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### Summary of Pack v. LaTourette, 128 Nev. Adv. Op. No. 25

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*Pack v. LaTourette*, 128 Nev. Adv. Op. No. 25 (May 31, 2012)<sup>1</sup>  
Tort – Equitable Indemnity, Contribution, Expert Affidavit Requirement

### **Summary**

Appeal from an action that was dismissed on statute of limitation grounds with prejudice. The Court addressed whether dismissal is proper in the absence of a preexisting relationship for a claim of equitable indemnity; whether contribution can be sought from a party who has not yet paid toward a judgment; and whether an expert affidavit is required for claims seeking contribution for medical malpractice.

### **Disposition/ Outcome**

The Court held that, in the absence of a preexisting relationship between parties, equitable indemnity cannot be sought if the claims derive from the third-party plaintiff's active negligence. The Court also held that contribution can be sought even if the party seeking contribution has yet to pay toward a judgment. Finally, the Court held that a contribution claim based on a theory of medical malpractice must include an expert affidavit, as defined by NEV. REV. STAT. § 41A.071 (2007).

### **Factual and Procedural History**

In 2006, a Sun Cab, Inc. (Sun Cab) employee injured a David Zinni in an automobile accident.<sup>2</sup> Zinni was treated by Dr. Gary LaTourette (LaTourette) after the accident. LaTourette was not initially named as a defendant in Zinni's lawsuit against Sun Cab, but following discovery, Sun Cab impleaded LaTourette seeking equitable indemnity and contribution for alleged medical malpractice.

LaTourette sought dismissal of this suit arguing, first, that it was time-barred by NEV. REV. STAT. § 41A.097; second, that Sun Cab's underlying claims of equitable indemnity and contribution should be dismissed because, for various reasons, they failed as a matter of law; and finally, because Sun Cab had failed to attach an expert affidavit in support of its claims, as required by NEV. REV. STAT. § 41A.071. The district court dismissed the claims against LaTourette with prejudice because the statute of limitations for medical malpractice had run.<sup>3</sup>

### **Discussion**

Justice Parraguirre wrote the opinion for the three justice panel. Relying on *Saylor v. Arcotta*, the Court found that the district court's application of Section 41A.097 was improper, and that Sections 11.190(2)(c) and 17.285 should be applied.<sup>4</sup> Thus, the Court held that the suit was timely and should not have been dismissed on statute of limitation grounds.

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<sup>1</sup> By Matthew Vantusko

<sup>2</sup> Zinni was not a party to this appeal.

<sup>3</sup> NEV. REV. STAT. § 41A.097 (2007).

<sup>4</sup> *Saylor v. Arcotta*, 126 Nev. \_\_\_, 225 P.3d 1276 (2010); NEV. REV. STAT. §§ 11.190(2)(c), 17.285 (2007).

The Court then considered whether the alternative arguments presented in the district court by LaTourette could allow for the dismissal, under NRCP 12(b)(5). The standard was a “rigorous” de novo review.

Sun Cab failed to state a claim for equitable indemnity.

The Court held that Sun Cab’s equitable indemnity claim failed as a matter of law. The first reason that the equitable indemnity claim failed was because there was no preexisting legal relationship between LaTourette and Sun Cab, and there was no duty on the part of LaTourette to protect Sun Cab.<sup>5</sup> The second reason was that Sun Cab had “committed an ‘independent wrong’” in its own negligence towards Zinni.<sup>6</sup>

Sun Cab stated a claim for contribution.

The Court held that contribution may be sought by a party who has yet to pay toward a judgment. The Court stated that requiring a party to seek contribution only after it has paid toward a judgment would contradict NRCP 14(a)’s allowance of impleader of third-party defendants for inchoate claims. Additionally, the Court mentioned that it has traditionally allowed contribution to be sought “in an original action prior to entry of judgment.” The Court concluded that Sun Cab’s claim for contribution was timely.

Sun Cab’s failure to attach an expert affidavit warranted dismissal, but without prejudice.

Despite the initial allowance of the contribution claim, the Court held that to seek contribution based on a theory of medical malpractice the requirement of NEV. REV. STAT. § 41A.097 must be met. As Sun Cab did not submit a medical expert affidavit, its complaint was void ab initio, and therefore was dismissed without prejudice.<sup>7</sup>

**Conclusion**

The Court affirmed the district court’s dismissal of the equitable and contribution claims, but reversed the district court’s dismissal with prejudice.

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<sup>5</sup> See *Doctors Company v. Vincent*, 120 Nev. 644, 654, 98 P.3d 681, 688 (2004).

<sup>6</sup> See *Rodriguez v. Primadonna Co.*, 125 Nev. 578, 216 P.3d 793, 801 (2009).

<sup>7</sup> See *Washoe Med. Ctr. v. Dist. Ct.*, 122 Nev. 1298, 1304, 148 P.3d. 790, 794 (2006).