

IN THE SUPREME COURT OF THE STATE OF NEVADA

REPUBLIC SILVER STATE DISPOSAL,
INC., A NEVADA CORPORATION

Appellant/Cross-Respondent,

vs.

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, A NEVADA LIMITED LIABILITY
COMPANY,

Respondents/Cross-Appellants.

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Supreme Court Case No.: 78572
District Court Case No.: A738123

**RESPONDENTS/CROSS-APPELLANTS, 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 OPPOSITION
TO APPELLANT REPUBLIC SILVER STATE DISPOSAL, INC.'S
MOTION TO DISMISS CROSS-APPEAL**

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Respondents/Cross-Appellants, 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 McBride Hall, hereby presents this Opposition to the Motion to Dismiss Cross-Appeal.

Dated this 29th of June, 2020.

McBRIDE HALL

/s/ Heather S. Hall

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Respondents/Cross-Appellants are aggrieved parties who have standing to bring this conditional cross-appeal of the district court's refusal to apply NRS 42.021 and NRS 41A.035 to this contribution claim that requires proving medical malpractice by these Respondents/Cross-Appellants. Republic's contribution claim against Respondents/Cross-Appellants is one of subrogation and the district court was required to limit Republic's rights to that of the underlying patient who subrogated her right to sue for medical malpractice.

The cross-appeal is properly before this Court. It raises conditional issues that need only be addressed if the Court reverses the summary judgment in favor of these Respondents/Cross-Appellants.

II. ARGUMENT

A. RESPONDENTS/CROSS-APPELLANTS ARE AGGRIEVED

PARTIES AND THE CROSS-APPEAL SHOULD NOT BE DISMISSED.

In general, "in the absence of a cross-appeal, an appellate court has no jurisdiction to modify a judgment so as to enlarge the rights of the appellee or diminish the rights of the appellant." *Amazing Spaces, Inc. v. Metro Mini Storage*, 608 F.3d 225, 250 (5th Cir. 2010); *see also Ford v. Showboat Operating Co.*, 110

Nev. 752, 755, 877 P.2d 546, 548 (1994) (quoting *United States v. American Ry. Exp. Co.*, 265 U.S. 425, 435, 44 S.Ct. 560, 563 (1924)); *Greenlaw v. United States*, 554 U.S. 237, 244–45, 128 S.Ct. 2559 (2008) (“This Court, from its earliest years, has recognized that it takes a cross-appeal to justify a remedy in favor of an appellee.”); *El Paso Natural Gas Co. v. Neztosie*, 526 U.S. 473, 479–80, 119 S.Ct. 1430, 1434–35 (1999) (holding no exceptions to the cross-appeal rule).

Federal courts applying the cross-appeal rule have held “that where an argument could have been raised on an initial appeal, it is inappropriate to consider that argument on a second appeal following remand.” *Nw. Ind. Tel. Co. v. F.C.C.*, 872 F.2d 465, 470 (D.C. Cir. 1989) (“This widely-accepted rule furthers the important value of procedural efficiency”); *see also Kessler v. Nat’l Enters., Inc.*, 203 F.3d 1058, 1059 (8th Cir. 2000) (“The general rule is that, where an argument could have been raised on appeal, it is inappropriate to consider that argument on a second appeal following remand.”); *Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735, 739 (D.C. Cir. 1995) (“We have several times said that appellate courts are precluded from revisiting not just prior appellate decision but also those prior rulings of the trial court that could have been but were not challenged on an earlier appeal.”); *Munoz v. Cnty. of Imperial*, 667 F.2d 811, 817 (9th Cir. 1982) (“We need not and do not consider a new contention that could have been but was not raised on the prior appeal.”); *Fogel v. Chestnutt*, 668 F.2d 100, 109 (2d Cir.

1981) (“It would be absurd that a party who has chosen not to argue a point on a first appeal should stand better as regards the law of the case than one who had argued and lost.”).

Most federal circuit courts hold that “prevailing parties are entitled to file cross-appeals against the contingency that this court will reverse an otherwise thoroughly satisfactory judgment.” *Council 31, Am. Fed’n of State v. Ward*, 978 F.2d 373, 380 (7th Cir. 1992); *see also Cook v. Rockwell Int’l Corp.*, 618 F.3d 1127, 1153 (10th Cir. 2010) (holding a “party who prevails in the district court is permitted to conditionally raise issues in a cross-appeal because if the appellate court decides to vacate or modify the trial court’s judgment, the judgment may become adverse to the cross-appellant’s interest.”); *Warfield v. Alaniz*, 569 F.3d 1015, 1019 n. 3 (9th Cir. 2009) (“A protective cross-appeal is permissible once an initial appeal is filed, raising the possibility of reversal.”).

The case law cited by Republic does not mandate dismissal of this cross-appeal. In *Ford v. Showboat Operating Co.*, the prevailing party cross-appealed a single conclusion of law within the district court’s favorable judgment. *Id.* 110 Nev. 752, 753–54, 877 P.2d 546, 547 (1994). The *Ford* court determined that the employer was not aggrieved by the judgment in any manner and, therefore, dismissed the cross-appeal. *Id.* at 757, 877 P.2d at 550. That case is distinguishable from the current case on several grounds.

First, Dr. Cash and related parties are not appealing the Judgment itself. If the Judgment is upheld, it would favor Respondents/Cross-Appellants. The purpose of the cross-appeal is to protect the rights and interests of Respondents/Cross-Appellants should this Court find any merit in the arguments raised in Republic's appeal. If the Court concludes that the issues raised by Republic are without merit, it is unnecessary to address the issues raised in the cross-appeal.

The cross-appeal raises significant conditional issues that adversely impacted Respondents/Cross-Appellants. Respondents/Cross-Appellants cross-appeal the district court's adverse, interlocutory order failing to apply NRS 42.021(introduction of collateral source payments) and NRS 41A.035 (limiting non-economic damages to \$350,000), which only becomes appealable when Judgment is entered. *See Consolidated Generator v. Cummins Engine*, 114 Nev. 1304, 971 P.2d 1251 (1998) (stating that interlocutory orders entered prior to final judgment may be heard on appeal from final judgment); *see also Summerfield v. Coca Cola Bottling Co.*, 113 Nev. 1291, 1293-94, 948 P.2d 704, 705 (1997).

The cross-appeal is brought to address the decision that adversely impacted the rights of Dr. Cash and related entities and impaired defenses and greatly increased potential damages at trial, had summary judgment not been entered in their favor. Should the summary judgment be reversed, these important issues need

to be addressed via the protective, contingent cross-appeal or risk forever waiving the possibility of appellate review.

Second, Respondents/Cross-Appellants are aggrieved parties. If summary judgment is reversed, Respondents/Cross-Appellants will be forced to proceed to trial with a ruling from the trial court that conveys more rights to Republic than the patient who subrogated her right to sue for medical malpractice. Republic stands in the same position as the patient/subrogor would if she were to bring a claim herself and Republic must also be subject to the same rules and limitations of NRS 41A and 42.021. From the record, it is clear that these Respondents/Cross-Appellants will be directly benefitted by reversal of the district court's order refusing to apply the same rules and limitations to Republic as would apply to the patient. *Leonard v. Belanger*, 67 Nev. 577, 593 (1950).

B. REPUBLIC IS NOT ENTITLED TO YET ANOTHER EXTENSION OF TIME IN THIS APPEAL.

The Notice of Appeal was filed on April 10, 2019. The Notice of Cross-Appeal was filed on April 24, 2019. Republic was given multiple extensions for its opening brief in this appeal. On April 20, 2020, Respondents/Cross-Appellants filed their Answering Brief on Appeal and Opening Brief on Cross-Appeal. Republic's reply brief was originally due on May 20, 2020. However, without requiring any demonstration of good cause, the parties entered into a stipulation to

extend the time for Republic's brief to June 19, 2020.

Instead of timely filing a reply brief, Republic chose to file a Motion to Dismiss the Cross-Appeal. If Republic believed there was a jurisdictional defect, Republic should have filed a Motion to Dismiss within 7 days of service of the docketing statement for the cross-appeal. *See* NRAP 14(a)(f). In a footnote, Republic asks this Court for an extension through and including July 20, 2020 to file its reply brief on the appeal and an answering brief on the cross-appeal but the reasons cited do not constitute good cause under NRAP 26(b)(1)(B). The representation that Republic's counsel is preparing for two oral arguments does not constitute good cause for the requested extension. *See Varnum v. Grady*, 90 Nev. 374, 528 P.2d 1027 (1974) (The fact that appellant's counsel was professionally engaged in other matters was not enough to show excusable neglect). No additional extension has been granted and there is not good cause to extend the time period for Republic's reply brief. This Court should order Republic to immediately serve its reply brief so that this appeal can proceed for decision.

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III. CONCLUSION

Based upon the foregoing, Respondents/Cross-Appellants respectfully request that this Honorable Court deny the Motion to Dismiss Cross-Appeal and order an immediate reply brief be filed on behalf of Republic.

Dated this 29th of June, 2020.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 29th day of June, 2020, service of the foregoing **RESPONDENTS/CROSS-APPELLANTS, 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 OPPOSITION TO APPELLANT REPUBLIC SILVER STATE DISPOSAL, INC.'S MOTION TO DISMISS CROSS-APPEAL** was served electronically to all parties of interest through the Court's CM/ECF system as follows:

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