

IN THE SUPREME COURT OF THE STATE OF NEVADA

MOUNTAIN STEAM, INC., D/B/A DIAL  
ONE MOUNTAIN STEAM,  
Appellant,

vs.

TURGUT BAYRAMKUL,  
INDIVIDUALLY AND AS GUARDIAN  
AD LITEM OF BRANDON H.  
BAYRAMKUL, A MINOR CHILD, AND  
BONNIE BAYRAMKUL,  
Respondents.

MOUNTAIN STEAM, INC. D/B/A DIAL  
ONE MOUNTAIN STEAM,  
Appellant,

vs.

TURGUT BAYRAMKUL,  
INDIVIDUALLY AND AS GUARDIAN  
AD LITEM OF BRANDON H.  
BAYRAMKUL, A MINOR CHILD, AND  
BONNIE BAYRAMKUL,  
Respondents.

No. 51543

**FILED**

DEC 16 2009

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

No. 52648

ORDER OF AFFIRMANCE

These are consolidated appeals from a district court final order in a tort action and a postjudgment order awarding attorney fees. Second Judicial District Court, Washoe County; Steven P. Elliott, Judge.

This case involves failed mold remediation attempts at the home of respondents Turgut and Bonnie Bayramkul. After purchasing their new home, the Bayramkuls discovered mold that had been caused by a subcontractor puncturing a pipe during construction. The pipe was repaired, and appellant Mountain Stream, Inc., d.b.a. Dial One, was hired to perform the remediation. Dial One attempted remediation three times before the Bayramkuls halted any further attempts by Dial One. The

Bayramkuls then sued the developers, contractors, subcontractors, and Dial One.

Prior to trial, the Bayramkuls settled with the other defendants. The district court granted the parties' motions for good faith settlement on January 16 and 24, 2008. The trial was then presented solely against Dial One and the proof of damages was limited to only those that occurred following the first failed remediation attempt. As a result, the district court determined that Dial One was not entitled to offset the settlement amounts from the other defendants because the case was tried solely as to damages that it caused. This appeal follows.<sup>1</sup> We conclude that of the district court properly found that Dial One was not entitled to an offset and, as such, affirm the order of the district court.<sup>2</sup>

#### Standard of review

We “review an order granting or denying a motion for offset under an abuse of discretion standard.” Western Tech. v. All-Am. Golf Ctr., 122 Nev. 869, 875, 139 P.3d 858, 862 (2006). However, statutory interpretation is an issue of law that we review de novo. Beazer Homes Nevada, Inc. v. Dist. Ct., 120 Nev. 575, 579, 97 P.3d 1132, 1135 (2004).

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<sup>1</sup>The parties are familiar with the facts and we do not recount them further here except as pertinent to our disposition.

<sup>2</sup>We have also examined the other issues raised in the consolidated appeals, notably that Dial One should be judicially estopped from obtaining an offset because of its incomplete appendix, that Dial One waived its right to challenge the offset determination based on its arguments to the district court, and that if the offset applies, this court should remand for consideration of a new trial conditioned on additur. We conclude that either these arguments are without merit or that pursuant to our determination as to the main issue, we need not reach these claims.

### Statutory offset

Dial One argues that the district court erred in concluding that it was not entitled to the statutory offset because NRS 17.245 mandates that when there is a common liability, a nonsettling tortfeasor has the right to reduce the claims against it by the amount of any settlement. Further, Dial One argues that even though there were separate theories of law and independent negligent acts for which each of the defendants were potentially liable, all claims of negligence against the defendants were for an indivisible injury for which damages were sought at trial. As such, Dial One contends that the verdict should be offset by the settlement amounts, resulting in a verdict of \$0 for the Bayramkuls.

This appeal revolves around the question of whether a party is entitled to have a jury verdict that was limited to damages caused by that party reduced by amounts from codefendants' settlements with the plaintiff. Pursuant to NRS 17.245(1), a nonsettling defendant may only claim an offset against a settlement with a joint tortfeasor when the settlement and the award compensate for the "same injury."<sup>3</sup> For the

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<sup>3</sup>Nevada's Contribution Among Tortfeasors Act, NRS 17.245(1), provides:

1. When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death:

(a) It does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide, but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or

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reasons discussed below, we conclude that the district court acted well within its discretion in refusing to offset the verdict against Dial One by the amount of the settlements. See Western Tech., 122 Nev. at 875, 139 P.3d at 862.

We have determined that the offset rule is an equitable remedy. Id. at 872, 139 P.3d at 860. “The language of NRS 17.245 indicates an intent to allow plaintiffs to settle with one tortfeasor without losing the right to proceed against the rest, while at the same time preventing double recovery to the plaintiff.” General Motors Corp. v. Reagle, 102 Nev. 8, 10, 714 P.2d 176, 177 (1986).

“Where multiple tortfeasors are responsible for an indivisible injury suffered by the plaintiff, each tortfeasor is jointly and severally liable to the plaintiff for those damages and thus may be held individually liable to the injured plaintiff for the entirety of such damages.” Greystone Homes, Inc. v. Midtec, Inc., 86 Cal. Rptr. 3d 196, 205 (Ct. App. 2008) (quoting Expressions v. Ahmanson Development, Inc., 103 Cal. Rptr. 2d 895, 898 (Ct. App. 2001)). However, if the injury inflicted may be conveniently severable in point of time, then each tortfeasor has caused a separate amount of injury and neither is responsible for the injury caused by the other. See Restatement (Second) of Torts § 433A cmt. c (1965).

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... continued

in the amount of the consideration paid for it, whichever is the greater; and

(b) It discharges the tortfeasor to whom it is given from all liability for contribution and for equitable indemnity to any other tortfeasor.

Here, the evidence presented at trial was limited to the damages allegedly caused by Dial One and omitted damages that were caused by the settling defendants. During the trial, the court declined to give a joint tortfeasor negligence instruction because it concluded that the jury might become confused and think it should also award damages for the actions of the settling defendants. Additionally, before the jury instructions were finalized, the district court made it clear that, because the damages evidence was limited to injuries caused by Dial One, there would be no offset. Further, the district court concluded in its order denying the motion for offset that:

The statutory offset, set forth in NRS 17.245, does not apply in this case because the trial was limited solely to the damages caused by Dial One.

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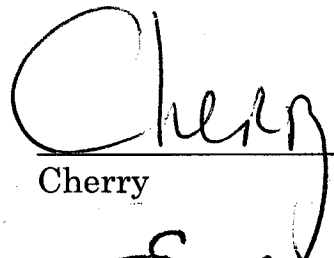
Because the trial was limited to the damages caused by Dial One alone, Dial One cannot now contend that its prior settlement with the previous defendants was “for the same injury,” as contemplated by the statute. Therefore, [Dial One's] Motion for Offset must be denied.

We agree with the district court and conclude that the harm caused by Dial One and the codefendants is not the “same injury” because, as was shown at trial, the injury was divisible and a rational apportionment of damages was made. See Kroger Co. v. Mays, 664 S.E.2d 812, 815 (Ga. Ct. App. 2008) (quoting Gay v. Piggly Wiggly Southern, Inc., 358 S.E.2d 468, 471 (Ga. Ct. App. 1987)) (holding that “independent wrongdoers are joint tortfeasors if their actions produce a single indivisible result and a rational apportionment of damages cannot be made”). The actions of the defendants here did not cause a single injury

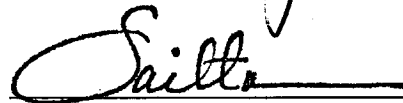
such that the harm is indivisible. Indeed, the trial was limited to Dial One's damages exclusively and the record contains no basis for concluding that the jury awarded damages for injuries caused by anyone other than Dial One. Consequently, we conclude that Dial One and the other defendants are not joint tortfeasors such that they are responsible for the damages caused by Dial One. Instead, we conclude that Dial One was a second, successive tortfeasor whose actions caused different injuries from the initial injuries caused by the settling defendants. As such, the offset provision of NRS 17.245 does not apply and we further conclude that the district court did not abuse its discretion in so finding.

In light of the foregoing discussion, we


ORDER the judgment of the district court AFFIRMED.

 \_\_\_\_\_ J.

Cherry

 \_\_\_\_\_ J.

Saitta

 \_\_\_\_\_ J.

Gibbons

cc: Hon. Steven P. Elliott, District Judge  
Lansford W. Levitt, Settlement Judge  
Stephenson & Dickinson  
Judd J. Balmer  
Lewis & Roca, LLP/Las Vegas  
Washoe District Court Clerk