Case No. 78572

In the Supreme Court of Nevada

REPUBLIC SILVER STATE DISPOSAL, INC.,

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,

Respondents.

APPEAL

from the Eighth Judicial District Court, Clark County
The Honorable JERRY A. WIESE, District Judge
District Court Case No. A738123

APPELLANT'S REPLY BRIEF

DAVID BARRON (SBN 142)
JOHN D. BARRON (SBN 14,029)
BARRON & PRUITT, LLP
3890 West Ann Road
North Las Vegas, Nevada 89031
(702) 870-3940

DANIEL F. POLSENBERG (SBN 2376)
JOEL D. HENRIOD (SBN 8492)
ABRAHAM G. SMITH (SBN 13,250)
LEWIS ROCA
ROTHGERBER CHRISTIE LLP
3993 Howard Hughes Parkway, Suite 600
Las Vegas, Nevada 89169
(702) 949-8200

Attorneys for Appellant

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SUMMARY OF THE ARGUMENT

1. The district court erroneously concluded that an original tortfeasor, who is liable for later injuries caused by the medical malpractice of a separate tortfeasor, is barred from seeking contribution against the health care provider, solely because the tortfeasors acted at different times in producing the ultimate injury.

This is wrong. The question is not whether Republic and Dr. Cash *acted* simultaneously; it is whether they were each "jointly or severally *liable* . . . for the same injury." NRS 17.225(1) (emphasis added). And for the injuries that Dr. Cash caused, both he and Republic were jointly liable. Republic has a valid contribution claim, and this Court should reverse.

2. Respondents attempt to raise an additional issue, whether limits of liability under NRS Chapter 41A apply to contribution claim. They assert these arguments as part of their cross-appeal, but this Court has dismissed their cross-appeal, and that issue is not before the Court.

ARGUMENT

I.

REPUBLIC HAS A RIGHT OF CONTRIBUTION FOR ITS COMMON LIABILITY WITH DR. CASH

Nevada courts historically followed the common-law rule that there was "no right of contribution between co-torfeasors." *Reid v. Royal Ins. Co.*, 80 Nev. 137, 142, 390 P.2d 45, 47 (1964). To remedy this harsh rule, in 1973 the Legislature adopted the Uniform Contribution Among Tortfeasors Act (rev. 1955), codified at NRS 17.225 *et seq*.[1] Now, "a claim for contribution is preserved by statute—NRS 17.225." *Saylor v. Arcotta*, 126 Nev. 92, 96, 225 P.3d 1276, 1279 (2010).

The statutory right is broad:

> [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). Whether Republic is "jointly or severally liable" with Dr.

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[1] *See* 1973 NEV. STAT. 1303. UCATA's "pro rata" distribution of a common liability was changed six years later to contribution based on "equitable shares," 1979 NEV. STAT. 1978, thus embracing claims where the jointly liable tortfeasors are not equally at fault.

Cash for an injury is the sole issue on appeal.[2]

In the opening brief, Republic parsed the text and case law from this Court and from other UCATA jurisdictions, all of which confirm that Republic was "jointly liable" for the injury caused by Dr. Cash's malpractice and thus can seek contribution.

In response, Dr. Cash does not engage with the statutory text, instead relying on a single citation to a jurisdiction with a very different contribution regime under its common law. Dr. Cash cannot distinguish the cases from this Court signaling approval of a right of contribution in these circumstances. And he has no support for the theory that Nevada's contribution right is restricted to those tortfeasors who act at a single moment to produce the same injury.

A. D.C.'s Common Law of Contribution Is Irrelevant to Nevada's Statutory Right

Dr. Cash inappropriately relies on the very different law of the

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[2] Dr. Cash does not contest the district court's express finding that the Republic/Gonzales Release (JA 515-24) extinguished his liabilities, and those of his co-defendants, for alleged professional negligence in treating Ms. Gonzales, satisfying NRS 17.225(3)'s requirement that the contribution plaintiff must first satisfy the liability of the contribution defendant. (JA 559-69.)

District of Columia. "*Just like* in the District of Columbia," Dr. Cash assures us, "[t]he 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." (RAB 6 (emphasis added) (quoting *George Washington Univ. v. Bier*, 946 A.2d 372, 275 (D.C. 2008).)

There's just one problem. Nevada's statutory right of contribution is *nothing like* the common-law action called "contribution" under D.C. law. The District of Columbia is Dr. Cash's sole example of another jurisdiction supposedly leaving Republic Services without a remedy, and it is inapposite.

1. D.C. Does Not Have a Contribution Statute

One of the first points that the D.C. cases make is that there, "the right of contribution is an equitable remedy"; "[t]here is no statute or rule of court dictating the result." *George Washington Univ. v. Bier*, 946 A.2d 372, 376–77 (D.C. 2008) (quoting Judge Schwelb's dissenting opinion in *Paul v. Bier*, 758 A.2d 40, 53 (D.C. 2000)). Because D.C. "law pertaining to the right of contribution among joint tortfeasors has been established by case precedent rather than by statute," the D.C. Court of

Appeals has repeatedly refused to draw on the Uniform Contribution Among Tortfeasors Act (UCATA), which "[t]he District has not adopted or modified." *M. Pierre Equip. Co., Inc. v. Griffith Consumers Co.*, 831 A.2d 1036, 1039 n.2 (D.C. 2003).

2. D.C.'s Analogue to the Contribution Right in the UCATA is Not Contribution, but Equitable Indemnity

The District of Columbia has two common-law actions—for contribution and equitable indemnification—each "intended to allocate financial responsibility equitably among parties responsible for the plaintiff's injuries." *Estate of Kurstin v. Lordan*, 25 A.3d 54, 62 (D.C. 2011). Although the two actions serve a common policy goal, the mechanics of each is quite different:

The linchpin of what the District of Columbia calls "contribution" is that two or more tortfeasors have *equally* contributed to the plaintiff's injuries, but only one of them has paid. *District of Columbia v. Washington Hosp. Ctr.*, 722 A.2d 332, 339 (D.C. 1998). Contribution, if it exists at all, is always "in equal shares." *Id.* at 339 & n.8 ("In this jurisdiction, where there is contribution among joint tortfeasors, damages are

apportioned equally among them."). "Apportionment based on comparative negligence is contrary to the contribution rules which have developed through our precedents." *Id.* An initial tortfeasor's recovery against a "medical attendant who aggravate[d] the victim's injuries"—i.e., for which the medical provider is primarily or entirely to blame—necessarily depends on the parties' comparative fault. *Id.* For precisely that reason, the initial tortfeasor cannot pursue a claim of contribution under D.C. law. *Id.*

Instead, the proper remedy in the District of Columbia is partial equitable indemnity. *R. & G. Orthopedic Appliances & Prosthetics, Inc. v. Curtin*, 596 A.2d 530, 547–48 (D.C. 1991). This—not D.C. contribution—"allows the initial tortfeasor to recoup that portion of the damages attributable to the conduct of the second tortfeasor." *District of Columbia v. Washington Hosp. Ctr.*, 722 A.2d 332, 340 (D.C. 1998) (internal citation and quotation marks omitted). And it is the only way for an initial tortfeasor "responsible for a minor injury" (ulcers on a foot) to recover against the medical provider who was "the effective cause of a major one" (total amputation). *Id.* at 340–41 (quoting *R. & G. Orthopedic*

Appliances, 596 A.2d at 545).[3]

But here's the catch: the D.C. courts understand that what their jurisdiction calls "equitable indemnity" is, in jurisdictions that have adopted the UCATA, a claim for statutory contribution. In *Caglioti v. District Hospital Partners, LP*, the D.C. Court of Appeals found instructive a Florida court's construction of the UCATA—not to interpret D.C.'s *contribution* action, which is dissimilar, but to interpret D.C.'s *indemnification* action "because the mechanics of the contribution claim pursuant to the Florida statute [UCATA] are analogous to an indemnification claim at common law in the District of Columbia." *Caglioti v. Dist. Hosp. Partners, LP*, 933 A.2d 800, 812–13 (D.C. 2007).

Likewise, some jurisdictions reserve the label "equitable indemnity" for defendants "without personal fault." *District of Columbia v. Washington Hosp. Ctr.*, 722 A.2d 332, 340 (D.C. 1998). In those states, the D.C. remedy of "equitably indemnity" is relabeled as "contribution."

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[3] Likewise, in the District of Columbia a party "whose active negligence concurred in causing an injury"—i.e., if the same injuries would have resulted absence the subsequent medical providers' negligence—then indemnity is unavailable. *Id.* (citing *R. & G. Orthopedic Appliances*, 596 A.2d at 547–48).

See id. (citing *Radford-Shelton Assocs. Dental Lab., Inc. v. Saint Francis Hosp., Inc.*, 569 P.2d 506, 507 (Okla. Ct. App. 1976) and noting that "[t]he Oklahoma court found it unnecessary to modify the doctrine of indemnity to reach an equitable result," and instead "opted to identify it for what it deemed it to be *i.e.,* contribution").[4]

So in Nevada, the statutory right of contribution is equivalent not to D.C.'s common-law contribution action, but to its right of partial equitable indemnity. In Nevada, unlike in the District of Columbia, contribution does *not* require the tortfeasors to have equally contributed to a single injury; rather, it invokes comparative negligence principles, allowing contribution up to "his or her equitable share" (not *pro rata* shares). NRS 17.225(2). In Nevada, an initial tortfeasor cannot limit its liability to the original injury and force the plaintiff to sue the medical providers to recover for malpractice. *Humphries v. Eighth Judicial Dist. Court*, 129 Nev. 788, 798, 312 P.3d 484, 491 (2013).[5] And unlike the District of Columbia, Nevada reserves the label "equitable indemnity" for

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[4] Shortly thereafter, Oklahoma adopted the Uniform Contribution Among Tortfeasors Act, too. *See* 12 OKLA. STAT. § 832 (effective Oct. 1, 1978).

[5] *Compare to District of Columbia v. Washington Hosp. Ctr.*, 722 A.2d

defendants who have "committed no independent wrong"; thus, any party that is "actively negligent" has no right to equitable indemnity. *Pack v. LaTourette*, 128 Nev. 264, 268, 277 P.3d 1246, 1248–49 (2012) (quoting *Rodriguez v. Primadonna Co.*, 125 Nev. 578, 589, 216 P.3d 793, 801 (2009)). What Nevada calls contribution under the UCATA is what D.C. calls indemnity.

3. Under the Correct Analogue, D.C. Courts Would Provide Republic a Remedy

Unsurprisingly, neither the District of Columbia nor, to Republic's knowledge, any other jurisdiction has actually adopted Dr. Cash's extreme position that a doctor can escape all liability whenever a plaintiff chooses to recover for the doctor's malpractice against the original tortfeasor. In a case where a plaintiff suffers additional injuries at the hands of medical professionals, if the original tortfeasor "is not allowed to pursue his claim, it is the medical providers who could potentially be the recipients of any windfall as they could evade liability and not have to pay any amount, even if they were negligent as alleged." *Caglioti v.*

332, 337 (D.C. 1998) (holding that in some circumstances, "successor tortfeasors are not jointly and severally liable for the whole loss, and thereby entitled to contribution among each other").

Dist. Hosp. Partners, LP, 933 A.2d 800, 815 (D.C. 2007).

Nor does the District of Columbia recognize Dr. Cash's artificial distinction between "aggravation" of an existing injury and new injuries. In *Caglioti*, a wheelchair malfunctioned, injuring its user, who then sought medical treatment and suffered further harm: while the wheelchair manufacturer "only caused relatively minor orthopedic injuries . . . the medical providers caused major injuries including neurological and pulmonary injuries." *Id.* at 815. The difference—in degree and kind—in the medical providers' injuries did not eliminate the manufacturer's joint liability for that foreseeable malpractice, so it did not eliminate the manufacturer's right of recovery against the providers. *Id.*; *see also Estate of Kurstin v. Lordan*, 25 A.3d 54, 60 (D.C. 2011) (describing the separate injuries from malpractice as "aggravat[ion]" of the original injury).

Dr. Cash has not identified a single jurisdiction in which the negligent doctor can escape all liability simply because the original tortfeasor can be made to pay for that negligence.

B. In Nevada, the Statutory Right of Contribution Extends to Joint Liability for Later Malpractice

Beyond Dr. Cash's misplaced reliance on D.C. law, Dr. Cash presents little affirmative authority to support his position. Instead, he resorts to attacking Republic's cases.

1. This Court Has Previously Indicated that this Right of Contribution Exists

Pack v. LaTourette, 128 Nev. 264, 269, 277 P.3d 1246, 1249 (2012), parallels this case. There, a cab driver had injured another motorist, who sued the driver and his employer. The cab company brought a third-party claim against a physician whose treatment aggravated the accident-related injuries. The physician argued that the contribution claim was premature because the original tortfeasor had not yet paid "more than its fair share of liability." Noting that NRS 17.225(1) provides a right to contribution "where two or more persons become jointly or severally liable in tort for the same injury to [a] person . . . even though judgment has not been recovered against all or any of them," this Court rejected the physician's "prematurity" argument, focusing instead on the parties' joint liability for the medical injury:

> Sun Cab's third-party contribution claim alleged that LaTourette exacerbated Zinni's injuries by negligently

> mistreating him after the car accident. Thus, by alleging that Sun Cab and LaTourette were joint tortfeasors in this regard, Sun Cab sufficiently pleaded a claim for contribution against LaTourette.

128 Nev. at 269, 277 P.3d at 1249.

Pack thus implies that an original tortfeasor may seek contribution against medical providers who cause further injury because the original tortfeasor remains "jointly . . . liable in tort" for that later injury. *Humphries*, 129 Nev. at 797, 312 P.3d at 490–91.

Dr. Cash engages in distraction, however, diverting attention to this Court's discussion of the NRS 41A.071 affidavit requirement earlier in the *Pack* opinion. (RAB 9.) Dr. Cash also suggests, without citation, that medical care that *aggravates* injuries suffered in a car crash is distinct from medical care that creates "a new, independent injury." (RAB 9–10.) Yet nowhere in Dr. Cash's "new and different" injury argument (RAB 13)—newly argued here—does Dr. Cash suggest that Republic was *not* liable for injuries arising from Dr. Cash's malpractice. As the district court held (JA 1399), and Nevada law requires, Republic was liable for Dr. Cash's malpractice, no matter how "new and different" those injuries were from Ms. Gonzales initially suffered in the car accident. Even under this argument, the parties would, under the language

of the statute, be liable jointly or severally for this "same injury," and contribution would apply.

Dr. Cash's suggestion—that contribution is unavailable whenever the doctor's malpractice is so gross it produces new and permanent injuries—would have the perverse effect of subjecting only minor acts of malpractice to claims of contribution while immunizing the most egregious examples.

Even under Dr. Cash's distinction between "aggravating" injuries and "new and different injuries," there is no way to say as a matter of law that the injuries Dr. Cash inflicted on Ms. Gonzales—in the same part of the body and exacerbating her earlier pain from the accident—are not "aggravating" injuries in the same way as those upheld in *Pack*.

2. Other UCATA Jurisdictions Uphold a Claim of Contribution

The Delaware court in *Lutz v. Boltz* quotes the official comments from the drafters of UCATA's predecessor (with the same "jointly . . . liable language"), which clarify that "it is joint or several *liability*, rather than joint or concurring *negligence*, which determines the right of contribution." 100 A.2d 647, 648 (Del. Super. Ct. 1953).

Dr. Cash disregards the whole case and its interpretive comments, because, unlike our situation, *Lutz* involved injuries from "one singular accident" rather than multiple injuries at different times. (RAB 8.) But whether the injuries were simultaneous was not critical to the analysis. Indeed, despite the "singular accident," the *Lutz* court found no right of contribution. *Lutz*, 100 A.2d at 648. Delaware had "guest statute" that eliminated a guest-passenger's claim for injuries against the host-driver. *Id.* So the host-driver and the driver of the other car could not be jointly liable to the injured guest, eliminating a right of contribution. *Id.* at 647–48.[6]

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[6] Dr. Cash invites us to "*see also*" a 1938 case from the Texas Court of Civil Appeals, cited in *Lutz*. (RAB 8 (citing *Patterson v. Tomlinson*, 118 S.W.2d 645 (Tex. Civ. App. 1938)). That case makes the same uninteresting point as *Lutz*, that someone whom the original plaintiff could not sue "is not a joint tort-feasor, and is therefore not liable for contribution." *Patterson v. Tomlinson*, 118 S.W.2d 645, 646 (Tex. Civ. App. 1938). In contrast, Ms. Gonzales here could have directly sued Dr. Cash for the injuries that he caused, and for which Republic was jointly liable.

Texas law is further inapplicable because there, unlike in Nevada, a "settling tortfeasor has no right of contribution against non-settling tortfeasors." *Jackson v. Freightliner Corp.*, 938 F.2d 40, 41 (5th Cir. 1991) (citing *Tex. Distribs., Inc. v. Tex. Coll.*, 747 S.W.2d 371, 371 (Tex. 1987)), *discussed in Caglioti v. Dist. Hosp. Partners, LP*, 933 A.2d 800, 814 n.14 (D.C. 2007). Nevada expressly recognizes such a right. NRS 17.225.

That does not diminish the salience of the official comments, which warn against the very error that Dr. Cash urges this Court to commit: conflating joint liability with joint, simultaneous negligence.

Dr. Cash also attacks *Lujan v. Healthsouth Rehabilitation*, 902 P.2d 1025 (N.M. 1995) and *Morgan v. Cohen*, 523 A.2d 1003 (Md. App. 1987)—both of which hold that an original tortfeasor and medical provider are jointly liable for the separate portion of the plaintiff's injury caused by the medical treatment. (AOB 28–29.)

According to Dr. Cash, the key in those cases is the discussion of whether the injury from treatment enhances the original injury or is "new and different." (RAB 13–14.) That distinction was relevant in those cases, not to the question of joint liability, but only to a contract-interpretation issue: whether the original tortfeasor's settlement with the plaintiff actually released the medical providers from liability for those injuries. *Lujan*, 902 P.2d at 1031; *Morgan*, 523 A.2d at 1009–10. Here, in contrast, the district court found—and Dr. Cash does not dispute—that Republic's settlement with Ms. Gonzales definitely released Dr. Cash from liability for all of Ms. Gonzales's injuries. Whatever the nature of Ms. Gonzales's treatment-related injuries, Republic was

jointly liable for them, and Republic extinguished Dr. Cash's liability through payment of the settlement.[7]

C. It Is Irrelevant Whether Dr. Cash Was a "Successive" Tortfeasor; What Matters Is that Republic was "Jointly or Severally Liable" for His Torts

The thrust of Dr. Cash's answering brief is that, even if his treatment was below the standard of care, he and Republic caused different injuries to Marie Gonzales, occurring over a year apart. According to Dr. Cash, they were "successive" torfeasors, for whom there is no right of contribution "because they are not joint tortfeasors responsible for the same injury." (RAB 12.)

The district court accepted this argument. The order granting summary judgment focuses on the absence of an "indivisible injury," supposing that the separate

> 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. Consequently, this Court has no choice but to conclude that

[7] *See Orien v. Conway*, No. 73519, 441 P.3d 81 (Table), 2019 WL 2158435 (Nev. May 15, 2019) ("[t]he effect of joint liability in a tort context is to excuse one defendant from paying any portion of the judgment if the plaintiff collects the full amount from the other") (quoting *United States v. Nucci*, 364 F.3d 419, 423 (2d Cir. 2004)).

> Dr. Cash and Republic are "successive" and not "joint tortfeasors." Because they are "successive" and not "joint torfeasors["], NRS 17.225 cannot apply, and there can be no claim for contribution, as a matter of law.

(JA 1398-99.)

This reasoning conflates the liability of multiple parties causing a single injury—so-called "joint *tortfeasors*" (a phrase appearing nowhere in NRS 17.225)—with the statute's concept of joint or several *liability*. An original tortfeasor can still be "jointly . . . liable" under NRS 17.225(1) for the damage caused by a later negligent actor; the original tortfeasor is causally on the hook when it is "foreseeable as a matter of law that the original injury may lead to a causally distinct additional injury." 74 AM. JUR. 2D *Torts*, § 67.

1. What Are "Joint Tortfeasors"?

Dr. Cash's brief rests heavily on the differences between "joint" and "successive" torts, but never discusses what those supposedly crucial differences entail.

In simplest terms, a "joint" tortfeasor was an actor who, at common law, nefariously combined with others to cause a single injury:

> The original meaning of a "joint tort" was that of vicarious liability for concerted action. All persons who acted to commit a trespass in pursuance of a common design, were held liable for the entire result. In such a case there was a common purpose, with mutual aid in carrying it out[.]*** Each [actor] was therefore liable for the entire damage done, although one might have battered the plaintiff, while another imprisoned him, and a third stole his silver buttons.

W. PROSSER, THE LAW OF TORTS 291 (4th ed. 1971) (footnotes and quotation marks omitted).

And because the accountability for a "joint" tort was "joint liability" among the actors,

> [t]he second meaning of a joint tort is that two or more persons may be joined as defendants in the same action at law. The common law rules as to joinder were . . . limited to cases of concerted action where a mutual agency might be found. Given such joint responsibility, the identity of the cause of action against each defendant was clear. The joinder was merely permitted, and was not compulsory, and the defendants might each be sued severally for the entire damages; but the plaintiff could recover only one judgment because it was considered he had but one cause of action against the several parties.

Id. at 293 (footnotes omitted).

While historically fraught with "uncertainty and confusion," *id.* at 291, the term "joint tortfeasors" has also taken on the added meaning of

concurrent negligence by different actors, intersecting to cause one injury, and from it a single liability:

> Joint, or more precisely, joint and several, liability may exist notwithstanding the absence of concerted action by the wrongdoers if their concurring negligence occasions the injury. Thus, even though persons are not acting in concert, if the result produced by their acts is indivisible, each person is liable for the whole.

74 AM. JUR. 2D *Torts*, § 67.

2. What is the Joint or Several Liability of Successive Tortfeasors?

Joint tortfeasors can be jointly liable, but the opposite is not true. Joint or several liability for all or a portion of a plaintiff's injuries does not require a joint tort.[8]

That is because an original tortfeasor may have both separate liability for some injuries and joint liability with a later tortfeasor for others:

> [T]here are situations in which the earlier wrongdoer will be liable for the entire damage, while the later one will not. If an automobile negligently driven by defendant A strikes the plaintiff, fractures his skull, and leaves him helpless on the highway, where shortly af-

[8] NRS 17.225 provides for contribution whether the parties are liable "jointly" or "severally" for the "same injury."

> terward a second automobile, negligently driven by defendant B, runs him over and breaks his leg, A will be liable for both injuries, for when the plaintiff was left in the highway, it was reasonably to be anticipated that a second car would run him down. But defendant B should be liable only the broken leg, since he had no part in causing the fractured skull, and could not foresee or avoid it. On the same basis, an original wrongdoer may be liable for the additional damages inflicted by the negligent treatment of his victim by a physician, while the physician will not be liable for the original injury.

PROSSER, *supra*, at 320-21.

Under the "successive" or "original tortfeasor" rule, "the law regards the act of the original wrongdoer as a proximate cause of the damages flowing from the subsequent negligent medical treatment [of the original injury] and holds [the original tortfeasor] liable therefor." *Hansen v. Collett*, 79 Nev. 159, 166, 380 P.2d 301, 305 (1963) (quoting *Ash v. Mortensen*, 150 P.2d 876, 877 (Cal. 1944)).

While numerous cases, commentators and secondary authorities have addressed the same rule stated in *Hansen v. Collett*, the Maryland appellate court's decision in *Morgan v. Cohen*, 523 A.2d 1003, 1006 (Md. 1987), is apt. "Courts in general have correctly characterized the negligent treatment as a subsequent tort *for which the original tortfeasor is jointly liable*." (Emphasis added.)

3. Republic Was Separately Liable for Ms. Gonzales's Initial Injury, and Jointly Liable with Dr. Cash for His Aggravating Those Injuries

That is the case here. To say Ms. Gonzales did not suffer a single, "indivisible" injury misses the point. We know there wasn't just one injury—there were two. And of those, Dr. Cash had no responsibility for the first since the traffic accident predated his services. But we know as well, that had Ms. Gonzales wanted to, she could have sued Dr. Cash herself for the damage caused by the undiagnosed pedicle breach. But she didn't.

Nor did she need to. That, as the district court conceded, was because the subsequent damages Dr. Cash caused because of his negligent treatment were already recoverable as part of Ms. Gonzales' claim against Republic.[9] Republic was the original tortfeasor, jointly liable for

[9] "[T]he original Plaintiff, Gonzales, would have had two distinct causes of action if she had chosen to bring them. She would have had a 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 Gonzales to have recovered all damages against Republic, it doesn't mean she would not have had a distinct cause of action against Dr. Cash if she had wanted to assert it." (JA 1399.)

what the law holds is a foreseeable consequence: Dr. Cash's malpractice.

4. The District Court Confused "Joint or Several Liability" with a Nonexistent "Joint Tortfeasor" Requirement

This is where the district court faltered. It never considered whether a "joint" tort had caused the same injury. *See J.E. Johns & Assocs. v. Lindberg*, 136 Nev., Adv. Op. 55, at 6–11, ___ P.3d ___, ___ (Aug. 21, 2020) (discussing the "same injury" rule under NRS 17.225). Instead, the district court contemplated only whether Ms. Gonzales's aggravated injuries from Dr. Cash's negligent treatment of an initial injury made Republic "jointly or severally liable in tort for the *same* injury," NRS 17.225(1) (emphasis added), with Dr. Cash. As to those injuries, the answer is yes, Republic was jointly and severally liable and has a contribution claim.[10]

[10] Dr. Cash again relies on *Discount Tire Co. of Nevada v. Fisher Sand & Gravel*, No. 69103, 400 P.3d 244 (Table), 2017 WL 1397333 (Nev. Apr. 14, 2017) but does not dispute that this Court's discussion of "joint tortfeasors" was in the context of an equitable indemnity claim, not a contribution claim (which was unavailable for unrelated reasons). (RAB 10–12.) The co-defendant argued that it should be excused from showing a special relationship—one of the elements of an equitable indemnity claim—because it was a successive, rather than joint, tortfeasor.

5. The Common Liability for Ms. Gonzalez's Malpractice Injuries Is Single and Indivisible

In the analogous context of settlement offsets under NRS 17.245, the Supreme Court recently held that "independent causes of action, multiple legal theories, or facts unique to each defendant do not foreclose a determination that both the settling and non-settling defendants bear responsibility for the *same injury* pursuant to NRS 17.245(1)(a). *J.E. Johns & Assocs. v. Lindberg*, 136 Nev., Adv. Op. 55, at 8, ___ P.3d ___, ___ (Aug. 21, 2020) (citing *Indivisible Injury*, BLACK'S LAW DICTIONARY (11th ed. 2019)). While it's true that Republic was separately liable for any injuries it caused in the accident, Republic is not seeking statutory contribution for those injuries. The only injuries for which Republic seeks contribution are those caused by Dr. Cash's malpractice: as to those, the overlap is total. Republic and Dr. Cash are liable for a single, indivisible injury. Under the words of NRS 17.225, they are liable jointly or severally for this "same injury," and contribution applies.

Id. at *4 n.6. To dispose of that argument, it was enough for this Court to hold that the defendants were joint tortfeasors. *Id.* at *3. This unpublished decision in no way imposes a requirement that a contribution claim can only arise out of single injury caused at a single time.

II.

THIS COURT SHOULD NOT REVIEW THE DISTRICT COURT'S RULING ON NRS 41A.035 OR NRS 41A.021

This Court was correct to dismiss the cross-appeal. This Court should not undermine that determination by reaching the issue of the application of NRS 41A.035 and NRS 41A.021. This Court instead should reverse and remand, with any debate over the damages cap to resume if, and only if, a jury actually awards damages supposedly in excess of that cap.

A. The Application of the Damages Cap Is Still Hypothetical; it Depends on a Future Jury's Award of Damages

This Court ordinarily does not offer advice on issues unnecessary to the disposition of the appeal. *Douglas City Contractors Ass'n v. Douglas County*, 112 Nev. 1452, 1466, 929 P.2d 253, 261–62 (1996). On rare occasions, this Court offers "additional instruction" on issues certain to arise in a retrial. *FCH1, LLC v. Rodriguez*, 130 Nev. 425, 433, 335 P.3d 183, 189 (2014). But this Court does not go out of its way to address issues that may or may not arise on remand. Unripe or otherwise premature issues are best left for germination and development in the district

court. *See Anes v. Crown P'ship, Inc.*, 113 Nev. 195, 202, 932 P.2d 1067, 1071 (1997); *City of North Las Vegas v. Cluff*, 85 Nev. 200, 452 P.2d 461 (1969), *cited with approval in Busick v. Trainor*, No. 72966, 2019 WL 1422712 at *4, 437 P.3d 1050 (Nev. Mar. 28, 2019) (Table) (refusing to review the constitutionality of NRS 41A.021 where "jury never reached the issue of damages"); *Capanna v. Orth*, 134 Nev. 888, 897, 432 P.3d 726, 735 (2018) (similar).

Here, reversal does not necessarily implicate the damages cap in NRS 41A.035. While defendants sought an advance ruling on the cap's potential application in the district court, that issue is premature—especially for this Court's review of the question in the abstract. This is not a situation where Republic's claim was dismissed after a trial and an adjudication of damages. There is no verdict or judgment to assess.

In a future trial, the issue may or may not arise, depending on the jury's assessment of damages. This Court's opinion would be solely advisory if, it turns out, the jury awards less than $350,000 on what Dr. Cash might characterize as "noneconomic damages" under NRS 41A.011. But even if the jury awards more, there may be fact questions about how to allocate the damages, in addition to the legal question of

whether Republic is really in the position of an "injured plaintiff . . . recover[ing] noneconomic damages." NRS 41A.035.

Although in an interlocutory ruling the district court indicated in the abstract that it would not apply the cap (JA 1378–85), it is prudent to let the district court confirm or revisit this issue when it has a concrete verdict to apply. *See Ins. Co. of the W. v. Gibson Tile Co.*, 122 Nev. 455, 466 n.4, 134 P.3d 698, 705 n.4 (2006) (Maupin, J., concurring) (describing the district court's power to alter its rulings at any time before a final judgment). This is especially so because the district court had already shifted its view of NRS 41A.035 once, and its reconsidered view ended up being superfluous to the final judgment—a dismissal of the entire case.

B. The District Court Was Correct Not to Apply the Cap

On the merits, moreover, the district court got it right.

1. The Limits on a Contribution Action Are Governed by the Contribution Statute, Not the Professional Negligence Statute

Contribution actions are not professional-negligence actions. And Nevada's contribution statute contains its own damages limitation: "the

tortfeasor's total recovery is limited to the amount paid by the tortfeasor in excess of his or her equitable share." NRS 17.225(2). A contribution plaintiff cannot recover "any amount paid in a settlement which is in excess of what was reasonable." NRS 17.225(3). Just as this Court declined to apply the professional-negligence statute of limitations (NRS 41A.097) to a contribution claim that carries its separate limitation period (NRS 17.285), *Saylor*, 126 Nev. at 95-96, 225 P.3d at 1278-79, this Court should not use the professional-negligence damages cap to override the limitations specific to contribution actions.

Here, Republic is not an "injured plaintiff" seeking pain-and-suffering damages for its own bodily "injury or death" so as to trigger NRS 41A.035. Republic is a tortfeasor who has paid more than its equitable share of the liability and is seeking recovery of that equitable share, no more.

2. Statutory Contribution Is Not Equitable Subrogation

Dr. Cash cites various insurance cases for the notion that "[t]he relationship between Marie Gonzales and Republic can only be described as subrogor and subrogee." (RAB 15–16.) From there, citing

State Farm Mut. Auto. Ins. Co. v. Wharton, 88 Nev. 183, 495 P.2d 359 (1972), Dr. Cash announces that, just like an insurer subrogee, Republic should be "subject to all of the same limitations" as the subrogor.

Wharton is an unfortunate choice for Dr. Cash, though, because it actually highlights the difference between equitable subrogation and statutory contribution. In *Wharton*, this Court applied the two-year statute of limitation for personal-injury claims to a subrogation claim based on payment of that underlying claim. 88 Nev. 183, 185–86, 495 P.2d 359, 361 (1972). But in *Saylor*, this Court took exactly the opposite approach for contribution claims, holding that the contribution statute prevails over a shorter period governing the underlying claim. *Saylor*, 126 Nev. at 95-96, 225 P.3d at 1278-79.

That is because Republic is *not* properly described as a subrogor; it is a contribution plaintiff with rights created under that statutory scheme that are not extinguished by limitations applicable to the underlying claim.

3. Because Republic's Liability Was Not Capped, it Would Be Unjust to Restrict Republic's Right of Contribution

Dr. Cash likes to say that Republic "stands in the shoes" of Ms.

Gonzales for purposes of applying the provider-friendly provisions of NRS chapter 41A, but he ignores that before Republic was a contribution plaintiff, it was a defendant liable for injuries that Dr. Cash caused. As a defendant, Republic did not get any of the advantages of NRS chapter 41A—not the cap on liability under NRS 41A.035, nor even the benefit of "several" liability under NRS 41A.045, which might have sealed off Republic's liability for Dr. Cash's malpractice altogether.

Although dismissive of *Pack v. LatTourette* in its description of a contribution claim against medical providers, Dr. Cash tethers himself to it in the application of NRS chapter 41A, condensing it into a holding that "the requirements of NRS 41A apply" to contribution actions. (RAB 16–17.) But that can't be right. *Pack*, after all, reaffirmed the holding in *Saylor v. Arcotta*, 126 Nev. 92, 96, 225 P.3d 1276, 1279 (2010) that contribution claims are *not* subject to NRS 41A.097(2)'s one-year statute of limitations for claims against a health care provider. *Pack v. LaTourette*, 128 Nev. 264, 267, 277 P.3d 1246, 1248 (2012). Instead, NRS 17.285 applies. *See id.* (citing *Saylor*, 126 Nev. at 95-96, 225 P.3d at 1278-79).

Pack instead made the more nuanced point that "statutory limitations should apply to protect doctors from frivolous claims where a given action requires proof of malpractice before relief may be granted." *Pack v. LaTourette*, 128 Nev. 264, 270, 277 P.3d 1246, 1250 (2012). The examples cited, logically, are all mechanisms—such as the expert-affidavit requirement of NRS 41A.071—that weed out meritless claims early on. *Id.* (citing *Fierle v. Perez*, 125 Nev. 728, 738, 219 P.3d 906, 912 (2009) and *Truck Ins. Exchange v. Tetzlaff*, 683 F. Supp. 223, 224–26 (D. Nev. 1988)).

The $350,000 cap in NRS 41A.035 has nothing to do with keeping frivolous claims out of court. Indeed, the cap comes into play only after a factfinder has adjudicated a provider's substantial liability. Its purpose, this Court found, is to "provide greater predictability and reduce costs for health-care insurers and, consequently, providers and patients," thereby "ensuring that adequate and affordable health care is available to Nevada's citizens." *Tam v. Eighth Judicial Dist. Court*, 131 Nev. 792, 798, 358 P.3d 234, 238–39 (2015) (citing Nevada Ballot Questions 2004, Question No. 3, Argument in Support of Question No. 3 at

16, *available at* https://www.leg.state.nv.us/Division/Research/VoteNV/BallotQuestions/2004.pdf 2004).

The UCATA articulates an equally important legislative policy: "to promote and encourage settlements among joint defendants." *Otak Nevada, L.L.C. v. Eight Judicial Dist. Court*, 129 Nev. 799, 808, 312 P.3d 491, 498 (2013); *accord Van Cleave v. Gamboni Constr. Co.*, 101 Nev. 524, 530, 706 P.2d 845, 849 (1985) ("We recognize that the expressed public policy established by the Uniform Act is 'to encourage rather than discourage settlements.'" (quoting 12 U.L.A. 65)). The "release provisions of the 1955 Revised Act [UCATA] were intended to promote settlements, so a construction of the statute should be directed to achieving that objective." *Van Cleave v. Gamboni Const. Co.*, 101 Nev. 524, 530, 706 P.2d 845, 849 (1985) (quoting Comment, *Torts—Vicarious Liability—Covenant Not to Sue Servant or Agent as Affecting Liability of Master of Principal*, 44 TENN. L. REV. 197 (1976)).

Here, arming plaintiffs with an uncapped claim of treatment-related injuries against an original tortfeasor, while capping the original tortfeasor's right of contribution against the negligent medical provider, would throw a wrench into settlement negotiations. The distortions

such a rule introduces would discourage plaintiffs, original tortfeasors, and medical providers alike: Plaintiffs would value their claims (recoverable against the original tortfeasor) at an uncapped amount, while providers would discount the same claims because of their windfall. Caught in the middle would the original tortfeasors, able neither to compel the plaintiff to join the negligent medical provider nor to obtain just contribution from them. That cannot be what this Court in *Pack*—or the Legislature—had in mind.

C. Republic Has No Collateral Sources to Trigger NRS 42.021

For the same reasons, Dr. Cash has no cause to fret about hypothetical collateral sources that he might have been able to introduce in a hypothetical action by Ms. Gonzales against him. As the district court found, it "is by no means certain" that "any such 'collateral source' benefits were paid to Ms. Gonzales." (JA 1383.)

Even assuming such sources exist, though, they are Ms. Gonzales's, not Republic's. In the hypothetical trial between Ms. Gonzales and Dr. Cash, he could have introduced these payments into evidence, Ms. Gonzales could have countered with her premium payments, and she

would have been insulated against third-party claims for reimbursement of the benefits against the judgment. NRS 42.021(1), (2). Here, however, Republic is not bringing an action for "injury or death," and as a contribution plaintiff it received no "amount[s] payable as a benefit . . . as a result of the injury or death." NRS 42.021(1). And while Dr. Cash seeks the benefit of a collateral-source offset for amounts Republic never received, Dr. Cash's proposal would also deny Republic the statute's protections: it could neither show that it paid for those collateral-source offsets nor protect itself against claims of subrogation by the third-party payors.

The district court correctly found that in these circumstances, "[i]t 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" Republic. (JA 1383–84.)

CONCLUSION

Dr. Cash's answering brief lays bare the cruelty of its position: making an original tortfeasor who causes a minor injury liable for the more catastrophic injuries caused by egregious malpractice, then denying the original tortfeasor any recovery against the negligent medical provider. While Dr. Cash cites no authority that justifies this position, in this state or anywhere else, Nevada's contribution statute expressly allows Republic a full recovery of what it paid in excess of its equitable share. This Court should reverse.

Dated this 27th day of August, 2020.

BARRON & PRUITT, LLP

By: */s/ David Barron*
DAVID BARRON (SBN 142)
JOHN D. BARRON (SBN 14,029)
3890 West Ann Road
North Las Vegas, Nevada 89031
(702) 870-3940

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: */s/ Daniel F. Polsenberg*

By: */s/ Abraham G. Smith*
DANIEL F. POLSENBERG (SBN 2376)
JOEL D. HENRIOD (SBN 8492)
ABRAHAM G. SMITH (SBN 13,250)
3993 Howard Hughes Parkway
Suite 600
Las Vegas, Nevada 89169
(702) 949-8200

Attorneys for Appellant

CERTIFICATE OF COMPLIANCE

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3. I certify that I have read this brief, that it is not frivolous or interposed for any improper purpose, and that it complies with all applicable rules of appellate procedure, including NRAP 28(e). I understand that if it does not, I may be subject to sanctions.

Dated this 27th day of August, 2020.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: */s/ Abraham G. Smith*

DANIEL F. POLSENBERG (SBN 2376)
JOEL D. HENRIOD (SBN 8492)
ABRAHAM G. SMITH (SBN 13,250)
3993 Howard Hughes Parkway
Suite 600
Las Vegas, Nevada 89169
(702) 949-8200

DAVID BARRON (SBN 142)
JOHN D. BARRON (SBN 14,029)
BARRON & PRUITT, LLP
3890 West Ann Road
North Las Vegas, Nevada 89031
(702) 870-3940

Attorneys for Appellant

CERTIFICATE OF SERVICE

I certify that on August 27, 2020, I submitted the foregoing APPELLANT'S REPLY BRIEF for filing *via* the Court's eFlex electronic filing system. Electronic notification will be sent to the following:

Robert C. McBride
Heather S. Hall
CARROLL, KELLY, TROTTER, FRANZEN, MCBRIDE & PEABODY
8329 West Sunset Road, Suite 260
Las Vegas, Nevada 89113

Attorneys for Respondents

/s/ Jessie M. Helm
An Employee of Lewis Roca Rothgerber Christie LLP