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. A738125

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VOLUME VII

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

The Honorable Jerry A. Wiese II

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MSJD

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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.; ANDREW MILLER CASH, M.D., P.C.; & DESERT INSTITUTE OF SPINE CARE, LLC'S MOTION FOR SUMMARY JUDGMENT ON AN ORDER SHORTENING TIME

DATE OF HEARING: 3/11/19

TIME OF HEARING:

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 hereby submit their Motion for Summary Judgment on Order Shortening Time and move this Court for summary judgment pursuant to NRCP 56.

This Motion is made and based on the attached Memorandum of Points and Authorities, the Affidavit of Heather S. Hall, the exhibits attached hereto, and the pleadings and paper already on file, and any other arguments presented to this Court at or before the hearing on this Motion.

DATED this _4th__ day of March, 2019.

CARROLL, KELLY, TROTTER,
FRANZEN, McBRIDE & PEABODY

/s/ Heather S. Hall

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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

ORDER SHORTENING TIME

GOOD CAUSE APPEARING THEREFOR, it is hereby ORDERED that the time for the hearing of the above Motion shall be shortened to the 11th day of March, 2019, at the hour of 2 ~~a.m.~~/p.m., in the above-referenced Department. Oppositions to this Motion are due on 3/7/19 by 2pm; Replies are due on 3/8/19 by 5pm.

DISTRICT COURT JUDGE

Respectfully submitted by:

CARROLL, KELLY, TROTTER,
FRANZEN, McBRIDE & PEABODY

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& Desert Institute of Spine Care, LLC

AFFIDAVIT OF HEATHER S. HALL, ESQ., IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND ORDER SHORTENING TIME

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

HEATHER S. HALL, ESQ., being first duly sworn, deposes and says:

1. That affiant is a partner at the law firm of CARROLL, KELLY, TROTTER, FRANZEN, McBRIDE & PEABODY, am licensed to practice law in all Courts within the State of Nevada; and am counsel for Defendants Andrew M. Cash, M.D.; Andrew M. Cash, M.D., P.C.; Andrew Miller Cash, M.D., P.C.; and Desert Institute of Spine Care, LLC in the above-entitled case. This Affidavit is made and based upon my personal knowledge and I am competent to testify to the matters contained herein.

2. On January 30, 2019, this Court heard a Joint defense Motion to Extend Discovery Deadlines and Continue Trial.

3. After considering oral argument and the stated reasons for the requested discovery extension, this Court extended the discovery deadline to March 4, 2019. *See* Order Granting in part and Denying in Part Joint Motion, attached as Exhibit "A" to Motion in Limine No. 2.

4. Part of the Court's ruling included that parties were to submit dispositive motions and motions in limine to the Court by March 4, 2019.

5. Because trial is scheduled to begin on March 18, 2019, it is my understanding that all motions are to be submitted on an Order Shortening Time for expedited consideration. Thus, this Motion for Summary Judgment is submitted on an Order Shortening Time and good cause exists for the requested OST pursuant to EDCR 2.26.

6. Defendants bring this timely Motion for Summary Judgment on the basis that contribution claims only exist in the context of joint tortfeasors.

7. Accepting Plaintiff's allegations as true, Dr. Cash and Republic are **not** joint tortfeasors and no right to contribution exists under Nevada Revised Statute §17.225.

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I declare under penalty of perjury that the foregoing is true and correct.

FURTHER AFFIANT SAYETH NAUGHT.

Heather S. Hall

HEATHER S. HALL, ESQ.

SUBSCRIBED and SWORN to before me
this 14th day of March, 2019.

NOTARY PUBLIC

NOTARY PUBLIC
CANDACE WAKEMAN
STATE OF NEVADA - COUNTY OF CLARK
MY APPOINTMENT EXP. NOV 16, 2020
No: 16-4444-1

MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

This is a contribution claim filed by Plaintiff, Republic Silver State Disposal, Inc. against Dr. Cash. *See* Pl.'s Second Amd. Compl., attached as **Exhibit "A"**. On September 4, 2013, Marie Gonzales filed suit against Republic for injuries she sustained as a result of a motor vehicle on January 14, 2012. *See* **Exhibit "B"**, Complaint from underlying MVA. Specifically, Ms. Gonzales alleged that she suffered potentially permanent injuries to her neck, back, legs, and arms. *Id.* at ¶18. Ms. Gonzales began treating with Defendant, Andrew M. Cash, M.D. in April 2012 for the injuries she suffered as a result of the collision with Republic. On July 6, 2015 Plaintiff resolved her claims against Republic for $2,000,000.00. *See* **Exhibit "A"**, Pl.'s Second Amd. Compl. at ¶55.

Plaintiff Republic Silver State Disposal, Inc. filed its Second Amended Complaint on January 30, 2019 asserting a claim for contribution pursuant to Nevada Revised Statute §17.225. *Id.* Republic alleges that as a result of these Defendants' alleged negligence, Ms. Gonzales suffered "new and different injuries from those allegedly suffered in the motor vehicle accident." *See* **Exhibit "A"**, Pl.'s Second Amd. Compl. at ¶56. As a result, Dr. Cash and Republic are not joint tortfeasors and Republic is not entitled to seek contribution from Dr. Cash. As set forth fully below, there are no genuine issues of material fact and summary judgment should be entered in favor of Dr. Cash, Desert Institute of Spine Care, LLC, and Andrew M. Cash, M.D., P.C.

A. STATEMENT OF UNDISPUTED FACTS

1. On September 4, 2013, Marie Gonzales filed a lawsuit against Republic Silver State Disposal arising out of injuries sustained in a January 14, 2012 motor vehicle accident. *See* **Exhibit "B"**.
2. Ms. Gonzales began treating with Dr. Cash in April 2012 for injuries sustained in the motor vehicle accident. *See* **Exhibit "A"**, Pl.'s Second Amd. Compl. at ¶24.
3. On July 6, 2015, Ms. Gonzales resolved her claims against Republic for $2,000,000.00.

Id. at ¶55.

4. Republic filed its Second Amended Complaint on January 30, 2019 asserting a cause of action for contribution against Dr. Cash. *Id.*
5. Republic claims that as a result of Dr. Cash's professional negligence, Ms. Gonzales suffered distinct injuries from those sustained as a result of the motor vehicle accident. *Id.* at ¶56.

II.

LEGAL ARGUMENT

A. STANDARD FOR SUMMARY JUDGMENT.

Summary judgment is proper if "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Nev. R. Civ. P. 56(c). A genuine issue of material fact is one that a rational trier of fact could return a verdict for the non-moving party. *Wood v. Safeway, Inc.*, 121 Nev. 724, 731, 121 P.3d 1026, 1031 (2005). *Busch v. Flangas*, 108 Nev. 821, 837 P.2d 438 (1992). Nevada has long recognized that summary judgment is appropriate when, as in this case, "an essential element of a claim for relief is absent, the facts, disputed or otherwise, as to other elements are rendered immaterial and summary judgment is proper." *Bulbman, Inc. v. Nevada Bell*, 108 Nev. 105, 111, 825 P.2d 588 (1992). Even though the pleadings and proof must be construed in the light most favorable to the non-moving party, the non-moving party must set forth specific facts demonstrating the existence of a genuine issue for trial or have summary judgment entered against the non-moving party. *Collins v. Union Fed. Sav. & Loan Ass'n*, 99 Nev. 284, 294, 662 P.2d 610, 618-619 (1983). The nonmoving party bears the burden of showing there is more than "some metaphysical doubt" as to the operative facts in order to avoid summary judgment being entered in the moving party's favor, with more than "gossamer threads of whimsy" needed. *Wood v. Safeway*, 121 Nev. 724, 730-31, 121 P.3d 1026 (2005)(Internal citations omitted).

Republic cannot establish it is entitled to contribution from Dr. Cash as the parties are not joint tortfeasors. Accordingly, summary judgment is necessary and appropriate.

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B. REPUBLIC IS NOT ENTITLED TO CONTRIBUTION UNDER NEVADA REVISED STATUTE 17.225.

Nevada Revised Statute Section 17.225 governs contribution and provides that:

> [W]here 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.

NRS §17.225(1)[emphasis added].

Plaintiff alleges that as a result of Dr. Cash's treatment, Ms. Gonzales suffered "new and different injuries" than the injuries she allegedly suffered as a result of the motor vehicle accident. *See* Pl.'s Second Amd. Compl. at ¶56. Accordingly, Dr. Cash cannot be a joint tortfeasor with Republic, a prerequisite to seeking contribution. *See District of Columbia v. Washington Hosp. Center*, 722 A.2d 332, 336 (D.C. 1998) (finding that "[a]n essential prerequisite for entitlement to contribution is that the parties be joint tortfeasors in the sense that their negligence concurred in causing the harm.") In *Washington Hospital Center*, a pedestrian was injured by an automobile involved in a high speed chase with police and subsequently filed suit. Before trial, the District settled with the pedestrian and subsequently filed suit against Washington Hospital Center alleging the hospital's negligence exacerbated the pedestrian's injuries. *Id.* at 335. The Court of Appeals held that:

> [T]he initial tortfeasor and the medical attendant who aggravates the victim's injuries through negligent treatment are not joint tortfeasors, and therefore are not entitled to contribution.

Id. at 339.

Just as in *Washington Hospital Center*, Republic claims that Dr. Cash's allegedly negligent treatment resulted in new and separate injuries than those sustained as a result of the motor vehicle accident. Accordingly, Republic and Dr. Cash are not joint tortfeasors and summary judgment as to Plaintiff's contribution claim is appropriate.

C. REPUBLIC IS LIABLE FOR THE ALLEGEDLY NEGLIGENT TREATMENT RENDERED BY DR. CASH.

Should this Court disagree that NRS 17.225 is inapplicable here, as an alternative basis for summary judgment, Republic is legally responsible for all foreseeable harm caused by its

negligence and summary judgment is appropriate on that basis. The Restatement 2d of Torts, section 457 states that the damages assessable against an initial negligent actor include not only the injury originally caused by the actor's negligence, but also the harm resulting from medical treatment sought in response to the injury, even if rendered in a negligent manner, it reasonably flows from the initial injury. *See* Rest. 2d Torts § 457. Nevada has approved of this Restatement as demonstrated by Nevada Medical Malpractice jury instruction 9MM.8, which provides:

> A physician liable for negligent medical treatment or negligence failure to render medical treatment is likewise liable for injury or death resulting from any additional medical treatment to which the patient is exposed as a proximate (legal) result of the original physician's negligence irrespective of whether such subsequent treatment is rendered in a proper or in a negligent manner.

The Nevada Supreme Court has recognized that the provisions of Nevada Revised Statute 41A apply to contribution claims based on medical malpractice. *See Pack v. Laourette*, 128 Nev. 264, 270, 277 P.3d 1246, 1250 (2012) (holding that NRS 41A.071's expert affidavit requirement applies to a contribution claim.) The critical factor in imposing liability where there is alleged subsequent negligent medical treatment is foreseeability. *See Ash v. Mortensen*, 140 P.2d 437, 439 (1943); *Blecker v. Wolbart*, 167 Cal. App. 3d 1195, 1201 (Cal. App. 1985); *see also Munoz v. Davis*, 141 Cal. App. 3d 420, 190 Cal. Rptr. 400 (1983) ("The important factor in those [medical negligence] cases is that the medical treatment is closely and reasonably associated with the immediate consequences of the defendant's act and forms a normal part of the aftermath.") The Ninth Circuit has long held that "[m]alpractice is a foreseeable result of any medical procedure." *In re Gregely*, 110 F.3d 1448, 1453 (9th Cir. 1997).

In this case, Ms. Gonzales was referred to Dr. Cash for treatment due to injuries suffered as a direct result of the motor vehicle accident with plaintiff Republic. Absent the negligence of Plaintiff Republic, Ms. Gonzales would not have been a patient of Dr. Cash's. Low back pain is an inherently foreseeable result of any motor vehicle accident and as such, any treatment rendered by Dr. Cash to treat Ms. Gonzales' low back pain was closely and reasonably associated with the consequences of Republic's actions, for which they are proximately liable.

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D. MS. GONZALES' INJURIES WERE LEGALLY CAUSED BY PLAINTIFF'S NEGLIGENCE AND AS SUCH, THEY ARE LIABLE FOR ANY SUBSEQUENT ALLEGEDLY NEGLIGENT MEDICAL TREATMENT.

It is a well-settled concept of tort law that an actor is liable for the full extent of injuries he causes that are foreseeable at the time of his action. *See* Rest. 2d Torts § 457. The Court of Appeals of California stated that traditional tort law "holds a tortfeasor liable not only for the victim's original personal injuries but also for any aggravation caused by subsequent negligent medical treatment, provided the injured party exercised reasonable care in obtaining the medical treatment." *See Henry v. Superior Court*, 160 Cal. App. 4th, 440, 72 Ca. Rptr. 3d 808 (Cal. App. 2008). Ms. Gonzales stated unequivocally in her deposition that there was no doubt in her mind that Mr. Hatcher was at fault for the injuries she suffered as a result of his negligent driving. *See* **Exhibit "C"**, 28:5-11. As a result of back injuries suffered in the motor vehicle accident, Ms. Gonzales was referred to Dr. Cash. *See* **Exhibit "D"**, 131:16-17. "The law regards the act of the original wrongdoer as a proximate cause of the damages flowing from the subsequent negligent medical treatment and holds [the original tortfeasor] liable therefor." *See Marina Emergency Medical Group v. Superior Court*, 84 Cal. App. 4th 435, 440 (Cal. App. 2000); *citing Ash v. Mortensen*, 140 P.2d 437, 439 (1943). As the original tortfeasor in the underlying litigation, Republic is undisputedly liable for the full extent of their negligence, including any subsequent allegedly negligent medical care performed by Dr. Cash in an attempt to remedy the original wrongdoings by Plaintiff.

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III.

CONCLUSION

Based upon the foregoing, Plaintiff Republic is the original tortfeasor and as such, is liable for the full extent of injuries Ms. Gonzales suffered from alleged subsequent negligent medical treatment. Absent the negligence of Republic, Ms. Gonzales would not have been a patient of Dr. Cash and therefore, Defendants respectfully request this Court grant this Motion for Summary Judgment.

DATED this _4th__ day of March, 2019.

CARROLL, KELLY, TROTTER,
FRANZEN, McBRIDE & PEABODY

/s/ Heather S. Hall

ROBERT C. McBRIDE, ESQ.
Nevada Bar No.: 7082
HEATHER S. HALL, ESQ.
Nevada Bar No.: 10608
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 5th day of March, 2019, I served a true and correct copy of the foregoing **DEFENDANTS ANDREW M. CASH, M.D.; ANDREW M. CASH, M.D., P.C.; ANDREW MILLER CASH, M.D., P.C.; & DESERT INSTITUTE OF SPINE CARE, LLC'S MOTION FOR SUMMARY JUDGMENT ON AN ORDER SHORTENING TIME** 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.

David Barron, Esq.
John D. Barron, Esq.
BARRON & PRUITT, LLP
3890 West Ann Road
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Attorneys for Plaintiff

An Employee of *CARROLL, KELLY, TROTTER, FRANZEN, McBRIDE & PEABODY*

EXHIBIT "A"

EXHIBIT "A"

COMJD
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Attorneys for Plaintiff
Republic Silver State Disposal, Inc.

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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EXHIBIT "B"

EXHIBIT "B"

CIVIL COVER SHEET

Clark County, Nevada

Case No. _____
(Assigned by Clerk's Office)

A- 13- 687931- C
XX

I. Party Information

Plaintiff(s) (name/address/phone): Marie Gonzalez	Defendant(s) (name/address/phone): Deval Hatcher and Republic Silver State Disposal, Inc.
Attorney (name/address/phone): Ryan M. Anderson, Esq., Morris Anderson Law, 2001 S. Maryland Pkwy, Las Vegas, NV 89104 (702) 333-1111	Attorney (name/address/phone):

II. Nature of Controversy (Please check applicable bold category and applicable subcategory, if appropriate)

☐ **Arbitration Requested**

Civil Cases

Real Property

- ☐ **Landlord/Tenant**
  - ☐ Unlawful Detainer
- ☐ **Title to Property**
  - ☐ Foreclosure
  - ☐ Liens
  - ☐ Quiet Title
  - ☐ Specific Performance
- ☐ **Condemnation/Eminent Domain**
- ☐ **Other Real Property**
  - ☐ Partition
  - ☐ Planning/Zoning

Torts

Negligence
- ☒ **Negligence – Auto**
- ☐ **Negligence – Medical/Dental**
- ☐ **Negligence – Premises Liability** (Slip/Fall)
- ☐ **Negligence – Other**

- ☐ **Product Liability**
  - ☐ Product Liability/Motor Vehicle
  - ☐ Other Torts/Product Liability
- ☐ **Intentional Misconduct**
  - ☐ Torts/Defamation (Libel/Slander)
  - ☐ Interfere with Contract Rights
- ☐ **Employment Torts** (Wrongful termination)
- ☐ **Other Torts**
  - ☐ Anti-trust
  - ☐ Fraud/Misrepresentation
  - ☐ Insurance
  - ☐ Legal Tort
  - ☐ Unfair Competition

Probate

- ☐ **Summary Administration**
- ☐ **General Administration**
- ☐ **Special Administration**
- ☐ **Set Aside Estates**
- ☐ **Trust/Conservatorships**
  - ☐ Individual Trustee
  - ☐ Corporate Trustee
- ☐ **Other Probate**

Other Civil Filing Types

- ☐ **Construction Defect**
  - ☐ Chapter 40
  - ☐ General
- ☐ **Breach of Contract**
  - ☐ Building & Construction
  - ☐ Insurance Carrier
  - ☐ Commercial Instrument
  - ☐ Other Contracts/Acct/Judgment
  - ☐ Collection of Actions
  - ☐ Employment Contract
  - ☐ Guarantee
  - ☐ Sale Contract
  - ☐ Uniform Commercial Code
- ☐ **Civil Petition for Judicial Review**
  - ☐ Other Administrative Law
  - ☐ Department of Motor Vehicles
  - ☐ Worker's Compensation Appeal

- ☐ **Appeal from Lower Court** (also check applicable civil case box)
  - ☐ Transfer from Justice Court
  - ☐ Justice Court Civil Appeal
- ☐ **Civil Writ**
  - ☐ Other Special Proceeding
- ☐ **Other Civil Filing**
  - ☐ Compromise of Minor's Claim
  - ☐ Conversion of Property
  - ☐ Damage to Property
  - ☐ Employment Security
  - ☐ Enforcement of Judgment
  - ☐ Foreign Judgment – Civil
  - ☐ Other Personal Property
  - ☐ Recovery of Property
  - ☐ Stockholder Suit
  - ☐ Other Civil Matters

III. Business Court Requested (Please check applicable category; for Clark or Washoe Counties only.)

- ☐ NRS Chapters 78-88
- ☐ Commodities (NRS 90)
- ☐ Securities (NRS 90)
- ☐ Investments (NRS 104 Art. 8)
- ☐ Deceptive Trade Practices (NRS 598)
- ☐ Trademarks (NRS 600A)
- ☐ Enhanced Case Mgmt/Business
- ☐ Other Business Court Matters

9/4/13
Date

/s/ Ryan M. Anderson
Signature of initiating party or representative

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CLERK OF THE COURT

COMP
RYAN M. ANDERSON, ESQ.
Nevada Bar No. 11040
KIMBALL JONES, ESQ.
Nevada Bar No. 12982
MORRIS ANDERSON
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Attorneys for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

MARIE GONZALEZ,

Plaintiff,

vs.

DEVAL HATCHER, REPUBLIC SILVER STATE DISPOSAL, INC., DOE OWNER, I-V, DOE DRIVER, I-V, ROE EMPLOYER, and ROE COMPANIES,

Defendants.

CASE NO: A-13-687931-C
DEPT. NO: XX

COMPLAINT

COMES NOW the Plaintiff, MARIE GONZALEZ, by and through counsel, Ryan M. Anderson, Esq., and Kimball Jones, Esq., of the law firm of MORRIS ANDERSON LAW, and for her causes of action against the Defendants, and each of them, alleges as follows:

1. That Plaintiff, MARIE GONZALEZ (hereinafter referred to as "PLAINTIFF"), was at all times relevant to this action a resident of Clark County, Nevada.

2. Upon information and belief, that at all times relevant to this action, the Defendant, DEVAL HATCHER (hereinafter referred to as "DEFENDANT HATCHER"), is and

was a resident of Clark County, Nevada, and was driving the automobile owned by DEFENDANT HATCHER and/or DEFENDANT REPUBLIC SILVER STATE DISPOSAL, INC. and/or DEFENDANT DOE OWNER at the time of the collision.

3. That at all times relevant to this action, DEFENDANT REPUBLIC SILVER STATE DISPOSAL, INC. (hereinafter as "DEFENDANT REPUBLIC SILVER STATE"), owned and/or maintained the vehicle driven by DEFENDANT HATCHER and/or DEFENDANT DOE DRIVER described.

4. That at all times relevant to this action, DEFENANT DOE DRIVER, was and is a resident of Clark County, Nevada, and was driving the automobile owned by DEFENDANT HATCHER and/or DEFENDANT REPUBLIC SILVER STATE and/or DEFEDANT DOE OWNER at the time of the incident herein described.

5. That at all times relevant to this action, DEFENDANT DOE OWNER, was and is a resident of Clark County, Nevada.

6. That at all times relevant to this action, DEFENDANT REPUBLIC SILVER STATE and/or DEFENDANT ROE EMPLOYER, was an entity doing business in the State of Nevada and was directing the course and scope of the actions of DEFENDANTS, and each of them, at the time of the incident herein described.

7. That at all times relevant to this action, DEFENDANT REPUBLIC SILVER STATE and/or DEFENDANT ROE EMPLOYER was employing DEFENDANTS, and each of them, and each of said DEFENDANTS were acting in the course and scope of said employment at all times relevant to the incident described herein.

8. That at all times relevant to this action, DEFENDANT REPUBLIC SILVER STATE and/or DEFENDANT ROE COMPANIES, was an entity doing business in the State of

Nevada and was directing the course and scope of the actions of DEFENDANTS, and each of them, at the time of the incident herein described.

9. That the true names and capacities, whether individual, corporate, partnership, associate or otherwise, of Defendants, DOES I through V and ROES I through V, are unknown to PLAINTIFF, who therefore sues said Defendants by such fictitious names. PLAINTIFF is informed and believe and thereon allege that each of the Defendants designated herein as DOE and ROE are responsible in some manner for the events and happenings referred to and caused damages proximately to PLAINTIFF as herein alleged, and that PLAINTIFF will ask leave of this Court to amend this Complaint to insert the true names and capacities of DOES I through V and ROES I through V, when the same have been ascertained, and to join such Defendants in this action.

10. That upon information and belief, at all times mentioned herein, DEFENDANT HATCHER and/or DEFENDANT DOE DRIVER was the driver of the vehicle owned by DEFENDANT REPUBLIC SILVER STATE and/or DEFENDANT HATCHER and/or DEFENDANT DOE OWNER and was acting in the course and scope of his or her employment with DEFENDANT REPUBLIC SILVER STATE and/or ROE EMPLOYER at the time of the events described herein.

11. That on or about January 14, 2012, PLAINTIFF was operating and driving a motor vehicle believed to be a 2004 Nissan (hereinafter referred to as "Plaintiff's Vehicle") on the public streets of Clark County, Nevada.

12. That on or about January 14, 2012, DEFENDANT HATCHER and/or DEFENDANT DOE DRIVER, was operating and driving a motor vehicle believed to be a 2001 Volvo

Trash Compactor Dump Truck (hereinafter referred to as "Defendant's Vehicle") on the public streets of Clark County, Nevada.

13. That on or about January 14, 2012, DEFENDANT HATCHER and/or DEFENDANT DOE DRIVER was the operator of Defendant's Vehicle when he or she negligently, recklessly, and carelessly caused the same to collide with Plaintiff's Vehicle.

14. That upon information and belief, DEFENDANT REPUBLIC SILVER STATE and/or DEFENDANT OWNER negligently entrusted his/her vehicle to Defendants and each of them and/or that DEFENDANT REPUBLIC SILVER STATE and/or DEFENDANT ROE EMPLOYER negligently hired, supervised and/or entrusted a vehicle to Defendants and each of them.

15. That the collision occurred in Clark County, Nevada.

FIRST CAUSE OF ACTION

16. Plaintiff incorporates by this reference all of the allegations of paragraphs 1 through 15, above, as though completely set forth herein.

17. That at the time of the accident herein complained of, and immediately prior thereto, Defendants, and each of them, in breaching a duty owed to PLAINTIFF, were negligent and careless, inter alia, in the following particulars:

A. In failing to keep Defendant's Vehicle under proper control;

B. In operating Defendant's Vehicle without due caution for the rights of the Plaintiff;

C. In failing to keep a proper lookout for Plaintiff's Vehicle;

D. Negligent entrustment;

E. Vicarious liability through the operation of NRS 41.440;

F. Respondeat superior;

G. The Defendants, and each of them, violated certain state and local statutes, rules, regulations, codes and ordinances, and PLAINTIFF will pray leave of Court to insert the exact citations at the time of trial.

18. By reason of the premises, and as a direct and proximate result of the aforesaid negligence and carelessness of Defendants, and each of them, PLAINTIFF, suffered physical injury and was otherwise injured in and about her neck, back, legs, arms, organs, and systems, and was otherwise injured and caused to suffer great pain of body and mind, and all or some of the same is chronic and may be permanent and disabling, all to her damage in an amount in excess of $10,000.00.

19. By reason of the premises, and as a direct and proximate result of the aforesaid negligence and carelessness of the Defendants, and each of them, PLAINTIFF has been caused to expend monies for medical and miscellaneous expenses, and will in the future be caused to expend additional monies for medical expenses and miscellaneous expenses incidental thereto, in a sum not yet presently ascertainable, and leave of Court will be requested to include said additional damages when the same have been fully determined.

20. Prior to the injuries complained of herein, PLAINTIFF was an able-bodied female, capable of being gainfully employed and capable of engaging in all other activities for which PLAINTIFF was otherwise suited. By reason of the motor vehicle accident, and as a direct and proximate result of the negligence of the said Defendants, and each of them, PLAINTIFF was caused to be disabled and limited and restricted in her occupations and activities, which caused PLAINTIFF a loss of wages in an unascertainable amount as of this time, and/or diminution of PLAINTIFF's earning

capacity and future loss of wages, all to her damage in a sum not yet presently ascertainable, the allegations of which PLAINTIFF prays leave of Court to insert herein when the same shall be fully determined.

21. PLAINTIFF has been required to retain the law firm of MORRIS ANDERSON LAW to prosecute this action, and is entitled to a reasonable attorney's fee.

WHEREFORE, Plaintiff, expressly reserving the right herein to include all items of damage, demands judgment against the Defendants, and each of them, as follows:

FIRST CLAIM FOR RELIEF:

1. General damages for Plaintiff, MARIE GONZALEZ, in an amount in excess of $10,000.00;

2. Special damages for said Plaintiff's medical and miscellaneous expenses as of this date, plus future medical expenses and the miscellaneous expenses incidental thereto in a presently unascertainable amount;

3. Special damages for lost wages in a presently unascertainable amount, and/or diminution of the earning capacity of said Plaintiff, plus possible future loss of earnings and/or diminution of said Plaintiff's earning capacity in a presently unascertainable amount.

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4. Costs of this suit;

5. Attorney's fees; and

6. For such other and further relief as to the Court may seem just and proper in the premises.

DATED THIS 4th day of September, 2013.

BY /s/ Ryan M. Anderson
MORRIS ANDERSON LAW
RYAN M. ANDERSON, ESQ.
Nevada Bar No. 11040
2001 S. Maryland Pkwy.
Las Vegas, Nevada 89104
Attorneys for Plaintiff

EXHIBIT "C"

EXHIBIT "C"

In the Matter Of:

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

MARIE G. GONZALES

January 24, 2019

Job Number: 520840

A. That's his opinion.

Q. My question was: Were you ever aware of that up until today?

A. No.

Q. Any doubt in your mind that Republic and its employee Deval Hatcher was responsible for the car accident and the injuries you suffered at the time of the accident?

A. Am I in any doubt?

Q. Any doubt in your mind?

A. No.

Q. Okay. So following the accident, I think you testified that you ended up not being able to work and there were periods of time that you didn't have insurance. At any point in time before you filed a District Court complaint against Mr. Hatcher and Republic, did Republic ever offer to pay any of your health care expenses?

A. At the time of the accident, I did get a call from them stating that they would be willing to take care of anything that is needed in regards to the accident and my injuries, and that's when I stated that. I said thank you very much, but I have already contacted an attorney so I'm represented. That was the end of that.

EXHIBIT "D"

EXHIBIT "D"

Transcript of the Testimony of

Marie Gonzales

Date Taken: June 19, 2014

Case: Marie Gonzales vs. Deval Hatcher Republic Silver State Disposal, Inc., et al.

Case No.: A-13-687931-C

Las Vegas Reporting
7583 Salvadora Pl, Las Vegas, Nevada 89113
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Services. And I believe I could have went either Monday or Tuesday the following week.

Q. In terms of your frequency of treatment, were you going a couple times a week, once a week, what do you recall?

A. Three times a week.

Q. Was that treatment helping?

A. No.

Q. Were you getting worse?

A. I didn't feel like I was getting better.

Q. What happens next then? Did you get referred to anywhere else, to any other doctors?

A. Yes.

Q. Who was the next doctor? So you're treating with the chiropractor --

A. I am seeing Dr. Bernard, and he refers me to Dr. Cash.

Q. What is your understanding as to the type of doctor Dr. Cash is?

A. He's a doctor that works on spinal surgery.

Q. Did Dr. Cash refer you anywhere?

A. To continue -- yes, he referred me to pain management with Dr. Coppel.

Q. What office did you go to for Dr. Coppel?

A. The one he has on Charleston.

OPP
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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 **OPPOSITION TO DEFENDANTS M. CASH, M.D., ANDREW M. CASH, M.D., P.C., ANDREW MILLER CASH, M.D., P.C., AND DESERT INSTITUTE OF SPINE CARE, LLC'S MOTION FOR SUMMARY JUDGMENT** Date: March 11, 2019 Time: 2:00 p.m.

Plaintiff REPUBLIC SILVER STATE DISPOSAL, INC. (Republic), by and through its counsel BARRON & PRUITT, LLP, hereby submits the following in opposition to Defendant ANDREW CASH, M.D.'S *Motion for Summary Judgment.*

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MEMORANDUM OF POINTS AND AUTHORITIES

The Court is well aware of the facts and legal intricacies this contribution action presents. Facts pertinent to this opposition to the Cash defendants pending motion for summary judgment are:

- Republic Silver State Disposal paid $2 million to settlement Marie Gonzales' lawsuit against it and its former employee, Deval Hatcher; and
- The release terminating the Gonzales v. Hatcher action contained express verbiage that, in addition to releasing itself and Mr. Hatcher, Republic's $2 million was also extinguishing any claims Ms. Gonzales had against any of her health care providers arising from treatment for injuries she claimed to have suffered in the January 14, 2012.

This Court over two years ago made the legal determination that the Gonzales/Republic release did indeed extinguish claims against Ms. Gonzales' health care providers for treatment arising from the 2012 traffic accident, thus satisfying the predicate under NRS 17.225(2), that:

> 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.

See also 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 nor in respect to any amount paid in a settlement which is in excess of what was reasonable.")[1]

In this motion for summary judgment the Cash defendants argue in the alternative that either: a) they and Republic are not "jointly and severally liable in tort for the same injury," and therefore Republic's contribution claim is invalid under NRS 17.225(1); or b) Republic's contribution claim under NRS 17.225 is invalid because its liability to Ms. Gonzales was co-extensive with Dr. Cash'

[1] This court also resolved the timeliness of the contribution action by finding that Republic commenced its lawsuit within 1 year of paying the "common liability." NRS 17.285(4)(b). The Nevada Supreme Court refused issuance of an extraordinary writ to the effect that Republic's contribution claim was governed by NRS 17.285(4), and not the "3 years from injury/1 year from discovery" limitations period for medical "professional negligence" found at NRS 41A.097. See Balodimas v. Dist. Ct., 2017 WL 6597149; see also Saylor v. Arcotta, 126 Nev. 92, 225 P.3d 1276 (2010).

liability since his medical negligence was reasonably foreseeable. See Restatement (2d) of Torts §457, discussed below.

Neither argument supports summary judgment under Rule 56.

The core rationale for inapplicability of the Uniform Contribution Among Tortfeasors Act, (UCATA), NRS 17.225, et seq., is that Republic's pleading alleges Ms. Gonzales suffered "new and different injuries" than those suffered in the traffic accident because of Dr. Cash's treatment, therefore "Dr. Cash cannot be a joint tortfeasor with Republic." Motion p. 8. This is sophistry: The "new and different" injury is what bottoms this case—Dr. Cash, in treating injuries supposedly incurred in the January 2012 accident, botched his (arguably unnecessary) surgery by misplacing two pedicle screws that, after almost six months, irreparably damaged Ms. Gonzales' left L5 and S1 nerve roots. So the post-operative, chronic radiculopathy she suffered was "new" in the sense that it was not caused by the accident; and "different" because her post-operative symptomatology was certainly different than what had gone before.

That said, the motion cites the District of Columbia Court of Appeals decision of District of Columbia v. Washington Hospital Center, 722 A.2d 332 (1998), to support a dispositive ruling. That case is distinguishable on several levels.

There, the plaintiff was carrying her young child when they were injured by a vehicle involved in a high-speed chase with a District of Columbia (the District) police officer. Prior to trial the District settled with the plaintiff and then filed suit against Washington Hospital Center (WHC) contending that the District's settlement also contemplated WHC, and that it was entitled to contribution to extent of WHC's aggravation of the initial injury.

The hospital filed a dispositive motion contending contribution under the District's law could only occur among "joint tortfeasors" and that the settlement "made impossible the determination of joint or any other liability." Id., 335. In upholding summary judgment, the D.C. Court of Appeals *en banc* held contribution was unavailable because the District "acknowledged it is **not** a joint tortfeasor with WHC 'in the classic' sense'," and that "the injuries allegedly caused [the plaintiff] by WHC's negligence are separate and distinct from those she sustained in the automobile accident." Id., 337; (emphasis added).

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Unlike Nevada, D.C. had no contribution statute. Rather, its law of contribution was entirely judge-made, and provided only for *pro rata* contribution among the joint tortfeasors. In fact, D.C.'s jurisprudence did not "recognize[] degrees of negligence***[thus] contribution is apportioned equally among all tortfeasors." Id., 336. So simply stated, D.C.'s law of contribution was distinctly different than Nevada's, which is defined by statute; permits distribution of a "common liability" based on "equitable shares" among responsible parties based on their relative liabilities; and is not just a mechanical distribution solely dependent on the number of tortfeasors.[2]

District of Columbia v. Washington Hospital Center's holding for the proposition that an "initial tortfeasor and the medical assistant who aggravates the victim's injuries***are not joint tortfeasors, and therefore not entitled to contribution," see Motion, p.8, is founded in no small part on D.C.'s rule against liability based on relative degrees of fault among defendants, and by extension, the relative fault of the party seeking contribution *vis-a-vis* that of the party from whom it is sought:

> To the extent that the District's claim is for contribution for only that portion of the damages associated with medical negligence, it appears to seek apportionment of liability based on comparative negligence principles. Apportionment based on comparative negligence is contrary to the contribution rules which have developed through our precedents.

Id., 339.[3]

---

[2] When it was first adopted by the State Legislature in 1973, the Uniform Contribution Among Tortfeasors Act also apportioned contribution liability *pro rata*. See 1973 Statutes of Nevada, p.1303. The UCATA was amended in 1979, replacing the arithmetic "pro rata" distribution scheme with division based on "equitable share[s] of the common liability," thus implicating relative degrees of fault when apportioning the loss via contribution. See 1979 Statutes of Nevada, p. 1978. The 1979 "equitable shares" amendment to the UCATA now must be read in multiple defendant cases with the comparative negligence statute, NRS 41.141(4), providing that "each defendant is severally liable to the plaintiff only for that portion of the judgment which represents of negligence attributable to him," and with NRS 17.285(5) that 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."

[3] Nor did District of Columbia v. Washington Hospital Center ever say what injury suffered in the underlying accident had been aggravated by the hospital's malfeasance. Instead the court simply explained its decision by saying:

> Here, Ms. Bringier's cause of action against the District arose out of an automobile accident, while the hypothetical cause of action of Ms. Bringier against WHC would be grounded upon medical negligence. Thus, the District and WHC engaged in no concurrent tortious action which caused Ms. Bringier's injury. **Moreover, their independent torts did not combine to produce a single harm.** Rather, it was the District's theory in the trial court that the injuries caused Ms. Bringier by WHC's negligence were separate and distinct from those caused by the automobile accident. Since the District and WHC are not joint tortfeasors whose tortious conduct concurred in causing an indivisible harm, it is not entitled to recover under a contribution theory.

Id.; (emphasis added).

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In contrast, NRS 17.225 requires that the party seeking contribution to have extinguished a "common liability" shared by itself and the contribution defendant.[4] Was there such a "common liability" here? There certainly was.

The Cash defendants' reliance on Restatement (2d) of Torts §457 ("Additional Harm Resulting from Efforts to Mitigate Harm Caused by Negligence") as a basis for summary judgment seems entirely misplaced. It provides the well-known rule that:

> If the negligent actor is liable for another's bodily injury, he is also subject to liability for any additional bodily harm resulting from normal efforts of third persons in rendering aid which the other's injury reasonably requires, **irrespective of whether such acts are done in a proper or a negligent manner.**

Emphasis added.

If Republic had tried Gonzales v. Hatcher it takes no stretch to see that plaintiff's counsel in that underlying action would have argued—in all likelihood, successfully—Ms. Gonzales' post-operative chronic radiculopathy was an "additional bodily harm," id., for which Republic was responsible. And because it became increasingly clear as the Gonzales case progressed that the radiculopathy was caused by the length of time the malpositioned pedicle screws had remained in place, a more crystalline example of a "common liability" shared by a "negligent actor" and a "third[] person rendering aid" (negligently or otherwise), id., is hard to imagine. Said differently, the Cash malpractice was a damage multiplier that Republic's contribution action is intended to equitably address.[5]

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[4] NRS 17.225(1) states the predicate relationship between the party seeking contribution, and the party from whom contribution can be rightfully sought, as arising 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." See also NRS 17.295 ("In determining the equitable shares of the tortfeasors in the entire liability…(b) Principles of equity applicable to contribution generally apply").

[5] See Section 457, *comment a*:

> *a. Additional harm from hospital or medical treatment.* The situation to which the rule stated in this Section is usually applicable is where the actor's negligence is the legal cause of bodily harm for which, even if nothing more were suffered, the other could recover damages. These injuries require the other to submit to medical, surgical, and hospital services. **The services are so rendered as to increase the harm or even to cause harm which is entirely different from that which the other had previously sustained. In such a case, the damages assessable against the actor include not only the injury originally caused by the actor's negligence but also the harm resulting from the manner in which the medical, surgical, or hospital services are rendered, irrespective of whether they are rendered in a mistaken or negligent manner, so long as the mistake or negligence is of the sort which is recognized as one of the risks which is inherent in the human fallibility of those who render such services.**

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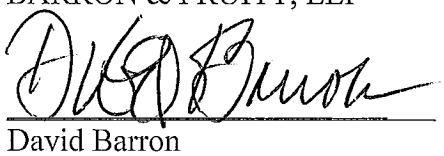
Whether a jury will agree with Republic's position is a fact question. But there definitely is sufficient evidence for a jury to consider whether Republic did indeed pay more than its "equitable share" of the "common liability." The motion for summary judgment should therefore be denied.

Respectfully submitted,

BARRON & PRUITT, LLP



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Emphasis added.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 7th day of March, 2019, I served the foregoing **OPPOSITION TO DEFENDANTS M. CASH, M.D., ANDREW M. CASH, M.D., P.C., ANDREW MILLER CASH, M.D., P.C., AND DESERT INSTITUTE OF SPINE CARE, LLC'S MOTION FOR SUMMARY JUDGMENT** 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.; 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.; ANDREW MILLER CASH, M.D., P.C.; & DESERT INSTITUTE OF SPINE CARE, LLC'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON AN ORDER SHORTENING TIME

DATE OF HEARING: 3/11/2019

TIME OF HEARING: 2:00 P.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 hereby submit their Reply in Support of Motion for Summary Judgment on Order Shortening Time and move this Court for summary judgment pursuant to NRCP 56.

This Reply is made and based upon the papers and pleadings on file herein, the Memorandum of Points and Authorities attached hereto, any other evidence that the Court deems just and proper and any argument of counsel which may be heard at the time of the hearing of the Motion.

DATED this 8th day of March, 2019.

CARROLL, KELLY, TROTTER,
FRANZEN, McBRIDE & PEABODY

/s/ Heather S. Hall

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MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

In its Second Amended Complaint filed on **January 30, 2019**, Republic alleges "[a]s a direct and proximate result of Defendants' negligence, gross negligence, recklessness, and failure to use due care Gonzalez [sic] suffered new and different injuries from those allegedly suffered in the motor vehicle accident of January 14, 2012." *See* Pl.'s Second Amd. Compl. at ¶56. Plaintiff's Opposition acknowledges its theory in this case, consistent with the allegations asserted in the Second Amended Complaint, is that these Defendants caused new injuries not caused by the motor vehicle accident Ms. Gonzales had with Republic on January 14, 2012. *See Plf's Opp.*, 3:4 – 13. Plaintiff's admission that these Defendants are not joint tortfeasors, by definition, renders contribution inapplicable.

Plaintiff asks this Court to focus on what would "likely" have occurred had Republic proceeded to trial with Ms. Gonzales. *See Plf's Opp.*, 5: 11 – 19. This is pure speculation. Plaintiff Republic did not go to trial on Ms. Gonzales's claims. Whether her counsel would have used the "additional bodily harm" Republic claims was caused by her medical care, to maximize the damages against Republic is unlikely, but more significantly, unknown. Given that the damages Marie Gonzales claimed solely as a result of Republic's negligence were in excess of $5 million, the $2 million dollar settlement compromised the damages against Republic for its own negligence. Speculation on how Ms. Gonzales's counsel may have maximized her jury verdict against Republic has no bearing on the legal issues before this Court. Had Republic chosen to proceed to trial on Marie Gonzales's claims rather than enter into a voluntary settlement, many things could have happened, including a verdict in favor of Republic in the underlying personal injury case.

This is a contribution claim filed by Plaintiff, Republic Silver State Disposal, Inc. against Dr. Cash. *See* Pl.'s Second Amd. Compl. On September 4, 2013, Marie Gonzales filed suit against Republic for injuries she sustained as a result of a motor vehicle crash on January 14, 2012. *See* Exhibit "A" to Motion for Summary Judgment. Specifically, Ms. Gonzales alleged

that she suffered potentially permanent injuries to her neck, back, legs, and arms. *Id.* at ¶18. Ms. Gonzales began treating with Defendant, Andrew M. Cash, M.D. in April 2012 for the injuries she suffered as a result of the collision with Republic. On July 6, 2015 Plaintiff resolved her claims against Republic for $2,000,000.00. *See* Pl.'s Second Amd. Compl. at ¶55.

Plaintiff Republic Silver State Disposal, Inc. filed its Second Amended Complaint on January 30, 2019 asserting a claim for contribution pursuant to NRS17.225. Republic alleges that, as a result of these moving Defendants' negligence, Ms. Gonzales suffered "new and different injuries from those allegedly suffered in the motor vehicle accident." *See* Pl.'s Second Amd. Compl. at ¶56. As a result, Dr. Cash and Republic are not joint tortfeasors and Republic is not entitled to seek contribution from Dr. Cash or his related entities. As set forth fully below, there are no genuine issues of material fact and summary judgment should be entered in favor of Dr. Cash, Desert Institute of Spine Care, LLC, and Andrew M. Cash, M.D., P.C.

II.

LEGAL ARGUMENT

A. PLAINTIFF CANNOT DEMONSTRATE A GENUINE ISSUE OF MATERIAL FACT EXISTS TO DEFEAT SUMMARY JUDGMENT.

Plaintiff's Opposition asks the Court to violate Nevada Rule of Civil Procedure 56 and rely on inadmissible evidence to overcome summary judgment. Nevada has long recognized that "a trial court may not consider hearsay or other inadmissible evidence when considering summary judgment." *Russ v. GMC*, 111 Nev. 1431, 1435, 906 P.2d 718, 720 (1995). Plaintiff's Opposition does not cite to any record, deposition, or other admissible evidence to demonstrate there is a genuine issue of material fact as to whether Defendants are joint tortfeasors, a necessary element of Republic's contribution claim. Instead, Plaintiff relies on its self-serving and speculative argument of counsel. *Jain v. MacFarland*, 109 Nev. 465, 475, 851 P.2d 450, 475-476 (1993) ("Arguments of counsel are not evidence and do not establish the facts of the case.") Plaintiff now argues that "the Cash malpractice was a damage multiplier." *See* Pl.'s Opp. at 5:18-19. This statement contradicts the allegations in Plaintiff's Complaint and said argument is not admissible evidence that can create a genuine issue of material fact under NRCP 56. Accordingly, summary judgment must be entered in favor of these Defendants

B. THERE IS NO CLAIM FOR EQUITABLE INDEMNITY.

Plaintiff has not alleged a claim for equitable indemnity. In Nevada, the doctrine of equitable indemnity only allows a party "to seek recovery from other potential tortfeasors" when they have committed no independent wrong, but are nonetheless held liable for the loss another party caused a plaintiff. *Pack v. LaTourette*, 128 Nev. 264, 268, 277 P.3d 1246, 1249 (2012). However, "where a party has committed an 'independent wrong,' and is thus actively negligent, that party has no right to indemnity from other tortfeasors." *Id.*

At no time during this contribution action has Republic asserted a claim for equitable indemnity. Further, Republic has never taken the position that it committed no independent wrong. Thus, equitable indemnity is not applicable here and does not give rise to a genuine issue of material fact sufficient to defeat summary judgment.

C. PLAINTIFF'S ONLY REMAINING CLAIM IS FOR CONTRIBUTION AND IT FAILS AS A MATTER OF LAW.

"The right of contribution does not arise without a finding that the party seeking contribution is a joint tortfeasor along with the party from whom contribution is sought." *George Washington University v. Bier*, 946 A.2d 372 375 (D.C. Ct. App. 2008) (finding that a defendant physician and defendant university were not joint tortfeasors so as to enable the university to bring an action for contribution against the physician). Just like in the District of Columbia, in Nevada, an action for contribution only exists "where two or more persons become jointly or severally liable in tort for the **same injury** to a person. NRS 17.225(1) [emphasis added].

"Contribution is a creature of statute . . . ." in Nevada. *Doctors Co. v. Vincent*, 120 Nev. 644, 650, 98 P.3d 681, 686 (2004). "Under the Nevada statutory formulation, the remedy of contribution allows one tortfeasor to extinguish joint liabilities through payment to the injured party, and then seek partial reimbursement from a joint tortfeasor for sums paid in excess of the settling or discharging tortfeasor's equitable share of the common liability." *Id.* at 651, 98 P.3d at 686.

Plaintiff attempts to distinguish *District of Columbia v. Washington Hosp. Center*, 722 A.2d 332, 336 (D.C. 1998) without success. Republic argues that the District of Columbia's

right of contribution was solely judge-made and not statutory. Illogically, Republic contends that Nevada's statute requiring "common liability" to recover for contribution somehow differs from the District of Columbia's prerequisite that parties be joint tortfeasors in causing the same harm to an injured party before a right of contribution can legally exist. *See Plf's Opp.*, 4:1 – 7. These requirements are exactly the same and the fact that one is created by statute and one is not statutory is no distinction at all. Both require that the parties be joint tortfeasors to seek contribution.

Pack v. LaTourette, is factually and legally distinguishable from the circumstance in front of this Court. The Supreme Court did not substantively decide whether Plaintiff had a valid contribution claim. Rather, the court was deciding whether a contribution claim premised on medical malpractice was subject to the threshold expert affidavit requirement as set forth in NRS 41A.071. Unlike in *Pack*, here Republic does not allege that Defendants' medical care aggravated any injuries suffered by Ms. Gonzales during the January 14, 2012 car crash. Instead, Plaintiff, through its expert Dr. Tung, has alleged that Ms. Gonzales had only some low axial back pain and neck sprain/strain following the crash with Republic. *See* **Exhibit "A"**, pages 62 – 63.

Plaintiff further contends that Dr. Cash's medical care was negligent and caused Ms. Gonzales to suffer new injuries in the form of new findings of radiculopathy and chronic pain following Dr. Cash's January 29, 2013 surgery. *Id.* at 72:3 – 18. Plaintiff does not allege the radiculopathy and chronic pain were caused by the Republic crash and Dr. Cash's care exacerbated these injuries. Plaintiff alleges these were new, independent injuries solely caused by Dr. Cash's negligent medical care. While Defendants deny all allegations of medical malpractice and resultant injury, for purposes of this Motion for Summary Judgment, accepting these allegations as true, they are legally insufficient to state a claim for contribution. Plaintiff does not have a legal right to seek contribution against these Defendants for the new, independent harm allegedly caused by the medical care.

It is a fundamental principle of tort law that, in order to be joint tortfeasors, the parties' negligence must have concurred in causing the harm to the injured party. Allowance of

contribution is premised upon each tortfeasor being responsible for a single injury. The Nevada Supreme Court has considered the issue of joint tortfeasors and successive tortfeasors in the context of a contribution claim. *Disc. Tire Co. of Nev. v. Fisher Sand & Gravel Co.*, 2017 Nev. Unpub. LEXIS 235, 400 P.3d 244 (holding that two parties were joint tortfeasors, not successive tortfeasors). In *Disc. Tire Co.*, the tire company was sued following a vehicle accident that resulted in the deaths of two adults and injuries to three minor children. *Id.* at *2. Discount Tire then filed suit against the Nevada Department of Transportation and a company doing improvements on the road, Fisher Sand & Gravel Co., alleging they had failed to maintain safety protocols. *Id.* Both parties were granted summary judgment and Discount Tire only appealed the summary judgment as to Fisher Sand & Gravel. *Id.*

In considering the argument that the parties were successive, not joint tortfeasors, the Court discussed the definitions of those terms:

> *Compare Joint Tortfeasors, Black's Law Dictionary* (10th ed. 2014) (defining joint tortfeasors as "[t]wo or more tortfeasors who contributed to the claimant's injury and who may be joined as defendants in the same lawsuit'), and 74 Am. Jur. 2d Torts § 64 (2012) (providing that "joint tortfeasors act negligently—either in voluntary, intentional concert, or ***separately and independently***—to produce a ***single indivisible injury***" (emphases added)), with *Hansen v. Collett*, 79 Nev. 159, 167, 380 P.2d 301, 305 (1963) (providing that successive tortfeasors must produce acts "differing in time and place of commission as well as in nature, [causing] ***two separate injuries*** [that] gave rise to two distinct causes of action" (emphasis added)), and *Successive Tort feasors, Black's Law Dictionary* (10th ed. 2014) (defining successive tortfeasors as "[t]wo or more tortfeasors whose negligence occurs at different times and causes different injuries to the same third party" (emphasis added)).

Id. at *7.

In reaching its holding, the Supreme Court focused on the fact that there was no dispute that there was one, indivisible injury suffered by the family. *Id.* at *8. Thus, the Court concluded the tire company and gravel company were joint tortfeasors causing the same injury. *Id.*

Here, the undisputed facts are that Republic does not contend Dr. Cash's medical care caused the same injury as the crash with Republic. Republic alleges Dr. Cash's medical care caused a new, independent injury from the injuries Ms. Gonzales suffered during the January 14, 2012 car crash. Where each tortfeasor causes a separate and distinct injury to the victim, as Republic alleges here, they are **successive tortfeasors**. In the absence of a joint tortfeasor

relationship, there is no legal basis for allowing Republic to recoup a proportionate share from Dr. Cash for harm which he did not contribute to. By its own allegations, Republic does not claim that these Defendants are joint tortfeasors with Republic. Republic cannot establish it is entitled to contribution from Dr. Cash as the parties are not joint tortfeasors. Accordingly, summary judgment is necessary and appropriate.

D. THESE DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT.

Even though the pleadings and proof must be construed in the light most favorable to the non-moving party, the non-moving party must set forth specific facts demonstrating the existence of a genuine issue for trial or have summary judgment entered against him. *Collins v. Union Federal Savings and Loan Association*, 99 Nev. 284, 294, 662 P.2d 610, 618-619; See also *Hoopes v. Hammargren*, 102 Nev. 425, 429, 725 P.2d 238, 241 (1986). To defeat Defendants' Motion for Summary Judgment, Plaintiff must demonstrate a genuine issue of material fact that supports its contention that it has a legal right to bring a contribution claim for the new, independent injuries they allege were suffered by Ms. Gonzales as a result of the medical care. They have not done so.

In *Nevada Power Co. v. Monsanto Co.*, 891 F. Supp. 1406 (D. Nev. 1995), the Nevada U.S. District Court stated that:

> Once the moving party has met its burden of demonstrating the absence of any genuine issue of material fact, the nonmoving party must set forth specific facts showing that there is a genuine issue for trial. The opposing party may not defeat a motion for summary judgment in the absence of any significant probative evidence tending to support its legal theory. The nonmoving party cannot stand on its pleadings, nor can it simply assert that it will be able to discredit the movant's evidence at trial. If the nonmoving party fails to assert specific facts, beyond the mere allegations or denials in its response, summary judgment, if appropriate, shall be entered. There is no genuine issue of fact if the opposing party fails to offer ***evidence sufficient to establish the existence of an element to that party's case.***

891 F. Supp. at 1413. [Internal citations omitted; emphasis added].

Republic has failed to offer any evidence sufficient to establish that Republic and these Defendants are joint tortfeasors, an essential element of its claim for contribution. Because Republic asserts Defendants caused new and independent injuries, its contribution claim fails as

a matter of law and summary judgment is appropriate. NRS 17.225.

III.

CONCLUSION

Based upon the foregoing, Defendants are entitled to summary judgment on Republic's contribution claim. Republic alleges that these Defendants caused a new and independent harm to Ms. Gonzales, not that these Defendants were jointly responsible for the same injuries as Republic.

DATED this 8th day of March, 2019.

CARROLL, KELLY, TROTTER,
FRANZEN, McBRIDE & PEABODY

/s/ Heather S. Hall

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 8th day of March, 2019, I served a true and correct copy of the foregoing **DEFENDANTS ANDREW M. CASH, M.D.; ANDREW M. CASH, M.D., P.C.; ANDREW MILLER CASH, M.D., P.C.; & DESERT INSTITUTE OF SPINE CARE, LLC'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON AN ORDER SHORTENING TIME** 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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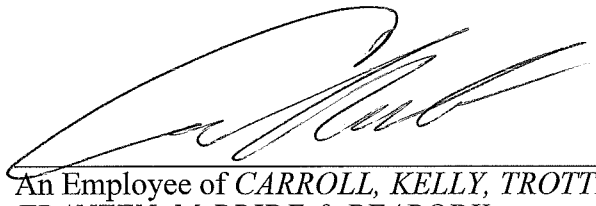

An Employee of *CARROLL, KELLY, TROTTER, FRANZEN, McBRIDE & PEABODY*

EXHIBIT A

EXHIBIT A

gets --

Q And not to interrupt you, Doctor, but I just want to make sure you have my question in mind. I'm focusing on the year 2012.

So for that period of time, you do recall seeing in Dr. Coppel's notes she had left leg pain extending to the foot; is that correct?

A Yes.

Q Now, did you consider that information in formulating your opinions in this case?

A Yes.

Q And you mentioned at the outset that one of the things you were tasked with in this case as part of your retention was to formulate opinions on causation, and part of that included causation from the garbage truck accident, true?

A Yes.

Q And what opinions did you form regarding injuries suffered by Ms. Gonzales as a result of that car accident?

A Well, I think that Ms. Gonzales had primarily axial back pain. I don't believe she had a true radiculopathy, and I think her back pain would have been best treated with medical supportive care.

Q Any other injuries you believe Marie Gonzales

suffered as a result of the car accident she had with Republic?

A Well, I think that there were also some complaints of neck pain initially, and I think that was probably more of a sprain/strain, in my opinion, although she continued to have some complaints of chronic neck pain as well in that same time frame I think you asked me, 2012 time period. I think she also had pain there.

Q Any other injuries?

A I think it was primarily neck and axial low back pain.

In fact, as -- since you pointed out Dr. Coppel's notes, he also agreed it was primarily axial low back pain. He uses it in many of his notes.

Q Any other injuries that you believe she suffered as a result of the garbage -- the garbage truck accident?

A No.

Q You stated all of those to me already?

A You asked what my review would have -- I think that my review is different than what is noted in the notes. I think that they went on to diagnose --

Q I'm sorry.

A You asked me a very open-ended question, so

of your declaration you talk about the spinal cord -- I'll let you get there. I'm sorry. It's Paragraph 10, Page 2. And you talk about that, you know, your opinion that she would not have required placement of a spinal cord stimulator, and then you talk about to which the malpositioned placement of the pedicle screw contributed when you're talking about her chronic pain and radiculopathy.

So I just wanted to know do you believe anything else contributed to the chronic pain and radiculopathy you're referring to in this report?

A There's nothing really that I can think of that would have contributed significantly. If there are any contributing factors, I believe they would be trivial. I believe that the substantial factor -- when I say contributed to it, I mean it is the substantial contributing factor to her pain and radiculopathy postoperatively.

Q The trivial factors that you refer to, what are you referring to?

A I can't think of any, but what I want to do is allow for other people and other experts if they have other factors, my belief is that those other factors would be considered trivial relative to what I believe the substantial factor for her new and worsened

DISTRICT COURT

CLARK COUNTY, NEVADA

REPUBLIC SILVER STATE DISPOSAL, INC.,	)	
Plaintiff,	)	CASE NO. A738123
	)	DEPT. NO. XXX
vs.	)	
ANDREW M. CASH, M.D.,	)	
Defendant.	)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND MOTIONS IN LIMINE

BEFORE THE HONORABLE JERRY A. WIESE, II

MONDAY, MARCH 11, 2019

AT 2:30 P.M.

LAS VEGAS, NEVADA

REPORTED BY: KIMBERLY A. FARKAS, NV CCR No. 741

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LAS VEGAS, NEVADA, MONDAY, MARCH 11, 2019

P R O C E E D I N G S

* * * * * * *

THE COURT: A738123. *Republic Silver State State v. Cash.* I got a whole bunch of stuff. I just actually got something handed to me as I got back, a motion to intervene from Physicians Casualty Risk Retention Group. That's a little late; right?

MS. ZINNA: Your Honor, Stephanie Zinna, on behalf of Physicians Casualty Retention Risk Group. Yes, we just got retained by them to come in as coverage counsel. I believe Friday we got the go-ahead. And today was the best day I could do, working over the weekend on it. Your ruling from the 6th is what triggered the need for this.

THE COURT: And if I allow this, you anticipate that that would move our trial date, obviously, that's scheduled for next week?

MS. ZINNA: The quicker you can hear it, the quicker I can get what I need to get on file, but, yes, we might be having to ask you to push some things out.

THE COURT: Mr. Barron, what do you think about staying this and letting the Supreme Court give

us some guidance?

MR. BARRON: I think it's a terrible idea.

THE COURT: I figured.

MR. BARRON: And I'll tell you -- and I'm only half in jest. Last time we saw you, and I know we're seeing you way too much, you said that this is eventually going to be resolved by the Supreme Court in some fashion. It's an appealable issue. We got a trial coming up next week. It may be obviated. How do I know what's gonna happen in that trial? But, for sure, there's going to be a record. And I think as an appealable issue -- that's what happened to us last time around, frankly. When the writ was taken, the Supreme Court said, look, we've got law on this, and this is something you should probably bring after trial as an appeal if you need to.

THE COURT: But we don't have law on this issue.

MR. BARRON: We sure don't. And that was one of the things that I wanted to raise with you. You got an order. And, frankly, I signed off on it, and then I thought, you know what, that's not really the order that I think you gave from the bench.

THE COURT: I haven't seen it. Did I sign it yet?

MR. BARRON: No. I hope you haven't because I've got another one I'd like you to look at anyway. And it was pretty clear --

THE COURT: Give me a second.

MS. HALL: I have a signed copy, but it's not the original signatures. It's got my signature and David Barrons' signature.

THE COURT: Let me take a look at it.

MS. HALL: Sure. May I approach, Your Honor?

THE COURT: Yeah.

MR. BARRON: Well, for some reason, I brought the wrong order.

MS. HALL: So what happened is on Thursday, because I am not trying to delay this trial and this issue any longer than needs to be, I went ahead and prepared a draft order. I sent it over to Mr. Barron on Thursday, I believe, or Wednesday, and he had a change. I made that change. He approved it. He signed off on it.

And then when I sent it down for Your Honor's signature, I also served a courtesy copy of my forthcoming motion for a stay on order shortening time on Mr. Barron. And then I received an email some hours later that he no longer believed my order was accurate.

THE COURT: Could you forward me a copy of

this in Word?

MS. HALL: Yes.

MR. BARRON: And I have an alternative.

THE COURT: What's your alternative?

MR. BARRON: I think you were trying to express something that's not in that order. That was the concern that I had.

THE COURT: Well, I want to give the Supreme Court a little bit more guidance than what's in this order. Because my real challenge is trying to apply all parts of the professional negligence statutes. And I think, based on the facts and circumstances as they are and because this is a subrogation claim and the injured party is not the plaintiff, I think that precludes me from applying certain portions of certain professional negligence statutes. And if the Supreme Court gives me guidance and says, no, this is how you apply them, I'm fine with that. But I don't see how I can apply, especially the second part of 42.021, because the plaintiff doesn't get any benefit from the 42.021 application when the plaintiff is not the party that has benefited from insurance proceeds. That's my biggest concern in applying any of them. Because if I can't apply 42.021, how do I apply 41A.035 and some of the other ones.

And I want to make sure that the Supreme Court gives me the guidance that I need. If they remand it back to me and tell me to do the trial, I'm fine with that. They just need to give me some guidance how to apply the statute in the specific facts of this case.

So I'm inclined at this point to -- here's the problem. I can't grant the stay until there's a writ filed. And I'll tell you why I don't do that. Because -- and you may or may not have been at the med mal sweep that this happened, but I had a party who asked me at one med mal sweep to stay the litigation because a writ was being filed. And then six months later, the writ had still not been filed and we're that much closer to the three-year rule and the five-year rule expiring. So I kind of made it my policy after that to not grant a stay until there's a writ filed.

So what I would probably do in this case would be to reserve ruling on that motion until you notify me that the writ is filed and show me some proof that the writ has been filed. And then I will probably grant the stay. Because I don't think it's fair to either side to make you do anything in the interim while we're waiting for the Supreme Court to tell me how these statutes are going to be applied. And I

don't like the idea of continuing a firm med mal trial.

MS. HALL: But it's not a med mal case.

THE COURT: I know.

MS. HALL: Over my wishes, but -- and I say that in all seriousness.

THE COURT: I know. But I did give you a firm trial date based in part on the fact that I was at least applying 41A.

MS. HALL: Right. And now, two weeks before trial, and as I said at the hearing last time we were here, I don't fault the Court because, you're right, there is no instruction yet from the Supreme Court on this issue and how this plays out in the context of a contribution claim. But the new issue that has arisen as a result of the changing landscape is 41A.045 and whether I'm going to be permitted to include others on the verdict form if there's evidence of negligence of other medical providers.

As Your Honor knows, in that Caruzi (phonetic) case, that was a new issue that was decided by the Supreme Court. And I really think that were we to go to trial without those issues decided, it could potentially be a huge waste of resources on everyone's part.

But the other issue is I have the writ. I'd

say I need maybe a couple more hours and it's ready to go. I just can't procedurally --

THE COURT: You need the order?

MS. HALL: Exactly.

THE COURT: I know. And I want to make sure that the order contains enough guidance and expresses my frustration based on -- and the issues that I'm dealing with in my head trying to apply the statutes, so that when the Supreme Court remands it, they don't just say, it's remanded because you have adequate remedy of law. That doesn't help us.

MS. HALL: Right.

THE COURT: We need some guidance one way or the other.

MR. BARRON: May I give this to you?

THE COURT: Sure.

MR. BARRON: Thank you.

THE COURT: Have you looked at his proposed order?

MS. HALL: I did.

MR. BARRON: She got it on Friday.

THE COURT: You don't like his?

MS. HALL: No. It has --

MR. BARRON: Judge, I'm not sure anybody is going to like anybody's. And I tend to agree with you.

If something is going to show up in front of the Supreme Court fairly soon, you know, be clear.

MS. HALL: I don't have a problem with that. There's just a lot of case law that's mentioned in his order that's never been mentioned in any filing ever in this case.

THE COURT: I don't know that I went over all of this.

MR. BARRON: Well, I'm not sure you did either. I'm just trying to get to someplace that I thought you were trying to get to. And, you know, that's one of the frustrations I think we're all dealing with is -- but I did talk about 42.021.

THE COURT: You did.

MR. BARRON: I did try and get to that.

THE COURT: Why don't we do this. If you guys could both email me a copy of your proposed orders in Word. Let me do my own order. I'll let you know when it's ready. I'm going to try to do it like -- if you can get the orders to me right now.

MS. HALL: My assistant is getting it right now.

MR. BARRON: If I can get online, I could send it to you.

THE COURT: I'm going to try to do an order

before the end of the day. Because I want an order filed so that you can file your writ so that I can issue the stay. I can't vacate the trial date until there's a stay in place. But I'll do an order granting the stay by minute order. And at that time I'll vacate the trial date as well. Don't get your experts ready.

MR. BARRON: I've got them all lined up. They've been paid.

THE COURT: I know. I'm sorry.

And as far as the motion to intervene, that may not be necessary if the Supreme Court tells me I was wrong last week. So let's hold off on all of it.

MS. ZINNA: Your Honor, if I may, we still would like to intervene for the purposes of joining the writ and being able to be a part of all those proceedings because it affects our interest in the matter.

THE COURT: Do you care if they intervene?

MR. BARRON: Can I think about it at least overnight? I'd like to talk to Ms. Zinna about it anyway.

THE COURT: That's fine.

MR. BARRON: You're putting me on the spot, Judge.

THE COURT: That's okay.

MR. BARRON: I'd love to be accommodating. The last time I did that, here I am giving you a different order. I'd just like a moment to think about it.

THE COURT: That's okay. She's obviously going to take a position that's adverse to your client. Whether she does it now or later, that position is probably going to be asserted. I don't know that it's necessarily a bad thing to get as many issues as we can in front of the Supreme Court as soon as we can. So --

MR. BARRON: If I could --

THE COURT: I think you all know me and you know I'm not the kind of judge -- my ego is not in the way here. I need help.

MR. McBRIDE: I'm sorry, Judge?

MR. BARRON: My ego is not in the way. I just need some guidance and help from the Supreme Court.

MS. ZINNA: Your Honor, did you want to sign the OST on that and maybe we can come back tomorrow or the next day, give Mr. Barron some time to think about it. And then that way, I can get it filed? I've already given everybody a copy.

THE COURT: When do you want to set it for?

MS. ZINNA: I can come back at any time.

THE COURT: You're not going to be able to get in on her filing of the writ because that's going to happen before we have a hearing on this anyway. You want to file a joinder?

MS. ZINNA: I'd like it heard before, obviously, the stay is issued. Then I'm kind of out of luck on that. So if we could possibly do it in the next couple days, that way, when she files the writ, I can join the writ if it's granted.

MR. BARRON: I'll try to give you a yea or nea very quickly.

THE COURT: We don't have a calendar on Wednesday.

MR. McBRIDE: Ms. Hall will not be here then, but I'll be here.

THE COURT: We don't have calendar then. I've got mock trials all day. You guys okay with me doing it on a chamber calendar?

MR. BARRON: Sure, Judge. Whatever.

THE COURT: I'll just do it on briefing. Let's put it on -- I'll put it on for Wednesday, March 13th at 3:00 o'clock a.m.

MR. BARRON: 3:00 a.m?

THE COURT: Chambers calendar.

MR. BARRON: You really don't want to see us.

THE COURT: If we have a chambers calendar, that's the time that it gets set for.

MR. BARRON: I think that's smart.

THE COURT: I'm just putting it on the 18th at 3:00 a.m. on chambers calendar. I'll give you this back.

MS. ZINNA: May I approach?

THE COURT: Yep. So you can get that filed.

MR. BARRON: As soon as you have a moment, if I can get your email address, I'll just send this now.

THE COURT: I don't have a copy now of that motion to intervene.

MS. ZINNA: I have a copy for Your Honor.

THE COURT: You may want to give me that, since we're trying to do this real quick. Email address, wiesej@clarkcountycourts.us.

MR. BARRON: Very good. Thank you.

THE COURT: Okay. So I think all of the other pending motions -- the motion for summary judgment is too late. I didn't even read that. It's not timely under the rule for dispositive motions so I didn't even look at that.

But I did look at all the motions in limine, but I don't want to rule on those yet.

MS. HALL: In the order, Your Honor, in

January, when we did the joint motion to extend discovery deadlines, that was included in the order. The deadline for dispositive motions was extended to March the 4th.

THE COURT: Really?

MS. HALL: Yes. I agree it was a scramble for me to get the motion ready and my 12 motions in limine.

THE COURT: I looked at the motions in limine. I did not look at the summary judgment motion.

MS. HALL: It's up to Your Honor.

THE COURT: Without even looking at it, I can tell you I think there are genuine issues of material fact, but I'll look at it and read it before I rule on it.

MS. HALL: Okay. I think that might need to be ruled on before the writ because while there might be genuine issues of material fact, with regard to the issue that's raised by the motion for summary judgment, I don't think that there is.

THE COURT: Tell me what the issue is.

MS. HALL: It's about joint versus successive tortfeasors. And the allegation from Republic in this case is that Dr. Cash caused a new and independent injury because of his allegedly negligent medical care.

That's successive tortfeasors. As a matter of law, you can't have a contribution claim in the context of a successive tortfeasor. You have to be jointly liable for the same injury.

And so they say that restatement of torts doesn't apply because the surgery we did had nothing to do with the car accident. Either it wasn't needed at all or it was needed because of other injuries she had experienced throughout her life. It wasn't medical care rendered as a result of the injury caused by Republic. That is insufficient as a matter of law to state a contribution claim. You cannot have contribution under existing Nevada law -- there's actually case law on this issue. You can't have a contribution claim when you are a successive tortfeasor, and that is the allegation here.

THE COURT: Okay. Mr. Barron, you want to argue that? With the understanding that I haven't read the motion or the opposition yet.

MR. BARRON: Yeah, and I appreciate it. Just as kind of a preview. Big difference between successive tortfeasors and contribution in this case. The reason that we filed a contribution case is that Dr. Cash, whatever liability he had, we paid for it. And this is very clear in the briefing. Successive

liability is -- and this is straight out of the restatement. I wish I put the example as a comment. Under the restatement, if there is an exaggeration or some new injury done by a physician or somebody treating the individual who was injured, the original wrongdoer is on the hook, so many words.

One of the examples they give is that the original tortfeasor hurts the plaintiff. Plaintiff goes in for treatment. I can't remember if they were in the OR or something. But the patient is allowed to fall off the gurney. Successive tortfeasor, totally different stuff.

Our case is a surgery that went wrong that we wound up paying for in terms of its damage. That's the big difference. You look curious.

THE COURT: It's an interesting issue. I don't know that I've had it before. Go ahead.

MS. HALL: I'll try to be brief. What the restatement says, and Mr. Barron quotes this in his opposition, is that the original tortfeasor is on the hook when the negligent medical care is given while rendering aid which the other's injury reasonably requires. Republic, through its many experts in this case, contends that no injury from the crash necessitated Dr. Cash's surgery. Either it wasn't

needed at all or it was needed for some other reasons, degenerative issues that she experienced throughout her life.

As a result of the Republic crash, their expert says all she had was some low back axial pain and some neck strain. That doesn't require a surgery. So that, right there, takes it out of the restatement situation where you would have the original tortfeasor, Republic, on the hook for any negligent care given by Dr. Cash.

THE COURT: So based on his argument, you think the restatement doesn't apply? But I'm almost willing to bet that Dr. Cash's records say that the surgery that he did was related to the accident.

MR. BARRON: You'd win.

MS. HALL: That might be, but the point is, Your Honor, that taking the evidence in the light most favorable to Republic, they have never contended at any point in this case through any admissible evidence, through experts or any other sort of admissible evidence, that Dr. Cash's surgery exacerbated an injury experienced from the crash. They claim that his surgery wasn't needed because of the crash and it caused new and independent injuries. That's paragraph 56 of their second amended complaint. And that's

exactly what Dr. Tong, their surgeon expert, testified to when he was deposed on January the 25th. That there was no radiculopathy, there was no chronic pain that she experienced from the injuries from the Republic crash. This was all new findings that were an independent, different injury caused by Dr. Cash.

And if you look -- and I have a copy for Your Honor and opposing counsel. But one of the cases that I cite in the motion is this Discount Tire case that's an unpublished 2017 Nevada Supreme Court case. And they talk about what it means to be a joint tortfeasor versus a successive. And they talk about that you are joint if the negligence concurs in causing the same injury. You're a successive tortfeasor if the negligence occurs at different times and causes different injuries. That's exactly what we have.

This is a year and some weeks later. This is factually distinguishable from the situation that Mr. Barron described where you get into a car accident, you're immediately taken to the hospital, and you fall off the gurney and you allege that there was an exacerbation or some further injury that is so interchangeable and so intertwined with the original injury.

This is a year and a couple weeks after the

car accident that was with Republic. This is not a situation where you immediately go and get care that is reasonably required by the original injury from the car accident. It's completely different.

THE COURT: It's completely different if I buy their argument as opposed to the medical records.

MS. HALL: Well, I don't think that -- that's what their theory of this case is. This is what Republic has put forth for the last two years, Your Honor. They don't have -- all of their experts say the surgery was unrelated to the car accident.

THE COURT: Why did your experts all say that?

MR. BARRON: Sorry. She's wrong. You're right; Dr. Cash did say whatever he did was related to the accident. It's right in his record.

THE COURT: I'm sure that's what he says.

MR. BARRON: Absolutely.

THE COURT: But you don't have anybody that agrees with that; right?

MR. BARRON: Beg your pardon?

THE COURT: You don't have anybody that agrees with that?

MR. BARRON: It's not the issue of whether they agree with it. The issue is did he operate; okay.

And the reason he operated was because of the accident. That's clear.

THE COURT: But she's saying that you allege exactly the opposite of that.

MR. BARRON: No. May I? Here's what the restatement says: "Situation in this section, usually applicable where actor's negligence is the legal cause of bodily harm for which if nothing more were suffered the other could recover damages." Okay. That's us.

"These injuries require, on the other hand -- or the other to submit to medical, surgical, and hospital services."

Now, here's the hard part, for them, I think, to get over. "Services are so rendered as to increase the harm or even to cause harm which is entirely different from that which the other had previously sustained."

That's what happened here. You can't divorce the operation that he did from the fact that he put two pedicle screws where they didn't belong and that she suffered permanent radiculopathy because of it. It's inseparable. You can't take one away from the other. And the reason he did that was, according to him, it was necessitated by the accident.

Now, do our guys think that he misdiagnosed

it in that sense? Yeah, they think it was a hip injury. Did they think it was below the standard of care for him to operate? Absolutely not. That's not what they testified to.

So the issue here is you got additional damage caused by the initial injury. And that, you know, the restatement, this is comment A, it goes on and talks about whether it was done appropriately or negligently. I mean, that's us.

MR. McBRIDE: Would you like that case?

THE COURT: Sure. So you're probably not going to get an order today. It's probably going to be tomorrow if you want this incorporated in it.

MS. HALL: As much as I don't want to delay things any further, I do think it's important -- I want to try and consolidate everything to the extent that that's possible.

THE COURT: I agree with you. So let me -- I'm going to try to issue a ruling on the summary judgment and an order from last week's hearing. Once you get those things, you'll be in a position to file your writ. Once you inform me or show you that you filed the writ, then I'll do an order on the stay.

MR. McBRIDE: Would you like us to just email a courtesy copy of the writ? I guess you're going to

get copied on it anyway when it gets filed.

THE COURT: I don't know. Just let me know. If I'm not automatically copied on it, just send me a courtesy copy of it so that I know that it's filed. That will prompt me to do something on the stay.

I'll just reserve on the stay for today. And I'm going to continue everything else until we know what's going to happen.

MR. McBRIDE: Okay.

THE COURT: And I also need to do something on the motion to intervene on Wednesday; right?

MR. McBRIDE: Yes. In chambers.

THE COURT: So, Mr. Barron, if you're going to do something in opposition to that, can you get it to me tomorrow?

MR. BARRON: Sure. Yeah, I'll get it to you. I'm going to have to make some calls, obviously. Would I be safe in saying it doesn't look like we're going on Monday?

THE COURT: Yep. I think it doesn't make sense to make you guys put on a whole trial and then have the Supreme Court tell me that I needed to apply these rules. Because it's going to have an impact on how evidence is presented and what evidence is presented at the time of trial. So we'd have to do the

whole thing over if I'm wrong. So I'd rather know in advance, get some guidance, am I supposed to allow it or not allow it, and how am I supposed to allow it, and how am I going to apply the statutes. I'd like to just do the trial once.

MR. BARRON: I'd like to get there myself.

THE COURT: It's a '16 case. We don't really have a five-year rule yet. But I do want to get it tried as quickly as I can. I'm going to hope that the Supreme Court will do something quickly. I don't know that I can encourage that, but --

MS. HALL: I still think -- I'll look at the rule again. I think I can bring it in as an emergency. That was my intention was to bring it as an emergency petition, but that sometimes doesn't mean anything with the Supreme Court in terms of the timing of getting a ruling.

THE COURT: And we don't know even if it's going to stay at the Supreme Court or go to the court of Appeals.

Anything else you guys want to tell me today?

MR. McBRIDE: No, Your Honor.

THE COURT: Okay. Thanks.

(Proceedings concluded at 2:59 P.M.)

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ATTEST: FULL, TRUE, AND ACCURATE TRANSCRIPT OF PROCEEDINGS.

/S/ Kimberly A. Farkas, RPR, CRR

DISTRICT COURT
CLARK COUNTY, NEVADA
-oOo-

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

ORDER ON DEFENDANTS ANDREW M. CASH, M.D.; ANDREW M. CASH, M.D., P.C.; & DESERT INSTITUTE OF SPINE CARE, LLC'S MOTIONS TO COMPEL AND NON-PARTY DEPONENTS MARIE GONZALES' MOTION FOR PROTECTIVE ORDER ON ORDER SHORTENING TIME

DATE OF HEARING: 03/04/19
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's Motion to Compel NRCP 30(b)(6) Deposition of Plaintiff on Order Shortening Time; Motion to Compel Deposition and Production of Documents on Order Shortening Time and Non-Party Deponent Marie Gonzales' Motion for Protective Order on Order Shortening Time came on for hearing on March 4, 2019. The Court, having reviewed the papers and pleadings on file herein and having heard argument of, hereby finds as follows:

1. 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. Considering the issues raised by the Motions has caused the Court to reconsider its prior ruling that NRS 41A.035

applies to this contribution action premised upon allegations of medical malpractice. See Order Granting Defendant Las Vegas Radiology's Motion to "Cap" Non-Economic Damages Per NRS 41A.035 and Joinders to Same.

2. The prior Order stating," ... Nevada law obligates a Plaintiff seeking contribution from health care providers, asserting claims for professional negligence, to satisfy the requirements of NRS Chapter 41A" is hereby vacated. Because of its reconsideration of its prior rulings, the Court believes the discussion found below at ¶¶ 3-13 is in order.

3. The Court finds that NRS Ch. 4lA has limited application to this contribution action. The Court has previously recognized that Republic Silver State Disposal's (Republic) cause of action is for contribution under the Uniform Contribution Among Tortfeasors Act, NRS 17.225 et seq., and not one for "professional negligence" against "provider(s) of health care" under the provisions of NRS ch. 41A. See Order re: Cash Defendants' Motion to Dismiss, etc., entered Dec. 13, 2016, p. 2. The referenced Order affirmatively dismissed a cause of action contained in Republic's Amended Complaint for professional negligence, but did so by further recognizing that the contribution claim was "based upon professional negligence" and that the contribution action "subsumed" professional negligence as its basis for liability. Id., pp. 2-3; see also NRS 41A.015 ("Professional negligence means the failure of a provider of health care, in rendering services, to use the reasonable care, skill or knowledge ordinarily used under similar circumstances by similarly trained and experienced providers of health care").

4. NRS 41A.035 imposes a $350,000 limitation for "noneconomic" damages," which are in turn defined at NRS 41A.011 as including "damages to compensate for pain, suffering, inconvenience, physical impairment, disfigurement and other nonpecuniary damages."

5. The Court finds the parameters of NRS 41A.035, limiting the recovery of "noneconomic damages," are set by the statute's own terms:

> 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. (emphasis added)

6. The Court believes its prior order imposing the damage limitation in NRS 41A.035 here was in error. The statutory definition of "noneconomic damage" at NRS 41A.011 contemplates a bodily injury or death, and is integral to an understanding of NRS 41A.035's scope and purpose. The statute further indicates that "the injured plaintiff may recover" certain damages, but Republic is not an "injured plaintiff," as contemplated by the statute. Republic's contribution action- is for neither bodily injury nor death; nor does it seek recovery for the injured patient's "pain, suffering, inconvenience," etc. resulting from allegedly faulty care. Its claim is brought under a statutory scheme allowing one who has extinguished a "common liability" to seek monetary restitution from another party who is also responsible for causing the loss. This conclusion regarding the nature of Republic's claim is in conformity with the Court's Order of Dec. 13, 2016, referenced above.

7. Next, Nevada's contribution statutes impose their own limitation on recovery since the party seeking contribution's "total recovery is limited to the amount paid by the tortfeasor in excess of his or her equitable share." NRS 17.225(2). The same provision also has a salutary effect for the party being sued for contribution because "[n]o tortfeasor is compelled to make contribution beyond his or her own equitable share of the entire liability." Id. The

contribution-defendant also has further protection because the contribution-plaintiff cannot recover "any amount paid in a settlement which is in excess of what was reasonable." Id. (3).

8. Finally, the damage limitation in NRS 41A.035 cannot be read harmoniously with the provisions of NRS 17.225. Each statute finds good application within its own statutory scheme, but becomes cumbersome to the point of being unworkable if superimposed elsewhere. This case presents an example of that unworkability: If NRS 41A.035's "cap" is imposed in Republic's contribution action, what of the $2 million settlement can be considered "noneconomic damage" with a monetary ceiling, as opposed to "economic damage," having no limitation on its full recovery under NRS 41A.007? As a prior practicing attorney in this area of the law, this Court has first-hand knowledge that when settling a personal injury case such as Ms. Gonzales' case against Silver State, the attorney and the Plaintiff have no incentive or reason to distinguish between economic and non-economic damages. If the settling parties themselves do not make that distinction, how can the Court make such a determination later? Or, without evidence of such an intent being found in the settlement, can the fact-finder ever do more than make a wholly arbitrary determination? The answers seem self-apparent – it is impossible to determine in a case such as this what portion of the settlement was for economic vs. non-economic damages. The Defendant suggests that the determination should be based on how the Plaintiff's tax liability for the amount received was calculated. This Court does not see that as a realistic option, as tax liabilities can be calculated differently by different CPA's, and may be based on a variety of tax codes. The Court therefore believes the better choice is to read NRS 41A.035, no less than NRS 17.225 et seq., in context and as written. This is part of the reason this Court finds and concludes that statutes contained in Chapter 41A of the NRS were not intended to apply to a subrogation/contribution type action such as that before this Court.

9. Thus, the Court finds NRS 41A.035's monetary limitation for "noneconomic damages" is specific to "pain, suffering, inconvenience, physical impairment, disfigurement, and other nonpecuniary damages." These damages are suffered by the individual who is personally injured because of the "professional negligence." The Court cannot find a way to apply NRS 41A.035 to the facts of the present case, and consequently, concludes that 41A.035's limitation is inapplicable in the present case.

10. In addition, the Court finds Republic's claim is not a continuation or assumption of Marie Gonzales' personal rights for recovery of any "pain, suffering" etc. resulting from the "professional negligence" alleged, and statements to the contrary in prior rulings are disavowed. Rather, Republic's claim is for contribution, which was statutorily created by the State Legislature with its adoption of the Uniform Contribution Among Torfeasors Act in 1973, and later amended during its 1979 legislative session. See 1973 Statutes of Nevada 1303; 1979 Statutes of Nevada 1978. But for its statutory creation, Republic would have no legal right of contribution. Reid v. Royal Ins. Co., 80 Nev. 137, 142, 390 P.2d 45, 47 (1964) (following the common law rule that there is "no right of contribution between co-torfeasors"). Therefore the Court finds Republic's right of contribution is created and dependent on the provisions of NRS 17.225 et seq., and does not derive from rights personal to Marie Gonzales.

11. The Court also finds that NRS 42.021 has no application to the present action. The foregoing rationale regarding NRS 41A.035 also pertains to NRS 42.021 as it too comes into play "[i]n an action for injury or death against a provider of health care based upon professional negligence." But as seen, Republic's contribution action is statutory, and not derivative of Marie Gonzales' injury, or rights personal to her that arose from it.

12. On its face, NRS 42.021 permits a defendant charged with "professional negligence" (specially defined in sub. (8)(c) as a "negligent act or omission to act by a provider

of health care in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death") to "elect" to bring into evidence payments from certain defined "collateral" sources which are made "payable as a benefit to the plaintiff as a result of the injury[.]" Id. (1). Should the professional negligence defendant offer such "collateral source" evidence, the plaintiff then has the option of offering his or her own 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." Id. (1). Subsection (2) of the statute thereafter cuts off any third party rights of reimbursement against the plaintiff, or subrogation rights against the defendant for any collateral source offered into evidence.

13. NRS 42.021, therefore, favors the medical defendant with the possibility of a "collateral source" offset against a total recovery, while at the same time shielding the NRS 42.021 plaintiff and "professional negligence" defendant from later actions by third-party payors. But assuming any such "collateral source" benefits were paid to Ms. Gonzales—which is by no means certain—application of the portions of the statute which would benefit Republic, would be impossible here because 1) it did not receive any collateral source payments (nor can it be charged with their constructive receipt since its rights are not derivative of Ms. Gonzales'); 2) the "professional negligence" defendants would nonetheless get the potential collateral source offset in the event of a recovery against them; and 3) there appears to be no impediment to a subrogation action by third-party payors under sub. (2)(b) for return of the very collateral benefits Republic never received. It violates Equal Protection of the Law to apply only a portion of the statute, which benefits the Defendant, when the portion of the statute which benefits the "injured party" is inapplicable and cannot be applied in favor

of the Plaintiff, Silver State. The Court thus finds NRS 42.021 inapplicable to Republic as a matter of law.

14. 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 Motion to take NRCP 30(b)(6) Deposition of Plaintiff Republic on Order Shortening Time is **GRANTED IN PART, DENIED IN PART.**

15. The Motion is granted in so far as Defendant Cash is entitled to depose Plaintiff Republic and question the PMK on the amount of and basis for the settlement in the personal injury action.

16. The Motion is denied in so far as the defense states that the attorney-client privilege is waived due to the at-issue waiver doctrine. The Court does not find that the attorney-client privilege has been waived by virtue of this contribution claim and specific ruling is reserved for a per question basis.

17. 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 Motion to Compel Deposition and Production of Documents on Order Shortening Time from certain non-parties is **DENIED AS MOOT.**

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18. Non-Party Deponents Marie Gonzales, Jacqueline R. Bretell, Esq., and Bighorn Law's Motion for Protective Order on Order Shortening Time is **DENIED AS MOOT.**

IT IS SO ORDERED.

DATED this 12th day of March, 2019.

DISTRICT COURT JUDGE

DISTRICT COURT
CLARK COUNTY, NEVADA
-oOo-

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

NOTICE OF ENTRY OF ORDER: ORDER ON DEFENDANTS ANDREW M. CASH, M.D.; ANDREW M. CASH, M.D., P.C.; & DESERT INSTITUTE OF SPINE CARE, LLC'S MOTIONS TO COMPEL AND NON-PARTY DEPONENTS MARIE GONZALES' MOTION FOR PROTECTIVE ORDER ON ORDER SHORTENING TIME

DATE OF HEARING: 03/04/19
TIME OF HEARING: 9:00 A.M.

You are hereby notified that this Court entered **ORDER ON DEFENDANTS ANDREW M. CASH, M.D.; ANDREW M. CASH, M.D., P.C.; & DESERT INSTITUTE OF SPINE CARE, LLC'S MOTIONS TO COMPEL AND NON-PARTY DEPONENTS MARIE GONZALES' MOTION FOR PROTECTIVE ORDER ON ORDER SHORTENING TIME**, a copy of which is attached hereto.

DATED this 13th day of March 2019.

JERRY A WIESE
DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on the date filed, a copy of this Order was electronically served through the Eighth Judicial District Court EFP system, or, if no e-mail was provided, mailed or placed in the Clerk's Office attorney folder for:

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Party: Andrew M. Cash, M.D. - Defendant

Michelle Newquist	mnewquist@cktfmlaw.com
Madeline VanHeuvelen	mvanheuvelen@cktfmlaw.com

Party: Republic Silver State Disposal, Inc. - Plaintiff

David Barron	dbarron@lvnvlaw.com
Mary Ann Dillard	mdillard@lvnvlaw.com
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Tatyana Ristic, JEA

Electronically Filed
3/13/2019 5:48 AM
Steven D. Grierson
CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA
-oOo-

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

ORDER ON DEFENDANTS ANDREW M. CASH, M.D.; ANDREW M. CASH, M.D., P.C.; & DESERT INSTITUTE OF SPINE CARE, LLC'S MOTIONS TO COMPEL AND NON-PARTY DEPONENTS MARIE GONZALES' MOTION FOR PROTECTIVE ORDER ON ORDER SHORTENING TIME

DATE OF HEARING: 03/04/19
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's Motion to Compel NRCP 30(b)(6) Deposition of Plaintiff on Order Shortening Time; Motion to Compel Deposition and Production of Documents on Order Shortening Time and Non-Party Deponent Marie Gonzales' Motion for Protective Order on Order Shortening Time came on for hearing on March 4, 2019. The Court, having reviewed the papers and pleadings on file herein and having heard argument of, hereby finds as follows:

1. 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. Considering the issues raised by the Motions has caused the Court to reconsider its prior ruling that NRS 41A.035

applies to this contribution action premised upon allegations of medical malpractice. See Order Granting Defendant Las Vegas Radiology's Motion to "Cap" Non-Economic Damages Per NRS 41A.035 and Joinders to Same.

2. The prior Order stating," ... Nevada law obligates a Plaintiff seeking contribution from health care providers, asserting claims for professional negligence, to satisfy the requirements of NRS Chapter 41A" is hereby vacated. Because of its reconsideration of its prior rulings, the Court believes the discussion found below at ¶¶ 3-13 is in order.

3. The Court finds that NRS Ch. 41A has limited application to this contribution action. The Court has previously recognized that Republic Silver State Disposal's (Republic) cause of action is for contribution under the Uniform Contribution Among Tortfeasors Act, NRS 17.225 et seq., and not one for "professional negligence" against "provider(s) of health care" under the provisions of NRS ch. 41A. See Order re: Cash Defendants' Motion to Dismiss, etc., entered Dec. 13, 2016, p. 2. The referenced Order affirmatively dismissed a cause of action contained in Republic's Amended Complaint for professional negligence, but did so by further recognizing that the contribution claim was "based upon professional negligence" and that the contribution action "subsumed" professional negligence as its basis for liability. Id., pp. 2-3; see also NRS 41A.015 ("Professional negligence means the failure of a provider of health care, in rendering services, to use the reasonable care, skill or knowledge ordinarily used under similar circumstances by similarly trained and experienced providers of health care").

4. NRS 41A.035 imposes a $350,000 limitation for "noneconomic" damages," which are in turn defined at NRS 41A.011 as including "damages to compensate for pain, suffering, inconvenience, physical impairment, disfigurement and other nonpecuniary damages."

5. The Court finds the parameters of NRS 41A.035, limiting the recovery of "noneconomic damages," are set by the statute's own terms:

> 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. (emphasis added)

6. The Court believes its prior order imposing the damage limitation in NRS 41A.035 here was in error. The statutory definition of "noneconomic damage" at NRS 41A.011 contemplates a bodily injury or death, and is integral to an understanding of NRS 41A.035's scope and purpose. The statute further indicates that "the injured plaintiff may recover" certain damages, but Republic is not an "injured plaintiff," as contemplated by the statute. Republic's contribution action- is for neither bodily injury nor death; nor does it seek recovery for the injured patient's "pain, suffering, inconvenience," etc. resulting from allegedly faulty care. Its claim is brought under a statutory scheme allowing one who has extinguished a "common liability" to seek monetary restitution from another party who is also responsible for causing the loss. This conclusion regarding the nature of Republic's claim is in conformity with the Court's Order of Dec. 13, 2016, referenced above.

7. Next, Nevada's contribution statutes impose their own limitation on recovery since the party seeking contribution's "total recovery is limited to the amount paid by the tortfeasor in excess of his or her equitable share." NRS 17.225(2). The same provision also has a salutary effect for the party being sued for contribution because "[n]o tortfeasor is compelled to make contribution beyond his or her own equitable share of the entire liability." Id. The

contribution-defendant also has further protection because the contribution-plaintiff cannot recover "any amount paid in a settlement which is in excess of what was reasonable." Id. (3).

8. Finally, the damage limitation in NRS 41A.035 cannot be read harmoniously with the provisions of NRS 17.225. Each statute finds good application within its own statutory scheme, but becomes cumbersome to the point of being unworkable if superimposed elsewhere. This case presents an example of that unworkability: If NRS 41A.035's "cap" is imposed in Republic's contribution action, what of the $2 million settlement can be considered "noneconomic damage" with a monetary ceiling, as opposed to "economic damage," having no limitation on its full recovery under NRS 41A.007? As a prior practicing attorney in this area of the law, this Court has first-hand knowledge that when settling a personal injury case such as Ms. Gonzales' case against Silver State, the attorney and the Plaintiff have no incentive or reason to distinguish between economic and non-economic damages. If the settling parties themselves do not make that distinction, how can the Court make such a determination later? Or, without evidence of such an intent being found in the settlement, can the fact-finder ever do more than make a wholly arbitrary determination? The answers seem self-apparent – it is impossible to determine in a case such as this what portion of the settlement was for economic vs. non-economic damages. The Defendant suggests that the determination should be based on how the Plaintiff's tax liability for the amount received was calculated. This Court does not see that as a realistic option, as tax liabilities can be calculated differently by different CPA's, and may be based on a variety of tax codes. The Court therefore believes the better choice is to read NRS 41A.035, no less than NRS 17.225 et seq., in context and as written. This is part of the reason this Court finds and concludes that statutes contained in Chapter 41A of the NRS were not intended to apply to a subrogation/contribution type action such as that before this Court.

9. Thus, the Court finds NRS 41A.035's monetary limitation for "noneconomic damages" is specific to "pain, suffering, inconvenience, physical impairment, disfigurement, and other nonpecuniary damages." These damages are suffered by the individual who is personally injured because of the "professional negligence." The Court cannot find a way to apply NRS 41A.035 to the facts of the present case, and consequently, concludes that 41A.035's limitation is inapplicable in the present case.

10. In addition, the Court finds Republic's claim is not a continuation or assumption of Marie Gonzales' personal rights for recovery of any "pain, suffering" etc. resulting from the "professional negligence" alleged, and statements to the contrary in prior rulings are disavowed. Rather, Republic's claim is for contribution, which was statutorily created by the State Legislature with its adoption of the Uniform Contribution Among Torfeasors Act in 1973, and later amended during its 1979 legislative session. See 1973 Statutes of Nevada 1303; 1979 Statutes of Nevada 1978. But for its statutory creation, Republic would have no legal right of contribution. Reid v. Royal Ins. Co., 80 Nev. 137, 142, 390 P.2d 45, 47 (1964) (following the common law rule that there is "no right of contribution between co-torfeasors"). Therefore the Court finds Republic's right of contribution is created and dependent on the provisions of NRS 17.225 et seq., and does not derive from rights personal to Marie Gonzales.

11. The Court also finds that NRS 42.021 has no application to the present action. The foregoing rationale regarding NRS 41A.035 also pertains to NRS 42.021 as it too comes into play "[i]n an action for injury or death against a provider of health care based upon professional negligence." But as seen, Republic's contribution action is statutory, and not derivative of Marie Gonzales' injury, or rights personal to her that arose from it.

12. On its face, NRS 42.021 permits a defendant charged with "professional negligence" (specially defined in sub. (8)(c) as a "negligent act or omission to act by a provider

of health care in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death") to "elect" to bring into evidence payments from certain defined "collateral" sources which are made "payable as a benefit to the plaintiff as a result of the injury[.]" Id. (1). Should the professional negligence defendant offer such "collateral source" evidence, the plaintiff then has the option of offering his or her own 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." Id. (1). Subsection (2) of the statute thereafter cuts off any third party rights of reimbursement against the plaintiff, or subrogation rights against the defendant for any collateral source offered into evidence.

13. NRS 42.021, therefore, favors the medical defendant with the possibility of a "collateral source" offset against a total recovery, while at the same time shielding the NRS 42.021 plaintiff and "professional negligence" defendant from later actions by third-party payors. But assuming any such "collateral source" benefits were paid to Ms. Gonzales—which is by no means certain—application of the portions of the statute which would benefit Republic, would be impossible here because 1) it did not receive any collateral source payments (nor can it be charged with their constructive receipt since its rights are not derivative of Ms. Gonzales'); 2) the "professional negligence" defendants would nonetheless get the potential collateral source offset in the event of a recovery against them; and 3) there appears to be no impediment to a subrogation action by third-party payors under sub. (2)(b) for return of the very collateral benefits Republic never received. It violates Equal Protection of the Law to apply only a portion of the statute, which benefits the Defendant, when the portion of the statute which benefits the "injured party" is inapplicable and cannot be applied in favor

of the Plaintiff, Silver State. The Court thus finds NRS 42.021 inapplicable to Republic as a matter of law.

14. 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 Motion to take NRCP 30(b)(6) Deposition of Plaintiff Republic on Order Shortening Time is **GRANTED IN PART, DENIED IN PART.**

15. The Motion is granted in so far as Defendant Cash is entitled to depose Plaintiff Republic and question the PMK on the amount of and basis for the settlement in the personal injury action.

16. The Motion is denied in so far as the defense states that the attorney-client privilege is waived due to the at-issue waiver doctrine. The Court does not find that the attorney-client privilege has been waived by virtue of this contribution claim and specific ruling is reserved for a per question basis.

17. 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 Motion to Compel Deposition and Production of Documents on Order Shortening Time from certain non-parties is **DENIED AS MOOT.**

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18. Non-Party Deponents Marie Gonzales, Jacqueline R. Bretell, Esq., and Bighorn Law's Motion for Protective Order on Order Shortening Time is **DENIED AS MOOT.**

IT IS SO ORDERED.

DATED this 12th day of March, 2019.

DISTRICT COURT JUDGE

DISTRICT COURT
CLARK COUNTY, NEVADA
-oOo-

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, Defendants.	CASE NO.: A-16-738123-C DEPT. NO.: 30 ORDER RE: DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendant's Motion for Summary Judgment came on for hearing on Monday, March 11, 2019, at 2:00 p.m. The parties were represented by counsel, who submitted briefs, and argued orally on behalf of their clients. The Court took the matter under advisement, and now issues this Order.

Summary Judgment is appropriate only if "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." NRCP 56. The pleadings and evidence must be construed in the light most favorable to the non-moving party, but the non-moving party must still set forth specific facts demonstrating the existence of a genuine issue of material fact, in order to defeat Summary Judgment. *Collins v. Union Fed. Sav. & Loan Ass'n*, 99 Nev. 284, 294, 662 P.2d 610, 618-619 (1983). The non-moving party must establish a genuine issue of material fact with more than "gossamer threads of whimsy." *Wood v. Safeway*, 121 Nev. 724, 730-31, 121 P.3d 1026 (2005).

Plaintiff's only remaining claim in this action is for contribution against Dr. Cash and the related Defendants, pursuant to NRS 17.225. Defendants argue that Summary Judgment is appropriate because no cause of action for contribution can exist when Republic and Dr. Cash are not "joint tortfeasors," and did not contribute to the same single injury. In support of their argument, Defendants cite to the Plaintiff's

Complaint, in which Plaintiff alleges that, "As a direct and proximate result of Defendants' negligence, . . . Gonzalez suffered new and different injuries from those allegedly suffered in the motor vehicle accident of January 14, 2012." (See Complaint at Paragraph 56).

NRS 17.225 reads in pertinent part 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.
> . . . .

NRS 17.225 (emphasis added).

Defendant suggests that accepting the Plaintiff's allegations as true, Dr. Cash and Republic are not joint tortfeasors, and no right to contribution exists under NRS 17.225.

In his Motion for Summary Judgment, Cash cites to the case of *District of Columbia v. Washington Hospital Center,* 722 A.2d 332 (1998), but Plaintiff responds that such case is inapplicable because the District of Columbia doesn't even have a contribution statute. Such a distinction is important and consequently, this Court cannot rely on that case for its decision in this case.

Nevada's contribution cause of action was created by statute. Defendant cites to the unpublished Nevada Supreme Court Case of *Disc. Tire Co. of Nev. V. Fisher Sand & Gravel Co.*, 400 P.3d 244 (2017 WL 1397333 (Nev. 2017 Unpub), which states the following:

> "Contribution is a creature of statute . . ." *Doctors Co. v. Vincent*, 120 Nev. 644, 560, 98 P.3d 681, 686 (204). "Under the Nevada statutory formulation, the remedy of contribution allows one tortfeasor to extinguish joint liabilities through payment to the injured party, and then seek partial reimbursement from a joint tortfeasor for sums paid in excess of the settling or discharging tortfeasor's equitable share of the common liability." *Id.*, at 651, 98 P.3d at 686.
> . . .

The Nevada Supreme Court discussed the difference between joint tortfeasors and successive tortfeasors, as follows:

> . . . we hold that Discount Tire and Fisher are joint tortfeasors, and not successive tortfeasors. Compare *Joint Tortfeasors, Black's Law Dictionary* (10th ed. 2014)(defining joint tortfeasors as "[t]wo or more tortfeasors who contributed to the claimant's injury and who may be joined as defendants in the same lawsuit"), and *74 Am.Jur.2d Torts* §64 (2012) (providing that "joint tortfeasors act negligently – either in voluntary, intentional concert, or separately and independently – to produce a ***single indivisible injury***" (emphasis added)), with *Hansen v. Collett*, 79 Nev. 159, 167, 380 P.2d 301, 305 (1963)(providing that successive tortfeasors must produce acts "differing in time and place of commission as well as in nature, [causing] ***two separate injuries*** [that] gave rise to two distinct causes of action" (emphasis added)), and *Successive Tortfeasors, Black's Law Dictionary* (10th ed. 2014)(defining successive tortfeasors as "[t]wo or more tortfeasors whose negligence occurs at different times and causes different injuries to the same third party" (emphasis added)). . . .

Disc. Tire Co. of Nev. V. Fisher Sand & Gravel Co., 400 P.3d 244, 2017 WL 1397333 (2017 Nev. Unpub)(emphasis added by the Supreme Court).

Based on this distinction, this Court needs to determine whether Republic and Cash are "joint tortfeasors" or "successive tortfeasors." Viewing the evidence in the light most favorable to the non-moving party, Republic, the Court must conclude that the Plaintiff will be able to establish its allegation that as a result of Dr. Cash's actions, "Gonzalez suffered new and different injuries from those allegedly suffered in the motor vehicle accident of January 14, 2012." (See Complaint at Paragraph 56). Although the Plaintiff would now have the Court conclude that a contribution claim is valid since there is a single "common liability," as discussed in NRS 17.225(2), subsection (1) of the same statute indicates that there is a right of contribution when "two or more persons become jointly or severally liable . . . for the ***same injury***." Although the Court assumes that Dr. Cash would testify that his treatment was part of the overall care of the patient's injuries resulting from the subject motor vehicle accident, and that he did not cause any "separate" or "additional" injury, for purposes of a Motion for Summary Judgment, the Court must assume that the Plaintiff will be able to prove its allegation that there was a "new and different injury" caused by Dr. Cash. If there is a "new and different injury," then the parties cannot be "joint tortfeasors," but instead they would be successive tortfeasors. There was not an "indivisible injury," but the acts (motor vehicle accident and separate alleged negligence of Dr. Cash) occurred at different times and places, and allegedly caused

"two separate injuries," which gave rise to two distinct causes of action.[1] Consequently, this Court has no choice but to conclude that Dr. Cash and Republic are "successive" and not "joint tortfeasors." Because they are "successive" and not "joint tortfeasors, NRS 17.225 cannot apply, and there can be no claim for contribution, as a matter of law.

Based upon the foregoing, and good cause appearing, the Defendant's Motion for Summary Judgment is hereby **GRANTED.**[2]

As a result of this decision, the Jury Trial set for 3/18/2019 is hereby **VACATED.**

The Defendants' Motion for Stay Pending Decision on Emergency Petition for Writ of Mandamus was not actually calendared, but is now **VACATED AS MOOT.**

The Motion to Intervene on behalf of Physicians Casualty Risk Retention Group is **VACATED AS MOOT.**

Dated this 14th day of March, 2019.

JERRY A. WIESE II
DISTRICT COURT JUDGE
EIGHTH JUDICIAL DISTRICT COURT
DEPARTMENT XXX

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[1] Unfortunately for the Plaintiff, the Court's ruling will eliminate the Plaintiff's cause of action for contribution, and consequently, one may ask "what are the two distinct causes of action?" This Court struggles with this question, but concludes that the original Plaintiff, Gonzalez, would have two distinct causes of action if she had chosen to bring them. She would have one negligence claim against Republic, and a separate claim for alleged professional negligence, against Dr. Cash. Although Restatement 2d Torts §457 and Nev. Med Mal Jury Inst. 9MM.8 would allow Gonzalez to have recovered all damages from Republic, it doesn't mean that she would not have had a distinct cause of action against Dr. Cash if she had wanted to assert it.

[2] The Court notes that although Dr. Cash's counsel was preparing a Writ with regard to the Court's prior decisions, this decision will obviously eliminate the need for that Writ. If Plaintiff's counsel instead files an Appeal, this Court suggests and/or requests that the parties brief and request that the Supreme Court also address and give guidance with regard to the applicability of NRS 41A.035, NRS 42.021, and other related professional negligence statutes to the facts and circumstances of this case, and how such statutes could be applied to a claim for contribution, when the Plaintiff is not the injured party.

DISTRICT COURT
CLARK COUNTY, NEVADA
-oOo-

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

NOTICE OF ENTRY OF ORDER: ORDER RE: DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

You are hereby notified that this Court entered **Order re: Defendant's Motion for Summary Judgment**, a copy of which is attached hereto.

DATED this 15th day of March 2019.

JERRY A WIESE

DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on the date filed, a copy of this Order was electronically served

CERTIFICATE OF SERVICE

I hereby certify that on or about the date e-filed, I served a copy of the foregoing document

☐ by causing the original of the same to be deposited in the United States Mail, postage prepaid, addressed as follows:

☐ by placing a copy in the attorney's folder located in the Regional Justice Center to:

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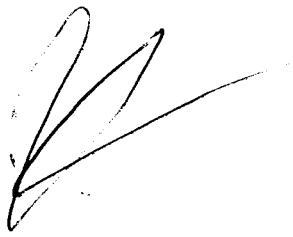

Tatyana Ristic
Judicial Executive Assistant
Department 30

DISTRICT COURT
CLARK COUNTY, NEVADA
-oOo-

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, Defendants.	CASE NO.: A-16-738123-C DEPT. NO.: 30 ORDER RE: DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendant's Motion for Summary Judgment came on for hearing on Monday, March 11, 2019, at 2:00 p.m. The parties were represented by counsel, who submitted briefs, and argued orally on behalf of their clients. The Court took the matter under advisement, and now issues this Order.

Summary Judgment is appropriate only if "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." NRCP 56. The pleadings and evidence must be construed in the light most favorable to the non-moving party, but the non-moving party must still set forth specific facts demonstrating the existence of a genuine issue of material fact, in order to defeat Summary Judgment. *Collins v. Union Fed. Sav. & Loan Ass'n*, 99 Nev. 284, 294, 662 P.2d 610, 618-619 (1983). The non-moving party must establish a genuine issue of material fact with more than "gossamer threads of whimsy." *Wood v. Safeway*, 121 Nev. 724, 730-31, 121 P.3d 1026 (2005).

Plaintiff's only remaining claim in this action is for contribution against Dr. Cash and the related Defendants, pursuant to NRS 17.225. Defendants argue that Summary Judgment is appropriate because no cause of action for contribution can exist when Republic and Dr. Cash are not "joint tortfeasors," and did not contribute to the same single injury. In support of their argument, Defendants cite to the Plaintiff's

Complaint, in which Plaintiff alleges that, "As a direct and proximate result of Defendants' negligence, . . . Gonzalez suffered new and different injuries from those allegedly suffered in the motor vehicle accident of January 14, 2012." (See Complaint at Paragraph 56).

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NRS 17.225 (emphasis added).

Defendant suggests that accepting the Plaintiff's allegations as true, Dr. Cash and Republic are not joint tortfeasors, and no right to contribution exists under NRS 17.225.

In his Motion for Summary Judgment, Cash cites to the case of *District of Columbia v. Washington Hospital Center,* 722 A.2d 332 (1998), but Plaintiff responds that such case is inapplicable because the District of Columbia doesn't even have a contribution statute. Such a distinction is important and consequently, this Court cannot rely on that case for its decision in this case.

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> "Contribution is a creature of statute . . ." *Doctors Co. v. Vincent*, 120 Nev. 644, 560, 98 P.3d 681, 686 (204). "Under the Nevada statutory formulation, the remedy of contribution allows one tortfeasor to extinguish joint liabilities through payment to the injured party, and then seek partial reimbursement from a joint tortfeasor for sums paid in excess of the settling or discharging tortfeasor's equitable share of the common liability." *Id.*, at 651, 98 P.3d at 686.
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Based on this distinction, this Court needs to determine whether Republic and Cash are "joint tortfeasors" or "successive tortfeasors." Viewing the evidence in the light most favorable to the non-moving party, Republic, the Court must conclude that the Plaintiff will be able to establish its allegation that as a result of Dr. Cash's actions, "Gonzalez suffered new and different injuries from those allegedly suffered in the motor vehicle accident of January 14, 2012." (See Complaint at Paragraph 56). Although the Plaintiff would now have the Court conclude that a contribution claim is valid since there is a single "common liability," as discussed in NRS 17.225(2), subsection (1) of the same statute indicates that there is a right of contribution when "two or more persons become jointly or severally liable . . . for the ***same injury***." Although the Court assumes that Dr. Cash would testify that his treatment was part of the overall care of the patient's injuries resulting from the subject motor vehicle accident, and that he did not cause any "separate" or "additional" injury, for purposes of a Motion for Summary Judgment, the Court must assume that the Plaintiff will be able to prove its allegation that there was a "new and different injury" caused by Dr. Cash. If there is a "new and different injury," then the parties cannot be "joint tortfeasors," but instead they would be successive tortfeasors. There was not an "indivisible injury," but the acts (motor vehicle accident and separate alleged negligence of Dr. Cash) occurred at different times and places, and allegedly caused

"two separate injuries," which gave rise to two distinct causes of action.[1] Consequently, this Court has no choice but to conclude that Dr. Cash and Republic are "successive" and not "joint tortfeasors." Because they are "successive" and not "joint tortfeasors, NRS 17.225 cannot apply, and there can be no claim for contribution, as a matter of law.

Based upon the foregoing, and good cause appearing, the Defendant's Motion for Summary Judgment is hereby **GRANTED.**[2]

As a result of this decision, the Jury Trial set for 3/18/2019 is hereby **VACATED.**

The Defendants' Motion for Stay Pending Decision on Emergency Petition for Writ of Mandamus was not actually calendared, but is now **VACATED AS MOOT.**

The Motion to Intervene on behalf of Physicians Casualty Risk Retention Group is **VACATED AS MOOT.**

Dated this 14th day of March, 2019.

JERRY A. WIESE II
DISTRICT COURT JUDGE
EIGHTH JUDICIAL DISTRICT COURT
DEPARTMENT XXX

---

[1] Unfortunately for the Plaintiff, the Court's ruling will eliminate the Plaintiff's cause of action for contribution, and consequently, one may ask "what are the two distinct causes of action?" This Court struggles with this question, but concludes that the original Plaintiff, Gonzalez, would have two distinct causes of action if she had chosen to bring them. She would have one negligence claim against Republic, and a separate claim for alleged professional negligence, against Dr. Cash. Although Restatement 2d Torts §457 and Nev. Med Mal Jury Inst. 9MM.8 would allow Gonzalez to have recovered all damages from Republic, it doesn't mean that she would not have had a distinct cause of action against Dr. Cash if she had wanted to assert it.

[2] The Court notes that although Dr. Cash's counsel was preparing a Writ with regard to the Court's prior decisions, this decision will obviously eliminate the need for that Writ. If Plaintiff's counsel instead files an Appeal, this Court suggests and/or requests that the parties brief and request that the Supreme Court also address and give guidance with regard to the applicability of NRS 41A.035, NRS 42.021, and other related professional negligence statutes to the facts and circumstances of this case, and how such statutes could be applied to a claim for contribution, when the Plaintiff is not the injured party.

MOT
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Attorneys for Plaintiff
Republic Silver State Disposal, Inc.

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

REPUBLIC SILVER STATE DISPOSAL, INC.'S MOTION FOR RECONSIDERATIO ON ORDER SHORTENING TIME

Hearing Date:

Hearing Time:

Plaintiff REPUBLIC SILVER STATE DISPOSAL, INC., by and through its counsel BARRON & PRUITT, LLP, submits its Motion for Reconsideration of the Court's Order of March 15, 2019, granting the motion for summary judgment Defendant Andrew M. Cash, M.D. and Desert Institute of Spine Care (DISC), and requests that the motion be heard on an Order Shortening Time.

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BARRON & PRUITT, LLP
ATTORNEYS AT LAW
3890 WEST ANN ROAD
NORTH LAS VEGAS, NEVADA 89031
TELEPHONE (702) 870-3940
FACSIMILE (702) 870-3950

DECLARATION OF DAVID BARRON, ESQ.
IN SUPPORT OF ORDER SHORTENING TIME

STATE OF NEVADA)
)
COUNTY OF CLARK)

DAVID BARRON, ESQ., being first duly sworn, deposes and says:

1. I am an attorney duly licensed to practice law in Nevada. I am counsel for Plaintiff Republic Silver State Disposal, Inc. in the above entitled matter and I have personal knowledge of the matters stated herein.

2. 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. filed and served their Motion for Summary Judgment on March 5; 2019, despite a previous Court order specifying that dispositive motions were to be filed no later than the date of the Calendar Call, March 4, 2019. The Defendants' unexplained delay left Plaintiff approximately 48 hours to respond.

3. The Defendants' Motion for Summary Judgment was heard on March 11, 2019.

4. On March 15, 2019, this Court granted Defendants' Motion for Summary Judgment, thereby vacating the Jury Trial set for March 18, 2019.

5. Plaintiff now submits its Motion for Reconsideration of the Court's Order of March 15, 2019 because it believes the Judge relied upon an application of law that is clearly erroneous and abused his discretion in granting Defendants' Motion for Summary Judgment.

6. The filing of this Motion does not stay time for Plaintiff to file its Notice of Appeal, and thus scheduling a hearing on this Motion on an Order Shortening Time is appropriate.

7. Accordingly, Plaintiff Republic Silver State Disposal, Inc. respectfully requests this matter be heard on an Order Shortening Time.

DAVID BARRON, ESQ.

SUBSCRIBED and SWORN to before me this 21st day of March, 2019.

NOTARY PUBLIC

NOTARY PUBLIC
MARYANN DILLARD
STATE OF NEVADA - COUNTY OF CLARK
MY APPOINTMENT EXP. JUNE 16, 2021
No: 17-2746-1

BARRON & PRUITT, LLP
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ORDER SHORTENING TIME

GOOD CAUSE APPEARING THEREFOR, it is hereby ORDERED that the time for the hearing of the above Motion shall be shortened to the 30th day of April, 2019, at the hour of 9:00 (a.m.)/p.m, in the above-referenced Department. Oppositions to this Motion are due on ~~3/27/19~~ 3/28/19; Replies are due on 3/29/19.

DISTRICT COURT JUDGE

Respectfully submitted by:

BARRON & PRUITT, LLP

DAVID BARRON, ESQ.
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JOHN D. BARRON, ESQ.
Nevada Bar No. 14029
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Republic Silver State Disposal, Inc.

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MEMORANDUM OF POINTS AND AUTHORITES

1. Factual summary

The facts upon which this contribution action are based are recounted throughout the record. In brief, on January 14, 2012, Marie Gonzales and Republic Silver State Disposal (Republic) employee, Deval Hatcher, were involved in a traffic accident. Ms. Gonzales sought treatment with Dr. Andrew Cash. Dr. Cash recommended a surgical procedure that entailed implantation of three "pedicle screws" into Ms. Gonzales' L4, L5 and S1 vertebrae. The screws at L5 and S1 went through bone; entered her neuroforamina; and began to compress Ms. Gonzales' left L5 and S1 nerve roots.

Ms. Gonzales suffered severe post-surgical pain, different in kind and intensity than what she experienced before the operation, suggesting nerve root compression. She eventually developed a foot-drop on the left—another clinical indication that her left L5 or S1 nerve roots were being compressed.

On February 12, 2013, Dr. Cash ordered a CT imaging study. He misdiagnosed findings that the L5 and S1 pedicle screws had breached their pedicles, and had gone into the neuroforamina. Republic's neuroradiology expert, Dr. David Seidenwurm opined that the CT imaging clearly showed the breach. Its spinal surgery expert, Dr. Howard Tung, opined that the CT imaging should have displayed to a reasonably prudent spine surgeon that there was pedicle breaches. And while Dr. Tung did not think Ms. Gonzales was a surgical candidate, his opinion was that it was imperative for the breached pedicles to have been removed promptly to avoid lasting neuropathic injury, and because they were not, she suffered permanent nerve root injuries.

In June 2013, Ms. Gonzales severed her relationship with Dr. Cash, and consulted with Dr. Stuart Kaplan. Dr. Kaplan reviewed the same CT imaging Dr. Cash had ordered and immediately concluded Ms. Gonzales needed to have the Cash surgery totally revised; all surgical hardware removed and replaced onto the right side at L4-5 and L5-S1; and most importantly, that the pedicle screws implanted by Dr. Cash be removed since they had compressed her left L5 and S1 nerve roots for so long that she had a permanent nerve injury. In fact, Dr. Kaplan believed the chronic nerve root pain was significant enough that he implanted a spinal cord stimulator during February 2015.

During July 2015, Republic settled the lawsuit Ms. Gonzales had brought against it and its former driver, Mr. Hatcher for $2 million. In a December 13, 2016 Order denying multiple Rule 12

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motions brought the defendants, the Court found that Republic's contribution action was timely, and determined a release between Ms. Gonzales and Republic expressly extinguished the liabilities of Ms. Gonzales' care providers for treatment of what she claimed were her accident related injuries. See Discount Tire of Nevada v. Fisher Sand & Gravel Co., 2017 WL 1397333, where the Nevada Supreme Court held in an unreported decision that to preserve rights of contribution against a co-tortfeasor under the Uniform Contribution Among Tortfeasors Act (UCATA), NRS 17.225 et seq., it was necessary to expressly extinguish that party's liability as well as its own.

2. The Court should reconsider its Order Granting Summary Judgment as it "Clearly Erroneous."

On March 15, 2019 this Court entered its Order Re: Defendants' Motion for Summary, granting an untimely Rule 56 motion, and terminating this action. This motion seeks the Court's reconsideration of that order under EDCR 2.224(a) on the grounds it is "clearly erroneous." Masonry & Tile Contrs. v. Jolly, Urga & Wirth Asss'n., 113 Nev. 737, 741, 941 P.2d 486, 489 (1997) ("a district court may reconsider a previously decided issue if substantially different evidence is subsequently introduced or the decision is clearly erroneous"). The reasons for reconsideration are now discussed.

a. Because Republic and the Cash Defendants are "liable it tort for the same injury" the Court's holding that contribution action fails under the UCATA because they are "Successive" and not "Joint" Tortfeasors is legally wrong.

Since we believe the Court's reasoning for summary judgment is in error, it is only fair to quote the ruling's substance:

> [T]his Court needs to determine whether Republic and Cash are "joint tortfeasors" or "successive tortfeasors." Viewing the evidence in the light most favorable to the non-moving party, Republic, the Court must conclude that the Plaintiff will be able to establish its allegation that as a result of Dr. Cash's actions, "Gonzales suffered new and different injuries from those allegedly suffered in the motor vehicle accident of January 14, 2012." (See Complaint at Paragraph 56). Although the Plaintiff would now have the Court conclude that a contribution claim is valid since there is single "common liability," as discussed in NRS 17.225(2), subsection (1) of the same statute indicates that there is a right

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of contribution when "two or more persons become jointly or severally liable…for the ***same injury***." Although the Cort assumes that Dr. Cash would testify that his treatment was part of the overall care of the patient's injuries resulting from the subject motor vehicle accident, and that he did not cause any "separate" or "additional" injury, for purposes of a Motion for Summary Judgment, the Court must assume that the Plaintiff will be able to prove its allegation that there was a "new and different injury" caused by Dr. Cash. If there is a "new and different injury," then the parties cannot be "joint tortfeasors," but instead they would be successive torfeasors. There was not an "indivisible injury," but the acts (motor vehicle accident and separate alleged negligence of Dr. Cash) occurred at different times and places, and allegedly caused "two separate injuries," [see Discount Tire of Nevada v. Fisher Sand & Gravel Co., 2017 WL 1397333 *3] which gave rise to two distinct causes of action. Consequently, this Cort has no choice but to conclude that Dr. Cash and Republic are "successive" and not "joint torfeasors." Because they are "successive" and not "joint tortfeasors["], NRS 17.225 cannot apply, and there can be no claim for contribution, as a matter of law.

Order, pp. 3-4.

Carrying the Court's ruling to its logical conclusion, it effectively eliminates the possibility that an otherwise perfected contribution action can ever be made against negligent physician (or other health care provider) under Nevada law, and the UCATA becomes a dead letter for contribution against malpracticing medical professionals. This is because the injury caused by the "original tortfeasor" will *invariably* occur before the victim is treated; and should the accident victim be additionally injured because of medical negligence, that treatment-related injury will just as invariably come *after* the original injury, and by definition be a "successive" tort. This is an error at law.

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1) The UCATA does not condition the right of contribution on whether a shared liability is "joint," nor preclude if the shared liability is predicated on a "successive" tort.

The *raison d'erte* for the Court's ruling is that the original injury in the traffic accident preceded a separate occurrence of alleged medical negligence. And because the torts arose at different times, and involved the conduct of different negligent actors, the Court concluded Republic and Dr. Cash are not "joint tortfeasors." Instead, they are "successive tortfeasors" and so the contribution claim fails. This rationale is wrong for two reasons.

First, nowhere in NRS 17.225 et seq., or the text of the Uniform Contribution Among Tortfeasors Act (1955) upon which the Nevada contribution statutes are entirely based, will one find the terms "joint tortfeasor"[1] or "successive tortfeasor." Nor does anything in the UCATA prevent the statutory right of contribution just because different torts by different parties have occurred at different times.

Instead, contribution under NRS 17.225(1) is triggered "where two or more persons become jointly or severally *liable in tort for the same injury*." Emphasis added.[2] Said differently, under the UCATA, so long as the injury for which the contribution plaintiff and defendant are liable is the "same," it does not matter if that liability is "joint" or "several"; whether their respective liabilities arose concurrently or at different times; or if their liabilities were the result of different tortious conduct. Is there such a shared liability for the "same injury" here? Absolutely.

2) An "original" tortfeasor is liable for an accident victim's subsequent injury due to negligent medical care.

There were only two injuries in this case—the first from the traffic accident; and the second from what Republic contends was medical negligence the following year. And for obvious reasons, Dr. Cash cannot share tort liability with Republic for the original injury in January 2012—after all, Ms. Gonzales never met him until she started treating with him three months later. So any potential

[1] The UCATA in its original 1939 version defined "joint tortfeasors" to mean "two or more persons jointly and severally liable in tort for the same injury[.]" The Comment to UCATA (rev. 1955) §1, upon which NRS 17.225, 17.255, 17.265 and 17.275 are directly fashioned, states that the definition of "joint tortfeasors and the term itself have been eliminated" since the "term is not indispensable to the Act." The term "successive" liability has never been part of the UCATA.

[2] Both the Court's Order, at p. 3, and Republic's Opposition, at p. 5, fn. 4, cited the same verbiage, reaching opposite conclusions, about whether Republic and Dr. Cash had become liable for the "same injury."

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"joint or several liability in tort for the same injury" has to come out of the medical treatment. But can Republic and the Cash defendants *both* have liability for that "successive" tort? The short answer is, of course they can. Not only that, they *do*.

Under the heading "Liability of independent and successive tortfeasors," 7 Am. Jur.2d Torts §67 states the rule generally espoused in the Court's Order, that different parties causing different injuries at different times bear their liabilities separately:

> Where multiple tortfeasors neither act in concert nor contribute concurrently to the same wrong, they are not joint tortfeasors that may be held jointly and severally liable. Similarly, if a plaintiff's injuries are separable, defendants are not jointly and severally liable for the damages. Thus, the Restatement Second, Torts [§881] provides that if two or more persons, acting independently, tortiously cause distinct harms or a single harm for which there is a reasonable basis for division according to the contribution of each, each is subject to liability only for the portion of the total harm that he or she has himself or herself caused.

But the broadly recognized exception to that rule—expressed as a caveat in §67—is the very circumstance presented here:

> **Caution:**
>
> What has been described as "successive liability" may arise when a first injury (such as from a car accident) caused by an original tortfeasor causally leads to a second distinct injury or a distinct enhancement of the first injury (such as when the original injury requires subsequent medical treatment that is negligently administered) caused by a successive tortfeasor. *The original tortfeasor is responsible for both injuries because it is foreseeable as a matter of law that the original injury may lead to a causally distinct additional injury. However, the second (or successive) tortfeasor is only responsible for the second injury or for the distinct enhancement of the first injury.*

Emphasis added; see also 2 Modern Tort Law: Liability and Litigation § 19:7 (2d ed., 2018) ("Where multiple tortfeasors do not act in concert or contribute concurrently to the same wrong, they are not

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joint tortfeasors; their wrongs are independent and successive. Under successive and independent liability the first tortfeasor may be liable to the plaintiff or the entire damage and any aggravation of injuries by successive tortfeasors.")

The rule just quoted—that an "original" tortfeasor is liable for both the initial, and "successive" injury—has historically been part of American jurisprudence, including Nevada's, especially where the "successive injury" is due to negligent medical care. See Hansen v. Collett, 79 Nev. 159, 165, 380 P.2d 301, 304 (1963) ("it is well-settled law that the original tortfeasor is liable for the malpractice of the attending physicians"); see also Nev. Civil Jury Instr., 9MM.8. Cases from around the country embracing what has come to be known as the "successive injury" or "original tortfeasor" rule are too numerous to mention here, but a large number are cataloged and discussed in 100 A.L.R.2d 808, Civil liability of one causing personal injury for consequences of negligence, mistake, or lack of skill of physician or surgeon.[3]

Both the Second and Third Restatements of Torts (as well as their "comments" and "illustrations") also set out the rule of "successive liability" for an "original tortfeasor" where the accident victim suffers an aggravation of either the first injury, or an additional injury because of negligently performed medical care:

> Restatement (2d) of Torts §457, **Additional Harm Resulting from Efforts to Mitigate Harm Caused by Negligence**:
>
> If the negligent actor is liable for another's bodily injury, he is also subject to liability for any additional bodily harm resulting from normal efforts of third

[3] A relatively recent example of the rule and its wide acceptance (to the point of becoming "hornbook" law) comes from the Tennessee Supreme Court's decision in Banks v. Elks Club Pride of Tennessee, 301 S.W.3d 214, 221-2 (2010):

> The principles governing liability for successive injuries are settled. They recognize that there are circumstances in which an earlier tortfeasor may be held liable not only for the injury caused by its own negligent conduct but also for later injury caused by the negligent conduct of another tortfeasor. Restatement (Second) of Torts § 433A, cmt. c (1965); *Prosser and Keeton* § 52, at 352. Liability in these circumstances arises when the subsequent negligent conduct is a foreseeable or natural consequence of the original tortfeasor's negligence. 2 Jacob A. Stein, *Stein on Personal Injury Damages* § 11:7 (3d ed.2009) (hereinafter "Stein"); *see also McClenahan v. Cooley,* 806 S.W.2d 767, 775 (Tenn.1991) (noting that "[a]n intervening act, which is a normal response created by negligence, is not a superseding, intervening cause so as to relieve the original wrongdoer of liability, provided the intervening act could have reasonably been foreseen and the conduct was a substantial factor in bringing about the harm").[¶] Negligence in subsequent medical treatment of a tortiously caused injury is the most common invocation of this rule. Lee & Lindahl, at § 6:3; *Prosser and Keeton* § 52, at 352; 2 Stein, at § 11:7.

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persons in rendering aid which the other's injury reasonably requires, irrespective of whether such acts are done in a proper or a negligent manner.

*****

Illustrations:

1. A's negligence causes B serious harm. B is taken to a hospital. The surgeon improperly diagnoses his case and performs an unnecessary operation, or, after proper diagnosis, performs a necessary operation carelessly. A's negligence is a legal cause of the additional harm which B sustains.

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Restatement (3d) of Torts §35, **Enhanced Harm Due to Efforts to Render Medical or Other Aid:**

An actor whose tortious conduct is a factual cause of harm to another is subject to liability for any enhanced harm the other suffered due to the efforts of third persons to render aid reasonably required by the other's injury, so long as the enhanced harm arises from a risk that inheres in the effort to rendered aid.

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Comment *a*. *Liability for enhanced harm from the efforts to aid an injured person.* ***The Restatement Second of Torts §457 provided that a negligent actor was liable for enhanced harm caused by third persons in rendering aid reasonably required by the injured person, regardless of whether the third person acted negligently. This section reiterates that rule, which retains virtually unanimous acceptance, and expands it to cover other tortious conduct. *Negligence in medical treatment of a tortiously caused injury is the most common invocation of the rule in this section.*

Emphasis added.

In a footnote, the Court candidly wrote of "struggl[ing]" about Ms. Gonzales apparently having two separate causes of action—one against Republic and the other against the Cash defendants. On the one hand, while "Gonzales [could] have recovered all damages against Republic [under

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Restatement 2d Torts §457 and Nev. Med Mal Jury Inst. 9MM.8], it doesn't mean that she would not have a distinct cause of action against Dr. Cash if she had wanted to assert it." Order, p. 4 fn. 1. But as the foregoing discussion hopefully clarifies, while she indeed had separate claims, to recover "medical malpractice" damages it was unnecessary for her to sue Dr. Cash since Republic, as a matter of law was already "liable" for that "same [malpractice-related] injury." NRS 17.225(1).

3) Although the "original" tortfeasor bears "successive liability" for later harm, it is still necessary to litigate allocation of the loss.

Since the "successive liability" rule relieves the twice-injured victim of the necessity of suing both the "original and "successive" tortfeasors, the next inquiry is whether there is a mechanism to allocate the loss between an "original" and "successive" tortfeasor? This question of "what next?" is also pertinently addressed at Restatement (3d) of Torts §35's Comment b.:

> ***In the medical-care context, the rule in *this Section obviates the need for injured persons to pursue a medical-malpractice claim when a defendant claims that some portion of the harm was caused by a health-care provider's negligence. Defendants are free to assert contribution claims against medical professionals for malpractice in enhancing the plaintiff's injury*. More broadly, the risk of enhanced injury to a person suffering harm due to efforts of others to aid the person is one that should be anticipated as arising from conduct posing risks of harm to others. Indeed, it would be the rare case in which enhanced harm covered by this Section would not be within the scope of the original tortfeasor's liability[.]

Emphasis added.

As can be seen from the foregoing, for "successive liability" the inquiry is not whether there were separate injuries caused by different tortious conduct, happening at different times. Rather:

> The successive tortfeasor doctrine imposes joint and several liability on the original tortfeasor for the full extent of injuries caused by the original tortfeasor and the successive tortfeasor. *The doctrine is limited, however, to those cases*

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> *in which the plaintiff can show more than one distinct injury successively caused by more than one tortfeasor. Thus,* it has been held that *the doctrine applies only when an original injury causes subsequent medical treatment because it is that separate injury that makes the subsequent medical treatment foreseeable*; without a separate original injury, there is but one injury caused by the combined negligence of two tortfeasors.

1 Modern Tort Law: Liability and Litigation § 6:8 (2d ed., 2018).

Italics have been supplied above to emphasize the necessity, for "successive liability" to come into play, of proving 1) "more than one distinct injury successively caused by more than one tortfeasor"; and 2) that it was foreseeable that the original injury would lead to "subsequent medical treatment." These fact questions were entirely foreclosed by the Court's Order granting summary judgment. No less importantly, the grant of summary judgment also disposed of fact questions about whether the Cash surgery on January 29, 2013, and his failure to diagnose that Ms. Gonzales was suffering from the nerve root compression caused by the breached pedicle screws, was below the standard of care.[4]

If the jury were to have determined that Dr. Cash had committed "professional negligence" the next jury determinations would have addressed damage allocation; in other words, what of the total $2 million settlement was due to the injury *he* caused? See e.g. Lujan v. Healthsouth Rehabilitation Corp, 902 P.2d 1025, 1029-30 (N.M. 1995) ("the original tortfeasor is responsible for

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[4] When Dr. Kaplan was deposed he was directly asked if there was a compressive injury suffered by Ms. Gonzales' nerve roots, and if so, whether that was why he operated in July 2013:

Q. ***I am interested in the compressive pathology you removed, and that, of course would be what, the hardware?
A. the hardware.
Q. Okay. Is there –well, that seems to suggest that the pedicle screw at L5, S1 or either of them or both was making some contact and compressing the nerve root.
A. I was concerned.
Q. Okay.
A. I was concerned based on what she told me, i.e., that her leg pain was worse. I was concerned based upon the CT scan with her clinical description.
Q. So putting it all together, it was your conclusion that there was a compression due to either or both of those screws?
Q. I felt so.
Q. And that's why you operated?
A. Yes, sir.

Deposition of Dr. Stuart Kaplan, p. 50, attached as EXHIBIT 1.

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both the original injury and for the harm caused by negligent medical treatment," but the negligent medical provider "is only liable for the additional harm caused by the negligent treatment").

Here we come full circle. Republic's pleading, alleging that the negligent medical treatment caused "new and differ injuries," was for there a reason: Damages caused by the negligent treatment are the only ones potentially recoverable by Republic in its contribution claim. It's just that simple.

Republic moves for reconsideration because it believes this Court's Order granting the motion for summary judgment was "clearly erroneous," and by reconsidering the ruling and its underpinnings the Court may come to a different conclusion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 25th day of March, 2019, I served the foregoing **PLAINTIFF REPUBLIC SILVER STATE DISPOSAL, INC.'S MOTION FOR RECONSIDERATION** 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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Exhibit 1

Exhibit 1

Exhibit 1

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; et al., Defendants.	Case No.: A-16-738123-C Dept. No.: XXX

(Complete caption on page 2.)

DEPOSITION OF STUART S. KAPLAN, M.D., F.A.C.S.

Taken on Friday, January 4, 2019

By a Certified Court Reporter

At 4:12 p.m.

At 2471 Professional Court

Las Vegas, Nevada

Reported by: Carla N. Bywaters, CCR 866

Job No. 30638

A -- don't like -- I think I'm going to -- I just wouldn't have used that word "negate" for the reasons like I have described.

Q Sure. I'm with you. However, I am interested in the compressive pathology that you removed, and that, of course, would be what, the hardware?

A The hardware.

Q Okay. Is there -- well, that seems to suggest that the pedicle screw at S1 L5 or either of them or both was making some contact and compressing the nerve root?

A I was concerned.

Q Okay.

A I was concerned based on what she told me, i.e., that her leg pain was worse. I was concerned based upon the CT scan with her clinical description.

Q So putting that all together, it was your conclusion that there was a compression due to either or both of those screws?

A I felt so.

Q All right. And that's why you operated?

A Yes, sir.

Q And I don't want to go through it in a lot of detail, because I know other people will probably have questions as well, but you do mention some costs in

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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 MOTION FOR RECONSIDERATION ON ORDER SHORTENING TIME

DATE OF HEARING: April 3, 2019

TIME OF HEARING: 9:00 a.m.

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 Motion for Reconsideration on Order Shortening Time.

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 Motion for Reconsideration.

DATED this 27th day of March, 2019.

CARROLL, KELLY, TROTTER,
FRANZEN, McBRIDE & PEABODY

Heather S. Hall

ROBERT C. McBRIDE, ESQ.
Nevada Bar No.: 7082
HEATHER S. HALL, ESQ.
Nevada Bar No.: 10608
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

MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

Plaintiff erroneously contends Defendants' Motion for Summary Judgment filed on an Order Shortening Time was untimely. Plf's Mtn., 5:9-10. To the contrary, the Motion was filed on the deadline for dispositive motions set for this Court. *See* Order Granting in part and Denying in Part Joint Motion, attached as **Exhibit "A"**, which extended the dispositive motion deadline to March 4, 2019. Further, a defendant may move for summary judgment at any time. *Cummings v. Las Vegas Mun. Corp.*, 88 Nev. 479, 481, 499 P.2d 650, 651 (1972) (citing NRCP 56(b)). The Motion for Summary Judgment was timely submitted and this Court's ruling

Furthermore, this Court's March 14, 2019 Order was not erroneous. Reconsideration is not warranted as this Court's ruling was correct. Defendants' Motion for Summary Judgment did not contend that the settlement agreement entered into by Republic and Marie Gonzales failed to preserve a right to sue medical providers for contribution. Instead, the Motion asserted that, under Nevada law, Republic has no right to contribution because it is not a joint tortfeasor with Dr. Cash. This Court correctly determined that Dr. Cash and Republic are successive tortfeasors and NRS 17.225 does not apply. *See* Order, 3:25 – 4:5. Plaintiff alleges that Dr. Cash's medical care caused a "new and different injury" and the Court's ruling that this allegation is one of successive tortfeasors is correct. Nevada law is clear that there is no right to contribution among successive tortfeasors. *See* NRS 17.225. You must be joint tortfeasors for a right to contribution to exist.

Plaintiff's Motion for Reconsideration should be denied as Plaintiff has failed to provide any sufficient basis to reconsider this Court's previous Order. Plaintiff's Motion for Reconsideration rehashes the same arguments, theories and facts which have already been decisively ruled upon by the Court. Thus, the instant Motion fails to meet the standard for reconsideration. Merely disagreeing with the decision of this Court does not permit such a filing. This Court appropriately applied the law to the facts contained in the Second Amended Complaint. This Court should deny the Motion for Reconsideration and allow its prior ruling to

stand.

II.

ARGUMENT

A. RECONSIDERATION IS NOT WARRANTED.

Rehearing is appropriate where "substantially different evidence is subsequently introduced or the decision is ***clearly wrong***." *Masonry and Tile Contractors Ass'n of Southern Nevada v. Jolly, Urga & Wirth, Ltd.*, 113 Nev. 737, 741, 941 P.2d 489 (1997) (*citing Little Earth of United Tribes v. Department of Housing*, 807 F.2d 1433, 1441 (8th Cir. 1986)); *see also, Moore v. City of Las Vegas*, 92 Nev. 402, 405, 551 P.2d 244, 246 (1976) ("Only in very rare instances in which ***new issues of fact or law*** are raised supporting a ruling contrary to the ruling already reached should a motion for rehearing be granted.") [Emphasis added].

Here, Plaintiff provides no basis for the Court to reconsider its Order. "A district court may reconsider a previously decided issue if substantially different evidence is subsequently introduced or the decision is **clearly erroneous**." *Masonry and Tile v. Jolley, Urga & Wirth*, 113 Nev. 737, 741, 941 P.2d 486, 489 (1997) [emphasis added]. Plaintiff's Motion for Reconsideration asks this Court to reconsider its Order granting Defendants' Motion for Summary Judgment, but has presented no new issues of fact or law to support a ruling contrary to the ruling already reached by this Court. Further, Plaintiff has presented nothing to support its argument that the Court's prior ruling was clearly erroneous.

B. RECONSIDERATION SHOULD BE DENIED AS THIS COURT APPROPRIATELY DETERMINED THAT PLAINTIFF AND DEFENDANTS ARE SUCCESSIVE TORTFEASORS.

It is a fundamental principle of tort law that, in order to be joint tortfeasors, the parties' negligence must have concurred in causing the same harm to the injured party. Allowance of contribution is premised upon each tortfeasor being responsible for a **single** injury. The Nevada Supreme Court has considered the issue of joint tortfeasors and successive tortfeasors in the context of a contribution claim. *Disc. Tire Co. of Nev. v. Fisher Sand & Gravel Co.*, 2017 Nev. Unpub. LEXIS 235, 400 P.3d 244 (holding that two parties were joint tortfeasors, not successive tortfeasors). In *Disc. Tire Co.*, the tire company was sued following a vehicle accident that

resulted in the deaths of two adults and injuries to three minor children. *Id.* at *2. Discount Tire then filed suit against the Nevada Department of Transportation and a company doing improvements on the road, Fisher Sand & Gravel Co., alleging they had failed to maintain safety protocols. *Id.* Both parties were granted summary judgment and Discount Tire only appealed the summary judgment as to Fisher Sand & Gravel. *Id.*

In considering the argument that the parties were successive, not joint tortfeasors, the Court discussed the definitions of those terms:

> *Compare Joint Tortfeasors, Black's Law Dictionary* (10th ed. 2014) (defining joint tortfeasors as "[t]wo or more tortfeasors who contributed to the claimant's injury and who may be joined as defendants in the same lawsuit'), and 74 Am. Jur. 2d Torts § 64 (2012) (providing that "joint tortfeasors act negligently—either in voluntary, intentional concert, or ***separately and independently***—to produce a ***single indivisible injury***" (emphases added)), with *Hansen v. Collett*, 79 Nev. 159, 167, 380 P.2d 301, 305 (1963) (providing that successive tortfeasors must produce acts "differing in time and place of commission as well as in nature, [causing] ***two separate injuries*** [that] gave rise to two distinct causes of action" (emphasis added)), and *Successive Tort feasors, Black's Law Dictionary* (10th ed. 2014) (defining successive tortfeasors as "[t]wo or more tortfeasors whose negligence occurs at different times and causes different injuries to the same third party" (emphasis added)).

Id. at *7.

In reaching its holding, the Supreme Court focused on the fact that there was no dispute that there was one, indivisible injury suffered by the family. *Id.* at *8. Thus, the Court concluded the tire company and gravel company were joint tortfeasors causing the same injury. *Id.*

Here, the undisputed facts in this case are that Dr. Cash and Republic are successive tortfeasors. Republic has never alleged that there was one, indivisible injury suffered by Ms. Gonzales. Republic alleges Dr. Cash's January 29, 2013 medical care caused a new, independent injury from the injuries Ms. Gonzales suffered during the January 14, 2012 car crash. Where each tortfeasor causes a separate and distinct injury to the victim, as Republic alleges here, they are **successive tortfeasors**. In the absence of a joint tortfeasor relationship, there is no legal basis for allowing Republic to recoup a proportionate share from Dr. Cash for harm which he did not contribute to. By its own allegations, Republic does not claim that these Defendants are joint tortfeasors with Republic. Republic cannot establish it is entitled to contribution from Dr. Cash as the parties are not joint tortfeasors.

Thus, this Court's Order finding exactly that – Republic and Dr. Cash are successive tortfeasors – is based on long-standing Nevada law and should not be overturned. Accordingly, this Motion for Reconsideration should be denied.

C. THE COURT'S MARCH 14, 2019 ORDER SHOULD NOT BE DISTURBED.

Plaintiff's Motion for Reconsideration tries to raise additional arguments in opposition to the Motion for Summary Judgment that could have and should have been raised in the original opposition filed by Republic. This is improper. Nevada law is clear that "points or contentions not raised, or passed over in silence on the original hearing, cannot be maintained or considered on petition for rehearing." *Chowdhry v. NLVH, Inc.*, 111 Nev. 560, 562 893 P. 2d 385, 387 (1995).

Even if this Court were to consider the new arguments, they do not provide a basis for reversing this Court's March 14, 2019 Order. First, Plaintiff asserts that nowhere in NRS 17.225 are the terms "joint tortfeasor" and "successive tortfeasor" mentioned. Plf's Mtn., 7:13 – 14. This is semantics. As recognized in this Court's Order, NRS 17.225 only allows for a right of contribution "where two or more persons become jointly or severally liable in tort ***for the same injury*** to person . . ." NRS 17.225 (emphasis added); *Court's Order*, 2:5 – 10. Both in Republic's Second Amended Complaint, as well as in the Motion for Reconsideration, Republic alleges there were two injuries. At paragraph 56 of the Second Amended Complaint, Republic alleges "[a]s a direct and proximate result of Defendants' negligence, gross negligence, recklessness, and failure to use due care Gonzalez [sic] suffered new and different injuries from those allegedly suffered in the motor vehicle accident of January 14, 2012." *See* Pl.'s Second Amd. Compl. at ¶56. In the Motion for Reconsideration, Plaintiff argues "[t]here were only two injuries in this case – the first from the traffic accident; and the second from what Republic contends was medical negligence from the following year." *See* Plf's Mtn., 7:20 -21. Because Plaintiff asserts there were two separate, distinct injuries, NRS 17.225 does not apply. This Court's conclusion that "There was not an 'indivisible injury,' but the acts (motor vehicle accident and separate alleged negligence of Dr. Cash) occurred at different times and placed and allegedly caused 'two separate injuries," which gave rise to two distinct causes of action" is

correct. Order, 3:27 – 4:1.

Plaintiff cites to 7 Am. Jur.2d Torts 67 which discusses the definition of successive tortfeasors and in no way supports the argument that Nevada law allows for a right of contribution among successive tortfeasors. There is no right of contribution when the alleged negligence of negligent actors did not cause a single, indivisible injury.

Plaintiff correctly quotes the Restatement 2d of Torts, section 457 which states that the damages assessable against an initial negligent actor include not only the injury originally caused by the actor's negligence, but also the harm resulting from medical treatment sought in response to the injury, even if rendered in a negligent manner, it reasonably flows from the initial injury, but ignores the facts of this case. *See* Rest. 2d Torts § 457. Throughout this litigation, Plaintiff Republic has maintained that the January 29, 2013 surgery Dr. Cash performed was **not** necessary because of injuries Ms. Gonzales sustained during the subject car crash over one year earlier. Instead, Plaintiffs have contended that Ms. Gonzales only had some low axial back pain and neck sprain/strain following the accident, which would not have caused the need for Dr. Cash's surgery. Plaintiff cannot now take a contrary position to try and cobble together an argument that this Court should ignore controlling Nevada law on contribution claims in order to save this claim which fails as a matter of law.

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III.

CONCLUSION

Based upon the foregoing, Plaintiff's Motion for Reconsideration on Order Shortening Time should be denied. The decision made by this Court and entry of summary judgment was appropriate and there is no basis to reconsider that ruling.

DATED this 27th day of March, 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 21st day of March, 2019, 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 MOTION FOR RECONSIDERATION ON ORDER SHORTENING TIME** 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.

David Barron, Esq.
John D. Barron, Esq.
BARRON & PRUITT, LLP
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North Las Vegas, NV 89031
Attorneys for Plaintiff

An Employee of *CARROLL, KELLY, TROTTER, FRANZEN, McBRIDE & PEABODY*

EXHIBIT "A"

EXHIBIT "A"

ORDR

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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

ORDER ON JOINT DEFENSE MOTION TO EXTEND DISCOVERY AND CONTINUE TRIAL ON ORDER SHORTENING TIME

DATE OF HEARING: 1/30/19

TIME OF HEARING: 9:00 A.M.

ORDER ON JOINT DEFENSE MOTION TO EXTEND DISCOVERY AND CONTINUE TRIAL ON ORDER SHORTENING TIME

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; Defendants BRUCE KATUNA, M.D. and ROCKY MOUNTAIN NEURODIAGNOSTICS, LLC; Defendants JAMES D. BALODIMAS, M.D. and JAMES D. BALODIMAS, M.D., P.C.; and Defendant DANIELLE MILLER a/k/a DANIELLE SHOPSHIRE's Joint Defense Motion to Extend Discovery and Continue Trial on Order Shortening Time came on for hearing on January 30, 2019. The Court, having considered the Motion, Opposition and Reply, and oral argument of counsel, hereby finds as follows:

1. The Joint Defense Motion to Extend Discovery and Continue Trial on Order Shortening Time is **GRANTED IN PART, DENIED IN PART.**
2. The Motion is granted in so far as it seeks to extend discovery. The current discovery cut-off of January 31, 2019 is extended. The parties shall have until March 4, 2019 to complete all remaining discovery.
3. All parties must file dispositive motions by March 4, 2019, the date of the Calendar Call in this matter.
4. All parties must also file motions in limine by March 4, 2019.
5. The Motion is denied in so far as it seeks to continue the trial date. The current firm trial date of March 18, 2019 will remain.
6. The Calendar Call will remain on March 4, 2019 at 9:00 a.m. The Court may revisit the issue of a trial continuance, if necessary, at the time of the Calendar Call.
7. The parties are encouraged to take all necessary steps to complete discovery in advance of the current trial date. If the parties are unable to satisfactorily complete discovery before the March 4, 2019 discovery cut-off, this Court will entertain a

Motion to Continue Trial.

8. If any discovery disputes arise during the remaining discovery period, this Court will hear those matters on an Order Shortening Time, due to the shortened amount of time for additional discovery.

IT IS SO ORDERED.

DISTRICT COURT JUDGE

Respectfully Submitted By:

DATED this 12th day of February, 2019.

CARROLL, KELLY, TROTTER,
FRANZEN, McBRIDE & PEABODY

/s/Heather S. Hall

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Approved as to Form and Content by: BARRON & PRUITT By:_____ DAVID BARRON, ESQ. Nevada Bar No.: 142 3890 West Ann Road North Las Vegas, Nevada 89031 Attorneys for Plaintiff	*Approved as to Form and Content by* OLSON CANNON GORMLEY ANGULO & STOBERSKI By:_____ STEPHANIE ZINNA, ESQ. Nevada Bar No.: 011488 9950 W. Cheyenne Avenue Las Vegas, NV 89129 *Attorneys for Defendants Katuna, M.D. and Rocky Mountain Neurodiagnostics, LLC*
Approved as to Form and Content by: JOHN H. COTTON & ASSOCIATES, LTD. By:_____ MICHAEL D. NAVRATIL, ESQ. Nevada Bar No.: 007460 7900 West Sahara Avenue, Suite 200 Las Vegas, NV 89117 *Attorneys for Defendants James D. Balodimas, M.D. and James D. Balodimas, M.D., P.C.*	*Approved as to Form and Content by:* LAURIA TOKUNAGA GATES & LINN, LLP By:_____ ANTHONY LAURIA, ESQ. Nevada Bar No.: 004114 601 South Seventh Street Las Vegas, NV 89101 *Attorneys for Defendant Danielle Miller a/k/a Danielle Shopshire*

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 9th day of February, 2019, I served a true and correct copy of the foregoing **ORDER ON JOINT DEFENSE MOTION TO EXTEND DISCOVERY AND CONTINUE TRIAL ON ORDER SHORTENING TIME** 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 No.: XXX

REPUBLIC SILVER STATE DISPOSAL, INC.'S REPLY IN SUPPORT OF MOTION FOR RECONSIDERATIO ON ORDER SHORTENING TIME

Hearing Date: 4/3/19

Hearing Time: 9:00 AM

REPUBLIC SILVER STATE DISPOSAL, INC., by and through its counsel BARRON & PRUITT, LLP, submits the following Reply in Support of its Motion for Reconsideration of the Court's Order of March 15, 2019, granting the motion for summary judgment Defendant Andrew M. Cash, M.D. and Desert Institute of Spine Care (DISC).

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MEMORANDUM OF POINTS AND AUTHORITES

1. Prefatory statement

EDCR 2.24 extends to the district courts in Eighth Judicial District the discretion to reconsider previous rulings upon a timely motion for reconsideration. Cf. Bower v. Harrah's Laughlin, Inc., 125 Nev. 470, 479, 215 P.3d 709, 716 (2109) (district court had authority to rehear a motion for summary judgment under NRCP 54(b) before entering final judgment as to all parties). Reconsidering a prior ruling is entirely appropriate in determining whether the ruling was "clearly erroneous." Masonry and Tile v. Jolley, Urga & Wirth, 113 Nev. 737, 741, 941 P.2d 486, 489 (1997) (subsequent district judge hearing the same matter could reconsider a ruling by the prior judge under the "clearly erroneous" standard); North Main LLC v. Dist. Ct., 2012 WL 1912173, *2 (2012) (a district court does not abuse its discretion in reconsidering its own previous ruling "if the decision was clearly erroneous"). Republic believes the Court's Order of March 15, 2019 granting the Cash defendants' Motion for Summary Judgment was clearly erroneous, and should be corrected at the trial level.

2. The right of contribution is dependent on "joint or several liability in tort for the same injury."

The Court's manifest error was finding that because Republic alleged that there were two tortious events and differing injuries arising from the January 2012 traffic accident and Dr. Cash's negligent medical care a year later that Republic and the Cash defendants were "successive" and not "joint" tortfeasors, leaving Republic with no right of contribution under the Uniform Contribution Among Tortfeasors Act (UCATA), NRS 17.225 et seq. The crux of this decision is:

> If there is a "new and different injury," then the parties cannot be "joint tortfeasors," but instead they would be successive tortfeasors. There was not an "indivisible injury," but the acts (motor vehicle accident and separate alleged negligence of Dr. Cash) occurred at different times and places and allegedly caused "two separate injuries," which gave raise to two distinct causes of action. Consequently this Court has no choice but to conclude that Dr. Cash and Republic are "successive" and not "joint tortfeasors." Because they are "successive" and not "joint tortfeasors[”], NRS 17.225 cannot apply, and there can be no claim for contribution, as a matter of law.

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Order, pp. 3-4 (footnote omitted).

The Cash Opposition to Republic's motion offers nothing to buttress the Court's rationale, except the supposedly "fundamental principal of tort law that, in order to be joint tortfeasors, the parties' negligence must have concurred in causing the same harm to the injured party." Opposition, p. 4; (emphasis is original). At best, this is an over-statement, or perhaps even a genuine misunderstanding of what's necessary for multiple parties to be "joint" tortfeasors.[1] Certainly it's unaccompanied by authority. What is certain however is that further injury due to negligent medical care after an initial injury will always be a "successive" tort, caused by someone other than the original actor. In that sense the Order's rationale is flawed at best.

But participation in a tortious single act or shared omission is entirely unnecessary for joint liability. For example, an employer held vicariously liable under notions of *respondeat superior* will not have acted "concurrently" with the negligent employee. Indeed, employer need not have acted at all since the only predicate for the employer to be "jointly" liable for the employee's tort is that the employee was in the course of his or her employment. National Convenience Stores v. Fantauzzi, 94 Nev. 655, 658, 584 P.2d 689, 691 (1978). And just as Republic's liability to Ms. Gonzales in her bodily injury action was imposed upon it vicariously, liability for Dr. Cash's treatment was "jointly" imposed on Republic by operation of law as well.

Central to the Court's decision was that the "successive" nature of the two tortious events ruled out a "single indivisible injury." This was done while at the same time acknowledging: 1) Ms. Gonzales' right to recover from Republic damages from the 2012 accident; 2) her separate right to sue Dr. Cash as well for later damages caused by his alleged professional negligence; and 3) even though Ms. Gonzales chose not to sue Dr. Cash (easily in the same suit), Republic was still liable for damages arising from the medical negligence and obligated to make good on them by operation of "Restatement 2d of Torts §457 and Nev. Med. Mal Jury Inst. 9MM.8." Order, p. 4, fn. 1.

The Court's three-part analysis prompts the question: If there was no "single indivisible injury" supporting an otherwise perfected contribution claim[2]—and instead there were two separate ones—

[1] Even Professor Prosser noted trouble with the concept, believing "joint tortfeasor meant radically different things to different courts, and often to the same court." Prosser, Joint Torts and Several Liability, 25 Calif. Law Review 413 (1936-37).

[2] See Order re Motions to Dismiss, December 13, 2016; Order on Defedants' Motions to Compel, etc., March 13, 2019.

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why would Republic be liable for both of them? The answer is as we explained it in the motion for reconsideration. First, there were indeed two separate liability-producing events. The first was the original injury from the traffic accident; and the second, was the "successive" injury from what Republic alleges was Dr. Cash's malpractice. Republic had no recourse against Dr. Cash for the January 2012 accident since his liability arises out of his own treatment. Gagnon v. Lakes Regional Hosp., 465 A.2d 1121, 1223 (N.H. 1983) ("the defendant physicians and hospital are not joint tortfeasors *vis-a-vis* the driver of the automobile who settled with the plaintiff…they are successive or independent wrongdoers who are not liable for the same loss as the driver because their liability arises solely from their alleged negligent conduct which aggravated the plaintiff's existing injury"). But Republic and Dr. Cash were jointly "liable in tort for the same injury" under NRS 17.225(1) for those injuries caused by Cash's "professional negligence."

3. Original tortfeasors are jointly liable with medical practitioners for negligent treatment after the "original" injury.

Nevada accepts the "well-settled law that the original tortfeasor is liable for the malpractice of the attending physicians." Hansen v. Collett, 79 Nev. 159, 165, 380 P.2d 301, 304 (1963); see also Morgan v. Cohen, 523 A.2d 1003, 1006 (Md. App. 1987) ("Courts in general have correctly characterized the negligent treatment as a subsequent tort for which the original tortfeasor is jointly liable"). In the motion for reconsideration Republic discussed Restatement (2d) of Torts §457, expressing the same principle in Hansen v. Collett that "If the negligent actor is liable for another's bodily injury, he is also subject to liability for any additional bodily harm resulting from normal efforts of third persons in rendering aid which the other's injury reasonably requires, *irrespective of whether such acts are done in a proper or negligent manner*." Emphasis supplied; see also Calif. Civ. Jury Inst. 3929 ("If you decide that [the defendant] is legally responsible for [the plaintiff's] harm, [the defendant] is also responsible for any additional harm resulting from the acts of others in providing medical treatment or other aid that [the plaintiff's] injury reasonably required, even if those acts were negligently performed").

The so-called "successive liability rule" was also discussed in the motion for reconsideration. It is essentially that the original negligent actor is liable for subsequent harm because it is "foreseeable as a matter of law that the original injury may lead to a causally distinct additional injury" if there is

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later negligent medical care. 7 Am. Jur.2d Torts §67. So the rule is that the original tortfeasor is jointly liable with the malpracticing physician for the latter's "successive" act of negligence.

4. The UCATA is premised on "joint or several liability," not "joint and several negligence.

Sometimes the concepts of "joint and several negligence" and "joint and several liability" are conflated. But simply put, it is inconsequential under the UCATA if the shared liability of the contribution plaintiff and defendant arises from "joint negligence." Instead contribution under NRS 17.225(1) is triggered "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[.]"

As shown above, and in the motion for reconsideration, Republic and Cash did "become jointly or severally liable in tort for the same injury"—in this case that injury resulting from Dr. Cash's medical negligence. And in fact, the necessity of a "common liability"—as opposed to "common negligence"—is exactly how the UCATA has been interpreted in other jurisdictions. See Lutz v. Boltz, 100 A.2d 647, 648 (Del. Supr. 1953) (under the UCATA "it is joint or several *liability*, rather than joint or concurring *negligence*, which determines the right of contribution") (emphasis is original); accord ICI America, Inc. v. Martin-Murietta Corp., 368 F. Supp. 1148, 1151 (D. Del. 1974) (quoting Lutz, that it is indispensable under the Delaware UCATA for there to be "common liability" to the injured party since "it is joint or several *liability*, rather than joint or concurring *negligence*, which determines the right of contribution"). See also Highway Const. Co. v. Moses, 483 F.2d 812, 815 (8th Cir. 1973) ("the Supreme Court of South Dakota has made it clear that the right to contribution is determined by whether there is joint or several *liability* rather than by the presence of joint or concurring negligence [and]…[h]ence there can be no right to contribution unless the injured party has a possible remedy against both tortfeasors"); Kussman v. City and Co. of Denver, 706 P.2d 776, 780 (Colo. 1985) ("common liability" giving rise to a right of contribution exists only when tortfeasors are "jointly or severally liable in tort for the same injury"); Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., 518 S.E.2d 301, 309 (S.C. 1999) (the "basic premise" of contribution under the UCATA is "commonality" and "'common liability,' rather than joint negligence, determine[s] the right to contribution"); Parler & Wobber v. Miles & Stockbridge, 756 A.2d 526, 534 (Md. App. 2000) ("Courts and commentators have been careful to note a distinction between common liability and joint

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negligence. Contribution rests on common liability, not on joint negligence or joint tort. Common liability exists when two or more actors are liable to an injured party for the same damages, even though their liability may rest on different grounds"); 1 Speiser, The American Law of Torts §3:21, pp. 456-57 ("it is not ordinarily essential that there be joint negligence in the sense that all the wrongdoers fail in the performance of an identical duty; contribution may be had among independent tortfeasors whose combined negligence, or whose omission of separate acts of care at the same instant, concur and contribute to the same injury").

5. The UCATA extends the right of contribution to "successive" medical tortfeasors.

"The definition in the [UCATA] making those jointly *or* severally liable for the same injury literally embraces successive wrongdoers liable for the same harm even though one may also be liable to the injured person for additional damages." Trieschman v. Eaton, 166 A.2d 892, 894 (Md. App. 1961); see also Lewis ex rel. Lewis v. Samson, 35 P.3d 972, 984 (N.M. 2001) ("medical malpractice committed while treating an injury caused by an initial tortfeasor and resulting enhanced injury constitutes a successive tort").

In Lujan v. Healthsouth Rehabilitation Corp., 902 P.2d 1025 (N.M. 1995), the Supreme Court of New Mexico considered a traffic accident case where the accident victim received negligent medical treatment, causing additional injury. The Lujan court found the "original" tortfeasor and negligent medical facility were not "concurrent" tortfeasors since their conduct was entirely different. It then analyzed the same issues presented here, of a "successive" tort occasioned by negligent treatment following an initial injury; whether the "original" tortfeasor was also liable for damages arising from the medical tort; the scope of "successive" tortfeasors own liability for the medical negligence; and whether the original tortfeasor had recourse against the successively liable treatment provider:

> When a person causes an injury to another which requires medical treatment, it is foreseeable that the treatment, whether provided properly or negligently, will cause additional harm.(Citations.) Thus, premised upon the concept that the original tort is a proximate cause of the harm attributable to negligent treatment, courts have held the original tortfeasor liable both for the original injury and for the harm caused by negligent medical treatment.

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> New Mexico follows the general rule that an original tortfeasor will be held liable for the "concurrent or succeeding negligence of a third person which does not break the sequence of events." (Citation). Hence, if negligent treatment was the foreseeable result of the January 1990 collision, Jaramillo [the original tortfeasor] could have been held liable for the total harm suffered by Martin Lujan; both the injury she caused in the collision and the aggravation of that injury by Healthsouth. Negligent treatment is thus a successive tort for which the original tortfeasor is jointly liable. (Citation.)
>
> Although an original tortfeasor may be held liable for plaintiff's entire harm, a medical care provider who negligently aggravates the plaintiff's initial injuries is not jointly and severally liable for the entire harm, but is liable only for the additional harm caused by the negligent treatment. (Citation.) The medical care provider is liable only for the enhanced injury because the total harm is divisible into separate injuries—that which the patient suffered before being treated by the medical care provider and that which was caused by the medical care provider in the course of treatment. In cases involving successive tortfeasors whose separate causal contributions to the plaintiff's harm can be measured, the doctrine of joint and several liability applies only to the enhanced portion of the injury.
>
> Even though the original tortfeasor may be held liable for both the original and the enhanced injury, *the imposition of entire liability is only temporary.* The original tortfeasor, whose duty is of a different character and who is not in pari delicto with a successive medical care provider with respect to the negligent treatment, can shift through indemnification the responsibility for an enhanced injury. (Citations.) Thus liability for the enhanced injury may be shifted to the successive tortfeasor alone, regardless of who plaintiff chooses to pursue for damages.

902 P.2d at 1029-30; (emphasis is original).

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Conclusion

For the reasons discussed above and in the motion for reconsideration, the Court committed an error by concluding that the case could be disposed of as a matter of law. Certainly the fact that Dr. Cash's alleged negligence was a "successive" tort was insufficient since negligent medical treatment will always come after the initial injury. Nor is the fact that Republic and Dr. Cash's conduct were different in kind of consequence. The injuries from the medical negligence are easily identified as those resulting from the breached pedicle screws, and the extended time that they were compressing the left L5 and S1 nerve roots. Finally, rather than there being no "indivisible single injury" for which Republic and Dr. Cash were jointly "liable in tort," the injuries were those stemming from the medical negligence—a "joint" liability imposed upon Republic as a matter of law. The Order of March 15, 2019 should be vacated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 29th day of March, 2019, I served the foregoing **REPLY** 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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DISTRICT COURT

CLARK COUNTY, NEVADA

REPUBLIC SILVER STATE DISPOSAL, INC., Plaintiff, vs. ANDREW M. CASH, M.D., Defendant.	)	CASE NO. A738123 DEPT. NO. XXX

REPORTER'S TRANSCRIPT OF PROCEEDINGS

REPUBLIC SILVER STATE DISPOSAL, INC.'s MOTION FOR RECONSIDERATION ON ORDER SHORTENING TIME

BEFORE THE HONORABLE JERRY A. WIESE, II

WEDNESDAY, APRIL 3, 2019

AT 10:12 A.M.

LAS VEGAS, NEVADA

REPORTED BY: KIMBERLY A. FARKAS, NV CCR No. 741

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LAS VEGAS, NEVADA, WEDNESDAY, APRIL 3, 2019

P R O C E E D I N G S

* * * * * * *

THE COURT: *Republic Silver State v. Cash*, let's do that one next. We got the parties here on that?

MR. BARRON: We sure do, Your Honor. You must have known that I have a deposition at 11:30.

THE COURT: I didn't know that, but we're usually done with this calendar by about 10:30.

MS. HALL: Usually goes really fast.

MR. BARRON: If I ever had to hire a lawyer, it would be Don Campbell.

THE COURT: So this is on -- Mr. Barron, this is on for your motion for reconsideration. Let me just kind of make a statement and then I'll let you make your argument if you want. I don't think it's a secret that I don't like to grant motions for summary judgment and motions to dismiss in this department, and I do everything I can to avoid doing that.

In this case, I've looked at your motion to reconsider and all of the citations that you raise. The dilemma that I have is I look at the Nevada Supreme Court cases and I look at the statute that we have, and

when the complaint alleges that it's a separate and distinct injury and the statute says that there can't be a contribution claim unless there's joint -- unless they're joint tortfeasors, and then the case law defines and explains joint versus successive, I kind of have to follow what the Supreme Court does whether or not I like the outcome. I can tell you in this case I don't like the outcome because I'd rather have the case go to trial.

MR. BARRON: Sure. You're obviously talking about *Discount Tire*?

THE COURT: Yeah.

MR. BARRON: Okay. You know what, I talked about *Discount Tire.* I took it out of the reply. I'll tell you why. That case is not recorded. They're not talking to us. They're talking to the litigants and the lawyers involved.

If you take a look at that case, what they said was, as a matter of law, a contribution claim has to be provided for in the release by extinguishing liability. This Court is very familiar with it. There was a second argument. If that didn't work, how about equitable indemnity? And the Court said, wait a minute. You're joint tortfeasors. You both caused the same injury at the same time, I think. And the reason

I have to think that is they really don't go into the facts, nor, of course, do we even have the release.

Then they contrast a joint tortfeasor from a successive tortfeasor. And the idea that I think they were trying to express was you can have one plaintiff, but if that plaintiff is hurt twice, that's a successive tort. That's the beginning of the analysis here.

There clearly was a successive tort. And I cited case after case. I could have kept going. And all of these courts that also have the uniform act say the same thing, don't look at concurrent negligence or joint negligence. You've got to focus on joint liability.

And in the case of medical malpractice following an original injury, I don't mean to be facetious, but there's no way short of time travel that Andrew Cash, Dr. Andrew Cash, and Republic could have ever been liable at the same time for the same event happening on July 14, 2012. Just doesn't happen.

THE COURT: Well, they're both liable to the plaintiff.

MR. BARRON: Exactly. Now, let me explain to you --

THE COURT: To the injured plaintiff.

MR. BARRON: Right. And let me explain to you. And I hope I had explained it but maybe I didn't.

The statute talks about joint or several liability. Doesn't say you have to be jointly and severally liable. You've got two events. I think we can agree to that. The first one is a traffic accident. The second is the act of medical negligence.

Republic is severally liable for the first one, simple as that. Cash cannot not be. He can only be liable for what he did. And if he committed malpractice, which, by the way, was the fact question ultimately that this Court disposed of, the result, if the Court agreed, would be he's severally liable to her for that.

Where the joint liability comes in is that, as a matter of law under *Hansen*, under the restatement, under the third restatement, the liability of the physician or the negligent medical practitioner is imposed on the original act. That's the original tortfeasor rule, successive liability rule, whatever you want to call it.

And the reason that's done is, and you see it throughout the cases, it's foreseeable that that original injury is going to require treatment. And if that treatment is negligently performed and enhances an

injury or causes an additional injury, that original actor, since it was foreseeable, is also liable for that injury.

So you've got out of two events two severally liable defendants, Republic for the first accident, Dr. Cash for his own malpractice, and you've got a joint liability with Republic and Cash because of the restatement. And it's a matter of law that liability is imposed. That's what we extinguish in that release.

So, you know, as I looked at the cases, and the one New Jersey case I thought was right on, said don't look at the negligence. You're looking for joint liability. Is there a joint liability here? There has to be.

Your Honor, you recognized it. You said, look, this lady could sue Dr. Cash. Pardon me. She could sue Republic. She didn't sue Dr. Cash, but that doesn't make any difference because Republic is already liable for those medical malpractice damages. That's the same injury.

So I think, if I could put it very succinctly, forget the first act. If you're concentrating on that, you're looking at the wrong harm. It's the medical malpractice, and then are both Dr. Cash and Republic liable in tort for that same

injury. The answer is yes. And that's what you need for contribution.

Now, I don't know if I've explained it clearly. I hope I have. It may not be the easiest thing in the world to understand, frankly. I've probably been thinking about this stuff way too long. But that's the mistake the Court made. And, you know what, I looked for cases that backed you up. I couldn't find any.

THE COURT: Okay. Ms. Hall.

MS. HALL: Thank you, Your Honor. First I want to point out, which I think the Court is aware of, that they haven't met the standard for reconsideration. They haven't provided any new evidence, any new facts, any new law that support ruling contrary to the Court's decision in March.

THE COURT: He said I was just wrong. I was clearly erroneous.

MS. HALL: That is his argument. But these arguments that are raised in the motion to reconsider are the same arguments which were raised in the opposition to my motion for summary judgment with one exception. In the opposition to my motion for summary judgment, plaintiff made the argument that the restatement does not apply because the January 29th,

2013 surgery wasn't needed due to bodily harm from the January 14, 2012 car crash.

So first, as I've said in the briefing, arguments of counsel are not evidence. But I think it's important to point out that in this motion to reconsider, they're now taking an entirely contrary position to what was taken in opposition to my motion for summary judgment. And now they're claiming, oh, yes, the restatement applies.

And the restatement is -- we talked about this briefly at the last hearing. It talks about when you're rendering aid which the other's injury reasonable requires. That's when the *Hansen* decision in Nevada and you become responsible for any alleged malpractice of the physicians who were rendering aid due to the injury caused from the original act.

They have always in this case taken the position that we did not cause any injury that needed a surgery. And I cited in the motion for summary judgment briefing the testimony of Republic's own expert who's the primary expert against Dr. Cash, that this surgery wasn't needed because of anything that happened during the car crash. This surgery was either needed because of a degenerative issue or not at all and Dr. Cash committed malpractice because he did an

unnecessary surgery. That's the testimony of their expert. The allegation in their amended complaint that was just filed in January says that this was a new and independent injury.

So all of the -- first, most of the cases, I think, that are cited in the motion to reconsider are from other jurisdictions. Of the ones that are specific to Nevada, you have that *Discount Tire* case.

In that case, as we discussed in the MSJ briefing, that case is distinguishable because it talks about in that particular case there was no dispute that there was one indivisible injury. That's not the circumstance here. I cited that case in the reply brief for the authority and the definitions of joint and successive tortfeasors.

And I think, Your Honor, and I don't say that with any facetiousness, I do agree that it's known that it's not easy to get a dispositive motion. And you prefer that cases be heard on the merits. So I know that when Your Honor issued this decision, that you thought through all of these issues, which were all raised in the briefing in the hearing before, and that the decision that was made by this Court was the right decision. Because in Nevada, regardless of what they do in New Jersey, in Nevada, you have to to have joint

tortfeasors to have a contribution claim. And they have always in this case through the evidence, the undisputed evidence, they've always taken the position that we are a successive tortfeasor.

And even in this motion to reconsider, they haven't pointed you to a single piece of admissible evidence suggesting, even suggesting, that we are somehow joint tortfeasors for the alleged medical malpractice. So I think the Court's decision was the right decision, and it should be upheld, and there's no ground to reconsider it.

MR. BARRON: I don't know where the idea comes that we didn't think because we didn't think the accident caused what I'll call a surgical lesion excused Dr. Cash from anything. The cases in the restatement and all the law we've cited says the very same thing. The misdiagnosis and a later injury, same thing as a diagnosis that's proper and then a botched surgery. They're indistinguishable, same stuff.

What we're looking at here is two pedicle screws that go into a neuro foramen. They show up on a CAT scan. They are looked at by Dr. Cash who says, oh, I don't think there's anything wrong here. And he leaves them there for a good five months until Dr. Stuart Kaplan comes along and he says, we got a

problem here.

Now, that's plenty of evidence of medical malpractice. As we've explained, the legal ramification of *Hansen v. Collett* and the restatement is we got stuck with it.

Now, there's that New Mexico case. And by the way, it is reason it's called the uniform act is everybody's got the same law.

So we cited cases from New Mexico, along with others that talked about medical negligence being a successive tort. And that's the *Lujan* case. And I quoted it quite a bit. And what *Lujan* said was, look, we follow the rule that the original tortfeasor will be responsible if there's medical negligence later, enhances an injury, causes additional injury.

That being the case, the two actors, the original and the successive actor, the doc, cannot be concurrent tortfeasors. They go ahead and just say that up front.

Then they look at it and say, well, that being the case, the plaintiff in this traffic accident could have sued both the original tortfeasor and the doctor. That physician was not sued in that case. And the issue there was could that medical facility -- it was a HealthSouth rehab facility -- could it be sued

later. And the New Mexico Supreme Court said, yes, although you're having this liability imposed on you Mr. Original Tortfeasor, it's not going to be there forever because you have a right to go against, in that case HealthSouth. That's exactly what we are doing. The mechanism that we have to do it is the only one that's really available to us and that's contribution.

I don't know where -- how you can conclude otherwise that Republic had liability for the Cash injury. I mean, that's just the law.

If you have any questions, I hope I can answer them. I'm not sure if I can or not, but I can certainly try.

THE COURT: I don't know that I have a question that anybody can answer. The Supreme Court is either going to tell me I'm wrong or I'm right. And I don't really care which they tell me because I'm not crazy about the outcome of the case.

MR. BARRON: Well, reconsider it.

THE COURT: Here's the problem that I've got. Under NRS 17.225 allows for contribution when two or more parties become jointly or severally liable in tort for the same injury to a person. Based on the pleadings that I have to assume that you can prove everything that's in your pleadings for purposes of a

motion to dismiss or summary judgment, it's alleged that they're separate and distinct injuries.

If I look at the *Discount Tire* case, whether that's published or not, they're comparing definitions from Blacks Law Dictionary about joint tortfeasors and successive tortfeasors. And we're talking about separate indivisible injuries. In this case I have to assume that they're separate and distinct injuries, and I don't think that there's a right to contribution.

Now, I agree with you that an original tortfeasor buys the malpractice that happens as a result of treatment that is related to that initial -- that initial accident or liability, but I don't know that I can get from that to the fact that you have a valid contribution claim when there's separate injuries alleged. And that's the dilemma that I have.

MR. BARRON: How can I help you with that? Because we're telling you there were two different injuries. What we're talking about is a liability that's shared for one of them. That's what we're talking about.

THE COURT: To the injured plaintiff, yes.

MR. BARRON: That's what's required under the contribution statute, is that we be liable in tort for the same injury. That injury was the malpractice.

THE COURT: But it's not the same injury based on your contribution claim.

MR. BARRON: I'm sorry. I don't understand or how to answer that. I'm not sure what you mean.

THE COURT: I look at the complaint and I have to do everything in the light most favorable to you, the nonmoving party. In the complaint you don't say it's the same injury. It's a separate and distinct injury.

MR. BARRON: I had to.

THE COURT: I get it. I get it.

MR. BARRON: I had to because it was totally different.

THE COURT: The Supreme Court has got to fix it. I have to decide the case based on the language of the statute. I don't like it either, Mr. Barron. I have to deny it. Sorry. Take it up.

MR. BARRON: This was reported? I'd like to get a transcript, please.

THE COURT: And I'm going to say the same thing on the record this time as I said in the order. When it goes up, because I thought it was going to go up on defendant's part in the past because of my rulings on the application of the medical malpractice statutes, 42.021 and 41.035 and the other ones in 41A,

I would hope that the Supreme Court gives us some guidance on the applicability of those if they kick it back to me so it doesn't have to go back up on a writ.

MR. BARRON: And my intent, Your Honor, is when Republic files their appeal, I plan to cross-appeal just for the sake of efficiency and trying to get all this resolved.

THE COURT: Make sure it goes in front of them at the same time.

MR. BARRON: Hopefully, they won't need to get to those issues because it will be denied as mute.

THE COURT: I wish you both good luck. I don't know. I do the best I can based on how I read the statutes. And there's plenty of times that I make decisions that I don't necessarily like that I think I am compelled to make based on the law that those that sit higher up than me have made.

MR. BARRON: Thanks, Judge.

THE COURT: Good luck.

MS. HALL: Thank you, Your Honor. Did you want me to prepare the order?

THE COURT: Sure. Just run it by him to approve.

(Proceedings concluded at 10:33 A.M.)

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ATTEST: FULL, TRUE, AND ACCURATE TRANSCRIPT OF PROCEEDINGS.

/S/ Kimberly A. Farkas, RPR, CRR

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Attorneys for Plaintiff
Republic Silver State Disposal, Inc.

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

NOTICE OF APPEAL

Notice is hereby given that REPUBLIC SILVER STATE DISPOSAL, INC. ("Plaintiff"), by and through its attorney, David Barron, Esq. of the law firm of BARRON & PRUITT, LLP, hereby appeals to the Supreme Court of Nevada from

1. All judgments and orders in this case;

2. The Order Granting Defendants Andrew M. Cash, MD; Andrew M. Cash, MD, PC and Desert Institute of Spine Care, LLC's Motion for Summary Judgment entered on March 15, 2019, notice of entry of which was served on March 15, 2019 (attached as **Exhibit A**);

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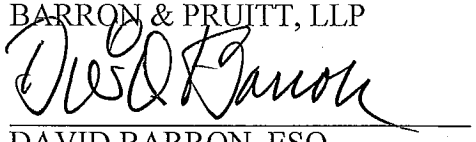
3. The ruling on Plaintiff Republic Silver State Disposal, Inc.'s Motion for Reconsideration (*supplement to this notice of appeal to follow upon entry of written order*); and

4. All other rulings and orders made appealable by the foregoing.

BARRON & PRUITT, LLP



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 10th day of April, 2019, I served the foregoing **NOTICE OF APPEAL** 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*
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*

/s/ Mary Ann Dillard
An Employee of BARRON & PRUITT, LLP

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EXHIBIT A

EXHIBIT A

EXHIBIT A

Electronically Filed
3/15/2019 5:58 AM
Steven D. Grierson
CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA
-oOo-

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

NOTICE OF ENTRY OF ORDER: ORDER RE: DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

You are hereby notified that this Court entered **Order re: Defendant's Motion for Summary Judgment**, a copy of which is attached hereto.

DATED this 15th day of March 2019.

JERRY A WIESE

DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on the date filed, a copy of this Order was electronically served

DISTRICT COURT
CLARK COUNTY, NEVADA
-oOo-

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, Defendants.	CASE NO.: A-16-738123-C DEPT. NO.: 30 ORDER RE: DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendant's Motion for Summary Judgment came on for hearing on Monday, March 11, 2019, at 2:00 p.m. The parties were represented by counsel, who submitted briefs, and argued orally on behalf of their clients. The Court took the matter under advisement, and now issues this Order.

Summary Judgment is appropriate only if "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." NRCP 56. The pleadings and evidence must be construed in the light most favorable to the non-moving party, but the non-moving party must still set forth specific facts demonstrating the existence of a genuine issue of material fact, in order to defeat Summary Judgment. *Collins v. Union Fed. Sav. & Loan Ass'n*, 99 Nev. 284, 294, 662 P.2d 610, 618-619 (1983). The non-moving party must establish a genuine issue of material fact with more than "gossamer threads of whimsy." *Wood v. Safeway*, 121 Nev. 724, 730-31, 121 P.3d 1026 (2005).

Plaintiff's only remaining claim in this action is for contribution against Dr. Cash and the related Defendants, pursuant to NRS 17.225. Defendants argue that Summary Judgment is appropriate because no cause of action for contribution can exist when Republic and Dr. Cash are not "joint tortfeasors," and did not contribute to the same single injury. In support of their argument, Defendants cite to the Plaintiff's

Complaint, in which Plaintiff alleges that, "As a direct and proximate result of Defendants' negligence, . . . Gonzalez suffered new and different injuries from those allegedly suffered in the motor vehicle accident of January 14, 2012." (See Complaint at Paragraph 56).

NRS 17.225 reads in pertinent part 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.
> . . . .

NRS 17.225 (emphasis added).

Defendant suggests that accepting the Plaintiff's allegations as true, Dr. Cash and Republic are not joint tortfeasors, and no right to contribution exists under NRS 17.225.

In his Motion for Summary Judgment, Cash cites to the case of *District of Columbia v. Washington Hospital Center*, 722 A.2d 332 (1998), but Plaintiff responds that such case is inapplicable because the District of Columbia doesn't even have a contribution statute. Such a distinction is important and consequently, this Court cannot rely on that case for its decision in this case.

Nevada's contribution cause of action was created by statute. Defendant cites to the unpublished Nevada Supreme Court Case of *Disc. Tire Co. of Nev. V. Fisher Sand & Gravel Co.*, 400 P.3d 244 (2017 WL 1397333 (Nev. 2017 Unpub), which states the following:

> "Contribution is a creature of statute . . ." *Doctors Co. v. Vincent*, 120 Nev. 644, 560, 98 P.3d 681, 686 (204). "Under the Nevada statutory formulation, the remedy of contribution allows one tortfeasor to extinguish joint liabilities through payment to the injured party, and then seek partial reimbursement from a joint tortfeasor for sums paid in excess of the settling or discharging tortfeasor's equitable share of the common liability." *Id.*, at 651, 98 P.3d at 686.
> . . .

The Nevada Supreme Court discussed the difference between joint tortfeasors and successive tortfeasors, as follows:

> . . . we hold that Discount Tire and Fisher are joint tortfeasors, and not successive tortfeasors. Compare *Joint Tortfeasors, Black's Law Dictionary* (10th ed. 2014)(defining joint tortfeasors as "[t]wo or more tortfeasors who contributed to the claimant's injury and who may be joined as defendants in the same lawsuit"), and *74 Am.Jur.2d Torts* §64 (2012) (providing that "joint tortfeasors act negligently – either in voluntary, intentional concert, or separately and independently – to produce a ***single indivisible injury***" (emphasis added)), with *Hansen v. Collett*, 79 Nev. 159, 167, 380 P.2d 301, 305 (1963)(providing that successive tortfeasors must produce acts "differing in time and place of commission as well as in nature, [causing] ***two separate injuries*** [that] gave rise to two distinct causes of action" (emphasis added)), and *Successive Tortfeasors, Black's Law Dictionary* (10th ed. 2014)(defining successive tortfeasors as "[t]wo or more tortfeasors whose negligence occurs at different times and causes different injuries to the same third party" (emphasis added)). . . .

Disc. Tire Co. of Nev. V. Fisher Sand & Gravel Co., 400 P.3d 244, 2017 WL 1397333 (2017 Nev. Unpub)(emphasis added by the Supreme Court).

Based on this distinction, this Court needs to determine whether Republic and Cash are "joint tortfeasors" or "successive tortfeasors." Viewing the evidence in the light most favorable to the non-moving party, Republic, the Court must conclude that the Plaintiff will be able to establish its allegation that as a result of Dr. Cash's actions, "Gonzalez suffered new and different injuries from those allegedly suffered in the motor vehicle accident of January 14, 2012." (See Complaint at Paragraph 56). Although the Plaintiff would now have the Court conclude that a contribution claim is valid since there is a single "common liability," as discussed in NRS 17.225(2), subsection (1) of the same statute indicates that there is a right of contribution when "two or more persons become jointly or severally liable . . . for the ***same injury***." Although the Court assumes that Dr. Cash would testify that his treatment was part of the overall care of the patient's injuries resulting from the subject motor vehicle accident, and that he did not cause any "separate" or "additional" injury, for purposes of a Motion for Summary Judgment, the Court must assume that the Plaintiff will be able to prove its allegation that there was a "new and different injury" caused by Dr. Cash. If there is a "new and different injury," then the parties cannot be "joint tortfeasors," but instead they would be successive tortfeasors. There was not an "indivisible injury," but the acts (motor vehicle accident and separate alleged negligence of Dr. Cash) occurred at different times and places, and allegedly caused

"two separate injuries," which gave rise to two distinct causes of action.[1] Consequently, this Court has no choice but to conclude that Dr. Cash and Republic are "successive" and not "joint tortfeasors." Because they are "successive" and not "joint tortfeasors, NRS 17.225 cannot apply, and there can be no claim for contribution, as a matter of law.

Based upon the foregoing, and good cause appearing, the Defendant's Motion for Summary Judgment is hereby **GRANTED.**[2]

As a result of this decision, the Jury Trial set for 3/18/2019 is hereby **VACATED.**

The Defendants' Motion for Stay Pending Decision on Emergency Petition for Writ of Mandamus was not actually calendared, but is now **VACATED AS MOOT.**

The Motion to Intervene on behalf of Physicians Casualty Risk Retention Group is **VACATED AS MOOT.**

Dated this 14th day of March, 2019.

JERRY A. WIESE II
DISTRICT COURT JUDGE
EIGHTH JUDICIAL DISTRICT COURT
DEPARTMENT XXX

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[1] Unfortunately for the Plaintiff, the Court's ruling will eliminate the Plaintiff's cause of action for contribution, and consequently, one may ask "what are the two distinct causes of action?" This Court struggles with this question, but concludes that the original Plaintiff, Gonzalez, would have two distinct causes of action if she had chosen to bring them. She would have one negligence claim against Republic, and a separate claim for alleged professional negligence, against Dr. Cash. Although Restatement 2d Torts §457 and Nev. Med Mal Jury Inst. 9MM.8 would allow Gonzalez to have recovered all damages from Republic, it doesn't mean that she would not have had a distinct cause of action against Dr. Cash if she had wanted to assert it.

[2] The Court notes that although Dr. Cash's counsel was preparing a Writ with regard to the Court's prior decisions, this decision will obviously eliminate the need for that Writ. If Plaintiff's counsel instead files an Appeal, this Court suggests and/or requests that the parties brief and request that the Supreme Court also address and give guidance with regard to the applicability of NRS 41A.035, NRS 42.021, and other related professional negligence statutes to the facts and circumstances of this case, and how such statutes could be applied to a claim for contribution, when the Plaintiff is not the injured party.

NOTC

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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

NOTICE OF CROSS APPEAL

On April 10, 2019 Plaintiff REPUBLIC SILVER STATE DISPOSAL, INC. filed a Notice of Appeal from the Order Granting Defendants Andrew M. Cash, MD; Andrew M. Cash, MD, PC and Desert Institute of Spine Care, LLC's Motion for Summary Judgment entered on March 15, 2019, as well as the denial of Plaintiff Republic Silver State Disposal, Inc.'s Motion for Reconsideration.

PLEASE TAKE NOTICE that Defendants/Respondents 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 hereby appeal to the Supreme Court of Nevada from the District Court's March 13, 2019 Order on Defendants' Motions to Compel and Non-Party Deponents Marie Gonzales' Motion for Protective Order on Order Shortening Time, wherein the District Court held that NRS 41A.035 and NRS 42.021 do not apply to this contribution action based upon allegations of medical malpractice. A copy of the Order is attached hereto as **Exhibit "A".**

DATED this 24th day of April, 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 24th day of April, 2019, I served a true and correct copy of the foregoing **NOTICE OF CROSS APPEAL** 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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John D. Barron, Esq.
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Attorneys for Plaintiff

An Employee of *CARROLL, KELLY, TROTTER, FRANZEN, McBRIDE & PEABODY*

EXHIBIT "A"

EXHIBIT "A"

DISTRICT COURT
CLARK COUNTY, NEVADA
-oOo-

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

NOTICE OF ENTRY OF ORDER: ORDER ON DEFENDANTS ANDREW M. CASH, M.D.; ANDREW M. CASH, M.D., P.C.; & DESERT INSTITUTE OF SPINE CARE, LLC'S MOTIONS TO COMPEL AND NON-PARTY DEPONENTS MARIE GONZALES' MOTION FOR PROTECTIVE ORDER ON ORDER SHORTENING TIME

DATE OF HEARING: 03/04/19
TIME OF HEARING: 9:00 A.M.

You are hereby notified that this Court entered **ORDER ON DEFENDANTS ANDREW M. CASH, M.D.; ANDREW M. CASH, M.D., P.C.; & DESERT INSTITUTE OF SPINE CARE, LLC'S MOTIONS TO COMPEL AND NON-PARTY DEPONENTS MARIE GONZALES' MOTION FOR PROTECTIVE ORDER ON ORDER SHORTENING TIME**, a copy of which is attached hereto.

DATED this 13th day of March 2019.

JERRY A WIESE
DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on the date filed, a copy of this Order was electronically served through the Eighth Judicial District Court EFP system, or, if no e-mail was provided, mailed or placed in the Clerk's Office attorney folder for:

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Party: Andrew M. Cash, M.D. - Defendant

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Madeline VanHeuvelen	mvanheuvelen@cktfmlaw.com

Party: Republic Silver State Disposal, Inc. - Plaintiff

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Tatyana Ristic, JEA

Electronically Filed
3/13/2019 5:48 AM
Steven D. Grierson
CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA
-oOo-

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

ORDER ON DEFENDANTS ANDREW M. CASH, M.D.; ANDREW M. CASH, M.D., P.C.; & DESERT INSTITUTE OF SPINE CARE, LLC'S MOTIONS TO COMPEL AND NON-PARTY DEPONENTS MARIE GONZALES' MOTION FOR PROTECTIVE ORDER ON ORDER SHORTENING TIME

DATE OF HEARING: 03/04/19
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's Motion to Compel NRCP 30(b)(6) Deposition of Plaintiff on Order Shortening Time; Motion to Compel Deposition and Production of Documents on Order Shortening Time and Non-Party Deponent Marie Gonzales' Motion for Protective Order on Order Shortening Time came on for hearing on March 4, 2019. The Court, having reviewed the papers and pleadings on file herein and having heard argument of, hereby finds as follows:

1. 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. Considering the issues raised by the Motions has caused the Court to reconsider its prior ruling that NRS 41lA.035

applies to this contribution action premised upon allegations of medical malpractice. See Order Granting Defendant Las Vegas Radiology's Motion to "Cap" Non-Economic Damages Per NRS 41A.035 and Joinders to Same.

2. The prior Order stating," ... Nevada law obligates a Plaintiff seeking contribution from health care providers, asserting claims for professional negligence, to satisfy the requirements of NRS Chapter 41A" is hereby vacated. Because of its reconsideration of its prior rulings, the Court believes the discussion found below at ¶¶ 3-13 is in order.

3. The Court finds that NRS Ch. 41A has limited application to this contribution action. The Court has previously recognized that Republic Silver State Disposal's (Republic) cause of action is for contribution under the Uniform Contribution Among Tortfeasors Act, NRS 17.225 et seq., and not one for "professional negligence" against "provider(s) of health care" under the provisions of NRS ch. 41A. See Order re: Cash Defendants' Motion to Dismiss, etc., entered Dec. 13, 2016, p. 2. The referenced Order affirmatively dismissed a cause of action contained in Republic's Amended Complaint for professional negligence, but did so by further recognizing that the contribution claim was "based upon professional negligence" and that the contribution action "subsumed" professional negligence as its basis for liability. Id., pp. 2-3; see also NRS 41A.015 ("Professional negligence means the failure of a provider of health care, in rendering services, to use the reasonable care, skill or knowledge ordinarily used under similar circumstances by similarly trained and experienced providers of health care").

4. NRS 41A.035 imposes a $350,000 limitation for "noneconomic" damages," which are in turn defined at NRS 41A.011 as including "damages to compensate for pain, suffering, inconvenience, physical impairment, disfigurement and other nonpecuniary damages."

5. The Court finds the parameters of NRS 41A.035, limiting the recovery of "noneconomic damages," are set by the statute's own terms:

> 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. (emphasis added)

6. The Court believes its prior order imposing the damage limitation in NRS 41A.035 here was in error. The statutory definition of "noneconomic damage" at NRS 41A.011 contemplates a bodily injury or death, and is integral to an understanding of NRS 41A.035's scope and purpose. The statute further indicates that "the injured plaintiff may recover" certain damages, but Republic is not an "injured plaintiff," as contemplated by the statute. Republic's contribution action- is for neither bodily injury nor death; nor does it seek recovery for the injured patient's "pain, suffering, inconvenience," etc. resulting from allegedly faulty care. Its claim is brought under a statutory scheme allowing one who has extinguished a "common liability" to seek monetary restitution from another party who is also responsible for causing the loss. This conclusion regarding the nature of Republic's claim is in conformity with the Court's Order of Dec. 13, 2016, referenced above.

7. Next, Nevada's contribution statutes impose their own limitation on recovery since the party seeking contribution's "total recovery is limited to the amount paid by the tortfeasor in excess of his or her equitable share." NRS 17.225(2). The same provision also has a salutary effect for the party being sued for contribution because "[n]o tortfeasor is compelled to make contribution beyond his or her own equitable share of the entire liability." Id. The

contribution-defendant also has further protection because the contribution-plaintiff cannot recover "any amount paid in a settlement which is in excess of what was reasonable." Id. (3).

8. Finally, the damage limitation in NRS 41A.035 cannot be read harmoniously with the provisions of NRS 17.225. Each statute finds good application within its own statutory scheme, but becomes cumbersome to the point of being unworkable if superimposed elsewhere. This case presents an example of that unworkability: If NRS 41A.035's "cap" is imposed in Republic's contribution action, what of the $2 million settlement can be considered "noneconomic damage" with a monetary ceiling, as opposed to "economic damage," having no limitation on its full recovery under NRS 41A.007? As a prior practicing attorney in this area of the law, this Court has first-hand knowledge that when settling a personal injury case such as Ms. Gonzales' case against Silver State, the attorney and the Plaintiff have no incentive or reason to distinguish between economic and non-economic damages. If the settling parties themselves do not make that distinction, how can the Court make such a determination later? Or, without evidence of such an intent being found in the settlement, can the fact-finder ever do more than make a wholly arbitrary determination? The answers seem self-apparent – it is impossible to determine in a case such as this what portion of the settlement was for economic vs. non-economic damages. The Defendant suggests that the determination should be based on how the Plaintiff's tax liability for the amount received was calculated. This Court does not see that as a realistic option, as tax liabilities can be calculated differently by different CPA's, and may be based on a variety of tax codes. The Court therefore believes the better choice is to read NRS 41A.035, no less than NRS 17.225 et seq., in context and as written. This is part of the reason this Court finds and concludes that statutes contained in Chapter 41A of the NRS were not intended to apply to a subrogation/contribution type action such as that before this Court.

9. Thus, the Court finds NRS 41A.035's monetary limitation for "noneconomic damages" is specific to "pain, suffering, inconvenience, physical impairment, disfigurement, and other nonpecuniary damages." These damages are suffered by the individual who is personally injured because of the "professional negligence." The Court cannot find a way to apply NRS 41A.035 to the facts of the present case, and consequently, concludes that 41A.035's limitation is inapplicable in the present case.

10. In addition, the Court finds Republic's claim is not a continuation or assumption of Marie Gonzales' personal rights for recovery of any "pain, suffering" etc. resulting from the "professional negligence" alleged, and statements to the contrary in prior rulings are disavowed. Rather, Republic's claim is for contribution, which was statutorily created by the State Legislature with its adoption of the Uniform Contribution Among Torfeasors Act in 1973, and later amended during its 1979 legislative session. See 1973 Statutes of Nevada 1303; 1979 Statutes of Nevada 1978. But for its statutory creation, Republic would have no legal right of contribution. Reid v. Royal Ins. Co., 80 Nev. 137, 142, 390 P.2d 45, 47 (1964) (following the common law rule that there is "no right of contribution between co-torfeasors"). Therefore the Court finds Republic's right of contribution is created and dependent on the provisions of NRS 17.225 et seq., and does not derive from rights personal to Marie Gonzales.

11. The Court also finds that NRS 42.021 has no application to the present action. The foregoing rationale regarding NRS 41A.035 also pertains to NRS 42.021 as it too comes into play "[i]n an action for injury or death against a provider of health care based upon professional negligence." But as seen, Republic's contribution action is statutory, and not derivative of Marie Gonzales' injury, or rights personal to her that arose from it.

12. On its face, NRS 42.021 permits a defendant charged with "professional negligence" (specially defined in sub. (8)(c) as a "negligent act or omission to act by a provider

of health care in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death") to "elect" to bring into evidence payments from certain defined "collateral" sources which are made "payable as a benefit to the plaintiff as a result of the injury[.]" Id. (1). Should the professional negligence defendant offer such "collateral source" evidence, the plaintiff then has the option of offering his or her own 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." Id. (1). Subsection (2) of the statute thereafter cuts off any third party rights of reimbursement against the plaintiff, or subrogation rights against the defendant for any collateral source offered into evidence.

13. NRS 42.021, therefore, favors the medical defendant with the possibility of a "collateral source" offset against a total recovery, while at the same time shielding the NRS 42.021 plaintiff and "professional negligence" defendant from later actions by third-party payors. But assuming any such "collateral source" benefits were paid to Ms. Gonzales—which is by no means certain—application of the portions of the statute which would benefit Republic, would be impossible here because 1) it did not receive any collateral source payments (nor can it be charged with their constructive receipt since its rights are not derivative of Ms. Gonzales'); 2) the "professional negligence" defendants would nonetheless get the potential collateral source offset in the event of a recovery against them; and 3) there appears to be no impediment to a subrogation action by third-party payors under sub. (2)(b) for return of the very collateral benefits Republic never received. It violates Equal Protection of the Law to apply only a portion of the statute, which benefits the Defendant, when the portion of the statute which benefits the "injured party" is inapplicable and cannot be applied in favor

of the Plaintiff, Silver State. The Court thus finds NRS 42.021 inapplicable to Republic as a matter of law.

14. 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 Motion to take NRCP 30(b)(6) Deposition of Plaintiff Republic on Order Shortening Time is **GRANTED IN PART, DENIED IN PART.**

15. The Motion is granted in so far as Defendant Cash is entitled to depose Plaintiff Republic and question the PMK on the amount of and basis for the settlement in the personal injury action.

16. The Motion is denied in so far as the defense states that the attorney-client privilege is waived due to the at-issue waiver doctrine. The Court does not find that the attorney-client privilege has been waived by virtue of this contribution claim and specific ruling is reserved for a per question basis.

17. 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 Motion to Compel Deposition and Production of Documents on Order Shortening Time from certain non-parties is **DENIED AS MOOT.**

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18. Non-Party Deponents Marie Gonzales, Jacqueline R. Bretell, Esq., and Bighorn Law's Motion for Protective Order on Order Shortening Time is **DENIED AS MOOT.**

IT IS SO ORDERED.

DATED this 12th day of March, 2019.

DISTRICT COURT JUDGE

ORDR

ROBERT C. McBRIDE, ESQ.
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HEATHER S. HALL, ESQ.
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Attorneys for Defendants,
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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

ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION OF THE COURT'S ORDER GRANTING SUMMARY JUDGMENT FOR DEFENDANTS

HEARING DATE: 4/3/19

HEARING TIME: 9:00 AM

Plaintiff's Motion for Reconsideration of the Court's Order Granting Summary Judgment for Defendants came on for hearing on April 3, 2019 at 9:00 a.m. Plaintiff Republic Silver State Disposal, Inc. was represented by David Barron, Esq. of the law firm Barron & Pruitt, LLP, and Defendants Andrew M. Cash, M.D.; Andrew M. Cash, M.D., P.C.; Andrew Miller Cash, M.D., P.C.; & Desert Institute of Spine Care, LLC were represented by Heather Hall, Esq. of the law firm Carroll Kelly Trotter Franzen McBride & Peabody. The Court, having reviewed the papers and pleadings on file herein and having heard argument of counsel, hereby finds as follows:

The Court, having reviewed the papers and pleadings on file herein and having heard argument of counsel, hereby finds as follows:

1. Plaintiff's prior pleadings allege that the injuries caused by Plaintiff and Defendants are separate and distinct and, therefore, the parties are successive tortfeasors.

2. Nevada case law and NRS 17.225 state that there is no contribution claim where the parties are not joint tortfeasors. *See Disc. Tire Co. of Nev. v. Fisher Sand & Gravel Co.*, 2017 Nev. Unpub. LEXIS 235, at *3-4.

3. Plaintiff's Motion for Reconsideration of the Court's Order Granting Summary Judgment for Defendants is hereby **DENIED**.

IT IS SO ORDERED.

Dated: 4/25/19

DISTRICT COURT JUDGE

DATED this 18th day of April, 2019.

Respectfully Submitted By:

CARROLL, KELLY, TROTTER, FRANZEN, McBRIDE & PEABODY

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

Approved as to Form and Content by:

BARRON & PRUITT 4/10/19

By:
DAVID BARRON, ESQ.
Nevada Bar No.: 142
3890 West Ann Road
North Las Vegas, Nevada 89031
Attorneys for Plaintiff

Rejected
4/17/19

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 25th day of April, 2019, I served a true and correct copy of the foregoing **ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION OF THE COURT'S ORDER GRANTING SUMMARY JUDGMENT FOR DEFENDANTS** 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.

David Barron, Esq.
John D. Barron, Esq.
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Attorneys for Plaintiff

An Employee of *CARROLL, KELLY, TROTTER, FRANZEN, McBRIDE & PEABODY*

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Attorneys for Plaintiff
Republic Silver State Disposal, Inc.

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

NOTICE OF ENTRY OF ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION OF THE COURT'S ORDER GRANTING SUMMARY JUDGMENT FOR DEFENDANTS

TO: All Interested Parties Herein

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BARRON & PRUITT, LLP
ATTORNEYS AT LAW
3890 WEST ANN ROAD
NORTH LAS VEGAS, NEVADA 89031
TELEPHONE (702) 870-3940
FACSIMILE (702) 870-3950

YOU WILL PLEASE TAKE NOTICE that an Order Denying Plaintiff's Motion for Reconsideration of the Court's Order Granting Summary Judgment for Defendants was entered in the above-entitled matter on the 25th day of April, 2019, a copy of which is attached hereto.

BARRON & PRUITT, LLP

DAVID BARRON, ESQ.
Nevada Bar No. 142
3890 West Ann Road
North Las Vegas, Nevada 89031
Attorneys for Plaintiff
Republic Silver State Disposal, Inc.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 29th day of April, 2019, I served the foregoing **NOTICE OF ENTRY OF ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION OF THE COURT'S ORDER GRANTING SUMMARY JUDGMENT FOR DEFENDANTS** 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*
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.*
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/s/ Luz T. Macias
An Employee of BARRON & PRUITT, LLP

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Attorneys for Defendants,
Andrew M. Cash, M.D.; Andrew M. Cash, M.D., P.C.; 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: XXX

ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION OF THE COURT'S ORDER GRANTING SUMMARY JUDGMENT FOR DEFENDANTS

HEARING DATE: 4/3/19

HEARING TIME: 9:00 AM

Plaintiff's Motion for Reconsideration of the Court's Order Granting Summary Judgment for Defendants came on for hearing on April 3, 2019 at 9:00 a.m. Plaintiff Republic Silver State Disposal, Inc. was represented by David Barron, Esq. of the law firm Barron & Pruitt, LLP, and Defendants Andrew M. Cash, M.D.; Andrew M. Cash, M.D., P.C.; Andrew Miller Cash, M.D., P.C.; & Desert Institute of Spine Care, LLC were represented by Heather Hall, Esq. of the law firm Carroll Kelly Trotter Franzen McBride & Peabody. The Court, having reviewed the papers and pleadings on file herein and having heard argument of counsel, hereby finds as follows:

The Court, having reviewed the papers and pleadings on file herein and having heard argument of counsel, hereby finds as follows:

1. Plaintiff's prior pleadings allege that the injuries caused by Plaintiff and Defendants are separate and distinct and, therefore, the parties are successive tortfeasors.

2. Nevada case law and NRS 17.225 state that there is no contribution claim where the parties are not joint tortfeasors. *See Disc. Tire Co. of Nev. v. Fisher Sand & Gravel Co.*, 2017 Nev. Unpub. LEXIS 235, at *3-4.

3. Plaintiff's Motion for Reconsideration of the Court's Order Granting Summary Judgment for Defendants is hereby **DENIED.**

IT IS SO ORDERED.

Dated: 4/25/19

DISTRICT COURT JUDGE

DATED this 18th day of April, 2019.

Respectfully Submitted By:

CARROLL, KELLY, TROTTER, FRANZEN, McBRIDE & PEABODY

HEATHER S. HALL, ESQ.
Nevada Bar No.: 010608
8329 West Sunset Road, Suite 260
Las Vegas, NV 89113
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

Approved as to Form and Content by:

BARRON & PRUITT 4/10/19

By:
DAVID BARRON, ESQ.
Nevada Bar No.: 142
3890 West Ann Road
North Las Vegas, Nevada 89031
Attorneys for Plaintiff

Reviewed 4/17/19

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 25th day of April, 2019, I served a true and correct copy of the foregoing **ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION OF THE COURT'S ORDER GRANTING SUMMARY JUDGMENT FOR DEFENDANTS** 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.

David Barron, Esq.
John D. Barron, Esq.
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Attorneys for Plaintiff

An Employee of *CARROLL, KELLY, TROTTER, FRANZEN, McBRIDE & PEABODY*