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### Piroozi v. Eighth Jud. Dict. Ct., 131 Nev. Adv. Op. 100 (Dec. 31, 2015)

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*Nevada Law Journal*

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TORTS: MEDICAL MALPRACTICE AND COMPARATIVE FAULT

**Summary**

Real parties in interest, Hurst and Abbington sought and obtained a pretrial order from the district court barring petitioners, Dr. Piroozi and Dr. Blahnik, from arguing comparative fault of settled defendants at trial and including those defendants' names on the verdict forms. In granting the Writ of Mandamus filed by the petitioners, the Supreme Court of Nevada resolved a conflict between NRS 41.141(3)<sup>2</sup> and NRS 41A.045<sup>3</sup>, holding that NRS 41A.045<sup>4</sup> preempts NRS 41.141(3)<sup>5</sup> and entitles a defendant to argue the percentage of fault of settled defendants at trial and to include the settled defendant's names on the jury verdict form.

**Background**

Hurst and Abbington, jointly and on behalf of their daughter, filed a complaint against several medical providers alleging professional negligence. All defendants settled except for the petitioners. Prior to trial, Hurst and Abbington filed a motion to bar petitioners from arguing comparative fault of the settled defendants at trial and including those defendant's names on the verdict forms. The district court, relying on NRS 41.141<sup>6</sup> (the comparative negligence statute governing liability of multiple defendants) granted the motion. Petitioners sought a writ of mandamus ordering the district court to allow petitioners to argue the comparative fault of the settled defendants and to place those names on the verdict forms.

**Discussion**

*Consideration of the writ petition*

The Court considered the writ on the basis that the case involved important legal issues that required clarification in order to promote judicial economy and administration.<sup>7</sup> The Court determined consideration of the petition would promote judicial economy and administration in not only this case, but similar pending negligence cases because the resolution of the issues in this case will promote settlements and reduce the time and expense of future trials.

*Merits of the writ petition*

Petitioners contended the district court abused its discretion in relying upon NRS 41.141(3)<sup>8</sup>, which prohibits a jury from considering the comparative negligence of settled

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<sup>1</sup> By Jessie Folkestad.

<sup>2</sup> NEV. REV. STAT. § 41.141(3).

<sup>3</sup> NEV. REV. STAT. § 41A.045.

<sup>4</sup> *Id.*

<sup>5</sup> NEV. REV. STAT. § 41.141(3).

<sup>6</sup> NEV. REV. STAT. § 41.141.

<sup>7</sup> *Cheung v. Eighth Judicial Dist. Ct.*, 121 Nev. 867, 869, 124 P.3d 550, 550 (2005).

<sup>8</sup> NEV. REV. STAT. § 41.141(3).

defendants and settlement amounts, when a remaining defendant asserts a comparative negligence defense. Petitioners argued that NRS 41.141(3)<sup>9</sup> does not apply to professional negligence actions against healthcare providers because its application invalidates NRS 41A.045's<sup>10</sup> abrogation of joint and several liability by preventing petitioners from arguing the liability of settled defendants.

The Court explained the plain language of NRS 41A.045<sup>11</sup> unequivocally provides that defendants in professional negligence actions are severally liable for damages. Thus, an injured plaintiff in a healthcare provider professional negligence action can only recover the defendant's share of the injured plaintiff's damages. The plain language of NRS 41A.045<sup>12</sup> and the statutes corresponding ballot initiative explanation demonstrate the purpose of the statute was to protect individual defendants from liability exceeding the defendant's fault.

In addressing the conflict between the two statutes when read together, the Court held that if defendants can be held responsible for only their share of an injured plaintiff's damages, it follows that defendants must be allowed to argue the comparative fault of the settled defendants and the jury verdict forms must account for the settled defendant's percentage of fault. Moreover, NRS 41A.045<sup>13</sup> is a special statute focusing specifically on professional negligence of medical providers. Where a general and a special statute, each relating to the same subject are in conflict and cannot be read together, the special statute controls.<sup>14</sup> Thus, in this context, NRS 41A.045<sup>15</sup> displaces NRS 41.141<sup>16</sup> and the district court was required to permit petitioners the opportunity to argue the comparative fault of the settled defendants.

## **Conclusion**

The writ petition was granted because the plain language of NRS 41A.045<sup>17</sup> intended that defendants in a medical provider negligence action be held responsible only for their share of a plaintiff's damages. Because the case involved medical provider negligence, NRS 41.141<sup>18</sup> is displaced by NRS 41A.045<sup>19</sup> as it is a special statute. It thus follows that defendants must be allowed to argue the comparative fault of the settled defendants and the jury verdict forms must account for the settled defendant's percentage of fault.

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<sup>9</sup> *Id.*

<sup>10</sup> NEV. REV. STAT. § 41A.045 was enacted after Nevada voters approved the Keep Our Doctors in Nevada (KODIN) ballot initiative.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *See Laird v. State Pub. Emps. Ret. Bd.*, 98 Nev. 42, 45, 639 P.2d 1171 (1982).

<sup>15</sup> NEV. REV. STAT. § 41A.045.

<sup>16</sup> NEV. REV. STAT. § 41.141.

<sup>17</sup> NEV. REV. STAT. § 41A.045.

<sup>18</sup> NEV. REV. STAT. § 41.141.

<sup>19</sup> NEV. REV. STAT. § 41A.045.

## **Dissent**

The dissent concludes that NRS 41A.045<sup>20</sup> is ambiguous and does not abrogate NRS 17.245's<sup>21</sup> offset provision, making it improper to introduce evidence of settlement.<sup>22</sup>

### *Ambiguity*

The dissent argued NRS 41A.045<sup>23</sup> is ambiguous: 1) The words “each defendant” could be read to either limit several liability to actions with multiple defendants or permit several liability, even when there is only one defendant; and 2) NRS 41A.045<sup>24</sup> is unclear whether the percentage of negligence attributable to the defendant for which he/she is liable is based only in relation to other defendants in the action or in relation to all persons at fault, including settled defendants. In the dissent's view, because there was ambiguity, legislative history should be considered.

### *Single or multiple defendants*

The dissent considered the ballot explanation section of NRS 41A.045<sup>25</sup> to determine voter intent. The dissent argued the explanation section of the ballot questionnaire relevant to NRS 41A.045 states, “[c]urrent law provides that each one of multiple defendants in medical malpractice is severally, but not jointly liable.” Thus, the dissent concluded that the voters intended NRS 41A.045 to only apply to medical malpractice actions with multiple defendants.

### *Several liability in relation to whom*

The dissent contended that requiring multiple defendants for NRS 41A.045<sup>26</sup> to apply allows the court to resolve the second ambiguity with a canon of statutory interpretation. Specifically, when a legislature adopts language that has a particular meaning or history, the rules of statutory construction indicate that a court may presume that the legislature intended a similar meaning. In applying this canon to the second ambiguity, the dissent contended NRS 41A.045<sup>27</sup> imposes several liability only in relation to remaining defendants, and not settled defendants.

As to the settled defendants, NRS 41A.045<sup>28</sup> must be reconciled with NRS 17.245(1)(a)<sup>29</sup> (effects of release or covenant not to sue). The dissent argued that allowing several liability

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<sup>20</sup> *Id.*

<sup>21</sup> NEV. REV. STAT. § 17.245.

<sup>22</sup> The majority opinion noted that although the dissent cited NRS 17.245, this statute was not argued in the district court, was not discussed in the district court's order, and was not argued on appeal by the parties.

<sup>23</sup> NEV. REV. STAT. § 41A.045.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> NEV. REV. STAT. § 17.245(a)(1).

between all tortfeasors, including settled defendants, is discordant with NRS 17.245(1)(a),<sup>30</sup> which requires a district court to reduce any judgment by all amounts paid by settled defendants that were liable in tort for the same injury. Under this theory, if a defendant could argue comparative negligence as to settled defendants, then she would only be liable for her proportional fault in relation to them. Because the judgment issued against this defendant would amount to her exactly liability, she would receive a windfall when NRS 17.245(1)(a)<sup>31</sup> reduced that judgment by all settlement amounts. Thus, this interpretation should be avoided because it is in conflict with the function of NRS 17.245(1)(a)<sup>32</sup>. The dissent concluded that NRS 41A.045<sup>33</sup> should be construed to prohibit a defendant from arguing the comparative negligence of settled defendants and therefore the district court did not abuse its discretion in its order granting the pretrial motion.

#### *NRS 17.245*

The dissent argued the Court has previously held that in association with NRS 17.245(1)(a)<sup>34</sup>, parties may not inform the jury as to either the existence of a settlement or the sum paid in order to prevent improper speculation by the jury.<sup>35</sup> Thus, the district court did not abuse its discretion by not allowing discussion as to a settlement occurring and the settlement amount.

#### *Defendant's names on the jury verdict forms*

The dissent argued the district court did not abuse its discretion by refusing to place settled defendant's names on the jury verdict form because that decision was consistent with the Court's decision in *Moore*<sup>36</sup>, wherein the jury may not be informed of settlement.

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<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> NEV. REV. STAT. § 41A.045.

<sup>34</sup> NEV. REV. STAT. § 17.245(a)(1).

<sup>35</sup> *Banks v. Sunrise Hosp.*, 120 Nev. 822, 843—44, 102 P.3d 52, 67 (2004).

<sup>36</sup> *Moore v. Bannen*, 106 Nev. 679, 681—682, 799 P.2d 564, 566 (1990).