NEVADA
Legal Update
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Highlights

Retained Expert Witness Who Provided Psychiatric Analysis in Divorce Proceeding Granted Absolute Immunity

The Nevada Supreme Court applied the "functional approach" regarding the doctrine of absolute immunity and held that party-retained experts play an integral role in the judicial process. The likelihood of intimidation or harassing litigation was as great, if not greater than, persons previously granted absolute immunity by the court.

Defense Verdict in Slip and Fall Case Resulting from a Water Drip

Plaintiff sued Defendant home-owner and Defendant carpet cleaning company claiming water dripping from a cleaning van created a dangerous condition, which caused her to fall and break her hip. Defendants specifically denied liability, asserting that Plaintiff was not paying attention and was thus responsible for the fall.

Defendants in Medical Malpractice Actions are Entitled to Argue the Percentage of Fault of Settled Defendants

The Nevada Supreme Court recently held that, because defendants in medical malpractice actions are severally liable, defendants in medical negligence actions are entitled to argue the percentage of fault of settled defendants, and can include those settled defendants on the jury verdict form.

Nevada Supreme Court Decisions

Expert Witness

A Retained Expert Witness Who Provided Psychiatric Analysis in Divorce Proceeding Was Entitled to Absolute Immunity

During the divorce proceeding between Vivian Harrison and Kirk Harrison, Kirk hired a psychiatrist, Norton Roitman, M.D., to conduct a psychiatric analysis of his then-wife, Vivian. Without examining or meeting with Vivian, Dr. Roitman submitted a written report to the court diagnosing Vivian with a personality disorder and concluding that her prognosis was poor. In response to the report, Vivian filed a complaint against Dr. Roitman, claiming medical malpractice, intentional infliction of emotional distress, negligent infliction of emotional distress, and civil conspiracy. According to Vivian, Dr. Roitman's report was based entirely on statements obtained from Kirk, and Dr. Roitman's diagnosis, without examining or even meeting Vivian, fell below the standard of care expected of a psychiatrist. The district court, citing absolute immunity, granted Dr. Roitman's motion to dismiss.

On appeal, the Nevada Supreme Court affirmed the dismissal and cited established decisions from the United States Supreme Court, and previous opinions from the Nevada Supreme Court regarding the "functional approach" to the doctrine of absolute immunity. As the court explained, the functional approach used to determine whether a witness should be granted absolute immunity was made up of three separate inquiries: (1) whether the person seeking immunity performed the functions sufficiently comparable to those of persons who have traditionally been afforded absolute immunity at common law; (2) whether the likelihood of harassment or intimidation by personal liability was sufficiently great to interfere with the person's performance of his or her duties; and (3) whether procedural safeguards existed in the system that would adequately protect against illegitimate conduct by the person seeking immunity.

Addressing the first inquiry, the court noted that absolute immunity for "parties and witnesses from subsequent liability for their testimony in judicial proceedings was well established." *Briscoe v. LaHue*, 460 U.S. 325, 330-31 (1983). The court explained that, without immunity, the risk of self-censorship was too great. For example, a witness who might be forced to defend a subsequent lawsuit may be inclined to shade his or her testimony in favor of the opposing party or may magnify uncertainties. The Nevada Supreme Court cited its earlier application of the functional approach to grant absolute immunity to child protective service agents when providing information to the courts. *See State v. Second Judicial Dist. Court (Ducharm)*, 118 Nev. 609 (2002).

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In regard to the "looming threat of liability," the court cited its earlier holding from *Duff v. Lewis* that court-appointed experts were afforded absolute immunity. 114 Nev. 564 (1998). In *Duff*, the court was concerned with the fear and apprehension that may result from personal liability, as losing parties often attempted to seek alternative methods to collect. *Id.* Similar to *Duff*, the court concluded that the threat of liability posed by party-retained experts was great, if not greater than the threat to court-appointed experts. It reasoned that if court-appointed experts run the risk of personal liability when acting as a party-neutral, a retained expert would be a "lightning rod for harassing litigation" without immunity.

The court further reasoned that, without immunity, potential retained-experts would be discouraged from accepting retainers, or they would be forced to carry insurance or charge exorbitantly high retainers to warrant the risk associated with testifying. Moreover, the court was concerned that even after being retained, experts may dilute or distort disagreeable conclusions in order to reduce their risk of liability, as opposed to offering candid opinions.

Finally, the court analyzed the procedural safeguards associated with retained-experts such as cross-examination, change of venue, imposition of sanctions, and appellate review. It concluded that the aforementioned safeguards were sufficient to hold party-retained experts accountable for their conduct.

In response to Vivian's alternative argument that Nevada law only provided immunity in defamation cases, the court cited multiple cases where it applied the theory of absolute immunity to claims for negligence. Likewise, the court rejected Vivian's argument that party-retained experts were not entitled to immunity because they offer testimony in favor of one side, based on the court's finding that expert opinion is not admitted to assist one party, but is admitted to assist the trier of fact by providing specialized knowledge. *See* N.R.S. 50.275. In that regard, the court concluded that "the path to truth is best paved by immunizing expert witnesses, court-appointed or party-retained, from tort liability."

The court thus held that all necessary inquiries to the functional approach were satisfied, thus absolute immunity was granted to Dr. Roitman. *Harrison v. Roitman, M.D.*, 131 Nev. Adv. Op. 92 (December 2015).

Mediation

Mediation Provision Constituted an Enforceable Condition Precedent to Litigation

MB America, Inc. (MBA) was a Nevada Corporation, headquartered in Reno, Nevada, that sold rock-crushing machines. MBA entered into an agreement (Agreement) with Alaska Pacific Leasing Company, whereby Alaska Pacific agreed to become a dealer for MBA's line of products. Upon termination of the Agreement, a dispute arose regarding more than $100,000.00 in equipment purchases made by Alaska Pacific, while acting as a dealer for MBA.

MBA filed a complaint in Nevada district court seeking declaratory relief that: (1) the Agreement was valid and binding; (2) MBA had not breached the Agreement; and (3) specific performance of the Agreement's mediation provision was appropriate. Alaska Pacific filed a motion for summary judgment, alleging that MBA did not comply with the mediation provision contained in the Agreement and therefore prematurely filed its complaint. The district court granted Alaska Pacific's motion, dismissed MBA's complaint, and awarded Alaska Pacific its attorney fees.

On appeal, the court determined that the plain meaning of the Agreement required MBA to submit any disputes to mediation according to the rules of the American Arbitration Association (AAA), and notify Alaska Pacific of any formal request. It was undisputed that MBA did not take the actions required by the AAA to initiate mediation. The court cited case law from other jurisdictions and concluded that "when parties agree to a prelitigation provision, such as mediation, the appropriate remedy is to dismiss the action." *Tattoo Art, Inc. v. TAT International, LLC*, 711 F. Supp. 2d 645, 651 (E.D. Va. 2010); *see also DeValk Lincoln Mercury, Inc. v. Ford Motor Co.*, 811 F.2d 326 (7th Cir. 1987).

MBA argued that despite not formally requesting mediation, summary judgment was inappropriate because genuine issues of material fact remained as to whether Alaska Pacific refused to participate in mediation as required by the Agreement and whether Alaska Pacific's prior refusal to mediate rendered any further attempt by MBA to mediate the dispute futile. MBA submitted evidence of correspondence between MBA and Alaska Pacific, accompanied by multiple affidavits, regarding an informal request for mediation to support its position. The Nevada Supreme Court concluded, however, that the correspondence did not actually contain either a request for mediation or a rejection of the same. Thus, the issue was never ripe for judicial review.

MBA next argued that the district court should not have dismissed the complaint, but rather stayed the proceedings and ordered the parties to mediate. In response, the Nevada Supreme Court relied on a case from the United States Court of Appeals for the Eleventh Circuit, which held that "because the mediation process does not purport to adjudicate or resolve a case in any way, it is not arbitration, and thus arbitration remedies, such as mandatory stays and motions to compel, are not appropriately invoked to compel mediation." *Advanced Bodycare Sols., LLC v. Thione Int'l, Inc.*, 524 F.3d 1235, 1240 (11th Cir. 2008). The court also upheld the award of attorneys' fees because the order granting summary judgment in favor of Alaska Pacific and the dismissal of MBA's complaint were sufficient to find Alaska Pacific a prevailing party pursuant to NRS § 18.010. *MB America, Inc. v. Alaska Pacific Leasing Company*, 132 Nev. Adv. Op. 8 (February 2016).

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Alverson, Taylor, Mortensen & Sanders

7401 W. Charleston Blvd.
Las Vegas, Nevada 89117
(702) 384-7000 | Fax (702) 385-7000
www.alversontaylor.com

NEVADA JURY VERDICTS

Personal Injury

Last Minute Settlement Prior to Jury Verdict

Plaintiff, a 39-year-old female, was a passenger in a Ford F-150 pickup truck traveling southbound on Interstate 15, when Defendant, a 76-year-old male, rear-ended the pickup truck. Defendant was operating a tractor trailer in the course and scope of his employment. According to Plaintiff, the impact propelled the pickup truck into another vehicle. Plaintiff's retained accident reconstructionist opined that Defendant caused the collision. Defendant denied liability, claiming that sudden stops by numerous motorists in front of him made it impossible for him to stop.

As a result of the collision, Plaintiff allegedly suffered a closed head injury with concussion, residual cognitive defects, and orthopedic injuries. Plaintiff's treating physician and various retained experts testified that her medical damages were causally related to the subject incident and opined that she would require future medical treatment. In response, Defendants argued the collision was a "bump" and called other treating physicians and retained experts to refute Plaintiff's claimed damages. The parties stipulated to $202,468.40 in past medical expenses.

Plaintiff served an $850,000.00 pretrial Offer of Judgment and Defendant served a $500,000.00 Offer of Judgment. During closing arguments, Plaintiff's counsel asked the jury to award Plaintiff $4,400,000.00. Minutes before the jury returned its verdict, the matter settled for Defendants' $2,000,000.00 policy limits. It was subsequently learned that the jury would have awarded Plaintiff a total of $2,436,468.40, representing $202,468.40 for past medical expenses, $534,000.00 for future medical expenses, $500,000.00 for past pain and suffering, and $1,200,000.00 for future pain and suffering. *Flores v. Friedman Enterprises, LTD.*, July 21, 2015.

Seven Figure Verdict Resulting from Motor Vehicle Collision

Plaintiff was operating his vehicle northbound on Interstate 15 when Defendant allegedly failed to maintain his lane of travel, steered right, and caused a motor vehicle accident. At trial, Plaintiff called the investigating highway patrol trooper who testified that the Defendant failed to maintain his lane of travel and entered Plaintiff's lane. Plaintiff also called an accident reconstructionist who opined that Defendant was 100 percent at fault. Specifically, the accident reconstructionist believed that at the time of the accident, Defendant was talking on his cellular telephone without a hands free device. Defendant argued that Plaintiff was partially at fault.

As a result of the collision, Plaintiff allegedly sustained cervical soft tissue injuries and bulging lumbar disks, which required fusions. Plaintiff claimed that his injuries were permanent in nature and he would endure pain and suffering for the rest of his life. Plaintiff called his treating physicians to support his allegations. Defendant argued Plaintiff did not suffer an injury that necessitated surgery, and alleged that Plaintiff was not truthful regarding his symptoms and his functional limitations. Defendant called multiple expert witnesses who opined that surgery was not necessary, and that Plaintiff's complaints and symptoms reflected medical conditions that predated the subject accident.

During the course of litigation, the court granted Plaintiff's motion for $30,990.00 in attorneys' fees and $5,092.30 in costs due to Defendant's alleged spoliation of a defense expert's opinion and report related to the physical examination of Plaintiff. Plaintiff made a pretrial demand of $2,500,000.00, and Defendant offered $501,000.00. After a 14-day trial, the jury awarded Plaintiff $2,133,878.35, representing $397,865.35 in past medical expenses, $411,013.00 for future medical expenses, $225,000.00 for past pain and suffering, and $1,100,000.00 for future pain and suffering. Plaintiff was found to be 40 percent at fault and his award was reduced to $1,280,327.01. *Westbrook v. Jacobson*, July 23, 2015.

Tire Retailer Liable for Rear-End Collision

Plaintiff was stopped for traffic on Interstate 80 when she was rear-ended by Defendant Driver. Plaintiff alleged that immediately prior to the accident, Defendant Big O Tires negligently serviced and/or repaired Defendant Driver's brakes, or sold him defective brakes. Defendant Driver denied liability and argued that his brakes were not functioning properly or were not properly installed by Defendant Big O Tires.

Defendant Big O Tires agreed that it serviced Defendant Driver's vehicle prior to the collision, but denied liability. According to Big O Tires, Defendant Driver took his vehicle to a Big O Tires location after noticing smoke coming from the rear wheels of his vehicle. Upon inspection, Big O Tires determined the problem was a manufacturer defect in the rear brake pads, but the issue did not cause any braking problems. Regardless, Big O Tires installed a new set of rear brake pads from a different manufacturer and test drove Defendant Driver's vehicle approximately 25 miles to confirm the brakes functioned properly.

Plaintiff allegedly sustained a cervical strain and sprain as a result of the collision, which required multiple procedures and would necessitate future medical treatment. After a four-day trial, the jury awarded Plaintiff $682,836.22, representing $43,185.22 in past medical expenses, $499,651.00 for future medical expenses, $100,000.00 for past pain and suffering, $40,000.00 for future pain in suffering, and $1,047.00 in property damage. All damages were awarded against Defendant Big O Tires. *Morell v. Mackenzie and Silver Creek Tire, LLC, dba Big O Tires*, July 23, 2015.

Allegations of Assault and Battery Over Two Candy Bars Results in Defense Verdict

Plaintiff, a cook at a restaurant, alleged that the restaurant's general manager assaulted him after Plaintiff took two candy bars from an "employees only" area. The candy bars were being sold for a fundraiser and Defendant general manager alleged Plaintiff was aware the candy bars were for sale. Plaintiff denied any knowledge of a fundraiser.

As a result of the altercation, Plaintiff allegedly suffered an injury to his right foot and anticipated future revision surgery. Plaintiff's experts opined that his injuries were causally related to the incident and that past and proposed medical treatments were reasonable and necessary. Defendant denied liability and argued that Plaintiff's injuries were caused by a third party. Defendant's expert opined that Plaintiff exaggerated his symptoms and sought secondary gain. Plaintiff served a $380,000.00

pretrial offer of judgment, and Defendant offered $20,000.00. During closing arguments, Plaintiff's counsel asked the jury to award Plaintiff $500,000.00. After a five-day trial, the jury found for Defendant. *Angeles-Carpio v. MacFaun*, September 9, 2015.

Plaintiff Comparatively Negligent for Traveling in Universal Turn Lane

Plaintiff, a 53-year-old male, was operating a motorcycle when Defendant, in the course and scope of his employment as a shuttle driver for Defendant Mardi Gras Inn, allegedly executed a driving motion that caused Plaintiff to lay down his motorcycle. Defendants denied liability and argued that Plaintiff was negligently traveling in the universal turn lane, was traveling too fast for conditions, and failed to use care in the operation of his motorcycle.

Plaintiff claimed that he sustained an injury to his left knee, which required a total knee replacement. Plaintiff also relied on the expert testimony of an economist who discussed Plaintiff's impaired future earning capacity. Plaintiff served a pre-trial offer of judgment for $750,000.00, and Defendants offered $300,000.00. During closing arguments, Plaintiff's counsel asked the jury to award Plaintiff $2,500,000.00. After a six-day trial, Plaintiff was awarded $616,459.75 in compensatory damages. Plaintiff was found to be 40 percent at fault and his award was reduced to $369,875.85. *Troutt v. Nevadian Inc. dba Mardi Gras Inn*, September 15, 2015.

Medical Malpractice

Defense Verdict after Complications from Shoulder Reconstruction

Plaintiff tripped and fell at her place of employment, sustaining an injury to her right shoulder, which had previously been surgically repaired. Plaintiff sought medical treatment from Defendant, an orthopedic surgeon, who performed a reconstruction/replacement surgery. Plaintiff alleged that Defendant fell below the standard of care during that procedure when he fractured Plaintiff's right distal humerus as he attempted to remove preexistent surgical cement. Plaintiff also alleged that Defendant knew he had fractured the humerus after obtaining intraoperative X-rays, but proceeded with the surgery as planned. Plaintiff further claimed that the hot cement used to affix the prosthetic into the humerus leaked through the fractures in the distal humerus. Plaintiff's retained expert orthopedist opined that Defendant fell below the standard of care and should not have used cement to secure the humeral component of the artificial shoulder.

Plaintiff claimed that, as a result of Defendant's malpractice, her radial nerve was burned and encased by the cement, she sustained permanent radial nerve damage, and she had lost the use of her dominant right hand. After a nine-day trial, the jury found for Defendant. *Martyn v. Nevins, MD and Nevada Orthopedic Spine Center, LLP*, July 10, 2015.

Verdict for Plaintiff after Surgery Performed at Incorrect Lumbar Level

Plaintiff sought services from Defendant, a neurosurgeon, for a lumbar injury he sustained while playing collegiate football. An MRI revealed a small bulging lumbosacral disk at L5-S1, and Plaintiff subsequently underwent a surgical lumbar micro discectomy for the bulging disk. Less than two weeks later, Plaintiff presented to Defendant with complaints of extreme pain. A second MRI revealed post-surgical changes as a result of an L-4 laminectomy and micro discectomy; however, Defendant allegedly advised Plaintiff that the MRI showed only significant edema.

Plaintiff alleged that Defendant fell below the standard of care by performing surgery on the wrong lumber level and further failed to disclose that the MRI showed post-surgical changes at L4, when surgery was to be performed at L5. Defendant argued that he met the appropriate standard of care and performed the micro discectomy at L5-S1 as planned. Both parties retained expert witnesses who testified in support of their respective positions.

Plaintiff claimed that as a result of the surgical incision into a healthy disk, L4-5 herniated and required surgical repair, in addition to the originally intended micro discectomy at L5-S1. After an 11-day trial, the jury awarded Plaintiff $4,286,300.49, representing $136,300.49 in past medical expenses, $350,000.00 for future medical expenses, $1,800,000.00 for past pain and suffering, and $2,000,000.00 for future pain and suffering. *Orth v. Capanna, MD*, September 2, 2015.

Premises Liability

Defendants Not Liable for Trip and Fall at Hotel

While attending a 3,000 plus person event at Defendant hotel, Plaintiff allegedly tripped over a temporary 18-foot lighting fixture. Defendant denied liability and argued the lighting fixture had been placed in a safe area, that the placement had been approved by the Clark County Fire Marshal, and that no other guest had any problems with the fixture. Moreover, Defendant claimed that Plaintiff was under the influence of alcohol when he tripped.

As a result of the fall, Plaintiff allegedly sustained a foot fracture that required two separate surgical procedures. Plaintiff made a $110,000.00 pretrial offer of judgment, and Defendant offered $20,000.00. After a four-day trial, the jury found for Defendant. *Lauer v. Hello! Destination Management and Paris Las Vegas Propco, LLC*, September 17, 2015.

Water Drip Not the Cause of Slip and Fall

Plaintiff, a 67-year-old female, slipped on ice in Defendant homeowner's driveway. Plaintiff alleged that Defendant homeowner failed to properly maintain his driveway and failed to warn Plaintiff of the dangerous condition. Plaintiff also alleged that Defendant carpet cleaning company allowed water to drip from its cleaning van onto the driveway, and that the water froze and caused Plaintiff to slip. Plaintiff sustained a fractured hip from the slip and fall.

Defendant homeowner denied liability and advanced the defense that Plaintiff was negligent. In the alternative, Defendant homeowner argued that Defendant carpet cleaning company was liable for Plaintiff's harm because it allowed the water to remain and freeze on his driveway. Defendant homeowner retained an expert who opined that the carpet cleaning company negligently left water on the driveway. Defendant carpet cleaning company also denied liability and argued that, if there was water on the driveway, Plaintiff was inattentive as to where she was walking. In the alternative, Defendant carpet cleaning company argued that Defendant homeowner was liable as he had a duty to warn Plaintiff of the dangerous condition.

Plaintiff served a $120,000.00 pretrial offer

of judgment and Defendant carpet cleaning company offered $15,000.00. After a two-day trial, the jury found for Defendants. *Edson v. Suzie Q's Stain Busters and Davis*, September 1, 2015.

Breach of Contract

Defendant Business Owner Liable for Breach of Contract, Fraud, and Misrepresentation

Plaintiff entered into a purchase agreement with Defendant, which provided that Plaintiff would purchase 49 percent of Defendant's company stock for a total of $150,000.00. Plaintiff was to pay $50,000.00 down and make monthly payments of $4,167.00 for two years. Plaintiff claimed that she advised Defendant that her investment was on behalf of her sister. Plaintiff established an escrow investment account and began the process of relocating Defendant's business operations to a safer, thriving area of Las Vegas, and updated the company's furniture and equipment for the new office. Defendant placed Plaintiff's name on the Defendant company's bank account. Eventually, however, Plaintiff discovered that Defendant had not updated its accounting records since 2009, had failed to pay taxes since its incorporation, and had poor credit. Plaintiff took necessary steps to bring Defendant into compliance with Nevada's Secretary of State. She also placed cellular telephone contracts on her personal credit card and paid other corporate expenses. In total, Plaintiff paid Defendant $83,000.00.

Plaintiff subsequently filed suit alleging that Defendant was liable for breach of contract for failing to be fully transparent regarding the company, failing to share Defendant company's profits, failing to disclose that Defendant had not paid taxes, and failing to facilitate the free transfer of Plaintiff's ownership to her sister. Plaintiff also alleged that after she withdrew $3,000.00 from the company bank account to pay a former employee's salary, Defendant removed her name from the account. Plaintiff claimed Defendant was guilty of misrepresentation, fraud, and conversion.

Defendant denied liability, filed a counterclaim, and advanced the defense that Plaintiff violated the contract by failing to pay in full under the terms of the purchase agreement, and engaged in self-help when she attempted to recover her down payment and installment payments by stealing money from the company bank account and personal property from the company's office. Defendant also claimed that the money paid pursuant to the agreement was nonrefundable.

After a five-day trial, the jury found for Plaintiff and awarded $92,536.00, representing $83,336.00 for fraudulent inducement, intentional misrepresentation and negligent misrepresentations, and $9,200.00 for unjust enrichment. *Trainor v. Patient Care Home Health Services, Inc. and De La Rosa*, May 22, 2015.

Insurance Intermediary Liable for Misrepresentation of Policy Limits

Defendant Travelers Insurance issued a business owners policy to Plaintiff, a furniture store and warehouse, for the policy period December 7, 2010 through December 7, 2011. The policy limits were $500,000.00 for Plaintiff's showroom and $150,000.00 for Plaintiff's warehouse, and included coverage for business interruption and/or loss. In May 2011, Plaintiff asked Defendant Stiles Insurance Services to increase the policy limits, and Defendant Stiles Insurance Services submitted a policy change request to Defendant Travelers Insurance to increase coverage to $1,300,000.00 for Plaintiff's showroom and $200,000.00 for Plaintiff's warehouse. A change endorsement was issued by Defendant Travelers Insurance in the amounts requested.

In September 2011, Plaintiff's warehouse was burglarized and all inventory was stolen, with a loss totaling $313,724.00. Plaintiff submitted a claim to Defendant Travelers Insurance, but Travelers Insurance only paid $200,000.00 pursuant to the policy limits. Plaintiff then submitted a claim for business interruption and/or loss, and Travelers Insurance requested additional documentation.

Plaintiff subsequently filed a lawsuit alleging that Defendant Stiles Insurance Services failed to obtain the amount of insurance coverage requested and misrepresented the policy limits. Plaintiff further alleged that Defendant Travelers Insurance failed to provide an explanation of its determination and its determination was incomplete, as it only paid for the furniture and not the cost to replace it. Plaintiff also alleged Defendant Travelers Insurance failed to make payment on its claim in a timely manner and mishandled Plaintiff's business interruption claim. The court reached a directed verdict for Defendant Travelers Insurance. After a six-day trial, the jury found Defendant Stiles Insurance Services liable for misrepresentation and awarded Plaintiff $56,862.50. *MG&S Enterprise, LLC v. Travelers Casualty Insurance Company of America and Insurance Services Corporation, Inc.*, September 28, 2015.

Comments

Defendants in Medical Malpractice Actions are Entitled to Argue the Percentage of Fault of Settled Defendants

In a 4-3 decision, the Nevada Supreme Court recently held that a defendant in a medical malpractice action is entitled to argue the percentage of fault of settled defendants, and can include those settled defendants' names on applicable jury verdict forms. In other words, defendants in medical malpractice cases are now entitled to argue that liability rests on the shoulders of a third party, including a settled party or non-party.

In *Piroozi v. Eighth Judicial District Court*, 131 Adv. Op. 100 (December 2015), Tiffani Hurst and Brian Abbington, jointly and on behalf of their infant daughter MayRose, alleged that MayRose suffered permanent brain damage as a result of the professional negligence of various medical providers. Prior to trial, all named defendants settled except for Ali Piroozi, M.D., and Martin Blahnik, M.D. Subsequently, the plaintiffs filed a motion in *limine* to bar the remaining defendants from arguing the comparative fault of the settled defendants or include the settled defendants' names on jury verdict forms. The district court granted the motion, relying on NRS § 41.141, which stated:

> If a defendant…settles with the plaintiff before the entry of judgment, the comparative negligence of that defendant and the amount of the settlement must not thereafter be admitted into evidence nor considered by the jury. The judge shall deduct the amount of the settlement from the net sum otherwise recoverable by the plaintiff pursuant to the general and special verdicts.

Alverson Taylor Mortensen
& Sanders
7401 W. Charleston Blvd.
Las Vegas, Nevada 89117

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In responding to the defendants' writ of mandamus, the Nevada Supreme Court agreed that NRS § 41.141, standing alone, would preclude the defendant doctors from arguing comparative negligence of the settled defendants; however, the Supreme Court also considered NRS § 41A.045, a 2004 statute enacted in direct response to the Keep Our Doctors in Nevada ballot initiative. NRS § 41A.045 provides:

1. In an action for injury or death against a provider of health care based upon professional negligence, each defendant is liable to the plaintiff for economic damages and noneconomic damages severally only, and not jointly, for that portion of the judgment which represents the percentage of negligence attributable to the defendant.

2. This section is intended to abrogate joint and several liability of a provider of health care in an action for injury or death against the provider of health care based upon professional negligence.

As the Court explained, the plain meaning of NRS § 41A.045 and the explanation accompanying the ballot initiative provided that an injured plaintiff in an action against a provider of healthcare can only recover that defendant's share of the injured plaintiff's damages. Moreover, the Court reasoned that since defendants in professional negligence suits can only be held responsible for their share the damages, the next logical step was to give defendants the opportunity to argue the comparative fault of settled defendants and include all defendants' names, whether settled or otherwise situated, on the jury verdict form.

With the two statutes in direct conflict, the Court concluded that NRS § 41A.045 controlled as a special statute focusing specifically on the professional negligence of a provider of healthcare, compared to the general rule provided by NRS § 41.141. Likewise, the Court explained that NRS § 41A.045 was enacted last, and in Nevada the statute more recent in time controls. Thus, the writ was granted and the district court was directed to permit the remaining defendants to argue that a portion of the plaintiffs' damages were caused by the settled defendants and include the settled defendants' names on the jury verdict form.

Piroozi comes on the heels of *Tam v. Eighth Judicial District Court*, which upheld a $350,000.00 cap for non-economic damages in medical malpractice cases. Thus, after the *Piroozi* decision, not only are non-economic damages capped in medical malpractice cases, but defendants now have additional opportunities to reduce the potential amount of damages owed, or even avoid liability altogether. What's more, the bargaining power of defendants during settlement negotiations has significantly increased, as the Court's decision clearly demonstrates an intention to "promote settlements and reduce the time and expense of professional negligence trials involving comparative defense or other settling defendants." It appears, at least at this point, that the Nevada Supreme Court is inclined to uphold the statutes passed as a direct result of the Keep of Our Doctors in Nevada ballot initiative.