMAS, M.D., P.C.; LAS VEGAS RADIOLOGY, LLC, a Nevada Limited Liability Company; BRUCE A. KATUNA, M.D.; ROCKY MOUNTAIN NEURODIAGNOSTICS, LLC, a Colorado Limited Liability Company; DANIELLE MILLER aka DANIELLE SHOPSHIRE; NEUROMONITORING ASSOCIATES, INC., a Nevada Corporation; DOES 1-10 inclusive; and ROE CORPORATIONS 1-10 inclusive

Defendants.

Case No.: A-16-738123-C

Dept No.: XXX

PLAINTIFF REPUBLIC SILVER STATE DISPOSAL, INC.'S OPPOSITION TO DEFENDANT LAS VEGAS RADIOLOGY, LLC'S MOTION IN LIMINE TO PERMIT COLLATERAL SOURCE PAYMENT EVIDENCE PER NRS 42.021

Plaintiff REPUBLIC SILVER STATE DISPOSAL, INC., by and through its counsel BARRON & PRUITT, LLP, hereby submits the following Opposition to Defendant Las Vegas Radiology, LLC's Motion in Limine NRS 42.021.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. PREFATORY STATEMENT

The motion pending before this Court is, like Defendant Las Vegas Radiology's motion impose the non-economic damages cap of $350,000, ordinarily applied to medical malpractice cases; but in this case, it is a NRCP 56(d) motion for partial summary judgment[1] on the issue of recoverable damages. As discussed below, many triable facts remain, including the fundamental matter of whether admissible collateral payments were made in the first place. Until such controversies are resolved, there is no basis for granting summary judgment on recoverable damages and accordingly this motion should be denied.

However, before even considering the substance of Defendant's instant "Motion in Limine," the Court should deny Defendant's motion on the basis that Defendant's counsel failure to comply with Court rules in filing the Motion. EDCR 2.47. Because Defense counsel failed to attempt to confer with Plaintiff's counsel prior to filing the motion. Accordingly, this Motion is improper for noncompliance with EDCR 2.47.

On the merits of the argument, Las Vegas Radiology's reasoning relies on NRCP 42.021, which provides in pertinent part:

> In an action for injury or death against a provider of health care based upon professional negligence, if the defendant so elects, the defendant may introduce evidence of any amount payable as a benefit to the plaintiff as a result of the injury or death pursuant to the United States Social Security Act, any state or federal income disability or worker's compensation act, any health, sickness or income-disability insurance, accident insurance that provides health benefits or income-disability coverage, and any contract or agreement of any group, organization, partnership or corporation to provide, pay for or reimburse the cost of medical, hospital, dental or other health care services.

At the outset, the instant Motion commits the same basic error as Las Vegas Radiology's preceding motion, in that it mistakenly seeks protections or affirmative defenses that are only available in first-

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[1] NCRP 56(d) states in full:

> **(d) Case Not Fully Adjudicated on Motion.** If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

party medical malpractice claims. It bears emphasis that there is presently no pending medical malpractice claims and that Plaintiff fully rebutted the faulty assumption that rules protecting treatment providers in medical malpractice actions apply here in its Opposition to Las Vegas Radiology's Motion to "Cap" Non-Economic Damages Per NRS 41A.035. Those arguments are incorporated by reference herein.

Moreover, as Defendant Las Vegas Radiology could have (and would have) determined prior to filing this Motion if its counsel had complied with EDCR 2.47(b) prior to filing this Motion, Plaintiff knows of no collateral source payments as described in NRS 42.021. On information and belief, Marie Gonzalez's medical treatment stemming from the subject accident in the underlying matter was made on the basis of physicians' liens, which were resolved by Ms. Gonzalez's counsel Ryan Anderson before settlement funds were disbursed. If collateral payments were made, they were not disclosed in the underlying case and as such Plaintiff would not know of them. In any event, Defendant's Motion fails as an evidentiary motion since there is currently no evidence of collateral payments because such payments exist only in speculation. For that reason, and because this is an improper motion for partial summary judgment, this Motion should be denied.

II. LEGAL ARGUMENT

a. Plaintiff is not a medical malpractice claimant and therefore NRS 42.021 does not apply.

As in its Motion to "Cap" Non-Economic Damages Per NRS 41A.035, Las Vegas Radiology mistakenly treats Plaintiff as though it is a medical malpractice plaintiff were in fact there is no pending medical malpractice cause of action. The reasoning articulated in Plaintiff's Opposition to that Motion applies with equal force here, as both NRS 42.021 and NRS 41A.035 applies only in actions brought by first-party medical malpractice claimants—not where an action is for contribution with an underlying basis in medical negligence. This is so because only a medical malpractice claimant can benefit from collateral sources For the sake of brevity, Plaintiff's reasoning with respect to the inapplicability of NRS 41A.035 in that Opposition is incorporated herein with respect to the applicability of NRS 42.021.

b. The instant Motion is a NRCP 56(d) motion for partial summary judgment where facts remain in controversy and Defendant is not entitled to judgment as a matter of law.

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Defendant's Motion makes much of the fact that "Republic [...] was not in an equal position with the medical treatment providers at the time of its settlement." By this, Defendant seems to argue that while the medical treatment providers' *noneconomic* damages are limited to $350,000.00 by NRS 41A.035 (which is the subject of a separate motion pending before this Court) and *economic* damages limited by NRS 42.021, Republic's share of the damages is not similarly limited. Neither contention is appropriate outside a motion for summary adjudication, since each goes directly to the issue of damages. The reasons for treating such Motions as motions for summary adjudication are stated in Plaintiff's Opposition to Las Vegas Radiology's Motion to "Cap" Non-Economic Damages Per NRS 41A.035, and Plaintiff's arguments therein are incorporated here by reference.

Defendant cites McCrosky v. Carson Tahoe Regional Medical Center, 133 Nev. ___, 408 P.3d 149, in favor of applying NRS 42.021 here. However, its reliance is misplaced. McCrosky was a first-party medical malpractice claim and is therefore fundamentally distinguishable from this contribution action. McCrosky involved "an action for personal injury or death against a provider of health care," per NRS 42.021, whereas this Court specifically held that Plaintiff did not have standing to bring a claim for personal injury against the Defendant health care providers and dismissed Plaintiff's medical malpractice cause of action. This case now proceeds solely as a contribution action, and Plaintiff seeks recovery not for personal injuries sustained as a result of Defendant's medical negligence, but for an unnecessarily inflated settlement due to the same negligence. Thus, NRS 42.021 does not apply.

Since this is functionally a motion for partial summary judgment on the issue of damages that Plaintiff may or may not recover, Defendant must show that there is no issue of material fact in order for the Court to rule on damages as a matter of law. However, Defendant's Motion is uncertain about the very existence of collateral sources of payment. The only collateral sources cited for certain in Defendant's Motion are liens sold to an entity known as DCP Services, LLP. However, liens are inadmissible to prove the value of medical treatment as a matter of course. In Khoury v/. Seastrand, 132 Nev ___, 377 P.3d 81, 93, the Nevada Supreme Court extended its holding in Tri-Cty. Equipment & Leasing v. Klinke, 128 Nev. 352, 286 P.3d 594 (2012), and held that "evidence regarding the sale of medical liens is [...] irrelevant to a jury's determination of the reasonable value of medical services

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provided." Accordingly, lien evidence is inadmissible for proving the value of Plaintiff's damages here.

Moreover, it is unclear what, precisely, Defendant's motion is after if not an outright limitation on damages under NRS 42.021. In Nevada, it is well settled that motions in limine are a proper means of providing the Court an opportunity to determine in advance whether specific evidence should be admitted or excluded at the time of trial. State ex rel. Dept. of Highways v. Nevada Aggregates & Asphalt Co., 92 Nev. 370, 376 (1976); EDCR 2.47. Nevada motions in limine are of two types: to either exclude or admit evidence before commencement of trial; or as a "prophylactic" motion to preclude "mentioning potentially inadmissible evidence in opening statement, or eliciting such evidence from a witness, until the district court has had the opportunity to rule on the evidence's admissibility." *Nevada Practice Manual*, Pretrial Conferences and Motions in Limine, §18.02 [1]. Defendant's instant Motion does none of these things, precisely because it is functionally a motion for partial summary judgment on the issue of (again, hypothetical) collateral payments in a bid to limit Plaintiff's damages. Because it fails as a motion for partial summary judgment for lack of factual clarity, it should be denied.

c. Defendant's Counsel failed to meet the mandatory conference requirements of EDCR 2.47 and accordingly this Motion should be denied.

EDCR 2.47 governs motions in limine EDCR 2.47(b) reads in full:

> Motions in limine may not be filed unless an unsworn declaration under penalty of perjury or affidavit of moving counsel is attached to the motion setting forth that after a conference or a good-faith effort to confer, counsel have been unable to resolve the matter satisfactorily. A "conference" requires a personal or telephone conference between or among counsel. Moving counsel must set forth in the declaration/affidavit what attempts to resolve the matter were made, what was resolved, what was not resolved and the reasons therefore. If a personal or telephone conference was not possible, the declaration/affidavit shall set forth the reasons.

Defendant's Motion was filed without an EDCR 2.47 declaration and is accordingly improper. In fact, no attempt was made to to confer with Plaintiff's counsel was made. If Defendant had made an attempt to confer with Plaintiff's counsel, it would have learned that Plaintiff does not possess any evidence suggesting that collateral payments were made for Marie Gonzalez's medical treatment.

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Unless Defendant knows of heretofore undisclosed evidence regarding such, at this time, purely hypothetical collateral payments, there is simply no purpose for this motion in limine.

While Defendant's Motion asks for an order permitting discovery on the collateral sources of payment, there is no account for why any collateral sources of payment would not be *discoverable*, nor is securing a ruling on discoverability the purpose of motion in limine. If collateral source materials were discovered, *then* would be the time to bring a motion in limine to determine whether they were admissible or whether they should be excluded? Defendant's instant Motion is therefore premature not only because it was filed before any efforts were made at conferring with opposing counsel pursuant to EDCR 2.47, but because the evidence that the Court would either exclude or admit has yet to be discovered and may or may not exist. In effect, Defendant is asking for an advance ruling that any collateral source payment discovered *will be admissible*. For those reasons, this Motion is insufficient as a motion in limine and should be denied.

III. CONCLUSION

Based on the foregoing argument, Defendant Las Vegas Radiology's Motion in Limine to Permit Collateral Source Evidence Per NRS 42.021 should be denied.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 2nd day of April, 2018, I served the foregoing **OPPOSITION etc.** as follows:

☐ US MAIL: by placing the document(s) listed above in a sealed envelope, postage prepaid, in the United States Mail at Las Vegas, Nevada, addressed to the following:

☐ BY FAX: by transmitting the document(s) listed above via facsimile transmission to the fax number(s) set forth below.

☐ BY HAND-DELIVERY: by hand-delivering the document(s) listed above to the address(es) set forth below.

☐ BY EMAIL: by emailing the document(s) listed above to the email address(es) set forth below.

☒ BY ELECTRONIC SERVICE: by electronically serving the document(s) listed above with the Eighth Judicial District Court's WizNet system upon the following:

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Robert C. McBride, Esq. Heather S. Hall, Esq. CARROLL, KELLY, TROTTER, FRANZEN, MC KENNA & PEABODY 8329 West Sunset Road, Suite 260 Las Vegas, NV 89113 Facsimile: (702) 796-5855 Email: rcmcbride@cktfmlaw.com Email: hshall@cktfmlaw.com *Attorneys for Defendants Andrew M. Cash, M.D. Andrew M. Cash, M.D., P.C. a/k/a Andrew Miller Cash, M.D., P.C.; and Desert Institute of Spine Care*	James R. Olson, Esq. Max E. Corrick, II, Esq. Stephanie M. Zinna, Esq. OLSON, CANNON, GORMLEY, ANGULO & STOBERSKI 9950 West Cheyenne Avenue Las Vegas, NV 89129 Facsimile: (702) 383-0701 Email: jolson@ocgas.com Email: mcorrick@ocgas.com Email: szinna@ocgas.com *Attorneys for Defendants Bruce Katuna, M.D. and Rocky Mountain Neurodiagnostics, LLC*
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/s/ MaryAnn Dillard
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DISTRICT COURT

CLARK COUNTY, NEVADA

REPUBLIC SILVER STATE DISPOSAL, INC., a Nevada Corporation

Plaintiff,

vs.

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; JAMES D. BALODIMAS, M.D.; JAMES D. BALODIMAS, M.D., P.C.; LAS VEGAS RADIOLOGY, LLC, a Nevada Limited Liability Company; BRUCE A. KATUNA, M.D.; ROCKYMOUNTAIN NEURODIAGNOSTICS, LLC, a Colorado Limited Liability Company; DANIELLE MILLER aka DANIELLE SHOPSHIRE; NEURO-MONITORING ASSOCIATES, INC., a Nevada Corporation; DOES 1 - 10, inclusive; and ROE CORPORATIONS 1 - 10 inclusive,

Defendants.

CASE NO.: A-16-738123-C
DEPT. NO.: XXX

REPLY IN SUPPORT OF DEFENDANT LAS VEGAS RADIOLOGY'S MOTION IN LIMINE TO PERMIT COLLATERAL SOURCE PAYMENT EVIDENCE PER NRS 42.021

Date of Hearing: 04/17/18
Time of Hearing: 9:00 a.m.

COMES NOW, Defendant, LAS VEGAS RADIOLOGY, LLC, by and through their counsel of record, Kim Irene Mandelbaum, Esq., Marie Ellerton, Esq. and Sherman B. Mayor, Esq. of MANDELBAUM ELLERTON & ASSOCIATES, and files this Reply in Support of its Motion in Limine to Permit Collateral Source Payment Evidence per NRS 42.021.

This Reply is made and based on the papers and pleadings on file herein, the Points and Authorities attached hereto and any oral argument which may be adduced at a hearing set for this matter.

Dated this 10th day of April, 2018.

MANDELBAUM, ELLERTON & ASSOCIATES

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Prefatory Note

This Defendant, Las Vegas Radiology's "Motion in Limine" to Permit Collateral Source Payment Evidence Per NRS 42.021 was styled, as an oversight, perhaps, as a "Motion in Limine". Plaintiff argues, that this Motion should really be more fairly described as an NRCP Rule 56(d) motion for partial summary judgment since it addresses an issue of recoverable damages. Plaintiff cannot have the Motion carry the standard of Rule 56 and at the same time demand a Rule 2.47 Conference. In any event, unless the Court rules otherwise, the Motion will be addressed on its merits below.

REPLY FACTS

In opposing Defendant's Motion to Permit Collateral Source Payment Evidence Per NRS 42.021, Republic argues on page 3 of its Opposition (lines 8-15) that Marie Gonzales' medical treatment stemming from the subject accident " . . . was made on the basis of physician liens, which were resolved by Ms. Gonzales' counsel Ryan Anderson before settlement funds were disbursed. . . ."

Such is an interesting position since Republic contends in paragraph 49 of its Amended Complaint in this case as follows:

> Gonzales' computation of damages pursuant to NRCP 16.1 (a) (1) (C) in the Gonzalez v. Hatcher, Republic Silver State Disposal, Inc. matter, as supported by expert opinion, through June 15,2015 included the following

economic damages:

a. Past medical expenses (inclusive of all billings before and after January 29, 2013)-$ 1,108,510.16 . . .

Further, Republic was asked, in this case, to admit that Gonzales' damage claims, prior to settlement, included $1,108,510.16 in past medical expenses. Republic admitted that its paragraph 49 so states that information. It is somewhat unclear whether Republic is stating that its settlement did not resolve Plaintiff's past medical expenses or merely that Republic had no knowledge of the actual payments made to resolve such past medical bills.

If Republic's settlement did not pay for or resolve any of the past medical expenses, then such cannot be a damage component for Republic's contribution action. If Republic has no knowledge of the amount that was actually paid to resolve Marie Gonzales' past medical expenses via liens, then such is precisely the reason why the collateral source exception provided in NRS 42.021 should apply to determine such actual amounts for consideration by the jury. In Nevada, a jury in medical malpractice litigation is not required to accept gross bills without evidence of the amount actually needed to resolve the bills. The specific purpose for this is to reduce verdicts and keep our doctors in Nevada.[1]

ARGUMENT

1. In Seeking Contribution, Republic "Stands in the Shoes" of Marie Gonzales (Underlying Plaintiff) and is Entitled to All of her Rights and Suffers all of the Liabilities to Which She Would be Subject.

The source of contribution in a "contribution" action is subrogation. *Lebleu v. Southern Silica of Louisiana*, 554 So.2d 852 (3rd Cir. Ct.App. Louisiana 1989). In pursuing subrogation/contribution, the subrogee (Republic) " . . . stands in the shoes" of the subrogor (Marie Gonzles) and is entitled to all of the rights of Ms. Gonzales, but also suffers all the liabilities to which she would be subject. *Cleary Brothers Construction Co. v. Upper Keys Marine Construction, Inc.*, 526 So.2d 116 (Ct.App. Fla. 3rd Dist. 1988). Indeed, in *In re W.R. Grace & Company*, 212 U.S.Dist. LEXIS 88887 (D.Del. 2012), the Court stated in pertinent part as follows:

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[1] It may be understandable why Republic did not seek the actual amount paid to resolve Marie Gonzales' underlying auto accident medical expenses (since no collateral source exception applied to that case). However, when Republic chose to settle Gonzales' claims for the healthcare providers, as well, the collateral source exception in NRS 42.021 would have applied (and does apply in this contribution action).

> " . . . An indirect claimant must first prove that it paid all, or a significant portion, of a liability that Grace owed to a direct claimant. The indirect claimant can then pursue an indemnity and/or ***contribution claim*** against the trust. At this point, the indirect claimant assumes the same position as a direct claimant and is entitled to recover from the trust **the same amount that a direct claimant could have recovered had it brought a direct *claim* against the trust itself**." (Emphasis added to last sentence only.)

Had Marie Gonzales pursued direct claims for medical malpractice against her treating healthcare providers, then, any collateral source information pertaining to payment of her past medical expenses (including medical liens and writedowns of same) would have been admissible in evidence. NRS 42.021 provides:

> "1. In an action for injury or death against a provider of health care based upon professional negligence, if the defendant so elects, the defendant **may introduce evidence of any amount payable as a benefit** to the plaintiff as a result of the injury or death pursuant to the United States Social Security Act, any state or federal income disability or worker's compensation act, any health, sickness or income-disability insurance, accident insurance that provides health benefits or income-disability coverage, **and any contract or agreement of any group, organization, partnership or corporation to provide, pay for or reimburse the cost of medical, hospital, dental or other health care services.** If the defendant elects to introduce such evidence, the plaintiff may introduce evidence of any amount that the plaintiff has paid or contributed to secure the plaintiff's right to any insurance benefits concerning which the defendant has introduced evidence." (Emphasis added.)[2]

Since Republic's contribution action is grounded in medical malpractice, and NRS 42.021 is a collateral source exception in the State of Nevada for medical malpractice litigation, the exception applies to Republic's contribution action. In its Opposition, Republic cites to the Nevada Supreme Court decision rendered in *Khoury v. Seastrand*, 377 P.3d 81 (Nev. 2016) which relied upon the language of *Tri-City, Equip. & Leasing v. Klinke*, 128 Nev. 352, 286 P.3d 594 (Nev. 2012).

However, Plaintiff's reliance on the *Seastrand* and *Klinke* cases is misplaced. Neither *Seastrand* nor *Klinke* were medical malpractice cases. The principle in *Klinke* (later relied upon by *Seastrand*) merely provides that writedowns as negotiated between a medical provider and a third party, at the very least, lead to an inference of collateral source. And, citing to *Proctor v. Castelletti,* 911 P.2d 853 (Nev. 1996), collateral source evidence is inadmissible in non medical malpractice litigation. The Nevada Supreme Court specifically states in *Klinke*:

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[2] Medical liens which have been negotiated and have resolved all of Plaintiff's past medical expenses, per NRS 42.020 would certainly qualify as "any contract" to provide, pay for or reimburse the cost of medical, hospital, dental or other healthcare services.

> " . . . evidence of writedowns creates the same risk of prejudice that the collateral source rule is meant to combat . . ."

However, Plaintiff's contribution action in the instant case is grounded upon medical malpractice. In stepping into the shoes of Marie Gonzales, Republic also subjects itself to the requirements of NRS 42.021 (a statutory exception to the collateral source rule for medical malpractice litigation) in pursuing its contribution action. (And *Klinke* and *Seastrand* do not apply.) Moreover, NRS 42.021 (the medical malpractice exception to the collateral source rule) has recently been determined to be valid and "intact" with respect to state or private collateral source payments. *McCrosky v. Carson Tahoe Regional Medical Center*, 133 Nev. Adv. Rep. 115, 408 P.3d 149 (Nev. 2017).

CONCLUSION

If Republic, in paying $2,000,000.00 to settle itself (and the medical providers) from this litigation did not pay for Marie Gonzales' past medical expenses, then such cannot be a component damage in Republic's contribution action. Alternatively, if Republic is stating that it has no knowledge of the actual amount paid to resolve the physician liens which, in turn, paid Marie Gonzales' medical expenses, then, collateral source evidence is needed to determine the actual amount paid (not just the gross bill provided in paragraph 49 of Republic's Amended Complaint.

A medical malpractice exception to the general collateral source rule in Nevada allows discovery for precisely this reason (to allow a jury to consider the evidence of the amounts actually paid versus gross bills). Republic offers no valid argument to avoid the application of NRS 42.021 in this contribution action which is "grounded" in medical malpractice.

Dated this 10th day of April, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of April, 2018, I forwarded a copy of the above and foregoing **REPLY IN SUPPORT OF DEFENDANT LAS VEGAS RADIOLOGY'S MOTION IN LIMINE TO PERMIT COLLATERAL SOURCE PAYMENT EVIDENCE PER NRS 42.021** as follows:

__X__ served on all parties electronically pursuant to mandatory NEFCR 4(b);

___ by depositing in the United States Mail, first-class postage prepaid, at Las Vegas, Nevada, enclosed in a sealed envelope; or

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DISTRICT COURT

CLARK COUNTY, NEVADA

REPUBLIC SILVER STATE DISPOSAL, INC., a Nevada Corporation

Plaintiff,

vs.

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; JAMES D. BALODIMAS, M.D.; JAMES D. BALODIMAS, M.D., P.C.; LAS VEGAS RADIOLOGY, LLC, a Nevada Limited Liability Company; BRUCE A. KATUNA, M.D.; ROCKYMOUNTAIN NEURODIAGNOSTICS, LLC, a Colorado Limited Liability Company; DANIELLE MILLER aka DANIELLE SHOPSHIRE; NEURO-MONITORING ASSOCIATES, INC., a Nevada Corporation; DOES 1 - 10, inclusive; and ROE CORPORATIONS 1 - 10 inclusive,

Defendants.

CASE NO.: A-16-738123-C
DEPT. NO.: XXX

ORDER GRANTING DEFENDANT LAS VEGAS RADIOLOGY'S MOTION TO "CAP" NON-ECONOMIC DAMAGES PER NRS 41A.035 AND JOINDERS TO SAME

Date of Hearing: 04/05/18
Time of Hearing: 9:00 a.m.

Defendant LAS VEGAS RADIOLOGY, LLC'S Motion to Cap Non-Economic Damages Per NRS 41A.035 having come on for hearing on the 5th day of April, 2018, and Defendants Andrew M. Cash, M.D.; Andrew M. Cash, M.D., P.C.; Desert Institute of Spine Care, LLC; James D. Balodimas, M.D.; James D. Balodimas, M.D., P.C.; Bruce A. Katuna, M.D. and Rocky Mountain Neurodiagnostics,

LLC having filed Joinders to same; and

David Barron, Esq. of Barron & Pruitt, LLC, appearing on behalf of Plaintiff Republic Silver State Disposal, Inc.; Sherman B. Mayor, Esq. of Mandelbaum Ellerton & Associates on behalf of Defendant Las Vegas Radiology; Heather Hall, Esq. of Carroll, Kelly, Trotter, Franzen, McBride & Peabody appearing on behalf of Defendants Andrew M. Cash, M.D.; Andrew M. Cash, M.D., P.D.; Desert Institute of Spine Care, LLC; Michael Navratil, Esq. of John H. Cotton & Associates appearing on behalf of James D. Balodimas, M.D. and James D. Balodimas, M.D., P.C.; James R. Olson, Esq. of Olson Cannon Gormley, appearing on behalf of Defendants Bruce A. Katuna, M.D. and Rocky Mountain Neurodiagnostics, LLC; James E. Murphy, Esq. of Lewis Brisbois Bisgaard & Smith, appearing on behalf of Defendant Neuromonitoring Associates, Inc.; and Anthony Lauria, Esq. of Lauria Tokunaga Gates & Linn, LLP on behalf of Defendant Danielle Miller aka Danielle Shopshire; and

The Court having reviewed the papers and pleadings on file herein and having heard argument of counsel and being otherwise duly advised in the premises, makes the following findings of fact, conclusions of law and orders:

UNDISPUTED MATERIAL FACTS

On January 14, 2012, a garbage truck owned and operated by Republic Silver State Disposal (Republic) struck the vehicle being operated by underlying Plaintiff, Marie Gonzales (Marie Gonzales). Marie Gonzales claimed she suffered personal injury in the accident and filed suit against Republic and its driver, Deval Hatcher on September 4, 2013. Marie Gonzales, the Plaintiff, was treated by a number of healthcare providers following the accident.

In the course of her care, Ms. Gonzales received certain medical care and/or services from Andrew M. Cash, M.D. (orthopedic surgeon - Nevada #11944); Desert Institute of Spine Care, LLC; James D. Balodimas, M.D. (radiologist - Nevada #9538); Las Vegas Radiology, LLC; Bruce A. Katuna, M.D. (neurologist - Nevada #14236); Rocky Mountain Neurodiagnostics, LLC; Neuromonitoring Associates; and Danielle Miller aka Danielle Shopshire (Neuro-Monitoring Associates).

At no time did Marie Gonzales bring an action against any of her above-referenced health care providers contending they caused, contributed to, or exacerbated injuries she sustained when struck by

Republic's garbage truck.

Several years later, on July 6, 2015, Republic settled Marie Gonzales' claims against Republic and Deval Hatcher for the total sum of $2,000,000.00. In that settlement, Republic prepared a Release which included the following language:

> ". . . this SETTLEMENT AGREEMENT RELEASE and 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 may possess ***against any of her medical treatment providers*** for injuries she alleges to have sustained in the described incident of January 14, 2012." [Emphasis added.]

Then, on June 8, 2016, Republic filed a lawsuit against a number of Marie Gonzales' subsequent treating healthcare providers for "contribution". Republic asserts that Marie Gonzales sustained additional injury due to alleged medical malpractice. Republic contends, as a result, that its $2,000,000 settlement payment exceeded Republic's liability for Marie Gonzales' injuries.

Defendant Las Vegas Radiology served a set of Requests for Admission upon Republic. Request for Admission No. 16 and the Response to same by Republic are as follows:

> **REQUEST NO. 16:**
> Admit that any potential non-economic claims or liabilities Plaintiff Marie Gonzales may have asserted against her treating medical providers are capped at a total amount of $350,000 per NRS 41A.035.
>
> **RESPONSE TO REQUEST NO. 16:**
> Republic admits[sic] that NRS 41A.035 would have applied had Marie Gonzales sued any or all of her negligent health care providers.

On March 2, 2018, Las Vegas Radiology, LLC filed a Motion to Cap Non-Economic Damages at "$350,000" per NRS 41A.035. Las Vegas Radiology contends that Republic's contribution action is grounded and based upon claims for professional negligence and is therefore subject to the requirements of NRS Chapter 41A which would include the "cap" on non-economic damage per NRS 41A.035. (That indirect Plaintiff Republic "steps into the shoes" of direct plaintiff Marie Gonzales from whom the professional negligence actions were obtained by settlement.)

Plaintiff, Republic, contends that its contribution action was brought under Nevada's adaptation of the Uniform Contribution Among Tortfeasors Act (UCATA) and that the statutory requirements of NRS 41A.035 do not apply to such an action.

CONCLUSIONS OF LAW

A. When Republic Settled with Marie Gonzales for Any Potential Claims She May Possess Against Any of Her Medical Treatment Providers, Republic "Stands in the Shoes" of Marie Gonzales in Pursuing Contribution Against the Providers.

On July 6, 2015, Republic settled with Marie Gonzales for the sum of $2,000,000. Such settlement discharged Republic's liability for its auto accident with Gonzales, and also discharged and extinguished any of Marie Gonzales' claims for "economic" and "non-economic" damage she may possess against her subsequent medical treatment providers.

Having settled, Republic then, on June 8, 2016, filed a lawsuit against the medical treatment providers of Marie Gonzales for "contribution". Nevada law obligates a plaintiff seeking contribution from healthcare providers, which is based upon claims of professional negligence, to satisfy the requirements of NRS Chapter 41A. *See Pack v. LaTourette*, 128 Nev. 264, 277 P.3d 1246 (Nev. 2012) and *Truck Insurance Exchange v. Tetzlaff*, 683 F.Supp. 233 (Nev. 1988) and December 2, 2016 Order of this Court.

In pursuing a contribution action, Republic " . . . stands in the shoes" of underlying plaintiff, Marie Gonzles. Republic is entitled to all of the rights of Ms. Gonzales, but also suffers all the liabilities to which she would be subject. *Cleary Brothers Construction Co. v. Upper Keys Marine Construction, Inc.*, 526 So.2d 116 (Ct.App. Fla. 3rd Dist. 1988). In *In re W.R. Grace & Company*, 212 U.S.Dist. LEXIS 88887 (D.Del. 2012), the Court stated in pertinent part as follows:

> " . . . An indirect claimant must first prove that it paid all, or a significant portion, of a liability that Grace owed to a direct claimant. The indirect claimant can then pursue an indemnity and/or ***contribution claim*** against the trust. At this point, the indirect claimant assumes the same position as a direct claimant and is entitled to recover from the trust **the same amount that a direct claimant could have recovered had it brought a direct *claim* against the trust itself.**" (Emphasis added to last sentence only.)

Here, had underlying plaintiff, Marie Gonzales sued moving and joinder healthcare providers (as a direct plaintiff), her recovery, if any, would have been limited to $350,000, in total, for non-economic damages per NRS 41A.035. As such, Republic (as an indirect plaintiff) is also limited to this same capped amount.

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B. Republic's Contribution Action Based Upon Claims of Professional Negligence Against the Moving and Joinder Defendants is Capped at $350,000 in Non-Economic Damages.

In Nevada, an action based upon professional negligence against a "provider of health care" may not exceed $350,000 in non-economic damage per NRS 41A.035. A "provider of health care" is defined in NRS 41A.017 to include " . . . a physician licensed pursuant to Chapter 630 or 633 of NRS . . .".

The instant Motion to "cap" non-economic damages was brought by Las Vegas Radiology which is alleged to be vicariously liable for Defendant James D. Balodimas, M.D. Joining the Motion were Defendants James D. Balodimas, M.D.; James D. Balodimas, M.D., P.C.; Andrew M. Cash, M.D.; Andrew M. Cash, M.D., P.C.; Desert Institute of Spine Care, LLC; Bruce A. Katuna, M.D. and Rocky Mountain Neurodiagnostics, LLC.

Per NRS 41A.035, the non-economic damage cap set forth in NRS 41A.035 applies to Drs. Balodimas, Cash and Katuna and their professional corporations (PC) per NRS 41A.017. Further, since each of the 3 Defendant group practices are asserted to be vicariously liable for each of the 3 physician Defendants, and no claim of independent negligence having been asserted, each of the professional groups' non-economic damage exposure mirrors the non-economic damage exposure of the physician employees. *See*, *Busch v. Flangas*, 873 P.2d 438 (Nev. 1992)(vicarious liability is not the conduct of the employer but the alleged tortious conduct of an agent performing within the scope of employment).

Accordingly, moving and joinder Defendants (Las Vegas Radiology, LLC; James D. Balodimas, M.D.; James D. Balodimas, M.D., P.C.; Andrew M. Cash, M.D.; Andrew M. Cash, M.D., P.C.; Desert Institute of Spine Care, LLC; Bruce A. Katuna, M.D. and Rocky Mountain Neurodiagnostics, LLC) are capped at $350,000, in total, for any recovery by Republic for non-economic damages.

Remaining Defendants Danielle Miller a/k/a Danielle Shopshire and Neuromonitoring Associates, Inc. did not file Joinders in Las Vegas Radiology's Motion to "Cap" Non-Economic Damages per NRS 41A.035 and hence, the Court has not considered such issue as it would apply to these two Defendants.

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ORDER

Accordingly, it is hereby ORDERED, ADJUDGED and DECREED that

1. Defendant Las Vegas Radiology's Motion to Cap Non-Economic Damages per NRS 41A.035 is hereby granted.

2. The Joinders to Defendant Las Vegas Radiology's Motion to Cap Non-Economic Damages per NRS 41A.035 filed by Defendants Andrew M. Cash, M.D.; Andrew M. Cash, M.D., P.C. and Desert Institute of Spine Care, LLC and Defendants James D. Balodimas, M.D. and James D. Balodimas, M.D., P.C.; and Defendants Bruce A. Katuna, M.D. and Rocky Mountain Neurodiagnostics, LLC are also granted.

3. The Non-Economic damage cap of $350,000 applies, in total, as a single cap to all moving and Joinder Defendants only; and

4. Defendants Danielle Miller aka Danielle Shopshire and Neuromonitoring Associates, Inc. did not file Joinders in the pending Motion, and accordingly, the applicability of the cap as to these two Defendants was not before the Court for decision.

DATED this 10 day of May, 2018.

DISTRICT COURT JUDGE

DRG

Respectfully Submitted by:

MANDELBAUM, ELLERTON & ASSOCIATES

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DISTRICT COURT

CLARK COUNTY, NEVADA

REPUBLIC SILVER STATE DISPOSAL, INC., a Nevada Corporation

Plaintiff,

vs.

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; JAMES D. BALODIMAS, M.D.; JAMES D. BALODIMAS, M.D., P.C.; LAS VEGAS RADIOLOGY, LLC, a Nevada Limited Liability Company; BRUCE A. KATUNA, M.D.; ROCKYMOUNTAIN NEURODIAGNOSTICS, LLC, a Colorado Limited Liability Company; DANIELLE MILLER aka DANIELLE SHOPSHIRE; NEURO-MONITORING ASSOCIATES, INC., a Nevada Corporation; DOES 1 - 10, inclusive; and ROE CORPORATIONS 1 - 10 inclusive,

Defendants.

CASE NO.: A-16-738123-C
DEPT. NO.: XXX

NOTICE OF ENTRY OF ORDER

Date of Hearing:
Time of Hearing:

TO: ALL PARTIES AND THEIR RESPECTIVE COUNSEL OF RECORD:

///

///

PLEASE TAKE NOTICE that an Order has been entered in the above-entitled matter on the 14th day of May, 2018, a copy of which is attached hereto.

Dated this 15th day of May, 2018.

MANDELBAUM, ELLERTON & ASSOCIATES

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CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of May, 2018, I forwarded a copy of the above and foregoing **NOTICE OF ENTRY OF ORDER** as follows:

__X__ served on all parties electronically pursuant to mandatory NEFCR 4(b);

___ by depositing in the United States Mail, first-class postage prepaid, at Las Vegas, Nevada, enclosed in a sealed envelope; or

_____ by facsimile transmission as indicated below; or

_____ both U.S. Mail and facsimile TO:

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DISTRICT COURT

CLARK COUNTY, NEVADA

REPUBLIC SILVER STATE DISPOSAL, INC., a Nevada Corporation

Plaintiff,

vs.

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; JAMES D. BALODIMAS, M.D.; JAMES D. BALODIMAS, M.D., P.C.; LAS VEGAS RADIOLOGY, LLC, a Nevada Limited Liability Company; BRUCE A. KATUNA, M.D.; ROCKYMOUNTAIN NEURODIAGNOSTICS, LLC, a Colorado Limited Liability Company; DANIELLE MILLER aka DANIELLE SHOPSHIRE; NEURO-MONITORING ASSOCIATES, INC., a Nevada Corporation; DOES 1 - 10, inclusive; and ROE CORPORATIONS 1 - 10 inclusive,

Defendants.

CASE NO.: A-16-738123-C
DEPT. NO.: XXX

ORDER GRANTING DEFENDANT LAS VEGAS RADIOLOGY'S MOTION TO "CAP" NON-ECONOMIC DAMAGES PER NRS 41A.035 AND JOINDERS TO SAME

Date of Hearing: 04/05/18
Time of Hearing: 9:00 a.m.

Defendant LAS VEGAS RADIOLOGY, LLC'S Motion to Cap Non-Economic Damages Per NRS 41A.035 having come on for hearing on the 5th day of April, 2018, and Defendants Andrew M. Cash, M.D.; Andrew M. Cash, M.D., P.C.; Desert Institute of Spine Care, LLC; James D. Balodimas, M.D.; James D. Balodimas, M.D., P.C.; Bruce A. Katuna, M.D. and Rocky Mountain Neurodiagnostics,

LLC having filed Joinders to same; and

David Barron, Esq. of Barron & Pruitt, LLC, appearing on behalf of Plaintiff Republic Silver State Disposal, Inc.; Sherman B. Mayor, Esq. of Mandelbaum Ellerton & Associates on behalf of Defendant Las Vegas Radiology; Heather Hall, Esq. of Carroll, Kelly, Trotter, Franzen, McBride & Peabody appearing on behalf of Defendants Andrew M. Cash, M.D.; Andrew M. Cash, M.D., P.D.; Desert Institute of Spine Care, LLC; Michael Navratil, Esq. of John H. Cotton & Associates appearing on behalf of James D. Balodimas, M.D. and James D. Balodimas, M.D., P.C.; James R. Olson, Esq. of Olson Cannon Gormley, appearing on behalf of Defendants Bruce A. Katuna, M.D. and Rocky Mountain Neurodiagnostics, LLC; James E. Murphy, Esq. of Lewis Brisbois Bisgaard & Smith, appearing on behalf of Defendant Neuromonitoring Associates, Inc.; and Anthony Lauria, Esq. of Lauria Tokunaga Gates & Linn, LLP on behalf of Defendant Danielle Miller aka Danielle Shopshire; and

The Court having reviewed the papers and pleadings on file herein and having heard argument of counsel and being otherwise duly advised in the premises, makes the following findings of fact, conclusions of law and orders:

UNDISPUTED MATERIAL FACTS

On January 14, 2012, a garbage truck owned and operated by Republic Silver State Disposal (Republic) struck the vehicle being operated by underlying Plaintiff, Marie Gonzales (Marie Gonzales). Marie Gonzales claimed she suffered personal injury in the accident and filed suit against Republic and its driver, Deval Hatcher on September 4, 2013. Marie Gonzales, the Plaintiff, was treated by a number of healthcare providers following the accident.

In the course of her care, Ms. Gonzales received certain medical care and/or services from Andrew M. Cash, M.D. (orthopedic surgeon - Nevada #11944); Desert Institute of Spine Care, LLC; James D. Balodimas, M.D. (radiologist - Nevada #9538); Las Vegas Radiology, LLC; Bruce A. Katuna, M.D. (neurologist - Nevada #14236); Rocky Mountain Neurodiagnostics, LLC; Neuromonitoring Associates; and Danielle Miller aka Danielle Shopshire (Neuro-Monitoring Associates).

At no time did Marie Gonzales bring an action against any of her above-referenced health care providers contending they caused, contributed to, or exacerbated injuries she sustained when struck by

Republic's garbage truck.

Several years later, on July 6, 2015, Republic settled Marie Gonzales' claims against Republic and Deval Hatcher for the total sum of $2,000,000.00. In that settlement, Republic prepared a Release which included the following language:

> ". . . this SETTLEMENT AGREEMENT RELEASE and 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 may possess ***against any of her medical treatment providers*** for injuries she alleges to have sustained in the described incident of January 14, 2012." [Emphasis added.]

Then, on June 8, 2016, Republic filed a lawsuit against a number of Marie Gonzales' subsequent treating healthcare providers for "contribution". Republic asserts that Marie Gonzales sustained additional injury due to alleged medical malpractice. Republic contends, as a result, that its $2,000,000 settlement payment exceeded Republic's liability for Marie Gonzales' injuries.

Defendant Las Vegas Radiology served a set of Requests for Admission upon Republic. Request for Admission No. 16 and the Response to same by Republic are as follows:

> **REQUEST NO. 16:**
> Admit that any potential non-economic claims or liabilities Plaintiff Marie Gonzales may have asserted against her treating medical providers are capped at a total amount of $350,000 per NRS 41A.035.
>
> **RESPONSE TO REQUEST NO. 16:**
> Republic admits[sic] that NRS 41A.035 would have applied had Marie Gonzales sued any or all of her negligent health care providers.

On March 2, 2018, Las Vegas Radiology, LLC filed a Motion to Cap Non-Economic Damages at "$350,000" per NRS 41A.035. Las Vegas Radiology contends that Republic's contribution action is grounded and based upon claims for professional negligence and is therefore subject to the requirements of NRS Chapter 41A which would include the "cap" on non-economic damage per NRS 41A.035. (That indirect Plaintiff Republic "steps into the shoes" of direct plaintiff Marie Gonzales from whom the professional negligence actions were obtained by settlement.)

Plaintiff, Republic, contends that its contribution action was brought under Nevada's adaptation of the Uniform Contribution Among Tortfeasors Act (UCATA) and that the statutory requirements of NRS 41A.035 do not apply to such an action.

CONCLUSIONS OF LAW

A. When Republic Settled with Marie Gonzales for Any Potential Claims She May Possess Against Any of Her Medical Treatment Providers, Republic "Stands in the Shoes" of Marie Gonzales in Pursuing Contribution Against the Providers.

On July 6, 2015, Republic settled with Marie Gonzales for the sum of $2,000,000. Such settlement discharged Republic's liability for its auto accident with Gonzales, and also discharged and extinguished any of Marie Gonzales' claims for "economic" and "non-economic" damage she may possess against her subsequent medical treatment providers.

Having settled, Republic then, on June 8, 2016, filed a lawsuit against the medical treatment providers of Marie Gonzales for "contribution". Nevada law obligates a plaintiff seeking contribution from healthcare providers, which is based upon claims of professional negligence, to satisfy the requirements of NRS Chapter 41A. *See Pack v. LaTourette*, 128 Nev. 264, 277 P.3d 1246 (Nev. 2012) and *Truck Insurance Exchange v. Tetzlaff*, 683 F.Supp. 233 (Nev. 1988) and December 2, 2016 Order of this Court.

In pursuing a contribution action, Republic " . . . stands in the shoes" of underlying plaintiff, Marie Gonzles. Republic is entitled to all of the rights of Ms. Gonzales, but also suffers all the liabilities to which she would be subject. *Cleary Brothers Construction Co. v. Upper Keys Marine Construction, Inc.*, 526 So.2d 116 (Ct.App. Fla. 3rd Dist. 1988). In *In re W.R. Grace & Company*, 212 U.S.Dist. LEXIS 88887 (D.Del. 2012), the Court stated in pertinent part as follows:

> " . . . An indirect claimant must first prove that it paid all, or a significant portion, of a liability that Grace owed to a direct claimant. The indirect claimant can then pursue an indemnity and/or ***contribution claim*** against the trust. At this point, the indirect claimant assumes the same position as a direct claimant and is entitled to recover from the trust **the same amount that a direct claimant could have recovered had it brought a direct *claim* against the trust itself.**" (Emphasis added to last sentence only.)

Here, had underlying plaintiff, Marie Gonzales sued moving and joinder healthcare providers (as a direct plaintiff), her recovery, if any, would have been limited to $350,000, in total, for non-economic damages per NRS 41A.035. As such, Republic (as an indirect plaintiff) is also limited to this same capped amount.

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B. Republic's Contribution Action Based Upon Claims of Professional Negligence Against the Moving and Joinder Defendants is Capped at $350,000 in Non-Economic Damages.

In Nevada, an action based upon professional negligence against a "provider of health care" may not exceed $350,000 in non-economic damage per NRS 41A.035. A "provider of health care" is defined in NRS 41A.017 to include " . . . a physician licensed pursuant to Chapter 630 or 633 of NRS . . .".

The instant Motion to "cap" non-economic damages was brought by Las Vegas Radiology which is alleged to be vicariously liable for Defendant James D. Balodimas, M.D. Joining the Motion were Defendants James D. Balodimas, M.D.; James D. Balodimas, M.D., P.C.; Andrew M. Cash, M.D.; Andrew M. Cash, M.D., P.C.; Desert Institute of Spine Care, LLC; Bruce A. Katuna, M.D. and Rocky Mountain Neurodiagnostics, LLC.

Per NRS 41A.035, the non-economic damage cap set forth in NRS 41A.035 applies to Drs. Balodimas, Cash and Katuna and their professional corporations (PC) per NRS 41A.017. Further, since each of the 3 Defendant group practices are asserted to be vicariously liable for each of the 3 physician Defendants, and no claim of independent negligence having been asserted, each of the professional groups' non-economic damage exposure mirrors the non-economic damage exposure of the physician employees. *See*, *Busch v. Flangas*, 873 P.2d 438 (Nev. 1992)(vicarious liability is not the conduct of the employer but the alleged tortious conduct of an agent performing within the scope of employment).

Accordingly, moving and joinder Defendants (Las Vegas Radiology, LLC; James D. Balodimas, M.D.; James D. Balodimas, M.D., P.C.; Andrew M. Cash, M.D.; Andrew M. Cash, M.D., P.C.; Desert Institute of Spine Care, LLC; Bruce A. Katuna, M.D. and Rocky Mountain Neurodiagnostics, LLC) are capped at $350,000, in total, for any recovery by Republic for non-economic damages.

Remaining Defendants Danielle Miller a/k/a Danielle Shopshire and Neuromonitoring Associates, Inc. did not file Joinders in Las Vegas Radiology's Motion to "Cap" Non-Economic Damages per NRS 41A.035 and hence, the Court has not considered such issue as it would apply to these two Defendants.

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ORDER

Accordingly, it is hereby ORDERED, ADJUDGED and DECREED that

1. Defendant Las Vegas Radiology's Motion to Cap Non-Economic Damages per NRS 41A.035 is hereby granted.

2. The Joinders to Defendant Las Vegas Radiology's Motion to Cap Non-Economic Damages per NRS 41A.035 filed by Defendants Andrew M. Cash, M.D.; Andrew M. Cash, M.D., P.C. and Desert Institute of Spine Care, LLC and Defendants James D. Balodimas, M.D. and James D. Balodimas, M.D., P.C.; and Defendants Bruce A. Katuna, M.D. and Rocky Mountain Neurodiagnostics, LLC are also granted.

3. The Non-Economic damage cap of $350,000 applies, in total, as a single cap to all moving and Joinder Defendants only; and

4. Defendants Danielle Miller aka Danielle Shopshire and Neuromonitoring Associates, Inc. did not file Joinders in the pending Motion, and accordingly, the applicability of the cap as to these two Defendants was not before the Court for decision.

DATED this 10 day of May, 2018.

DISTRICT COURT JUDGE

Respectfully Submitted by:

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DISTRICT COURT

CLARK COUNTY, NEVADA

*****

REPUBLIC SILVER STATE DISPOSAL, INC., a Nevada Corporation, Plaintiff vs. ANDREW M. CASH, M.D.; DESERT INSTITUTE OF SPINE CARE, LLC, a Nevada Limited Liability Company; JAMES D. BALODIMAS, M.D.; 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 aka DANIELLE SHOPSHIRE; NEUROMONITORING ASSOCIATES; DOES 1-10 inclusive; and ROE CORPORATIONS 1-10 inclusive Defendants.	Case No.: A-16-738123-C Dept No.: XXX **SECOND AMENDED COMPLAINT & JURY DEMAND**

Plaintiff REPUBLIC SILVER STATE DISPOSAL, INC., by and through its attorneys, BARRON & PRUITT, LLP, complains and alleges against Defendants as follows:

PARTIES

1. Plaintiff, REPUBLIC SILVER STATE DISPOSAL, INC. is and was at all relevant times a Nevada corporation doing business in Clark County, Nevada.

2. Defendant ANDREW M. CASH, M.D. (CASH) is and was at all times relevant a resident of the state of Nevada; a physician licensed to practice medicine in Nevada as defined by NRS 630.014 and NRS 630.020; and doing business as a practicing physician in Clark County,

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Nevada, holding himself out as board certified and specializing in the field of orthopedic and spinal surgery.

3. Defendant ANDREW M. CASH, M.D., P.C. (CASH P.C.), is a Nevada professional corporation doing business as ANDREW M. CASH, M.D. On information and belief, Defendant CASH P.C. may also be or have been known as "ANDREW MILLER CASH, M.D., P.C." in filings with Nevada Secretary of State.

4. Defendant DESERT INSTITUTE OF SPINE CARE, LLC, is a Nevada limited liability company providing surgical and health care services in Clark County, Nevada.

5. Defendants ANDREW M. CASH, M.D.; ANDREW M. CASH, M.D., P.C. or ANDREW MILLER CASH, M.D., P.C.; or all of them is a member of Defendant DESERT INSTITUTE OF SPINE CARE, LLC. Moreover Defendants CASH; CASH P.C.; and DESERT INSTITUTE OF SPINE CARE is the agent, partner, joint venturer, employee and alter-ego of the other.

6. Defendants CASH and/or CASH P.C. were at all times relevant employees and/or agents of Defendant DESERT INSTITUTE OF SPINE CARE, LLC and in all acts or omissions complained of in this Amended Complaint, were acting within such employment and/or agency.

7. Defendant JAMES D. BALODIMAS, M.D. (BALODIMAS) was at all times relevant a resident of the state of Nevada; a physician licensed to practice medicine in Nevada as defined by NRS 630.014 and NRS 630.020; and doing business as a practicing physician in Clark County, Nevada, holding himself out as board certified and specializing in the field of radiology.

8. Defendant LAS VEGAS RADIOLOGY, LLC, is a Nevada limited liability company providing radiological services in Clark County, Nevada.

9. Defendant JAMES D. BALODIMAS, M.D., PC (BALADIMAS P.C.) is a Nevada professional corporation doing business as JAMES D. BALODIMAS, M.D.

11. Defendants BALODIMAS and/or BALADIMAS P.C. were at times relevant employees and/or agents of Defendant LAS VEGAS RADIOLOGY, LLC, and in all acts or omissions complained of in this Amended Complaint, were acting within such employment and/or agency.

12. Defendant BRUCE A. KATUNA, M.D. (KATUNA) is and was at times relevant a

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resident of the state of Colorado. It is further alleged that Defendant KATUNA is and was at times relevant a physician licensed to practice medicine in Nevada as defined by NRS 630.014 and NRS 630.020 and that all acts, errors and omissions complained of against Defendant KATUNA occurred in or were directed into the state of Nevada. It is further alleged on information and belief that Defendant KATUNA holds himself out as board certified and a specialist in the field of neurology, and intra-operative neuro-monitoring.

13. On information and belief, Defendant KATUNA is the sole member of Defendant ROCKY MOUNTAIN NEURODIAGNOSTICS, LLC is a Colorado limited liability company. In all acts or omissions complained of in this Amended Complaint, Defendant ROCKY MOUNTAIN NEURODIAGNOSTICS' conduct occurred in, or was directed into the state of Nevada.

14. On information and belief, Defendant KATUNA was at times relevant an employee and/or agent of Defendant ROCKY MOUNTAIN NEURODIAGNOSTICS, LLC and in all acts or omissions complained of in this Amended Complaint was acting within such employment and/or agency.

15. Defendant DANIELLE MILLER aka Danielle Shopshire (MILLER) at times relevant was a neuromonitoring technician practicing in Clark County, Nevada.

16. Defendant NEUROMONITORING ASSOICATES, INC. is a Nevada corporation providing neuromonitoring personnel and services in Clark County, Nevada.

17. On information and belief Defendant MILLER, in all acts or omissions complained of in this Amended Complaint, was acting as an employee and/or agent of Defendant NEUROMONITORING ASSOICATES.

18. The true names and capacities, whether individual, corporate, association or otherwise of Defendants DOES 1-10, inclusive, and ROE CORPORATIONS 1-10 inclusive, are unknown to Plaintiff, who therefore sues those Defendants by fictitious names.

19. REPUBLIC is informed, believes, and thereupon alleges that each of the Defendants designated as DOE 1-5 and ROE CORPORATION 1-5, and each of them, is an individual or business entity who is a "health care provider" as defined in NRS 41A.017. Each such fictitiously named Defendant caused the events and damages complained of; and each is negligently, vicariously or otherwise responsible for the breach of a legal duty which proximately caused the injuries and

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damages alleged. Alternatively, DOES 1-5 and ROE CORPORATIONS 1-5 are the owners, operators, employers, employees, joint venturers, alter egos, principals, servants, and/or agents of any or all of the Defendants named herein.

20. DOE 6-10 and ROE CORPORATION 6-10, and each of them, is an individual or business entity who is not a "health care provider" as defined in NRS 41A.017. Each such fictitiously named Defendant caused the events and damages complained of; and each is negligently, vicariously, or otherwise responsible for the breach of a legal duty which proximately caused the injuries and damages alleged. Alternatively, DOES 6-10 and ROE CORPORATIONS 6-10 are the owners, operators, employers, employees, joint venturers, alter egos, principals, servants, and/or agents of any or all of the Defendants named herein.

21. REPUBLIC will seek leave of this court to amend this Complaint to insert the true names and capacities of DOES 1-10 and/or ROE CORPORATIONS 1-10, inclusive, when the same have been ascertained, together with the appropriate charging allegations, and to join such Defendants in this action.

22. Defendants CASH; CASH P.C.; BALODIMAS; BALODIMAS P.C.; LAS VEGAS RADIOLOGY; KATUNA; ROCKY MOUNTAIN NEURODIAGNOSTICS; MILLER; and NEUROMONITORING ASSOCIATES; and DOES 1-10 and ROE CORPORATIONS 1-10, each of them, were physicians, health care institutions, or other medical treatment providers who treated or performed services on behalf of Marie Gonzalez on or about January 29, 2013 and at times relevant thereafter for injuries she claimed to have resulted from a traffic accident with a commercial garbage truck owned and operated by REPUBLIC and driven by its then-employee, Deval Hatcher, occurring on or about January 14, 2012 in Clark County, Nevada. Gonzalez filed a legal action for injuries allegedly sustained in the aforementioned motor vehicle accident against REPUBLIC and Hatcher, entitled *Gonzalez v. Hatcher, Republic Silver State Disposal, Inc.* (Eighth Judicial District Court Case No. A687931).

FACTUAL ALLEGATIONS COMMON TO ALL CAUSES OF ACTION

23. All the facts, circumstances, errors and omissions giving rise to the instant lawsuit occurred in Clark County, Nevada.

24. On or about April 4, 2012, Gonzalez, began treating with Defendant CASH for

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injuries to her low back allegedly sustained in the motor vehicle accident of January 14, 2012.

25. On or about December 19, 2012, Defendant CASH recommended that Gonzales undergo reconstructive spinal surgery at L4-5, L5-S1.

26. On or about January 29, 2013, Gonzalez underwent spinal surgery performed by Defendant CASH known as an "oblique lateral lumbar interbody fusion" (referred to below as "OLIF" or "OLIF procedure").

27. Defendant CASH's OLIF procedure on Gonzales was performed at the L4-5 and L5-S1 levels on the left.

28. The described OLIF procedure at L4-5, L5-S1 involved placement by Defendant CASH of so-called "pedicle screws."

29. Prior to the OLIF procedure Defendant CASH requested DOE 1 and/or ROE CORPORATION 1to hire, retain or otherwise obtain intraoperative neurophysiological monitoring services for the Gonzales OLIF.

30. The neurophysiological monitoring services referenced in the preceding paragraph were provided by Defendants KATUNA and ROCKY MOUNTAIN NEURODIAGNOSTICS, and Defendants MILLER and NEUROMONITORING ASSOICATES.

31. On information and belief, Defendant KATUNA remotely conducted the neurophysiological monitoring of the Gonzales OLIF from the state of Colorado. In so doing his actions were purposefully directed to the state of Nevada.

32. A true and correct copy of a March 6, 2013 "Intraoperative Neurophysiological Monitoring Report" from Defendant ROCKY MOUNTAIN NEURODIAGNOSTICS, signed by Defendant KATUNA, is attached as **EXHIBIT 1**. The neuromonitoring report **(EXHIBIT 1)** states that it is for intraoperative neuromonitoring of Gonzales' central and peripheral nervous systems, and that "Monitored responses showed no significant changes throughout the procedure, and the surgeon was so informed. Pedicle screw testing demonstrated thresholds suggesting low likelihood of pedicle breach."

33. Defendant MILLER was retained to perform, or alternatively assigned to perform as the agent Defendant NEUROMONITORING ASSOICATES; DOES 1and 6, or either of them ; and/or ROE CORPORATIONS 1 and 6, or either of them, neurophysiological monitoring services

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in connection with the OLIF procedure described in the preceding paragraphs.

34. Defendant MILLER was at all times relevant present in the operating room at Spring Valley Hospital in Clark County, Nevada, providing neurophysiological monitoring services during the described OLIF procedure as it was being performed by Defendant CASH at Spring Valley Hospital on January 29, 2013. Defendant Miller was negligently overseen and supervised in the performance of the described neuromonitoring services by Defendants CASH and KATUNA, or either of them.

35. On information and belief, Defendant MILLER prepared, or had prepared at her direction, a document entitled "Neuromonitoring Report," dated January 29, 2013 concerning the neurophysiological monitoring of Gonzales during the described OLIF procedure. A true and correct copy of the described "Neuromonitoring Report," as currently available to REPUBLIC after good faith efforts to obtain the same, is attached as **EXHIBIT 2**.

36. The "Neuromonitoring Report," **EXHIBIT 2**, states in part:

> [Pedicle Screw Testing (PTS)] was requested by [Defendant Cash] to verify accuracy of screw position and confirm that the respective nerve root is not at risk from the screw placement. PST can detect subtle breaches in the pedicle wall that cannot be visualized with x-rays thereby providing a higher standard of safety and avoiding iatrogenic injury. Pedicle screws that do not elicit [Compound Muscle Action Potential (CMAP)] to stimulation less than 4 [milliamps (mA)] are deemed safe. The surgeon was handed a ball tip probe which is connected to our stimulator. Stimulation was started at 0 mA and slowly went up to 4 mA in 1 mA increments. If a screw was positioned close to a nerve root, we would see a response on our EMG window in the muscle that correlates to the level we are testing. **6 nerve prox** were tested (L4, L5, and S1 screws on the right and left side). Pedicles screw testing (PST) yielded no CMAPs to stimulation below 4 mA. The surgeon was satisfied with the PST responses and felt no need to reposition any of the placed screws. After PST was completed, rods were placed and the surgeon began to close, Final x-rays further confirmed safe screw placement.

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Emphasis is in the original.

37. In fact, the intraoperative neurophysiological monitoring performed and assessed by Defendants KATUNA and ROCKY MOUNTAIN NEURDIAGNOSTICS, and Defendants MILLER was in error and below the standard of care, and failed to detect and accurately report pedicle screw breaches at L4-5, L5-S1, or either of them.

38. Attached as **EXHIBIT 3** is a true and correct copy of the operative report authored by Defendant CASH regarding the Gonzales OLIF procedure. **EXHIBIT 3** states in part that "All [pedicle] screws were carefully placed into the center of the pedicle and no bony breach of any pedicle was felt to occur." In fact, the operative report and opinion of Defendant CASH was in error and pedicle screw breaches had occurred at L4-5, L5-S1, or either of them.

39. Immediately after the OLIF surgery, Gonzalez reported severe back and left leg pain, and remained at Spring Valley Hospital as an in-patient for pain control until discharged on February 2, 2013. Prior to discharge from Spring Valley Hospital, Gonzales did not undergo electrodiagnostic, or CT or MRI imaging studies to assess whether the pain was caused by, or related to surgical complications, including breach of the pedicle screws.

40. Gonzales continued to experience pain after discharge from Spring Valley Hospital into her left hip and leg and returned to Defendant CASH for postsurgical follow-up on or about February 6, 2013. Defendant CASH then ordered a CT study of Gonzales' lumbar spine.

41. On February 12, 2013, a CT study of Gonzales' lumbar spine was performed at the facilities of Defendant LAS VEGAS RADIOLOGY.

42. A true and correct copy of Defendant LAS VEGAS RADIOLOGY's February 12, 2013 report for the CT study of Gonzales' lumbar spine is attached as **EXHIBIT 4. EXHIBIT 4** was signed by Defendant BALODIMAS who diagnosed "no evidence of significant mass effect upon the neural foramina by the pedicle screws," and that the "[c]ase was discussed with [Defendant CASH] at time of dictation."

43. On December 3, 2014, Defendant CASH testified under oath during his deposition as a treating physician in the *Gonzalez v. Hatcher, Republic Silver State Disposal, Inc.* matter that, on or about February 12, 2013, he had reviewed the CT scan and Defendants LAS VEGAS RADIOLOGY and BALODIMAS's report (**EXHIBIT 4**), and that:

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> It said there might be some scar tissue versus disk material encroaching on the left foramina at L4-5, L5-S1. When I evaluated the patient on 12/12/13 (sic), I actually saw the CT scan, reviewed the report, [and] spoke with the radiologist [Dr. Balodimas]. He confirmed that on his report of the study and found that there was no neural impingement, meaning no compression on the nerve to be decompressed surgically and no complication or malfunction in the hardware to be addressed surgically.

Deposition of Andrew Cash, M.D., December 4, 2014, pg. 62, ln.2-11. A copy of the excerpted testimony is attached as **EXHIBIT 5**.

44. In fact, Defendants CASH and BALODIMAS were in error, and their assessments of the February 12, 2013 CT lumbar study were below their respective standard of care as the CT study demonstrated breach of the pedicle screws at L4-5, L5-S1, or either of them, where they displaced the nerve root(s).

45. After February 12, 2013, Gonzales' post-surgical pain continued notwithstanding additional treatment that included follow-up visits with Defendant CASH, and other health care providers, including those providing physio-therapy; spinal injections; and implantation of a trial spinal cord stimulator. At no time after the OLIF procedure did Defendant CASH recommend additional surgery to determine the cause of, or to rectify Gonzales' post-operative pain.

46. On or about June 7, and July 12, 2013, Gonzales consulted with Drs. Jason Garber and Stuart Kaplan of Western Regional Center for Brain & Spine Surgery for continued debilitating post-surgical pain. It was the opinion of Drs. Garber and Kaplan that the pain was in the L5 and S1 nerve distributions and that the pedicle screws on the left at L4-5, L5-S1 had breached the pedicles. To alleviate Gonzales' post-operative pain in her back and left leg it was recommended that she undergo an anterior fusion at L4-5, L5-S1, and that the existing hardware and pedicle screws on the left be replaced on the right at the same levels. The recommended surgery was performed by Dr. Kaplan at Spring Valley Hospital on July 15, 2013.

47. Notwithstanding the surgery of July 15, 2013, Gonzales suffered lasting injury to the L5 and S1 nerve roots, and developed chronic pain syndrome directly because of the failure of Defendants, and each of them, to have properly detected or diagnosed the pedicle screw breach,

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and/or to have rendered medical treatment to address the surgical complication in a timely fashion so as to avoid permanent pain, disability and impairment.

48. On or about February 10, 2015, Dr. Kaplan implanted a spinal cord stimulator for Gonzales' chronic back and leg pain, and on information and belief Gonzales will require battery replacements and further expense into the future in connection with the spinal cord stimulator.

49. On or about September 3, 2013, Gonzalez filed her Complaint in *Gonzalez v. Hatcher, Republic Silver State Disposal, Inc.*, (Case No. A687931) against REPUBLIC and Deval Hatcher.

50. Gonzales' computation of damages pursuant to NRCP 16.1 (a) (1) (C) in the *Gonzalez v. Hatcher, Republic Silver State Disposal, Inc.* matter, as supported by expert opinion, through June 15, 2015 included the following economic damages:

a. Past medical expenses (inclusive of all billings before and after January 29, 2013)—$ 1,108,510.16

b. Future medical expenses—$2,980,907.34 to $3,502,858.34

c. Loss of future earning capacity—$297,040.00 to $549,512.00

d. Loss of household services—$431,656.00

51. All or substantial portions Gonzales' claimed damages, including past and future pain, suffering and disability, and past and future costs of medical treatment and care and other "economic" damages as defined by NRS 41A.007, were due to the professional negligence of the Defendants, and each of them, in their failure to have properly diagnosed the pedicle screw breach and/or to have rendered timely medical treatment to Gonzales to remove the pedicle screws and avoid permanent neurological damage.

52. Attached as **EXHIBIT 6** in support of REPUBLIC's allegations is the true and correct declaration under penalty perjury pursuant to NRS 41A.071 of Howard Tung, M.D., in which Dr. Tung states that in his professional opinion Defendant CASH's treatment of Marie Gonzales was below the standard of care for a spinal surgeon, and gives the reasons therefor. Dr. Tung also opines that the neuromonitoring services of Defendant KATUNA were below the standard of care, and gives the reasons therefor. The Tung declaration is incorporated by reference as if fully set forth herein.

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53. Attached as **EXHIBIT 7** in support of REPUBLIC's allegations is the true and correct declaration under penalty perjury pursuant to NRS 41A.071 of David Seidenwurm, M.D., in which Dr. Seidenwurm states that in his professional opinion Defendant BALODIMAS' treatment of Marie Gonzales was below the standard of care for a radiologist, and gives the reasons therefor. The Seidenwurm declaration is incorporated by reference as if fully set forth herein.

54. Attached as **EXHIBIT 8** in support of REPUBLIC's allegations is the true and correct declaration under penalty perjury pursuant to NRS 41A.071 of Gerald Saline, Ph.D., in which Dr. Saline states that in his professional opinion professional and technical neuromonitoring services rendered by Defendants KATUNA and MILLER in the treatment of Marie Gonzales were below the standard of care, and gives the reasons therefor. The Saline declaration is incorporated by reference as if fully set forth herein.

55. On July 6, 2015, REPUBLIC settled *Gonzalez v. Hatcher, Republic Silver State Disposal, Inc.*, resolving all claims against itself, Deval Hatcher, and all Gonzales' health care providers, including but not limited to the Defendants herein, for $2,000,000.00.

56. As a direct and proximate result of Defendants' negligence, gross negligence, recklessness, and failure to use due care, Gonzalez suffered new and different injuries from those allegedly suffered in the motor vehicle accident of January 14, 2012.

57. REPBULIC is entitled, as a matter of law, to seek contribution from the Defendants, and each of them, pursuant to the provisions of the *Uniform Contribution Among Tortfeasors Act*, NRS 17.225, et seq., and receive all sums in excess of REPUBLIC's equitable share of the common liability from the Defendants, and each of them.

58. REPUBLIC should also receive from the Defendants, and each of them, in amounts proportionate to the Defendants' shares of the common liability, reimbursement of REPUBLIC's fees and costs incurred in addressing and defending claims asserted in *Gonzalez v. Hatcher, Republic Silver State Disposal, Inc.* arising from the Defendants' medical malpractice or medical negligence.

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FISRT CAUSE OF ACTION
(Contribution Against All Defendants)

59. Plaintiff incorporates each and every allegation stated above as though fully set forth herein.

60. Because REPUBLIC made payment to Marie Gonzales in settlement for injuries that were due to the fault, negligence and carelessness of Defendants, and each of them, REPUBLIC should be required to pay no more than its equitable share of the common liability to Gonzales, as provided by NRS 17.225, et. seq., and thus receive contribution from the Defendants, and each of them in accordance with their equitable shares of that common liability.

61. Because the Defendants have not paid their equitable share of the common liability, REPUBLIC is damaged in an amount in excess of $15,000.00.

62. It was necessary for REPUBLIC to retain the services of an attorney to defend against Gonzales' claims, including defense against damages caused exclusively by the negligence, gross negligence and recklessness of the Defendants, and each of them. REPUBLIC should also receive from the Defendants, and each of them, in amounts proportionate to the Defendants' shares of the common liability, reimbursement of REPUBLIC's fees and costs incurred in addressing and defending claims asserted in *Gonzalez v. Hatcher, Republic Silver State Disposal, Inc.* arising from the Defendants' medical malpractice or medical negligence.

63. It was also necessary for REPUBLIC to bring this action for contribution, and REPUBLIC is therefore entitled to recover attorney's fees and costs incurred.

SECOND CAUSE OF ACTION
(Misrepresentation of Medical Service and False Billing for Services not Rendered)

64. Plaintiff incorporates each and every allegation stated above as though fully set forth herein.

65. Defendants MILLER and KATUNA claimed to have rendered, in connection with the operative procedure described more fully above, services known as "pedicle screw testing."

66. The purpose of such testing is to identify and detect mal-positioning of surgical instrumentation used in spinal surgery known as known as "pedicle screws," and to avoid injury to nerve roots which can occur should misplaced pedicle screws enter the neuroforamina.

67. Defendants MILLER and KATUNA each authored reports stating that pedicle screw

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testing had in fact occurred during the operative procedure described above, and that pedicle screws implanted during the subject procedure were properly positioned. See **EXHIBITS 1 & 2.**

68. REPUBLIC alleges on its best information that such pedicle screw testing services had in fact not been rendered as represented by Defendants MILLER and KATUNA.

69. Although such pedicle screw testing had not been performed, Defendants MILLER and KATUNA submitted bills for such services by and through the offices of MILLER's employer, NEUROMONITORING ASSOCIATES, INC. Such bills were based on misrepresentations of fact, and were charges for services not rendered.

70. Because of the described misrepresentations iatrogenic injuries were suffered by Marie Gonzales, REPUBLIC made payment to Marie Gonzales in settlement for injuries that were due to the fault, negligence and carelessness of the Defendants, and each of them, and REPUBLIC should be required to pay no more than its equitable share of the common liability to Gonzales, as provided by NRS 17.225, et. seq., and thus receive contribution from the Defendants, and each of them in accordance with their equitable shares of that common liability.

71. Because the Defendants have not paid their equitable share of the common liability, REPUBLIC is damaged in an amount in excess of this Court's jurisdictional minimum.

72. It has become necessary for REPUBLIC to bring this action for contribution, and REPUBLIC is therefore entitled to recover attorney's fees and costs incurred.

JURY DEMAND

REPUBLIC SILVER STATE DISPOSAL, INC. demands a jury as preserved by the U.S. and Nevada Constitutions, and NRCP 38.

WHEREFORE, Plaintiff prays for judgment against Defendants, and each of them, as follows:

1. For general damages in excess of FIFTEEN THOUSAND DOLLARS ($15,000.00);
2. For special damages in excess of FIFTEEN THOUSAND DOLLARS ($15,000.00);
3. For pre-judgment and post-judgment interest;
4. For reasonable attorney fees;
5. For costs of suit; and

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6. For such other and further relief as this Court may deem just and proper.

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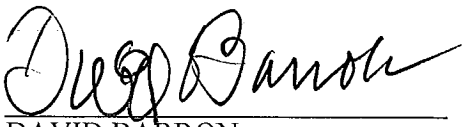

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DISTRICT COURT

CLARK COUNTY, NEVADA

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REPUBLIC SILVER STATE DISPOSAL, INC., a Nevada Corporation,

Plaintiff

vs.

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; JAMES D. BALODIMAS, M.D.; JAMES D. BALODIMAS, M.D., P.C.; LAS VEGAS RADIOLOGY, LLC, a Nevada Limited Liability Company; BRUCE A. KATUNA, M.D.; ROCKY MOUNTAIN NEURODIAGNOSTICS, LLC, a Colorado Limited Liability Company; DANIELLE MILLER aka DANIELLE SHOPSHIRE; NEUROMONITORING ASSOCIATES, INC., a Nevada Corporation; DOES 1-10 inclusive; and ROE CORPORATIONS 1-10 inclusive

Defendants.

Case No.: A-16-738123-C

Dept No.: XXX

CERTIFICATE OF SERVICE OF SECOND AMENDED COMPLAINT & JURY DEMAND

I HEREBY CERTIFY that on the 31st day of January, 2019, I served the attached **SECOND AMENDED COMPLAINT & JURY DEMAND** as follows:

☐ US MAIL: by placing the document(s) listed above in a sealed envelope, postage prepaid, in the United States Mail at Las Vegas, Nevada, addressed to the following:

☐ BY FAX: by transmitting the document(s) listed above via facsimile transmission to the fax number(s) set forth below.

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☐ BY HAND-DELIVERY: by hand-delivering the document(s) listed above to the address(es) set forth below.

☐ BY EMAIL: by emailing the document(s) listed above to the email address(es) set forth below.

☒ BY ELECTRONIC SERVICE: by electronically serving the document(s) listed above with the Eighth Judicial District Court's WizNet system upon the following:

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Robert C. McBride, Esq. Heather S. Hall, Esq. CARROLL, KELLY, TROTTER, FRANZEN, MC BRIDE & PEABODY 8329 West Sunset Road, Suite 260 Las Vegas, NV 89113 Facsimile: (702) 796-5855 Email: rcmcbride@cktfmlaw.com Email: hshall@cktfmlaw.com *Attorneys for Defendants* *Andrew M. Cash, M.D.* *Andrew M. Cash, M.D., P.C. a/k/a* *Andrew Miller Cash, M.D., P.C.; and* *Desert Institute of Spine Care*	James R. Olson, Esq. Max E. Corrick, II, Esq. Stephanie M. Zinna, Esq. OLSON, CANNON, GORMLEY, ANGULO & STOBERSKI 9950 West Cheyenne Avenue Las Vegas, NV 89129 Facsimile: (702) 383-0701 Email: jolson@ocgas.com Email: mcorrick@ocgas.com Email: szinna@ocgas.com *Attorneys for Defendants* *Bruce Katuna, M.D. and* *Rocky Mountain Neurodiagnostics, LLC*
John H. Cotton, Esq. Michael D. Navratil, Esq. JOHN H. COTTON & ASSOCIATES, LTD. 7900 West Sahara Avenue, Suite 200 Las Vegas, NV 89117 Facsimile: (702) 832-5910 Email: jhcotton@jhcottonlaw.com Email: mdnavratil@jhcottonlaw.com *Attorneys for Defendants* *James D. Balodimas, M.D. and* *James D. Balodimas, M.D., P.C.*	James Murphy, Esq. LEWIS BRISBOIS BISGAARD & SMITH, LLP 6385 South Rainbow Blvd., Suite 600 Las Vegas, NV 89118 Facsimile: (702) 893-3789 Email: James.Murphy@lewisbrisbois.com *Attorneys for Defendant Neuromonitoring Associates, Inc.*
Kim Irene Mandelbaum, Esq. Marie Ellerton, Esq. MANDELBAUM, ELLERTON & ASSOCIATES 2012 Hamilton Lane Las Vegas, NV 89106 Facsimile: (702) 367-1978 Email: filing@meklaw.net *Attorneys for Defendant* *Las Vegas Radiology, LLC*	Anthony D. Lauria, Esq. LAURIA TOKUNAGA GATES & LINN, LLP 1755 Creekside Oaks Drive, Ste. 240 Sacramento, CA 95833 601 South Seventh Street Las Vegas, NV 89101 Facsimile: (702) 387-8635 Email: alauria@lgtlaw.net *Attorneys for Defendant Danielle Miller a/k/a Danielle Shopshire*

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Attorneys for Plaintiff
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DISTRICT COURT

CLARK COUNTY, NEVADA

*****

REPUBLIC SILVER STATE DISPOSAL, INC., a Nevada Corporation, Plaintiff vs. ANDREW M. CASH, M.D.; DESERT INSTITUTE OF SPINE CARE, LLC, a Nevada Limited Liability Company; JAMES D. BALODIMAS, M.D.; 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 aka DANIELLE SHOPSHIRE; NEUROMONITORING ASSOCIATES; DOES 1-10 inclusive; and ROE CORPORATIONS 1-10 inclusive Defendants.	Case No.: A-16-738123-C Dept No.: XXX **SECOND AMENDED COMPLAINT & JURY DEMAND**

Plaintiff REPUBLIC SILVER STATE DISPOSAL, INC., by and through its attorneys, BARRON & PRUITT, LLP, complains and alleges against Defendants as follows:

PARTIES

1. Plaintiff, REPUBLIC SILVER STATE DISPOSAL, INC. is and was at all relevant times a Nevada corporation doing business in Clark County, Nevada.

2. Defendant ANDREW M. CASH, M.D. (CASH) is and was at all times relevant a resident of the state of Nevada; a physician licensed to practice medicine in Nevada as defined by NRS 630.014 and NRS 630.020; and doing business as a practicing physician in Clark County,

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Nevada, holding himself out as board certified and specializing in the field of orthopedic and spinal surgery.

3. Defendant ANDREW M. CASH, M.D., P.C. (CASH P.C.), is a Nevada professional corporation doing business as ANDREW M. CASH, M.D. On information and belief, Defendant CASH P.C. may also be or have been known as "ANDREW MILLER CASH, M.D., P.C." in filings with Nevada Secretary of State.

4. Defendant DESERT INSTITUTE OF SPINE CARE, LLC, is a Nevada limited liability company providing surgical and health care services in Clark County, Nevada.

5. Defendants ANDREW M. CASH, M.D.; ANDREW M. CASH, M.D., P.C. or ANDREW MILLER CASH, M.D., P.C.; or all of them is a member of Defendant DESERT INSTITUTE OF SPINE CARE, LLC. Moreover Defendants CASH; CASH P.C.; and DESERT INSTITUTE OF SPINE CARE is the agent, partner, joint venturer, employee and alter-ego of the other.

6. Defendants CASH and/or CASH P.C. were at all times relevant employees and/or agents of Defendant DESERT INSTITUTE OF SPINE CARE, LLC and in all acts or omissions complained of in this Amended Complaint, were acting within such employment and/or agency.

7. Defendant JAMES D. BALODIMAS, M.D. (BALODIMAS) was at all times relevant a resident of the state of Nevada; a physician licensed to practice medicine in Nevada as defined by NRS 630.014 and NRS 630.020; and doing business as a practicing physician in Clark County, Nevada, holding himself out as board certified and specializing in the field of radiology.

8. Defendant LAS VEGAS RADIOLOGY, LLC, is a Nevada limited liability company providing radiological services in Clark County, Nevada.

9. Defendant JAMES D. BALODIMAS, M.D., PC (BALADIMAS P.C.) is a Nevada professional corporation doing business as JAMES D. BALODIMAS, M.D.

11. Defendants BALODIMAS and/or BALADIMAS P.C. were at times relevant employees and/or agents of Defendant LAS VEGAS RADIOLOGY, LLC, and in all acts or omissions complained of in this Amended Complaint, were acting within such employment and/or agency.

12. Defendant BRUCE A. KATUNA, M.D. (KATUNA) is and was at times relevant a

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resident of the state of Colorado. It is further alleged that Defendant KATUNA is and was at times relevant a physician licensed to practice medicine in Nevada as defined by NRS 630.014 and NRS 630.020 and that all acts, errors and omissions complained of against Defendant KATUNA occurred in or were directed into the state of Nevada. It is further alleged on information and belief that Defendant KATUNA holds himself out as board certified and a specialist in the field of neurology, and intra-operative neuro-monitoring.

13. On information and belief, Defendant KATUNA is the sole member of Defendant ROCKY MOUNTAIN NEURODIAGNOSTICS, LLC is a Colorado limited liability company. In all acts or omissions complained of in this Amended Complaint, Defendant ROCKY MOUNTAIN NEURODIAGNOSTICS' conduct occurred in, or was directed into the state of Nevada.

14. On information and belief, Defendant KATUNA was at times relevant an employee and/or agent of Defendant ROCKY MOUNTAIN NEURODIAGNOSTICS, LLC and in all acts or omissions complained of in this Amended Complaint was acting within such employment and/or agency.

15. Defendant DANIELLE MILLER aka Danielle Shopshire (MILLER) at times relevant was a neuromonitoring technician practicing in Clark County, Nevada.

16. Defendant NEUROMONITORING ASSOICATES, INC. is a Nevada corporation providing neuromonitoring personnel and services in Clark County, Nevada.

17. On information and belief Defendant MILLER, in all acts or omissions complained of in this Amended Complaint, was acting as an employee and/or agent of Defendant NEUROMONITORING ASSOICATES.

18. The true names and capacities, whether individual, corporate, association or otherwise of Defendants DOES 1-10, inclusive, and ROE CORPORATIONS 1-10 inclusive, are unknown to Plaintiff, who therefore sues those Defendants by fictitious names.

19. REPUBLIC is informed, believes, and thereupon alleges that each of the Defendants designated as DOE 1-5 and ROE CORPORATION 1-5, and each of them, is an individual or business entity who is a "health care provider" as defined in NRS 41A.017. Each such fictitiously named Defendant caused the events and damages complained of; and each is negligently, vicariously or otherwise responsible for the breach of a legal duty which proximately caused the injuries and

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damages alleged. Alternatively, DOES 1-5 and ROE CORPORATIONS 1-5 are the owners, operators, employers, employees, joint venturers, alter egos, principals, servants, and/or agents of any or all of the Defendants named herein.

20. DOE 6-10 and ROE CORPORATION 6-10, and each of them, is an individual or business entity who is not a "health care provider" as defined in NRS 41A.017. Each such fictitiously named Defendant caused the events and damages complained of; and each is negligently, vicariously, or otherwise responsible for the breach of a legal duty which proximately caused the injuries and damages alleged. Alternatively, DOES 6-10 and ROE CORPORATIONS 6-10 are the owners, operators, employers, employees, joint venturers, alter egos, principals, servants, and/or agents of any or all of the Defendants named herein.

21. REPUBLIC will seek leave of this court to amend this Complaint to insert the true names and capacities of DOES 1-10 and/or ROE CORPORATIONS 1-10, inclusive, when the same have been ascertained, together with the appropriate charging allegations, and to join such Defendants in this action.

22. Defendants CASH; CASH P.C.; BALODIMAS; BALODIMAS P.C.; LAS VEGAS RADIOLOGY; KATUNA; ROCKY MOUNTAIN NEURODIAGNOSTICS; MILLER; and NEUROMONITORING ASSOCIATES; and DOES 1-10 and ROE CORPORATIONS 1-10, each of them, were physicians, health care institutions, or other medical treatment providers who treated or performed services on behalf of Marie Gonzalez on or about January 29, 2013 and at times relevant thereafter for injuries she claimed to have resulted from a traffic accident with a commercial garbage truck owned and operated by REPUBLIC and driven by its then-employee, Deval Hatcher, occurring on or about January 14, 2012 in Clark County, Nevada. Gonzalez filed a legal action for injuries allegedly sustained in the aforementioned motor vehicle accident against REPUBLIC and Hatcher, entitled *Gonzalez v. Hatcher, Republic Silver State Disposal, Inc.* (Eighth Judicial District Court Case No. A687931).

FACTUAL ALLEGATIONS COMMON TO ALL CAUSES OF ACTION

23. All the facts, circumstances, errors and omissions giving rise to the instant lawsuit occurred in Clark County, Nevada.

24. On or about April 4, 2012, Gonzalez, began treating with Defendant CASH for

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injuries to her low back allegedly sustained in the motor vehicle accident of January 14, 2012.

25. On or about December 19, 2012, Defendant CASH recommended that Gonzales undergo reconstructive spinal surgery at L4-5, L5-S1.

26. On or about January 29, 2013, Gonzalez underwent spinal surgery performed by Defendant CASH known as an "oblique lateral lumbar interbody fusion" (referred to below as "OLIF" or "OLIF procedure").

27. Defendant CASH's OLIF procedure on Gonzales was performed at the L4-5 and L5-S1 levels on the left.

28. The described OLIF procedure at L4-5, L5-S1 involved placement by Defendant CASH of so-called "pedicle screws."

29. Prior to the OLIF procedure Defendant CASH requested DOE 1 and/or ROE CORPORATION 1to hire, retain or otherwise obtain intraoperative neurophysiological monitoring services for the Gonzales OLIF.

30. The neurophysiological monitoring services referenced in the preceding paragraph were provided by Defendants KATUNA and ROCKY MOUNTAIN NEURODIAGNOSTICS, and Defendants MILLER and NEUROMONITORING ASSOICATES.

31. On information and belief, Defendant KATUNA remotely conducted the neurophysiological monitoring of the Gonzales OLIF from the state of Colorado. In so doing his actions were purposefully directed to the state of Nevada.

32. A true and correct copy of a March 6, 2013 "Intraoperative Neurophysiological Monitoring Report" from Defendant ROCKY MOUNTAIN NEURODIAGNOSTICS, signed by Defendant KATUNA, is attached as **EXHIBIT 1**. The neuromonitoring report (**EXHIBIT 1**) states that it is for intraoperative neuromonitoring of Gonzales' central and peripheral nervous systems, and that "Monitored responses showed no significant changes throughout the procedure, and the surgeon was so informed. Pedicle screw testing demonstrated thresholds suggesting low likelihood of pedicle breach."

33. Defendant MILLER was retained to perform, or alternatively assigned to perform as the agent Defendant NEUROMONITORING ASSOICATES; DOES 1and 6, or either of them ; and/or ROE CORPORATIONS 1 and 6, or either of them, neurophysiological monitoring services

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in connection with the OLIF procedure described in the preceding paragraphs.

34. Defendant MILLER was at all times relevant present in the operating room at Spring Valley Hospital in Clark County, Nevada, providing neurophysiological monitoring services during the described OLIF procedure as it was being performed by Defendant CASH at Spring Valley Hospital on January 29, 2013. Defendant Miller was negligently overseen and supervised in the performance of the described neuromonitoring services by Defendants CASH and KATUNA, or either of them.

35. On information and belief, Defendant MILLER prepared, or had prepared at her direction, a document entitled "Neuromonitoring Report," dated January 29, 2013 concerning the neurophysiological monitoring of Gonzales during the described OLIF procedure. A true and correct copy of the described "Neuromonitoring Report," as currently available to REPUBLIC after good faith efforts to obtain the same, is attached as **EXHIBIT 2**.

36. The "Neuromonitoring Report," **EXHIBIT 2**, states in part:

> [Pedicle Screw Testing (PTS)] was requested by [Defendant Cash] to verify accuracy of screw position and confirm that the respective nerve root is not at risk from the screw placement. PST can detect subtle breaches in the pedicle wall that cannot be visualized with x-rays thereby providing a higher standard of safety and avoiding iatrogenic injury. Pedicle screws that do not elicit [Compound Muscle Action Potential (CMAP)] to stimulation less than 4 [milliamps (mA)] are deemed safe. The surgeon was handed a ball tip probe which is connected to our stimulator. Stimulation was started at 0 mA and slowly went up to 4 mA in 1 mA increments. If a screw was positioned close to a nerve root, we would see a response on our EMG window in the muscle that correlates to the level we are testing. **6 nerve prox** were tested (L4, L5, and S1 screws on the right and left side). Pedicles screw testing (PST) yielded no CMAPs to stimulation below 4 mA. The surgeon was satisfied with the PST responses and felt no need to reposition any of the placed screws. After PST was completed, rods were placed and the surgeon began to close, Final x-rays further confirmed safe screw placement.

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Emphasis is in the original.

37. In fact, the intraoperative neurophysiological monitoring performed and assessed by Defendants KATUNA and ROCKY MOUNTAIN NEURDIAGNOSTICS, and Defendants MILLER was in error and below the standard of care, and failed to detect and accurately report pedicle screw breaches at L4-5, L5-S1, or either of them.

38. Attached as **EXHIBIT 3** is a true and correct copy of the operative report authored by Defendant CASH regarding the Gonzales OLIF procedure. **EXHIBIT 3** states in part that "All [pedicle] screws were carefully placed into the center of the pedicle and no bony breach of any pedicle was felt to occur." In fact, the operative report and opinion of Defendant CASH was in error and pedicle screw breaches had occurred at L4-5, L5-S1, or either of them.

39. Immediately after the OLIF surgery, Gonzalez reported severe back and left leg pain, and remained at Spring Valley Hospital as an in-patient for pain control until discharged on February 2, 2013. Prior to discharge from Spring Valley Hospital, Gonzales did not undergo electrodiagnostic, or CT or MRI imaging studies to assess whether the pain was caused by, or related to surgical complications, including breach of the pedicle screws.

40. Gonzales continued to experience pain after discharge from Spring Valley Hospital into her left hip and leg and returned to Defendant CASH for postsurgical follow-up on or about February 6, 2013. Defendant CASH then ordered a CT study of Gonzales' lumbar spine.

41. On February 12, 2013, a CT study of Gonzales' lumbar spine was performed at the facilities of Defendant LAS VEGAS RADIOLOGY.

42. A true and correct copy of Defendant LAS VEGAS RADIOLOGY's February 12, 2013 report for the CT study of Gonzales' lumbar spine is attached as **EXHIBIT 4**. **EXHIBIT 4** was signed by Defendant BALODIMAS who diagnosed "no evidence of significant mass effect upon the neural foramina by the pedicle screws," and that the "[c]ase was discussed with [Defendant CASH] at time of dictation."

43. On December 3, 2014, Defendant CASH testified under oath during his deposition as a treating physician in the *Gonzalez v. Hatcher, Republic Silver State Disposal, Inc.* matter that, on or about February 12, 2013, he had reviewed the CT scan and Defendants LAS VEGAS RADIOLOGY and BALODIMAS's report (**EXHIBIT 4**), and that:

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> It said there might be some scar tissue versus disk material encroaching on the left foramina at L4-5, L5-S1. When I evaluated the patient on 12/12/13 (sic), I actually saw the CT scan, reviewed the report, [and] spoke with the radiologist [Dr. Balodimas]. He confirmed that on his report of the study and found that there was no neural impingement, meaning no compression on the nerve to be decompressed surgically and no complication or malfunction in the hardware to be addressed surgically.

Deposition of Andrew Cash, M.D., December 4, 2014, pg. 62, ln.2-11. A copy of the excerpted testimony is attached as **EXHIBIT 5.**

44. In fact, Defendants CASH and BALODIMAS were in error, and their assessments of the February 12, 2013 CT lumbar study were below their respective standard of care as the CT study demonstrated breach of the pedicle screws at L4-5, L5-S1, or either of them, where they displaced the nerve root(s).

45. After February 12, 2013, Gonzales' post-surgical pain continued notwithstanding additional treatment that included follow-up visits with Defendant CASH, and other health care providers, including those providing physio-therapy; spinal injections; and implantation of a trial spinal cord stimulator. At no time after the OLIF procedure did Defendant CASH recommend additional surgery to determine the cause of, or to rectify Gonzales' post-operative pain.

46. On or about June 7, and July 12, 2013, Gonzales consulted with Drs. Jason Garber and Stuart Kaplan of Western Regional Center for Brain & Spine Surgery for continued debilitating post-surgical pain. It was the opinion of Drs. Garber and Kaplan that the pain was in the L5 and S1 nerve distributions and that the pedicle screws on the left at L4-5, L5-S1 had breached the pedicles. To alleviate Gonzales' post-operative pain in her back and left leg it was recommended that she undergo an anterior fusion at L4-5, L5-S1, and that the existing hardware and pedicle screws on the left be replaced on the right at the same levels. The recommended surgery was performed by Dr. Kaplan at Spring Valley Hospital on July 15, 2013.

47. Notwithstanding the surgery of July 15, 2013, Gonzales suffered lasting injury to the L5 and S1 nerve roots, and developed chronic pain syndrome directly because of the failure of Defendants, and each of them, to have properly detected or diagnosed the pedicle screw breach,

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and/or to have rendered medical treatment to address the surgical complication in a timely fashion so as to avoid permanent pain, disability and impairment.

48. On or about February 10, 2015, Dr. Kaplan implanted a spinal cord stimulator for Gonzales' chronic back and leg pain, and on information and belief Gonzales will require battery replacements and further expense into the future in connection with the spinal cord stimulator.

49. On or about September 3, 2013, Gonzalez filed her Complaint in *Gonzalez v. Hatcher, Republic Silver State Disposal, Inc.*, (Case No. A687931) against REPUBLIC and Deval Hatcher.

50. Gonzales' computation of damages pursuant to NRCP 16.1 (a) (1) (C) in the *Gonzalez v. Hatcher, Republic Silver State Disposal, Inc.* matter, as supported by expert opinion, through June 15, 2015 included the following economic damages:

a. Past medical expenses (inclusive of all billings before and after January 29, 2013)—$ 1,108,510.16

b. Future medical expenses—$2,980,907.34 to $3,502,858.34

c. Loss of future earning capacity—$297,040.00 to $549,512.00

d. Loss of household services—$431,656.00

51. All or substantial portions Gonzales' claimed damages, including past and future pain, suffering and disability, and past and future costs of medical treatment and care and other "economic" damages as defined by NRS 41A.007, were due to the professional negligence of the Defendants, and each of them, in their failure to have properly diagnosed the pedicle screw breach and/or to have rendered timely medical treatment to Gonzales to remove the pedicle screws and avoid permanent neurological damage.

52. Attached as **EXHIBIT 6** in support of REPUBLIC's allegations is the true and correct declaration under penalty perjury pursuant to NRS 41A.071 of Howard Tung, M.D., in which Dr. Tung states that in his professional opinion Defendant CASH's treatment of Marie Gonzales was below the standard of care for a spinal surgeon, and gives the reasons therefor. Dr. Tung also opines that the neuromonitoring services of Defendant KATUNA were below the standard of care, and gives the reasons therefor. The Tung declaration is incorporated by reference as if fully set forth herein.

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53. Attached as **EXHIBIT 7** in support of REPUBLIC's allegations is the true and correct declaration under penalty perjury pursuant to NRS 41A.071 of David Seidenwurm, M.D., in which Dr. Seidenwurm states that in his professional opinion Defendant BALODIMAS' treatment of Marie Gonzales was below the standard of care for a radiologist, and gives the reasons therefor. The Seidenwurm declaration is incorporated by reference as if fully set forth herein.

54. Attached as **EXHIBIT 8** in support of REPUBLIC's allegations is the true and correct declaration under penalty perjury pursuant to NRS 41A.071 of Gerald Saline, Ph.D., in which Dr. Saline states that in his professional opinion professional and technical neuromonitoring services rendered by Defendants KATUNA and MILLER in the treatment of Marie Gonzales were below the standard of care, and gives the reasons therefor. The Saline declaration is incorporated by reference as if fully set forth herein.

55. On July 6, 2015, REPUBLIC settled *Gonzalez v. Hatcher, Republic Silver State Disposal, Inc.*, resolving all claims against itself, Deval Hatcher, and all Gonzales' health care providers, including but not limited to the Defendants herein, for $2,000,000.00.

56. As a direct and proximate result of Defendants' negligence, gross negligence, recklessness, and failure to use due care, Gonzalez suffered new and different injuries from those allegedly suffered in the motor vehicle accident of January 14, 2012.

57. REPBULIC is entitled, as a matter of law, to seek contribution from the Defendants, and each of them, pursuant to the provisions of the *Uniform Contribution Among Tortfeasors Act*, NRS 17.225, et seq., and receive all sums in excess of REPUBLIC's equitable share of the common liability from the Defendants, and each of them.

58. REPUBLIC should also receive from the Defendants, and each of them, in amounts proportionate to the Defendants' shares of the common liability, reimbursement of REPUBLIC's fees and costs incurred in addressing and defending claims asserted in *Gonzalez v. Hatcher, Republic Silver State Disposal, Inc.* arising from the Defendants' medical malpractice or medical negligence.

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FISRT CAUSE OF ACTION
(Contribution Against All Defendants)

59. Plaintiff incorporates each and every allegation stated above as though fully set forth herein.

60. Because REPUBLIC made payment to Marie Gonzales in settlement for injuries that were due to the fault, negligence and carelessness of Defendants, and each of them, REPUBLIC should be required to pay no more than its equitable share of the common liability to Gonzales, as provided by NRS 17.225, et. seq., and thus receive contribution from the Defendants, and each of them in accordance with their equitable shares of that common liability.

61. Because the Defendants have not paid their equitable share of the common liability, REPUBLIC is damaged in an amount in excess of $15,000.00.

62. It was necessary for REPUBLIC to retain the services of an attorney to defend against Gonzales' claims, including defense against damages caused exclusively by the negligence, gross negligence and recklessness of the Defendants, and each of them. REPUBLIC should also receive from the Defendants, and each of them, in amounts proportionate to the Defendants' shares of the common liability, reimbursement of REPUBLIC's fees and costs incurred in addressing and defending claims asserted in *Gonzalez v. Hatcher, Republic Silver State Disposal, Inc.* arising from the Defendants' medical malpractice or medical negligence.

63. It was also necessary for REPUBLIC to bring this action for contribution, and REPUBLIC is therefore entitled to recover attorney's fees and costs incurred.

SECOND CAUSE OF ACTION
(Misrepresentation of Medical Service and False Billing for Services not Rendered)

64. Plaintiff incorporates each and every allegation stated above as though fully set forth herein.

65. Defendants MILLER and KATUNA claimed to have rendered, in connection with the operative procedure described more fully above, services known as "pedicle screw testing."

66. The purpose of such testing is to identify and detect mal-positioning of surgical instrumentation used in spinal surgery known as known as "pedicle screws," and to avoid injury to nerve roots which can occur should misplaced pedicle screws enter the neuroforamina.

67. Defendants MILLER and KATUNA each authored reports stating that pedicle screw

testing had in fact occurred during the operative procedure described above, and that pedicle screws implanted during the subject procedure were properly positioned. See **EXHIBITS 1 & 2.**

68. REPUBLIC alleges on its best information that such pedicle screw testing services had in fact not been rendered as represented by Defendants MILLER and KATUNA.

69. Although such pedicle screw testing had not been performed, Defendants MILLER and KATUNA submitted bills for such services by and through the offices of MILLER's employer, NEUROMONITORING ASSOCIATES, INC. Such bills were based on misrepresentations of fact, and were charges for services not rendered.

70. Because of the described misrepresentations iatrogenic injuries were suffered by Marie Gonzales, REPUBLIC made payment to Marie Gonzales in settlement for injuries that were due to the fault, negligence and carelessness of the Defendants, and each of them, and REPUBLIC should be required to pay no more than its equitable share of the common liability to Gonzales, as provided by NRS 17.225, et. seq., and thus receive contribution from the Defendants, and each of them in accordance with their equitable shares of that common liability.

71. Because the Defendants have not paid their equitable share of the common liability, REPUBLIC is damaged in an amount in excess of this Court's jurisdictional minimum.

72. It has become necessary for REPUBLIC to bring this action for contribution, and REPUBLIC is therefore entitled to recover attorney's fees and costs incurred.

JURY DEMAND

REPUBLIC SILVER STATE DISPOSAL, INC. demands a jury as preserved by the U.S. and Nevada Constitutions, and NRCP 38.

WHEREFORE, Plaintiff prays for judgment against Defendants, and each of them, as follows:

1. For general damages in excess of FIFTEEN THOUSAND DOLLARS ($15,000.00);
2. For special damages in excess of FIFTEEN THOUSAND DOLLARS ($15,000.00);
3. For pre-judgment and post-judgment interest;
4. For reasonable attorney fees;
5. For costs of suit; and

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6. For such other and further relief as this Court may deem just and proper.

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DISTRICT COURT

CLARK COUNTY, NEVADA

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REPUBLIC SILVER STATE DISPOSAL, INC., a Nevada Corporation,

Plaintiff

vs.

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; JAMES D. BALODIMAS, M.D.; JAMES D. BALODIMAS, M.D., P.C.; LAS VEGAS RADIOLOGY, LLC, a Nevada Limited Liability Company; BRUCE A. KATUNA, M.D.; ROCKY MOUNTAIN NEURODIAGNOSTICS, LLC, a Colorado Limited Liability Company; DANIELLE MILLER aka DANIELLE SHOPSHIRE; NEUROMONITORING ASSOCIATES, INC., a Nevada Corporation; DOES 1-10 inclusive; and ROE CORPORATIONS 1-10 inclusive

Defendants.

Case No.: A-16-738123-C

Dept No.: XXX

PLAINTIFF REPUBLIC SILVER STATE DISPOSAL. INC.'S COUNTER-MOTION IN LIMINE TO LIMIT OR EXCLUDE EVIDENCE OF MEDICAL LIENS

DATE: 2/20/19
TIME: 9:00am

Plaintiff REPUBLIC SILVER STATE DISPOSAL, INC., by and through its counsel BARRON & PRUITT, LLP, hereby submits as a Counter-Motion pursuant to EDCR 2.220(f), its Motion in Limine to Limit or Exclude Evidence of Medical Liens.

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This Motion is based upon the attached Memorandum of Points and Authorities, the pleadings and papers on file herein, and any argument as permitted by the Court at the hearing of this Motion.

BARRON & PRUITT, LLP

/S/ David Barron

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Attorneys for Plaintiff

DECLARATION OF COUNSEL IN SUPPORT OF MOTION IN LIMINE (EDCR 2.47(b))

The undersigned is counsel for Plaintiff, Republic Silver State Disposal, Inc. (Republic). As the Court is aware, this matter is for contribution pursuant to NRS 17.225 et seq., and arises from Republic's $2 million settlement of an action entitled Gonzales v. Hatcher, et al., Clark Co. Dist. Ct. Case #A687931. At the Jan. 30, 2019 hearing on Defendants' Joint Motion to Continue Trail, etc., counsel for Defendant Cash, joined by other defense counsel, argued that additional discovery time was necessary to determine if medical insurance covered any or all of over $1.1 million in medical charges incurred by Ms. Gonzales. If there were such payments, the Defendants believe NRS 42.021would be implicated, and that such medical insurance payments would be subject to that statute's "collateral source" exception.

While the undersigned did not object to the additional discovery time to explore the medical insurance issue, counsel brought to the Court's attention that Republic produced (in addition to medical bills and invoices) so-called "medical" liens given by Ms. Gonzales to her treatment providers, including Dr. Andrew Cash. In other words, Ms. Gonzales paid her own medical expenses as evidenced by the medical liens to her health care providers, and therefore the case is subject to the holdings in Khoury v. Seastrand, 132 Nev. ___, 377 P.3d 81 (2016), regarding issues of "collateral

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source" and medical liens, and not subject to the provisions of NRS 42.021.

The undersigned called Dr. Cash's attorneys' office on Jan. 31, 2019 asking to speak with either Mr. McBride or Ms. Hall to discuss the implications of NRS 42.021 and Khoury in light of the upcoming Feb. 20, 2019 hearing on the Defendants' "Motion in Limine to Permit Collateral Source Payment Evidence NRS 42.021." The undersigned has thereafter corresponded with Ms. Hall and it is clear that this motion in limine should be filed to resolve the significant legal and evidentiary issues described below.

Signed electronically pursuant to EDCR 2.47(b),

/S/ David Barron

MEMORANDUM OF POINTS AND AUTHORITIES

I. PREFATORY STATEMENT

This case arises from a January 14, 2012 traffic accident involving Marie Gonzales and a Republic Silver State Disposal commercial garbage truck driven by its then-employee, Deval Hatcher, in Clark County, Nevada. On April 4, 2012, Ms. Gonzales began medical treatment with Defendant Andrew Cash, M.D. for injuries to her low back allegedly sustained in the motor vehicle accident of January 14, 2012. Defendant Cash recommended that Ms. Gonzales undergo reconstructive spinal surgery at L4-5, L5-S1. On January 29, 2013, Ms. Gonzales underwent an "oblique lateral lumbar interbody fusion" ("OLIF") on the left at L4-5 and L5-S1, which included the placement of so-called "pedicle screws." The OLIF procedure was performed by Defendant Cash.

Ms. Gonzales testified that immediately following the surgery, she suffered from new, more extreme symptoms. On February 12, 2013 Defendant Cash referred Ms. Gonzales to Las Vegas Radiology and Dr. James Balodimas for a CT study. The CT imaging performed on Ms. Gonzalez showed breaches of the pedicle screws in L5 and S1, but according to the radiology report, and

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Defendant Cash's own interpretation, the imaging did not show a "significant mass effect" upon the neuroforamina. As a result of this finding, the screws were left in place.

For months, the screws compressed the left L5 and S1 nerve roots. On or about June 7, 2013, Ms. Gonzalez consulted with Drs. Jason Garber and Stuart Kaplan. Dr. Kaplan was of the opinion that the pain affecting Ms. Gonzales was in the L5 and S1 nerve distributions. Dr. Kaplan testified, that because Ms. Gonzales' CT studies clearly showed the medial pedicle breaches and her clinical presentation indicated radiculopathy resulting from nerve root compression exerted by the misplaced pedicle screws, it was necessary to replace the hardware and screws implanted during the procedure performed by Defendant Cash. Dr. Kaplan performed the recommended surgery on July 15, 2013. Republic alleges that because the malpositioned pedicle screws were left in place for months, Ms. Gonzales suffered permanent injury to her left L5 and S1 nerve roots and seeks contribution from Dr. Cash and others for these treatment-caused injuries, all of which were a substantial part of its eventual $2 million settlement of the Marie Gonzales lawsuit.

During discovery and NRCP 16.1 practice, Republic has produced bills and invoices for Ms. Gonzales' treatment, of which a significant amount were paid on the basis of medical liens, as detailed below. The bulk of these medical expenses were incurred either as part of the January 2013 OLIF and related hospitalization, or were incurred because of Ms. Gonzales' worsening post-operative condition:

PROVIDER	DATES OF SERVICE	LIEN AMOUNT
AA Medical	01/31/2013	$129.00
Advanced Procedure Center		$4,800.00
Akhtar, Salman MD LTD	07/15/2013	$40.00
Anesthesia and Intensive Care		$1,240.00
BioMet/EBI, LLC	07/26/2013	$7,192.81

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PROVIDER	DATES OF SERVICE	LIEN AMOUNT
Breg, Inc.		$1,302.81
Center for Surgical Intervention		$10,660.00
Desert Institute of Spine Care (Dr. Cash)	04/04/2012-07/09/2013	$145,973.84
Don Nobis, PT	03/18/2015-03/20/2015	$3,215.00 $525.00
Family Select Dental Care	05/16/2013	$75.00
Garden Dentistry	06/26/2013-09/16/2013	$5,186.00
General Vascular Specialists Frank Jordan, MD	07/15/2013	$15,952.00
Green Valley Neck & Back Clinic	1/18/2012- 2/16/2012	$2,159.00
Horizon Home Health	02/03/2013-02/15/2013	$3,000.00
Las Vegas Radiology	03/18/2012- 09/25/13	$1650.00
Lemper Pain Center	02/02/2015	$1,368.00
Machuca Family Medicine		$761.00
Matt Smith Physical Therapy		$3,215.00
Monitoring Associates	01/29/2013 and 07/15/2013	$8,192.00
Nevada Comprehensive Pain Center, Alain Coppel, M.D.	4/16/2012- 05-18-2015	$138,855.00
Nevada Surgical Suites		$10,500.00
Neuromonitoring Associates	01/29/2013 and 07/15/2013	$12,287.90
Partell Specialty Pharmacy	01/16/2013—02/26/2013	$36,777.10

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PROVIDER	DATES OF SERVICE	LIEN AMOUNT
Primary Care Consultants (T. Knauff, PA-C)	01/17/2012-02/24/2012	$671.00
Primary Care Consultants (Govind Koka, DO, PC)	04/21/2015	$549.62
Prime Care Medical Services (Romualdo Aragon Jr., MD)	02/27/12-09/05/12	$1,757.00
ProCare Medical Center	01/16/2013	$766.38
Raxo Drugs	08/02/2013-09/05/2013	$3,266.73
Spine & Sports of Summerlin, Jeffrey Muir, M.d.		$21, 404.00
Spring Valley Hospital	01/27/2013-02/02/2013; 02/03/2013	$155,332.00; $2,727.00
Sound Physicians of Nevada	01/29/2013-02/02/2013	$998.00
Surgical Anesthesia Services	07/15/2013	$7,350.00
Valley Anesthesiology Consultants	01/29/2013	$3,000.00
Valley Health Systems – Spring Valley Hospital	07/15/2013-07/18/2013	$314,666.00
Western Regional Center for Brain & Spine	06/07/2013-07/15/2013	$59,750.00
	TOTAL	**$810,558.19**

The "Motion in Limine to Permit Collateral Source Payment Evidence Per NRS 42.021" to be heard on Feb. 20, 2019 makes special mention of Ms. Gonzales's medical liens which were sold to DCP Holdings, LLP ("DCP"). DCP became the largest lienholder, accruing liens for a totaling $506,008.90, for which Ms. Gonzales was personally liable. The chart below is specific to the DCP liens:

LIEN HELD BY DCP	DATES OF SERVICE	LIEN AMOUNT HELD
AA Medical	01/31/2013	$129.00

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LIEN HELD BY DCP	DATES OF SERVICE	LIEN AMOUNT HELD
Garden Dentistry	6/26/2013	$5,175.00
Horizon Home Health	2/13/2013	$3,000.00
Monitoring (Dr. Cash)	1/29/2013	$4,614.00
Monitoring (Dr. Kaplan)	7/15/2013	$3,578.00
Neuromonitoring (Dr. Kaplan)	7/15/2013	$6,491.20
Neuromonitoring (Dr. Cash)	1/29/2013	$5,796.70
Spring Valley Hospital	2/27/2013	$155,332.00
Spring Valley Hospital	2/4/2013	$2,727.00
Valley Anesthesiology Consultants	1/29/2013	$4,500.00
Valley Health Systems – Spring Valley Hospital	07/15/2013	$314,666.00
	TOTAL	**$506,008.90**

The purpose of this Counter-Motion in Limine is to obtain the Court's determination that the requirements of NRS 42.021 do not apply to medical liens; and that evidence of compromises, or "write-downs" of the medical bills or liens, or sale of the liens be excluded.

II. LEGAL ARGUMENT

A. NRS 42.021 does not apply to Medical Liens

Proctor v. Castelletti, 112 Nev. 88, 90 n.1, 911 P.2d 853, 854 n.1 (1996), imposes a "*per se* rule barring the admission of a collateral source of payment for an injury into evidence for any purpose."[1] In practice, the collateral source rule allows a Nevada plaintiff to "board" the amount he or

[1] Under Proctor, "[t]collateral source rule provides that if an injured party received some compensation for his injuries from a source wholly independent of the tortfeasor, such payment should not be deducted from the damages which the plaintiff would otherwise collect from the tortfeasor." 112 Nev. at 90 n.1, 911 P.2d 854 n.1 (internal quotation marks and citation omitted).

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she was charged for medical services, irrespective of whether the plaintiff actually paid that charged amount. In fact, had Ms. Gonzales tried her case against Republic and Mr. Hatcher, she would have been expected to have offered the full value of her medical bills into evidence. At that point Republic would not have been able to claim any bill was compromised—or that liens were discounted and sold to third parties—for the reasons that are now discussed.

While there are exceptions to the collateral source rule, they are not plentiful. A recognized exception arises where a plaintiff has had an industrial accident; treatment has been paid by worker's compensation insurance; and the worker sues a third party allegedly responsible for the job-related injury. In such a case, under NRS 616C.215(10) "the jury must receive proof of the amount of all payments made or to be made by the [work-comp] insurer." Emphasis added. In other words, irrespective of the collateral source rule, the defendant is entitled bring evidence of what the insurer actually paid for the plaintiff's treatment, even if the bill was compromised. While the Nevada Supreme Court has upheld evidence of "medical write-downs" in the work-comp setting, it has thus far declined considering "applicability of the collateral source rule to medical provider discounts in other types of cases." Tri-County Equip. & Leasing v. Klinke, 128 Nev. 352, 357 n.6, 286 P.3d 593, 597 n.6 (2014).

NRS 42.021(1) is also in contravention of the collateral source rule by permitting "providers of health care" sued in "professional negligence" actions to offer into evidence certain types of benefits paid to the "med-mal" plaintiff:

> In an action for injury or death against a provider of health care based upon professional negligence, if the defendant so elects, the defendant may introduce evidence of any amount payable as a benefit to the plaintiff as a result of the injury or death pursuant to the United States Social Security Act, any state or federal income disability or worker's compensation act, any health, sickness or income-disability insurance, accident insurance that provides health benefits or income-disability coverage, and any contract or agreement of any group, organization, partnership or corporation to provide, pay for or reimburse the cost of medical, hospital, dental or other health care services. If the defendant elects to

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> introduce such evidence, the plaintiff may introduce evidence of any amount that the plaintiff has paid or contributed to secure the plaintiff's right to any insurance benefits concerning which the defendant has introduced evidence.

But on its face, NRS 42.021 has nothing to do with medical liens. In fact the statute has a limited purpose. Writing for the court in McCrosky v. Carso Tahoe Regional Medical Center, 133 Nev. ___, 408 P.3d 149, 155 (2017), Justice Stiglich described that purpose succinctly:

> NRS 42.021(1) created an exception to that rule in the medical malpractice context, allowing [professional negligence] defendants…to introduce evidence of collateral payments that the plaintiff received from third parties. The purpose of this law, according to the summary that was presented to voters in the ballot initiative that enacted it, was to prevent "double-dipping"—that is, the practice of plaintiffs receiving payments from both health care providers *and* collateral sources for the same damages.

Emphasis is original.

If there were evidence of health insurance payments made to Ms. Gonzales, that evidence would likely be offered at trial. But without Ms. Gonzales' medical expenses having been paid by health insurance, or another statutorily defined benefit, there is no opportunity for "double dipping," and NRS 42.021 simply has no application.

B. Evidence of neither the compromise of medical bills, nor sale of medical liens is admissible

In Khoury v. Seastrand, 132 Nev. ___, 377 P.3d 81, 94 (2016), our Supreme Court made clear that a medical lien was a personal obligation, not a "collateral source" payment made by a third party on a patient's behalf:

> "[A] medical lien refers to an oral or written promise to pay the medical provider from the plaintiff/patient's personal injury recovery." State Bar of Nev. Standing Comm'n on Ethics and Prof'l Responsibility, Formal Op. 31 (2005), *available at* http://nvbar.org/wp-content/uploads/Opinion–31–Client–Funds–Reissued_4–l–15.pdf (last visited May 9, 2016) (internal quotation marks omitted). Thus, a

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> medical lien represents something that the plaintiff has personally paid for his or her treatment, not compensation that a third party has paid to the plaintiff.

Emphasis supplied.[2]

Under the foregoing definition, medical liens, as a matter of law, are not a "collateral source," and as shown in the preceding discussion, have no place in the operation of NRS 42.021. But one anticipates prejudicial attempts will be made to offer evidence that the liens were compromised or even sold. Both issues were discussed in Khoury, with the court definitively holding neither the sale of a lien nor write-down of a medical bill reflect the value of the services, and are thus "irrelevant":

> Evidence of payments showing medical provider discounts, or write-downs, to third-party insurance providers "is irrelevant to a jury's determination of the reasonable value of the medical services and will likely lead to jury confusion." *Tri–County. Equip. & Leasing v. Klinke,* 128 Nev. 352, 360, 286 P.3d 593, 598 (2012) (Gibbons, J., concurring). This is because "[t]he write-downs reflect a multitude of factors mostly relating to the relationship between the third party and the medical provider, and not necessarily relating to the reasonable value of the medical services." *Id.*
>
> Here, assuming that Seastrand's medical providers sold her liens to a third party for less than their face value, they are functionally similar to a write-down made to a third-party insurer. In both instances the medical provider negotiates with a third party to receive less than what they charged a patient to provide medical care. Therefore, in line with the discussion of write-downs in the concurrence in *Tri–County Equipment & Leasing,* which is analogous to the present issue, we hold that evidence regarding the sale of medical liens is likewise irrelevant to a jury's determination of the reasonable value of medical services provided. Thus, the district court did not abuse its discretion by excluding such evidence.

377 P.3d at 93.

The holding of Khoury on these points is absolutely clear.

III. CONCLUSION

Based on the foregoing, Plaintiff requests Defendants be precluded from attempting to

[2] Khoury did hold however that the collateral source rule was not implicated when the District Court appropriately exercised its discretion by allowing a medical lien to be used to show bias on the part of a treating physician—a circumstance not present here. Id., 377 P.3d at 93-94.

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introduce into evidence, or to argue, or prejudicially suggest to the jury that medical liens were compromised, discounted or sold to third parties; and that the Court find as a matter of law those personal obligations of Marie Gonzales secured by liens given to her health care providers are neither collateral source payments, nor subject to NRS 42.021.

Respectfully submitted,

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/S/ David Barron

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 1st day of February, 2019, I served the foregoing **MOTION IN LIMINE etc.** as follows:

☐ US MAIL: by placing the document(s) listed above in a sealed envelope, postage prepaid, in the United States Mail at Las Vegas, Nevada, addressed to the following:

☐ BY FAX: by transmitting the document(s) listed above via facsimile transmission to the fax number(s) set forth below.

☐ BY HAND-DELIVERY: by hand-delivering the document(s) listed above to the address(es) set forth below.

☐ BY EMAIL: by emailing the document(s) listed above to the email address(es) set forth below.

☒ BY ELECTRONIC SERVICE: by electronically serving the document(s) listed above with the Eighth Judicial District Court's WizNet system upon the following:

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DISTRICT COURT

CLARK COUNTY, NEVADA

REPUBLIC SILVER STATE DISPOSAL, INC., a Nevada Corporation,

Plaintiff,

vs.

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; JAMES D. BALODIMAS, M.D.; JAMES D. BALODIMAS, M.D., P.C.; LAS VEGAS RADIOLOGY, LLC, a Nevada Limited Liability Company; BRUCE A. KATUNA, M.D.; ROCKY MOUNTAIN NEURODIAGNOSTICS, LLC a Colorado Limited Liability Company; DANIELLE MILLER aka DANIELLE SHOPSHIRE; NEUROMONITORING ASSOCIATES, INC., a Nevada Corporation; DOES 1-10 inclusive; and ROE CORPORATIONS 1-10 inclusive,

Defendants.

CASE NO.: A-16-738123-C
DEPT: XXX

DEFENDANTS ANDREW CASH, M.D., ANDREW CASH, M.D., P.C. aka ANDREW MILLER CASH, M.D., P.C. & DESERT INSTITUTE OF SPINE CARE, LLC'S OPPOSITION TO PLAINTIFF'S COUNTER-MOTION IN LIMINE TO LIMIT OR EXCLUDE EVIDENCE OF MEDICAL LIENS

DATE OF HEARING: 2/20/19

TIME OF HEARING: 9:00 A.M.

DEFENDANTS ANDREW CASH, M.D., ANDREW CASH, M.D., P.C. aka ANDREW MILLER CASH, M.D., P.C. & DESERT INSTITUTE OF SPINE CARE, LLC'S OPPOSITION TO PLAINTIFF'S COUNTER-MOTION IN LIMINE TO LIMIT OR EXCLUDE EVIDENCE OF MEDICAL LIENS

COME Defendants ANDREW M. CASH, M.D.; ANDREW M. CASH, M.D., P.C., aka ANDREW MILLER CASH, M.D., P.C.; and DESERT INSTITUTE OF SPINE CARE, LLC, by and through their counsel of record, Robert C. McBride, Esq. and Heather S. Hall, Esq. of the law firm of Carroll, Kelly, Trotter, Franzen, McBride & Peabody, and hereby submits their Opposition to Plaintiff's Counter-Motion in Limine to Limit or Exclude Evidence of Medical Liens.

This Opposition is made and based upon the Points and Authorities attached hereto, the papers and pleadings on file herein, and any such oral argument as may be entertained by the Court at the time and place of the hearing of this Plaintiff's Counter-Motion in Limine to Limit or Exclude Evidence of Medical Liens.

DATED this 13th day of February, 2019.

CARROLL, KELLY, TROTTER,
FRANZEN, McBRIDE & PEABODY

Heather S. Hall

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MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

On January 14, 2012, a garbage truck owned and operated by Republic Silver State Disposal ("Republic") struck the vehicle being driven by Marie Gonzales. Following the motor vehicle accident between Ms. Gonzales and Mr. Hatcher, Ms. Gonzales received medical care for her injuries from various medical providers. On January 29, 2013 she underwent an OLIF spine fusion surgery with various medical providers, including Andrew M. Cash, M.D., an orthopedic surgeon, his office Desert Institute of Spine Care, LLC; James D. Balodimas, M.D., a radiologist; Las Vegas Radiology; Bruce A. Katuna, M.D., the remote monitoring neurologist; Rocky Mountain Neurodiagnostics, LLC; Neuromonitoring Associates; and Danielle Shopshire Miller, the neuromonitoring technician during Dr. Cash's January 29, 2013 surgery.

Ms. Gonzales never sued any of her medical providers for alleged medical malpractice. She did, however, file suit against Republic on September 4, 2013, alleging the car accident was caused by Republic's driver Deval Hatcher and she suffered personal injuries as a result, necessitating the medical care provided by the above-mentioned treaters.

On July 6, 2015, Republic settled Marie Gonzales' claims against it and Deval Hatcher for two million dollars ($2,000,000). In the Settlement Agreement prepared by Republic's counsel, the following language is included:

> "... this SETTLEMENT AGREEMENT RELEASE and 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 may possess against any of her medical treatment providers for injuries she alleges to have sustained in the described incident of January 14, 2012."
>
> [Emphasis added.]

On June 8, 2016, Republic filed a lawsuit against many of Ms. Gonzales's healthcare providers[1] asserting claims for: (1) Medical Malpractice and/or Medical Negligence; (2)

Respondeat Superior/Vicarious Liability; (3) Negligent Supervision and Retention; and (4) Contribution. On December 2, 2016, this Court granted various defense motions and dismissed all claims except for the contribution claim. *See* Order, attached hereto as **Exhibit "A"**. Republic asserts that the medical care provided after Ms. Gonzales's injuries caused her to sustain additional injuries.

On May 14, 2018, this Court issued an order stating that the non-economic damages in this action were capped at $350,000 per NRS 41A.035. *See* Order Granting Defendant Las Vegas Radiology's Motion to "Cap" Non-Economic Damages Per NRS 41A.035 and Joinders to Same, attached hereto as **Exhibit "B"**. As evident from that Order, this Court has already determined that Republic stands in the shoes of Ms. Gonzales in pursuing its contribution claim against Ms. Gonzales's medical providers. *Id.* at 4:1 – 28.

In the personal injury action, Republic apparently did not seek information about the amounts actually paid to resolve Ms. Gonzales's medical bills. This is most likely because in a personal injury action, the collateral source rule applies to bar admission of collateral source payments. The instant matter is **not** a personal injury action. This is a contribution action based upon allegations of medical malpractice against medical providers. This Court has already correctly determined that " . . . Nevada law obligates a Plaintiff seeking contribution from health care providers, asserting claims for professional negligence, to satisfy the requirements of NRS Chapter 41A." *See* **Exhibit "A"**, 2:25 – 27. Just as the non-economic damages cap set forth in NRS 41A.035 applies in this case, so too does NRS 42.021.

By stepping into the shoes of the patient, Republic's contribution action is subjected to the same benefits and limitations that a direct claim by Ms. Gonzales against her medical providers would be. Had Ms. Gonzales attempted to sue her health care providers for medical malpractice, NRS 42.021 would permit her medical providers to introduce collateral source payments. Republic's contribution claim which is based on medical malpractice, is subject to the same laws as a direct claim from the patient would be. Just as Republic cannot avoid NRS 41A.035, it cannot deny the medical providers the inherent right they enjoy in medical malpractice cases to introduce collateral source payments.

II.

ARGUMENT

A. NRS 42.021 APPLIES TO THIS ACTION.

Medical lien is another way of saying medical bill. In Nevada, a jury in a medical malpractice case is not required to accept gross bills without evidence of the amount actually paid to resolve the bills, but that is exactly what Republic argues. Plaintiff's Counter-Motion shows a fundamental misunderstanding of NRS 42.021, relying on the personal injury case, *Khoury v. Seastrand*, 377 P.3d 81 (Nev. 2016), which has no application to medical malpractice and NRS 42.021. *See* **Exhibit "C"**. Contrary to Republic's argument, NRS 42.021 specifically allows defendant medical providers in medical malpractice cases to introduce collateral sources and compromise of medical bills. Because *Khoury* is a personal injury action it does not discuss NRS 42.021. In *Khoury*, the defense attempted to introduce evidence of the amount plaintiff's medical providers received for the sale of her medical liens to a third party. *Id.* at 93. The district court refused to admit the evidence, finding that under the collateral source rule, it was per se inadmissible. *Id.* Ultimately, the Supreme Court of Nevada **agreed** with the district court and concluded that the district court did not abuse its discretion by excluding the amount plaintiff's medical providers received for the sale of her medical liens. *Id.* The Supreme Court's affirmed the ruling that admission of medical lien payment information would violate the bar on collateral sources in a personal injury action.

Importantly, *Khoury* does **not** stand for the proposition that if a patient pays her own medical expenses, collateral source payments are inadmissible. Further, *Khoury* is distinguishable from this case for contribution based upon allegations of medical malpractice cases because: (1) *Khoury* addresses collateral source payments in the context of personal injury cases and (2) no specific statute allows the introduction of collateral source payments in a personal injury case.

Republic's focus on what rights it would have enjoyed had it actually gone to trial on Ms. Gonzales's personal injury claims is equally misplaced. It is undisputed that Republic's action for contribution is based upon medical malpractice/professional negligence against these

providers of health care. NRS 42.021 specifically abolishes the collateral source rule in medical malpractice cases. NRS 42.021 provides in relevant part:

> 1. In an action for injury or death against a provider of health care based upon professional negligence, if the defendant so elects, the defendant **may introduce evidence of any amount payable as a benefit** to the plaintiff as a result of the injury or death pursuant to the United States Social Security Act, any state or federal income disability or worker's compensation act, any health, sickness or income-disability insurance, accident insurance that provides health benefits or income-disability coverage, and any contract or agreement of any group, organization, partnership or corporation to provide, pay for or reimburse the cost of medical, hospital, dental or other health care services. If the defendant elects to introduce such evidence, the plaintiff may introduce evidence of any amount that plaintiff has paid or contributed to secure his right to insurance benefits concerning which the defendant has introduced evidence.

See NRS 42.021(1).

Medical liens which have been negotiated and resolved for a lesser amount in satisfaction of Marie Gonzales's past medical expenses would qualify as any contract to provide or pay for the cost of medical and healthcare expenses under NRS 42.021(1). Defendants agree that Republic would not have been permitted to introduce evidence of collateral sources in the underlying car accident litigation, but that is not the issue before this Court. It is undisputed that if Ms. Gonzales were to have brought a direct claim against her medical providers for medical malpractice, NRS 42.021 would apply. In this contribution claim based on medical malpractice, Republic stands in the shoes of Ms. Gonzales. Thus, NRS 42.021 applies here.

As stated in the Motion in Limine to Permit Collateral Source Payment Evidence Per NRS 42.021, the source of a contribution is subrogation. *Lebleu v. Southern Silica of Louisiana*, 554 So.2d 852 (3rd Cir. Ct. App. Louisiana 1989). In pursuing subrogation/contribution, the subrogee (in this case, Republic) " . . . stands in the shoes" of the subrogor (Marie Gonzales) and is entitled to all of the rights of Ms. Gonzales, **but also suffers all of the liabilities to which Ms. Gonzales would be subjected to**. *Cleary Brothers Construction Co. v. Upper Keys Marine Construction, Inc.*, 526 So.2d 116 (Ct.App. Fla. 3rd Dist. 1988).

Had Ms. Gonzales chosen to directly pursue a claim for medical malpractice against her medical providers, those medical providers would be permitted to introduce collateral source information pertaining to payment of her medical expenses. This would include medical liens

and write downs. NRS 42.021 creates a collateral source exception that must be applied to Republic's contribution action.

III.

CONCLUSION

Based upon the foregoing, Plaintiff Republic's Counter-Motion in Limine to Exclude Evidence of Medical Liens should be denied as it asks this Court to ignore the clear language of NRS 42.021.

DATED this 13th day of February, 2019.

CARROLL, KELLY, TROTTER, FRANZEN, McBRIDE & PEABODY

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Attorneys for Defendants
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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 13th day of February, 2018, I served a true and correct copy of the foregoing **DEFENDANTS ANDREW CASH, M.D., ANDREW CASH, M.D., P.C. aka ANDREW MILLER CASH, M.D., P.C. & DESERT INSTITUTE OF SPINE CARE, LLC'S OPPOSITION TO PLAINTIFF'S COUNTER-MOTION IN LIMINE TO LIMIT OR EXCLUDE EVIDENCE OF MEDICAL LIENS** addressed to the following counsel of record at the following address(es):

☒ **VIA ELECTRONIC SERVICE:** By mandatory electronic service (e-service), proof of e-service attached to any copy filed with the Court; or

☐ **VIA U.S. MAIL:** By placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, addressed as indicated on the service list below in the United States mail at Las Vegas, Nevada

☐ **VIA FACSIMILE:** By causing a true copy thereof to be telecopied to the number indicated on the service list below.

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EXHIBIT "A"

EXHIBIT "A"

DISTRICT COURT
CLARK COUNTY, NEVADA

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12/13/2016 06:27:30 AM

CLERK OF THE COURT

REPUBLIC SILVER STATE DISPOSAL, INC., a Nevada Corporation,

Plaintiff,

vs.

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; JAMES D. BALODIMAS, M.D.; JAMES D. BALODIMAS, M.D., P.C.; LAS VEGAS RADIOLOGY, LLC, a Nevada Limited Liability Company; BRUCE A. KATUNA, M.D.; ROCKY MOUNTAIN NEURODIAGNOSTICS, LLC, a Colorado Limited Liability Company; DANIELLE MILLER aka DANIELLE SHOPSHIRE; NEUROMONITORING ASSOCIATES, INC., a Nevada Corporation; DOES 1-10 inclusive; and ROE CORPORATIONS 1-10 inclusive,

Defendants.

CASE NO.: A-16-738123-C
DEPT. XXX

ORDER RE: THE CASH DEFENDANTS' MOTION TO DISMISS, THE BALODIMAS DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS, AND DANIELLE MILLER'S MOTION TO DISMISS, AND ALL JOINDERS

The above-captioned matter came on for hearing before Judge Jerry A. Wiese II, on Tuesday, October 4, 2016, with regard to the Cash Defendants' Motion to Dismiss, the Balodimas Defendants' Motion for Judgment on the Pleadings, and Danielle Miller's Motion to Dismiss, and all related Joinders. The Court having reviewed the briefs submitted by all parties, entertained oral argument by counsel for all parties. Following oral argument, the Court indicated that it would enter a written decision from chambers. The Court then issued a Minute Order on October 13, 2016, setting an Evidentiary Hearing for November 9, 2016. Various parties submitted supplemental briefing, and an Evidentiary Hearing occurred on November 9, 2016. The Court indicated that an Order would issue, and this Order follows:

This case stems from a motor vehicle accident which occurred on or about January 14, 2012, involving Marie Gonzales and a commercial garbage truck owned

and operated by Republic, and driven by its employee Deval Hatcher. As a result of the accident, Marie Gonzales allegedly suffered personal injuries, and treated with various medical care providers, including those named as Defendants herein. On or about September 3, 2013, Marie Gonzales filed a lawsuit against Republic and its driver, alleging negligence, and seeking compensation for her injuries. On or about July 6, 2015, Republic settled the underlying case with Ms. Gonzales, and paid the amount of $2,000,000.00. Republic thereafter filed a Complaint in this separate litigation, alleging that from January 29, 2013 forward, Ms. Gonzales' damages were the direct result of the professional negligence of the Defendants named herein.

All pending motions and joinders essentially make the same arguments – 1) that the Plaintiff does not have standing to assert a direct claim for medical malpractice or medical negligence (now known in Nevada as "professional negligence"); 2) that the Plaintiff failed to bring its claims for professional negligence, respondeat superior, and negligent supervision and retention, within the applicable statutes of limitations; and 3) that Plaintiff's contribution claim fails pursuant to NRS 17.225(3), as Plaintiff's settlement with Maria Gonzales did not extinguish any liability on the part of the Defendants in this case.

With regard to the first argument, that the Plaintiff does not have standing, even the Plaintiff's Opposition concedes that Plaintiff has "no stand-alone right under NRS Ch.41A to pursue Marie Gonzales' – or anyone else's – claim of medical malpractice." (See Plaintiff's Opposition to the Cash Motion to Dismiss at pg. 7). Plaintiff simply argues that its claim is for contribution, based upon claims for professional negligence, respondeat superior, and negligent supervision and retention. With this understanding, this Court agrees that the Plaintiff does not have standing to bring these claims directly against the Defendants. The Court acknowledges that the Plaintiff's claim for contribution is based upon the Defendants' alleged professional negligence, respondeat superior, and negligent supervision and retention. As noted by the Plaintiff, Nevada law obligates a Plaintiff seeking contribution from health care providers, asserting claims for professional negligence, to satisfy the requirements of NRS Chapter 41A. (See Plaintiff's Opposition to the Cash Motion to Dismiss at pg. 8).

Having concluded that the Plaintiff's claims for professional negligence, respondeat superior, and negligent supervision and retention are all subsumed within

and are part of, and the premise of the Plaintiff's claim for contribution, the more difficult issue is whether the Plaintiff's claim for contribution fails under NRS 17.225(3).

NRS 17.225 reads as follows:

> **NRS 17.225 Right to contribution.**
> 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.
> 2. The right of contribution exists only in favor of a tortfeasor who has paid more than his or her equitable share of the common liability, and the tortfeasor's total recovery is limited to the amount paid by the tortfeasor in excess of his or her equitable share. No tortfeasor is compelled to make contribution beyond his or her own equitable share of the entire liability.
> 3. ***A tortfeasor who enters into a settlement with a claimant is not entitled to recover contribution from another tortfeasor whose liability for the injury or 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.
> (Added to NRS by 1973, 1303; A 1979, 1355, emphasis added).

NRS 17.285, also dealing with contribution, reads as follows:

> **NRS 17.285 Enforcement of right of contribution.**
> 1. Whether or not judgment has been entered in an action against two or more tortfeasors for the same injury or wrongful death, contribution may be enforced by separate action.
> 2. Where a judgment has been entered in an action against two or more tortfeasors for the same injury or wrongful death, contribution may be enforced in that action by judgment in favor of one against other judgment defendants by motion upon notice to all parties to the action.
> 3. If there is a judgment for the injury or wrongful death against the tortfeasor seeking contribution, any separate action by the tortfeasor to enforce contribution must be commenced within 1 year after the judgment has become final by lapse of time for appeal or after appellate review.
> 4. If there is no judgment for the injury or wrongful death against the tortfeasor seeking contribution, the tortfeasor's right of contribution is barred unless the tortfeasor has:
> (a) Discharged by payment the common liability within the statute of limitations period applicable to claimant's right of action against him or her and has commenced an action for contribution within 1 year after payment; or
> (b) Agreed while action is pending against him or her to discharge the common liability and has within 1 year after the agreement paid the liability and commenced an action for contribution.
> 5. The judgment of the court in determining the liability of the several defendants to the claimant for an injury or wrongful death shall be binding as among such defendants in determining their right to contribution.
> (Added to NRS by 1973, 1304)

The Defendants argue that since the professional negligence statute of limitations set forth in NRS 41A.097, expired prior to the settlement between Maria Gonzales and Republic, there was no liability on the part of the doctors that could have

been extinguished by such settlement, and consequently, pursuant to 17.225(3), the Plaintiff has no claim for contribution.

In order to evaluate the applicable statute of limitations, the Court must briefly analyze each of the Defendants' involvement in the care and treatment of Ms. Gonzales. In Plaintiff's Amended Complaint, filed on 6/27/16, the Plaintiff alleges that Maria Gonzales began treating with Dr. Cash on 4/4/12, who performed an OLIF procedure on or about 1/29/13, which procedure involved the placement of pedicle screws. (See Amended Complaint at ¶23-27). Plaintiff alleges that Katuna and Rocky Mountain Neurodiagnostices and Miller and Neuromonitoring Associates were involved in neurophysiological monitoring prior to the OLIF procedure. (See Amended Complaint ¶28-29). Plaintiff alleges that Defendant Miller was present and providing neurophysiologic monitoring services during the procedure on 1/29/13. (See Amended Complaint ¶33). Ms. Gonzales was apparently discharged from Spring Valley Hospital on 2/2/13. (Id., at ¶38). A CT study was apparently performed by Las Vegas Radiology on 2/12/13. (Id., at ¶40-41). On or about June 7 and July 12, 2013, Gonzales consulted with Drs. Jason Garber and Stuart Kaplan, and on 7/15/13, Dr. Kaplan performed an anterior fusion surgery at Spring Valley Hospital. (Id., at ¶45). Ms. Gonzales allegedly continued to have back problems and on or about 2/10/15, Dr. Kaplan implanted a spinal cord stimulator. (Id., at ¶46-47). On 9/3/13, Gonzales filed her Complaint in *Gonzales v. Hatcher* (Case No.: A687931) against Republic and Hatcher. (Id., at ¶48). On 7/6/15, Republic settled that case with Gonzales for $2,000,000.00. (Id., at ¶51).

Based upon the foregoing chronology, it appears that the medical care providers named as Defendants in the present litigation were involved in the care of Ms. Gonzales from 4/4/12 through approximately 2/12/13. Plaintiff's original Complaint in this matter was filed on 6/8/16. If NRS 41A.097 applies, the statute reads as follows:

> **NRS 41A.097 Limitation of actions; tolling of limitation.**
> 1. Except as otherwise provided in subsection 3, an action for injury or death against a provider of health care may not be commenced more than 4 years after the date of injury or 2 years after the plaintiff discovers or through the use of reasonable diligence should have discovered the injury, whichever occurs first, for:
> (a) Injury to or the wrongful death of a person occurring before October 1, 2002, based upon alleged professional negligence of the provider of health care;
> (b) Injury to or the wrongful death of a person occurring before October 1, 2002, from professional services rendered without consent; or
> (c) Injury to or the wrongful death of a person occurring before October 1, 2002, from error or omission in practice by the provider of health care.
> 2. Except as otherwise provided in subsection 3, ***an action for injury or death against a provider of health care may not be commenced more than 3***

years after the date of injury or 1 year after the plaintiff discovers or through the use of reasonable diligence should have discovered the injury, whichever occurs first, for:

(a) Injury to or the wrongful death of a person occurring on or after October 1, 2002, based upon alleged professional negligence of the provider of health care;

(b) Injury to or the wrongful death of a person occurring on or after October 1, 2002, from professional services rendered without consent; or

(c) Injury to or the wrongful death of a person occurring on or after October 1, 2002, from error or omission in practice by the provider of health care.

3. This time limitation is tolled for any period during which the provider of health care has concealed any act, error or omission upon which the action is based and which is known or through the use of reasonable diligence should have been known to the provider of health care.

4. For the purposes of this section, the parent, guardian or legal custodian of any minor child is responsible for exercising reasonable judgment in determining whether to prosecute any cause of action limited by subsection 1 or 2. If the parent, guardian or custodian fails to commence an action on behalf of that child within the prescribed period of limitations, the child may not bring an action based on the same alleged injury against any provider of health care upon the removal of the child's disability, except that in the case of:

(a) Brain damage or birth defect, the period of limitation is extended until the child attains 10 years of age.

(b) Sterility, the period of limitation is extended until 2 years after the child discovers the injury.

(Added to NRS by 1971, 366; A 1975, 407; 1977, 857, 954, 1082; 1985, 2011; 1989, 424; 1991, 1131; 1993, 2224; 1995, 2350; 1999, 5; 2001, 1107; 2002 Special Session, 8; 2004 initiative petition, Ballot Question No. 3, emphasis added).

Defendants argue that the Plaintiff's claims are barred because the Complaint was filed more than 3 years after the date of injury (date of any treatment), and more than 1 year since the Plaintiff discovered or through the use of reasonable diligence should have discovered the injury. Since the Plaintiff's treatment with the Defendants concluded on or about 2/12/13, and the Plaintiff's Complaint was not filed until 6/8/16, it appears that more than 3 years elapsed since any treatment by any Defendant, and consequently, the statute would have expired.

In a case very similar to the present case, the Nevada Supreme Court has recently held that a claim for contribution carries a fixed limitation period pursuant to NRS 17.285, and arises "[w]here a judgment has been entered in an action against two or more tortfeasors for the same . . . wrongful death."[1]

In *Saylor v. Arcotta*, a motor vehicle accident occurred in which a passenger in a cab was injured. Two weeks after the accident, the passenger was hospitalized for a heart attack and died during surgery. The heirs sued the taxi cab driver and the cab company. Through discovery, the cab company learned that the death may have been

[1] *Saylor v. Arcotta*, 126 Nev. 92, 225 P.3d 1276 (2010).

caused by medical negligence, and they subsequently filed a third-party complaint against the passenger's treatment physicians for equitable indemnity and contribution. The doctors moved for summary judgment arguing that the claims were time-barred by the medical malpractice statute of limitations contained in NRS 41A.097. The district court agreed and dismissed the case. On appeal, the Nevada Supreme Court held that "equitable indemnity claims are not governed by the limitations period applicable to the underlying tort." [2] The Court held that "equitable indemnity claims that arise out of medical malpractice allegations are not subject to NRS 41A.097(2)'s limitations period for medical malpractice claims, but are instead subject to NRS 11.190(2)(c)'s limitations period for actions on implied contracts."[3] The Supreme Court's analysis of the "contribution" claim was separate, and in that regard the Court stated the following:

> In Nevada, a claim for contribution is preserved by statute – NRS 17.225 – and carries a fixed limitations period under NRS 17.285. Pursuant to NRS 17.285(2), a contribution claim arises "[w]here a judgment has been entered in an action against two or more tortfeasors for the same ... wrongful death." The contribution claim must be filed "within 1 year after the judgment has become final by lapse of time for appeal or after appellate review." Thus, once a contribution claim arises, it is subject to a one-year statute of limitations.[4]

Two years later, in 2012, the Nevada Supreme Court addressed another similar case, in *Pack v. Latourette*.[5] In that case, David Zinni was injured in a motor vehicle accident and brought an action against a taxi cab driver who caused the accident, and the cab company. The cab company brought a third-party complaint against the doctors who treated Zinni, asserting claims for equitable indemnity and contribution, based on medical malpractice. Dr. LaTourette moved to dismiss the third-party complaint, alleging that it was time-barred by NRS 41A.097. Dr. LaTourette argued alternatively that the Complaint should be dismissed because the cab company failed to attach an expert affidavit as required by NRS 41A.071. The district court concluded that the cab company's claims were time-barred by NRS 41A.097's medical malpractice statute of limitations, and didn't address the alternative arguments.

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[2] *Saylor* at pg. 95, citing to *Reggio v. E.T.I.* 15 So.3d 951, 955 (La. 2008).
[3] *Saylor* at pg. 95.
[4] *Saylor* at pg. 96, citing to *Aetna Casualty & Surety v. Aztec Plumbing*, 106 Nev. 474, 476, 796 P.2d 227, 229, and NRS 17.285(3).
[5] *Pack v. LaTourette*, 128 Nev.Adv.Op. 28, 277 P.3d 1246 (2012).

The Supreme Court noted that while the appeal was pending in the Pack case, the Court decided the Saylor case, and the Court stated:

> In *Saylor*, we clarified that ***"NRS 41A.097(2)'s limitations period does not apply to equitable indemnity and contribution claims,"*** and that such claims are instead subject to the limitations period laid out in NRS 11.190(2)(c) and NRS 17.285, respectively.[6]

Dr. LaTourette argued that because the cab company had not yet "paid" Zinni more than its fair share of liability, the contribution claim was premature. The Supreme Court did not agree. The Court indicated that NRS 17.285 sets forth two methods for enforcing a claim for contribution – "either by a separate action following entry of judgment or 'in the same action in which [the] judgment is entered against two or more tortfeasors.'"[7] The Court further indicated that because the cab company's complaint rested upon the theory that Dr. Lautorette committed medical malpractice, the cab company was required to satisfy the statutory prerequisites in place for malpractice cases before bringing its contribution claim. Because the cab company failed to attach an expert affidavit to its claim for contribution, the complaint in that regard was void ab initio and should have been dismissed without prejudice.[8]

This Court notes that the facts underlying both the *Saylor* and *Pack* cases, are almost identical to the facts underlying the present case. Significantly, however, in neither *Saylor* nor *Pack*, did the Nevada Supreme Court address sub-paragraph (3) of NRS 17.225. In the present case, the Defendants contend that the Plaintiff is not entitled to recover contribution from the doctors, because their liability for the injury to Ms. Gonzales was not extinguished by the settlement, because Ms. Gonzales' statute of limitations for any claims against the doctors had expired prior to the settlement.

In *McNulty v. Eighth Jud. Dist. Ct.*,[9] the Nevada Supreme Court did have an opportunity to consider sub-paragraph (3) of NRS 17.225. That case stemmed from a motor vehicle accident, in which a cab passenger, Michael Cicchini, suffered injuries. Subsequent to the accident, McNulty and others were involved in performing a back

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[6] *Pack* at 1248, citing *Saylor v. Arcotta*, 126 Nev. --, 225 P.3d 1276, 1278-79 (2010), emphasis added.
[7] *Pack* at pg. 1249-1250, citing *Bell & Gossett Co. v. Oak Grove Investors*, 108 Nev. 958, 963, 843 P.2d 351, 354 (1992), ant NRS 17.285(1),(2).
[8] *Pack* at pg. 1250, citing to *Fierle v. Perez*, 125 Nev. 728, 736-38, 219 P.3d 906, 911-12 (2009), and *Washoe Med. Ctr.*, 122 Nev. 1298, 1300, 148 P.3d 790, 792 (2006).
[9] *McNulty v. Eighth Jud. Dist. Ct.*, 127 Nev. 1159, 373 P.3d 942 (unpublished 2011).

surgery on Mr. Cicchini, which allegedly left him partially paralyzed. Cicchini sued the cab company, and settled his claim for $1,150,000.00. Cicchini signed a release, but it did not extinguish McNulty's liability. The release actually included specific language that indicated that the subject accident did not cause the need for surgery, and neither the surgery nor any complications relating to it were caused by the accident. After settling, both Cicchini and the cab company each sued Dr. McNulty. Cicchini's suit sought damages for alleged medical malpractice. The cab company sued for contribution and indemnity, based on the contention that the surgery, not the accident, caused Cicchini's damages. Dr. McNulty moved for dismissal, and the district court denied the motion. McNulty then filed a writ with the Nevada Supreme Court. The Supreme Court concluded that McNulty was entitled to a writ of mandamus compelling the dismissal of the case, based upon the clear statutory language of NRS 17.225(3):

> A tortfeasor who enters into a settlement with a claimant is not entitled to recover contribution from another tortfeasor whose liability for the injury or wrongful death is not extinguished by the settlement . . . [10]

The Court held that "the statute's wording is plain and its application clear: VWC [the cab company] has no contribution claim against McNulty."[11]

In *McNulty*, the Nevada Supreme Court held that because McNulty's liability had not been extinguished by the settlement between Cicchini and the cab company, the cab company had no claim for contribution against McNulty. In the present case, Plaintiff's counsel offered during oral argument to make the settlement agreement available, but neither party attached a copy of the settlement agreement to the original pleadings. Following the October 4, 2016, hearing with regard to the foregoing, this Court issued a Minute Order, and scheduled an Evidentiary Hearing, asking the parties to respond to the following two specific issues:

1) Do the terms of the settlement agreement between Gonzales and Republic extinguish the liability of the Defendants named in the present litigation? (See *Saylor v. Arcotta*, 126 Nev. 92, 225 P.3d 1276 [2010]; *Pack v. LaTourette*, 128 Nev.Adv.Op. 25, 277 P.3d 1246 [2012]; and *McNulty v. Eighth Judicial Dist. Ct.*, 127 Nev. 1159, 373 P.3d 942 [2011]).

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[10] McNulty at pg. 2, citing NRS 17.225(3).
[11] Id.

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

Prior to the November 9, 2016, Evidentiary Hearing, counsel for the Plaintiff submitted to the Court a copy of the subject Release between Marie Gonzales and Republic Silver State Disposal. The Release specifically includes the following language:

> . . . this SETTLEMENT AGREEMENT, RELEASE and 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 may possess ***against any of her medical treatment providers*** for injuries she alleges to have sustained in the described incident of January 14, 2012.[12]

Although Defense Counsel noted that the Release was not specific as to which "medical treatment providers" liability would be extinguished, this Court finds that the Release is very clear that it was the intent of the parties that the Release would extinguish any claims or liabilities that Ms. Garcia had against her medical treatment providers, relating to the injuries she alleged as a result of the subject accident. Consequently, the Court concludes that the terms of the settlement agreement do extinguish the liability of the Defendants named in the present litigation, pursuant to *Saylor, Pack*, and *McNulty*.[13]

The next issue the Court must address, is whether any of the medical treatment providers (particularly those named as Defendants in the present case) had any liability to Ms. Gonzales that could have been extinguished on July 6, 2015. NRS 41A.079 provides that "an action for injury or death against a provider of health care may not be commenced more than 3 years after the date of injury or 1 year after the plaintiff discovers or through the use of reasonable diligence should have discovered the injury, whichever occurs first."[14] Defendants argue that any claim that Ms. Gonzales had against the treating doctors, expired prior to the July 6, 2015, Release, and consequently, she had no claims against these Defendants which could have been extinguished on that date. Plaintiff argues that the NRS 41A.079 Limitation of Action

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[12] See Exhibit 3 to Plaintiff's Brief Re: Evidentiary Hearing, at pg. 2 of 10 (emphasis added).

[13] *Saylor v. Arcotta*, 126 Nev. 92, 225 P.3d 1276 [2010]; *Pack v. LaTourette*, 128 Nev.Adv.Op. 25, 277 P.3d 1246 [2012]; and *McNulty v. Eighth Judicial Dist. Ct.*, 127 Nev. 1159, 373 P.3d 942 [2011]).

[14] NRS 41A.079.

does not apply, because this is a claim for "contribution," and in the *Saylor* and *Pack* cases, the Nevada Supreme Court indicated that the NRS 41A.079 limitation of actions does not apply to a claim for equitable indemnity or contribution.

If this Court were to agree with Defendants, the result would be the following: If the parties to the underlying negligence case "settle" their claims, after the statute of limitations set forth in NRS 41A.079 has expired, then the settling Defendant cannot bring a claim for contribution because pursuant to NRS 17.225(3), there would be no liability from the alleged tortfeasor (doctor) to be extinguished. On the other hand, if the parties to the underlying negligence case do not "settle" their case, but instead go to trial and obtain a "Judgment," against a Defendant, that Defendant can bring a claim for contribution against an alleged tortfeasor (doctor), even if the statute of limitations set forth in NRS 41A.079 has expired, because NRS 17.285(3) would apply instead of NRS 17.225(3). This would seem to provide a disincentive to the parties to settle, and cannot be the intent of the legislature.

The Nevada Supreme Court has made it clear in *Saylor* and *Pack*, that in a claim for contribution, NRS 41A.079 does not apply.[15] This Court finds and concludes that the language in NRS 17.225(3), (***whose liability for the injury or wrongful death is not extinguished by the settlement)***, refers to the need for the parties to extinguish liability in the Settlement Agreement, and that was done in this case. This Court finds and concludes that the liability of the Defendant Doctors was extinguished by the underlying Settlement Agreement, and consequently, pursuant to NRS 17.225 and 17.285, as well as the above-referenced case law, the Plaintiff in this case has preserved

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[15] *Saylor v. Arcotta*, 126 Nev. 92, 225 P.3d 1276 [2010]; *Pack v. LaTourette*, 128 Nev.Adv.Op. 25, 277 P.3d 1246 [2012].

its right to assert a claim for contribution, and in that regard, the Defendants' Motions must be Denied.

Based upon the foregoing, the pending Motions are GRANTED, as they relate to all claims other than the claim for Contribution, but they are DENIED as they relate to the Plaintiff's claim for Contribution.

DATED this 2nd day of December, 2016.

JERRY A. WIESE II
DISTRICT COURT JUDGE, DEPT. 30

EXHIBIT "B"

EXHIBIT "B"

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DISTRICT COURT

CLARK COUNTY, NEVADA

REPUBLIC SILVER STATE DISPOSAL, INC., a Nevada Corporation

Plaintiff,

vs.

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; JAMES D. BALODIMAS, M.D.; JAMES D. BALODIMAS, M.D., P.C.; LAS VEGAS RADIOLOGY, LLC, a Nevada Limited Liability Company; BRUCE A. KATUNA, M.D.; ROCKYMOUNTAIN NEURODIAGNOSTICS, LLC, a Colorado Limited Liability Company; DANIELLE MILLER aka DANIELLE SHOPSHIRE; NEURO-MONITORING ASSOCIATES, INC., a Nevada Corporation; DOES 1 - 10, inclusive; and ROE CORPORATIONS 1 - 10 inclusive,

Defendants.

CASE NO.: A-16-738123-C
DEPT. NO.: XXX

ORDER GRANTING DEFENDANT LAS VEGAS RADIOLOGY'S MOTION TO "CAP" NON-ECONOMIC DAMAGES PER NRS 41A.035 AND JOINDERS TO SAME

Date of Hearing: 04/05/18
Time of Hearing: 9:00 a.m.

Defendant LAS VEGAS RADIOLOGY, LLC'S Motion to Cap Non-Economic Damages Per NRS 41A.035 having come on for hearing on the 5th day of April, 2018, and Defendants Andrew M. Cash, M.D.; Andrew M. Cash, M.D., P.C.; Desert Institute of Spine Care, LLC; James D. Balodimas, M.D.; James D. Balodimas, M.D., P.C.; Bruce A. Katuna, M.D. and Rocky Mountain Neurodiagnostics,

LLC having filed Joinders to same; and

David Barron, Esq. of Barron & Pruitt, LLC, appearing on behalf of Plaintiff Republic Silver State Disposal, Inc.; Sherman B. Mayor, Esq. of Mandelbaum Ellerton & Associates on behalf of Defendant Las Vegas Radiology; Heather Hall, Esq. of Carroll, Kelly, Trotter, Franzen, McBride & Peabody appearing on behalf of Defendants Andrew M. Cash, M.D.; Andrew M. Cash, M.D., P.D.; Desert Institute of Spine Care, LLC; Michael Navratil, Esq. of John H. Cotton & Associates appearing on behalf of James D. Balodimas, M.D. and James D. Balodimas, M.D., P.C.; James R. Olson, Esq. of Olson Cannon Gormley, appearing on behalf of Defendants Bruce A. Katuna, M.D. and Rocky Mountain Neurodiagnostics, LLC; James E. Murphy, Esq. of Lewis Brisbois Bisgaard & Smith, appearing on behalf of Defendant Neuromonitoring Associates, Inc.; and Anthony Lauria, Esq. of Lauria Tokunaga Gates & Linn, LLP on behalf of Defendant Danielle Miller aka Danielle Shopshire; and

The Court having reviewed the papers and pleadings on file herein and having heard argument of counsel and being otherwise duly advised in the premises, makes the following findings of fact, conclusions of law and orders:

UNDISPUTED MATERIAL FACTS

On January 14, 2012, a garbage truck owned and operated by Republic Silver State Disposal (Republic) struck the vehicle being operated by underlying Plaintiff, Marie Gonzales (Marie Gonzales). Marie Gonzales claimed she suffered personal injury in the accident and filed suit against Republic and its driver, Deval Hatcher on September 4, 2013. Marie Gonzales, the Plaintiff, was treated by a number of healthcare providers following the accident.

In the course of her care, Ms. Gonzales received certain medical care and/or services from Andrew M. Cash, M.D. (orthopedic surgeon - Nevada #11944); Desert Institute of Spine Care, LLC; James D. Balodimas, M.D. (radiologist - Nevada #9538); Las Vegas Radiology, LLC; Bruce A. Katuna, M.D. (neurologist - Nevada #14236); Rocky Mountain Neurodiagnostics, LLC; Neuromonitoring Associates; and Danielle Miller aka Danielle Shopshire (Neuro-Monitoring Associates).

At no time did Marie Gonzales bring an action against any of her above-referenced health care providers contending they caused, contributed to, or exacerbated injuries she sustained when struck by

Republic's garbage truck.

Several years later, on July 6, 2015, Republic settled Marie Gonzales' claims against Republic and Deval Hatcher for the total sum of $2,000,000.00. In that settlement, Republic prepared a Release which included the following language:

> ". . . this SETTLEMENT AGREEMENT RELEASE and 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 may possess ***against any of her medical treatment providers*** for injuries she alleges to have sustained in the described incident of January 14, 2012." [Emphasis added.]

Then, on June 8, 2016, Republic filed a lawsuit against a number of Marie Gonzales' subsequent treating healthcare providers for "contribution". Republic asserts that Marie Gonzales sustained additional injury due to alleged medical malpractice. Republic contends, as a result, that its $2,000,000 settlement payment exceeded Republic's liability for Marie Gonzales' injuries.

Defendant Las Vegas Radiology served a set of Requests for Admission upon Republic. Request for Admission No. 16 and the Response to same by Republic are as follows:

> **REQUEST NO. 16:**
> Admit that any potential non-economic claims or liabilities Plaintiff Marie Gonzales may have asserted against her treating medical providers are capped at a total amount of $350,000 per NRS 41A.035.
>
> **RESPONSE TO REQUEST NO. 16:**
> Republic admits[sic] that NRS 41A.035 would have applied had Marie Gonzales sued any or all of her negligent health care providers.

On March 2, 2018, Las Vegas Radiology, LLC filed a Motion to Cap Non-Economic Damages at "$350,000" per NRS 41A.035. Las Vegas Radiology contends that Republic's contribution action is grounded and based upon claims for professional negligence and is therefore subject to the requirements of NRS Chapter 41A which would include the "cap" on non-economic damage per NRS 41A.035. (That indirect Plaintiff Republic "steps into the shoes" of direct plaintiff Marie Gonzales from whom the professional negligence actions were obtained by settlement.)

Plaintiff, Republic, contends that its contribution action was brought under Nevada's adaptation of the Uniform Contribution Among Tortfeasors Act (UCATA) and that the statutory requirements of NRS 41A.035 do not apply to such an action.

CONCLUSIONS OF LAW

A. When Republic Settled with Marie Gonzales for Any Potential Claims She May Possess Against Any of Her Medical Treatment Providers, Republic "Stands in the Shoes" of Marie Gonzales in Pursuing Contribution Against the Providers.

On July 6, 2015, Republic settled with Marie Gonzales for the sum of $2,000,000. Such settlement discharged Republic's liability for its auto accident with Gonzales, and also discharged and extinguished any of Marie Gonzales' claims for "economic" and "non-economic" damage she may possess against her subsequent medical treatment providers.

Having settled, Republic then, on June 8, 2016, filed a lawsuit against the medical treatment providers of Marie Gonzales for "contribution". Nevada law obligates a plaintiff seeking contribution from healthcare providers, which is based upon claims of professional negligence, to satisfy the requirements of NRS Chapter 41A. *See Pack v. LaTourette*, 128 Nev. 264, 277 P.3d 1246 (Nev. 2012) and *Truck Insurance Exchange v. Tetzlaff*, 683 F.Supp. 233 (Nev. 1988) and December 2, 2016 Order of this Court.

In pursuing a contribution action, Republic " . . . stands in the shoes" of underlying plaintiff, Marie Gonzles. Republic is entitled to all of the rights of Ms. Gonzales, but also suffers all the liabilities to which she would be subject. *Cleary Brothers Construction Co. v. Upper Keys Marine Construction, Inc.*, 526 So.2d 116 (Ct.App. Fla. 3rd Dist. 1988). In *In re W.R. Grace & Company*, 212 U.S.Dist. LEXIS 88887 (D.Del. 2012), the Court stated in pertinent part as follows:

> " . . . An indirect claimant must first prove that it paid all, or a significant portion, of a liability that Grace owed to a direct claimant. The indirect claimant can then pursue an indemnity and/or ***contribution claim*** against the trust. At this point, the indirect claimant assumes the same position as a direct claimant and is entitled to recover from the trust **the same amount that a direct claimant could have recovered had it brought a direct *claim* against the trust itself.**" (Emphasis added to last sentence only.)

Here, had underlying plaintiff, Marie Gonzales sued moving and joinder healthcare providers (as a direct plaintiff), her recovery, if any, would have been limited to $350,000, in total, for non-economic damages per NRS 41A.035. As such, Republic (as an indirect plaintiff) is also limited to this same capped amount.

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B. Republic's Contribution Action Based Upon Claims of Professional Negligence Against the Moving and Joinder Defendants is Capped at $350,000 in Non-Economic Damages.

In Nevada, an action based upon professional negligence against a "provider of health care" may not exceed $350,000 in non-economic damage per NRS 41A.035. A "provider of health care" is defined in NRS 41A.017 to include " . . . a physician licensed pursuant to Chapter 630 or 633 of NRS . . .".

The instant Motion to "cap" non-economic damages was brought by Las Vegas Radiology which is alleged to be vicariously liable for Defendant James D. Balodimas, M.D. Joining the Motion were Defendants James D. Balodimas, M.D.; James D. Balodimas, M.D., P.C.; Andrew M. Cash, M.D.; Andrew M. Cash, M.D., P.C.; Desert Institute of Spine Care, LLC; Bruce A. Katuna, M.D. and Rocky Mountain Neurodiagnostics, LLC.

Per NRS 41A.035, the non-economic damage cap set forth in NRS 41A.035 applies to Drs. Balodimas, Cash and Katuna and their professional corporations (PC) per NRS 41A.017. Further, since each of the 3 Defendant group practices are asserted to be vicariously liable for each of the 3 physician Defendants, and no claim of independent negligence having been asserted, each of the professional groups' non-economic damage exposure mirrors the non-economic damage exposure of the physician employees. *See, Busch v. Flangas*, 873 P.2d 438 (Nev. 1992)(vicarious liability is not the conduct of the employer but the alleged tortious conduct of an agent performing within the scope of employment).

Accordingly, moving and joinder Defendants (Las Vegas Radiology, LLC; James D. Balodimas, M.D.; James D. Balodimas, M.D., P.C.; Andrew M. Cash, M.D.; Andrew M. Cash, M.D., P.C.; Desert Institute of Spine Care, LLC; Bruce A. Katuna, M.D. and Rocky Mountain Neurodiagnostics, LLC) are capped at $350,000, in total, for any recovery by Republic for non-economic damages.

Remaining Defendants Danielle Miller a/k/a Danielle Shopshire and Neuromonitoring Associates, Inc. did not file Joinders in Las Vegas Radiology's Motion to "Cap" Non-Economic Damages per NRS 41A.035 and hence, the Court has not considered such issue as it would apply to these two Defendants.

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ORDER

Accordingly, it is hereby ORDERED, ADJUDGED and DECREED that

1. Defendant Las Vegas Radiology's Motion to Cap Non-Economic Damages per NRS 41A.035 is hereby granted.

2. The Joinders to Defendant Las Vegas Radiology's Motion to Cap Non-Economic Damages per NRS 41A.035 filed by Defendants Andrew M. Cash, M.D.; Andrew M. Cash, M.D., P.C. and Desert Institute of Spine Care, LLC and Defendants James D. Balodimas, M.D. and James D. Balodimas, M.D., P.C.; and Defendants Bruce A. Katuna, M.D. and Rocky Mountain Neurodiagnostics, LLC are also granted.

3. The Non-Economic damage cap of $350,000 applies, in total, as a single cap to all moving and Joinder Defendants only; and

4. Defendants Danielle Miller aka Danielle Shopshire and Neuromonitoring Associates, Inc. did not file Joinders in the pending Motion, and accordingly, the applicability of the cap as to these two Defendants was not before the Court for decision.

DATED this 10 day of May, 2018.

DISTRICT COURT JUDGE

Respectfully Submitted by:

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EXHIBIT "C"

EXHIBIT "C"

Khoury v. Seastrand

Supreme Court of Nevada

July 28, 2016, Filed

No. 64702, No. 65007, No. 65172

Reporter
377 P.3d 81 *; 2016 Nev. LEXIS 647 **; 132 Nev. Adv. Rep. 52

RAYMOND RIAD KHOURY, Appellant, vs. MARGARET SEASTRAND, Respondent.

Subsequent History: As Amended November 4, 2016.

Prior History: [**1] Consolidated appeals from a district court judgment, pursuant to a jury verdict, and post-judgment orders awarding costs and denying a new trial in a personal injury action. Eighth Judicial District Court, Clark County; Jerry A. Wiese, Judge.

Disposition: Affirmed in part, reversed in part, and remanded.

Counsel: Lewis Roca Rothgerber Christie LLP and Daniel F. Polsenberg, Joel D. Henriod, and Abraham G. Smith, Las Vegas; Hall Jaffe & Clayton, LLP, and Steven T. Jaffe, Las Vegas; Harper Law Group and James E. Harper, Las Vegas; Houser & Allison, APC, and Jacob S. Smith, Las Vegas, for Appellant.

Richard Harris Law Firm and Benjamin P. Cloward, Alison M. Brasier, and Richard A. Harris, Las Vegas, for Respondent.

Judges: SAITTA, J. We concur: Hardesty, J., Douglas, J., Cherry, J., Gibbons, J. PICKERING, J., concurring.

Opinion by: SAITTA

Opinion

[*85] BEFORE THE COURT EN BANC.[1]

By the Court, SAITTA, J.:

As any trial attorney is aware, the jury voir dire process can be as important to the resolution of their claim as the trial itself. In this case we are asked to consider whether an attorney may ask prospective jurors questions [**2] concerning a specific verdict amount to determine potential bias or prejudice against returning large verdicts and whether repeatedly asking questions about that specific verdict amount results in jury indoctrination warranting a mistrial. We also consider the question of when a district court abuses its discretion in dismissing jurors for cause under *Jitnan v. Oliver, 127 Nev. 424, 254 P.3d 623 (2011)*.

We hold that while it is permissible for a party to use a specific award amount in questioning jurors regarding their biases towards large verdicts, it is the duty of the district court to keep the questioning within reasonable limits. When the district court fails to do so, this can result in reversible error due to jury indoctrination. We also distinguish our holding in *Jitnan* to emphasize that a juror's statements must be taken as a whole when deciding whether to dismiss for cause due to bias. Just as detached language considered alone is insufficient to establish that a juror is *unbiased*, it is also insufficient to establish that a juror is *biased*.

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[1] The Honorable Ron Parraguirre, Chief Justice, voluntarily recused himself from participation in the decision of this matter.

In the current case, we hold that, while troubling, the plaintiffs questioning of the jurors during voir dire did not reach the level of indoctrination. Furthermore, we hold that the district [**3] court abused its discretion by dismissing for cause five jurors because their statements, when taken as a whole, did not indicate that they were biased against large verdict amounts. However, the district court's error was harmless. Next, the district court did not abuse its discretion by admitting opinion and causation testimony by respondent's treating physician, by admitting testimony by respondent's expert witness, or by excluding evidence of the amount that respondent's medical providers received for the sale of her medical liens. However, the district court did abuse its discretion by excluding evidence of the medical lien's existence to prove bias in Seastrand's medical providers, but the error was harmless. Lastly, we hold that the district court abused its discretion by awarding respondent expert witness fees in excess of $1,500 per expert because it did not state a basis for its award, Therefore, we reverse the district court's decision as to the award of expert witness fees and remand to the district court with instructions to redetermine the amount of expert witness fees and, if greater than $1,500 per witness, to state the basis for its decision.

*FACTUAL AND PROCEDURAL [**4] HISTORY*

Respondent Margaret Seastrand and appellant Raymond Riad Khoury were in an automobile accident where Khoury's car rear-ended Seastrand's car. Following the accident, Seastrand received extensive treatment to both her neck and back, including surgeries. Seastrand brought the underlying personal injury action against Khoury to recover damages.

Khoury stipulated to liability for the accident, and the only issues contested at trial were medical causation, proximate cause, and damages. Khoury argued that Seastrand's injuries leading to the surgeries were preexisting and were not caused by the accident. During voir dire, Seastrand stated that she was seeking $2 million in damages and was permitted to question the jurors regarding whether they had hesitations about potentially awarding that specific verdict amount. After this questioning, the district court granted Seastrand's motion to dismiss several jurors for cause but denied Seastrand's motion to dismiss five other jurors for cause. [*86] However, the next day, the district court reconsidered its previous ruling and dismissed those five jurors for cause.

During trial, multiple expert witnesses testified, including Dr. Jeffrey Gross, a [**5] neurological expert, and Dr. William S. Muir, one of Seastrand's treating physicians. After a ten-day trial, the jury returned a verdict in the amount of $719,776. Seastrand then filed a memorandum of costs in the amount of $125,238.01 and a motion for attorney fees. Khoury opposed the motion and moved to retax costs. The district court granted in part Seastrand's motion for costs, awarding her $75,015.61, denied Seastrand's motion for attorney fees, and denied Khoury's countermotion to retax costs. Khoury then made a motion for a new trial, alleging various errors. The district court denied Khoury's motion. Khoury appeals from the judgment, the costs award, and the order denying his new trial motion.

Khoury raises the following issues on appeal: whether the district court abused its discretion by (1) denying Khoury's motion for a mistrial due to jury indoctrination, (2) dismissing jurors for cause that displayed concerns about their ability to award large verdicts and/or damages for pain and suffering, (3) admitting causation and opinion testimony by one of Seastrand's treating physicians, (4) admitting testimony by one of Seastrand's expert witnesses that was outside the scope of [**6] his specialized knowledge and/or undisclosed in a timely expert report, (5) excluding evidence of the amount Seastrand's medical providers received for the sale of her medical liens, (6) excluding evidence of her medical liens, (7) refusing to grant a new trial following Seastrand's use of the word "claim" during opening arguments, and (8) awarding costs to Seastrand.

DISCUSSION

The voir dire process

Khoury argues that the district court abused its discretion by allowing Seastrand to voir dire the jury panel about their biases regarding large verdicts. Khoury contends that Seastrand's questioning indoctrinated the jury to have a disposition towards a large verdict. Khoury argues that by asking jurors if they were uncomfortable with a verdict in excess of $2 million, Seastrand's attorney "improperly implanted a numerical value in the minds of the jury as representative of plaintiff's damages *before* the

jurors heard or considered any admitted evidence." Therefore, Khoury urges this court to "rule that such questions are *per se* improper."

The decision whether to grant or deny a motion for mistrial is within the trial court's discretion. *Owens v. State, 96 Nev. 880, 883, 620 P.2d 1236, 1238 (1980)*.

*Questioning jurors during voir dire about specific [**7] verdict amounts is not per se indoctrination*

"The purpose of jury voir dire is to discover whether a juror will consider and decide the facts impartially and conscientiously apply the law as charged by the court." *Lamb v. State, 127 Nev. 26, 37, 251 P.3d 700, 707 (2011)* (internal quotation marks omitted). "While counsel may inquire to determine prejudice, he cannot indoctrinate or persuade the jurors." *Scully v. Otis Elevator Co., 2 Ill. App. 3d 185, 275 N.E.2d 905, 914 (Ill. App. Ct. 1971)*.

Although we have not yet considered the issue of jury indoctrination in the civil context, we have considered it, albeit briefly, in criminal proceedings. *See Hogan v. State, 103 Nev. 21, 23, 732 P.2d 422, 423 (1987)*; *see also Johnson v. State, 122 Nev. 1344, 1354-55, 148 P.3d 767, 774 (2006)*. In *Hogan*, the court indicated that it was not an abuse of discretion for the district court to refuse to allow voir dire questions that were "aimed more at indoctrination than acquisition of information." *103 Nev. at 23, 732 P.2d at 423*. In *Johnson*, the court indicated that allowing the State to ask "prospective jurors about their ability to carry out their responsibilities[,]" by sentencing the defendant to death, was within the district court's discretion. *122 Nev. at 1354-55, 148 P.3d at 774*.

Other jurisdictions have considered the indoctrination issue in the civil context and have addressed the particular issue raised here—whether asking jurors if they have any hesitations about awarding a specific amount **[*87]** of damages results in indoctrination **[**8]** per se. In *Kinsey v. Kolber*, the Appellate Court of Illinois held that questioning jurors about specific verdict amounts was not indoctrination because it "tended to uncover jurors who might have bias or prejudice against large verdicts." *103 Ill. App. 3d 933, 431 N.E.2d 1316, 1325, 59 Ill. Dec. 559 (Ill. App. Ct. 1982)*; *see also Scully, 275 N.E.2d at 914* (suggesting that allowing the plaintiff to question jurors about specific amounts was not an abuse of discretion because "[s]ome prospective jurors may have had fixed opinions, which indicate bias or prejudice against large verdicts, and which might not readily yield to proper evidence." (internal quotation marks omitted)).

Alternatively, some jurisdictions have found that it is within the discretion of the district court to *refuse* to allow the plaintiff to ask questions about specific dollar amounts. This is because "they may tend to influence the jury as to the size of the verdict, and may lead to the impaneling of a jury which is predisposed to finding a higher verdict by its tacit promise to return a verdict for the amount specified in the question during the voir dire examination." *Trautman v. New Rockford-Fessenden Co-op Transp. Ass'n, 181 N.W.2d 754, 759 (N.D. 1970)*; *see also Henthorn v. Long, 146 W. Va. 636, 122 S.E.2d 186, 196 (W. Va. 1961)*. However, these courts did not state that questions about specific dollar amounts were per se improper; rather, the courts in these cases merely held **[**9]** that it was within the district court's discretion to refuse to allow the plaintiff to ask questions about specific dollar amounts. *See Trautman, 181 N.W.2d at 759* ("It is well within the trial court's discretion to sustain objections to such questions."); *Henthorn, 122 S.E.2d at 196* ("While jurors may be interrogated on their *voir dire* within reasonable limits, to elicit facts to enable the litigants to exercise intelligently their right of peremptory challenge, the nature and extent thereof should be left largely to the discretion of the trial court." (internal quotation marks omitted)).

We agree with other courts that have considered this issue and do not find the use of specific dollar amounts in voir dire to be per se improper. Indeed, it may be appropriate to use a specific amount in order to discover a juror's biases towards large verdicts. Simply asking jurors about their feelings regarding "large" awards or some similarly vague adjective may be insufficient to determine if a juror has a preconceived damages threshold for a certain type of case. A juror may consider himself or herself capable of awarding a verdict of $100,000, a verdict which in his or her mind may be fabulously large, but be unable to follow the law and award a verdict **[**10]** with another zero attached. Therefore, we hold that allowing a party to voir dire the jury panel regarding a specific verdict amount is within the district court's discretion.

Courts should remain vigilant of the danger of indoctrination during voir dire

During the three-day voir dire, Seastrand's attorney asked the jurors the following question:

> I'm going to be brutally honest with you folks right now. I'm going to say something that's a little uncomfortable for me to say. My client is suing for in excess of $2 million, and that's—you know, that's—that's what it is, and I'm putting that out there. I'm just going to be brutally honest about that. And I know that some of you folks, you know, you had different views and different beliefs in—in the jury questionnaire, and that's fine. But I want to talk about that right now.
>
> So who here is a little uncomfortable, even if it's just a little bit, with what I just said?

Seastrand's attorney did not stop there, however. He repeatedly brought up the $2 million verdict amount with each individual juror. In his quest to discover the jurors' feelings on that specific verdict amount, the record indicates that his actions bordered on badgering. One **[**11]** juror stated that Seastrand's attorney had used a "bullying tactic" in his "overemphasis on money" that "left a very bad taste in [his] mouth." The record also reflects that the questioning almost reduced another juror to tears.

Although our review of the voir dire transcript indicates that it was aimed more at acquisition of information than indoctrination, **[*88]** it was uncomfortably close. If the conduct by Seastrand's attorney had been allowed to become any more egregious, it would have reached the level of reversible error due to jury indoctrination. We take this opportunity to remind district court judges of their role in carefully considering the treatment of jurors during the selection process and the ultimate objective of seating a fair and impartial jury, However, we ultimately hold that the district court did not abuse its discretion in finding that the jury was not impermissibly indoctrinated in its denial of Khoury's motion for a mistrial.

The dismissals for cause

Khoury argues that the district court abused its discretion by misapplying *Jitnan v. Oliver, 127 Nev. 424, 254 P.3d 623 (2011)*, to dismiss jurors for cause who expressed concerns about awarding a large verdict amount. Khoury argues that a juror's prejudice against large **[**12]** verdict amounts or pain and suffering damages is not a form of bias. Therefore, he maintains that the district court abused its discretion in dismissing for cause jurors displaying such a prejudice. Khoury further asserts that the district court abused its discretion by denying his motion for a mistrial on these issues. *See Owens, 96 Nev. at 883, 620 P.2d at 1238*.

During voir dire, the district court initially denied a motion to dismiss for cause five individual jurors. However, after reviewing our decision in *Jitnan*, the district court reconsidered its prior ruling and dismissed the five jurors for cause "in an abundance of caution" because "[e]ach one of them talked about the fact . . . that $2 million was too much." In making its ruling, the district court was particularly concerned with whether the prospective jurors could state "unequivocally" that they did not have a preconception that a personal injury case could not support a large damages verdict. *See Jitnan, 127 Nev. at 432, 254 P.3d at 629* (holding that "[d]etached language considered alone is not sufficient to establish that a juror can be fair when the juror's declaration as a whole indicates that she could not state *unequivocally* that a preconception would not influence her verdict." (emphasis added) (internal quotation **[**13]** marks omitted)). The district court stated that "the unequivocal language [in *Jitnan*] is the language that I keep coming back to and in order to avoid the potential of bias or prejudice, I'm going to exclude them all."

A juror's bias against large verdict amounts or pain and suffering damages is a form of bias

"[B]ias exists when the juror's views either prevent or substantially impair the juror's ability to apply the law and the instructions of the court in deciding the verdict." *Sanders v. Sears-Page, 131 Nev. Adv. Op. 50, 354 P.3d 201, 206 (Ct. App. 2015)*.

Here, jurors were dismissed for cause on the grounds that they indicated they were predisposed against awarding a large amount of damages or damages for pain and suffering and would not be able to apply the law and the instructions of the court to the evidence presented because of their preconceived views. Inability by a juror to apply the law and instructions of the court displays bias. Therefore, we next consider whether such a bias existed in the jurors dismissed for cause by the district court.

The district court abused its discretion by dismissing jurors for cause that displayed a "potential" bias against large verdicts

"A district court's ruling on a challenge for **[**14]** cause involves factual determinations, and therefore, the district court enjoys broad discretion, as it is better able to view a prospective juror's demeanor than a subsequent reviewing court." *Jitnan, 127 Nev. at 431, 254 P.3d at 628* (internal quotation marks omitted).[2] In *Jitnan*, we stated:

> In determining if a prospective juror should have been removed for cause, the relevant inquiry focuses on whether the juror's views would prevent or substantially **[*89]** impair the performance of his duties as a juror in accordance with his instructions and his oath. Broadly speaking, if a prospective juror expresses a preconceived opinion or bias about the case, that juror should not be removed for cause if the record as a whole demonstrates that the prospective juror could lay aside his impression or opinion and render a verdict based on the evidence presented in court. But detached language considered alone is not sufficient to establish that a juror can be fair when the juror's declaration as a whole indicates that she could not state *unequivocally* that a preconception would not influence her verdict.

Id. at 431-32, 254 P.3d at 628-29 (emphasis added) (citations and internal quotation marks omitted).

Here, the district court initially denied Seastrand's motion to dismiss five jurors for cause who had expressed concerns about awarding large verdict amounts and/or pain and suffering damages, but later stated under cross-examination by Khoury that they would be able to follow the law and award a large verdict amount and/or pain and suffering damages. However, the next day, the district court reconsidered its prior ruling and dismissed the jurors for cause, reasoning that "the unequivocal language [in *Jitnan*] is the language that I keep coming back to and in order to avoid the *potential* of bias or prejudice, I'm going to exclude them all." (Emphasis added.)

This statement encapsulates the district court's error. *Potential* bias is not a valid basis for dismissing a juror for cause. Jurors should only be excluded on the basis of an *actual* bias that prevents or substantially impairs the juror's ability to apply the law and the instructions of the court in deciding the verdict or **[**16]** for other grounds defined by statute. *See NRS 16.050*. It is clear from the district court's oral reasoning that it was focused on the last sentence of *Jitnan* and, specifically, the single word "unequivocally," while ignoring the context provided by the remainder of the paragraph in which it is contained. If potential bias was all that were required to dismiss a juror for cause, then *any* expression of doubt, no matter how small, by a juror would be grounds to dismiss for cause. Under such a standard, rehabilitation by the opposing party's attorney would be impossible. No matter how fervent a juror's statements indicating that the juror could follow the law, the potential for bias would remain.

Jitnan, when read in context, states that jurors' statements expressing a potential bias are not enough, when taken alone, to mean that they cannot "unequivocally" follow the law. *127 Nev. at 432, 254 P.3d at 629*. While *Jitnan* only states that "[d]etached language considered alone is not sufficient to establish that a juror can be fair," this is also true for establishing whether a juror *cannot* be fair. *Id.* (internal quotation marks omitted). Jurors' statements must be taken "as a whole," and "[d]etached language, considered alone[,]" indicating that they may **[**17]** have difficulty awarding a large verdict amount is insufficient to demonstrate that they would be unable or substantially impaired in applying the law and the instructions of the court in deciding the verdict and thus actually biased against awarding large verdict amounts. *Id.* (internal quotation marks omitted).

After reviewing the voir dire transcript, we conclude that the district court got it right the first time when it refused to dismiss the five jurors for cause. Therefore, we hold that the district court abused its discretion by improperly dismissing jurors for cause whose statements, when taken as a whole, indicate that they could apply the law and the instructions of the court in deciding the verdict and thus were not actually biased.

The error was harmless

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[2] Khoury argues in his reply brief that the district court misinterpreted **[**15]** *NRS 16.050* and that therefore the proper standard of review is de novo, not abuse of discretion. Because Khoury raises this issue for the first time in his reply brief, it is deemed waived and we do not consider it here. *NRAP 28(c)*.

Khoury argues that excluding jurors for their biases against large verdict amounts was reversible error because it prevented the jury from being a fair cross-section of society. Khoury equates this to excluding jurors on the basis of political affiliation, which some courts do not allow.

Although we have not yet considered this issue, most jurisdictions have held that when the district court abuses its discretion in dismissing **[**18]** a juror for cause, it is not reversible error. *See Jones v. State, 982 S.W.2d 386, 392 [*90] (Tex. Crim. App. 1998)* ("The law in Texas for civil cases is like that of the federal courts and the courts of the other states. It has long been the established rule in this state that even though the challenge for cause was improperly sustained, no reversible error is presented unless appellant can show he was denied a trial by a fair and impartial jury." (internal quotation marks omitted)); *see also Basham v. Commonwealth, 455 S.W.3d 415, 421 (Ky. 2014)* (holding that even when a trial court abuses its discretion in dismissing a juror for cause, it is not reversible error unless that abuse was "tantamount to some kind of systematic exclusion, such as for race"). This is because, unlike an abuse of discretion in *refusing* to dismiss a juror, which can result in a biased juror or jury, when the district court improperly strikes a juror, it "[does] not prejudice the [appellant]." If a "competent and unbiased juror was selected and sworn," the appellant had "a trial by an impartial jury, which was all it could demand." *N. Pac. R.R. Co. v. Herbert, 116 U.S. 642, 646, 6 S. Ct. 590, 29 L. Ed. 755 (1886)*.

Khoury is unable to provide any persuasive authority to support his contention that improperly dismissing jurors with a perceived bias for cause is reversible error. Rather, Khoury relies on *Powers v. Ohio, 499 U.S. 400, 422, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991)* **[**19]** , which holds that dismissing jurors on the basis of race prevents a jury from being "a fair cross section of the community." We do not conclude exclusion on the basis of race to be comparable to exclusion due to a mistaken finding of bias. Likewise, we reject Khoury's argument that dismissing for cause due to bias against large verdicts is comparable to dismissing for cause due to political affiliations. While at least one court has held that "[a]ffiliations with political parties constitute neither a qualification nor disqualification for jury service," *State v. McGee, 336 Mo. 1082, 83 S.W.2d 98, 106 (Mo. 1935)*, it did not hold that dismissing for cause on this issue is reversible error. Therefore, we hold that the district court's error was harmless and does not warrant reversal of the judgment or the order denying Khoury's new trial motion.

Dr. Muir's testimony

Khoury argues that Seastrand's treating physician, Dr. Muir, should have been precluded from testifying about the cause of Seastrand's injuries and his opinion on the treatment provided by Dr. Marjorie E. Belsky because Seastrand failed to conform to the testifying expert witness disclosure requirements in presenting Dr. Muir as a witness.

The district court did not abuse its discretion by admitting Dr. Muir's testimony

This court reviews the decision of the district court to admit expert testimony **[**20]** without an expert witness report or other disclosures for an abuse of discretion. *FCH1, LLC v. Rodriguez, 130 Nev. Adv. Op. 46, 335 P.3d 183, 190 (2014)* (reviewing for an abuse of discretion a district court's decision to allow physician testimony without an expert witness report and disclosure). "While a treating physician is exempt from the report requirement, this exemption only extends to 'opinions [that] were formed during the course of treatment.'" *Id., 335 P.3d at 189* (quoting *Goodman v. Staples the Office Superstore, LLC, 644 F.3d 817, 826 (9th Cir. 2011)*). "Where a treating physician's testimony exceeds that scope, he or she testifies as an expert and is subject to the relevant requirements." *Id.*

On direct examination, the following exchange occurred between Dr. Muir and Seastrand's attorney:

> Q. Dr. Muir, No. 1, do you feel that there was an adequate workup of the patient prior to getting to you?
>
> A. Yes.

Khoury argues that Dr. Muir improperly opined on the reasonableness of Dr. Belsky's treatment in this exchange because Dr. Muir did not form this opinion during the course of his treatment of Seastrand.

At trial, evidence was presented supporting the contention that Dr. Muir's opinion of the workup of Seastrand by Dr. Belsky was formed in the course of Dr. Muir's treatment. Dr. Muir testified that Dr. **[**21]** Belsky referred Seastrand to him after the injections given by Dr. Belsky failed to cause her condition to **[*91]** improve. Dr. Muir testified that both he and Dr. Belsky

believed that Seastrand's symptoms were caused by the same portions of the spine. Dr. Muir further testified that the injections given by Dr. Belsky "help[ed] to determine if a particular nerve is being irritated or maybe damaged." He testified that it is possible that "after a couple of injections, maybe the body has healed itself . . . [a]nd you can treat the problem in a less aggressive way or maybe it won't require any treatment after a period of time." Lastly, Dr. Muir testified that he took into consideration the course of treatment of other providers in making his diagnosis and treatment plan.

Dr. Muir's testimony indicates that the injections given by Dr. Belsky were helpful in determining which of Seastrand's nerves were damaged and whether aggressive treatment would be necessary. His testimony also indicated that his review of the treatment of other providers is helpful in making his diagnosis and treatment plan. Thus, Dr. Muir's testimony indicates that his opinion of Dr. Belsky's treatment was formed in the course of his own **[**22]** treatment. Therefore, we hold that the district court did not abuse its discretion by admitting Dr. Muir's testimony as to whether Dr. Belsky's workup of Seastrand was adequate.[3]

Dr. Gross's testimony

Khoury argues that the district court abused its discretion by allowing Dr. Gross to testify about symptoms that Seastrand experienced before the accident, as such testimony was outside the scope of his specialized knowledge as a neurosurgeon and was an opinion that was not disclosed in Dr. Gross's expert report. Therefore, Khoury argues that the district court abused its discretion by admitting the testimony.

On direct examination, the following exchange occurred between Seastrand's attorney and Dr. Gross:

> [The court, repeating a question from Seastrand's attorney.] Is it more probable those findings were—of the numbness and tingling were coming **[**23]** from the neck or more probable it was from the heart event for which she had a positive stress test?
>
> [Dr. Gross]: It is more probable that the arm symptoms are unrelated to the neck and more likely related to the heart or anxiety or both.

Dr. Gross was referring to symptoms that Seastrand had prior to the accident giving rise to the current case. This was relevant because Khoury's defense was that Seastrand's injuries predated the accident, and thus, he was not liable for damages related to those injuries.

The district court did not abuse its discretion by admitting testimony by Dr. Gross because it was not outside the scope of his specialized knowledge

> To testify as an expert witness under NRS 50.275, the witness must satisfy the following three requirements: (1) he or she must be qualified in an area of "scientific, technical or other specialized knowledge" (the qualification requirement); (2) his or her specialized knowledge must "assist the trier of fact to understand the evidence or to determine a fact in issue" (the assistance requirement); and (3) his or her testimony must be limited "to matters within the scope of [his or her specialized] knowledge" (the limited scope requirement).

Hallmark v. Eldridge, 124 Nev. 492, 498, 189 P.3d 646, 650 (2008). These **[**24]** requirements are analogous to the requirement in federal law that the expert testimony "rests on a reliable foundation," which is that "the knowledge underlying it has a reliable basis in the knowledge and experience of the relevant discipline." Pyramid Techs., Inc. v. Hartford Cas. Ins. Co., 752 F.3d 807, 813 (9th Cir. 2014) (internal quotation marks omitted).

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[3] Khoury also argues that Dr. Muir's testimony as to causation regarding Seastrand's injuries was improper. However, because Khoury did not object to Dr. Muir's testimony on causation, he has waived this issue on appeal. *See* In re Parental Rights as to J.D.N., 128 Nev. 462, 468, 283 P.3d 842, 846 (2012) ("[W]hen a party fails to make a specific objection before the district court, the party fails to preserve the issue for appeal.").

At trial, Dr. Gross testified that he was a board-certified neurological surgeon with a [*92] fellowship in spinal biomechanics. He regularly treats patients with "neck and back problems, including injuries and other causes of disk problems, nerve problems, spinal cord problems." When patients are first referred to him, he asks about their past history and other medical issues that they have had. He then does a physical examination, where if the patient appears to have a neck condition, he tests the neck, head, arms, and hands and reviews films and tests that have been taken of the patient. Lastly, he uses the patient's past history and the results of the physical examination to "come up with the best diagnoses that match or correlate to all the findings[,]" so that "the treatment recommendations . . . [are] proper and correct, [and] rely on the proper diagnosis."

Thus, Dr. Gross typically uses patient histories [**25] and physical examinations to reach a diagnosis and decide whether neurological surgery is the proper treatment for the patient's diagnosis. In doing so, Dr. Gross tests the neck, head, arms, and hands. It follows, that in order to rule out neurological surgery as a treatment, Dr. Gross must determine the cause of the patient's symptoms and whether they result from something not neurologically related. Therefore, we hold that Dr. Gross's opinion that Seastrand's prior symptoms were "unrelated to the neck and more likely related to the heart or anxiety or both" rested on the reliable foundation of the knowledge and experience of Dr. Gross's neurological surgery practice and was therefore within the scope of his specialized knowledge.

Dr. Gross's opinion was disclosed in a supplemental expert report

Khoury argues that Dr. Gross was required to disclose his opinion that Seastrand's prior injuries were unrelated to the neck and more likely related to the heart or anxiety, or both, in an expert report but failed to do so.

NRCP 16.1(a)(2)(B) requires an expert's report to "contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered [**26] by the witness in forming the opinions."

On September 29, 2012, Dr. Gross disclosed a supplemental report apparently made at least in part in response to disclosures by Khoury's expert witnesses. Khoury's experts had made disclosures of their opinions of Seastrand's past medical records, including records from a doctor's visit Seastrand made on October 27, 2008. In his supplemental report, Dr. Gross stated that he had reviewed the past medical records, including the records from an October 27, 2008, doctor's visit and summarized that the records revealed that Seastrand had been "having left chest wall pain associated with numbness and tingling bilaterally in both arms." Dr. Gross then stated, apparently quoting directly from Seastrand's medical records, that the doctor's assessment of Seastrand during that visit "was '[a]typical chest pain, numbness, and anxiety.'"

Later in the report, Dr. Gross directly addressed an opinion proffered by Dr. John Siegler, one of Khoury's experts, of Seastrand's October 27, 2008, visit. Dr. Siegler had opined that Seastrand's doctor visits in 2007, where she was seen for back pain flare-ups, and, in 2008, where she "was seen for numbness and tingling radiating [**27] to both arms and shooting pain into the left arm," indicated that she had a "documented history of cervical and lumbar pain." Dr. Gross indicated that he disagreed with Dr. Siegler's opinion, stating that Dr. Siegler had "conveniently omit[ted] the fact that the records note that the episode of tingling to the upper extremities was related to chest pain and stress."

By disagreeing with Dr. Siegler's opinion that Seastrand had a documented history of cervical and lumbar pain, Dr. Gross proffered an opinion that Seastrand's symptoms during her October 27, 2008, doctor's visit were unrelated to the neck. He also appeared to endorse the doctor's assessment of Seastrand during her October 27, 2008, visit that her symptoms were related to chest pain and stress, by chiding Dr. Siegler for "conveniently omit[ting] th[is] fact." Therefore, we hold that the district court did not abuse its discretion by allowing Dr. Gross [*93] to testify as to his opinion that Seastrand's prior injuries were unrelated to her neck.[4]

[4] Khoury also appears to argue that Dr. Gross's expert reports were not timely disclosed and should have been excluded on that basis. However, Khoury does not specifically argue that any particular report was made [**28] outside NRCP 16.1(a)(2)(C)'s time limitations. Rather, he merely sets forth NRCP 16.1(a)(2)(C)'s time limitations without stating which report was untimely under which time limit. We thus decline to consider his argument. *See* Edwards v. Emperor's Garden Rest., 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (stating that this court "need not consider . . . claims" that are not "cogently argue[d]" or supported by "relevant authority").

The district court did not abuse its discretion by excluding evidence of the amount Seastrand's medical providers received for the sale of her medical liens

At trial, Khoury attempted to introduce evidence of the amount Seastrand's medical providers received for the sale of her medical liens to a third party. Khoury sought to admit the evidence to prove the reasonable amount of Seastrand's medical costs. The district court refused to admit the evidence, finding that under the collateral source rule, it was per se inadmissible. Khoury now argues that the district court abused its discretion.[5]

Evidence of the sale of Seastrand's medical liens is irrelevant to prove the reasonable value of Seastrand's medical costs

Evidence of payments showing medical provider discounts, or write-downs, to third-party insurance providers "is irrelevant to a jury's determination of the reasonable value of the medical services and will likely lead to jury confusion." Tri-Cty. Equip. & Leasing v. Klinke, 128 Nev. 352, 360, 286 P.3d 593, 598 (2012) (Gibbons, J., concurring). This is because "[t]he write-downs reflect a multitude of factors mostly relating to the relationship between the third party and the medical provider, and not necessarily relating to the reasonable value of the medical services." *Id.*

Here, assuming that Seastrand's **[**30]** medical providers sold her liens to a third party for less than their face value, they are functionally similar to a write-down made to a third-party insurer. In both instances the medical provider negotiates with a third party to receive less than what they charged a patient to provide medical care. Therefore, in line with the discussion of write-downs in the concurrence in *Tri-County Equipment & Leasing*, which is analogous to the present issue, we hold that evidence regarding the sale of medical liens is likewise irrelevant to a jury's determination of the reasonable value of medical services provided. Thus, the district court did not abuse its discretion by excluding such evidence.

The district court abused its discretion by excluding evidence of Seastrand's medical liens to establish bias

Khoury argues that the district court abused its discretion by excluding evidence of Seastrand's medical liens to prove bias on the part of Seastrand's treating physicians who testified at trial. Khoury contends that the district court incorrectly excluded that evidence under the collateral source rule.

*Evidence of the existence of medical liens to prove bias does not invoke the collateral source **[**31]** rule*

"The collateral source rule provides that if an injured party received some compensation for his injuries from a source wholly independent of the tortfeasor, such payment should not be deducted from the **[*94]** damages which the plaintiff would otherwise collect from the tortfeasor." Proctor v. Castelletti, 112 Nev. 88, 90 n.1, 911 P.2d 853, 854 n.1 (1996) (internal quotation marks omitted). This court has also created "a *per se* rule barring the admission of a collateral source of payment for an injury into evidence for *any purpose*." Id. at 90, 911 P.2d at 854 (second emphasis added). This is because of the danger that "the jury will misuse the evidence to diminish the damage award." Id. at 91, 911 P.2d at 854. The question of whether evidence of a medical lien implicates the collateral source rule does not appear to have been considered before in Nevada.

"[A] medical lien refers to an oral or written promise to pay the medical provider from the plaintiff/patient's personal injury recovery." State Bar of Nev. Standing Comm'n on Ethics and Prof'l Responsibility, Formal Op. 31 (2005), *available* at

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[5] Khoury also argues that the district court erred by refusing to allow him to examine Seastrand's medical providers as to the reasonable value of Seastrand's medical care. However, this is a misrepresentation of the issue that was presented to and ruled upon by the district court. Khoury actually **[**29]** moved to limit Seastrand's presentation of past medical special damages at trial to amounts actually paid by or on behalf of Seastrand, *not* to examine Seastrand's treatment providers about the reasonable value of Seastrand's medical care. Because the arguments Khoury makes on this issue in his brief were not raised before the district court, Khoury has waived his right to make them on appeal. *See* Old Aztec Mine, Inc. v. Brown, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) ("A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal.").

http://nvbar.org/wp-content/uploads/Opinion-31-Client-Funds-Reissued_4-1-15.pdf (last visited May 9, 2016) (internal quotation marks omitted). Thus, a medical lien represents something that the plaintiff has personally paid for his or her treatment, not compensation that a third party has paid [**32] to the plaintiff. Therefore, we hold that evidence of the existence of medical liens to prove bias does not invoke the collateral source rule.[6]

The district court's error was harmless

To be reversible, an error must be prejudicial and not harmless. NRCP 61. To demonstrate that an error is not harmless, a party "must show that the error affects the party's substantial rights so that, but for the alleged error, a different result might reasonably have been reached." *Wyeth v. Rowatt, 126 Nev. 446, 465, 244 P.3d 765, 778 (2010)*.

Here, the probative value of the lien evidence is limited as to the issue of bias. The terms of Seastrand's medical liens indicate that she would owe the money to her medical providers whether or not she was successful in the lawsuit. Seastrand's medical providers were also paid for the time they spent preparing for trial and testifying in court, and Khoury was able [**33] to cross-examine the medical providers about any bias that resulted from these payments. In addition to the testimony of Khoury's two treatment providers, evidence was also presented by Seastrand's expert witnesses as to the causation of Seastrand's injuries. Lastly, Khoury has not presented any arguments or evidence to support a contention that the verdict in this case was close and that allowing him to use evidence of Seastrand's medical liens to establish bias in Seastrand's treatment providers would have resulted in a different verdict. Therefore, we hold that the district court's error was harmless.

The district court did not abuse its discretion by refusing to grant a new trial following Seastrand's use of the word "claim" during opening arguments

Khoury argues that by using the word "claim" one time in her opening arguments, Seastrand improperly informed the jury that he had insurance coverage.

During opening arguments, Seastrand's attorney made the following statement in regard to a 1981 rollover auto accident in which Seastrand was involved:

> But you'll hear from [Seastrand] and she'll tell you, yeah, in that rollover I was the passenger and I wasn't hurt. I went to the ER [**34] and the ER physicians checked me out, and then I went to a holistic doctor one or two times and then I didn't have any problems. *I didn't make a claim.* I didn't do anything like that. I didn't have any issues with it.

(Emphasis added.) This is the only time that Seastrand mentioned the word "claim" during opening arguments.

Khoury bases his argument on a mistaken belief that the word "'[c]laim' is uniquely an insurance term." However, claim has many other meanings. *Black's Law Dictionary*, for instance, defines claim as, among other things, "[a] demand for money, property, or a [*95] legal remedy." *Claim, Black's Law Dictionary* (8th ed. 1999). While this *could* mean an insurance claim, in context it could just as easily mean a claim of relief in a court of law. Furthermore, Seastrand's use of the word claim was in regard to a 1981 car accident. Thus, even if the jury *did* believe Seastrand was talking about an insurance claim, it would only have indicated whether Seastrand or another party in. the 1981 accident was insured, *not* whether Khoury was insured in the current case. Therefore, we hold that the district court did not abuse its discretion by refusing to grant Khoury's motion for a mistrial.

*The [**35] district court abused its discretion by awarding costs to Seastrand without stating a basis for its decision*

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[6] However, we caution that this holding may not be used as a "backdoor" by parties to question a treatment provider about whether and to what amount it would write-down the amount of the medical lien in the event that the plaintiff loses his or her lawsuit. Such evidence could be used by the jury to diminish the damage award and would thus invoke the collateral source rule.

NRS 18.005, which defines recoverable costs, allows the recovery of "Measonable fees of not more than five expert witnesses in an amount of not more than $1,500 for each witness, *unless the court allows a larger fee after determining that the circumstances surrounding the expert's testimony were of such necessity as to require the larger fee.*" NRS 18.005(5) (emphasis added); *see also* Gilman v. State, Bd. of Veterinary Med. Exam'rs, 120 Nev. 263, 272-73, 89 P.3d 1000, 1006 (2004) (observing that a district court has discretion to award more than $1,500 for an expert witness's fees). When a district court awards expert fees in excess of $1,500 per expert, it must state the basis for its decision. Frazier v. Drake, 131 Nev. Adv. Op. 64, 357 P.3d 365, 378 (Ct. App. 2015).

The district court awarded $42,750 as expert witness fees for Seastrand's five expert witnesses. It did not state a basis for its award. Khoury argues that because the district court awarded expert witness fees that exceed $1,500 per witness, the district court abused its discretion under NRS 18.005(5). However, Khoury ignores the second half of NRS 18.005(5), which allows the district court to award a greater fee per expert witness if it determines that the higher fee was necessary. Nonetheless, **[**36]** because the district court awarded expert fees in excess of $1,500 without stating a basis for its decision, we hold that the district court abused its discretion.[7]

CONCLUSION

While it is permissible for a party to use a specific award amount in questioning jurors regarding their biases towards large verdict amounts; it is the duty of the district court to keep the questioning within reasonable limits. Here, Seastrand's voir dire did not reach the level of reversible error on the basis of jury indoctrination. Furthermore, although the district court abused its discretion by dismissing jurors for cause whose statements, when taken as a whole, indicated that they could apply the law and the instructions of the court in deciding the verdict, this was harmless error, Accordingly, the district court **[**37]** was within its discretion in denying Khoury's motions for a mistrial and new trial on the grounds related to the voir dire.

Next, the district court did not abuse its discretion by allowing testimony from Dr. Muir because his opinions were formed during the course of his treatment of Seastrand. The district court also did not abuse its discretion by admitting the testimony of Dr, Gross because his testimony was within the scope of his specialized knowledge and was disclosed in a supplemental expert report. It also did not abuse its discretion by excluding evidence of the amount that Seastrand's medical liens were sold for because it was irrelevant to the issue of the reasonable value of her medical care. However, it did abuse its discretion by excluding evidence of the existence of Seastrand's medical liens for the purpose of establishing bias in the testimony of her medical providers. Nonetheless, this error was harmless. Therefore, we hold that the new trial motion was properly denied. Lastly, the district court did not abuse its **[*96]** discretion by refusing to declare a mistrial due to Seastrand's use of the word "claim" in opening arguments because it did not improperly inform the jury **[**38]** that Khoury was insured.

However, the district court did abuse its discretion by awarding costs to Seastrand without stating a basis for its decision. Therefore, we affirm in part, reverse in part, and remand to the district court for further proceedings regarding costs.

/s/ Saitta, J.

Saitta

We concur:

/s/ Hardesty, J.

Hardesty

/s/ Douglas, J.

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[7] Khoury also makes a one-sentence argument that because trial preparation costs and costs for copies of medical records are not specifically listed as recoverable under NRS 18.005, they are a routine part of normal legal overhead, and the district court abused its discretion by awarding them. Because Khoury provides no further analysis or authority for his argument, we decline to consider this issue, *See* Edwards v. Emperor's Garden Rest., 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006).

Douglas

/s/ Cherry, J.

Cherry

/s/ Gibbons, J.

Gibbons

Concur by: PICKERING

Concur

PICKERING, J., concurring:

While I concur in the result, I do not join the majority's internally contradictory analysis of the medical provider lien sale evidence. To be clear, Seastrand was uninsured, which gave her doctors lien rights against her eventual recovery from Khoury. The evidence the district court excluded was that one or more of Seastrand's doctors sold his lien rights to a third party, presumably at a discount. Such a sale—assuming evidence of it had been proffered (it was not)—did not result in a discount to Seastrand. After the sale, Seastrand remained liable for the full amount the lien secured. Her liability just ran to the third party to whom the doctor sold the lien instead of to the doctor. Thus, this case does not present the medical provider discount, or write-down, issue **[**39]** between doctor and patient (or doctor and patient's insurer or benefit provider) that has divided courts elsewhere. *See, e.g., Howell v. Hamilton Meats & Provisions, Inc., 52 Cal. 4th 541, 129 Cal. Rptr. 3d 325, 257 P.3d 1130, 1138, 1142-43, 1146 (Cal. 2011)* (holding that a "plaintiff could recover as damages for her past medical expenses no more than her medical providers had accepted as payment in full from plaintiff and PacifiCare, her insurer," since costs must be incurred or paid by a plaintiff or her insurer to be recoverable as damages) (citing *Restatement (Second) of Torts § 911* (1979)). It also does not implicate the collateral source rule discussed in *Howell* since Seastrand, being uninsured and fully liable, had no collateral source to which to look for payment of her medical expenses.

As five members of the court held in *Tri-County Equipment & Leasing v. Klinke, 128 Nev. 352, 357-58 n.6, 286 P.3d 593, 596 n.6 (2012)* (5-2), whether evidence of pre-negotiated provider discounts is admissible because it sets the outside limit of the special damages a plaintiff has incurred or paid, or excludable under the collateral source rule, is a legal issue that is sufficiently nuanced and important that it should be left "for a case that [actually] requires its determination." Two justices, writing separately in *Tri-County*, would have reached and resolved the provider discount issue, rejecting *Howell*. *Id. at 597-99* (Gibbons and Cherry, JJ., concurring). Inexplicably, **[**40]** today's majority quotes language from the two-justice *Tri-County* minority on the issue the *Tri-County* majority declined to reach. *See ante* 22. But this case has even less to do with the provider-discount/collateral-source-rule issue in *Howell* than *Tri-County*, for two reasons. First, as the majority acknowledges, *ante* 24, "The terms of Seastrand's medical liens indicate that she would owe the money to her medical providers whether or not she was successful in the lawsuit." With no provider discount *to the plaintiff or her insurer*, no question arises as to whether the amounts billed by the provider were "incurred or paid," removing much of the rationale for the rule announced in *Howell*. Second, Seastrand had no insurance. With no insurance and no provider-to-patient discounts, the collateral source rule, on which the two-justice *Tri-County* concurrence relied to reject *Howell*, does not apply, as today's majority also recognizes. *See ante* 23-24 ("a medical lien represents something that the plaintiff has personally paid for his or her treatment, not compensation that a third party has paid to the plaintiff.").

Given all this, it is not clear to me why the majority feels it necessary to **[**41]** address the relevance of provider discounts or write-downs. The price a third party pays to buy a lien from a doctor depends more on the third party's assessment of the plaintiff's chances in the litigation, including the strength of the plaintiff's claim and the solvency of the defendant, than the reasonable value of the doctor's services, and as such has so little probative value and so much **[*97]** potential for distraction as to be excludable as irrelevant. I would resolve the relevance issue on this basis, rather than confuse our law with what is, in this case, dictum drawn from a minority opinion not joined by a majority of the justices on this court.

For these reasons, while I join the remainder of today's opinion, I do not join and concur only in the result as to the medical lien sale evidence.

/s/ Pickering, J.

Pickering

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DISTRICT COURT

CLARK COUNTY, NEVADA

*****

REPUBLIC SILVER STATE DISPOSAL, INC., a Nevada Corporation,

Plaintiff

vs.

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; JAMES D. BALODIMAS, M.D.; JAMES D. BALODIMAS, M.D., P.C.; LAS VEGAS RADIOLOGY, LLC, a Nevada Limited Liability Company; BRUCE A. KATUNA, M.D.; ROCKY MOUNTAIN NEURODIAGNOSTICS, LLC, a Colorado Limited Liability Company; DANIELLE MILLER aka DANIELLE SHOPSHIRE; NEUROMONITORING ASSOCIATES, INC., a Nevada Corporation; DOES 1-10 inclusive; and ROE CORPORATIONS 1-10 inclusive

Defendants.

Case No.: A-16-738123-C

Dept No.: XXX

REPLY IN SUPPORT OF COUNTERMOTION IN LIMINE

Date: Feb. 20, 2019
Time: 9:00 am

Plaintiff REPUBLIC SILVER STATE DISPOSAL, INC. (Republic), by and through its counsel BARRON & PRUITT, LLP, hereby submits the following in Reply to Defendant ANDREW CASH, M.D.'S Opposition to Republic's Counter-Motion in Limine to Limit or Exclude Evidence of Medical Liens.

///

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MEMORANDUM OF POINTS AND AUTHORITIES

NRS 42.021 creates special statutory exception to the "collateral source rule" for "providers of health care" sued for "professional negligence" to

> introduce evidence of any amount payable as a benefit to the plaintiff as a result of the injury or death pursuant to the United States Social Security Act, any state or federal income disability or worker's compensation act, any health, sickness or income-disability insurance, accident insurance that provides health benefits or income-disability coverage, and any contract or agreement of any group, organization, partnership or corporation to provide, pay for or reimburse the cost of medical, hospital, dental or other health care services.

Id., emphasis added.

Republic's $2 million settlement with Marie Gonzales took into account the face value of the medical expenses she alleged were related to her January 14, 2012 traffic accident with a Republic truck. Before the Court is whether NRS 42.021 can also be extended to medical liens she gave to the bulk of her treatment providers for those medical services. For the reasons discussed in Republic's Countermotion to Exclude or Limit Evidence of Medical Liens, and below, the answer to that question should be, no.

Of the more than $800,000 in treatment costs incurred by Marie Gonzales' arising from Dr. Andrew Cash's failed surgery on January 29, 2013, and later treatment, the lion's share was directly related to an iatrogenic injury caused by Dr. Cash's professional negligence. And of that $800,000 in medical expenses, fully $506,000 were in the form of medical liens purchased by third-party "lien companies." These liens were authenticated by Mrs. Gonzales when she was deposed by Defendant Cash on January 24, 2019.

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To that $506,000 figure can be added an additional lien from Dr. Stuart Kaplan for almost $60,000 for his treatment from June 2013 to February 2015.[1] Nor is that the end of it; attached as EXHIBIT 1 is a form from Dr. Cash's office which was executed by Marie Gonzales in which she agreed she would not use health insurance to pay for close to $150,000 for his services.[2]

The upshot of the original motion in limine regarding NRS 42.021, and now the Cash Opposition to Republic's Countermotion, is that "Medical liens which have been negotiated and resolved for a lesser amount in satisfaction of Marie Gonzales' past medical expenses would qualify as any contract to provide or pay for the cost of medical and healthcare expenses under NRS 42.021(1)." Opposition, p. 8. The only justification for this contention is that if Mrs. Gonzales had brought her claim against Dr. Cash and others as a "medical malpractice" plaintiff, it is "undisputed" NRS 42.021 would have applied.[3]

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[1] When Mrs. Gonzales first presented to Dr. Kaplan she complained of pain and weakness extending down the left leg to the left foot, and her development of a drop-foot on the left. Of course, none of this symptomatology was present before the Cash operation; nor had pain management in the form of lumbar injections—and a "trial" spinal cord stimulator—provided significant relief. Dr. Kaplan was deposed on January 4, 2019. He testified it was opinion—then and now—that Mrs. Gonzales was suffering from compression of the left L5 and S1 nerve roots directly related to the misplaced pedicle screws. Even after the mal-positioned Cash hardware was removed, and Dr. Kaplan performed a complete revision of the Cash operation, Mrs. Gonzales continued to suffer from pain and weakness in the left leg. He implanted a permanent spinal cord stimulator in February 2015.

[2] One can surmise the reason Dr. Cash preferred Mrs. Gonzales' personal obligation is that had her bills been processed through health insurance, they in all likelihood would have been compromised. See Khoury v. Seastrand, 132 Nev. ___, 377 P.3d 81, 93 (2016) (discussing the common practice of health insurers discounting the full amount of a physician's charges). By Mrs. Gonzales promising not to use health insurance, there was no insurer to insist on a "medical discount" on his fee. He also had the option of selling his interest in the Gonzales recovery, getting his money up-front without waiting for resolution of the underlying lawsuit, or risking a bad result in that litigation.

[3] The prior ruling that Republic is effectively Mrs. Gonzales' "subrogee" is an error in law. Subrogation, either by contract or under notions of equity, is entirely different than the stand-alone rights created by Nevada's contribution statutes. See NRS 17.225 et seq. In fact, there was no right of contribution until our State Legislature enacted the Uniform Contribution Among Torfeasors Act during its 1973 session. Cf. Reid v. Royal Ins. Co., 80 Nev. 137, 142, 390 P.2d 45, 47 (1964) (while Nevada recognized contractual and equitable indemnification to shift an entire loss from an innocent (often vicariously responsible) party to an active tortfeasor, there was "no right of contribution between co-tortfeasors"). Simply put subrogation allows one who pays a loss to an injured party (most commonly through "first party" payments under an insurance policy) to pursue the rights of the party to whom payment was made. Contribution in Nevada on the other hand, is a statutory right allowing a defendant who pays more than his or her "equitable share" of a common liability to the sue others who were also responsible for the same loss. NRS 17.225(1).

By its plain language, NRS 42.021(1)'s only application is to "amount[s] payable to as a **benefit to** the plaintiff." (Emphasis added) The collateral source payments to which the statute limits itself are clearly enumerated:

- the United States Social Security Act[4],
- any state or federal income disability or worker's compensation act,
- any health, sickness or income-disability insurance,
- accident insurance that provides health benefits or income-disability coverage, and
- any contract or agreement of any group, organization, partnership or corporation to provide, pay for or reimburse the cost of medical, hospital, dental or other health care services.

The best that can be said of the argument favoring inclusion of a medical lien to the defined "collateral sources" in NRS 42.021(1) is that it rewrites the statute, grafting a plaintiff's personal obligation, secured by a medical lien, to a list of third-party benefits paid to the plaintiff to cover medical costs.

As discussed in the margin at n.4, the scope of NRS 42.021 has already been pared-down by the Nevada Supreme Court in McCrosky v. Carson Tahoe Regional Medical Center, 133 Nev. ___, 408 P.3d 149 (2017).[5] There, the plaintiff had received federal/state Medicare payments. NRS

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[4] The viability of NRS 42.021 applying to a federal benefit paid to a plaintiff is questionable in light of ruling in McCrosky v. Carson Tahoe Regional Medical Center, 133 Nev. ___, 408 P.3d 149 (2017). McCrosky held evidence of Medicaid payments were not admissible under NRS 42.021(1) on federal preemption grounds. This was in no small part because NRS 42.021(2) disallows the entity who paid the benefit from subrogating against the plaintiff's recovery. Since federal law allowed just such a subrogation interest against the Medicaid recipient who succeeds in a medical malpractice case, the McCrosky court held "we must strike the statute in its entirety as applied to federal collateral source payments" to avoid what would amount to an unintended "double deduction" of a medical malpractice plaintiff's recovery. Id., 408 P.3d at 155.

[5] This Court has even declared NRS 42.021 unconstitutional under an "equal protection" analysis. See Costa v. Summerlin Hospital Medical Center, et al. (Clark County District Court Case# A640951). In that same 112-page Order, NRS 41A.035 was also declared unconstitutional, albeit under the constitutionally preserved "right to jury trial." While the Costa decision striking NRS 41A.035's statutory "cap" of $350,000 as an unconstitutional intrusion on the right to a trial by jury was effectively rejected in Tam v. Dist. Ct., 131 Nev. ___, 358 P.3d 234(2015), the constitutionality of NRS

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42.021(1), of course, treats Social Security and federal disability benefits as a statutory "collateral source." If a benefit paid to a medical malpractice plaintiff is subject to NRS 42.021(1), NRS 42.021(2) prohibits the benefit's payor from subrogating against the beneficiary to recover the value of those payments. Stated differently, as NRS 42.021(1) and (2) are designed and drafted, a medical malpractice plaintiff, whose benefits have been credited to the (negligent) health care provider, should be secure in the knowledge that the statutory offset for "collateral source" payments in subsection (1) is a one-time deduction (albeit favoring the defendant who caused the very injury necessitating the "collateral source" payment in the first place).

McCrosky recognized, however, that a federal statute, 42 U.S.C. 2651(a), preserves a right of subrogation allowing Medicaid's payments to be reimbursed directly from the medical malpractice plaintiff's recovery. So if NRS 42.021 and the federal statute were both given effect, the result is what the McCrosky court called a "double deduction": The defendant health care provider gets the offset of the Medicaid payments as a collateral source, but the plaintiff remains obligated to reimburse those very payments to under federal law. Thus, the Nevada Supreme Court held NRS 42.021 had been preempted by the federal statutory scheme, and NRS 42.021 had no effect under McCrosky's facts. Id. 408 P.3d at 155.

With McCrosky's holding in mind, now consider if a medical lien is (somehow) transfigured into an NRS 42.021(1) "collateral source." Not only would the defendant get the windfall offset, the plaintiff would remain "on the hook" for the amount of the lien—a genuine "double whammy" for a now twice-victimized plaintiff. The result becomes even more egregious if (as is usually the case) the health care provider-defendant is also the lien holder, (or if the injured plaintiff's obligation on the lien is sold to a third-party purchaser, and the defendant has already pocketed the money from the sale).

42.021 has yet to be determined. Republic sees no reason why the Court's "equal protection" analysis in Costa is any less applicable here.

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NRS 42.021 was part of a state-wide voter-referendum entitled "Keep Our Doctors In Nevada" (KODIN), pitched as a measure to prevent (by combating the evils of a supposed medical "insurance crisis") an exodus of physicians from our state. To its critics, KODIN—and NRS 42.021 of which it was a part—was built on the dubious premise that Nevada health care becomes better and more affordable if at-fault health care providers uniquely benefit from their malpractice by requiring the injured plaintiff (or his or her health plan or insurer) to foot the bill for the medical defendants' malfeasance. Or as this Court put it in Costa v. Summerlin Hospital Medical Center, et al., previously referenced in the margin at n.5:

> **NRS 42.021 provides a benefit to negligent medical care providers that is not available to other tortfeasors, and this benefit is provided at the cost and expense of the victims of such negligence.** The effect of NRS 42.021 is as follows:
>
> > First, the negligent health care provider is given special privileges and immunities not afforded other tortfeasors. Second, the statute creates a special class of tort victims, which, unlike other tort victims, effectively is deprived of the benefits of collateral source payments. Third, the provision under scrutiny creates two classifications of medical malpractice tort victims; those who have paid for financial protection in the event of tort injury, and those who have saved those payments and elected to be self-insurers.

Costa, Order Regarding Plaintiff's Motion to Declare NRS 42.021 and NRS 41A.035 Unconstitutional, pp. 58-59. Emphasis is original, citing Rudolph v. Iowa Methodist Med. Cntr., 293 N.W.2d 550, 561 (Iowa 1980) (Reynoldson, C.J., dissenting).[6]

[6] The Rudolph dissent, joined by two additional Iowa Supreme Court justices, made clear the necessity to examine the Iowa statute under an "equal protection" analysis:

> The various classifications spawned by section 16 treat both negligent health care providers and their victims differently than other persons similarly situated, and do not bear a fair and substantial relation to any reasonably conceivable legislative purpose for the statute, which is inherently irrational and arbitrary. I would hold section 16 denies equal protection and thus violates article I, section 6, of the Iowa Constitution.

Id. at 568.

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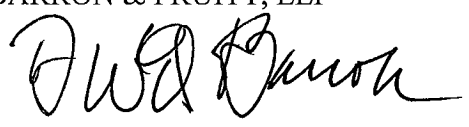
While Republic believes constitutional examination of NRS 42.021 is entirely appropriate here, it is also readily apparent that even if the statute were to pass constitutional muster for defined "collateral source" benefits, medical liens do not fall within its ambit. Khoury v. Seastrand, cited in the margin at n.3, and discussed at some length in Republic's Countermotion, controls the outcome here. It defines a medical lien as an entirely personal obligation, and "not compensation that a third party has paid to the plaintiff." Id., 377 P.3d at 94. Next, both the sale of a lien to a third party "at less than face value" and "medical provider discounts, or write downs" by health insurers are irrelevant to "a jury's determination of the reasonable value of the medical services and will likely lead to jury confusion." Id., 377 P.3d at 93.

The Cash Opposition's only rejoinder to Khoury is that it was a "personal injury action" while this is a case is "based on medical malpractice." Opposition, p.6. With all deference, that's not much of a distinction.

The Defendants motion should be denied, and Republic's Countermotion granted to the extent that any evidence offered as an NRS 42.021(1) "collateral source" should be limited only to those third-party payments falling within the express scope of the statute; and that the sale or compromise of medical liens be excluded.

Respectfully submitted,

BARRON & PRUITT, LLP



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 19th day of February, 2019, I served the foregoing **REPLY RE COUNTERMOTION IN LIMINE etc.** as follows:

☐ US MAIL: by placing the document(s) listed above in a sealed envelope, postage prepaid, in the United States Mail at Las Vegas, Nevada, addressed to the following:

☐ BY FAX: by transmitting the document(s) listed above via facsimile transmission to the fax number(s) set forth below.

☐ BY HAND-DELIVERY: by hand-delivering the document(s) listed above to the address(es) set forth below.

☐ BY EMAIL: by emailing the document(s) listed above to the email address(es) set forth below.

☒ BY ELECTRONIC SERVICE: by electronically serving the document(s) listed above with the Eighth Judicial District Court's WizNet system upon the following:

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Robert C. McBride, Esq. Heather S. Hall, Esq. CARROLL, KELLY, TROTTER, FRANZEN, MC KENNA & PEABODY 8329 West Sunset Road, Suite 260 Las Vegas, NV 89113 Facsimile: (702) 796-5855 Email: rcmcbride@cktfmlaw.com Email: hshall@cktfmlaw.com *Attorneys for Defendants* *Andrew M. Cash, M.D.* *Andrew M. Cash, M.D., P.C. a/k/a* *Andrew Miller Cash, M.D., P.C.; and* *Desert Institute of Spine Care*	James R. Olson, Esq. Max E. Corrick, II, Esq. Stephanie M. Zinna, Esq. OLSON, CANNON, GORMLEY, ANGULO & STOBERSKI 9950 West Cheyenne Avenue Las Vegas, NV 89129 Facsimile: (702) 383-0701 Email: jolson@ocgas.com Email: mcorrick@ocgas.com Email: szinna@ocgas.com *Attorneys for Defendants* *Bruce Katuna, M.D. and* *Rocky Mountain Neurodiagnostics, LLC*
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/s/ MaryAnn Dillard

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Exhibit 1

Exhibit 1

Exhibit 1

Andrew M. Cash M.D.
Phone: (702) 630-3472 Fax: (702-946-5115

Insurance only

The attorney representing me is _____ however I choose to use only my personal insurance for all visits.

Primary Insurance Co. Name: _____

Insured Name: _____ Insured DOB: _____
Insured Social Security # _____-_____-_____
Policy Id# _____ Group# _____

Print Name: _____ Signature: _____

Lien Only

I DO NOT have health insurance. Therefore, please bill all of my office visits and or charges directly to the attorney listed below:

Attorney name: _____
Law Firm: _____
Date Of injury: _____

Print Name: _____ Signature _____

Waiving insurance/ attorney only

I have health insurance; the name of my insurance is: MGM Resorts Health however I choose not to use my health insurance. Therefore, please bill all of my office visits and or charges directly to the attorney listed below:

Attorney name: Glenn Schepps
Law Firm: _____
Date Of injury: 1/14/12

Print Name: Marie Gonzales Signature Marie Gonzales

ANAC
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DISTRICT COURT

CLARK COUNTY, NEVADA

REPUBLIC SILVER STATE DISPOSAL, INC., a Nevada Corporation,

Plaintiff,

vs.

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; JAMES D. BALODIMAS, M.D.; JAMES D. BALODIMAS, M.D., P.C.; LAS VEGAS RADIOLOGY, LLC, a Nevada Limited Liability Company; BRUCE A. KATUNA, M.D.; ROCKY MOUNTAIN NEURODIAGNOSTICS, LLC a Colorado Limited Liability Company; DANIELLE MILLER aka DANIELLE SHOPSHIRE; NEUROMONITORING ASSOCIATES, INC., a Nevada Corporation; DOES 1-10 inclusive; and ROE CORPORATIONS 1-10 inclusive,

Defendants.

CASE NO.: A-16-738123-C
DEPT: XXX

DEFENDANTS ANDREW M. CASH, M.D., ANDREW M. CASH, M.D., P.C. AKA ANDREW MILLER CASH, M.D., P.C. AND DESERT INSTITUTE OF SPINE CARE, LLC'S ANSWER TO PLAINTIFF'S SECOND AMENDED COMPLAINT

DEFENDANTS ANDREW M. CASH, M.D., ANDREW M. CASH, M.D., P.C. aka ANDREW MILLER CASH, M.D., P.C. AND DESERT INSTITUTE OF SPINE CARE, LLC'S ANSWER TO PLAINTIFF'S SECOND AMENDED COMPLAINT

COME Defendants ANDREW M. CASH, M.D., ANDREW M. CASH, M.D., P.C. aka ANDREW MILLER CASH, M.D., P.C. and DESERT INSTITUTE OF SPINE CARE, LLC, by and through their counsel of record, ROBERT C. MCBRIDE, ESQ. and HEATHER S. HALL, ESQ. of the law firm of CARROLL, KELLY, TROTTER, FRANZEN, MCBRIDE & PEABODY and hereby submit their answer to Plaintiff's Second Amended Complaint as follows:

PARTIES

1. Answering Paragraph 1, these answering Defendants are without sufficient knowledge and information to formulate a belief as to the truth of such allegations and, based upon such lack of information and belief, the same are hereby denied.

2. Answering Paragraph 2, these answering Defendants admit each and every allegation contained therein.

3. Answering Paragraph 3, these answering Defendants admit each and every allegation contained therein.

4. Answering Paragraph 4, these answering Defendants admit each and every allegation contained therein.

5. Answering Paragraph 5, these answering Defendants are without sufficient knowledge and information to formulate a belief as to the truth of such allegations and, based upon such lack of information and belief, the same are hereby denied.

6. Answering Paragraph 6, these answering Defendants deny each and every allegation contained therein.

7. Answering Paragraph 7, these answering Defendants admit each and every

allegation contained therein.

8. Answering Paragraph 8, these answering Defendants admit each and every allegation contained therein upon information and belief.

9. Answering Paragraph 9, these answering Defendants admit each and every allegation contained therein upon information and belief.

10. Answering Paragraph 10 (erroneously named No. 11), these answering Defendants admit each and every allegation contained therein upon information and belief.

11. Answering Paragraph 11 (erroneously named No. 12), these answering Defendants deny each and every allegation contained therein insofar as such allegations pertain to these answering Defendants. As to the remainder of the allegations contained therein, these answering Defendants admit each and every allegation contained therein upon information and belief.

12. Answering Paragraph 12 (erroneously named No. 13), these answering Defendants deny each and every allegation contained therein insofar as such allegations pertain to these answering Defendants. As to the remainder of the allegations contained therein, these answering Defendants admit each and every allegation contained therein upon information and belief.

13. Answering Paragraph 13 (erroneously named No. 14), these answering Defendants deny each and every allegation contained therein insofar as such allegations pertain to these answering Defendants. As to the remainder of the allegations contained therein, these answering Defendants admit each and every allegation contained therein upon information and belief.

14. Answering Paragraph 14 (erroneously named as No. 15), these answering Defendants deny each and every allegation contained therein insofar as such allegations pertain to these answering Defendants. As to the remainder of the allegations contained therein, these

answering Defendants admit each and every allegation contained therein upon information and belief.

15. Answering Paragraph 15 (erroneously named as No. 16), these answering Defendants deny each and every allegation contained therein insofar as such allegations pertain to these answering Defendants. As to the remainder of the allegations contained therein, these answering Defendants admit each and every allegation contained therein upon information and belief.

16. Answering Paragraph 16 (erroneously named as No. 17), these answering Defendants deny each and every allegation contained therein insofar as such allegations pertain to these answering Defendants. As to the remainder of the allegations contained therein, these answering Defendants admit each and every allegation contained therein upon information and belief.

17. Answering Paragraph 17 (erroneously named as No. 18), these answering Defendants deny each and every allegation contained therein insofar as such allegations pertain to these answering Defendants. As to the remainder of the allegations contained therein, these answering Defendants admit each and every allegation contained therein upon information and belief.

18. Answering Paragraph 18 (erroneously named as No. 19), these answering Defendants deny each and every allegation contained therein insofar as such allegations pertain to these answering Defendants. As to the remainder of the allegations contained therein, these answering Defendants admit each and every allegation contained therein upon information and belief, as they pertain to the remaining Defendants Plaintiff sued in this action.

19. Answering Paragraph 19 (erroneously named as No. 20), these answering Defendants deny each and every allegation contained therein insofar as such allegations pertain to these answering Defendants. As to the remainder of the allegations contained therein, these

answering Defendants admit each and every allegation contained therein upon information and belief, as they pertain to the remaining Defendants Plaintiff sued in this action.

20. Answering Paragraph 20 (erroneously named as No. 21), these answering Defendants deny each and every allegation contained therein insofar as such allegations pertain to these answering Defendants. As to the remainder of the allegations contained therein, these answering Defendants admit each and every allegation contained therein upon information and belief, as they pertain to the remaining Defendants Plaintiff sued in this action.

21. Answering Paragraph 21 (erroneously named as No. 22), these answering Defendants admit that Ms. Gonzales suffered injuries during her accident with the commercial garbage truck owned and operated by REPUBLIC and driven by its then-employee Deval Hatcher, occurring on or about January 14, 2012 and, as a result of those injuries, sought medical treatment from these answering Defendants, who are providers of healthcare. As to the remainder of the allegations contained therein, these answering Defendants deny the remainder.

FACTUAL ALLEGATIONS COMMON TO ALL CAUSES OF ACTION

22. Answering Paragraph 22 (erroneously named as No. 23), these answering Defendants deny there were any errors and omissions by these Answering Defendants. As to the remainder of the allegations contained therein, these answering Defendants are without sufficient knowledge and information to formulate a belief as to the truth of such allegations and, based upon such lack of information and belief, the same are hereby denied.

23. Answering Paragraph 23 (erroneously named as No. 24), these answering Defendants admit that Marie Gonzales first became a patient on April 4, 2012 for treatment of the injuries she sustained in the motor vehicle accident with REPUBLIC's employee on January 14, 2012. As to the remainder, denied.

24. Answering Paragraph 24 (erroneously named as No. 25), these answering Defendants admit that spinal surgery was recommended. As to the remainder, denied.

25. Answering Paragraph 25 (erroneously named as No. 26), these answering Defendants admit each and every allegation contained therein.

26. Answering Paragraph 26 (erroneously named as No. 27), these answering Defendants admit each and every allegation contained therein.

27. Answering Paragraph 27 (erroneously named as No. 28), these answering Defendants admit that pedicle screws were placed during the January 29, 2013 surgery. As to the remainder, denied.

28. Answering Paragraph 28 (erroneously named as No. 29), these answering Defendants admit that Danielle Miller aka Danielle Shopshire was retained to perform intraoperative monitoring services during the January 29, 2013 surgery.

29. Answering Paragraph 29 (erroneously named as No. 30), these answering Defendants admit each and every allegation contained therein.

30. Answering Paragraph 30 (erroneously named as No. 31), these answering Defendants admit each and every allegation contained therein.

31. Answering Paragraph 31 (erroneously named as No. 32), these answering Defendants admit each and every allegation contained therein.

32. Answering Paragraph 32 (erroneously named as No. 33), these answering Defendants admit each and every allegation contained therein.

33. Answering Paragraph 33 (erroneously named as No. 34), these answering Defendants admit that Defendant MILLER was at all times present in the operating room at Spring Valley Hospital in Clark County, Nevada, providing neurophysiological monitoring services during the January 29, 2013 surgery. As to the remainder, denied.

34. Answering Paragraph 34 (erroneously named as No. 35), these answering Defendants admit each and every allegation contained therein.

35. Answering Paragraph 35 (erroneously named as No. 36), these answering

Defendants admit the Neuromonitoring Report states as alleged.

36. Answering Paragraph 36 (erroneously named as No. 37), these answering Defendants admit that either Defendants KATUNA, ROCKY MOUNTAIN DIAGNOSTICS performed erroneous intraoperative monitoring or monitoring that was below the standard of care for neuro monitoring or the pedicle screw testing performed showed a false negative.

37. Answering Paragraph 37 (erroneously named as No. 38), these answering Defendants admit that the Operative Report states as alleged. As to the remainder, denied.

38. Answering Paragraph 38 (erroneously named as No. 39), these answering Defendants deny each and every allegation contained therein.

39. Answering Paragraph 39 (erroneously named as No. 40), these answering Defendants admit that Ms. Gonzales returned to Dr. Cash on February 6, 2013 who ordered a CT. As to the remainder, denied.

40. Answering Paragraph 40 (erroneously named as No. 41), these answering Defendants admit each and every allegation contained therein.

41. Answering Paragraph 41 (erroneously named as No. 42), these answering Defendants admit each and every allegation contained therein.

42. Answering Paragraph 42 (erroneously named as No. 43), these answering Defendants admit that Dr. Cash's testimony is cited correctly. As to the remainder, denied.

43. Answering Paragraph 43 (erroneously named as No. 44), these answering Defendants deny each and every allegation contained therein.

44. Answering Paragraph 44 (erroneously named as No. 45), these answering Defendants deny each and every allegation contained therein. These answering Defendants specifically deny falling below the standard of care in any treatment rendered to Marie Gonzales.

45. Answering Paragraph 45 (erroneously named as No. 46), these answering Defendants deny each and every allegation contained therein. These answering Defendants

specifically deny falling below the standard of care in any treatment rendered to Marie Gonzales.

46. Answering Paragraph 46 (erroneously named as No. 47), these answering Defendants deny each and every allegation contained therein. These answering Defendants specifically deny falling below the standard of care in any treatment rendered to Marie Gonzales or that Marie Gonzales suffered any lasting injury from the January 29, 2013 surgery and these answering Defendants' care and treatment.

47. Answering Paragraph 47 (erroneously named as No. 48), these answering Defendants deny each and every allegation contained therein. These answering Defendants specifically deny falling below the standard of care in any treatment rendered to Marie Gonzales or that Marie Gonzales suffered any lasting injury from the January 29, 2013 surgery and these answering Defendants' care and treatment.

48. Answering Paragraph 48 (erroneously named as No. 49), these answering Defendants admit each and every allegation contained therein upon information and belief.

49. Answering Paragraph 49 (erroneously named as No. 50), these answering Defendants admit that the stated damages were claimed by Marie Gonzales against REPUBLIC.

50. Answering Paragraph 50 (erroneously named as No. 51), these answering Defendants deny each and every allegation contained therein. These answering Defendants specifically deny falling below the standard of care in any treatment rendered to Marie Gonzales or that Marie Gonzales suffered any lasting injury from the January 29, 2013 surgery and these answering Defendants' care and treatment.

51. Answering Paragraph 51 (erroneously named as No. 52), these answering Defendants deny each and every allegation contained in Dr. Tung's declaration as it pertains to these answering Defendants.

52. Answering Paragraph 52 (erroneously named as No. 53), these answering Defendants deny each and every allegation contained in Dr. Seidenwurm's declaration as it

pertains to these answering Defendants.

53. Answering Paragraph 53 (erroneously named as No. 54) these answering Defendants deny each and every allegation contained in Dr. Saline's declaration as it pertains to these answering Defendants.

54. Answering Paragraph 54 (erroneously named as No. 55), these answering Defendants deny each and every allegation contained therein. These answering Defendants specifically deny falling below the standard of care in any treatment rendered to Marie Gonzales or that Marie Gonzales suffered any lasting injury from the January 29, 2013 surgery and these answering Defendants' care and treatment.

55. Answering Paragraph 55 (erroneously named as No. 56), these answering Defendants deny each and every allegation contained therein. These answering Defendants specifically deny falling below the standard of care in any treatment rendered to Marie Gonzales or that Marie Gonzales suffered any lasting injury from the January 29, 2013 surgery and these answering Defendants' care and treatment.

56. Answering Paragraph 56 (erroneously named as No. 57) these answering Defendants deny each and every allegation contained therein as it pertains to these answering Defendants. These answering Defendants specifically deny falling below the standard of care in any treatment rendered to Marie Gonzales or that Marie Gonzales suffered any lasting injury from the January 29, 2013 surgery and these answering Defendants' care and treatment.

57. Answering Paragraph 57 (erroneously named as No. 58), these answering Defendants deny each and every allegation contained therein as it pertains to these answering Defendants. These answering Defendants specifically deny falling below the standard of care in any treatment rendered to Marie Gonzales or that Marie Gonzales suffered any lasting injury from the January 29, 2013 surgery and these answering Defendants' care and treatment.

/ / /

FIRST CAUSE OF ACTION

(Contribution Against All Defendants)

58. Answering Paragraph 58 (erroneously named as No. 59), these answering Defendants repeat each and every response to Paragraphs 1 through 57, inclusive, and incorporates the same by reference as though set forth fully herein.

59. Answering Paragraph 59 (erroneously named as No. 60), these answering Defendants deny each and every allegation contained therein insofar as such allegations pertain to these answering Defendants. As to the remainder of the allegations contained therein, these answering Defendants are without sufficient knowledge and information to formulate a belief as to the truth of such allegations and, based upon such lack of information and belief, the same are hereby denied.

60. Answering Paragraph 60 (erroneously named as No. 61), these answering Defendants deny each and every allegation contained therein insofar as such allegations pertain to these answering Defendants. As to the remainder of the allegations contained therein, these answering Defendants are without sufficient knowledge and information to formulate a belief as to the truth of such allegations and, based upon such lack of information and belief, the same are hereby denied.

61. Answering Paragraph 61 (erroneously named as No. 62), these answering Defendants deny each and every allegation contained therein insofar as such allegations pertain to these answering Defendants. As to the remainder of the allegations contained therein, these answering Defendants are without sufficient knowledge and information to formulate a belief as to the truth of such allegations and, based upon such lack of information and belief, the same are hereby denied.

62. Answering Paragraph 62 (erroneously named as No. 63), these answering Defendants deny each and every allegation contained therein insofar as such allegations pertain to these answering Defendants. As to the remainder of the allegations contained therein, these answering Defendants are without sufficient knowledge and information to formulate a belief as to the truth of such allegations and, based upon such lack of information and belief, the same are

hereby denied.

SECOND CAUSE OF ACTION

(Misrepresentation of Medical Service and False Billing for Services not Rendered)

63. Answering Paragraph 63 (erroneously named as No. 64), these answering Defendants repeat each and every response to Paragraphs 1 through 62, inclusive, and incorporates the same by reference as though set forth fully herein.

64. Answering Paragraph 64 (erroneously named as No. 65), these answering Defendants admit each and every allegation contained therein.

65. Answering Paragraph 65 (erroneously named as No. 66), these answering Defendants admit each and every allegation contained therein.

66. Answering Paragraph 66 (erroneously named as No. 67), these answering Defendants admit each and every allegation contained therein.

67. Answering Paragraph 67 (erroneously named as No. 68), these answering Defendants admit that either Defendants MILLER and KATUNA did not perform pedicle screw testing services as represented to Dr. Cash that they did or any information suggesting that pedicle screw testing was not performed during the January 29, 2013 surgery is false.

68. Answering Paragraph 68 (erroneously named as No. 69), these answering Defendants aver that pedicle screw testing was performed by Defendant MILLER during the January 29, 2013 surgery.

69. Answering Paragraph 69 (erroneously named as No. 70), these answering Defendants deny each and every allegation as it pertains to them. As to the remainder, these answering Defendants are without sufficient knowledge and information to formulate a belief as to the truth of such allegations and, based upon such lack of information and belief, the same are hereby denied.

70. Answering Paragraph 70 (erroneously named as No. 71), these answering Defendants deny each and every allegation as it pertains to them. As to the remainder, these answering Defendants are without sufficient knowledge and information to formulate a belief as to the truth of such allegations and, based upon such lack of information and belief, the same are

hereby denied.

71. Answering Paragraph 71 (erroneously named as No. 72), these answering Defendants deny each and every allegation as it pertains to them. As to the remainder, these answering Defendants are without sufficient knowledge and information to formulate a belief as to the truth of such allegations and, based upon such lack of information and belief, the same are hereby denied.

AFFIRMATIVE DEFENSES

1. The Complaint fails to state a claim against these answering Defendants upon which relief can be granted.

2. Defendants allege that in all medical attention and care rendered to Ms. Gonzales, these answering Defendants possessed and exercised that degree of skill and learning ordinarily possessed and exercised by members of the medical profession in good standing practicing in similar localities and that at all times these answering Defendants used reasonable care and diligence in the exercise of their skill and application of learning, and at all times acted in accordance with their best medical judgment.

3. Defendants allege that any injuries or damages alleged sustained or suffered by Ms. Gonzales at the times and places referred to in Plaintiff's Complaint were caused in whole or in part or were contributed to by the negligence or fault or want of care of the Plaintiff, and the negligence, fault or want of care on the part of the Plaintiff was greater than that, if any, of these answering Defendants.

4. That in all medical attention rendered by these answering Defendants to Ms. Gonzales, these Defendants possessed and exercised the degree of skill and learning ordinarily possessed and exercised by members of their profession in good standing, practicing in similar localities, and that at all times, these answering Defendants used reasonable care and diligence in the exercise of their skills and the application of their learning, and at all times acted according to their best judgment; that the medical treatment administered by these answering Defendants was the usual and customary treatment for the physical condition and symptoms exhibited by Ms. Gonzales, and that at no time were these answering Defendants guilty of negligence or improper

treatment; that, on the contrary, these answering Defendants performed each and every act of such treatment in a proper and efficient manner and in a manner approved and followed by the medical profession generally and under the circumstances and conditions as they existed when such medical attention was rendered.

5. Defendants allege that they made, consistent with good medical practice, a full and complete disclosure to Ms. Gonzales of all material facts known to them or reasonably believed by them to be true concerning Ms. Gonzales' physical condition and the appropriate alternative procedures available for treatment of such condition. Further, each and every service rendered to Ms. Gonzales by these answering Defendants was expressly and impliedly consented to and authorized by Ms. Gonzales on the basis of said full and complete disclosure.

6. Defendants allege that they are entitled to a conclusive presumption of informed consent pursuant to NRS §41A.110.

7. Defendants allege that the Complaint is barred by the applicable statute of limitations.

8. Defendants allege that Ms. Gonzales assumed the risks of the procedures, if any, performed.

9. Plaintiff's damages, if any, were caused by and due to an unavoidable condition or occurrence.

10. Plaintiff has failed to mitigate its damages.

11. Defendants allege that the injuries and damages, if any, alleged by Marie Gonzales were caused in whole or in part by the actions or inactions of third parties over whom these answering Defendants had no liability, responsibility or control.

12. Defendants allege that the injuries and damages, if any, complained of by the Plaintiff were unforeseeable.

13. Defendants allege that the injuries and damages, if any, complained of by the Plaintiff were caused by forces of nature over which these answering Defendants had no responsibility, liability or control.

14. Defendants allege that the injuries and damages, if any, complained of by the

Plaintiff were not proximately caused by any acts and/or omissions on the part of these answering Defendants.

15. Defendants allege that Ms. Gonzales' need for medical treatment was caused solely by the negligence of Plaintiff and, therefore, Plaintiff is responsible for any alleged medical malpractice of these Defendants, the existence of which is specifically denied.

16. Plaintiff's Complaint violates the Statute of Frauds.

17. Defendants allege that pursuant to Nevada law, they would not be jointly liable, and that if liability is imposed, such liability would be several for that portion of the Plaintiff's damages, if any, that represents the percentage attributed to these answering Defendants.

18. Defendants allege that the injuries and damages, if any, suffered by the Plaintiff were caused by new, independent, intervening and superseding causes and not by these answering Defendants' alleged negligence or other actionable conduct, the existence of which is specifically denied.

19. Defendants allege that Plaintiff's and/or Marie Gonzales's damages, if any, are subject to the limitations and protections as set forth in Chapter 41A of the Nevada Revised Statutes including, without limitation, several liability and limits on non-economic damages.

20. Defendants allege that it has been necessary to employ the services of an attorney to defend this action and a reasonable sum should be allowed these Defendants for attorney's fees, together with the costs expended in this action.

21. Defendants allege that they are not guilty of fraud, oppression or malice, express or implied, in connection with the care rendered to Plaintiff at any of the times or places alleged in the Complaint.

22. Defendants allege that at all relevant times they were acting in good faith and not with recklessness, oppression, fraud or malice.

22. Defendants allege that the injuries and damages, if any, suffered by Plaintiff can and do occur in the absence of negligence.

23. Plaintiff has failed to allege any facts sufficient to satisfy Plaintiff's burden of proof by clear and convincing evidence that these answering Defendants engaged in any conduct

that would support an award of punitive damages.

24. No award of punitive damages can be awarded against these answering Defendants under the facts and circumstances alleged in Plaintiff's Complaint.

25. The facts of this case do not meet any of the circumstances set forth in NRS 41A.100.

26. Pursuant to NRS 41A.100(3), Plaintiff would never be entitled to a rebuttal presumption under NRS 41A.100(1) because Plaintiff has purportedly submitted an affidavit pursuant to NRS 41A.071.

27. Defendants assert that Plaintiff failed to properly perfect a contribution claim against these Defendants.

28. Defendants assert they are entitled to contribution and/or indemnity from Plaintiff, other parties and/or non-parties to this action.

29. Defendants assert that any settlement paid by Plaintiff to Ms. Gonzales represented Plaintiff's proportional share of liability to Ms. Gonzales.

30. Defendants assert that Plaintiff Republic's negligence caused the need for Ms. Gonzales to seek medical care and treatment for her injuries and Republic is wholly responsible for any alleged medical negligence resulting from that medical care and treatment.

31. To the extent Marie Gonzales has been reimbursed from any source for any special damages claimed to have been sustained as a result of the car accident with Republic or any incidents alleged in Plaintiff Republic's Complaint, Defendants may elect to offer those amounts into evidence and, if Defendants so elect, Marie Gonzales's special damages shall be reduced by those amounts pursuant to NRS §42.021.

32. Pursuant to N.R.C.P. 11 all possible affirmative defenses may not have been alleged since sufficient facts were not available and, therefore, these Defendants reserve the right to amend this Answer to allege additional affirmative defenses if subsequent investigation warrants. Additionally, one or more of these Affirmative Defenses may have been pled for the purposes of non-waiver.

WHEREFORE, these answering Defendants pray that Plaintiff take nothing by way of its

Complaint, that the Complaint be dismissed with prejudice and that the Court award fees and expenses as deemed appropriate.

DATED this _19th _ day of February, 2019.

CARROLL, KELLY, TROTTER,
FRANZEN, McBRIDE & PEABODY

/s/ Heather S. Hall

_____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 19th day of February, 2019, I served a true and correct copy of the foregoing **DEFENDANTS ANDREW M. CASH, M.D., ANDREW M. CASH, M.D., P.C. aka ANDREW MILLER CASH, M.D., P.C. AND DESERT INSTITUTE OF SPINE CARE, LLC'S ANSWER TO PLAINTIFF'S SECOND AMENDED COMPLAINT** addressed to the following counsel of record at the following address(es):

☐ **VIA ELECTRONIC SERVICE:** By mandatory electronic service (e-service), proof of e-service attached to any copy filed with the Court; or

☐ **VIA U.S. MAIL:** By placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, addressed as indicated on the service list below in the United States mail at Las Vegas, Nevada

☐ **VIA FACSIMILE:** By causing a true copy thereof to be telecopied to the number indicated on the service list below.

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