IN THE SUPREME COURT OF THE STATE OF NEVADA

ADAM LEVY, M.D.,
Appellant,
vs.
PATRICIA WATTS, AN INDIVIDUAL, AND AS GUARDIAN AD LITEM OF HOWARD GABRIEL WALTON, A/K/A HOWARD GABRIEL WATTS, A MINOR; RELIABLE MEDICAL CARE, INC.,D/B/A ST. ANA MEDICAL CENTER, D/B/A ST. ANA BIRTHING CENTER, D/B/A ST. ANN'S MEDICAL CLINIC; AND SHELLEY FRITZ HOOPER, R.N., A.P.N.,
Respondents.

No. 42156

FILED

DEC 14 2006

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER GRANTING REHEARING AND AFFIRMING

Appellant Adam Levy, M.D., has filed a petition for rehearing of our order of May 17, 2006, affirming the district court judgment entered on a jury verdict in a medical malpractice action. Eighth Judicial District Court, Clark County; Mark R. Denton, Judge. We grant rehearing to clarify our affirmation of that judgment.

In its verdict, the jury determined that respondent and guardian ad litem Patricia Watts (Patricia), as to her individual claims for emotional distress and medical expenses individually incurred, was 75 percent responsible for injuries sustained during the birth of her son, respondent Howard Gabriel Walton, a/k/a Howard Gabriel Watts (Howard), and should recover nothing. As to Howard's claim, the jury found that Dr. Levy was 5 percent liable for Howard's injuries. The jury found co-defendants St. Ana Medical Center and Dr. Ken Turner 90 percent and 5 percent, respectively, responsible for Howard's injuries. The

district court further ordered that these defendants were jointly and severally liable for the entire judgment.

Howard cannot be comparatively negligent

NRS 41.141 "must be read as applying to situations where a plaintiff's contributory negligence[1] may be properly asserted as a bona fide issue in the case."[2] Claims asserted by a guardian ad litem on behalf of injured children "[are] not, as a matter of law, . . . subject to the defense of [the guardian's] contributory negligence."[3]

Patricia, as guardian ad litem, brought Howard's claim for injuries he sustained as a result of alleged medical malpractice. As a matter of law, Dr. Levy could not assert a claim of comparative negligence against Howard because Howard could not have negligently caused the injuries he suffered during his birth.

Inclusion of the guardian ad litem within the section of the verdict form apportioning fault

Dr. Levy contends that the district court should have included Patricia as a potentially responsible "party" on the verdict form apportioning fault as to Howard's individual claim for malpractice because she was a "party" to the action.[4] We disagree. NRCP 20(a) allows two

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[1]NRS 41.141 was adopted in 1973 but was subsequently amended to change the term "contributory negligence" to comparative negligence.

[2]Buck v. Greyhound Lines, 105 Nev. 756, 764, 783 P.2d 437, 442 (1989).

[3]Id.

[4]Other courts have noted that by definition, "[a] guardian ad litem is not a party to the action, but merely a party's representative." In re Christina B., 23 Cal. Rptr. 2d 918, 926 (Ct. App. 1993); see also

continued on next page . . .

plaintiffs to join in a single suit and "assert any right to relief, jointly, severally, or in the alternative . . . arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action."

Patricia, for herself and as guardian ad litem for Howard, proceeded under NRCP 20(a) and filed a complaint to recover for injuries that she and Howard sustained during his birth. Though the claims were joined in a single complaint, they remained separate and distinct, and the jury considered each claim separately in awarding damages. As set forth above, Howard could not have negligently caused his injuries. Most importantly, Patricia was never joined in Howard's separate action as a defendant or as a third-party defendant by Dr. Levy or any other party defendant below. Because Patricia is only a nominal party appointed to press Howard's claim, she is not a "party remaining in the action" for the purposes of NRS 41.141(2)(b)(2). In short, apportioning her relative fault as a plaintiff in Howard's case was irrelevant because she was never sued in her role as an alleged tortfeasor. Dr. Levy's issues with any inequities in this law should be addressed to the legislature. Accordingly, the district court did not err in omitting Patricia's name from the special verdict form regarding Howard's injuries.

. . . *continued*

Shainwald v. Shainwald, 395 S.E.2d 441, 444 (S.C. Ct. App. 1990) (noting that "a guardian ad litem is not in the true sense an adversary party" because "the duty of the guardian ad litem [is] to advocate and fully protect the interests of his ward"); Jackson General Hosp. v. Davis, 464 S.E.2d 593, 596 (W. Va. 1995) (noting that "[t]he purpose of an order appointing a guardian ad litem is to protect the person under disability").

Affirmative defense of several liability

Dr. Levy argues that he is severally liable for 5 percent of the judgment. He further contends that the issue of several liability, unlike comparative negligence, should not be considered as a matter constituting an avoidance or affirmative defense. Consequently, he does not need to affirmatively raise several liability as an affirmative defense. We disagree.

Under NRCP 8(c), a party must affirmatively set forth any matter constituting an avoidance or affirmative defense. Affirmative defenses must be specifically pleaded or they are waived, unless they are tried by consent.[5] Assuming without deciding that NRS 41.141 allows one of multiple defendants in a negligence action to invoke the protection of several liability in actions brought by a non-negligent plaintiff, we conclude that the assertion of such a right would have to be affirmatively pleaded under NRCP 8(c) as an avoidance of the presumption that liability to innocent claimant is joint and several. Dr. Levy failed to affirmatively plead several liability in his answer to the fourth amended complaint.[6] In addition, the parties did not try the issue of several liability by consent.[7]

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[5]Schwartz v. Schwartz, 95 Nev. 202, 205, 591 P.2d 1137, 1139 (1979).

[6]Dr. Levy relies on dictum in the case of Touchard v. Williams, 606 So. 2d 927, 932 (La. 1992), for the contention that several liability is not an affirmative defense under Rule 8. However, Dr. Levy failed to note that this decision of the Louisiana Court of Appeals was subsequently reversed by the Louisiana Supreme Court. See Touchard v. Williams, 617 So. 2d 885 (La. 1993).

[7]Dr. Levy concedes on page 4 of his post-judgment motion to amend judgment filed March 5, 2001, that the issues of several and joint and

continued on next page . . .

Finally, NRCP 15(b) permits a party to request to amend its pleadings "at any time, even after judgment." (Emphasis added.) Dr. Levy had the opportunity after the jury verdict and entry of judgment to move to amend his answer to Patricia's fourth amended complaint to assert his claimed affirmative defense of several liability to have the judgment reflect the extent of his liability: i.e., the extent to which execution may be levied against him. Although the issue of several liability was vigorously contested by the parties in post-judgment motions, he failed to do so. Therefore, he waived this issue.[8]

Accordingly, we affirm the judgment of the district court.

_____, C.J.
Rose

_____, J.
Gibbons

_____, J.
Douglas

_____, J.
Parraguirre

. . . *continued*
several liability "ha[d] never been addressed by the parties to this litigation . . . ."

[8]Because this issue was not preserved for appeal, we make no conclusion as to whether several liability as set forth in NRS 41.141 is applicable to this case.

cc: Hon. Mark R. Denton, District Judge
Eugene Osko, Settlement Judge
Beckley Singleton, Chtd./Las Vegas
Bourgault & Harding
Hilton English & Associates
Bradley Drendel & Jeanney
Weldon E. Havins
Michael A. Rosenauer
Clark County Clerk

MAUPIN, J., with whom BECKER, J., agrees, concurring:

I concur in the result reached by the majority. I would go further and reach the primary question litigated in this appeal, to wit: whether NRS 41.141, as appellant asserts, allows a defendant to seek avoidance of joint and several liability to a non-negligent plaintiff by pleading the comparative negligence of a codefendant.[1] I believe that appellant's argument in this case contorts the plain meaning of NRS 41.141, violates basic principles concerning the interpretation of statutes enacted in derogation of the common law, and runs afoul of our decision in Buck v. Greyhound Lines, Inc.,[2] which, in my view, still governs the issues raised in this appeal. In short, NRS 41.141 does not change the common law rule that any defendant against whom recovery is effected is jointly and severally liable to an innocent plaintiff.

Maupin, J.

Maupin

I concur:

Becker, J.

Becker

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[1]This case arose before specific changes to NRS Chapter 41A, which addresses joint and several liability of medical malpractice defendants.

[2]105 Nev. 756, 783 P.2d 437 (1989).

HARDESTY, J., concurring:

I concur in the result reached by the majority based solely on Dr. Levy's failure to assert the affirmative defense of several liability. I also concur with my concurring brother and sister that this court should reach the primary question whether NRS 41.141 allows a defendant to seek avoidance of joint and several liability and would review the application of our decision in Buck v. Greyhound Lines, Inc.[1]

/ Hardesty, J.
Hardesty

[1]105 Nev. 756, 783 P.2d 437 (1989).