Case No. 79424

In the Supreme Court of Nevada

DESIRE EVANS-WAIAU, individually; GUADALUPE PARRA-MENDEZ, individually,

Appellants,

vs.

BABYLYN TATE ,

Respondent,

OPPOSITION TO MOTION TO INTERVENE

Plaintiff-appellants Desire Evans-Waiau and Guadalupe Parra-Mendez alleged they incurred particular injuries during a minor traffic accident with the defendant-respondent Babylyn Tate. The jury returned a general defense verdict and appellants appealed directly following entry of judgment. On June 16, 2022, this Court affirmed that verdict.

The Paul Powell Law Firm, plaintiff-appellants' original counsel, now seeks to intervene in order to seek rehearing on portions of the published opinion that refers to the firm's referrals to medical providers. Not only is this request untimely, but it is also unwarranted. The opinion does not include any details that would harm the Paul

Powell Law Firm's reputation. Accordingly, the request to intervene should be denied.

A. Movant Cannot Intervene at this Stage in the Appeal

The Paul Powell Law Firm contends it may intervene as a matter of right under NRCP 24(a). NRCP 24(a)(2) permits a prospective intervener to intervene as a right upon a showing that (1) the motion is timely, (2) it has a sufficient interest in the subject matter of the litigation, (3) its ability to protect its interest would be impaired if it does not intervene and, (4) its interest is not adequately represented. *Am. Home Assurance Co. v. Eighth Judicial Dist. Court*, 122 Nev. 1229, 1238, 147 P.3d 1120, 1126 (2006). Here, the Paul Powell Law Firm cannot prove any of the necessary factors.

1. The Motion is Not Timely

Generally, a motion for intervention is considered untimely when it is filed after a judgment has been considered on appeal. *See Spickard v. Civ. Serv. Comm'n of City & Cnty. of Denver*, 33 Colo. App. 426, 428–29, 523 P.2d 149, 151 (1974); 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE § 1916 ("There is even more reason to deny an application to intervene made while an appeal is pending or after the

judgment has been affirmed on appeal."). Determining whether an application is timely under NRCP 24 involves examining "the extent of prejudice to the rights of existing parties resulting from the delay" and then weighing that prejudice against any prejudice resulting to the applicant if intervention is denied. *Am. Home Assur. Co*, 122 Nev. at 1244, 147 P.3d at 1130. Courts view motions for intervention filed after consideration on appeal with a jaundiced eye because it is assumed that intervention at this point will either (1) prejudice the rights of the existing parties to the litigation, or (2) substantially interfere with the orderly processes of the court. *Spickard*, 33 Colo. App. at 428–29, 523 P.2d at 151.

Here, the Paul Powell Law Firm's 23rd hour intervention is untimely. Final judgment has been entered and that judgment was affirmed. Further, there was no timely petition for rehearing from any *party* to the appeal and accordingly there is nothing pending before the Court.

The Paul Powell Law Firm contends it only learned of its need to intervene on June 16, 2022. However, the topic of medical liens and counsel's working relationship with medical providers was raised

throughout trial and became public record when the issue was discussed in the appellate briefing. Indeed, plaintiffs filed a motion in limine before trial seeking to preclude the argument that plaintiff's medical care was "attorney driven" unless supporting evidence was introduced at trial. Further, the issue was briefed by both appellants and respondent before this court. The discussion of counsel's working relationship with the medical providers is not a new issue. Therefore, the Paul Powell Law Firm's application is untimely.

2. Movant Does Not Have an Interest in the Litigation

To intervene the applicant must show a sufficient interest in the litigation's subject matter *Am. Home Assur. Co.*, 122 Nev. at 1238–39, 147 P.3d at 1126–27. A general, indirect, contingent, or insubstantial interest is insufficient. *Id.* Courts have found that harm to reputation alone, does not constitute the required "interest relating to the property or transaction which is the subject of the present action" necessary to allow intervention as a matter of right." *Calloway v. Westinghouse Elec. Corp.*, 115 F.R.D. 73, 74 (M.D. Ga. 1987); *Edmondson v. State of Neb. ex rel. Meyer*, 383 F.2d 123 (8th Cir. 1967) (finding that movant had no legal interest in litigation and mere fact that his reputation was injured

by allegation of fraud was not enough to serve as basis for mandatory intervention by movant).

Here, the Paul Powell Law Firm has no direct interest in the litigation. They also do not suffer the reputational harm they fear. The allegations that Paul Powell referred plaintiffs to their medical providers is factually accurate. And there is nothing unprofessional about maintaining working relationships with medical providers. Accordingly, the opinion cannot be read in a manner that implies harm to the Paul Powell Law Firm's reputation.

A. THE OPINION IS FACTUALLY ACCURATE

Movant contends that the published opinion does not comport with the evidence. However, the record demonstrates that the Paul Powell Law Firm's referral to plaintiff's medical providers is factually accurate. Appellants Evans-Waiau and Parra-Mendez both testified that Paul Powell, referred them to the initial treater, a chiropractor who, in turn, recommended them to certain spine doctors. (7 A.App. 1725; 8 A.App. 1880.) Further, Evans-Waiau testified that Paul Powell referred her to spine surgeon Jason Garber, MD. (7 A.App. 1728; 6

A.App. 1390 (discussing intake paperwork that indicates she was referred by Paul Powell).)

B. THE INFORMATION IS NOT SCANDALOUS

An attorney maintaining working relationship with medical providers or experts is not necessarily unprofessional. But inquiry into the relationship is relevant to bias that provider may have as a witness. The right to confront and cross examine witnesses includes the right to inquire and examine a witness about the bias and motivation behind their testimony. *See Rish v. Simao*, 132 Nev. 189, 199, 368 P.3d 1203, 1210 (2016), *citing Delaware v. Van Arsdall*, 475 U.S. 673, 678–79, 106 S.Ct. 1431(1986) ("[T]he exposure of a witness motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination."). A reasonable jury may weigh a medical witness's relationship with an attorney as a factor potentially causing bias.

This legitimate inquiry into bias fairly works both ways, moreover. Indeed, at trial, appellant-plaintiff's trial attorney (Dennis Prince) engaged in a similar line of questioning as it related to defense expert Dr. Jeffrey Wang:

> Q Okay. And, anyway, I want to ask you some questions You've obviously -- you know Mr. Winner; correct?
> A Yes.
> Q And you've worked with Mr. Winner and his law firm, the Atkin Winner & Sherrod law firm –
> … You've worked with that law firm in defense, at least, as to personal injury cases for more than 10 years; correct?
> A Yes.
> Q And, in fact, it's likely more than 15 years at this point?
> A Yeah, I'm not sure.
> Q But it's definitely more than 10 years; right?
> A Probably.

(6 App. 1500; 7 App. 1501.) There was nothing wrong with that line of inquiry by plaintiffs' counsel. Nor was the addressed history between Dr. Wong and defense counsel unprofessional.[1]

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[1] The attorney's referral to treaters also was relevant considering plaintiffs' intent to rely on the doctrine that an original tortfeasor is liable for any malpractice of attending physicians. *See Republic Silver State Disposal, Inc. v. Cash*, 136 Nev. 744, 747, 478 P.3d 362, 365 (2020) ("It is well-settled law that the original tortfeasor is liable for the malpractice of the attending physicians"), citing RESTATEMENT (SECOND) OF TORTS § 457 (Am. Law Inst. 1965). In applying that concept, it is appropriate to allow the jury to weigh whether the plaintiff exercised reasonable judgment in the selection of treaters. *Callihan v. Burlington Northern, Inc.*, 654 P.2d 972, 976 (Mont. 1982) ("[T]he defendant is liable to the plaintiff for the results of medical treatment even where such treatment is itself negligent even where such treatment is itself negligent, so long as the plaintiff exercised reasonable care in her selection of a physician."). A defendant may probe the reasonableness of that due diligence or lack thereof. Nevertheless, even though the selection process of a physician is a relevant consideration, which does

Put simply, while the Paul Powell Firm takes offense from the opinion, the opinion is not objectively offensive. There is no insult, much less harm, to that respected firm's reputation.

3. Movant's Interest Were Adequately Protected

While there is no protectable interest in this matter, even if there were, a movant must also demonstrate that its interest is not adequately represented by existing parties. *Am. Home Assur. Co.*, 122 Nev. at 1238, 147 P.3d at 1126.

Here, the Paul Powell Law Firm contends that no party represents or protects its interest. It contends that the discussion of counsel's working relationship with medical providers was an attempt to argue "medical build-up." While the Paul Powell Firm, as discussed above, is not accused of engaging in unprofessional behavior, at the trial below and during the appeal plaintiff-appellants' counsel already argued that the medical treatment was reasonable, and the providers were not biased. *See Calloway*, 115 F.R.D. at 74 (M.D. Ga. 1987) (finding that expert witnesses interests were protected where counsel

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not mean the attorney's referral is necessarily untoward or unprofessional.

actively sought to persuade the court that the expert was reputable and holding that because party had a direct interest in protecting and proving the character and competence of its expert witnesses, it is impossible for this court to find that expert was not given adequate representation in protecting his alleged "interest" in his integrity and reputation).

4. The Parties to the Litigation Will Be Prejudiced

After years of litigation, the only thing remaining in this matter is for this Court to remand, after which a final settlement of costs will be entered. None of the existing parties have filed a petition for rehearing. The Powell Paul Firm's untimely intervention now seeks to unwind portions of this Court's published opinion. Rehearing this appeal further delays the close of this matter and will prejudice the parties who have elected to allow the appeal to conclude.

Dated this 22nd day of July, 2022.

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CERTIFICATE OF SERVICE

I certify that on July 22, 2022, I submitted the foregoing "Opposition to Motion to Intervene" for filing *via* the Court's eFlex electronic filing system. Electronic service shall be made in accordance with the Master Service List as follows:

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