IN THE SUPREME COURT OF THE STATE OF NEVADA

ALBERT H. CAPANNA, M.D., Appellant/Cross-Respondent, vs. BEAU R. ORTH, Respondent/Cross-Appellant.	Case No. 69935 District Court Case No. A648041
ALBERT H. CAPANNA, M.D., Appellant, vs. BEAU R. ORTH, Respondent.	Case No. 70227

RESPONDENT/CROSS-APPELLANT'S COMBINED ANSWERING AND OPENING BRIEF

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ROUTING STATEMENT

This appeal and cross-appeal are presumptively retained by the Supreme Court under NRAP 17(b)(2), 17(a)(13) and (14).

STATEMENT OF THE ISSUES

1. Did the district court abuse its discretion limiting the cross-examination of Plaintiff's non-retained expert witness, Andrew Cash, M.D.?

2. Did the district court err by admitting future care opinions from Plaintiff's treating physician, Andrew Cash, M.D., and retained expert, Kevin Yoo, M.D.?

3. Did Plaintiff's counsel engage in attorney misconduct during voir dire or during closing arguments concerning the topic of insurance?

4. Did Plaintiff's counsel make impermissible arguments in his closing argument?

5. Did the district court err in awarding a portion of Plaintiff's attorneys' fees under NRS 18.010(2)(b)?

6. Did the district court err when it awarded Plaintiff more than $1,500 each for Plaintiff's medical expert witnesses?

STATEMENT OF THE CASE

Respondent Beau Orth agrees with Appellant's Statement of the Case.

STATEMENT OF THE FACTS

I. SUMMARY

Beau was 20 years old when Appellant Albert H. Capanna, M.D. performed surgery on the wrong level of his lumbar spine. This ended Beau's college football career. Dr. Capanna denied and disputed the wrong-level surgery for five years until he suddenly admitted it at trial during direct examination. 19 A.App. 4318-19; 20 A. App. 4782 ("I hurt Beau. And I admit it, okay? And I'm very sorry, or we wouldn't all be here.).

II. DR. CAPANNA PERFORMS WRONG-LEVEL SURGERY ON BEAU ORTH, ENDING HIS FOOTBALL CAREER

Beau developed low back and leg pain in fall of 2008, while playing football during his freshman year at UNLV. 19 A.App. 4518:14 – 4519:9. Beau was a standout football player at Bishop Gorman High School. 19 A.App. 4495-4506, 4509-15.

UNLV referred Beau to Dr. Capanna, the team neurosurgeon, who diagnosed him with a disc problem at L5-S1. 15 A.App. 3555-5619, 19 A.App. 4529-31. Beau agreed to a lumbar L5-S1 microdiscectomy to repair the disc herniation. Dr. Capanna performed the surgery on Beau on September 17, 2010. 16 A.App. 3764-65. Dr. Capanna informed Beau the surgery would "cure" his pain and he could return to play in a few weeks. 20 A.App. 4533:16-23; 1 R.App.

57:6-9.[1] Based upon Dr. Capanna's recommendation, Beau elected to undergo the surgery. 20 A.App. 4534-35.

Following the surgery, Beau's pain rapidly increased and was disabling. 20 A.App. 4540-45; 1 R.App. 236:6-10.[2] The pain was so bad that Beau called Dr. Capanna, who ordered a follow-up MRI on October 6, 2010. 2 R.App. 282. After reviewing the MRI, Dr. Capanna told Beau he saw only edema (swelling) and possible infection. 1 R.App. 235:20-22. Dr. Capanna never informed Beau he performed wrong-level surgery. 19 A.App. 4488:20-23

On October 12, 2010, Beau sought a second opinion with orthopedic spine surgeon, Andrew Cash, M.D. 20 A.App. 4547-49. To Dr. Cash, Beau appeared "crippled." 2 R.App. 320. Dr. Cash reviewed the October 6, 2010 MRI and found evidence of surgery and a new herniation at L4-5, the unintended level. *Id.*

Dr. Cash discovered that Dr. Capanna operated on L4-5, which was now herniated, instead of L5-S1. 15 A.App. 3578-81. Dr. Cash recommended that Beau undergo immediate surgery. *Id.* Dr. Cash also advised Beau that he may require a future fusion surgery as a consequence of the microdiscectomy procedure. 15 A.App. 3583-84.

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[1] Beau's counsel published Dr. Capanna's deposition during trial, which makes it part of the trial court record. 9 R.App. 1978:4-7

[2] Capanna's counsel referenced Beau's deposition at trial during his direct examination of Reynold Rimoldi, M.D., which makes the deposition part of the trial court record. 3 R.App. 496:20 – 498:16.

On October 22, 2010, Beau underwent a microdiscectomy by Dr. Cash at L4-5 and L5-S1. 20 A.App. 4551-52. During the surgery, Dr. Cash saw a "box cut" from the prior surgery into the L4-5 disc, which resulted in a herniation. 2 R.App. 330-331; 16 A.App. 3601-02. After surgery, Dr. Cash told Beau he could never play football again for fear of re-injury. 16 A.App. 3644-47.

Initially, Beau improved after Dr. Cash's surgery and physical therapy. 2 R.App. 312, 315. But, even after surgery and physical therapy, Beau remained symptomatic and actually worsened over time. 2 R.App. 284-294. Based upon the continued deterioration of the disc levels, particularly at L4-5, Dr. Cash testified Beau actually had the spine of a 60-year-old man at 24. 16 A.App. 3674:8-19.

III. BEAU FILES A COMPLAINT AND THE EVIDENCE OVERWHELMINGLY INDICATES DR. CAPANNA'S LIABILITY

On September 8, 2011, Beau filed a Complaint against Dr. Capanna. 1 A.App. 1-14. Pursuant to NRCP 16.1, Beau produced all of his medical records to the defense on March 2, 2012, including Dr. Cash's records, hospital records, and records from pain management physician, Anthony Ruggeroli, M.D.

The scheduling order originally set the initial expert deadline for June 10, 2013, which was later extended to November 14, 2014. 3 R.App. 667-669. On August 9, 2013, Beau designated his expert witnesses pursuant to NRCP 16.1(a)(2)(B), and again on November 14, 2014. 1 A.App. 20-21; 1 A.App. 66-103.

Beau's standard of care expert was Kevin Yoo, M.D., a neurosurgeon from San Diego, California. 1 A.App. 20-21. Dr. Yoo also authored the affidavit attached to Beau's complaint. 1 A.App. 7-8, 66-67. Dr. Yoo's initial opinion was straightforward: Dr. Capanna fell below the standard of care in his treatment of Beau by performing a surgical procedure at L4-5 rather than L5-S1, resulting in injury to Beau. 1 A.App. 72-73.

Beau also designated his treating physicians, Drs. Cash and Ruggeroli[3] as non-retained expert witnesses pursuant to NRCP 16.1(a)(2)(B). 1 A.App. 67-69. The designation stated, among other things, that Drs. Cash and Ruggeroli were "also expected to testify regarding any future medical care to be provided to Plaintiff." *Id.* Dr. Cash's records contained his opinions that Dr. Capanna performed wrong-level surgery at L4-5; a second surgery was needed; and Beau would "potentially" need a fusion surgery in the future. 2 R.App. 283-320, 2 R.App. 321-408. Beau also produced Drs. Cash and Ruggeroli's curricula vitae, fee schedules, and testimony lists. 1 A.App. 67-69, 83-103.

Capanna designated two surgical experts, (1) orthopedic spine surgeon Reynold Rimoldi, M.D. who performed a NRCP 35 Examination of Beau, and (2) neurosurgeon Allan Belzberg, M.D. on the issue of standard of care. On

[3] Dr. Ruggeroli was also involved in Beau's care before Dr. Capanna performed surgery on September 17, 2010.

November 14, 2014, Capanna designated Plaintiff's treating physicians as non-retained experts, including Dr. Cash. 3 R.App. 671-674.

Dr. Rimoldi performed a NRCP 35 examination of Beau on July 17, 2013. 4 R.App. 764-769. In his initial report, Dr. Rimoldi opined that Dr. Capanna performed surgery at L4-5, instead of L5-S1. 4 R.App. 769. He further opined Dr. Cash's surgery was medically "required." *Id.* Dr. Rimoldi testified at his deposition that Dr. Capanna "opened up, dissected and decompressed the incorrect motion segment." 6 A.App. 1208, 31:7-20; 32:17-25; 1209, 33:1-25.

Dr. Belzberg's initial report acknowledged that Dr. Capanna "left a surgical footprint at L4-5." 3 R.App. 700; 3 R.App 692 – 4 R.App. 790; 8 R.App. 1831 – 1854. At trial, however, Dr. Belzberg testified that the October 6, 2010 MRI showed that all post-operative changes and scarring were at L4-5, and there was no evidence of surgery at L5-S1. 4 R.App. 865:15-24.

Every surgeon in the case—except Dr. Capanna—agreed Dr. Capanna performed surgery at L4-5, not L5-S1.

IV. BEAU'S CONDITION DETERIORATES

Since the October 22, 2010 surgery, Beau has remained under the care of Dr. Cash. 15 A.App. 3526:13-18. Unfortunately, Beau's condition worsened over time. 2 R.App. 254:20-255:5. By March 2014, Beau's pain escalated to 6-8/10, he developed an antalgic gait [painful gait] and listing to the right when sitting. 2

R.App. 287, 291. To address the increase in symptoms, Dr. Cash referred Beau back to Dr. Ruggeroli. *Id.*

Beau presented to Dr. Ruggeroli on March 19, 2014 complaining of "the worst pain that he has experienced for a long time." 4 R.App. 914. He underwent a transforaminal epidural steroid injection without significant benefit. 4 R.App. 906. On April 16, 2014, Beau underwent left L4-5 and L5-S1 facet joint injections and was pain-free for one and a half weeks. 4 R.App. 897-898. On May 14, 2014, Beau underwent radiofrequency ablation at L3-5. 4 R.App. 889, 897. Unfortunately, Dr. Ruggeroli's treatment provided minimal benefit, so Beau discontinued the treatment. 1 R.App. 207:3-208:9.

V. DR. CAPANNA DENIES LIABILITY AND ACCUSES DR. CASH OF PERFORMING UNNECESSARY SURGERY

Capanna's experts' reports did not dispute the reasonableness, necessity, or causation of Beau's treatment ***after*** Capanna's surgery. 3 R.App 698-701; 4 R.App. 764-769.

At his January 15, 2015 deposition, Dr. Capanna denied wrong-level surgery or the need for a second surgery by Dr. Cash:

> Q Isn't it true, Doctor, on September 17, 2010, you performed a laminotomy and microdiscectomy at L4-5 on Beau Orth?
> A No, sir.

1 R.App. 5:23-23

Q With regard to Doctor Cash's records, we're going to look at in a minute, but what do you recall of those records that you disagreed with?
A I just, as I said earlier, ***I would not have reoperated on him. I would have treated him conservatively. I think when the swelling went away, he would have been okay, personally***.
Q Why wouldn't you have reoperated on him?
A Because that little piece of disc, I do not think it was causing all the problem. I think the swelling was causing the problem. ***And that could have been treated and gone down and he would not have had to have another surgery.***

1 R.App. 132:18 – 133:5. (emphasis added).

VI. IN RESPONSE TO DR. CAPANNA'S TESTIMONY, DR. CASH WAS ASKED TO DO RECORDS REVIEW AND REPORT

Dr. Capanna's deposition transcript, the defense experts' reports, and Beau's medical records related to the care of his spine were provided to Dr. Cash. Out of an abundance of caution, Dr. Cash was asked to prepare a report defending his treatment.

On April 8, 2015, Beau served a Second Supplement to Designation of Expert Witnesses with a report from Dr. Cash, dated April 1, 2015, that included a summary of records and opinions all relating to matters of Beau's spine condition. The vast majority of records were from treatment received by Beau after he was under the care of Dr. Cash, which Dr. Cash directed. 1 A.App 114-152. None of these opinions were new or different from Beau's medical records produced in disclosures and supplements pursuant to NRCP 16.1(a)(1). 4 A.App 830-877; 5 A.App 952-972. Many of Beau's providers' records indicate that Dr. Cash referred

Beau to them for imaging studies, procedures and treatment. *Id.*; 4 R.App. 885-890, 893-902, 905-919; 5 R.App. 987-989, 1073-1092. While Dr. Cash reviewed some records from before Dr. Capanna's surgery, he was already familiar with this history from Beau himself. 2 R.App. 319-320; 2 R.App. 321.

Actually, Dr. Cash opined Dr. Capanna's proposed surgery was indicated. 1 A.App. 151. Dr. Cash also opined that Dr. Capanna's surgery was performed at the wrong level, L4-5; and he disagreed with Drs. Belzberg and Kaye's (defense experts) interpretation of radiographic films. Cash's surgery at L4-5 and discectomy at L5-S1 was necessary. 1 A.App. 151-52. None of these opinions were new or even unexpected.

VII. IN RESPONSE TO BEAU'S DEPOSITION TESTIMONY, DRS. CASH AND YOO SUPPLEMENTED THEIR OPINIONS TO INCLUDE FUTURE SURGERIES

On April 14, 2015, Beau testified at his deposition that his condition worsened over time. 1 R.App. 235:11-236:10, 2 R.App. 255:1-5, 260:23-261:1. Beau's deposition transcript was THEN sent to Drs. Cash and Yoo. Dr. Yoo prepared a supplemental report with opinions that Beau required future medical treatment based on new information from Beau's deposition. 5 R.App. 1096-1097. Dr. Yoo produced this supplemental report at his deposition on May 26, 2015,

counsel attached it as Exhibit 2 and Dr. Yoo signed and dated it. 2 A.App. 327, 12:12-21; 337, 50:12-15.[4]

Defense counsel extensively questioned Dr. Yoo at his deposition regarding this supplemental report. 2 A.App. 329, 18:8-11; 330, 24:12 - 333, 34:10; 336, 46:2-49:23; 337, 50:21-51:10. Dr. Yoo testified that his updated opinions were based on Beau's deposition, from which he learned that Beau's treatment with Dr. Ruggeroli "did not afford him much relief." 2 A. App. 329, 19:2-10; 336, 46:8-25; 48:1-8. Dr. Yoo opined that Beau required a future L4-5/L5-S1 fusion, which would then lead to adjacent segment disc disease, requiring fusion at L3-4 within 5 to 15 years of the L4-5/L5-S1 fusion. *Id.;* 5 R.App. 1096-1097.

After reading Beau's deposition, Dr. Cash addressed the need for future fusion surgery. On May 15, 2015, Beau supplemented his NRCP 16.1(a)(1) and (a)(3) disclosures with a report from Dr. Cash, dated May 14, 2015, stating that Beau's deposition described "an overall gradual worsening of low back pain over time" and Beau would continue to experience "***accelerated deterioration*** at L4-5 and L5-S1 levels." 5 R.App. 1116-1118 (emphasis added). Dr. Cash formally recommended a two-level lumbar fusion at L4-5 and L5-S1 within the next 10 years at approximately $350,000, and a fusion at L3-4 seventeen years after the

[4] On July 17, 2015, Beau supplemented another report from Dr. Yoo that contained the ***same*** opinions as the report attached to his deposition, but listed all documents he reviewed. 5 R.App. 1119-1123. This was 31 days before trial.

two-level fusion, at approximately $342,401. *Id.* It is notable that defense expert Dr. Rimoldi agreed that Beau's condition worsened. 21 A.App. 5030-31.

In the May 15, 2015 supplemental disclosure, Beau also supplemented his NRCP 16.1(a)(1)(C) computation of damages with the costs enumerated by Dr. Cash. 5 R.App. 1109-1110. He added the cost of the L3-4 fusion, $342,401, but inadvertently omitted the cost of the two-level L4-5/L5-S1 fusion, $350,000, which was contained in Dr. Cash's May 14, 2015 letter. *Id.*

VIII. SUPPLEMENTAL DEFENSE EXPERT REPORTS IN RESPONSE TO YOO AND CASH SUPPLEMENTAL REPORTS

Defense counsel took Dr. Cash's deposition on June 17 and 23, 2015, and asked questions about both April 8, 2015 and May 15, 2015 reports and his future care opinions. 3 A.App. 439, 25:1 – 442, 37:25; 454, 82:1-83:25.

Capanna supplemented his expert disclosures regarding Beau's expert's opinions with a report from Dr. Rimoldi dated May 26, 2015, stating he reviewed Dr. Cash's records review and his opinions were unchanged 5 R.App. 1149; a report from defense neurosurgeon expert Allan Belzberg, M.D. dated July 20, 2015 disputing that Beau would need a future fusion 5 R.App. 1154; twenty medical journal articles disclosed on July 22, 2015 regarding rates of reoperation after microdiscectomy and likelihood of fusion surgery 5 R.App. 1156 – 6 R.App. 1245; and a supplemental report from Dr. Rimoldi dated July 24, 2015 disputing Dr. Cash's fusion recommendation. 6 R.App. 1250.

IX. PERTINENT PRETRIAL MOTIONS & RULINGS

A. Plaintiff's Motion And Defendant's Countermotion To Strike Allegedly Untimely Disclosures

Before trial, the court ruled that Beau's experts' future care opinions were not untimely given Beau's changing condition, and the parties had the opportunity to depose each other's experts on the supplemented opinions and have their experts respond to the opinions. 11 A.App. 2604:12 – 2605:8. Thus, there was no prejudice or harm to either party under NRCP 37. *Id*. The court also ruled that Capanna had notice and knowledge of Beau's claim for future damages based on expert reports and computation. *Id.* at 2605:22 – 2606:12.

B. Plaintiff's Omnibus Motion In Limine No. 1, Section 6, "Precluding Reference To Plaintiff's Counsel Working With Plaintiff's Treating Physicians On Unrelated Cases"

Capanna appeals the district court's order granting, in part, Section No. 6 of Plaintiff's Omnibus Motion in Limine No. 1, which requested "Precluding Reference to Plaintiff's Counsel Working with Plaintiff's Treating Physicians on Unrelated Cases" because such reference was substantially more prejudicial than probative under NRS 48.035. 23 A.App. 5404. The district court granted the motion, in part, expressly allowing cross-examination of ***treating physicians*** as follows:

> Defendant can ask questions about the nature of physicians' practice, such as the amount of work for defense versus plaintiffs, and attorneys. However, Defendant cannot ask specific questions about

> working with Plaintiff's counsel in the past, such as the number of times the doctor ***treated Plaintiff's counsel's clients***. (Emphasis added)

6 R.App. 1251-1254, at ¶ 6.

There was no limitation on questions regarding work performed in this case, financial arrangements, or testimony experience in cases involving Plaintiff's counsel or as a retained expert.

During cross-examination of Dr. Cash, defense elected not to ask any questions regarding Dr. Cash's potential bias or relationship with Beau's counsel. 19 A.App 4372-4433, 4452-67, 4469-77. In his opening statement, defense counsel stated: "Dr. Cash has been ***hired*** as an expert by Mr. Prince's firm in the past." 6 R.App 1266:20-22. Defense never revisited this during Dr. Cash's cross-examination. 19 A.App 4372-4433, 4452-67, 4469-77.

C. Plaintiff's Motion In Limine No. 4 To Permit Treating Physicians To Testify As To Causation, Diagnosis, Prognosis, Future Treatment, And Extent Of Disability Without A Formal Expert Report

Before trial, Beau filed a motion to allow treating physicians to testify without a formal report to comply with NRCP 16.1(a)(2)(B)'s requirements for non-retained expert witnesses. 6 R.App. 1309-1317. In his opposition, Capanna simply said that Drs. Cash and Ruggeroli were retained experts since they prepared reports. 6 R.App 1318-1321. The district court granted Beau's motion and stated that Dr. Cash can testify about billing, causation, prognosis, future treatment, and

extent of disability without an expert report. 6 R.App. 1253-1254. The district court rejected the argument that Dr. Cash was converted to a retained expert simply because he was asked to prepare a report. *Id.*

X. TRIAL

A. Capanna Introduced Evidence Of Dr. Ruggeroli's Future Care Opinions, Not Beau, Because Beau Withdrew His Claim For Them

Even though Dr. Ruggeroli provided a future cost letter relating to pain management, Beau withdrew this claim prior to trial. 6 R.App. 1329. Ruggeroli was never called to testify at trial. Beau did not introduce Ruggeroli's opinions to the jury; he did not request them as damages; and the jury did not award them as damages.

B. Verdict

On September 2, 2015, the jury returned a verdict in Beau's favor as follows: $136,300.49 for 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. 7 A.App. 1431-32.

C. Dr. Capanna Does Not File A Motion For New Trial Pursuant To NRCP 59(A)(2) For Misconduct

On November 9, 2015, Capanna filed a motion for new trial. 9 A.App. 1913-29. The motion for new trial was not based upon alleged attorney

misconduct pursuant to NRCP 59(a)(2) and was never raised before the district court. The motion for new trial was denied.

XI. POST-TRIAL

A. Application Of NRS 41A.0135 And 42.021

Pursuant to NRS 41A.035, the district court reduced the noneconomic damages to $350,000. 10 A.App. 2279-81. The court also applied NRS 42.021(3)-(8) to allow Dr. Capanna to pay the future damages award of $350,000 in three periodic payments over the course of 18 months. 10 A.App. 2291-93.

B. Beau's Motion For Attorney's Fees

The court granted Beau's Motion for Attorney's Fees, determining there were no reasonable grounds for Capanna's liability defense pursuant to NRS 18.010(2)(b). 11 A.App. 2436-39; 6 R.App. 1331:17-18. The court further found that "the totality of evidence showing that the original surgery was performed at the wrong level of the spine would meet a 'beyond a reasonable doubt' standard." *Id.* at 1331:20-26. The court found that the presentation of liability issues encompassed at least 80% of Beau's trial presentation. *Id.* Applying this percentage to Beau's total request of fees of $212,486.98, the court awarded $169,989.58 in attorneys' fees. *Id.*

C. Award Of Beau's Expert Fees

The court awarded Beau costs. 7 A.App. 1443-1612; 11 A.App. 2459-61. The only portion of this order that Capanna appeals is the court's award of the full amount of Beau's expert fees, $69,975.95. *Id.* The court specifically found that all of the experts were necessary to Beau's case and it was reasonable to exceed the statutory amounts of $1,500 per expert. *Id.* The court awarded Dr. Cash's costs of $47,250.00 and Dr. Yoo's costs of $16,625.95.

SUMMARY OF THE ARGUMENT

The district court has broad discretion to control the scope of cross-examination of an expert witness, both retained and non-retained, on the issue of bias and credibility to avoid confusion or misleading the jury. Here, the trial court did not abuse its discretion in limiting questions of a non-retained expert treating physician concerning the number of times he treated a patient represented by Beau's counsel where there is no established referral relationship. Further, where defense counsel failed to even question the treating physician regarding his relationship with Beau's counsel, there is no record for this court to review to determine if there was an abuse of discretion.

The district court did not abuse its discretion in allowing supplemental opinions from Beau's medical experts (retained and non-retained) based upon newly discovered information concerning the deterioration of Plaintiff's medical

condition. Further, where the defense has a full opportunity to depose Plaintiff's experts concerning their opinions and have his experts supplement their opinions before trial, any such delay is harmless pursuant to NRCP 37(c)(1).

There is no per se ban on questioning jurors concerning the issue of insurance where the jurors raise the issue themselves to explore the issue of bias. This is particularly true in medical malpractice cases where there has been legal reform based upon a widely reported medical malpractice insurance crisis. Counsel for a plaintiff did not engage in attorney misconduct during closing argument when discussing the Nevada Pattern Jury Instruction informing the jurors not to consider the issue of insurance during deliberations.

Ordering a new trial based upon attorney misconduct requires a detailed analysis by the district court in applying the applicable standard outlined by this Court. Here, a major focus of the appeal is attorney misconduct justifying a new trial. However, Capanna never moved for a new trial based upon alleged misconduct pursuant to NRCP 59(a)(2). This issue was waived as it was never presented to the district court to make detailed findings as always required under *Lioce*. Further, informing jurors that they are acting as the conscience of the community does not rise to the level of attorney misconduct. Finally, even isolated, improper comments without more do not justify a new trial.

The district court found substantial evidence that Capanna unnecessarily maintained a liability defense on the issue of wrong level surgery. Accordingly, there was no abuse of discretion in awarding attorney's fees for an unreasonably maintained liability defense.

Medical malpractice cases are very expert intensive. The issues were complex and required extensive pre-trial preparation and multiple appearances at trial by Beau's experts. The fees charged were also comparable to those charged by the defense and the rates were well known based upon the expert disclosure. Thus, the district court properly awarded Beau's expert fees.

ARGUMENT

II. THE DISTRICT COURT DID NOT UNREASONABLY LIMIT THE CROSS-EXAMINATION OF DR. CASH

A district court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *McClellan v. State*, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008). "Even if evidence is otherwise admissible, a trial court may exclude evidence after striking a proper balance between the probative value of the evidence and its prejudicial dangers," and this decision will only be reversed if it is manifestly wrong. *State, Dep't of Transp. v. Cowan*, 120 Nev. 851, 858-59, 103 P.3d 1, 6 (2004). The admissibility of expert testimony lies within the sound discretion of the trial court. *Hallmark v. Eldridge*, 124 Nev. 492, 189 P.3d 646 (2008).

Capanna argues that the district court erred "by prohibiting cross-examination regarding key information going to the doctor's bias and credibility," namely, "Dr. Cash' [sic] extensive ongoing relationship with Mr. Prince [which] would have established that Dr. Cash had an enormous financial incentive to give opinions favorable to Mr. Prince's client…." *See* Appellant's Opening Brief 16. This argument fails because Capanna was allowed broad cross-examination of Dr. Cash regarding his bias and credibility, except for one limited issue that was not probative of bias or credibility. Furthermore, any such error was harmless. NRCP 61. For an error in exclusion of evidence to justify a new trial, the appellant must show that but for the alleged legal error, a different result might have reasonably been achieved. *Carr v. Paredes,* 2017 Nev. Unpub. LEXIS 56 (Jan. 13, 2017); *Wyeth v. Rowatt*, 126 Nev. 446, 465, 244 P.3d 765, 778 (2010). Capanna makes no such showing. There was overwhelming evidence of injury to L4-5, which caused accelerated degeneration of Beau's spine, and ended Beau's football career.

A. Capanna's Cross-Examination Of Dr. Cash Was Not Limited In The Manner He Claims; He Elected Not To Conduct Cross-Examination On Bias

Bias and credibility are proper subjects for cross-examination of specially retained expert witnesses and can be demonstrated by various means, including financial motivation and business relationships. *See, e.g., Robinson v. G.G.C., Inc.*, 107 Nev. 135, 143, 808 P.2d 522, 527 (1991).

Capanna misleads this Court into thinking the district court denied him all opportunity to cross-examine Dr. Cash regarding potential bias. *See* App.Br. pages 7-17. Capanna claims the district court erred in finding Dr. Cash to be a treating physician instead of a retained expert, allowing for a "different standard for cross-examination." App.Br. 12. Treating physicians are not required to prepare a report unless their testimony exceeds the "scope of their treatment." *See Carr*, 2017 Nev. Unpub. LEXIS 56. The only topics Dr. Cash addressed were Beau's spinal condition, his own care, and need for future care.

Regardless of whether Dr. Cash was considered a retained expert or treating physician, Capanna was permitted broad cross-examination of Dr. Cash. Capanna had the opportunity to inquire into Dr. Cash's credibility and potential bias, but did not ask a single question about these matters. 19 A.App. 4372-4470.[5] Capanna's counsel did not ask about the percentage of work that Dr. Cash performed for defendants versus plaintiffs, or the percentage of work that Dr. Cash performed for Mr. Prince on the defense versus plaintiff side. Capanna did not ask if Mr. Prince referred Beau or other clients to Dr. Cash. Capanna did not ask about the nature of Dr. Cash's practice and the percentage of work Dr. Cash performed as a treating physician versus retained expert, or the percentage of work Dr. Cash performed as

[5] Although in their opening statement defense counsel did bring up the topic of Dr. Cash and plaintiff's counsel "working together" in the past. 6 R.App. 1266:20-22.

a treating physician versus retained expert for Mr. Prince. Capanna did not ask about a referral relationship, how much Dr. Cash earned in the past as a retained expert or from testifying as a treating physician in personal injury cases generally, or how much he earned from Mr. Prince specifically. Capanna did not even ask how much Dr. Cash was paid by Beau for his services in this case or time spent on the case, except for preparation of his records review and future cost letter ($13,500). Therefore, Capanna's argument about Dr. Cash's bias from being paid "$47,250 for litigation services on this case alone" and an "enormous financial incentive" lacks credibility. App.Br. 14, 16. Capanna knew Dr. Cash's fee schedule from the expert disclosure. There was ***no*** limitation on defense counsel from cross-examining on time spent preparing for trial, meeting with Beau's counsel to prepare for trial, and fees charged for appearing at trial. The financial arrangement was fair game, which defense counsel failed to question.

B. The District Court Properly Precluded Cross-Examination On The Number Of Times Dr. Cash And Mr. Prince Worked Together Because It Is Irrelevant And Unduly Prejudicial

Capanna's argument is flawed because it assumes that if he can prove Dr. Cash is a retained expert, there is no limitation on questions related to Dr. Cash's potential bias. Although cross-examination about a witness's bias and credibility is certainly proper, its scope is not unlimited. The trial judge is given broad discretion in his restrictions of inquiry into matters of general credibility involving

potential bias. *Leonard v. State*, 117 Nev. 53, 72, 17 P.3d 397, 409 (2001). **"Trial judges 'retain wide latitude' to restrict cross-examination to explore potential bias 'based on concerns about, among other things,…prejudice, confusion of the issues,…or interrogation that is repetitive or only marginally relevant.'"** *Id*. (emphasis added).

The district court's order restricted questions about the specifics of Beau's treating physicians' past work "such as the number of times the doctor ***treated*** Plaintiff's counsel's clients." 23 A.App. 5402, 5420-21; 6 R.App. 1251-1254 at ¶ 6. The specific number of times counsel represented a client treated by Dr. Cash is irrelevant for several reasons.

First, any relationship or history between Dr. Cash and Beau's counsel has little to no probative value because any such opinions must be formed during the course of Beau's treatment. Dr. Cash became involved in Beau's care a few weeks after Dr. Capanna's surgery failed. 2 R.App. 379. ("mom is patient here"). All of his treatment, opinions, and recommendations happened before any attorney was involved. Therefore, the specific number of times Dr. Cash and Mr. Prince worked together in the past is not probative. Nev. Rev. Stat. 48.035(1).

Second, Capanna mischaracterizes Dr. Cash's testimony to lead this Court to believe that Dr. Cash worked with Mr. Prince "up to four dozen times." App.Br. 8. His actual testimony was that he worked "with Mr. Eglet's firm or any of his

attorneys and Mr. Prince's or any of his previous firm's attorneys, I would say somewhere on the order of two to three to maybe four dozen times." 5 A.App. 1009: 47:15 – 48:3. By the vague nature of Dr. Cash's response, it is unclear how many times he ***treated*** patients represented by Prince & Keating or Eglet Prince. Dr. Cash's testimony history reflects doing forensic work since 2006. 1 A.App. 36-51, 53-60. Thus, at the time of his deposition, Dr. Cash treated patients or served as a retained expert between 24 to 48 times by multiple attorneys in two different law firms over the course of nearly 10 years, which equates to approximately 2 to 3 cases per year. This is hardly the picture of extraordinary bias that Capanna paints in his brief. Further, such an inquiry would lead to further questions regarding who referred the patient to Dr. Cash, when was counsel hired (i.e. before litigation, after litigation, or by another law firm), was there even litigation, or did Dr. Cash testify in connection with such patients.

Third, it would be misleading to tell the jury they worked together "two to three to maybe four dozen times" between the firms without also introducing Dr. Cash's work with other attorneys to compare. *See* NRS 48.035(1). As the district court pointed out in its ruling on the motion in limine, "But the number of times, dozens of times, three dozen times that he's worked with this person, that person or another, I'm betting Dr. Cash has probably worked with other attorneys a lot as

well." 11 A.App. 2500:13-15. These are the types of collateral issues the trial court has discretion to control.

Capanna cites to *Noel v. Jones*, and *Flores v. Miami-Dade Cnty.*, for the premise that cross-examination is allowed when there is a referral relationship between the doctor and attorney. Here, there is no evidence of ***any*** referral relationship between Dr. Cash and Beau's counsel. The mere fact that Beau's counsel represents clients who were past patients of Dr. Cash does not establish a referral relationship. In fact, there were no questions regarding any type of referral relationship by the defense. At trial, Dr. Cash even confirmed Beau was ***not*** referred to him by Beau's counsel. 15 A.App. 3523:19-20. Therefore, *Noel* and *Flores* are inapplicable.

C. Even If The District Court's Ruling Was In Error, It Was Harmless Because Capanna's Substantial Rights Were Not Affected

Even if the district court's order is considered to be error, the judgment should not be disturbed if such error does not affect the substantial rights of the parties. NRCP 61; *Serpa v. Porter*, 80 Nev. 60, 69, 389 P.2d 241, 246 (1964). Capanna has the burden of proving that but for the claimed error regarding limiting the cross-examination of Dr. Cash, a different result would have been reached by the jury. *Carr*, 2017 Nev. Unpub. LEXIS 56. Capanna makes no such showing.

Capanna fails to show how one potential line of questioning during the cross-examination of Dr. Cash would change the outcome given the clear evidence of wrong level surgery, need for a second surgery, and impact on Beau's life. By not asking any questions during the cross-examination on this topic, Capanna did not properly preserve the substance of the questions sought to be asked or the anticipated testimony for this Court to review. *Carr,* 2017 Nev. Unpub. LEXIS 56. By not asking any questions, this issue was waived. *Id.*

III. DRS. CASH AND YOO TIMELY SUPPLEMENTED THEIR REPORTS

Discovery rulings are within the district court's sound discretion and will not be disturbed unless the court clearly abused its discretion. *Club Vista Financial Servs. v. Dist. Ct.*, 128 Nev. ___, 276 P.3d 246, 249 (2012). Capanna argues that the district court erred when it admitted Drs. Cash and Yoo's opinions about Beau's future care at trial because the opinions were allegedly untimely disclosed. App.Br. 17-43. This argument fails because Drs. Cash and Yoo timely supplemented their opinions pursuant to NRCP 26(e) and NRCP 16.1(a)(2)(c) based on new information, to wit: Beau's deposition testimony about his worsening condition, an updated MRI of the lumbar spine, and Capanna's deposition testimony disputing Beau's need for future surgery. This argument also fails as to Dr. Ruggeroli because Beau did not introduce, nor request damages related to Dr. Ruggeroli's opinions.

A non-retained expert, such as a treating physician, need not prepare a written report if their opinions are formed in the course of treatment and the disclosure requirements of NRCP 16.1(a)(2)(B) for non-retained experts are satisfied: the disclosure states the subject matter of the expert's testimony; a summary of his facts and opinions; his qualifications; and his compensation. *FCH1, LLC v. Rodriguez*, 130 Nev. ___, 335 P.3d 183, 189 (Oct. 2, 2014); NRCP 16.1(a)(2)(B). "A treating physician is not a retained expert merely because the witness will opine about diagnosis, ***prognosis***, or causation of the patient's injuries, or ***because the witness reviews documents outside his or her medical chart in the course of providing treatment or defending that treatment,"*** so long as the appropriate disclosure is made in accordance with NRCP 16.1(a)(2)(B). NRCP 16.1, 2012 Drafters Note (emphasis added). Treating physicians are not required to submit a report unless their testimony ***exceeds*** their personal treatment. *Carr,* 2017 Nev. Unpub. LEXIS 56; *see also FCH1*, 335 P.3d at 189. Further, the mere fact a treating physician prepares a report does not convert the treating physician to a "retained" expert. *Id.*

A party who is found to have failed to disclose information required by NRCP 16.1 is not permitted to use the information at trial *unless* the party's failure to disclose is substantially justified or harmless. NRCP 37(c)(1). Thus, if the failure is harmless, then the information should not be stricken. *Id.* This

determination is left to the discretion of the trial judge. *Bahena v. Goodyear Tire & Rubber, Co*. 126 Nev. 243, 235 P.3d 592 (2010). Here, the district court determined that Beau's supplements were not untimely given the nature of the case and there was no harm or prejudice to Capanna. 6 R.App. 1334-1335.

A. As A Treating Physician, Dr. Cash Was Not Required To Prepare A Written Report

Capanna argues that Dr. Cash started out as a treating physician, but "plaintiff's counsel changed him into a retained medical expert" by requesting him to review and opine on other doctors' medical records, and paying Dr. Cash for his time spent on this case. App.Br. 20-21. This argument is illogical and directly contravenes the plain language of the 2012 Drafter's Note to NRCP 16.1.

Beau properly designated Dr. Cash as a non-retained, treating physician expert witness in accordance with NRCP 16.1(a)(2)(B), thus he was not required to prepare a written report. 1 A.App. 21, 66; *FCH1*, 335 P.3d at 189. The designation stated the subject matter on which Dr. Cash was expected to testify and a summary of the facts and opinions, including Beau's diagnoses; the reasonableness, necessity, and causal relationship of Beau's treatment to the subject incident; the reasonableness and customary nature of the bills; and that he was "also expected to testify regarding any future medical care to be provided to Plaintiff." *Id.* There was ***no*** objection to the NRCP 16.1(a)(2)(B) disclosure of Dr. Cash.

It cannot be reasonably disputed that Dr. Cash's recommendation for future fusion surgery was made during the course of his treatment of Beau. 2 R.App. 320. Dr. Cash was also made aware of Beau's history of back pain, conservative treatment, and Dr. Capanna's surgery by Beau himself. The records that Capanna claims were outside of Dr. Cash's medical chart were actually part of his chart, and for those that were not, they were reviewed in order to defend his treatment against attacks made by Dr. Capanna. Although Beau's counsel sent Dr. Cash a complete set of Beau's medical records, most of them were already in his chart once he took over Beau's care after Dr. Capanna's surgery.

Beau clearly complied with the requirements of NRCP 16.1(a)(2)(B) for non-retained experts. Further, counsel, acting with an abundance of caution by asking a non-retained expert to prepare a report to avoid a problem, does not change the applicable designation. It helps in avoiding opinions being stricken if there is any question about whether a report was required or not.

B. Dr. Yoo Was Timely And Properly Disclosed As A Retained Expert

Capanna makes a cursory reference to Dr. Yoo not being mentioned in Beau's NRCP 16.1(a)(1) disclosures and his expert report not being expanded upon prior to the initial expert deadline. App.Br. 28. Dr. Yoo's absence from NRCP 16.1(a)(1) disclosures is inconsequential because Beau first designated Dr.

Yoo as a retained expert in his NRCP 16.1(a)(2)(B) disclosures on August 9, 2013, more than a year before the expert disclosure deadline. 1 A.App. 20-21.

C. Drs. Cash And Yoo's Future Care Opinions Were Supplemented More Than 30 Days Before Trial

All supplemental NRCP 16.1(a)(3) disclosures are due 30 days before trial. NRCP 26(e)(1); NRCP 16.1(a)(3). This Court addressed supplemental expert reports in its Order Granting a Petition for Writ of Mandamus in *Kinstel v. Eighth Jud. Dist. Ct.*, No. 48191, January 30, 2007. There, the plaintiffs supplemented expert reports after the discovery cutoff, but over 40 days before trial pursuant to NRCP 26(e), and the district court granted the defendant's motion in limine to exclude them. *Id.* This Court issued a writ of mandamus instructing the district court to vacate its order. *Id.*

Here, the original scheduling order directed the parties to make NRCP 16.1(a)(3) disclosures at least 30 days before trial, which was set for August 17, 2015. 3 R.App. 667-669. Therefore, final pretrial disclosures were due on July 18, 2015. Dr. Yoo's supplemental report and future care opinions at issue were first produced at his deposition on May 26, 2015, 83 days before trial.[6] 6 R.App. 1336; 2 A.App. 327, 12:14-21. Dr. Cash's supplemental reports were produced on April 8, 2015 and May 15, 2015, 131 and 94 days before trial, respectively. 6 R.App.

[6] Dr. Yoo supplemented his report a few more times to correct deficiencies such as letterhead, signature, and lists of materials reviewed. His opinions did not change. 5 R.App. 1112-1113, 1096-1097.

1337-1375; 5 R.App. 1098-1118. This was well in advance of the 30-day deadline to supplement expert reports under NRCP 26(e)(1) and NRCP 16.1(a)(3).

D. Drs. Cash And Yoo's Future Care Opinions Were Supplemented Based On New Information

Capanna's experts did not dispute the reasonableness, necessity, or causation of Beau's treatment after Dr. Capanna's surgery. 8 R.App. 1831-1854; 3 R.App. 700; 4 R.App. 746-748; 768-769. Dr. Rimoldi even stated, "***Certainly*** the patient required a second surgical procedure…." 4 R. App. 769 (emphasis added).

However, at Dr. Capanna's deposition, Dr. Capanna testified that he disagreed with the need for Dr. Cash's surgery and would have treated Beau conservatively. *See, e.g.,* 1 R.App. 132:18-133:5. This was the first Beau learned of Capanna disputing his past medical treatment. Dr. Cash's report dated April 1, 2015 and disclosed on April 8, 2015, consisted of a summary of Beau's records, most of which were already in his chart but well within the scope of his personal treatment, and a basic explanation of why Beau's treatment, ***after*** Dr. Capanna's surgery, was reasonable and necessary. 6 R.App. 1337-1375.

1. Dr. Cash's Opinions Related to Beau's Spinal Condition, Need for Surgery, and Status, All Well Within Dr. Cash's Personal Involvement with Beau's Care.

One of the hottest topics in civil litigation concerns the non-retained expert conversion into a retained expert. This should not be a slippery slope for plaintiffs, nor should it be to the disadvantage of the defense. This is a disclosure issue so no

party is unfairly prejudiced. Under *FCH1*, Dr. Cash could offer opinions to defend his treatment without preparing a written report. *See* NRCP 16.1, 2012 Drafter's Note. The mere fact that he prepared reports does not by itself "convert" him. The records reviewed all related to Beau's spinal condition. Dr. Cash offered no opinion on the pre-surgery care other than that Dr. Capanna's surgery was medically indicated. ***All*** records ***after*** Dr. Capanna's surgery related to care Dr. Cash performed or directed. While not required, a report was requested to ensure compliance either as a referral or non-retained expert.

2. Drs. Cash and Yoo Supplemented Future Care Opinions in Response to Beau's Deposition Testimony, Which Conveyed His Deteriorating Condition

Beau was deposed on April 14, 2015 and testified his pain became worse over time. 2 R.App. 260:4-10. He also testified Dr. Ruggeroli's pain management procedures did not help. 2 R.App. 254:20-255:5, 259:1-261:11. Beau's counsel provided this transcript to Drs. Cash and Yoo, who then prepared supplemental reports with their updated opinions regarding Beau's need for future care based on his changed condition. 5 R.App. 1116-1118; 6 R.App. 1336. At trial, Dr. Cash testified that based upon a worsening condition, Beau was a surgical candidate "***now***." 7 R.App. 1475; 7 R.App. 1526-1528, 1546. (emphasis added). Due to accelerated degeneration caused by the disc surgery at L4-5, Beau's condition significantly progressed beyond expectations. *Id.* at 1526-1527. As such, the first

surgery would be a two-level fusion as opposed to a possible single level fusion had Dr. Capanna's surgery been done correctly. 7 R.App. 1545.

Dr. Yoo prepared a supplemental report on approximately May 26, 2015, and testified in his deposition that it was based on information he learned in Beau's deposition. 6 R.App. 1336; 2 A.App. 336, 46:8-25. Dr. Yoo learned from Beau's deposition that Dr. Ruggeroli's treatment "did not afford him much relief." 2 A.App. 329, 19:2-10; 336, 48:1-8. Because conservative treatment was not working, Dr. Yoo opined that Beau required future surgery, including L4-5 and L5-S1 fusions, which would then lead to adjacent disc disease, requiring fusion at L3-4 within 5 to 15 years of the L4-5 and L5-S1 fusion. 6 R.App. 1336; 5 R.App. 1096-1097.

Dr. Cash's report, dated May 14, 2015, expressly described a "**gradual worsening** of low back pain over time" and Beau experienced "**accelerated deterioration** at L4-5 and L5-S1," based upon imaging and recommended two surgeries: a two level fusion at L4-5 and L5-S1 within 10 years at approximately $350,000, and a fusion at L3-4, approximately $342,401, seventeen years later. 5 R.App. 1116-1118 (emphasis added). It is notable that defense expert Dr. Rimoldi agreed that Beau's condition worsened. 21 A.App. 5030-31.

While Dr. Cash initially discussed with Beau the possibility for fusion surgery in the future, he never formally recommended it. 1 R.App. 208:15-209:17;

2 R.App. 261:6-11. The May 14, 2015 report was specifically based on Beau's deteriorating condition. 5 R.App. 1116-1118; 15 A.App. 3577-3578.

Dr. Capanna cites *FCH1*, 335 P.3d 183 and *Ghiorzi v. Whitewater Pools & Spas Inc*., 2011 U.S. Dist. LEXIS 125329, 2011 WL 5190804 (D. Nev. Oct. 28, 2011) in support of his argument to exclude Dr. Cash's opinions, but these cases actually support Beau's position. In *Ghiorzi*,[7] the plaintiff did not designate any medical experts by the expert deadline, and three weeks before discovery cut-off he disclosed Joseph Schifini, M.D. as a treating physician along with a report containing "a forensic summary of medical records reviewed from 2007 to present and a letter stating Dr. Schifini's opinions." *Ghiorzi*, 2011 U.S. Dist. LEXIS 125329, *2-4. The plaintiff did not provide a curriculum vitae, fee schedule, list of prior testimony, the records upon which Schifini relied, and did not make Schifini available for deposition. *Id.* The court found that plaintiff's disclosure was problematic because Schifini's opinions went beyond those formed during the course of his treatment and the records he reviewed were not disclosed to defendant. *Id.* at *22-29.

In *FCH1*, Dr. Schifini testified about opinions he formed ***based*** on "'thousands of pages of documents' from 'many, many providers.'" *FCH1*, 335 P.3d at 189. This Court stated that "[t]o the extent that Dr. Schifini reviewed these

[7] The undersigned law firm associated into *Ghiorzi* for purposes of trial, after these disclosures of experts and treating physicians were made.

documents in the course of providing treatment to Rodriguez, he could offer an opinion based on them," but the problem was that he did not testify that he reviewed them during the course of his treatment. *Id.* at 189 (citing to 2012 amendment to NRCP 16.1). Further, Schifini could only testify to opinions based on documents disclosed to the defendant, and plaintiff disclosed only 21 pages of records out of thousands that Schifini apparently read. *Id.* at 190.

Beau's disclosure of Dr. Cash and his opinions were far different from the facts in *Ghiorzi* and *FCH1*. Dr. Cash's potential future care options were presented in his initial consultation record in October 2010 and were thus formed during the course of treatment. Beau disclosed ***all*** of the records upon which Dr. Cash relied for his opinions and they were in his chart long before he summarized them in a report. None of Dr. Cash's opinions in the April 1, 2015 report or May 14, 2015 letter were new or based on previously undisclosed records or documents.

E. Dr. Capanna Suffered No Prejudice Or Harm Under Rule 37(c)(1)

Even if it is found that Beau's disclosure of Drs. Cash and Yoo's future care opinions were untimely or otherwise failed to comply with NRCP 16.1, the failure was harmless under NRCP 37(c)(1).

After Beau disclosed Dr. Cash's April 1, 2015 report on future care opinions and his May 14, 2015 letter, Capanna took Dr. Cash's deposition on June 17 and 23, 2015, and asked questions about the reports and his future care opinions. 3

A.App. 439, 25:1 – 442, 37:25; 454, 82:1-83:25. Counsel also conducted extensive questioning of Dr. Yoo at his deposition regarding his supplemental report and future care opinions. 2 A. App. 329, 18:8-11; 330, 24:12 – 333, 34:10; 336, 46:10-49:23; 337, 50:21-51:10.

On May 29, 2015, July 22, 2015, and July 27, 2015, Capanna supplemented his NRCP 16.1(a)(2)(b) and (a)(1) disclosures with reports from Drs. Rimoldi and Belzberg specifically addressing their disagreement that Beau would need any fusion surgeries in the future, and twenty medical journal articles regarding rates of reoperation after microdiscectomy and likelihood of future fusion surgery. 5 R.App. 1149; 5 R.App. 1154; 5 R.App. 1156-1245; 6 R.App. 1250.

Based upon these circumstances, the court did not abuse its discretion in ruling that Drs. Cash and Yoo's future care opinions were not untimely under either NRCP 16.1 or NRCP 37.

F. Even If It Was Error To Admit Drs. Cash And Yoo's Future Care Opinions, It Was Harmless Under NRCP 61

Even if the district court's order allowing Drs. Cash and Yoo's opinions about future treatment was in error, it is harmless. NRCP 61.

Capanna's defense advanced two arguments. First, it was medically unlikely Beau would need fusion surgery. 21 A.App. 4994:6-9; 16 A.App. 3735:19-24. Second, according to Dr. Cash (no other expert agreed), Beau would have needed fusion surgery to L4-5 and L5-S1 regardless of Dr. Capanna's surgery

because a microdiscectomy usually required a subsequent fusion. 19 A.App. 4380-81, 4386. Dr. Cash recognized his position was in the minority at trial. 19 A.App. 4435. However, Dr. Cash further testified at trial that given the unique circumstances in Beau's case of two microdiscectomies at L4-5 within one month and based upon the worsening of his condition over time and increased symptoms, Beau required two future surgeries based upon Dr. Capanna's wrong level surgery at his age of 24 at that time. 16 A.App. 3674:20-3675:22. Dr. Cash testified that all of Beau's problems were greatly accelerated and his twenties and thirties will be disrupted due to three disc surgeries at age twenty. 16 A.App. 3675:5-22; 7 R.App. 1526-1527.

The jury declined to award both future surgeries and only awarded the cost of one future surgery. 7 A.App. 1432.

G. Beau's Inadvertent Omission Of The Cost Of One Surgery From His Computation Of Damages Was Harmless Under NRCP 61

Capanna also complains that the extent of Beau's future damages were not contained in his computation of damages under NRCP 16.1(a)(C). Specifically, the computation contained the cost of Dr. Cash's recommendation for surgery at L3-4 for $342,401, but it did not contain the cost of his recommendation for two-level surgery at L4-5 and L5-S1 for $350,000. However, Dr. Cash clearly set forth the cost in his report produced on May 14, 2015. 5 R.App 1098-1118.

NRCP 37(c)(1) only warrants striking evidence that does not comply with NRCP 16.1 if it harms the adverse party, and here, there was no harm to Capanna.

IV. CAPANNA INTRODUCED DR. RUGGEROLI'S FUTURE CARE OPINIONS AT TRIAL

The doctrine of "invited error" embodies the principle that a party will not be heard to complain on appeal of errors which he himself induced or contributed. *Pearson v. Pearson*, 110 Nev. 293, 297, 871 P.2d 343, 345 (1994). "A party who participates in an alleged error is estopped from raising any objection on appeal." *Carter v. State*, 121 Nev. 759, 769, 121 P.3d 592, 599 (2005).

Here, Beau dropped the claim for future pain management before trial. Beau did not present this evidence at trial. Rather, Capanna brought this issue up to impeach the credibility of Beau's case.

Actually, Capanna introduced it while trying to impeach Dr. Yoo on cross-examination, and Beau objected because he was not making this claim for future pain management care. 17. A.App. 3903:21—3904:1, 17 A.App. 4023. Beau's objection was overruled and defense counsel delved into Dr. Ruggeroli's future cost letter with Dr. Yoo even though the damages were not being sought. 17 A.App. 3904:3—3905:9.

V. BEAU'S COUNSEL DID NOT COMMIT ATTORNEY MISCONDUCT AT TRIAL

Dr. Capanna argues that Beau's counsel committed three types of attorney misconduct: (1) mentioning liability insurance in voir dire and closing argument; (2) making golden rule arguments by using the words "you" and "your;" and (3) encouraging jury nullification.

A. Reference To Insurance During Voir Dire

One of the two purposes of jury voir dire is to facilitate the identification and removal of potential jurors "who, because of bias or prejudice, cannot serve as fair and impartial jurors." *Silver State Disposal Co. v. Shelley,* 105 Nev. 309, 312, 774 P.2d 1044, 1046 (1989). Parties are permitted good faith questioning of prospective jurors about their interests and connections with insurance companies. *Id.* at 312-13, 1046-47. "Good faith" questioning is "questioning for the purpose of ascertaining the qualifications of prospective jurors and for ferreting out bias and prejudice, and not for the purpose of informing them that there is insurance in the case." *Id*. at 312-13. Bias exists when a juror has preconceived views about their ability to apply the law and court's instructions to the evidence presented. *Khoury v. Seastrand*, 132 Nev. ___, 377 P.3d 81, 88 (2016).

Capanna does not provide any law to support his argument that mentioning insurance in voir dire was error. Capanna also does not cite to any order in limine that he contends Beau's counsel repeatedly violated.

1. Jurors Raised the Issue of Insurance in Voir Dire, Not Beau, and then Beau's Counsel Asked Limited Follow-Up to Ferret Out Bias

Jurors brought up the topic of insurance, as is commonplace, when asked if anyone was involved in a lawsuit before in response to a question for the court. 12 A.App. 2741:20-23, 2750:16-2751:16. Jurors also interjected insurance into their answers for the following questions (parentheticals contain answers that triggered Beau's follow-up questioning about potential bias):

- If anyone had strong feelings about serving as a juror on a medical malpractice case. 12 A.App. 2781:7-14, 2782:11-14 (doctors' "crazy insurance problems"), 2793:1, 2796:18-21.
- If they would believe a person testifying under oath if they brought a case. 12 A.App. 2842:18-23, 2843:8-10 ("instead of a $50,000 insurance thing, if you can get $2 million, I'd be -- I wouldn't be telling you the truth").
- Whether doctors should be held accountable for mistakes and actions. 12 A.App. 2854:18-24 (concern over increased insurance rates), 12 A.App. 2859:7-9 ("many of them pay more money in malpractice insurance a year than most of us make").
- If doctors were unfairly targeted in some way. 12 A.App. 2856:15-21 (malpractice has made health insurance costs "crazy").

- If there should be limitations in personal injury cases. 13 A.App. 2962:1-10, 2965:12-16 (insurance rates increase because of injury claims).
- If anyone had beliefs that would prevent them from returning a multimillion verdict if it was supported by the evidence. 13 A.App. 2998:22-25, 2999:10-21 (surgeon might pay $100,000 for malpractice insurance, versus suing a neighbor who has limited money and insurance).

Based upon juror responses, Beau's counsel asked the jurors if they could follow the judge's instruction not to consider insurance or ability to pay. 13 A.App. 3001:7-10. Some jurors said they could (13 A.App. 3001:11, 3004:24, 3005:16, 3006:1), but another said it "would be really hard to follow that" even with the judge's instruction because "it's somebody's life on the line" and "you're going to take a lot away from him." 13 A.App. 3003:15-3004:6. This is when defense counsel objected. 13 A.App. 3006:13-3007:15. However, inquiry into bias and whether jurors can follow the law is clearly permissible, and was particularly important here in light of jurors' responses about malpractice insurance, concerns over Dr. Capanna's financial condition, and their own insurance rates. *Khoury*, 377 P.3d at 88.

This Court recognizes that insurance voir dire questioning must strike a balance for both parties. *Shelley*, 105 Nev. at 312, 774 P.2d at 1046. The reality is most jurors have had involvement with insurance claims. For example, automobile

liability coverage is mandated by state law. Most jurors have had involvement with automobile insurers following a collision. Insurance companies heavily advertise in print media, internet and television. Similarly, personal injury lawyers frequently advertise their services to deal with the insurance industry or "sue" insurance companies in court proceedings. Finally, in particular to medical malpractice matters, in the early 2000s there was a ballot initiative by Nevada citizens giving rise to comprehensive medical malpractice reform due to concerns of medical malpractice insurance. Thus, appropriate follow-up questions with these jurors was clearly appropriate.

2. Dr. Capanna Fails to Establish the Impropriety of Using a Nevada Pattern Jury Instruction 1.07

This Court reviews a district court's decision to give a jury instruction for abuse of discretion. *Sweet v. Harrah's Las Vegas, Inc.*, 2016 Nev. App. Unpub. LEXIS 543 (Nev. Ct. App. Dec. 27, 2016).

Prior to the closing arguments, the court gave Nevada Pattern Instruction 20:

> You are not to discuss or even consider whether or not Dr. Capanna was carrying insurance that would reimburse him for whatever sum of money he may be called upon to pay to the Plaintiff.
>
> Whether or not Dr. Capanna was insured is immaterial, and should make no difference in any verdict you may render in this case.

Nev. J.I. 1.07 (1986) *cf.* 7 A. App. 1402.

This Nevada pattern instruction is commonly given in personal injury cases. Capanna provides no legal authority to support his argument that it was error to give the jury this instruction, that it is an incorrect statement of law, or that Beau's use of it in his closing argument was error. Given jurors' statements during voir dire about concerns over insurance or how a defendant would pay, it was appropriate to instruct the jurors not to consider these issues. Beau's counsel did not unfairly highlight or emphasize Instruction 20, as Dr. Capanna suggests in his brief. App.Br. 46-48. Beau's counsel reviewed and explained many of the jury instructions in his closing argument. 22 A.App. 5151:16, 5152:9, 5153:24, 5160:20, 5162:20, 5163:2, 5167:20, 5168:10, 5169:7, 5177:17, 5180:12-17, 5181:37, 5185:17, 5192:19, etc.

Beau's counsel's closing argument about Instruction 20 clearly implores the jurors to ***follow*** the law:

> Now, instruction number 20 talks about how you're not to discuss or even consider whether or not Dr. Capanna was carrying insurance that would reimburse him for whatever sum of money he may be called upon to pay the plaintiff. Whether or not Dr. Capanna was insured is immaterial and should make no difference in your verdict in any way. Don't be consider (sic) where the money comes from. ***Your job is to balance these harms and these losses. It's up to you to decide what you think is fair, reasonable and appropriate for what happened to Beau and what he's going to go through in the future***. But if someone starts to talk about whether Dr. Capanna has insurance or where the money was going to come from, please remind them that under instruction 20 you can't do that.

22 A. App. 5185-86. (emphasis added).

This argument does not overly or unnecessarily emphasize insurance. In fact, unlike *Lioce v. Cohen*, 124 Nev. 1, 174 P.3d 970 (2008), Beau's counsel asked the jury to follow the law. This sole paragraph comprises the sum total of Beau's mention of insurance in his entire 60-page closing argument.

B. Capanna Failed To Preserve His Arguments Regarding Attorney Misconduct

Capanna attempts to make an appeal regarding alleged attorney misconduct related to "golden rule" arguments and jury nullification. This issue was not preserved for appeal.

1. Capanna Did Not File an Appeal Regarding Alleged Misconduct and this Issue Should Not be Considered

The Notice of Appeal shall "designate the judgment, order or part thereof being appealed." NRAP 3(c)(1)(B). Only those parts of the judgment which are included in the notice of appeal will be considered on appeal. *Reno Newspapers v. Bibb*, 76 Nev. 332, 334, 353 P.2d 458, 458 (1960).

Here, Capanna requests a new trial based on alleged attorney misconduct. None of the items being appealed or alleged addressed attorney misconduct. 11 A.App. 2377-93. Capanna's Case Appeal Statement and supplements thereto also do not reference any order or ruling regarding alleged attorney misconduct. 11 A.App. 2394-96. 2455-58, 2475-78. Capanna made no request for new trial based upon claimed misconduct pursuant to NRCP 59(a)(2), giving the district court an

opportunity to rule on the matter. This issue has been waived as there was no detailed analysis or specific finding by the district court as is required by *Lioce*, 124 Nev. 1, 174 P.3d 970.

With no motion for new trial or detailed findings by the district court in connection with its ruling on a motion for new trial, there is simply no record for this court to review the trial court's exercise of discretion. *Carr,* 2017 Nev. Unpub. LEXIS 56. A motion for new trial based upon attorney misconduct pursuant to NRCP 59(a)(2) must be made to preserve the issue for appeal. *Gunderson v. D.R. Horton,* 130 Nev. ___, 319 P.3d 606, 611 (2014). By failing to raise the issue in the motion for new trial, the issue is waived. *Id.*

2. *Lioce* Standards of Review

In *Lioce*, this Court set forth clear and specific standards for seeking a new trial based upon attorney misconduct.

a. Objected-to and admonished misconduct and objected-to and unadmonished misconduct

The parties' attorneys must competently and timely state any objections to alleged misconduct. *Lioce*, 124 Nev. at 17-18, 174 P.3d at 980-81. If an objection is sustained, the district court should admonish the jury and counsel. *Id.* "A party moving for a new trial bears the burden of demonstrating that the misconduct is so extreme that the objection and admonishment could not remove the misconduct's effect." *Id.*

If an objection to purported misconduct is overruled and the jury is not admonished, the party moving for new trial must first demonstrate that the district court erred by overruling the party's objection. *Id.* Next, if the court concludes it erred by overruling the objection, the court "must then consider whether an admonition to the jury would likely have changed the verdict." *Id.* This requires evaluation of the evidence and the parties' and attorneys' demeanor to determine whether a party's substantial rights were affected by the court's failure to sustain the objection and admonish the jury. *Id.*

b. Unobjected-to misconduct

When a party does not object to the complained-of conduct, the district court should deem the issue of alleged attorney misconduct waived, unless there is plain error. *Id.* at 19, 174 P.3d at 981-82. In deciding whether there is plain error, the court must determine "whether the complaining party met its burden of demonstrating that its case is a rare circumstance in which the attorney misconduct amounted to irreparable and fundamental error." *Id.* Irreparable and fundamental error is error "that results in a substantial impairment of justice or denial of fundamental rights such that, but for the misconduct, the verdict would have been different." *Id.* In other words, if there was no objection, then there must be ***no other*** explanation for the verdict, i.e. plain error. *Id.*

Even when there are improper comments, this does not alone give rise to a new trial unless they are so severe and pervasive enough to encourage the jury to ignore facts, the law, and decide the case based upon personal prejudice. *Carr,* 2017 Nev. Unpub. LEXIS 56.

c. Appellate standard of review

Orders denying or granting motions for a new trial are reviewed for abuse of discretion. *Lioce*, 124 Nev. at 20, 174 P.3d at 982. Whether an attorney's comments are misconduct is a question of law, which is reviewed de novo, but deference is given to the district court's factual findings and application of the standards to the facts. *Id.*

3. Capanna Fails to Satisfy His Burden of Proof in *Lioce* to Show there was Misconduct

Capanna argues that Beau's counsel committed attorney misconduct related to golden rule arguments and jury nullification during closing arguments under *Lioce*, 124 Nev. 1, 174 P.3d 970. App.Br. 44-45, 48-59.

Even though Capanna accuses Beau of "repeated and persistent misconduct, despite Capanna's objections," he identifies only ***one*** objection to alleged golden rule argument and ***one*** objection to alleged jury nullification argument, both of which were overruled. 22 A.App. 5198-200, 5206-10. Out of 60 pages of closing argument and 10 days of trial, Capanna identifies only two objections to purported misconduct during the closing argument. Because the objections were overruled,

Capanna must first demonstrate that the district court erred by overruling his objections. *Lioce*, 124 Nev. at 18, 174 P.3d at 981. If the Court concludes the district court erred by overruling the objections, the next question is whether a jury admonition would likely have affected the verdict in Capanna's favor. *Id.* at 20, 982.

a. Beau's counsel did not make golden rule arguments

The trial court did not err in overruling Capanna's objection during closing arguments, and Capanna does not show how a jury admonishment would have likely changed the verdict in his favor. *Lioce*, 124 Nev. at 18, 174 P.3d at 981.

A golden rule argument is one that asks jurors to place themselves in the position of one of the parties, which is improper because they infect the jury's objectivity. *Id.* at 23, 174 P.3d at 984.

Capanna complains about a few paragraphs in Beau's closing argument in Volume 22 of Capanna's Appendix, citing pages 5198-99, 5202, 5207-08, 5210. However, he did not object to the argument he complains of on page 5202 at trial and does not meet his burden of demonstrating irreparable and fundamental error. *Lioce*, 124 Nev. at 19, 174 P.3d at 981-82.

The remaining pages, 5198-99 and 5207-10, are all part of the same objection to argument on page 5198. While Beau's counsel described Beau's lost ability to pursue his dream and passion - football - in closing argument, defense

counsel's objection was overruled. 22 A.App. 5197-98. Outside the presence of the jury, defense counsel repeated his objection, Beau's counsel explained his argument, and the court overruled the objection again and explained his reasoning. 22 A.App. 5207:8—5210:21.

Capanna argues Beau's counsel made golden rule arguments by "persistently using hypothetical and rhetorical questions with the words 'you' and 'your.'" App.Br. 48. Capanna's argument relies on semantics, rather than context and substance. Under *Lioce* and *Gunderson*, the misconduct must be so pervasive that it significantly affects the fairness of the proceedings. Even isolated improper comments without more, will not warrant a new trial. *Carr,* 2017 Nev. Unpub. LEXIS 56. Capanna suggests any use of the word "you" regardless of context is a golden rule violation. *Lioce* is not a talismanic prohibition of all attorneys' use of the word "you" and "your" in closing arguments; these words must be read in context. *FCH1*, 335 P.3d at 188. ("***rather than listening for specific words*** the district court should have considered the ***purpose*** of the expert testimony and its certainty in light of its ***context***.")

The analysis made under *Lioce* is all about context. The conduct must be so severe and pervasive there is no option to remedy it other than ordering a new trial. There is more than one definition of the word "you." It can be singular or plural, but it can also mean "one; anyone; people in general."

See https://en.oxforddictionaries.com/definition/you. Here, once one (i.e. "you") reads Beau's counsel's use of "you" and "your" in context with the surrounding language and paragraphs, it is clearly referencing a third-person or "reasonable person." In other words, "one" and "one's" could be substituted for "you" or "your":

> And unfortunately, there's a window of time as a football player that you have. And Beau was well on is way -- not only did he not get to complete -- compete and finish his, you know, Division I college experience, he lost the opportunity to go to the next level, to go play professional football. And that is invaluable, because we only heard -- remember we heard from Beau's dad who knew a lot about this, only one percent of all the players in high school level get to go play in a Division I college football program. That takes a lot of talent, dedication, strength and commitment. And Beau loved it. And it was his first love.
>
> But let's think about this: Who would volunteer -- ***what reasonable person would volunteer to –***
>
> MR. LAURIA: ***Your Honor, may we approach, please?***
>
> MR. PRINCE: ***-- give up their hopes and dreams and suffer a lifetime*** --
>
> [Bench conference begins at 12:31 p.m.]
>
> MR. LAURIA: That's a little bit like a Golden Rule –
>
> MR. PRINCE: No –
>
> MR. LAURIA: -- argument if he's -- excuse me. ***That is clearly a Golden Rule argument because he's asking them who would do that which is putting them in that same position, who would give up those opportunities for money.*** It is -- whether he phrased it as you personally or a third person –

THE COURT: No.

MR. LAURIA: -- would give it up –

THE COURT: ***No, no, no, no. I disagree.***

[Bench conference ends at 12:32 p.m.]

MR. PRINCE: ***And what reasonable person would give up their hopes, their dreams and agree to suffer a lifetime of pain, discomfort and limitation for money?*** Would it be a million dollars -- if I give you a million dollars today, but I give you a 65-year-old man's spine, you won't be able to finish playing your college career, you're going to have discomfort and as you get older, it's going to get worse with time, you're going to need future surgeries, who would do that? Who would sign up for something like that?

Who would do it even for five million? How about 10 million? Those are big losses. And -- you know, ***that's what juries do***. ***You decide based on the evidence of a case*** what somebody's loss of their hopes and dreams means, what's to suffer a lifetime of pain, but the ***only thing you can do is award money***. That's the only thing you can do. ***And come up with what you think is fair based upon the losses that Beau sustained that you heard in this evidence***.

22 A.App. 5197:22—5199:14 (emphasis added).

The district court explained this ruling: "I know that there are situations in which somebody could make an argument that impliedly invokes the Golden Rule, but more importantly, it's really about expressly asking a jury in particular to put themselves in the shoes of the plaintiff." 22 A.App. 5210. It is notable that the court emphatically stated "No, no, no, no. I disagree," in response to defense

counsel's objection because the court was present, listening to the argument, context, and tone. 22 A.App. 5198:20.

In contrast to the offensive part of Emerson's golden rule argument in *Lioce*, counsel did not encourage the jury to ignore the facts and decide the case based upon personal prejudice and opinions. *Lioce*, 124 Nev. at 23, 174 P.3d at 984.

b. Beau's counsel did not make jury nullification arguments

Capanna contends that a few paragraphs in Beau's closing argument cited in Volume 22 of Capanna's Appendix at pages 5149-50, 5200, 5206, 5208-10 amount to jury nullification. However, he did not object to the statements on pages 5200 and 5206 at trial and does not meet his burden to show the statements caused irreparable and fundamental error, which is required for unobjected-to misconduct. *Lioce*, 124 Nev. at 19, 174 P.3d at 981-82. The remaining pages are all part of the same objection to Beau's argument on pages 5149-50.

Jury nullification is the jury's "knowing and deliberate rejection of the evidence or refusal to apply the law either because the jury wants to send a message about some social issue that is larger than the case itself or because the result dictated by law is contrary to the jury's sense of justice, morality, or fairness." *Id.* at 20, 982-83.

Capanna extracts a few words from this definition of jury nullification-"send a message," "social issue," and "dictated by law." Similar to his golden rule

argument regarding "you," Capanna focuses on the semantics rather than the actual context. Jury nullification is more than using a handful of what Capanna apparently thinks are magic words; it is a doctrine that encourages the jury to ignore the law and evidence, and instead make a decision based on some overriding belief or emotion.

Beau's argument actually did the opposite of nullification. His counsel was describing the jury's duty and responsibility to use the evidence and law to make decisions, when defense counsel interrupted to make his one objection, which was overruled:

> And your decision here is important because, well, it affects the public. ***A jury speaks as the conscious (sic) of our community, as the enforcer of our values and our beliefs***…
>
> And we trust juries -- hang on a second. Sorry. To make some of the most important decisions in our life. In fact, probably the ultimate decision. Only a jury, ladies and gentlemen, can decide in a criminal case, in a capital murder case whether someone lives or dies. So we give -- ***we empower juries to make decisions based on evidence, based on the law. You make the most important decisions in life***.
>
> And I think John Adams is -- said who was one of the founding fathers said representative government, which is our elected officials, and trial by jury are the heart and lungs of liberty. I think that's true and I think Thomas Jefferson felt the same way because you're the most democratic of all of our institutions because you're free from influence. ***And for that reason, you have power to decide cases just like this and to enforce our values***.
>
> And the only protection Beau has -- his only option is to come to court. ***His only protection is in the law. He has no other protection***

> ***available to him because Dr. Capanna has always refused to accept any responsibility for what he did***.
>
> MR. LAURIA: ***Your Honor, may we approach, please***?
>
> MR. PRINCE: And so for --
>
> [Bench conference begins at 11:05 a.m.]
>
> MR. LAURIA: ***I believe counsel is making an improper social justice argument here in closing argument, suggesting that they have to protect society,*** that this is - from Dr. Capanna (indiscernible) so I'm concerned you know that's improper --
>
> MR. LAURIA: -- closing argument.

22 A.App. 5149:6—5150:10, 5208:23—5209:6 (emphasis added).

> And the right thing to do is to ***award something that you feel is fair and appropriate for Beau and that you feel would be just in this case*** because I think Dr. King said it best: Injustice anywhere is a threat to justice anywhere -- everywhere. And Beau's only protection is in the law. He has no other protection….

22 A.App. 5200:14-27 (emphasis added).

Dr. Capanna cannot show the district court erred in not sustaining his objection, or that the court's admonishment would have likely changed the verdict. *See Lioce*, 124 Nev. at 18, 174 P.3d at 981. The district court recognized that Beau was not making an argument about sending a larger message not based upon evidence or law, and the argument about not accepting responsibility was acceptable for closing argument. 22 A.App. 5209:20—5210:14.

Contrary to Capanna's argument, Beau's closing was not "a textbook example of improper jury nullification arguments." App.Br. 55. It was literally the opposite from Emerson's argument in *Lioce*: Emerson asked the jury to send a message about frivolous lawsuits, encouraged disdain for the civil jury process, and perpetuated a misconception that most injury cases were unfounded and brought in bad faith by unscrupulous lawyers (*Lioce*, 124 Nev. at 20-21, 174 P.3d at 983), while Beau empowered the jury by telling them they are "the heart and lungs of liberty," their decisions are some of the most important in life and should be based on evidence and law, and that Beau's only protection was the law. 22 A.App. 5149:6—5150:10, 5200:14-22.

Capanna's argument about "sending a message" to a party was rejected by this court in *Gunderson.* In *Gunderson,* a construction defect case, defense counsel in closing arguments told the jury to "send a message" to the plaintiff homeowners that their homes were not defective. *Gunderson,* 319 P.3d at 613-614. Counsel for the homeowners argued on appeal this was misconduct giving rise to a new trial. This court rejected the argument that "sending a message" to a party constituted misconduct. *Gunderson,* 319 P.3d at 611.

Dr. Capanna represents that *Schoels v. State*, 114 Nev. 981, 987, 966 P.2d 735, 739 (1998) was a "well-established prohibition against attorneys referring to juries as the conscience of the community in closing argument," which is the

opposite of its holding. App.Br. 54. The Court in *Schoels* actually found that the prosecutor's reference to "the conscience of the community" was ***not*** improper. 114 Nev. at 987, 966 P.2d at 739.

In fact, this Court described the role of the jury as the "conscience of the community" in *El Dorado Hotel v. Brown,* 100 Nev. 622, 691 P.2d 436 (1984). (overruled on other grounds). This Court stated in *El Dorado*:

> The jury, acting as the conscience of the community, determined that Brown is entitled to $25,000 as compensation for the indignities he has suffered. For our part, we cannot say the jury acted either unreasonably or as a result of passion or prejudice.

Id. at 629, 691 at 442 (Emphasis added).

The reasoning for allowing a "community conscience" argument in *Schoels* is equally applicable in civil cases because the jury listens to the evidence and draws from their knowledge, experience, and standards in the community to determine the verdict. *See Barber v. Pointe*, 772 F.2d 982, 997 (1st Cir. 1985); *In Re Japanese Elec. Prods. Antitrust Litig.*, 631 F.2d 1069, 1085 (3rd Cir. 1980).

Lastly, even if counsel did engage in alleged isolated misconduct, the admonishment the court would have given the jury would not have changed the verdict amount. As the district court found, there was overwhelming evidence of Dr. Capanna's wrong level surgery and injury to Beau. Because the NRS 41A.035 non-economic damages cap makes such a difference in this case, Dr. Capanna

would have to show that the misconduct changed the verdict by more than $3,450,00 before it had any impact on the verdict.

Based on the foregoing, any alleged jury nullification argument either did not occur or had no effect on the verdict.

VI. THE DISTRICT COURT PROPERLY AWARDED ATTORNEYS' FEES DUE TO DR. CAPANNA'S FRIVOLOUS LIABILITY DEFENSE

The district court's decision to award attorneys' fees under NRS 18.010(2)(b) is within the sound discretion of the trial court, and will not be disturbed absent an abuse of discretion. *Barozzi v. Benna*, 112 Nev. 635, 683, 918 P.2d 301, 303 (1996).

The court may award attorney's fees to a prevailing party "when the court finds that the…defense of the opposing party was brought or maintained ***without reasonable ground*** or to harass the prevailing party." Nev. Rev. Stat. 18.010(2)(b) (emphasis added); *Farmers Home Mut. Ins. Co. v. Fiscus*, 102 Nev. 371, 725 P.2d 234, 237 (1986).

Capanna claims that the court did not apply the correct standard for an award of fees under NRS 18.010(2)(b) because it said evidence of Dr. Capanna's liability was "overwhelming," instead of stating the claim was not "supported by any credible evidence at trial." App.Br. 60 (citing *Bobby Berosini, Ltd. v. PETA*, 114 Nev. 1348, 1355, 971 P.2d 383, 387 (1998)). Capanna again relies upon a single

talismanic word, to the exclusion of others. Capanna overlooks the district court's clear findings that there were ***no reasonable grounds*** for Capanna's liability defense, which is the standard to be used under the plain language of NRS 18.010(2)(b). 6 R.App. 1331:17-18 ("the Court cannot find that Dr. Capanna's liability defense was maintained with reasonable grounds"). The court even found that "the totality of evidence showing that the original surgery was performed at the wrong level of the spine would meet a ***'beyond a reasonable doubt'*** standard." *Id.* at 1331:20-26. This certainly satisfies the standard in NRS 18.010(2)(b).

If the district court finds that some defenses have merit and others do not, then it should allocate attorneys' fees between the grounded and groundless defenses. *Bergmann*, 109 Nev. at 675-76, 856 P.2 at 563-64. Judge Herndon ruled that NRS 7.095 was an appropriate mechanism to determine attorneys' fees and found that the presentation of liability issues encompassed at least 80% of Beau's trial presentation. *Id.* Based on applying this percentage to Beau's total fee request of $212,486.98 in his reply brief, the court properly awarded $169,989.58 in attorneys' fees. *Id.*

VII. THE DISTRICT COURT APPLIED THE PROPER STANDARD WHEN IT AWARDED COSTS

The Supreme Court reviews the district court's award of costs for abuse of discretion. *Cadle Co. v. Woods & Erickson, LLP*, 131 Nev. 345 P.3d 1049, 1054 (2015).

NRS 18.005(5) allows a prevailing party to recover fees larger than $1,500 per expert if the circumstances warrant. Grounds for awarding expert fees in excess of $1,500 are shown when an expert witness's testimony constitutes key evidence in a party's case. *See Gilman v. Nev. State Bd. of Veterinary Med. Examiners*, 120 Nev. 263, 272–73, 89 P.3d 1000, 1006–07 (2004); *see also Frazier v. Drake*, 131 Nev. ___, 357 P.3d 365, 375-78 (Nev. App. 2015).

The only cost challenge that Capanna makes regards the expert fees for Dr. Yoo and Cash. App.Br. 64-65. Capanna complains the district court only made a vague and general comment "[r]ather than articulating an express, careful analysis of the applicable factors, as required by *Frazier*." App.Br. 65. However, *Frazier* does not require a written explanation of the court's analysis of the factors; it states only that written is preferable. *Frazier*, 357 P.3d at 377. Further, "not all of these factors may be pertinent to every request for expert witness fees in excess of $1,500 per expert under NRS 18.050(5)." *Id.* at 378.

The basis and justification for Drs. Yoo and Cash were extensively briefed for Capanna's Motion to Retax Costs. 7 A.App.2626-30, 8 A.App. 1642-1876; 7

R.App. 1571-1594. The district court found pursuant to *Berosini*, Beau's named experts were necessary to his case and that "exceeding the statutory amounts is justified and reasonable for Dr. Yoo and Dr. Cash based upon their roles in the litigation." There can be no reasonable dispute that medical malpractice is one of the most difficult, complex, and expert driven type of case in civil law. The litigation costs in medical malpractice actions are commonly in the hundreds of thousands of dollars.

The amounts awarded reflect the standard amounts for the experts' skill level, time, and necessity in this matter: $47,250.00 for Dr. Cash, and $16,625.95 for Dr. Yoo. Dr. Cash is an orthopedic surgeon and Dr. Yoo is a neurosurgeon. Both doctors' fees are reasonable relative to the fees charged by other, similarly-situated medical professionals. For a full day of trial testimony, Dr. Yoo charges $8,800.00 plus expenses, and Dr. Cash charges $12,000.00. 1 A. App. 34; 1 A.App. 52. Similarly, Capanna's medical expert, Dr. Belzberg, charges $8,500.00 for any court appearances outside of Maryland, and Dr. Rimoldi charges $14,000. 4 R.App. 744; 21 A.App. 5001.

Further, Dr. Capanna fails to acknowledge that Dr. Cash's increased fees are also due to Dr. Capanna's own trial scheduling. Defense counsel announced that he needed to call Dr. Belzberg out of order, in the middle of Beau's case-in-chief, forcing Beau to stop in the middle of Dr. Cash's testimony. 11 A. App. 2488-89;

A. App. 3504-05; 16 A.App 3681. Dr. Cash had to come back to court a second time, which required him to fly in from a conference to testify. Dr. Capanna cannot be heard to complain about increased fees caused by his own imposition on Beau's case, and this imposition does not render the district court's award of costs an abuse of discretion.

Because the doctors' testimony was legally necessary for Beau to pursue his claims and given the medical complexity, their fees are reasonable and justified under the circumstances. The district court properly exercised its discretion when it awarded Beau the full amount of his expert fees.

CONCLUSION

Beau requests this court to affirm the judgment in this matter.

RESPONDENT/CROSS-APPELLANT'S OPENING BRIEF

STATEMENT OF THE ISSUE

Does NRS 42.021 deny medical malpractice victims equal protection under the law?

STATEMENT OF THE FACTS

On July 13, 2015, Beau filed his Motion to Declare NRS 42.021 and NRS 41A.035 Unconstitutional, which the Court denied. *See* 7 R.App. 1595-1688; 7 R.App. 1689-1690. At trial, Capanna introduced evidence of collateral source

payments made by Beau's health insurers for treatment he received to address the injury caused by Capanna. *See* 6 R.App. 1465-1469; 8 R.App 1814-1825.

The district court did not instruct the jury about evidence of collateral source payments from Beau's health insurers. The jury received no guidance regarding how to evaluate the collateral source evidence. Despite the lack of instruction, the jury determined that Capanna was negligent and awarded Beau $136,300.49, the entirety of his past medical expenses. *See* 8 R.App. 1829-1830.

Although the jury did not reduce Beau's recovery for past medical expenses, Beau's cross-appeal regarding the constitutionality of NRS 42.021 is justified. Should this Court determine the district court committed reversible error and remand this case for a new trial, a jury will once again receive evidence of collateral source payments. The district courts and litigants in medical malpractice actions need clarity on this issue to properly prepare for trial and evaluate these cases for settlement. Given these potential ramifications, the constitutionality of NRS 42.021 is ripe for this Court's review.

SUMMARY OF THE ARGUMENT

Medical malpractice is an ongoing problem and one of the leading causes of death in the U.S. Nevada voters were convinced that doctors were leaving the state due to increasing medical malpractice premiums resulting from high jury verdicts. In response, voters approved and the legislature passed NRS 42.021, which allows

a medical malpractice defendant to introduce evidence of collateral source payments made towards a malpractice plaintiff's treatment. The only purpose of the statute is to reduce jury awards for a malpractice victim.

NRS 42.021 is unconstitutional because it is not substantially and rationally related to a legitimate state interest. *Laakonen v. Eighth Judicial Dist. Court*, 91 Nev. 506, 538 P.2d 574 (1975). Medical malpractice plaintiffs are a vulnerable group and depend on courts to provide a complete remedy resulting from a medical provider's violation of their health and safety. NRS 42.021 subverts this interest in favor of negligent medical providers even though studies show that the admission of collateral source benefits does not increase the cost of doctors' liability insurance premiums. The statute provides extra protection to medical providers that is unnecessary and actually rewards negligent health care. The statute also unfairly precludes health insurers from asserting subrogation rights. Different classifications of victims, tortfeasors, and health insurers that result from NRS 42.021 do not help to achieve a high quality of health care for Nevadans. Instead, it has a disparate impact on one class of innocent victims.

NRS 42.021 is unconstitutionally vague because it fails to provide specific standards for the jury necessary to enforce its terms. This leads to arbitrary enforcement and varying awards for malpractice plaintiffs.

ARGUMENT

I. MEDICAL MALPRACTICE IS A SERIOUS HEALTH PROBLEM

Medical malpractice continues to be a pervasive problem in this country. Medical error is the third most common cause of death in the United States. *See* Michael Daniel and Martin A. Makary, M.D., *Medical Error – the third leading cause of death in the US*, BMJ 2016;353:i2139 (May 3, 2016).

II. NRS 42.021 CONTRADICTS THIS COURT'S LONG-STANDING PER SE RULE BARRING THE ADMISSION OF COLLATERAL SOURCE EVIDENCE

Nevada adopted a *per se* rule barring the admission of collateral source payments for an injury into evidence for any purpose. *Proctor v. Castelleti*, 112 Nev. 88, 90, 911 P.2d 853, 854 (1996). This Court held that evidence of collateral source payments "inevitably prejudices the jury because it greatly increases the likelihood that a jury will reduce a plaintiff's award of damages because it knows the plaintiff is already receiving compensation." *Id.* at 90, 854. This Court addressed the collateral source issue on numerous occasions since *Proctor* and continually reaffirmed the rule. *See Bass-Davis v. Davis*, 122 Nev. 442, 454, 134 P.3d 103, 110 (2006); *Winchell v. Schiff*, 124 Nev. 938, 945-46, 193 P.3d 946, 951 (2008).

In *Tri-County Equip. & Leasing, LLC v. Klinke*, 128 Nev. ___, 286 P.3d 593, 597 (2012), Justices Gibbons and Cherry, in their concurrence, stated:

> [T]he focal point of the collateral source rule is not whether an injured party has incurred certain medical expenses. Rather, it is whether a tort victim has received benefits from a collateral source that cannot be used to reduce the amount of damages owed by a tortfeasor.

Id. at 598.

Most recently, this Court expressly adopted Justices Gibbons and Cherry's concurrence that payments, write-downs, or discounts are barred by the collateral source rule in *Khoury v. Seastrand*, 132 Nev. ___, 377 P.3d 81, 93 (2016). This Court concluded that the collateral source rule bars evidence of insurance payments, write-downs, and discounts because they are ***"irrelevant to a jury's determination of the reasonable value of medical services provided."*** *Id.* (emphasis added).

NRS 42.021(1) creates an exception to the collateral source rule in cases involving medical malpractice. A malpractice victim can also introduce his past payments or contributions to secure such insurance benefits under the statute.

In medical malpractice actions, like other personal injury actions, a jury is charged to determine an award for past medical expenses. As part of this determination, a jury must consider the reasonable value of medical services the injured plaintiff received. Clearly, the only purpose for the introduction of collateral source evidence is to potentially reduce the amount of an award for past medical expenses. However, as this Court held in *Khoury*, payments from collateral source evidence, including write-downs, discounts, and sales of medical

liens, are irrelevant to this determination. *Khoury*, 377 P.3d at 93. This Court's position on the inadmissibility of collateral source evidence should be equally applied to cases involving medical malpractice. Collateral source evidence does not suddenly become relevant in cases involving medical malpractice cases, only.

III. NRS 42.021 IS UNCONSTITUTIONAL BECAUSE THE STATUTE VIOLATES THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES AND NEVADA CONSTITUTIONS

In *Tam v. Eighth Judicial Dist. Court*, 131 Nev. ___, 358 P.3d 234 (2015), this Court addressed the constitutionality of NRS 41A.035, but left open the question of NRS 42.021's constitutionality. Thus, this is issue is ripe for a determination from this Court.

The Fourteenth Amendment of the United States Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws." U.S.C.S. Const. Amend. 14, § 1 (2016). Nevada's counterpart to the Fourteenth Amendment's Equal Protection Clause is found in Article 4, Section 21, of the Nevada Constitution. *Laakonen*, 91 Nev. at 508, 538 P.2d at 575.

NRS 42.021(1) is unconstitutional because it deprives victims of medical malpractice equal protection of the law. The equal protection clauses of both the United States and Nevada Constitutions are implicated when a "…statute effectuates dissimilar treatment of similarly situated persons." *Rico v. Rodriguez*,

121 Nev. 695, 703, 120 P.3d 812, 817 (2005). NRS 42.021 discriminates against different classifications of injured tort victims based on who caused the injury and medical malpractice tort victims who maintain health insurance and those who do not.

NRS 42.021(1) also has the potential to operate as an indirect cap on economic damages. Allowing a jury to consider otherwise irrelevant evidence to reduce damage awards for past medical expenses actually rewards negligent health care.

A. NRS 42.021(1) Treats Injured Plaintiffs Differently Based On The Person Or Entity Who Caused The Injury

Plaintiffs in all other tort actions may recover the full amount of reasonable medical expenses incurred without reductions based on third-party payments, write-downs, or discounts. Plaintiffs in medical negligence actions do not receive the benefit of the collateral source rule because NRS 42.021 allows defendants to introduce irrelevant evidence to determine the reasonable value of medical services.

B. NRS 42.021(1) Treats Injured Plaintiffs Differently Based On Whether They Treated With Or Without Health Insurance

NRS 42.021 discriminates against those victims of medical malpractice who received their treatment through health insurance. An uninsured victim of medial negligence who treated on a lien basis can introduce evidence of the usual and

customary charges incurred for the medical treatment without evidence of write-downs or third-party payments. *Khoury*, 377 P.3d at 93. Thus, the uninsured victim will not face the potential prejudice of the jury considering evidence that such treatment was paid by health insurance. *Id.* However, injured victims of medical negligence who had health insurance pay for their treatment are subject to the consequences of NRS 42.021. This means injured plaintiffs who are insured face the likelihood that their recovery will be reduced simply because they have health insurance.[8]

C. NRS 42.021(1) Treats Medical Providers Liable For Professional Negligence Differently From Other Tortfeasors

NRS 42.021(1) also treats negligent medical providers differently than other tortfeasors. Negligent medical providers receive the benefit of potentially lower jury verdicts. Thus, NRS 42.021 operates as a potential indirect cap on economic damages along with the statutory cap on non-economic damages pursuant to NRS 41A.035. In all other personal injury cases, the tortfeasor must pay the full amount of reasonable medical damages that he caused. NRS 42.021 confers a benefit on negligent medical providers not available to other tortfeasors. The inherent unfairness of this result is more apparent because negligent medical providers already receive other protections not afforded to other negligent defendants.

[8] In a medical malpractice case, Judge Weise of the Eighth Judicial District Court provided a hypothetical illustrating the unfair burden NRS 42.021 imposes on insured victims of medical malpractice. 7 R.App. 1627-1687.

Besides the $350,000 cap, another protection afforded to medical malpractice defendants is they are only severally liable for damages that result from their negligence. *See* NRS 41A.015. Meanwhile, defendants in other tort actions are jointly and severally liable. *Id.* Not only does NRS 41A.045 protect a negligent physician from joint liability, it also imposes a risk of nonpayment to the injured party if one of the defendants cannot pay his percentage share of damages.

This Court previously invalidated a statute on equal protection grounds because it treated one class of defendants differently than another. *State Farm Fire & Casualty Co. v. All Elec.*, 99 Nev. 222, 660 P.2d 995 (1983) (overruled on other grounds). In *State Farm*, this Court concluded a statute that abolished a party's claim for injury after 6 years caused by a design deficiency only against entities that designed, planned, supervised, or observed a construction project, not owners or occupiers, violated equal protection. *Id.* at 229, 1000. This Court reasoned that the statute improperly granted one class of defendants immunity from suit without a reasonable basis. *Id.* at 226, 998. The same is true for NRS 42.021(1) because it grants a benefit to one group of tortfeasors (medical doctors), but not to other tortfeasors, on an arbitrary basis.

D. NRS 42.021(2) Negatively Impacts A Plaintiff's Health Insurer In Professional Negligence Lawsuits

NRS 42.021(2) undermines health insurance companies and third-party payers in medical malpractice suits because it strips the insurer or payer's right of

subrogation. Subrogation arises in the insurance context when an insurer reimburses its insured for injuries the insured received at the hands of a tortfeasor. *Harvey's Wagon Wheel v. MacSween*, 96 Nev. 215, 218, 606 P.2d 1095, 1097 (1980). In personal injury cases, generally, an insurer has the right to subrogation for amounts paid on behalf of its insured. NRS 42.021(2) precludes a source of collateral benefits from seeking subrogation.

NRS 42.021(2) is particularly offensive to health insurers because they lose their subrogation rights for payments made. This leads to unfair results for health insurers as well.

Hypothetically, assume A is injured due to medical malpractice and incurs $5,000 in medical expenses. Plaintiff's health insurer reimburses A for these medical expenses. A then sues B, the medical provider tortfeasor, for the $5,000 in medical expenses plus $10,000 for pain and suffering. When the jury awards A the full $15,000 from B, A is **not** required to repay A's health insurer the $5,000 of medical expenses pursuant to NRS 42.021(2).

E. NRS 42.021(2) Adversely Impacts Both Personal Injury Plaintiffs And Health Insurers Because Self-Funded Employee Health Benefit Plans Are Exempt Under Federal Law

NRS 42.021(2) also negatively affects medical malpractice victims who are insured under a ***self-funded employee plan*** as a matter of federal law because they are not subject to NRS 42.021(2)'s anti-subrogation provision. The Employee

Retirement Income Security Act of 1974 (ERISA) governs self-funded employee health benefit plans. *See* 29 U.S.C.S. § 1001, et seq. (2016). ERISA contains two provisions applicable to NRS 42.021: (1) the pre-emption clause; and (2) the deemer clause. *FMC Corp. v. Holliday*, 498 U.S. 52, 57, 111 S. Ct. 403, 407 (1990). The pre-emption clause establishes that self-funded plans are subject to federal law. *Id.* at 58, 407. However, ERISA's deemer clause excludes employee benefit plans from regulation because they are not deemed to be insurers or engaged in insuring for purposes of state law. *Id.* In *FMC Corp.*, the Supreme Court held that application of Pennsylvania's anti-subrogation law to a self-funded employee health benefit plan was pre-empted by ERISA. *Id.* at 65, 411.

NRS 42.021(1) broadly covers all collateral sources of benefits, including "any contract or agreement of any ***group, organization, partnership or corporation to provide, pay for or reimburse the costs of…health care services***." However, self-funded employee health benefit plans are not subject to NRS 42.021(2) and its anti-subrogation provision pursuant to ERISA and *FMC Corp.*

NRS 42.021(1) and NRS 42.021(2) operate together. To lessen the impact of introducing collateral source evidence on medical negligence victims pursuant to NRS 42.021(1), all subrogation interests are foreclosed under NRS 42.021(2). However, a victim of medical malpractice who has a self-funded benefit plan will

not have the benefit of NRS 42.021(2) even though the defense can introduce payments of health benefits received from the self-funded plan.

F. NRS 42.021 Arbitrarily Discriminates Against Professional Negligence Plaintiffs And Insurers Based On Pre-Existing Contractual Write-Down Agreements

This Court expressly held that "…evidence of payments showing medical provider discounts or write-downs is 'irrelevant to a jury's determination of the reasonable value of medical services and will likely lead to jury confusion.'" *Khoury*, 377 P.3d at 93. This evidence is irrelevant because "…[w]rite-downs reflect a multitude of factors mostly relating to the relationship between the third party and the medical provider and not actually relating to the reasonable value of medical services." *Id.*

An insurer's buying power enables it to negotiate discounted terms with medical providers and the insured receives the benefit of reduced fees. A medical provider can provide the same service to two different patients, yet accept completely different reimbursement amounts. The amount of payment received by the provider, therefore, is not based on the reasonable value of the service provided, but on a separately negotiated contract.

Not only does NRS 42.021 negatively affect a plaintiff's ability to recover the reasonable value of damages, it does so arbitrarily and in contravention of this Court's holding in *Khoury*, 377 P.3d at 93. Under NRS 42.021, a reasonable jury

could potentially decrease the plaintiff's award based on the random and arbitrary amount paid by the insurer rather than the reasonable value of the medical service.

IV. STANDARDS OF REVIEW FOR DECLARING A STATUTE UNCONSTITUTIONAL ON EQUAL PROTECTION GROUNDS

Equal protection allows different classifications of treatment only if the classifications are reasonable. *Flamingo Paradise Gaming, LLC v. Chanos*, 125 Nev. 502, 520, 217 P.3d 546, 558-59 (2009). "The standard for testing the validity of legislation under the equal protection clause of the state constitution is the same as the federal standard." *In re Candelaria*, 126 Nev. 408, 416, 245 P.3d 518, 523 (2010).

The United States Supreme Court recognizes three standards of review in determining a statute's constitutionality on equal protection grounds. The most critical level of scrutiny is "strict scrutiny" and requires the classification be necessary to achieve a compelling state interest. *Shapiro v. Thompson,* 394 U.S. 618, 634, 89 S. Ct. 1322, 1331 (1969) (overruled on other grounds).

The next standard of review is intermediate scrutiny and requires the classification be substantially related to an important government purpose. *Craig v. Boren,* 429 U.S. 190, 197, 97 S. Ct. 451, 457 (1976).

The lowest standard of review is the "rational basis" test. Under the rational basis test, the challenging party must prove the classification is not rationally related to the government's legitimate interest. *McGowan v. Maryland,* 366 U.S.

420, 425, 81 S. Ct. 1101, 1105 (1961). Under rational basis, equal protection is satisfied if: "(1) there is a plausible policy reason for the classification," (2) the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, and (3) the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational." *Tutor-Saliba Corp. v. City of Hailey*, 452 F.3d 1055, 1062 (9th Cir. 2006)

While this Court has not addressed abrogating the collateral source rule in medical malpractice cases, Beau requests this Court apply a heightened rational basis standard to assess NRS 42.021 under the equal protection clause. Beau believes this Court adopted a heightened rational basis test in *Laakonen*, 91 Nev. at 509, 538 P.2d at 575. While not a suspect class, medical malpractice tort plaintiffs are a particularly vulnerable group. By the time a jury is deciding to award damages, it has determined the medical provider was negligent and injured the plaintiff. Like other tort victims, medical malpractice plaintiffs depend on the courts to deliver justice and provide a fair and adequate remedy to make them whole. The interest of bodily health, safety and integrity is of vital importance to the citizens of Nevada, which justifies the application of a heightened level of scrutiny.

V. NRS 42.021 DOES NOT BEAR A SUBSTANTIAL AND RATIONAL RELATION TO A LEGITIMATE STATE INTEREST.

In *Laakonen*, this Court enumerated a heightened standard of review under the rational basis test. 91 Nev. at 509, 538 P.2d at 575 (1975). To pass constitutional muster under this heightened test, NRS 42.021 must bear a "…substantial and rational relation" to a legitimate state interest. *Id.* A classification must also be reasonable, not arbitrary. *Id.* at 505, 575.

The United States Supreme Court also adopted a heightened rational basis test. *Coburn v. Agustin*, 627 F.Supp. 983, 990 (D. Kan. 1985) (citing *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 105 S. Ct. 3249 (1985)). Under the *Cleburne* formulation, "the question is whether the legislative classification is *in fact* related to the object of the statute." *Cleburne*, 473 U.S. at 449-50, 105 S. Ct. at 3259-60.

"A legislature does not act 'rationally' when it acts in logical furtherance of lesser goals at the gross expenses of more vital goals." *Bell v. Hongisto*, 501 F.2d 346, 355 n.12 (9th Cir. 1974). "A court must examine the nature of the class burdened, the importance of the rights affected, and the extent to which they are impaired, and must balance these considerations against the significance of the government interest." *Coburn*, 627 F.Supp. at 991. "In circumstances where a right is particularly important or a class is particularly in need of protection, heightened scrutiny under the rational basis test appears to be required." *Id.*

This Court should apply heightened rational basis scrutiny to assess the constitutionality of NRS 42.021 because of the disparate impact it has on one class of innocent victims. In *Coburn*, a similar statute that abrogated the collateral source rule in medical malpractice actions was analyzed under a heightened rational basis standard. 627 F. Supp. at 985-86. The *Coburn* court considered that the collateral source statute conferred benefits on negligent medical providers unavailable to other tortfeasors. *Id.* at 993. *Coburn* also noted that the statute distinguished between tort plaintiffs injured by medical malpractice and all other tort victims by restricting amounts medical malpractice victims could recover as damages. *Id.* The collateral source statute also distinguished between medical malpractice plaintiffs based on the types of reimbursement they received. *Id.*

The *Coburn* court applied a heightened form of rational basis scrutiny because it is significantly important to protect "…intimate personal liberties and rights regarding bodily integrity." *Id.* at 993-94. The *Coburn* court further noted that medical malpractice victims, by and large, lack control over the cause of their injuries and the political power to protect their interests. *Id.* at 994.

Notwithstanding the legislature's purpose, to assure the availability of malpractice insurance and quality health care providers for Kansas, the *Coburn* court determined that providing litigation benefits to negligent medical providers does very little to protect public health. *Id.* at 995. Legislation like NRS 42.021

overlooks the cause of the alleged medical malpractice crisis in the first place, careless medical care, which is a serious health crisis by itself. "It is a major contradiction to legislate for quality health care on the one hand, while on the other hand, in the same statute, to reward negligent health care providers." *Farley v. Engelken*, 241 Kan. 663, 676-77, 740 P.2d 1058, 1067 (Kan. 1987).

The *Coburn* court balanced societal interests against class interests served by the collateral source statute. 627 F.Supp. at 996. The court ultimately held that "the legislative means of affording health care providers a method of reducing their liability for damages is not sufficiently related to the legislative goal of better health care." *Id.* at 497.

Coburn's reasoning is persuasive because it equally applies to NRS 42.021. This Court's determination that the classification must have a "fair and substantial" relation to the legislation necessarily encompasses the view of the *Cleburne* and *Coburn* courts that rational basis scrutiny "…requires a balancing of state interests and personal rights." *Laakonen*, 91 Nev. at 509, 538 P.2d at 575, *Cleburne*, 105 S. Ct. at 3260; *Coburn*, 627 F.Supp. at 991.

NRS 42.021 was passed for the same reasons as the statute in *Coburn*, to "stabilize medical malpractice premiums and help your doctors stay in Nevada." *See* Nevada *Ballot Questions 2004, Question No, 3, Argument in Support of Question No. 3,* at 16. The introduction of collateral source payments received by

medical malpractice victims was intended to eliminate or reduce medical malpractice lawsuits, which would reduce medical insurance premiums and improve the availability and quality of health care in Nevada. *Id.* However, studies have shown that the number of claims filed and number of claims paid do not affect a medical provider's malpractice insurance premiums and that several other factors have a greater impact. *See* Lucinda M. Finley, *The Hidden Victims of Tort Reform: Women, Children, and the Elderly*, 53 Emory L.J. 1263, 1273 (2004). Thus, the admission of collateral source benefits in medical malpractice cases does nothing to reduce doctors' liability insurance premiums, one of NRS 42.021's goals.

The legislature never considered the adverse consequences of passing NRS 42.021 because its entire focus was to "keep" doctors in Nevada, regardless of quality. The legislature severely restricted the ability of one distinct group of injured parties to obtain full recovery from the wrongdoer. The legislature should have no interest in providing economic relief to one distinct profession.

> More importantly, we believe that the state *has neither a compelling nor legitimate interest in providing* economic relief to one segment of society by depriving those who have been wronged of access to, and remedy by, the judicial system. If such a hypothesis were once approved, any profession, business or industry experiencing difficulty could be made the beneficiary of special legislation designed to ameliorate its economic adversity…. Under such a system, our constitutional guarantees would be gradually eroded, until this state became no more than a playground for the privileged and influential.

Kenyon v. Hammer, 142 Ariz. 69, 84, 688 P.2d 961, 976 (1984).

Medical malpractice victims' right to bodily safety and corresponding right to relief from violations of bodily integrity deserve the utmost protection especially because they typically lack the political clout necessary to protect their interests. *Farley*, 241 Kan. at 672, 740 P.2d at 1064. In *Farley*, the Kansas Supreme Court resolved the issue of whether Kansas's statute abrogating the collateral source rule in medical malpractice actions was constitutional. *Id.* at 678, 1068. The *Farley* court concluded that the statute was unconstitutional because it violated equal protection based on conclusions similar to those in *Coburn*. *Id.*

Like *Farley* and *Coburn*, other jurisdictions recognize the unconstitutionally prejudicial effect of a statute abrogating the collateral source rule in medical malpractice actions. *Arneson v. Olson*, 270 N.W.2d 125, (N.D. 1978); *Carson v. Maurer*, 424 A.2d 825, 836 (N.H. 1980) (overruled on other grounds); *Graley v. Satayatham*, 343 N.E.2d 832, 837-38 (Ohio C.P. 1976); and *Boucher v. Sayeed*, 459 A.2d 87, 90 n.11 (R.I. 1983).

NRS 42.021 only protects the privileged medical providers to the severe detriment of the victims of their malpractice. Like the Kansas Legislature, the Nevada Legislature "…overlooked, or more likely, ignored the fundamental cause of the so-called crisis: it is the unmistakable result not of excessive verdicts, but of excessive malpractice by health care providers." *Farley*, 241 Kan. at 678, 740

P.2d at 1068. The different classifications of medical malpractice victims and medical provider tortfeasors that result from NRS 42.021 are not fairly and substantially related to maintaining a high quality of health care for Nevadans. Therefore, NRS 42.021 is unconstitutional.

VI. NRS 42.021 IS UNCONSTITUIONALLY VAGUE BECAUSE IT DOES NOT PROVIDE SPECIFIC STANDARDS REGARDING THE ADMISSION OF COLLATERAL SOURCE EVIDENCE

The application of NRS 42.021 creates arbitrary and capricious awards that are not based on the reasonable amount of a plaintiff's medical expenses. By failing to provide a jury with specific standards, a jury will enforce NRS 42.021 in a discriminatory manner.

In *Silvar v. Eighth Judicial Dist. Court*, 122 Nev. 289, 293, 129 P.3d 682, 685 (2006), this Court clarified the standard for vagueness:

> A statute is unconstitutionally vague and subject to facial attack if it (1) fails to provide notice sufficient to enable persons of ordinary intelligence to understand what conduct is prohibited and (2) lacks specific standards, thereby encouraging, authorizing, or even failing to prevent arbitrary and discriminatory enforcement.

As currently constituted, NRS 42.021 leaves open many questions regarding how a judge and jury must apply its terms. NRS 42.021 allows a defendant to introduce collateral source evidence, if he so desires. It does not say anything about how such evidence shall be introduced at trial or when such evidence can be introduced.

The statute is also silent concerning what the jury is supposed to do with the collateral source evidence. There are no standards for the jury to consider about the amount it can deduct from past medical expenses in its award for damages. Clearly, a jury is not permitted to consider evidence of medical provider discounts or write-downs to third-party insurers because they are irrelevant. *Khoury*, 377 P.3d at 93.

The same is true as to what a jury can add to its award. NRS 42.021 allows a plaintiff to introduce "any amount that the plaintiff has paid or contributed to secure the plaintiff's right to any insurance benefits." Yet, the statute offers no standard for how to calculate "any amount." The statute provides no instruction regarding the relevant timeframe a plaintiff is allowed to introduce payments in relation to when the benefits were provided or the claims were paid. Without specific parameters outlining which premium payments a jury may consider, it is impossible to enforce the law. Instead, any reduction of collateral source payments or addition of plaintiff's premiums will be arbitrary. As such, NRS 42.021 is void for vagueness because it encourages arbitrary enforcement and does nothing to prevent it.

CONCLUSION

For the reasons set forth above, Beau respectfully requests this Court hold that NRS 42.021 is unconstitutional on equal protection grounds and because it

allows for the introduction of collateral source evidence that this Court deemed is irrelevant to the reasonable value of medical services.

DATED this 25th day of May 2017.

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made so that the judges of this court may evaluate for possible disqualification or recusal:

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1. Identify all parent corporations and any publicly held company that owns 10% or more of the party's stock:

   NONE

2. Names of all law firms whose partners or associates have appeared for the party or amicus in the case (including proceedings in the district court or before an administrative agency) or are expected to appear in this court:

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3. If any litigant is using a pseudonym, disclose the litigant's true name:

NONE

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6). This brief has been prepared in a proportionally spaced typeface using Microsoft Word for Mac 2011, Version 14.4.1, in 14 point, double-spaced Times New Roman font.

2. I further certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains 18,492 words pursuant to NRAP 28.1(e)(2)(B)(i).

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

…

…

…

I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of Nevada Rules of Appellate Procedure.

DATED this 25th day of May 2017.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this document was filed electronically with the Nevada Supreme Court on the 25th day of May 2017. Electronic service of the foregoing **RESPONDENT/CROSS-APPELLANT'S COMBINED ANSWERING AND OPENING BRIEF** shall be made in accordance with the Master Service List as follows:

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