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

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

VOL. 3 PART 1

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DISTRICT COURT

CLARK COUNTY, NEVADA

BEAU R. ORTH,

Plaintiff,

vs.

ALBERT H. CAPANNA, M.D.; DOES I through X; ROE BUSINESS ENTITIES I through X, inclusive,

Defendants.

CASE NO. : A-11-648041-C
DEPT. NO. : III

PLAINTIFF'S MOTION IN LIMINE NO. 4: PERMIT TREATING PHYSICIANS TO TESTIFY AS TO CAUSATION, DIAGNOSIS, PROGNOSIS, FUTURE TREATMENT, AND EXTENT OF DISABILITY WITHOUT A FORMAL EXPERT REPORT

COMES NOW, Plaintiff, BEAU ORTH, by and through his attorneys, DENNIS M. PRINCE, ESQ., TRACY A. EGLET, ESQ., and DANIELLE TARMU, ESQ. of EGLET PRINCE, and hereby submits *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.*

/ / /

This Motion is based upon the pleadings and papers on file in this action, the Points and Authorities set forth herein, and argument to be made by counsel at the time of the hearing.

DATED this 22 day of June, 2015.

EGLET PRINCE

DENNIS M. PRINCE, ESQ.
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EGLET PRINCE

NOTICE OF MOTION

PLEASE TAKE NOTICE that the undersigned will bring the foregoing **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** on for hearing on the day of 7-29-15, 2015, at the hour of 9:00A, or as soon thereafter as counsel may be heard in Department III.

DATED this 22 day of June, 2015.

EGLET PRINCE

DENNIS M. PRINCE, ESQ.
Nevada Bar No.: 5092
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AFFIDAVIT OF KEVIN T. STRONG, ESQ. IN COMPLIANCE WITH EDCR 2.47

STATE OF NEVADA)
) ss.:
COUNTY OF CLARK)

KEVIN T. STRONG, ESQ., being first duly sworn, under oath, deposes and says that:

1. Affiant is an attorney licensed to practice law in the State of Nevada and an Associate with the law firm of **EGLET PRINCE**, counsel for Plaintiff in this matter;

2. Trial of this matter is scheduled to begin on August 17, 2015.

3. That pursuant to EDCR 2.47, Affiant communicated on June 22, 2015 with Anthony Lauria, Esq. regarding the Motion Affiant intended to file.

4. Affiant and Mr. Lauria were unsuccessful in resolving this matter satisfactorily, thereby necessitating the filing of the instant Motion.

FURTHER, AFFIANT SAYETH NAUGHT.

K. T. S.
KEVIN T. STRONG, ESQ.

SUBSCRIBED AND SWORN to before me
this 22nd day of June, 2015.

J. Calinao
NOTARY PUBLIC

LORENZA A. CALINAO
NOTARY PUBLIC
STATE OF NEVADA
Appt. No: 14-14798-1
My Appt. Expires Sept. 22, 2018

EGLET PRINCE

MEMORANDUM OF POINTS AND AUTHORITIES

I.

STATEMENT OF FACTS

Beau Orth ("Orth") was a student athlete at the University of Nevada Las Vegas. At the time, Orth attended UNLV on a full football scholarship, where he played the position of wide receiver. On February 3, 2009, Orth was diagnosed with a very small (5mm) left paracentral disc protrusion at L5-S1, causing a very mild lateral displacement of the left S1 nerve root, following a football injury. The protrusion worsened over time and caused Orth pain and numbness into his lower left extremity. On February 18, 2010, Orth underwent a comparison MRI study of his lumbar spine. The comparison study revealed relatively no change. Orth underwent conservative care for many months, including physical therapy and epidural injection therapy to alleviate his pain. However, the conservative care failed to alleviate his pain and numbness.

On September 1, 2010, Orth was referred to Dr. Capanna, a neurosurgeon, by the UNLV Athletic Department for consultation. Dr. Capanna performed an examination of Orth and reviewed the lumbar MRI films from December 3, 2009 and February 18, 2010. Based on his review and examination, Dr. Capanna diagnosed Orth with focal left lumbar L5-S1 disc injury. Dr. Capanna ordered an EMG study and an upright MRI of Orth's lumbar spine, and instructed him to return once the studies were complete.

On September 17, 2010, Orth returned to Dr. Capanna for follow-up care. Dr. Capanna reviewed the MRI findings. Based on the findings, Dr. Capanna recommended Orth undergo a lumbar discectomy at L5-S1. Accordingly, on September 17, 2010, Orth underwent a left microlumbar L5-S1 laminectomy and left L5-S1 microdiscectomy by Albert Capanna, M.D. at University Medical Center.

On September 29, 2010, Orth returned to Dr. Capanna for a post-surgery office visit. Orth reported he was in extreme pain. Dr. Capanna noted on examination that Orth's body was angled to the left. Dr. Capanna ordered an MRI with and without contrast, and prescribed a Medrol Dosepak for Orth.

On October 6, 2010, Orth underwent follow-up MRIs at Steinberg Diagnostic Medical Imaging. On October 7, 2010, Dr. Capanna called Orth and advised that the MRI showed significant edema. Orth was prescribed antibiotics for inflammation due to any infection that may have been present. At no time did Dr. Capanna note that the MRI showed postsurgical changes at L4, when the surgery scheduled by Dr. Capanna was supposed to be performed at L5-S1. On October 19, 2010, Orth presented to Andrew Cash, M.D. for a second opinion. Dr. Cash examined Orth and reviewed the MRI of October 6, 2010. Dr. Cash noted Orth had a painful stance, was unable to walk very well and was basically in a crippled state. Dr. Cash advised Orth that the MRI showed he was status post left laminectomy at L4 with a 4mm non-enhancing fragment surrounded by enhancing scar tissue. Dr. Cash recommended surgical intervention at L4-5 to repair the herniation caused by the surgery performed by Dr. Capanna, and also repair of the disc bulge at L5-S1, the site of the original injury.

On October 22, 2010, Orth underwent revision surgery by Dr. Cash at Southern Hills Hospital.

II.

ARGUMENT

Nevada law allows a treating physician to testify to matters such as causation, future care, and the extent of disability as part of the treating physician's ordinary care of the patient, without the need for preparing an expert report pursuant to NRCP 16.1(a)(2)(B). The 2004 Drafter's Note to NRCP 16.1 expressly states, "a treating physician could be deposed or called to testify

without any requirement for a written report." *See* Nev. R. Civ. P. 16.1, 2004 Drafter's Note. In 2012, the Nevada Rules of Civil Procedure were amended and the 2012 Drafter's Note states, "A treating physician is not a retained expert merely because the patient was referred to the physician by an attorney for treatment," even if the physician relies on records of another medical provider. *See* Nev. R. Civ. P. 16.1, 2012 Drafter's Note. Further, "[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." *Id.* Therefore, Nevada law explicitly states that treating physicians can testify to opinions of causation, diagnosis, and prognosis without preparing the expert reports required from specially retained experts.

The 2012 Drafter's Note to NRCP 16.1 conforms with past case law that provided guidance about this issue. Decisions of the United States District Court for the District of Nevada made the same conclusion with respect to the nearly identical federal rule, FRCP 26:

> Since a treating physician's opinions on matters such as "causation, future treatment, extent of disability and the like" are part of the ordinary care of a patient, a treating physician may testify to such an opinion without being subject to the extensive reporting requirements of Rule 26(a)(2)(B).

Elgas v. Colorado Belle Corp., 179 F.R.D. 296, 298 (D. Nev. 1998).

> It is commonplace for a treating physician, during, and as part of, the course of treatment of a patient to consider things such as the cause of the medical condition, the diagnosis, the prognosis and the extent of disability caused by the condition, if any. Opinions such as at these are part of the ordinary care of the patient and do not subject the treating physician to the extensive reporting requirements of Fed. R. Civ. P. 26(a)(2)(B).

Piper v. Harnischfegar Corp., 170 F.R.D. 173, 174-75 (D. Nev. 1997).

In June of last year, the Nevada Supreme Court issued *FCH1, LLC v. Rodriguez*, 130 Nev. ___, 326 P.3d 440 (Nev. June 4, 2014) (hereinafter "*FCH1 I*"), which caused some short-

lived confusion in the legal community. On October 2, 2014, the Nevada Supreme Court issued an amended opinion to clarify the confusion, *FCH1, LLC v. Rodriguez*, 130 Nev. ___, 335 P.3d 183 (Nev. Oct. 2, 2014) (hereinafter "*FCH1 II*"). In *FCH1 II*, the Court altered the following language regarding Dr. Kidwell and Dr. Shannon's testimony about the mechanism and causation of injury (changes in **bold**):

> Allowing Dr. Kidwell and Dr. Shannon to so testify without requiring **them to disclose expert reports** was also an abuse of the district court's discretion--once they opined as to the cause of Rodriguez's condition and treatments **they testified as experts and should have been subject to the expert witness standards. *Brooks v. Union Pac. R. Co.*, 620 F.3d 896, 900 (8th Cir. 2010).**

FCH1 I, 326 P.3d at 446 (emphasis added).

> The Court replaced that sentence with the following:
>
> Allowing Dr. Kidwell and Dr. Shannon to so testify without requiring **an appropriate NRCP 16.l(a)(2)(B) disclosure** was also an abuse of the district court's discretion-once they opined as to the cause of Rodriguez's condition and treatments **they should have been subject to the section's disclosure standards. See NRCP 16.l(a)(2)(B)**.

FCH1 II, 335 P.3d at 190 (emphasis added).

Therefore, the Nevada Supreme Court purposefully removed all language that indicated an expert report was required in order for treating physicians to give opinions of causation and mechanism of injury. *Id.* The Court replaced it with language that allows such opinions as long as their expert disclosures comply with the provisions of NRCP 16.1(a)(2)(B) ("the initial disclosure must state the subject matter on which the witness is expected to present evidence under NRS 50.275, 50.285, and 50.305; a summary of the facts and opinions to which the witness is expected to testify" and disclose the physicians' qualifications and fees).

Based on the 2012 amendment to NRCP 16.1 and case law, there is no question that Nevada law allows treating physicians to provide opinions about their own treatment of the plaintiff, other physicians' treatment, diagnoses, causation, future treatment, prognosis,

disability, defending their own treatment, and similar subject matter without preparing a written report because treating physicians are not specially retained experts.

III.

CONCLUSION

Based upon the foregoing law, data, and analysis, Plaintiff respectfully requests that this Honorable Court **GRANT** his 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.

DATED this 22 day of June, 2015.

EGLET PRINCE

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EGLET PRINCE

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of EGLET PRINCE, and that on June 23 2015, I caused the foregoing document entitled **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** to be served upon those persons designated by the parties in the E-Service Master List for the above-referenced matter in the Eighth Judicial District Court eFiling System in accordance with the mandatory electronic service requirements of Administrative Order 14-2 and the Nevada Electronic Filing and Conversion Rules.

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DISTRICT COURT

CLARK COUNTY, NEVADA

BEAU R. ORTH, Plaintiff, vs. ALBERT H. CAPANNA, M.D., DOES I through X and ROE BUSINESS ENTITIES I through X, inclusive, Defendants.	CASE NO. A-11-648041-C DEPT. NO. III **DEFENDANT'S RESPONSE AND OPPOSITION TO PLAINTIFF'S MOTION IN LIMINE NO. 4: PERMIT TREATING PHYSICIANS TO TESTIFY AS TO CAUSATION, DIAGNOSIS, PROGNOSIS, FUTURE TREATMENT, AND EXTENT OF DISABILITY WITHOUT A FORMAL EXPERT REPORT** Hearing Date: July 29, 2015 Hearing Time: 9:00 a.m.

COMES NOW Defendant Albert H. Capanna, M.D., by and through his attorneys of record, Anthony D. Lauria, Esq. of the law firm Lauria Tokunaga Gates and Linn, LLP, and submits his Response and Opposition to Plaintiff's Omnibus Motion in Limine No. 4: Permit Treating Physicians to Testify as to Causation, Diagnosis, Prognosis, Future Treatment and Extent of Disability without a Formal Expert Report.

FACTUAL BACKGROUND

Plaintiff Beau Orth was seen by Defendant Dr. Capanna for debilitating low back and leg pain which had been present for months, had not responded to conservative treatment by a pain management specialist, and prevented him from athletic activities. Mr. Orth underwent microsurgical removal of a bulging disc which was felt to be impinging on a nerve root in the lumbo-sacral spine

performed by Dr. Capanna on September 17, 2010. In accessing the area of the disc which was to be removed, Dr. Capanna's procedure included approaching the area from cephalad of the L5-S1 disc which resulted in some post-surgical changes in MRI studies.

Following the surgical procedure, Mr. Orth's condition, including radicular symptoms related to the nerve impingement improved. Approximately 12 days post-operatively, however, Mr. Orth reported the sudden onset of severe pain and was reevaluated by Dr. Capanna who ordered additional MRI studies. The radiologist did not report seeing the bulging disc which Dr. Capanna had previously treated and now reported a disc fragment in the area of the L4-5 disc. Mr. Orth left Dr. Capanna's care and sought surgical intervention from Dr. Andrew Cash who performed a micro-discectomy at the L4-5 and L5-S1 levels.

Permitting Testimony Without Report or Affidavit

There are essentially two "treating physicians" who may be called to offer causation, diagnosis, prognosis, future treatment and extent of disability testimony: Dr. Cash and Dr. Ruggerolli. In both cases, these doctors are not just "treating physicians" but have become Experts retained by the Plaintiff to review materials beyond their own care and express opinions predicated on information unrelated to the knowledge they had as treating physicians.

In the case of Dr. Cash, he recently did an extensive review of the records of several other care providers unrelated to his care for which he was paid by Plaintiff's Counsel, purportedly contacted institutions, anesthesiologists, and other care providers to determine costs of care, all of which he set forth in a recently disclosed Report. As a result, he is an NRCP 16.1(a)(2)(B) expert who must meet the full disclosure requirements.

The recent changes to NRCP 16.1 read as follows:

(a) Required Disclosures. * * *

(2) Disclosure of Expert Testimony.

(A) In addition to the disclosures required by paragraph (1), a party shall disclose to other parties the identity of any person who may be used at trial to present evidence under NRS 50.275, 50.285 and 50.305. (B) Except as otherwise stipulated or directed by the court, this disclosure **shall, with respect to a witness who is retained or specially employed to provide expert testimony** in

the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The court, upon good cause shown or by stipulation of the parties, may relieve a party of the duty to prepare a written report in an appropriate case. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding 10 years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

Unless otherwise stipulated or ordered by the Court, if the witness is not required to provide a written report the initial disclosure must state the subject matter on which the witness is expected to present evidence under NRS 50.275,50, and 50.305.a summary of the facts and opinions to which the witness is expected to testify, the qualifications of that witness to 'resent evidence under NRS 50.275 50.285 and 50.305 which may be satisfied by the production of a resume or curriculum vitae [sic]; and the compensation of the witness for providing testimony at deposition and trial, which is satisfied by production of a fee schedule.

Dr. Cash has clearly now been "retained and specially employed" to offer testimony beyond his role and knowledge as a treating provider. As such the provisions requiring full reports for such an expert apply.

The same is true of Dr. Ruggerolli in this case. At the request of Plaintiff, Dr. Ruggerolli was asked to prepare a Report outlining future care needs and the costs of such future care for Mr. Orth. Dr. Ruggerolli was retained and pain by Plaintiff to prepare this report and, therefore, is also a "retained or specially employed expert."

Dated: July 7, 2015

LAURIA TOKUNAGA GATES & LINN, LLP

By: */S/ ANTHONY D. LAURIA*
Anthony D. Lauria
Nevada Bar No. 4114
Attorneys for Defendant
Albert H. Capanna, M.D.

CERTIFICATE OF SERVICE

Pursuant to N.R.C.P. 5(b), I certify that I am an employee of Lauria Tokunaga Gates & Linn, and that on this 9th day of July, 2015, I served a true and correct copy of the foregoing **DEFENDANT'S RESPONSE AND OPPOSITION TO PLAINTIFF'S MOTION IN LIMINE NO. 4: PERMIT TREATING PHYSICIANS TO TESTIFY AS TO CAUSATION, DIAGNOSIS, PROGNOSIS, FUTURE TREATMENT, AND EXTENT OF DISABILITY WITHOUT A FORMAL EXPERT REPORT**:

□ By placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepared in Sacramento, California; and/or

X By mandatory electronic service (e-service), proof of e-service attached to any copy filed with the Court; and/or

□ By facsimile, pursuant to EDCR 7.26 (as amended); and/or

□ By personal service

as follows:

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DISTRICT COURT

CLARK COUNTY, NEVADA

BEAU R. ORTH, Plaintiff, vs. ALBERT H. CAPANNA, M.D.; DOES I through X; ROE BUSINESS ENTITIES I through X, inclusive, Defendants.	CASE NO.: A-11-648041-C DEPT. NO.: III Hearing Date: July 29, 2015 Hearing Time: 9:00 a.m.

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTIONS IN LIMINE

COMES NOW, Plaintiff, BEAU R. ORTH, by and through his attorneys of record, DENNIS M. PRINCE, ESQ., TRACY A. EGLET, ESQ., and DANIELLE TARMU, ESQ. of the law firm of EGLET PRINCE; and hereby files his *Opposition to Defendant's Motions in Limine.*

MEMORANDUM OF POINTS AND AUTHORITIES

I.

FACTUAL BACKGROUND/PROCEDURAL HISTORY

Beau Orth ("Orth") was a student athlete at the University of Nevada, Las Vegas. At the time, Orth attended UNLV on a full football scholarship, where he played the position of wide receiver. On February 3, 2009, Orth was diagnosed with a very small (5mm) left paracentral disc protrusion at L5-S1, causing a very mild lateral displacement of the left S1 nerve root, following a football injury. The protrusion worsened over time and caused Orth pain and numbness into his lower left extremity. On February 18, 2010, Orth underwent a comparison MRI study of his lumbar spine. The comparison study revealed relatively no change. Orth underwent conservative care for many months, including physical therapy and epidural injection therapy to alleviate his pain. However, the conservative care failed to alleviate his pain and numbness.

On September 1, 2010, Orth was referred to Dr. Capanna, a neurosurgeon, by the UNLV Athletic Department for consultation. Dr. Capanna performed an examination of Orth and reviewed the lumbar MRI films from December 3, 2009 and February 18, 2010. Based on his review and examination, Dr. Capanna diagnosed Orth with focal left lumbar L5-S1 disc injury. Dr. Capanna ordered an EMG study and an upright MRI of Orth's lumbar spine, and instructed him to return once the studies were complete.

On September 17, 2010, Orth returned to Dr. Capanna for follow-up care. Dr. Capanna reviewed the MRI findings. Based on the findings, Dr. Capanna recommended Orth undergo a lumber discectomy at L5-S1. Accordingly, on September 17, 2010, Orth underwent a left microlumbar L5-S1 laminectomy and left L5-S1 microdisectomy by Albert Capanna, M.D. at University Medical Center.

On September 29, 2010, Orth returned to Dr. Capanna for a post-surgery office visit. Orth reported he was in extreme pain. Dr. Capanna noted on examination that Orth's body was angled to the left. Dr. Capanna ordered a MRI with and without contrast, and prescribed a Medrol Dosepak for Orth.

On October 6, 2010, Orth underwent follow-up MRIs at Steinberg Diagnostic Medical Imaging. On October 7, 2010, Dr. Capanna called Orth and advised that the MRI showed significant edema. Orth was prescribed antibiotics for inflammation due to any infection that may have been present. At no time did Dr. Capanna note that the MRI showed postsurgical changes at L4-5, when the surgery scheduled by Dr. Capanna was supposed to be performed at L5-S1. According to Dr. Capanna's expert report, "the surgical procedure was done at the wrong level, one level cephalad, that is the L4-5 level." *See* Reynold L. Rimoldi, M.D.'s IME Report, at pg. 5 (attached hereto as **"Exhibit 1"**). On October 19, 2010, Orth presented to Andrew Cash, M.D. for a second opinion. Dr. Cash examined Orth and reviewed the MRI of October 6, 2010. Dr. Cash noted Orth had a painful stance, was unable to walk very well and was basically in a crippled state. Dr. Cash advised Orth that the MRI showed he was status post left laminectomy at L4-5 with a 4mm non-enhancing fragment surrounded by enhancing scar tissue. Dr. Cash recommended surgical intervention at L4-5 to repair the herniation caused by the surgery performed by Dr. Capanna, and also repair of the disc bulge at L5-S1, which Dr. Capanna failed to address.

On October 22, 2010, Orth underwent revision by Dr. Cash at Southern Hills Hospital. Beau filed his Complaint on September 8, 2011. This matter is set for trial on August 17, 2015.

II.

LEGAL ARGUMENT

1. Plaintiff does not oppose Defendant's Subsection 1

Plaintiff does not oppose Defendant's subsection 1 regarding malpractice insurance coverage.

2. Evidence Relating to Other Claims and Lawsuits Involving Defendant is Relevant to Rebut Defendant's Qualifications as an Expert Witness and Medical Provider

In reliance upon N.R.S. 48.045(2), Defendant argues that evidence relating to other claims and lawsuits involving Defendant is inadmissible to prove conformity with the past conduct in the present case. N.R.S. 48.045(2) provides as follows:

> Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Prior misconduct is admissible only if it is relevant for some purpose other than to show that the accused probably committed the crime because he is of a criminal character. *See McMichael v. State,* 94 Nev. 184, 577 P.2d 398 (Nev. 1978). The purpose of evidence relating to other claims and lawsuits will be used to rebut the qualifications of Defendant as a medical provider, which are squarely at issue in this case. In addition, as Defendant himself intends to present expert testimony regarding standard of care, his qualifications as an expert witness are at issue. *See* Albert H. Capanna, M.D.'s Designation of Expert Witness (attached hereto as **"Exhibit 2"**).

3/4. The Nevada State Board Medical Examiner's Investigation is Relevant and Should Not Be Excluded Because The Licensure Status of Defendant as a Physician is at Issue

Without any legal authority, Defendant argues that this court should preclude evidence of the Nevada State Board Medical Examiner's complaint filed by Plaintiff. As stated, Defendant intends to present expert testimony regarding standard of care. The licensure status of a

physician who gives an expert opinion is admissible to impeach the doctor's opinion. *See Linton v. Davis,* 887 N.E.2d 960, 969 (Ind. Ct. App. 2008); *Sneed v. Stovall,* 156 S.W.3d 1 (Tenn. Ct. App. 2004). In addition, if Defendant holds himself to be highly respected and reputable in the medical community, his qualifications as physician are at issue. Based on NSBME's investigation into Plaintiff's complaint, Defendant's licensure status as a physician is at issue. Accordingly, Plaintiff should not be precluded from offering evidence, including testimony of his expert witnesses, regarding NSBME's investigation.

5. Defendant's Argument Regarding Demonstrative Evidence is Unclear

Plaintiff cannot adequately address Defendant's argument regarding the disclosure of the demonstrative evidence Plaintiff intends on using during his opening statement because it is unclear to Plaintiff what Defendant is requesting. In Plaintiff's NRCP 16.1(a)(3) pre-trial disclosure, Plaintiff identified the demonstrative exhibits he may offer at trial. Despite this, Defendant's motion failed to specifically identify any of the demonstrative exhibits that he has an issue with. Plaintiff is agreeable to providing Defendant with any demonstrative evidence he intends to use 24 hours prior to opening statement, except for the actual PowerPoint presentation used.

6. Plaintiff does not oppose Defendant's Subsection 6

Plaintiff does not oppose Defendant's subsection 6 regarding evidence of and claims for lost wages.

7. Nevada Law Does Not Prohibit Lay Witnesses From Offering Testimony as to Causation

Defendant argues that Plaintiff and/or his other lay witnesses should be precluded from offering testimony about "medical matters." *Defendant's Motions in Limine,* at 8:24-25. More specifically, Defendant argues that Plaintiff and other lay witnesses should be prevented from

presenting testimony regarding standard of care, the deviation therefrom, and causation. *Id.* at 8:21-22. Both parties agree that Plaintiff and other lay witnesses may present testimony regarding Plaintiff's damages. Plaintiff, however, should be permitted to present testimony regarding causation.

According to the Nevada Supreme Court, "[a]s a general rule, a plaintiff must use expert testimony to establish medical malpractice." *Jain v. McFarland,* 109 Nev. 465, 474 (1993). Through testimony from Plaintiff's expert witnesses, this is exactly what Plaintiff intends to do at trial. However, Nevada does not prohibit Plaintiff, in addition to his expert witnesses, from presenting lay testimony regarding causation, which includes testimony from the Plaintiff. *See Prabhu v. Levine,* 112 Nev. 1538, 1544 (1996)(stating that "[c]ausation in a medical malpractice case may also be proved with expert medical testimony."). According to N.R.S. 50.265, so long as lay witness testimony is "[r]ationally based on the perception of the witness; and . . . [h]elpful to a clear understanding of the testimony of the witness or the determination of a fact in issue[,]" it should be permitted at trial. This court should not preclude lay witness testimony so long as it meets the standard set forth in N.R.S. 50.265. It is for the jury to decide what testimony it accepts as credible.

8. <u>Plaintiff does not oppose Defendant's Subsection 8</u>

Plaintiff does not oppose Defendant's subsection 8 regarding the residence of defense counsel.

9. <u>Plaintiff Should Not Be Precluded From Presenting to the Jury Every Instance in Which Defendant's Conduct Failed to Meet the Standard of Care</u>

Defendant's argument that his acts of negligence that are not the legal and proximate cause of harm to Plaintiff should be precluded is nothing more than an attempt to prevent Plaintiff from presenting the totality of the circumstances to the jury. Plaintiff should not be

precluded from presenting to the jury every instance Defendant's conduct failed to meet the standard of care. For instance, Plaintiff should not be precluded from presenting evidence to the jury that Defendant incorrectly identified the location of Plaintiff's L5-S1 level; that Defendant failed to obtain Plaintiff's informed consent to perform surgery at L4-5; and that Defendant failed to correctly note the level he actually performed Plaintiff's surgery. Finally, all of Defendant's acts of negligence are relevant to his credibility.

10. <u>Evidence Regarding Defendant's Personal Choices Are Relevant to Determine Whether Defendant's Personal Choices Differ From the Standard of Care as Asserted by the Defendant</u>

Evidence of personal practices of an expert witness do not by itself establish standard of care, although they can be used to assess the credibility of experts. *See Condra v. Atlanta Orthopaedic Group, P.C.* 285 Ga. 667, 672 (Ga. 2009); *Bergman v. Kelsey*, 873 N.E.2d 486, 507 (stating that a "medical expert's personal practices may well be relevant to that expert's credibility, particularly when those practices do not entirely confirm to the expert's opinion as to the standard of care."). Defendant's attempt to exclude evidence of personal practices would prevent Plaintiff's counsel from questioning Defendant as to his own personal practices. Consequently, if Plaintiff were prevented from questioning Defendant as to his own personal practices, Plaintiff would wrongfully be prevented from establishing that Defendant's personal practices differ from the standard of care as asserted by the Defendant.

Defendant also claims that evidence regarding the personal choices of Plaintiff's expert witnesses would mislead the jury. *Defendant's Motions in Limine,* at 12:1. Any potential confusion created by the admission of such evidence may be remedied through the use of jury instructions. Such instructions, for example, clearly define the legal meaning of standard of care; enunciate the principal that a mere difference in the views between physicians does not itself prove malpractice; and clarify concepts such as burden of proof and credibility of

witnesses. Accordingly, this court should not preclude Plaintiff's expert witnesses from presenting testimony as to their personal choices.

11. Defendant Failed to Provide this Court with Any Legal Authority in Support of his Position that Plaintiff's Expert Witnesses Should Be Limited to the Opinions Provided at the Time of Deposition

Defendant's request for a court order limiting expert witnesses testimony to that from his/her deposition will provide Defendant the opportunity to argue to the jury that Plaintiff's expert witnesses violated a court order. Not surprisingly, Defendant failed to provide this court with any legal authority to support his position. Assuming that an expert's testimony changed at trial, even without good cause, the appropriate method is to impeach the witness with his/her deposition and/or expert report, not to argue to the jury that the witness violated a court order. Conversely, assuming that Plaintiff's expert did in fact change his/her opinion, with good cause, Defendant's counsel argument to the jury that Plaintiff's expert violated this court's order would unduly prejudice Plaintiff as it would poison the jury.

12. Plaintiff Will Not Forego His Right to the Exception to the 90 Day Cutoff Rule for Expert Witness Disclosures Provided by NRCP 16.1(a)(2)(C)(i)

NRCP 16.1(a)(2)(C)(i) provides that in the "absence of extraordinary circumstances," expert disclosures shall be made at least 90 days before the discovery cut-off date. While Plaintiff does not intend to present testimony from an untimely identified expert witness, for the simple reason that there is an exception to the 90 day cutoff rule, albeit an extremely high standard to meet, Plaintiff will not forego his right to this exception if the circumstances were presented.

EGLET PRINCE

13. Sequence of Testifying Witnesses

As to subsection 13 regarding the sequence of testifying witness, Plaintiff's counsel proposes that we will inform Defendant's counsel the witnesses we intend to call the night before we call them.

14. Plaintiff does not oppose Defendant's Subsection 14

Plaintiff does not oppose Defendant's subsection 14 barring non-party witnesses from the courtroom, except expert witnesses may remain.

15. Barring Cumulative Testimony

As to subsection 15 barring any cumulative testimony regarding the standard of care and causation, Plaintiff's counsel proposes that we will inform Defendant's counsel the witnesses we intend to call the night before we call them, which will allow Defendant's counsel to make an objection before trial begins the following day, outside the presence of the jury, regarding any concerns of cumulative testimony. This court can entertain argument and rule at that time.

16. Plaintiff Should Not Be Precluded From Arguing Negative Inferences That Are Supported by the Record

Both parties should be precluded from commenting on a party's failure to call a witness at trial if the parties agree, or if this court determines, that the witness' testimony would be cumulative. However, absent this situation, Plaintiff objects to being prevented from arguing negative inferences that are supported by the record, which includes failure to call certain witnesses. *See Glover v. Eighth Judicial District Court of Nev.*, 125 Nev. 691, 705 (2009).

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EGLET PRINCE

III.

CONCLUSION

Based upon the foregoing law and analysis, Plaintiff respectfully requests that this Honorable Court Deny Defendant's Motions in Limine: 2, 3, 4, 5, 7, 9, 10, 11, 12, 13, 15, and 16.

DATED this 9th day of July, 2015.

EGLET PRINCE

DENNIS M. PRINCE, ESQ.
Nevada Bar No.: 5092
TRACY A. EGLET, ESQ.
Nevada Bar No.: 6419
DANIELLE TARMU, ESQ.
Nevada Bar No.: 11727

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of EGLET PRINCE, and that on this 9th day of July, 2015, I did cause a true copy of **PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTIONS IN LIMINE** to be e-filed and e-served through the Eighth Judicial District EFP system pursuant to the Electronic Filing and Service Order entered on the Court's Docket in the above referenced matter.

Anthony D. Lauria, Esq.
Kimberly L. Johnson, Esq.
LAURIA TOKUNGA GATES & LINN, LLP
601 South Seventh Street, 2nd Floor
Las Vegas, Nevada 89101
Attorneys for Defendant Albert H. Capanna

An employee of EGLET PRINCE

EGLET PRINCE

EXHIBIT "1"

NEVADA Orthopedic & Spine Center

2650 N. Tenaya Way, Ste 301
Las Vegas, NV 89128

1505 Wigwam Pkwy., Ste 330
Henderson, NV 89074

Patient Name: Beau Orth
Patient ID: 496711
Date of Birth: 11/02/1989
Date of Examination/Report: 07/17/2013

INDEPENDENT MEDICAL EVALUATION

Beau Orth was seen for an Independent Medical Evaluation in my office at Nevada Orthopedic & Spine Center at 2650 N. Tenaya, Suite 301, Las Vegas, Nevada 89128 on 7/17/13 for the purposes of my rendering opinions in the way of an Independent Medical Evaluation. Prior to performing the Independent Medical Evaluation, I explained to him that I would not be entering in to a formal physician/patient relationship and that I was seeing him on a one-time basis to perform an evaluation of alleged complaints that he states arose out of a 9/17/10 surgical procedure that was performed by Dr. Albert Capanna. Once Mr. Orth understood that I would not be entering in to a formal physician/patient relationship, I proceeded with the Independent Medical Evaluation which consisted of taking a history from Mr. Orth which included a history of the chief complaint as well as a past medical history, reviewing medical records, performing a physical exam, reviewing diagnostic imaging, and formulating opinions in this matter.

HISTORY OF PRESENT ILLNESS: Mr. Orth is a 23-year-old gentleman. He is employed as a store manager. He indicates that while participating in athletic activities, namely football, at the University of Nevada Las Vegas, he sustained a lower back injury. He complained of back pain and left-sided lower extremity pain. After receiving conservative treatment, he presented to Dr. Capanna on 9/1/10. Dr. Capanna had reviewed an MRI scan which noted an L5-S1 disc protrusion. Dr. Capanna ordered nerve conductions and EMGs which suggested a left-sided S1 radiculopathy. Based on the patient's clinical impression and the diagnostic studies, Dr. Capanna elected to proceed with a left-sided decompression at L5-S1. On 9/17/10, Dr. Capanna performed, what was dictated as, a left L5-S1 microdiscectomy. Apparently the patient had persistent pain and a follow up MRI with gadolinium showed postoperative scar tissue at L4-5. It appears that no surgery was performed at L5-S1. The patient went on to have a second surgery in October of 2010 by Dr. Andrew Cash in which a two-level decompression was performed, that being at L4-5 and L5-S1. The patient continues to have back and left leg pain. For further details regarding the treatment the patient received for his lumbar spine and left lower extremity pain, please see the medical record review listed below.

PAST SURGICAL HISTORY: Remarkable for the two lumbar spine surgeries that I have mentioned, one in September of 2010 and the other in October of 2010.

PAST MEDICAL HISTORY: Unremarkable.

MEDICATIONS: Multivitamins only.

ALLERGIES: Penicillin.

REVIEW OF SYSTEMS: Noncontributory.

FAMILY HISTORY: Unremarkable.

SOCIAL HISTORY: He denies tobacco use. He drinks ethanol on rare occasions. The patient is employed as a store manager having received a degree in Marketing from the University of Nevada Las Vegas.

MEDICAL RECORD REVIEW:

8/25/08 through 10/22/10 – Handwritten notes from the UNLV athletic training facility as well as the general medical assessment team at University of Nevada Las Vegas. This Claimant is seen on multiple occasions for various conditions between 8/25/08 and 10/22/10. Approximately 130 visits are noted between these two dates. The patient is seen for multiple issues. He is an UNLV football player and is seen for upper extremity symptoms, ankle sprains, injuries to his left great toe, as well as general medical issues such as upper respiratory tract infections; however, the majority of these visits are for issues pertaining to his lumbar spine. It appears from looking at other notes that this patient sustained, as a result of his football activities, issues with his lumbar spine and left lower extremity. These handwritten notes over the approximate two-year period noted from August of 2008 through October of 2010 concern athletic trainer and evaluations as well as referrals to various healthcare specialists for treatment regarding his lower back and his left leg.

2/3/09 – MRI scan of the lumbar spine from 2/3/09 and it shows a very small left L5-S1 disc protrusion.

2/19/10 – MRI of the lumbar spine is comparable to the 2009 scan, that is a small left-sided L5-S1 disc protrusion.

2/23/10 – Ruggeroli, M.D., pain specialist – The patient is seen and diagnosed with a left L5-S1 disc hernia versus protrusion and recommends a left-sided L5-S1 epidural steroid injection.

2/24/10 – Ruggeroli, M.D. – Performs left-sided L5-S1 transforaminal epidural steroid injection.

3/9/10 – Ruggeroli, M.D. – The patient is seen status post the injection. The injection has helped him with regards to his back and left leg pain. The patient will follow up on an as-needed basis.

8/11/10 – Ruggeroli, M.D. – The patient is seen and the diagnosis is left-sided L5-S1 disc herniation. He recommends additional injections into the lumbar spine.

8/13/10 – Ruggeroli, M.D. – Performs a left-sided L5-S1 transforaminal epidural steroid injection.

8/26/10 – Ruggeroli, M.D. – The patient is seen with the L5-S1 disc herniation. There was no relief with the epidural steroid injection. No further injections are recommended.

9/1/10 – Capanna, M.D. – The patient is seen and Dr. Capanna notes in his history that he is complaining of back and left leg pain. It seems to be related when he switched from a wideout to a linebacker. Discussions regarding L5-S1 microdiscectomy were made. Dr. Capanna recommends EMGs and flexion/extension MRI prior to making final decisions regarding surgery.

9/2/10 – MRI scan of the lumbar spine with flexion/extension views shows an L5-S1 disc protrusion, only mild stenosis.

9/8/10 – Germin, M.D. – Performs nerve conductions and EMGs left lower extremity, suggest left-sided S1 radiculopathy.

9/17/10 – Capanna, M.D. – Performs a left-sided L5-S1 microdiscectomy. This is done after the patient undergoes a preoperative evaluation. Apparently, the patient does not do well. There are multiple phones call into Dr. Capanna's office indicating that the patient has persistent pain.

10/6/10 – MRI with gadolinium shows postoperative scar tissue and a recurrent L4-5, which is the first time that the L4-5 level is mentioned having an issue. All the previous MRIs suggested L5-S1 as the problematic level. This states L4-5 was operated on on the left side and there is a recurrent disc herniation there.

10/12/10 – Cash, M.D. – The patient is seen status post surgery by Dr. Capanna. The patient had one week of relief, but now has persistent left leg pain. He recommends surgery for a recurrent disc herniation.

10/19/10 – Cash, M.D. – Performs a preoperative evaluation.

10/22/10 – Cash, M.D. – Performs revision left-sided L4-5 discectomy. There is epidural fibrosis noted at L4-5. There is a disc herniation at L4-5 and a bulge at L5-S1. Dr. Cash decompresses both levels, L4-5 and L5-S1 on the left.

Dr. Cash sees the patient in postoperative visit two weeks postop and approximate six-week postop on 11/3/10 and 12/1/10 respectively. On 12/1/10, he recommends physical therapy and utilizing a brace when out of bed.

12/9/10 – The patient is seen for physical therapy modalities by physical therapist Keith Kleven.

4/19/11 – Cash, M.D. – The patient is seen and the diagnoses are postlaminectomy syndrome and lumbar radiculopathy. The patient is indicated as doing well and will follow up in three months.

8/28/12 – Cash, M.D. – The patient is seen and the diagnoses are postlaminectomy syndrome and left lower lumbar radiculopathy. MRI scan of the lumbar spine with and without contrast is recommended.

8/31/12 – MRI of the lumbar spine with and without gadolinium contrast shows a small left-sided L5-S1 disc protrusion and a bulge at L4-5 as well as postoperative changes.

9/4/12 – Cash, M.D. – The patient is seen and Dr. Cash notes the MRI findings. He notes that there is disc dehydration at L4-5 and L5-S1. The patient is diagnosed with a postlaminectomy syndrome and lumbar radiculopathy. Recommendations are to follow up on an as-needed basis.

CURRENT COMPLAINTS: The patient's current complaints are of a lumbar spine pain eccentrically placed to the left of the midline with a pins and needles, stabbing, and numbness in his left leg. He indicates that currently his pain is a 2 out of 10 on a visual analog scale with 0 being no pain and 10 being the worst pain that he can imagine. At its worst, it is a 10 out of 10. He indicates that 70% of his pain is in his back and 30% is in his left leg. He indicates that he can sit for 30 minutes, stand for 30 minutes, ride in a car for one hour, and walk two to three blocks. He indicates that exercise, sitting too long, and activities such as washing a car make his pain worse. He indicates doing nothing makes it better.

PHYSICAL EXAMINATION: On physical examination, the patient is observed to be ambulating without use of lateral support. He is not using any type of lumbar spine a brace. On inspection, his lumbar spine shows a well-healed midline incision consistent with the two previous decompressions. He has diffuse tenderness that is difficult to localize throughout his lumbar spine. He has 10% limitation of lumbar spine range of motion based on my estimate. Sensory and motor evaluations in key dermatomes and myotomes tested from L3 through S1 are intact. Reflexes are 2/4 and symmetric at the patella and Achilles. Straight leg raising is negative for radicular findings.

I have reviewed previous studies:

The diagnostic imaging that I have reviewed in chronological order presented to me on DVD disc are as follows.

9/2/10 – MRI scan of the lumbar spine shows a small left-sided L5-S1 disc protrusion.

10/6/10 – MRI scan of the lumbar spine shows a left L4-5 laminotomy that was done. There is no laminotomy at L5-S1.

10/12/10 – X-rays of the lumbar spine show changes consistent with an L4-5 laminotomy.

11/3/10 – Radiographs of the lumbar spine that show two-level decompression, left-sided, by Dr. Cash.

12/1/10 – X-rays of the lumbar spine show changes consistent with left-sided L4-5 and L5-S1 laminotomy.

2/8/11 – X-rays of the lumbar spine show disc height diminution L4-5 and L5-S1 and postoperative changes.

8/28/12 – X-rays of the lumbar spine with flexion/extension views of the lumbar spine that show no instability, disc height diminution L4-5 and L5-S1.

DIAGNOSIS: Left-sided L5-S1 disc herniation with a postlaminectomy syndrome.

DISCUSSION/OPINIONS: As is noted based on my evaluation, this patient had an L5-S1 disc protrusion on 9/2/10. He had surgery to his lumbar spine. It was stated it was done at L5-S1. However, postoperative scans show that the surgical procedure was performed at L4-5. Apparently the patient did not improve and the patient had a second decompression at L4-5 and L5-S1. Follow up radiographs show postoperative changes. The patient is now here for evaluation and it is clear that he has ongoing symptoms subjectively and the objective findings on his scans show postlaminectomy changes.

This patient did have an L5-S1 disc protrusion. It was appropriate for Dr. Capanna to make the recommendation for surgery. However, the surgical procedure was done at the wrong level, one level cephalad, that is the L4-5 level. Certainly the patient required a second surgery. In my opinion, the patient's condition postoperatively is satisfactory indicating that the patient has normal neurologic function and can perform all activities of daily living; although, he complains of subjective pain. Certainly the patient required a second surgical procedure by Dr. Andrew Cash after the first surgical procedure was done at the wrong level. Certainly, to a reasonable degree of medical probability, this patient would have had ongoing symptoms to some degree even if the surgical procedure was done at the correct level the first time. Certainly the patient was subjected to a second anesthetic and had a longer time to reach maximum medical improvement secondary to the need for a second decompressive surgery. The patient is quite functional and performing activities as a manager that he is able to perform without restriction.

He is on no medications at this time and, in my opinion, has had a satisfactory result status post the two previous lumbar spine procedures, albeit the first one being performed at the incorrect level, that being one level cephalad to what was meant to be.

If could be of any further assistance, please feel free to contact me.

REYNOLD L. RIMOLDI, M.D.

RLR/rp

EXHIBIT "2"

DOW
JOHN H. COTTON, ESQ.
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JOHN J. SAVAGE, ESQ.
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Facsimile: 702/791-1912

Attorneys for Defendant
Albert H. Capanna, M.D.

DISTRICT COURT

CLARK COUNTY, NEVADA

BEAU R. ORTH,

Plaintiff,

v.

ALBERT H. CAPANNA, M.D.; DOES I through X; ROE BUSINESS ENTITIES I through X, inclusive,

Defendants.

Case No.: A-11-648041-C
Dept. No.: XXVI

ALBERT H. CAPANNA, M.D.'S DESIGNATION OF EXPERT WITNESSES

Defendant ALBERT H. CAPANNA, M.D., by and through his attorneys of record, John H. Cotton, Esq. and John J. Savage, Esq., of the law firm COTTON, DRIGGS, WALCH, HOLLEY, WOLOSON & THOMPSON, hereby designate the following expert witnesses, to be called in his defense as necessary to refute the allegations against him in this matter:

1. **Albert H. Capanna, M.D.**
c/o Cotton, Driggs, Walch, Holley, Woloson & Thompson
400 S. Fourth St., 3rd Floor
Las Vegas, Nevada 89101

Dr. Capanna is expected to testify that no act or omission on his part deviated from the standard of care with respect to the care and treatment he provided to Beau Orth.

2. **Allan Joel Belzberg, B.Sc., M.D., FRCSC**
8419 Greenspring Avenue
Baltimore, MD, 21208

Dr. Belzberg is expected to testify as to his opinions and findings regarding the care provided to Beau Orth, as alleged in Plaintiff's Complaint. Dr. Belzberg's opinions and findings are based on his review of the medical records disclosed in this matter and the pleadings on file in this matter. Dr. Belzberg's opinions and findings are further based on his education, experience and training. Dr. Belzberg has reserved the right to comment on other opinions or materials that he has not yet seen, or any additional discovery that is completed in this case.

Dr. Belzberg is expected to testify that no act or omission on the part of Dr. Capanna deviated from the standard of care with respect to the care and treatment Dr. Capanna provided to Beau Orth. Dr. Belzberg is further expected to provide expert testimony to rebut the testimony of Plaintiff's expert witnesses. Dr. Belzberg's Expert Report is attached hereto as *Exhibit A*. A copy of Dr. Belzberg's Curriculum Vitae is attached hereto as *Exhibit B*. A copy of Dr. Belzberg's Fee Schedule, which sets forth his rate of compensation as an expert witness, is attached hereto as *Exhibit C*. There is no record of Dr. Belzberg's testimony history.

3. **Marc D. Kaye, M.D.**
Collier Radiology Consultants
2805 East Oakland Park Blvd., Suite 452
Ft. Lauderdale, FL 33306

Dr. Kaye is expected to testify as to his opinions and findings regarding the care provided to Beau Orth, as alleged in Plaintiffs' Complaint. Dr. Kaye's opinions and findings are based on his review of the medical records disclosed in this matter and the pleadings on file in this matter. Dr. Kaye's opinions and findings are further based on his education, experience and training. Dr. Kaye has reserved the right to comment on other opinions or materials that he has not yet seen, or any additional discovery that is completed in this case.

Dr. Kaye is expected to testify that Mr. Orth's MRI from October 6, 2010 shows that Dr.

Capanna did operate at L5-S1 and did remove the small disc fragment seen on the pre-operative MRI exams. Dr. Kaye is further expected to provide expert testimony to rebut the testimony of Plaintiff's expert witnesses. Dr. Kaye's Expert Report is attached hereto as *Exhibit D*. A copy of Dr. Kaye's Curriculum Vitae is attached hereto as *Exhibit E*. A copy of Dr. Kaye's Fee Schedule, which sets forth his rate of compensation as an expert witness, is attached hereto as *Exhibit F*. There is no record of Dr. Kaye's testimony history.

4. **Reynold L. Rimoldi, M.D.**
2650 North Tenaya Way, Suite 301
Las Vegas, NV 89128

Dr. Rimoldi is expected to provide testimony concerning the facts and circumstances surrounding this matter, including, but not limited to, the medical examination of Plaintiff Beau Orth that he performed on July 17, 2013 and the injuries alleged in Plaintiff's Complaint. Dr. Rimoldi's opinions and findings are based on his examination of Plaintiff, his review of the medical records disclosed in this matter, and the pleadings on file in this matter. Dr. Rimoldi's opinions and findings are further based on his education, experience, and training. Dr. Rimoldi has reserved the right to comment on other opinions or materials that he has not yet seen, or any additional discovery that is completed in this case.

Dr. Rimoldi is expected to testify consistent with his IME report. Dr. Rimoldi's IME report is attached hereto as *Exhibit G*. A copy of Dr. Rimoldi's Curriculum Vitae is attached hereto as *Exhibit H*. A copy of Dr. Rimoldi's Fee Schedule, which sets forth his rate of compensation as an expert witness, is attached hereto as *Exhibit I*. Finally, a copy of Dr. Rimoldi's four year testimonial history, for trials and depositions, is attached hereto as *Exhibit J*.

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5. Any Expert designated by any other party

Defendant reserves the right to elicit expert testimony from any other expert witness designated by any other party to this action.

Dated this 8th day of August 2013.

COTTON, DRIGGS, WALCH, HOLLEY, WOLOSON & THOMPSON

JOHN H. COTTON, ESQ.
Nevada Bar No. 005268
JOHN J. SAVAGE, ESQ.
Nevada Bar No. 011455
400 South Fourth Street, Third Floor
Las Vegas, Nevada 89101
Attorneys for Defendant
Albert H. Capanna, M.D.

CERTIFICATE OF MAILING

I hereby certify that on this 9th day of August 2013, I sent a true and correct copy of the foregoing **ALBERT H. CAPANNA, M.D.'S DESIGNATION OF EXPERT WITNESSES** by U.S. Mail, postage prepaid, addressed to the following:

Dennis M. Prince, Esq.
John T. Keating, Esq.
PRINCE & KEATING
3230 S. Buffalo Drive, Suite 108
Las Vegas, NV 89117
Attorney for Plaintiff

An employee of Cotton, Driggs, Walch, Holley, Woloson, & Thompson

MOT
DENNIS M. PRINCE, ESQ.
Nevada Bar No. 5092
TRACY A. EGLET, ESQ.
Nevada Bar No. 6419
DANIELLE TARMU, ESQ.
Nevada Bar No. 11727
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Attorneys for Plaintiff
Beau R. Orth

DISTRICT COURT

CLARK COUNTY, NEVADA

BEAU R. ORTH,

Plaintiff,

vs.

ALBERT H. CAPANNA, M.D.; DOES I through X; ROE BUSINESS ENTITIES I through X, inclusive,

Defendants.

CASE NO. : A-11-648041-C
DEPT. NO. : III

PLAINTIFF'S MOTION TO DECLARE NRS 42.021 AND NRS 41A.035 UNCONSTITUTIONAL

COMES NOW, Plaintiff, BEAU R. ORTH, by and through his attorneys of record, DENNIS M. PRINCE, ESQ., TRACY A. EGLET, ESQ. and DANIELLE TARMU, ESQ., and hereby submits his *Motion to Declare NRS 42.021 and NRS 41A.035 Unconstitutional.*

This Motion is made and based upon the pleadings and papers on file herein, the Points and Authorities below stated, and any argument to be entertained at the time of the hearing in this matter.

DATED this 13th day of July, 2015.

EGLET PRINCE

#12505

DENNIS M. PRINCE, ESQ.
Nevada Bar No.: 5092
TRACY A. EGLET, ESQ.
Nevada Bar No. 6419
DANIELLE TARMU, ESQ.
Nevada Bar No. 11727
Attorneys for Plaintiff

NOTICE OF MOTION

PLEASE TAKE NOTICE that Plaintiff will bring the foregoing **PLAINTIFF'S MOTION TO DECLARE NRS 42.021 AND NRS 41A.035 UNCONSTITUTIONAL** on for hearing in Department III of the Eighth Judicial District Court on the 19 day of August, 2015, at the hour of 9:00 a.m., or as soon thereafter as counsel may be heard.

DATED this 13th day of July, 2015.

EGLET PRINCE

#12505

DENNIS M. PRINCE, ESQ.
Nevada Bar No.: 5092
TRACY A. EGLET, ESQ.
Nevada Bar No. 6419
DANIELLE TARMU, ESQ.
Nevada Bar No. 11727
Attorneys for Plaintiff

EGLET PRINCE

MEMORANDUM OF POINTS AND AUTHORITIES

I.

FACTUAL BACKGROUND

Beau Orth ("Orth") was a student athlete at the University of Nevada, Las Vegas. At the time, Orth attended UNLV on a full football scholarship, where he played the position of wide receiver. On February 3, 2009, Orth was diagnosed with a very small (5mm) left paracentral disc protrusion at L5-S1, causing a very mild lateral displacement of the left S1 nerve root, following a football injury. The protrusion worsened over time and caused Orth pain and numbness into his lower left extremity. On February 18, 2010, Orth underwent a comparison MRI study of his lumbar spine. The comparison study revealed relatively no change. Orth underwent conservative care for many months, including physical therapy and epidural injection therapy to alleviate his pain. However, the conservative care failed to alleviate his pain and numbness.

On September 1, 2010, Orth was referred to Dr. Capanna, a neurosurgeon, by the UNLV Athletic Department for consultation. Dr. Capanna performed an examination of Orth and reviewed the lumbar MRI films from December 3, 2009 and February 18, 2010. Based on his review and examination, Dr. Capanna diagnosed Orth with focal left lumbar L5-S1 disc injury. Dr. Capanna ordered an EMG study and an upright MRI of Orth's lumbar spine, and instructed him to return once the studies were complete.

On September 17, 2010, Orth returned to Dr. Capanna for follow-up care. Dr. Capanna reviewed the MRI findings. Based on the findings, Dr. Capanna recommended Orth undergo a lumber discectomy at L5-S1. Accordingly, on September 17, 2010, Orth underwent a left microlumbar L5-S1 laminectomy and left L5-S1 microdisectomy by Albert Capanna, M.D. at University Medical Center.

On September 29, 2010, Orth returned to Dr. Capanna for a post-surgery office visit. Orth reported he was in extreme pain. Dr. Capanna noted on examination that Orth's body was angled to the left. Dr. Capanna ordered a MRI with and without contrast, and prescribed a Medrol Dosepak for Orth.

On October 6, 2010, Orth underwent follow-up MRIs at Steinberg Diagnostic Medical Imaging. On October 7, 2010, Dr. Capanna called Orth and advised that the MRI showed significant edema. Orth was prescribed antibiotics for inflammation due to any infection that may have been present. At no time did Dr. Capanna note that the MRI showed postsurgical changes at L4-5, when the surgery scheduled by Dr. Capanna was supposed to be performed at L5-S1. According to Dr. Capanna's expert report, "the surgical procedure was done at the wrong level, one level cephalad, that is the L4-5 level." *See* Reynold L. Rimoldi, M.D.'s IME Report, at pg. 5 (attached hereto as **"Exhibit 1"**). On October 19, 2010, Orth presented to Andrew Cash, M.D. for a second opinion. Dr. Cash examined Orth and reviewed the MRI of October 6, 2010. Dr. Cash noted Orth had a painful stance, was unable to walk very well and was basically in a crippled state. Dr. Cash advised Orth that the MRI showed he was status post left laminectomy at L4-5 with a 4mm non-enhancing fragment surrounded by enhancing scar tissue. Dr. Cash recommended surgical intervention at L4-5 to repair the herniation caused by the surgery performed by Dr. Capanna, and also repair of the disc bulge at L5-S1, which Dr. Capanna failed to address. On October 22, 2010, Orth underwent revision by Dr. Cash at Southern Hills Hospital.

ARGUMENT

I. NRS 42.021 VIOLATES THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES AND NEVADA CONSTITUTIONS.

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.A. Const. Amend. 14. The Nevada counterpart to the Fourteenth Amendment equal protection clause is found in Article 1, Section 1 of the Constitution of the State of Nevada, which provides:

> §1. Inalienable Rights
>
> All men are by Nature free and equal and have certain inalienable rights among which are those of enjoying and defending life and liberty; Acquiring, Possessing, and Protecting property and pursuing and obtaining safety and happiness.
>
> NRS Const. Art. 1, §1.

NRS 42.021 states in pertinent part, as follows:

> 1. In an action for injury or death against a provider of health care based upon professional negligence, if the defendant so elects, the defendant may introduce evidence of any amount payable as a benefit to the plaintiff as a result of the injury or death pursuant to the United States Social Security Act, any state of federal income disability or worker's compensation act, any health, sickness or income-disability insurance, accident insurance that provides health benefits or income-disability coverage, and any contract or agreement of any group, organization, partnership or corporation to provide, pay for or reimburse the cost of medical, hospital, dental or other health care services. If the defendant elects to introduce such evidence, the plaintiff may introduce evidence of any amount that the plaintiff has paid or contributed to secure the plaintiff's right to any insurance benefits concerning which the defendant has introduced evidence.
>
> 2. A source of collateral benefits introduced pursuant to subsection 1 may not:
>
> (a) Recover any amount against the plaintiff; or
>
> (b) Be subrogated to the rights of the plaintiff against a defendant.

Accordingly, NRS 42.021 as applied in this case is unconstitutional because this statute denies Plaintiff's equal protection of the law. Specifically, NRS 42.021 discriminates based upon the classification of plaintiffs in tort litigation and also between those plaintiffs who carry insurance and those plaintiffs who do not.[1]

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[1] NRS 30.130 mandates that the Attorney General's office be informed of the challenge to the constitutionality of a statute. Accordingly, Plaintiff will serve his motion upon the Attorney General's Office by U.S. mail.

A. NRS 42.021 discriminates based upon the classification of plaintiffs.

First, in the context of personal injury plaintiffs, Nevada has adopted a *per se* rule barring the admission of a collateral source of payment for an injury into evidence for any purpose. *Proctor v. Castelletti*, 112 Nev. 88, 90, 911 P.2d 853, 854 (1996). In contrast, plaintiffs of professional negligence suits do not receive the benefit of the collateral source rule as NRS 42.021 abrogates the collateral source rule in any actions for injury…against a provider of health care based upon professional negligence…" and allows defendants to introduce any amount payable to plaintiffs as a result of the injury arising from professional negligence. In Nevada, plaintiffs in tort actions may recover uncapped noneconomic damages.

B. NRS 42.021 discriminates among those with insurance and those without insurance.

Second, if a victim of professional negligence did not have health insurance and obtained medical treatment on a lien basis, NRS 42.021 would have no application. The uninsured victim of professional negligence would simply be able to introduce evidence of the usual and customary charges incurred without the potential prejudice of a jury considering that the charges have already been paid through a lien. In contrast, injured victims of professional negligence that have health insurance and elect to pay for the treatment received through his or her health insurance are subject to the penalties and prejudices of NRS 42.021. In this context, the injured victim must endure the potential of having their recovery reduced simply because they had the foresight to protect themselves through health insurance.

1. An illustration of NRS 42.021's unfair burden on insured victims.

The following example is set forth in Judge Jerry A. Wiese's order determining that NRS 42.021 is unconstitutional:

> We assume that two patients suffer similar injuries as a result of the negligence or medical malpractice of a single doctor. Both patients suffer from a lacerated artery, as the result of a surgeon's negligence, while performing a

surgical procedure. Both patients require an additional two weeks of hospital care that would not have otherwise been necessary. The cost of the extra care is $100,000.00. The first patient has health insurance which pays all but $5,000.00 in co-pays. The second patient has no health insurance, and is obligated to the hospital for the full $100,000.00. Both patients bring suit against their respective doctors. At trial, both patients present evidence that they incurred $100,000.00 in reasonable medical bills, as a result of the doctor's negligence. With regard to the first patient, the doctor elects, pursuant to NRS 42.021, to inform the jury about the collateral source payments. Because of that knowledge, the jury awards the Plaintiff only $5,000.00. With regard to the second patient, there are no collateral benefits to inform the jury about, and consequently, the jury awards the plaintiff $100,000.00. The patients were similarly situated, with regard to the procedure, the negligence, the injury, and the fact that both sued the same doctor. The only thing that differentiates the patients, is the fact that one of the patients had health insurance, and the other did not. Consequently, the statute does not treat all patients who are injured as the result of a doctor's negligence, equally or fairly.

See Order Re: Plaintiff's Motion in Limine to Exclude Collateral Source Evidence, at p. 55-56 (attached hereto as **"Exhibit 2"**).

C. NRS 42.021 discriminates against the insurers of plaintiffs in professional negligence suits.

Similarly, NRS 42.021 discriminates against plaintiffs' health insurance companies in professional negligence suits. An insurer's payment of a claim for damages caused by a third party entitles the insurer to subrogation. Subrogation arises in the insurance context when an insurance company reimburses its insured for injuries the insured received at the hands of a tortfeasor. In all contexts other than professional negligence, an insurance company has the right to subrogation for all amounts paid on behalf of its insured. Under NRS 42.021(2), however, a professional negligence victim's insurance company's right to subrogation is completely eviscerated.

This is especially offensive to health insurers as health insurers continue to claim amounts it paid for Defendants' negligence.

1. An illustration of NRS 42.021's unfair burden on insurance companies.

NRS 42.021(2) leads to unfair and unjust results for insurance companies. For example, suppose A is injured in an automobile accident and incurs $5,000 of medical expenses. A's automobile insurance carrier reimburses A for these medical expenses under a personal injury clause in A's automobile insurance policy. A then sues B, the 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 required to repay A's insurance company the $5,000 of medical expenses under the doctrine of subrogation. In this scenario, both the plaintiff and the insurance company are made whole and the tortfeasor is held liable for all damages he caused.

Now suppose that the exact same scenario happens except instead of the injury occurring from an automobile accident it occurs from professional negligence. Suppose A is injured due to medical malpractice and incurs $5,000 of medical expenses. Plaintiff's health insurance carrier reimburses A for these medical expenses. A then sues B, the tortfeasor, for the $5,000 in medical expenses plus $10,000 for pain and suffering. However, when the jury awards A the full $15,000 from B, A is **not** required to repay A's insurance company the $5,000 of medical expenses pursuant to NRS 42.021(2). Even further, NRS 42.021(2) bars the insurance company from asserting its right of subrogation. In this scenario, even though the plaintiff recovered the full $15,000 in damages, the insurance company is left having spent $5,000 and has no right to recoup its costs.

Moreover, in a scenario where a plaintiff of a professional negligence suit settles his or her claim with the negligent physician pre-trial, NRS 42.021(2) still prevents the plaintiff's insurance company from recouping its costs, unless the company extracts subrogation under federal law. It does not matter that the parties came to a settlement agreement based partly on the amount of medical expenses that were covered by the insurance company. In fact, no

matter what amount the parties settle for, NRS 42.021(2) completely bars the insurance company from being able to recoup the costs it paid on behalf of its injured insured. Again, the plaintiff is placed in a scenario where he or she can potentially settle his or her claim for the full amount sought, and yet still the insurance company is left with no right to recovery. Clearly, NRS 42.021 places a huge burden on the insurers of plaintiffs in professional negligence suits because no matter how a plaintiff recovers his or her damages and no matter how much a plaintiff recovers, the insurer is **completely barred from recouping any costs** paid on behalf of the plaintiff.

Because NRS 42.021(2) bars a victim of professional negligence's insurance company from recovering benefits paid on the insured's behalf from both the plaintiff and/or the defendant, such insurance companies are treated differently than the insurance companies of all other plaintiffs. Essentially, while insurance companies in any other context are able to fully recover the amounts they pay on behalf of their insured, professional negligence victims' insurance companies are not able to recover anything.

D. NRS 42.021 classifies the physician liable for professional negligence differently from other tortfeasors.

Further, NRS 42.021 classifies physicians liable for professional negligence differently than other tortfeasors. Because professional negligence tort victims are denied the benefits of the collateral source rule, physicians liable for professional negligence receive the benefit of lower awards to their victims. Meanwhile, all other personal injury tortfeasors are required to pay the full amount of damages that they caused. Likewise, professional negligence tort victims are deprived of obtaining awards for pain and suffering in excess of $350,000 while most other personal injury tortfeasors are required to pay the full amount of damages that they caused. As such, NRS 42.021 unconstitutionally classifies between professional negligence tortfeasors and all other tortfeasors. The unfairness of the benefit NRS 42.021 confers on the

negligent physicians becomes even more glaring in light of the fact that the negligent physician already receives numerous other protections not afforded to all other tort defendants.

1. Physicians are already protected by only being subject to several liability.

Additionally, defendants of professional negligence suits are already afforded the protection of being only severally, and not jointly and severally, liable. NRS 41A.045 provides:

> 1. In an action for injury or death against a provider of health care based upon professional negligence, each defendant is liable to the plaintiff for economic damages and noneconomic damages severally only, and not jointly, for that portion of the judgment which represents the percentage of negligence attributable to the defendant.
>
> 2. This section is intended to abrogate joint and several liability of a provider of health care in an action for injury or death against the provider of health care based upon professional negligence.

A defendant among multiple defendants in a professional negligence action is only required to pay the injured person only the share of damages attributable to that defendant's wrongful conduct and would not have to pay the share attributable to the wrongful conduct of the other defendants. Meanwhile, defendants in other tort actions, such as intentional torts or strict liability torts, are held jointly and severally liable. *See* NRS 41.141. Therefore, in a professional negligence case, 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 is unable to pay his percentage share of damages. This acts to the benefit of the tortfeasor and to the detriment of the innocent plaintiff.

Consequently, defendants who commit professional negligence are only "severally" liable to the innocent victims. By abrogating the collateral source rule, NRS 42.021 acts to protect negligent physicians even more so than they are already protected. No other class of defendants is afforded this much protection. In turn, all of these protections and limitations on a negligent defendant's liability directly burden a plaintiff's ability to recover the reasonable

cost of medical expenses. Thus, NRS 42.021 creates an extremely unfair benefit on an arbitrarily determined class of defendants.

II. THE STANDARDS OF REVIEW FOR DECLARING A STATUTE UNCONSTITUTIONAL.

As this Court is aware, the United States Supreme Court recognizes three standards of review in determining whether a statute that distinguishes between different classes of individuals is constitutional. The first standard of review is called the "rational basis" test. Under a rational basis test, the party challenging the statute has the burden to prove that the classification is not rationally related to the government's legitimate interest. *McGowan v. Maryland,* 366 U.S. 420 (1961).

The next level of review is called "intermediate scrutiny" and requires that the statutory classification be substantially related to an important government purpose. *Craig v. Boren,* 429 U.S. 190, 197 (1976). The third and most critical level of scrutiny is called "strict scrutiny" and requires that the classification be necessary to achieve a compelling state interest. *Shapiro v. Thompson,* 394 U.S. 618, 634 (1969).

In determining what level of scrutiny applies regarding statutes that abrogate the common law collateral source rule in medical malpractice cases, many jurisdictions have applied higher levels of scrutiny than the rational basis test. *Farley v. Engelken,* 241 Kan. 663, 668, 740 P.2d 1058, 1062 (1987) (using intermediate scrutiny); *Jones v. State Bd. Of Medicine*, 97 Idaho 859, 555 P.2d 399 (1976); *Graley v. Satayatham*, 74 Ohio Op.2d 316, 320, 343 N.E.2d 832, 837-38 (Ct.C.P. Cuyahoga County 1976). Accordingly, this Court should utilize intermediate scrutiny in analyzing NRS 42.021.

A. Courts analyzing statutes abrogating the collateral source rule utilize the intermediate scrutiny standard.

While the Nevada Supreme Court has not dealt with the issue of abrogating the collateral source rule in medical malpractice claims, it should follow the lead of Kansas. In *Farley*, at issue was whether a Kansas statute that abrogated the collateral source rule in medical malpractices actions was constitutional. 241 Kan. at 666, 740 P.2d at 1060. In its analysis, the *Farley* court noted that the Kansas collateral source statute created a class of persons and organizations – negligent health care providers – who were accorded preferential treatment not extended to other tortfeasors in being relieved of accountability for their actions when a plaintiff had received compensation through other means. *Id.*, 740 P.2d at 1060. The court further stated that the Kansas statute created a disadvantaged class (insured or otherwise compensated victims of medical malpractice) who, unlike other tort plaintiffs, were denied compensation from the person or persons who had wronged them and who received an award of damages based upon the criterion of need rather than actual compensation for loss. *Id.* at 666, 740 P.2d at 1060. The court reasoned that the political powerlessness of the class of medical malpractice victims justifies treating future malpractice victims similarly to other politically powerless suspect and semi-suspect classes (e.g., minorities, women, illegitimates, and aliens) who receive judicial protection through an enhanced scrutiny of legislation critically affecting their individual rights. *Id.* at 672, 740 P.2d at 1064. Therefore, the court reviewed the statute using intermediate scrutiny.[2]

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[2] In Judge Wiese's equal protection analysis, he applied the standard set forth by the Nevada Supreme Court in the *Laakonen v. Eighth Judicial District Court*, 91 Nev. 506, 507, 538 P.2d 574, 575 (1975). Judge Wiese's order stated the following: "this Court requires more than just a 'rational basis,' but instead requires a 'substantial and rational relation to the state's [legitimate] purposes.' It should be noted that this is essentially the same analysis that was applied in the *Farley* case, by the Kansas Supreme Court." *See Order Re: Plaintiff's Motion in Limine to*

1. The statute in *Farley* was unconstitutional because it was not substantially related to its intended purpose.

Once it was determined that heightened scrutiny analysis was appropriate in determining the constitutionality of the statute, the *Farley* court reasoned that the equal protection clause of the Kansas Constitution was violated by abrogation of the collateral source rule in medical malpractice actions. *Id.*, 740 P.2d at 1064. The court reasoned that "by abrogating the collateral source rule in medical malpractice actions, the legislature ha[d] attempted to reduce or eliminate malpractice verdicts, thereby effectuating a reduction in liability insurance premiums. A reduction in premiums [would] allegedly ensure the continued availability and quality of health care in this state." *Id.* at 676, 740 P.2d at 1067. Notwithstanding the legislature's purpose, the court held that the application of the statute has produced counterproductive results. *Id.* at 676, 740 P.2d at 1067. Specifically, the court held that **"[i]t 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."** Id. at 677, 740 P.2d at 1067. (emphasis added).

Additionally, the court noted that "while the effect of [the statute] may be to lower liability insurance premiums to the benefited class, it may also result in an **increased insurance burden on the injured victims, their insurers, and the general public**" because an injured party's insurance company may be require to compensate a victim even though the negligent tortfeasor is fully insured. *Id.*, 740 P.2d at 1067. (emphasis added). This discriminates against the victim's insurer and increases the insurance burden on the innocent party. The court also noted that the statute denies victims of medical malpractice negligence compensation from the person or persons who have wronged them and in effect, it gives a

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Exclude Collateral Source Evidence, at p. 52 (attached hereto as **"Exhibit 2"**)(footnotes omitted).

negligent health care provider a credit against the damage the provider inflicts on its victim in the amount of the value of the victim's independent contractual rights. *Id.* at 675, 740 P.2d at 1066. Thus, the court concluded that the statute was unconstitutional as it treats both negligent health care providers and their victims differently from other persons similarly situated and does not substantially further a legitimate legislative objective, contrary to law. *Id.* at 678, 740 P.2d at 1068. Just as the *Farley* court found abrogation of the collateral source rule to be unconstitutional, so too should this Court find NRS 42.021 unconstitutional.[3]

2. Other courts have found statutes abrogating the collateral source rule to be unconstitutional.

Similarly, the Supreme Court of Georgia in *Denton v. Con-Way Southern Exp., Inc.*, 261 Ga. 41, 45-46, 402 S.E.2d 269, 272 (1991), recognized the unconstitutionally prejudicial affect of a statute abrogating the collateral source rule. The Court stated the statute abrogating the collateral source rule:

> . . . allows a jury to consider inherently prejudicial evidence which could be misused. There can be no equal justice where the kind of trial [or the damages] a man gets depends on the amount of money he has. Because inherently prejudicial evidence is allowed only to show the plaintiff's sources, juries will be misled. If for example, both the plaintiff and the defendant are insured, but the jury is only informed of the plaintiff's coverage, it may assume that only the plaintiff has insurance and the plaintiff's insurance should pay for the loss caused by the tortfeasor.

Id., 402 S.E.2d at 272. (internal citations omitted).

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[3] In Judge Wiese's equal protection analysis, he applied the standard set forth by the Nevada Supreme Court in the *Laakonen v. Eighth Judicial District Court*, 91 Nev. 506, 507, 538 P.2d 574, 575 (1975). Judge Wiese's order stated the following: "this Court requires more than just a 'rational basis,' but instead requires a 'substantial and rational relation to the state's [legitimate] purposes.' It should be noted that this is essentially the same analysis that was applied in the *Farley* case, by the Kansas Supreme Court." (footnotes omitted).

Accordingly, because the statute unjustly allowed the jury to consider inherently prejudicial evidence, the Georgia Supreme Court found the statute unconstitutional. Similarly, NRS 42.021 unconstitutionally allows for the admission of prejudicial evidence.

3. In the instant case, NRS 42.021 is unconstitutional because it does not substantially further a legitimate government interest.

Although Nevada courts have not ruled on this particular issue, the Court should find the reasoning in *Farley* persuasive and adopt a higher level of scrutiny in reviewing the constitutionality of NRS 42.021. Here, NRS 42.021 was enacted for the same reasons that the statute in *Farley* was enacted. Specifically, NRS 42.021 was enacted in an attempt to eliminate or reduce medical malpractice lawsuits, which would reduce medical insurance premiums and improve the availability and quality of health care in Nevada. Accordingly, this Court should analyze NRS 42.021 under intermediate scrutiny.

Despite the legislature's intent to improve the quality of health care, the statute arbitrarily and unreasonably discriminates against plaintiffs of professional negligence suits by imposing new burdens on plaintiffs of professional negligence suits of restricting their right to recover damages. Conversely, the statute has actually awarded negligent health care providers. NRS 42.021 has conferred a previously nonexistent advantage on negligent defendants by effectively reducing the amount of damages such defendants pay in damage awards. This Court must strike down NRS 42.021 because it does not apply fairly and equally to all members of the classes of plaintiffs and defendants. As illustrated below, this unfair discrimination is shown by the fact that the amounts actually awarded will vary from case to case depending on whether and to what extent a particular claimant has received benefits; whether and to what extent an insurer or benefit plan has contracted for reduced payments; and whether and to what extent rights of reimbursement and recovery are asserted.

4. NRS 42.021 arbitrarily discriminates against plaintiffs of professional negligence suits based on the pre-existing contractual write-down agreements.

A plaintiff's insurance provider, whether it is Medicare, Medicaid, or private insurance, generally contracts for a write-off with medical service providers. In these write-off agreements, the medical service provider writes off a contractually agreed upon amount from the amount originally billed by the provider. As such, Medicare, Medicaid, or the private insurance company only pays for a portion of the original amount billed to the plaintiff pursuant to a contract agreement. The amount that the medical provider writes off from the originally billed amount is based on a variety of factors. "The write-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." *See Martinez v. Milburn Enterprises, Inc.*, 233 P.3d 205, 228 (Kan. 2010). An insurance company's buying power enables it to negotiate discounted terms with medical providers and the insured, in turn, receives the benefit of reduced fees. Therefore, business relationships and various economic factors affect the amount by which a medical provider will agree to write down the original bill. A medical provider can provide the exact 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 rather on a separately negotiated contract. The plaintiff's medical costs, then, are arbitrarily affected by insurance provider's pre-existing relationship with the medical provider.

As a result, not only does NRS 42.021 negatively affect a plaintiff's ability to recover the reasonable value of damages, it does so arbitrarily. Evidence of the amount that an insurance company paid for services provided to the plaintiff is randomly based on the pre-existing agreement between the insurance company and the medical provider. A reasonable jury would randomly decrease the plaintiff's award based on the random amount paid by the

insurance company rather than the reasonable value of the service. Thus, NRS 42.021 acts to prejudice plaintiffs of professional negligence suits in such an arbitrary way that it cannot possibly further the legislation's purpose.

5. NRS 42.021's ill effect on professional negligence victims with Medicaid.

Furthermore, under NRS 42.021, plaintiffs insured by Medicaid are discriminated against and treated differently than plaintiffs whose medical bills are paid by other means, such as Medicare or other insurance. Such discrimination violates the constitutional guarantees of equal protection.

Under NRS 42.021, a professional negligence defendant who negligently treated a plaintiff insured by Medicaid or a private insurer will be allowed to admit evidence of the amount of medical bills actually paid. However, Medicaid and private insurers who contract with healthcare providers to pay a substantially lower rate for medical services provided to Medicaid patients. *Bates v. Hogg*, 22 Kan. App.2d 702, 921 P.2d 249, 253 (Kan. Ct. App. 1996). The care provided is the same, yet the amount actually paid is substantially lower than the amount paid by other patients. As a result, injured plaintiffs covered by Medicaid or private insurers have substantially lower medical bills than plaintiffs covered by some other form of insurance. Under NRS 42.021, injured plaintiffs covered by Medicaid are prejudiced even more than those covered by other forms of insurance. Thus, NRS 42.021 arbitrarily creates a class of plaintiffs of professional negligence suits that are much more prejudiced solely based on the fact that those patients are covered by Medicaid.

Such arbitrary discrimination among the injured violates the equal protection guarantee of the Nevada and United States Constitutions. Medicaid beneficiaries, generally the indigent and disabled, recover much less in economic damages then those with Medicare or private

insurance. Similarly, physicians who negligently treat a patient with Medicaid will benefit by these lower damages. This special treatment of negligent tortfeasors is arbitrarily based on the financial status of the injured party. This inequitable and irrational framework makes NRS 42.021 clearly unconstitutional.

III. NRS 42.021 VIOLATES THE DUE PROCESS CLAUSE OF THE UNITED STATES AND NEVADA CONSTITUTIONS.

Application of NRS 42.021 will create wildly 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 any guidance, standards, or parameters, NRS 42.021 will lead to wildly arbitrary awards. For example, NRS 42.021 neglects to address whether a jury is to award only the out of pocket expenses, such as co-pays, premiums, or deductibles of a plaintiff's medical expenses of a professional negligence action or simply take those expenses into consideration. Without instructions on how to properly address this amount, NRS 42.021 is unconstitutionally vague. In *Villanueva v. State*, 117 Nev. 664, 27 P.3d 443 (2001), the Supreme Court of Nevada stated that "when construing statutes, [the courts] generally presume that the plain meaning of the words reflects the legislature's intent, unless that reading violates the spirit of the act or **leads to an absurd result.**" (emphasis added.)

Furthermore, in *Silvar v. Eighth Jud. Dist. Ct. ex rel. County of Clark*, 122 Nev. 289, 129 P.3d 682 (2006), the Supreme Court of Nevada stated the following:

> The void-for-vagueness doctrine is predicated upon a statute's repugnancy to the Due Process Clause of the Fourteenth Amendment to the United States Constitution.
>
> 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. The first prong is concerned with guiding those who may be subject to potentially vague statutes, while the second – and more important – prong is concerned with guiding the enforcers of statutes.

The statute indicates that the "defendant may introduce evidence . . ." of the collateral source, if it so desires. The statute does not say anything about introducing such evidence in "trial." The only language that it uses to give us guidance as to when it will be introduced is "In an action. . . ." The statute is vague as it does not give any further guidance as to what "introduction of evidence" is necessary, and when such "introduction" occurs.

In this case, which involves collateral source payments that may have been made by university and private insurance, it is unknown what amount a jury can deduct from a plaintiff's medical expenses when awarding a plaintiff damages of a professional negligence action. Further, there are no specific instructions for a jury on how to navigate through this process and there are no guidelines within NRS 42.021 that either add the premiums paid by plaintiff or deduct the collateral source payments paid on behalf of plaintiff from an award of damages. Simply put, the statute provides no guidance with regard to what the jury or judge is supposed to do with such evidence. Without these necessary standards, NRS 42.021 "fails to provide notice sufficient to enable persons of ordinary intelligence to understand what conduct is prohibited." *Id.*, 129 P.3d 682. As a result, the enforcement of NRS 42.021, as written, would be based solely on an arbitrary or discriminatory means.

For example, if a jury is presented with the amount of an original bill along with the written-down balance, that jury will be able to calculate the collateral payment. The likelihood that the jury will be misled is extremely high because even a reasonable jury may only award the amount actually paid. However, it is unlikely that the jury will take into account the collateral source's right to subrogation. The jury would likely not award damages for a sum that it concludes has already been paid by a collateral source despite the fact that the collateral source has a right to recoup that sum from the plaintiff. This may leave the plaintiff with a sum smaller than that necessary to satisfy the insurer's subrogation claim. Conversely, the

defendant would receive a windfall because the plaintiff's damages will have been wrongly reduced. This is contrary to the long-standing principle in tort law that where a windfall must be given to one of two parties, the innocent party should receive the benefit. Justice cannot allow a wrongdoer to benefit from his negligence.

Abrogating the collateral source rule provides the tortfeasor a significant windfall to the substantial detriment of the injured party. By effectively reducing a plaintiff's award, NRS 42.021 provides negligent medical providers with a special exemption from the general principle that a negligent tortfeasor must fully compensate his victim. Without guidance, such a reduction would be arbitrarily based on whatever standard each individual jury improvises in each particular case. This situation leads to a result contrary to one of the most well established principles of tort law.

Furthermore, the last sentence of NRS 42.021(1) allows a plaintiff to introduce into evidence "any amount that the plaintiff has paid or contributed to secure the plaintiff's right to any insurance benefits." Because NRS 42.021 provides no guidelines to determine the necessary meaning of "any amount," the last sentence of NRS 42.021(1) is unconstitutionally vague. Therefore, this Court should exclude evidence of Plaintiff's insurance coverage as any such evidence because NRS 42.021 violates the Due Process Clause of the United States and Nevada Constitutions.

IV. NRS 41A.035 DENIES PLAINTIFFS OF PROFESSIONAL NEGLIGENCE SUITS THE RIGHT TO A TRIAL BY JURY.

The purpose of awarding money for pain and suffering caused by another person is to give "the sufferer a pecuniary satisfaction." 3 W. Blackstone, *Commentaries* 1112. "The amount of damages…from the beginning of trial by jury, was a 'fact' to be found by the jurors." Charles T. McCormick, *Handbook on the Law of Damages* 24 (1935).

Article 1, Section 3 of the Nevada Constitutions provides:

> The right of trial by Jury shall be secured to all and remain inviolate forever; but a Jury trial may be waived by the parties in all civil cases in the manner to be prescribed by law…

Moreover, NRCP 38(a) states: "The right of trial by jury as declared by the Constitution of the State or as given by a statute of the State shall be preserved to the parties inviolate."

Although, the Nevada Supreme Court has not addressed the issue of whether NRS 41A.035 denies plaintiffs of professional negligence/medical malpractice suits the right to a trial by jury, other jurisdictions have based on this particular constitutional ground. In *Lakin v. Senco Prods., Inc.*, 329 Ore. 62, 81, 987 P.2d 463, 474 (1999), the Supreme Court of Oregon struck down an Oregon statute that capped noneconomic damages at $500,000. The court explained how "…ORS 18.560(1) interferes with the resolution of a **factual issue**, i.e., noneconomic damages, that Article I, section 17, commits to the jury. Thus, the statute's requirement that 'the amount awarded…shall not exceed $500,000' violates the injured party's right to receive an award that reflect the jury's factual determination of the amount of damages 'as will fully compensate [plaintiffs] for all loss and injury to [them].'" *Id.*, 987 P.2d at 474 (quoting *Oliver v. North Pacific Transp. Co.*, 3 Ore. 84, 87-88 (1869)). (emphasis added.) The court concluded:

> [T]o permit the legislature to override the effect of the jury's determination noneconomic damages would 'violate' plaintiffs' right to 'Trial by Jury,' guaranteed in Article I, section 17. Limiting the effect of a jury's noneconomic damages verdict eviscerates 'Trial by Jury; as it was understood in 1857 and, therefore, does not allow the common-law right of jury trial to remain 'inviolate.'
>
> *Id.* at 79, 987 P.2d at 473. (emphasis added).

Similarly, the Nevada Supreme Court "has consistently stated that the constitutional right [of a trial by jury] applies as it did under the common law in existence when the Nevada

Constitution was adopted in 1864." *Aftercare of Clark County v. Justice Court*, 120 Nev. 1, 5, 82 P.3d 931, 933 (2004). In 1861, Nevada's first territorial legislature removed any monetary threshold altogether, mandating a jury trial in justice's court for issues of fact, unless waived. *Id.* at 12, 82 P.3d at 933 (citing 1861 Nev. Laws, ch. 103 § 155, at 339 (stating generally that "an issue of fact shall be tried by a jury, unless a jury trial is waived"). Accordingly, this Court should find that NRS 41A.035 denies a plaintiff the right of a trial by jury.

In this case, Plaintiff was a twenty year old, young and healthy man, when he underwent a surgical procedure on the wrong level of his lumbar spine. Like the plaintiff in *Lakin*, Plaintiff should be allowed to obtain the noneconomic damages the jury finds appropriate without an automatic reduction to the cap. Moreover, like the statute in *Lakin*, if a jury returned a verdict in favor of Plaintiff and awarded him noneconomic damages in excess of $350,000, NRS 41A.035 would reduce that award to meet this statutory cap even if the case warranted more noneconomic damages. NRS 41A.035 serves as a cap on the jury's determination of noneconomic damages and prevents the plaintiff of the action from being made whole after the defendant's tortious conduct. Plaintiff has a right to a trial by jury, and Article 1, Section 3, prohibits the legislature from interfering with the jury's fact-finding ability and assessment of damages. In fact, other jurisdictions have found damage caps unconstitutional based on various reasons, and some jurisdictions have state constitutional prohibitions on damage caps. *See Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*, 691 S.E.2d 218 (Ga. 2010); *LeBron v. Gottlieb Memorial Hospital*, (Ill. February 4, 2010); *Carson v. Maurer*, 120 N.H. 925, 424 A.2d 825 (1980), *overruled on other grounds by Cmty. Res. For Justice v. City of Manchester, 154 N.H. 748, 917 A.2d 707 (2007); Watts v. Lester E. Cox Medical Centers*, No. SC91867, Supreme Court of Missouri (July 31, 2012); *Sofie v. Fireboard Corp.*, 112 Wash. 2d 636, 771 P.2d 711(1989); Arizona Constitution Article 2, § 31; Arkansas

Constitution Article 5, § 32; Ohio Constitution Article 1, §19a; Oklahoma Constitution Article 23, §7; Pennsylvania Constitution Article 3, §18; Wyoming Constitution Article 10, § 4. Thus, this Court, like the court in *Lakin*, should find that NRS 41A.035 denies a plaintiff the right to a trial by jury and declare NRS 41A.035 unconstitutional.

V.

CONCLUSION

Plaintiff respectfully request that this Court grant his Motion in its entirety.

DATED this 13th day of July, 2015.

EGLET PRINCE

12505

DENNIS M. PRINCE, ESQ.
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Las Vegas, Nevada 89101

EGLET PRINCE

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of EGLET PRINCE, and that on July 13th, 2015, I caused the foregoing document entitled **PLAINTIFF'S MOTION TO DECLARE NRS 42.021 AND NRS 41A.035 UNCONSTITUTIONAL** to be served upon those persons designated by the parties in the E-Service Master List for the above-referenced matter in the Eighth Judicial District Court eFiling System in accordance with the mandatory electronic service requirements of Administrative Order 14-2 and the Nevada Electronic Filing and Conversion Rules.

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Via Regular U.S. Mail

an Employee of EGLET PRINCE

EGLET PRINCE

EXHIBIT "1"

NEVADA Orthopedic & Spine Center

2650 N. Tenaya Way, Ste 301
Las Vegas, NV 89128

1505 Wigwam Pkwy., Ste 330
Henderson, NV 89074

Patient Name: Beau Orth
Patient ID: 496711
Date of Birth: 11/02/1989
Date of Examination/Report: 07/17/2013

INDEPENDENT MEDICAL EVALUATION

Beau Orth was seen for an Independent Medical Evaluation in my office at Nevada Orthopedic & Spine Center at 2650 N. Tenaya, Suite 301, Las Vegas, Nevada 89128 on 7/17/13 for the purposes of my rendering opinions in the way of an Independent Medical Evaluation. Prior to performing the Independent Medical Evaluation, I explained to him that I would not be entering in to a formal physician/patient relationship and that I was seeing him on a one-time basis to perform an evaluation of alleged complaints that he states arose out of a 9/17/10 surgical procedure that was performed by Dr. Albert Capanna. Once Mr. Orth understood that I would not be entering in to a formal physician/patient relationship, I proceeded with the Independent Medical Evaluation which consisted of taking a history from Mr. Orth which included a history of the chief complaint as well as a past medical history, reviewing medical records, performing a physical exam, reviewing diagnostic imaging, and formulating opinions in this matter.

HISTORY OF PRESENT ILLNESS: Mr. Orth is a 23-year-old gentleman. He is employed as a store manager. He indicates that while participating in athletic activities, namely football, at the University of Nevada Las Vegas, he sustained a lower back injury. He complained of back pain and left-sided lower extremity pain. After receiving conservative treatment, he presented to Dr. Capanna on 9/1/10. Dr. Capanna had reviewed an MRI scan which noted an L5-S1 disc protrusion. Dr. Capanna ordered nerve conductions and EMGs which suggested a left-sided S1 radiculopathy. Based on the patient's clinical impression and the diagnostic studies, Dr. Capanna elected to proceed with a left-sided decompression at L5-S1. On 9/17/10, Dr. Capanna performed, what was dictated as, a left L5-S1 microdiscectomy. Apparently the patient had persistent pain and a follow up MRI with gadolinium showed postoperative scar tissue at L4-5. It appears that no surgery was performed at L5-S1. The patient went on to have a second surgery in October of 2010 by Dr. Andrew Cash in which a two-level decompression was performed, that being at L4-5 and L5-S1. The patient continues to have back and left leg pain. For further details regarding the treatment the patient received for his lumbar spine and left lower extremity pain, please see the medical record review listed below.

PAST SURGICAL HISTORY: Remarkable for the two lumbar spine surgeries that I have mentioned, one in September of 2010 and the other in October of 2010.

PAST MEDICAL HISTORY: Unremarkable.

MEDICATIONS: Multivitamins only.

ALLERGIES: Penicillin.

REVIEW OF SYSTEMS: Noncontributory.

FAMILY HISTORY: Unremarkable.

SOCIAL HISTORY: He denies tobacco use. He drinks ethanol on rare occasions. The patient is employed as a store manager having received a degree in Marketing from the University of Nevada Las Vegas.

MEDICAL RECORD REVIEW:

8/25/08 through 10/22/10 – Handwritten notes from the UNLV athletic training facility as well as the general medical assessment team at University of Nevada Las Vegas. This Claimant is seen on multiple occasions for various conditions between 8/25/08 and 10/22/10. Approximately 130 visits are noted between these two dates. The patient is seen for multiple issues. He is an UNLV football player and is seen for upper extremity symptoms, ankle sprains, injuries to his left great toe, as well as general medical issues such as upper respiratory tract infections; however, the majority of these visits are for issues pertaining to his lumbar spine. It appears from looking at other notes that this patient sustained, as a result of his football activities, issues with his lumbar spine and left lower extremity. These handwritten notes over the approximate two-year period noted from August of 2008 through October of 2010 concern athletic trainer and evaluations as well as referrals to various healthcare specialists for treatment regarding his lower back and his left leg.

2/3/09 – MRI scan of the lumbar spine from 2/3/09 and it shows a very small left L5-S1 disc protrusion.

2/19/10 – MRI of the lumbar spine is comparable to the 2009 scan, that is a small left-sided L5-S1 disc protrusion.

2/23/10 – Ruggeroli, M.D., pain specialist – The patient is seen and diagnosed with a left L5-S1 disc hernia versus protrusion and recommends a left-sided L5-S1 epidural steroid injection.

2/24/10 – Ruggeroli, M.D. – Performs left-sided L5-S1 transforaminal epidural steroid injection.

3/9/10 – Ruggeroli, M.D. – The patient is seen status post the injection. The injection has helped him with regards to his back and left leg pain. The patient will follow up on an as-needed basis.

8/11/10 – Ruggeroli, M.D. – The patient is seen and the diagnosis is left-sided L5-S1 disc herniation. He recommends additional injections into the lumbar spine.

8/13/10 – Ruggeroli, M.D. – Performs a left-sided L5-S1 transforaminal epidural steroid injection.

8/26/10 – Ruggeroli, M.D. – The patient is seen with the L5-S1 disc herniation. There was no relief with the epidural steroid injection. No further injections are recommended.

9/1/10 – Capanna, M.D. – The patient is seen and Dr. Capanna notes in his history that he is complaining of back and left leg pain. It seems to be related when he switched from a wideout to a linebacker. Discussions regarding L5-S1 microdiscectomy were made. Dr. Capanna recommends EMGs and flexion/extension MRI prior to making final decisions regarding surgery.

9/2/10 – MRI scan of the lumbar spine with flexion/extension views shows an L5-S1 disc protrusion, only mild stenosis.

9/8/10 – Germin, M.D. – Performs nerve conductions and EMGs left lower extremity, suggest left-sided S1 radiculopathy.

9/17/10 – Capanna, M.D. – Performs a left-sided L5-S1 microdiscectomy. This is done after the patient undergoes a preoperative evaluation. Apparently, the patient does not do well. There are multiple phones call into Dr. Capanna's office indicating that the patient has persistent pain.

10/6/10 – MRI with gadolinium shows postoperative scar tissue and a recurrent L4-5, which is the first time that the L4-5 level is mentioned having an issue. All the previous MRIs suggested L5-S1 as the problematic level. This states L4-5 was operated on on the left side and there is a recurrent disc herniation there.

10/12/10 – Cash, M.D. – The patient is seen status post surgery by Dr. Capanna. The patient had one week of relief, but now has persistent left leg pain. He recommends surgery for a recurrent disc herniation.

10/19/10 – Cash, M.D. – Performs a preoperative evaluation.

10/22/10 – Cash, M.D. – Performs revision left-sided L4-5 discectomy. There is epidural fibrosis noted at L4-5. There is a disc herniation at L4-5 and a bulge at L5-S1. Dr. Cash decompresses both levels, L4-5 and L5-S1 on the left.

Dr. Cash sees the patient in postoperative visit two weeks postop and approximate six-week postop on 11/3/10 and 12/1/10 respectively. On 12/1/10, he recommends physical therapy and utilizing a brace when out of bed.

12/9/10 – The patient is seen for physical therapy modalities by physical therapist Keith Kleven.

4/19/11 – Cash, M.D. – The patient is seen and the diagnoses are postlaminectomy syndrome and lumbar radiculopathy. The patient is indicated as doing well and will follow up in three months.

8/28/12 – Cash, M.D. – The patient is seen and the diagnoses are postlaminectomy syndrome and left lower lumbar radiculopathy. MRI scan of the lumbar spine with and without contrast is recommended.

8/31/12 – MRI of the lumbar spine with and without gadolinium contrast shows a small left-sided L5-S1 disc protrusion and a bulge at L4-5 as well as postoperative changes.

9/4/12 – Cash, M.D. – The patient is seen and Dr. Cash notes the MRI findings. He notes that there is disc dehydration at L4-5 and L5-S1. The patient is diagnosed with a postlaminectomy syndrome and lumbar radiculopathy. Recommendations are to follow up on an as-needed basis.

CURRENT COMPLAINTS: The patient's current complaints are of a lumbar spine pain eccentrically placed to the left of the midline with a pins and needles, stabbing, and numbness in his left leg. He indicates that currently his pain is a 2 out of 10 on a visual analog scale with 0 being no pain and 10 being the worst pain that he can imagine. At its worst, it is a 10 out of 10. He indicates that 70% of his pain is in his back and 30% is in his left leg. He indicates that he can sit for 30 minutes, stand for 30 minutes, ride in a car for one hour, and walk two to three blocks. He indicates that exercise, sitting too long, and activities such as washing a car make his pain worse. He indicates doing nothing makes it better.

PHYSICAL EXAMINATION: On physical examination, the patient is observed to be ambulating without use of lateral support. He is not using any type of lumbar spine a brace. On inspection, his lumbar spine shows a well-healed midline incision consistent with the two previous decompressions. He has diffuse tenderness that is difficult to localize throughout his lumbar spine. He has 10% limitation of lumbar spine range of motion based on my estimate. Sensory and motor evaluations in key dermatomes and myotomes tested from L3 through S1are intact. Reflexes are 2/4 and symmetric at the patella and Achilles. Straight leg raising is negative for radicular findings.

I have reviewed previous studies:

The diagnostic imaging that I have reviewed in chronological order presented to me on DVD disc are as follows.

9/2/10 – MRI scan of the lumbar spine shows a small left-sided L5-S1 disc protrusion.

10/6/10 – MRI scan of the lumbar spine shows a left L4-5 laminotomy that was done. There is no laminotomy at L5-S1.

10/12/10 – X-rays of the lumbar spine show changes consistent with an L4-5 laminotomy.

11/3/10 – Radiographs of the lumbar spine that show two-level decompression, left-sided, by Dr. Cash.

12/1/10 – X-rays of the lumbar spine show changes consistent with left-sided L4-5 and L5-S1 laminotomy.

2/8/11 – X-rays of the lumbar spine show disc height diminution L4-5 and L5-S1 and postoperative changes.

8/28/12 – X-rays of the lumbar spine with flexion/extension views of the lumbar spine that show no instability, disc height diminution L4-5 and L5-S1.

DIAGNOSIS: Left-sided L5-S1 disc herniation with a postlaminectomy syndrome.

DISCUSSION/OPINIONS: As is noted based on my evaluation, this patient had an L5-S1 disc protrusion on 9/2/10. He had surgery to his lumbar spine. It was stated it was done at L5-S1. However, postoperative scans show that the surgical procedure was performed at L4-5. Apparently the patient did not improve and the patient had a second decompression at L4-5 and L5-S1. Follow up radiographs show postoperative changes. The patient is now here for evaluation and it is clear that he has ongoing symptoms subjectively and the objective findings on his scans show postlaminectomy changes.

This patient did have an L5-S1 disc protrusion. It was appropriate for Dr. Capanna to make the recommendation for surgery. However, the surgical procedure was done at the wrong level, one level cephalad, that is the L4-5 level. Certainly the patient required a second surgery. In my opinion, the patient's condition postoperatively is satisfactory indicating that the patient has normal neurologic function and can perform all activities of daily living; although, he complains of subjective pain. Certainly the patient required a second surgical procedure by Dr. Andrew Cash after the first surgical procedure was done at the wrong level. Certainly, to a reasonable degree of medical probability, this patient would have had ongoing symptoms to some degree even if the surgical procedure was done at the correct level the first time. Certainly the patient was subjected to a second anesthetic and had a longer time to reach maximum medical improvement secondary to the need for a second decompressive surgery. The patient is quite functional and performing activities as a manager that he is able to perform without restriction.

He is on no medications at this time and, in my opinion, has had a satisfactory result status post the two previous lumbar spine procedures, albeit the first one being performed at the incorrect level, that being one level cephalad to what was meant to be.

If could be of any further assistance, please feel free to contact me.

REYNOLD L. RIMOLDI, M.D.

RLR/rp

EXHIBIT "2"

DISTRICT COURT
CLARK COUNTY, NEVADA

ROBERT THOMPSON,	
Plaintiff,	**CASE NO.: A621658**
	DEPT. NO. XXX
vs.	
EUTENE PORRECA, M.D.; DOES I through X, inclusive, and ROE BUSINESS ENTITIES I through X, inclusive,	**ORDER RE: PLAINTIFF'S MOTION IN LIMINE TO EXCLUDE COLLATERAL SOURCE EVIDENCE**
Defendants.	

INTRODUCTION.

On May 4, 2012, the Plaintiff filed a Motion in Limine to Exclude Collateral Source Evidence. The Defendant filed an Opposition on May 29, 2012, and the Plaintiff filed a Reply on or about June 18, 2012. This matter came on for hearing before Judge Jerry Wiese on Monday, July 2, 2012. The Plaintiff was represented by Michael Kane, Esq., and Dennis Prince, Esq. Defendant was represented by Laura Lucero, Esq. The Court heard oral argument on July 2, 2012, and took the matter under advisement. Subsequently, the Court determined that NRS 30.130 mandated that the Attorney General's office be informed of the challenge to the constitutionality of a statute, and required counsel to provide the Attorney General's office with the relevant pleadings. The Attorney General's office responded initially, indicating that it would be filing a written brief, but that it did not request any further oral argument. Subsequently, the Attorney General's office indicated that it had no desire to file a written brief.

This is an action for alleged medical malpractice arising from a laparoscopic appendectomy performed by the Defendant on or about August 7, 2007. It is alleged that Dr. Porreca fell below the standard of care by failing to identify the base of the appendix and failing to remove the full appendix. Plaintiff claims that only half of the appendix was

removed, and the Plaintiff thereafter developed an infection, and required additional hospitalizations, medications, and procedures.

FACTUAL SUMMARY.

Plaintiff filed a Motion in Limine to Exclude Collateral Source Evidence, based upon the argument that NRS 42.021 is unconstitutional in that it violates the Equal Protection Clause of the Constitution of the State of Nevada.

Plaintiff argues in his Motion, that NRS 42.021 discriminates based upon the classification of plaintiffs. Plaintiff also argues that NRS 42.021 discriminates among those with insurance and those without insurance. Plaintiff suggests that this Court should apply an "intermediate scrutiny" analysis, and follow the case of *Farley v. Engelken*, 241 Kan. 663, 740 P.2d 1058 (1987), in determining the constitutionality of NRS 42.021. Plaintiff argues that NRS 42.021 is unconstitutional because it does not substantially further a legitimate governmental interest. Finally, the Plaintiff argues that this Court should apply the holding of *Proctor v. Castelletti*, 112 Nev. 88, 911 P.2d 853 (1996) to the present case, and bar the admission of any collateral source of payments which have benefitted the Plaintiff.

The Defendant asserts in his Opposition, that Plaintiff is claiming $217,075.14 in past medical specials, of which he personally only paid $5,124.20 as co-pays and deductibles. The remaining $211,950.94 was paid in part by Plaintiff's various medical insurance policies. Defendant argues that NRS 42.021 was enacted by a 2004 initiative petition as a result of the medical malpractice crisis in the state of Nevada, and specifically allows the Defendant in a medical malpractice case to elect to introduce evidence of health insurance benefits paid as a result of the alleged injury. Defendant points out that NRS "42.021 does not require the jury to reduce plaintiff's damage award by the amount of the collateral source benefits."[1] Defendant argues that NRS 42.021 is not subject to "intermediate scrutiny" but must be reviewed under the "rational basis test."

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[1] See Defendant's Opposition, pg. 4.

Defendant also states that Plaintiff failed to meet and confer as required by EDCR 2.47.[2]

Defendant argues that NRS 42.021 is presumed to be constitutional, and Plaintiff has failed in its burden to prove it unconstitutional. Defendant argues that the "rational basis" is the appropriate level of judicial scrutiny, as the statute does not bear on a fundamental right, suspect class, or quasi-suspect class. Defendant argues that NRS 42.021 meets the "rational basis" test, as it is rationally related to legitimate governmental interests, which are: "to stabilize the cost of medical malpractice insurance, preserve access to health care, and stop the depletion of physicians in Nevada."[3] Finally, Defendant argues that damages are not subject to an "equal protection analysis," and that NRS 42.021 is an evidentiary statute which does not require the jury to reduce the Plaintiff's damages.

The 14th Amendment to the U.S. Constitution indicates that:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[4]

The Constitution of the State of Nevada also includes "equal protection" language as follows:

> All men are by Nature free and equal and have certain inalienable rights among which are those of enjoying and defending life and liberty; Acquiring, Possessing and Protecting property and pursuing and obtaining safety and happiness.[5]
>
> In all cases enumerated in the preceding section, and in all other cases where a

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[2] This matter was not addressed at the time of the hearing on this Motion. This Court has no desire to determine which attorney is more credible with regard to this issue. Consequently, this Court determines that if there was a failure to comply with EDCR 2.47, on this occasion, such failure was harmless. This Court will address the Motion on its merits, and not on a technicality, but suggests that both counsel comply with EDCR 2.47 in the future.

[3] See Opposition, pg. 11.

[4] *Tarango v. SIIS*, 117 Nev. 444, 453, 25 P.3d 175 (2001), citing the U.S. Const. Art. XIV, § 1.

[5] Constitution of the State of Nevada, Article 1, § 1.

general law can be made applicable, all laws shall be general and of uniform operation throughout the State.[6]

DETERMINING THE APPROPRIATE LEVEL OF SCRUTINY.

In considering an "equal protection" challenge, the Court must first determine the appropriate standard of review. This Court's standard for examining an "equal protection" challenge, is the same as the federal standard. Thus, the proper standard of review depends on the classification to be considered, and the appropriate level of scrutiny to be applied to the affected interest.[7]

The highest level of scrutiny – strict scrutiny – is applied in cases involving a fundamental right or a suspect class. Under strict scrutiny, legislation should only be upheld if it is necessary to advance a compelling state interest, and it is narrowly tailored to achieve that interest.[8]

A lesser standard of review is required when the classification does not affect fundamental liberties. Under the lower standard, the rational-basis-test, legislation meets its burden of review as long as it is rationally related to a legitimate governmental interest. This lower standard generally presumes that the law is constitutional, and thus, the courts show deference to the legislation.[9]

An "intermediate level of scrutiny" has also been recognized by many courts. This level of scrutiny is ordinarily applied to matters dealing with gender or the illegitimacy of children.[10]

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[6] Nevada Const. Art. 4, § 21.

[7] *Tarango v. SIIS* 117 Nev. 444, 454, 25 P.3d 175, 182 (2001), citing *Laakonen v. District Court*, 91 Nev. 506, 538 P.2d 574 (1975), and *Gaines v. State*, 116 Nev. 359, 998 P.2d 166 (2000).

[8] *Id.*

[9] *Id.*, citing *Sereika v. State*, 14 Nev. 142, 143-45, 955 P.2d 175, 179 (1998), and *Plyer v. Doe*, 457 U.S. 202, 219 n. 19, 225, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982).

[10] *Tarango v. SIIS* 117 Nev. 444, 454, 25 P.3d 175, 182 (2001), citing *Clark v. Jeter*, 486 U.S. 456, 461, 108 S.Ct. 1910, 100 L.Ed.2d 465 (1988). The Court did not explain whether issues other than gender or illegitimacy would qualify for intermediate scrutiny, and they did not explain what "intermediate scrutiny" entailed. The only cases in which the Nevada Supreme Court has even discussed the "intermediate scrutiny" standard are *University and Community College System of Nevada v. Farmer*, 113 Nev. 90, 930 P.2d 730 (1997); *S.O.C., Inc. v. Mirage Casino-Hotel*, 117 Nev. 403, 23 P.3d 243 (2001); and *Pohlabel v. State*, 268 P.3d 1264 (2012). In none of these cases did the Nevada Supreme Court apply the "intermediate scrutiny" analysis, nor did

It should further be noted that in performing an "equal protection" analysis, one of the things the Court must look at is whether "all those similarly situated are treated in a like manner."[11]

The parties in the instant case have conceded that the statute at issue, NRS 42.021 does not involve a "fundamental right" or a "suspect class," and consequently, they have conceded that the "strict scrutiny" standard does not apply. The issue becomes whether this Court should apply the "rational basis" test, or the "intermediate scrutiny" analysis.

CONSIDERATION OF NEVADA CASES DEALING WITH EQUAL PROTECTION CHALLENGES

This Court must look to other cases decided by the Nevada Supreme Court, to determine what level of scrutiny should be applied to the subject analysis. In the majority of cases reviewed by this Court, it seems that the Nevada Supreme Court uses the "rational basis" analysis. This Court will undertake a review of various Nevada Supreme Court decisions, in an attempt to determine under what circumstances each of the levels of scrutiny are appropriate, and in an attempt to determine what level of scrutiny is applicable to the instant case, and the equal protection challenge herein.

In the case of *Flamingo Paradise Gaming v. Chanos*[12], the Court recently addressed whether the Nevada Clean Indoor Air Act violated the equal protection clause. The Court noted that "Equal protection allows different classifications of treatment, but

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the Court discuss how or under what specific circumstances it would apply.

In *Rainey v. Chever*, 527 U.S. 1044, 119 S.Ct. 2411 (1999), the U.S. Supreme Court denied a Petition for writ of certiorari, but in the Order the Court seemed to indicate that an "intermediate scrutiny" analysis would apply to a "gender-based classification." In *Astrue v. Capato*, 132 S.Ct. 2021, the U.S. Supreme Court held that under an equal protection analysis, an intermediate level of scrutiny is applied to laws burdening illegitimate children for the sake of punishing the illicit relations of their parents, because visiting this condemnation on the head of an infant is illogical and unjust.

In *University and Community College System of Nevada v. Farmer*, 13 Nev. 90, 930 P.2d 730 (1997), the Nevada Supreme Court cited to *Metro Broadcasting Inc., v. FCC*, 497 U.S. 547, 110 S.Ct. 2997, 111 L.Ed.2d 445 (1990), in which the Court held that the "intermediate scrutiny standard of review applies towards congressionally mandated benign racial classifications."

[11] *Tarango v. SIIS* 117 Nev. 444, 456, 25 P.3d 175, 183, citing *Romer v. Evans*, 517 U.S. 620, 631-35, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996).

[12] 125 Nev. 502, 217 P.3d 546 (2009).

the classifications must be reasonable."[13] In the Flamingo case, the parties agreed that smoking did not involve a "fundamental right" or a "suspect class," and consequently, the Supreme Court used a "rational basis" analysis. The Court did not even discuss the possibility of using an "intermediate scrutiny" analysis. The Court noted that "this court is not limited when analyzing a rational basis review, to the reasons enunciated for enacting a statute; if any rational basis exists, then a statute does not violate equal protection." Further, the Court indicated that "under a rational basis test, classifications must 'apply uniformly to all who are similarly situated, and the distinctions which separate those who are included within a classification from those who are not must be reasonable, not arbitrary.'"[14] The issue before the Court in *Flamingo*, involved the fact that the NCIAA applied to businesses that held restricted gaming licenses but not to gaming areas in those businesses that held nonrestricted gaming licenses. The Court held that there were a number of reasons why different treatment of the license holders passed equal protection requirements, and there were rational reasons for allowing the classification.[15]

In the case of *Tarango v. SIIS*, 117 Nev. 444, 25 P.3d 175 (2001), the Court addressed whether SIIS's denial of vocational rehabilitation benefits to the claimant violated the Equal Protection Clause. Tarango could not substantiate his legal right to work with the appropriate immigration documents, so he fell into Congress' definition of an "unauthorized alien."[16] The Nevada Supreme Court discussed the various levels of scrutiny which may possibly apply in an equal protection challenge,[17] and ultimately relied on the case of *Plyer v. Doe*,[18] and its refusal to acknowledge undocumented aliens as a

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[13] *Flamingo Paradise Gaming v. Chanos*, 125 Nev. 502, 520, 217 P.3d 546, 559, (2009), citing *State Farm v. All Electric, Inc.*, 99 Nev. 222, 225, 660 P.2d 995, 997 (1983), overruled on other grounds by *Wise v. Bechtel Corp.*, 104 Nev. 750, 766 P.2d 1317 (1988).

[14] *Id.*, at 520, citing *Arata v. Faubion*, 123 Nev. 19, 161 P.3d 244, 248 (2007), and *State Farm v. All Electric, Inc.*, 99 Nev. 222, 225, 660 P.2d 995, 997 (1983).

[15] *Id.*, at 522.

[16] *Id.*, at 450.

[17] *Tarango*, at 454-455. Note that although the Court discussed three separate levels of scrutiny, including an "intermediate level of scrutiny," the Appellant apparently argued that the standard of review should meet that of a "compelling state interest" (strict scrutiny standard), and the Court without discussing the possibility of an intermediate scrutiny analysis, applied the rational basis analysis.

[18] 457 U.S. 202, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982).

suspect class. The Court noted as follows:

> Appellant Tarango is an undocumented alien. Unauthorized entry into the United States is a crime. Consequently, the United States Supreme Court has stated that benefits may be withheld "from those whose very presence within the United States is the product of their own unlawful conduct." As a result, we conclude that SIIS's denial of appellant's vocational rehabilitation benefits was fairly related to a legitimate government purpose."[19]

In *Laakonen v. Eighth Judicial District Court*,[20] the Nevada Supreme Court was asked to declare NRS 41.180 unconstitutional under the equal protection clause of both the U.S. Constitution and the Nevada Constitution. That statute indicated in part as follows:

> Any person who as a guest accepts a ride in any vehicle, moving upon any of the public highways of the State of Nevada, and while so riding as such guest receives or sustains an injury, shall have no right of recovery against the owner or driver or person responsible for the operation of such vehicle.[21]

In discussing the application of the statute, the Court stated the following:

> NRS 41.180 statutorily bars an automobile 'guest' passenger from any recovery for injury attributable to negligent driving by his host. As a result, this statute denies a defined class of persons, passengers who give no compensation for their ride who are injured by their host's negligence, the right afforded to other classes of tort victims to recover for negligently inflicted injuries. Laakonen argues that this establishes a discriminatory treatment which conflicts with the

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[19] *Tarango v. SIIS* 117 Nev. 444, 456, 25 P.3d 175 (2001), citing 8 U.S.C. § 1325(a), and *Plyler*, 457 U.S., at 219, 102 S.Ct. 2382. Note that the Court used the terms "fairly related to a legitimate government purpose," as opposed to "rationally related to a legitimate government interest." It does not appear that the Nevada Supreme Court intended to change the standard by using different words. It appears that "fairly" and "rationally" were used to describe the same term, and they seem to mean essentially the same thing. Likewise, a "government interest" and a "government purpose" seem to be terms that are interchangeable. Consequently, although the Court used different words than those customarily used in discussing the "rational basis" analysis, under an equal protection challenge, this Court does not believe that the *Tarango* case was intended to modify the "rational basis" test in the state of Nevada.

[20] 91 Nev. 506, 538 P.2d 574 (1975).

[21] *Laakonen v. Eighth Judicial District Court*, 91 Nev. 506, 507, 538 P.2d 574, 575 (1975), citing NRS 41.180.

equal protection guarantees of our State and Federal Constitutions. We agree.[22]

The Court discussed the application of the 14th Amendment as follows:

> Article 4, Section 21, of the Nevada Constitution provides in pertinent part that 'all laws shall be general and of uniform operation throughout the state.' The Fourteenth Amendment to the United States Constitution mandates that no state may 'deny to any person within its jurisdiction the equal protection of the laws.' Under Federal and State equal protection provisions, a state may single out a class for distinctive treatment only if such classification bears a rational relation to the purposes of the legislation.[23]

The Court cited to a California Supreme Court case[24], in which the California court held the California automobile guest statute to be unconstitutional as violative of the equal protection clauses of the state and U.S. Constitutions. It noted that one of the justifications for the statute was the "protection of hospitality." The Court indicated the following:

> The Nevada automobile guest statute produces the same discriminations found in the California statute. The justifications propounded in support of the Nevada statute are identical to those discussed in Brown. NRS 41.180 has been upheld in the past on the grounds that a generous host should be protected from suit by an ungrateful guest and that public policy is served by such a limitation. We can no longer accept the notion that there is a rational relation between promotion of hospitality and removal of liability for negligent injury of another.[25]

In discussing the "hospitality" rationale, the Nevada Supreme Court stated the following:

> . . . The "protection of hospitality" rationale was found fatally defective since it did not explain why different treatment was accorded automobile guests from

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22 *Id.*, at 508.
23 *Id.*, at 508.
24 *Brown v. Merlo*, 8 Cal.3d 855, 106 Cal.Rptr. 388, 506 P.2d 212 (1973).
25 *Id.*, at 511.

> all other guests; how the interests in protecting hospitality could rationally justify the withdrawal of legal protection from guests, nor does it take account of the prevalence of liability insurance coverage which effectively undermines any rational connection between the prevention of suits and the protection of hospitality . . .[26]

The Court went on to state that it agreed with the *Brown* reasoning, as did the Supreme Court of Kansas in *Henry v. Bauder*, 213 Kan. 751, 518 P.2d 362 (1974), that the 'hospitality' argument does not provide a sufficient rational basis for a guest statute classification.[27]

Without expressly saying so, the Court applied a standard akin to the "rational basis" test, but required something a little more compelling, in finding the statute unconstitutional, when it stated its conclusion as follows:

> We conclude, therefore, that the denial of recovery for negligently inflicted injuries to those who by chance fall within the provisions of NRS 41.180 does not bear a substantial and rational relation to the state's purposes of protecting the hospitality of the host driver and in preventing collusive lawsuits. Such irrational discrimination cannot stand in light of the applicable constitutional standards. It is ordered that a writ of mandamus shall issue, directing the district court to enter an order of partial summary judgment, declaring NRS 41.180 unconstitutional.[28]

In the case of *State, Private Investigator's Licensing Board v. Taketa*,[29] the Nevada Supreme Court used the "rational basis" test, in finding that NRS 648.1405(4) did not violate the equal protection clause. The Court noted the following:

> The constitutionality of a state regulating occupational licensing is properly determined under a rational basis test. Under the rational basis test, a statutory

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[26] *Laakonen*, at 512, citing to *Lightenburger v. Gordon*, 89 Nev. 226, 510 P.2d 865 (1973), and *Brown v. Merlo*, 8 Cal.3d 855, 106 Cal.Rptr. 388, 506 P.2d 212 (1973).

[27] *Laakonen* at 512.

[28] *Laakonen* at 514. Note that the Court required a "substantial and rational" relation, as opposed to the simple "rational basis."

[29] 105 Nev. 4, 767 P.2d 875 (1989).

> classification must be upheld if it rationally furthers a legitimate state purpose or interest. It need not reflect perfect logical consistency.[30]

The Court went on to hold that the State had a legitimate interest in maintaining the integrity of private investigation work, and that the trial judge erred in finding no rational relationship between the statute's "prohibition against entrusting to ex-felons duties the execution of which requires the utmost respect for the law and the State's legitimate interest in maintaining the integrity and lawfulness of private investigations."[31]

In the case of *Hamm v. Arrowcreek Homeowners' Association*, 124 Nev. 290, 183 P.3d 895 (2008), the Nevada Supreme Court used the "rational basis" test in finding that NRS 38.310 did not violate equal protection rights. Under NRS 38.310, a homeowner was required to submit to mediation or arbitration before initiating a civil action in the district court. The Hamms argued that the statute violated their constitutional rights to a jury trial, and to equal protection under the law. The Court noted that the parties had options to choose binding or non-binding arbitration, or mediation, and under any circumstances, after such ADR had transpired, they had the right to initiate litigation in district court. As the Hamms had adequate legal remedies available to them, the Court concluded that NRS 38.310 did not violate their constitutional right to a jury trial.[32]

In the *Hamm* case, the Court addressed the equal protection challenge to NRS 38.310, and acknowledged that "the first step in the equal protection analysis is to determine the appropriate standard of scrutiny to apply according to the rights infringed and the classification created."[33] The Court stated the following:

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[30] *State, Private Investigator's Licensing Board v. Taketa*, 105 Nev. 4, 767 P.2d 875, 876 (1989), citing *Schware v. Bd. Of Examiners*, 353 U.S. 232, 239, 77 S.Ct. 752, 756, 1 L.Ed.2d 796 (1957), and *Massachusetts Bd. Of Retirement v. Murgia*, 427 U.S. 307, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976).

[31] *Id.*

[32] *Hamm v. Arrowcreek Homeowners' Association*, 124 Nev. 290, 300, 183 P.3d 895 (2008). Note that the Court did not address the right to jury trial in the context of the equal protection challenge, but the Court addressed the issues separately. The argument that the Hamms were denied the right to a jury trial, by the statute, was concluded by the Court without reference to any specific standard (rational basis, strict scrutiny, or intermediate scrutiny).

[33] *Id.* at 301.

> If fundamental rights are not infringed or a suspect class is not involved, the statute "will survive an equal protection attack so long as the classification withstands 'minimum scrutiny,' i.e., is rationally related to a legitimate governmental purpose." In this case, as no fundamental rights are involved, we apply the rational basis test to assess the constitutionality of NRS 38.310.[34]

The Court concluded that NRS 38.310 did not treat similarly situated individuals differently, because it required mediation or arbitration before civil actions could be initiated by homeowners or homeowners' associations alike, without classification. The Court further concluded that NRS 38.310's requirement of mediation or arbitration was rationally related to the legitimate governmental interest of assisting homeowners to achieve a quicker and less costly resolution of their disputes with homeowners' associations. Consequently, the Court concluded that the statute did not violate the equal protection clause.[35]

In *Garfinkel v. Second Judicial District Court*,[36] the Nevada Supreme Court used the "rational basis" test, in holding that NRS 484.379(3)(h) which prohibits a person from driving with a marijuana metabolite content greater than 5 nanograms per milliliter of blood, did not violate the equal protection or due process clauses. The Court relied on its prior decision in *Williams v. State*,[37] wherein the Court upheld NRS 484.379(3) against a similar attack. In that case, the Court had noted that "the Legislature, in constructing this per se statute, considered and rejected the arguments of those who claimed that the law 'lacked a direct correlation between the prohibited drugs in a driver's system and impairment.'"[38]

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[34] *Id.* at 301., ,citing *Arata v. Faubion*, 123 Nev. 19, 23, 161 P.3d 244, 248 (2007), and *Sawyer v. Dooley*, 21 Nev. 390, 394, 32 P. 437, 438 (1893) (applying the rational basis test to a statute involving different treatment of property owners according to the amount of delinquent taxes they owed on their property.)

[35] *Id.*, at 301.

[36] 2010 WL 5275797 (Nev. 2010). Note that this is an unpublished opinion, and consequently has no controlling effect, but it does provide this Court with some insight with regard to the Nevada Supreme Court's inclination with regard to what level of scrutiny is applied to different types of cases.

[37] 118 Nev. 536, 50 P.3d 1116.

[38] *Garfinkel*, supra, citing *Williams v. State*, 118 Nev. 536, 543, 50 P.3d 1116, 1120-21 (2002)

In *Aguilar-Raygoza v. State*,[39] the Court considered whether it was unconstitutional to deny defendants who exercised their right to a jury trial, eligibility for the alcohol treatment diversion program set forth in NRS 484C.340. The district court determined that while there is a fundamental right to a jury trial for serious criminal offenses, there is no fundamental right to participate in the alcohol treatment diversion program provided for in NRS 484C.340. The Supreme Court noted that "the district court analyzed NRS 484C.340 under a rational basis review, and found that the statute is constitutional because it does not significantly interfere with a defendant's fundamental right to a jury trial."[40] The Court noted that "statutes are presumed to be valid," and the party challenging a statute bears a "heavy burden," of proving a statute unconstitutional.[41]

The Nevada Supreme Court cited to the Fourteenth Amendment to the U.S. Constitution, and noted that "Equal protection of the law 'has long been recognized to mean that no class of persons shall be denied the same protection of the law which is enjoyed by other classes in like circumstances.'"[42] The Court went on to conclude that "as a result of NRS 484C.340, those who choose to go to trial are 'denied the same protection of the law which is enjoyed by other classes in like circumstances.' Because the statute does not penalize a defendant for exercising the fundamental right to a jury trial, it is not subject to strict scrutiny. And we conclude that the statute is rationally related to a legitimate governmental purpose."[43]

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[39] 255 P.3d 262 (Nev. 2011).

[40] *Aguilar-Raygoza v. State*, 255 P.3d 262, 264 (Nev. 2011). It should be noted that the Supreme Court indicated that the district court used a "rational basis" review, but did not comment on the "rational basis" that the district court found. The Court noted that the district court found the statute constitutional because "it did not significantly interfere" with the defendant's fundamental right to a jury trial. This does not appear to be the appropriate analysis, even under the "rational basis" test. It appears that if the issue was interference with a "fundamental right to a jury trial," then the highest level of scrutiny – strict scrutiny-- should have been applied.

[41] *Id.*, at 264.

[42] *Id.*, at 267, citing *Allen v. State Pub. Emp. Ret. Bd.*, 100 Nev. 130, 135, 676 P.2d 92, 795 (1984).

[43] *Id.*, at 267, citing *Allen*, 100 Nev. at 135, 676 P.2d at 795, and *Arata*, 123 Nev. at 159, 161 P.3d at 248 (explaining the level of scrutiny that applies in the absence of impingement on fundamental rights or a suspect classification.) Note that the Supreme Court here explains why "strict scrutiny" does not apply, and why the Court used the "rational basis" analysis – because the Court found that there was no deprivation of the fundamental right to a jury trial.

In *Rico v. Rodriguez*,[44] the Court considered whether the district court violated Araceli Rico's equal protection rights when it used her immigration status in making a child custody determination. After several hearings and independent studies of the parents' living conditions, etc., the District Court found that it was in the children's best interest, to grant Rodriguez (the father) primary physical custody, based on his "employment, his ability to provide medical insurance and stable schooling, and Rico's immigration status."[45] The Supreme Court noted that the district court "expressed deep concern about . . . Rico's immigration status."[46] In a subsequent hearing, the district court indicated that "Rico's immigration status was not the primary factor used in awarding custody, . . . [but] was only part of the previous decision. . ."[47] The Court noted that "Under NRS 125.480(1), '[i]n determining custody of a minor child ..., the sole consideration of the court is the best interest of the child."[48] The Court held that "Since the child's best interests are paramount in custody matters, we conclude that a district court has the discretion to consider a parent's immigration status and its derivative effects as a factor in determining custody."[49]

In considering the equal protection argument, the Court stated the following:

> The threshold question in equal protection analysis is whether a statute effectuates dissimilar treatment of similarly situated persons. In analyzing alleged equal protection violations, the level of scrutiny that applies varies according to the type of classification created. Where a case presents no judicially recognized suspect class or fundamental right that would warrant intervention under a standard of strict scrutiny or where it presents no quasi-suspect class such as sex, illegitimates or the poor that would warrant application of intermediate level scrutiny, we analyze the challenged law under the rational basis test. A statute meets rational basis review so long as it is reasonably related to a legitimate government interest.
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> But where a law contains no classification or a neutral classification

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44 121 Nev. 695, 120 P.3d 812 (2005),
45 *Rico*, at 700.
46 *Id.*
47 *Id.*
48 *Id.*, at 701.
49 *Id.*

> and is applied evenhandedly, it may nevertheless be challenged as in reality constituting a device designed to impose different burdens on different classes of persons.
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> In this case, the statute at issue, NRS 125.480, is facially neutral. It creates no classifications and sets forth that child custody determinations should be based solely on "the best interest of the child." The policy behind NRS 125.480 is to ensure that minor children have frequent associations and a continuing relationship with both parents . . .[50]

Based upon the foregoing, the Court found that there was no violation of the equal protection clause.

There are many other cases in which the Nevada Supreme Court has evaluated an alleged equal protection violation, but the above-referenced cases provide some indication that the Court favors the "rational basis" analysis. There are few, if any, Nevada Supreme Court decisions in which the Court used the "intermediate scrutiny" analysis.[51] The Court uses the "strict scrutiny" standard, only when posed with a suspect

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[50] *Rico* at 703, citing *Allen v. State, Pub. Emp. Ret. Bd.*, 100 Nev. 130, 135, 676 P.2d 792, 795 (1984); *Tarango v. SIIS*, 117 Nev. 444, 454, 25 P.3d 175, 182 (2001); *Phelps v. Phelps*, 337 N.C. 344, 446 S.E.2d 17, 21 (1994); and NRS 125.480(3)(a). This case is important as it relates to the present analysis, because it is one of the only Nevada Supreme Court cases which addresses when "intermediate scrutiny" may be applied. The Court indicates that when dealing with a "quasi suspect class such as sex, illegitimates, or the poor," the Court would apply an intermediate level of scrutiny.

While this Court is not being asked to review the Rico case specifically, this Court must comment on the fact that it appears that the Nevada Supreme Court evaluated the statute itself, NRS 125.480, as opposed to the manner in which it was applied by the district court. If we were to follow the Court's reasoning, if a custody determination was based in part on race, color, sexual orientation, national origin, etc., such determination would be upheld, since the statute itself is "facially neutral," and doesn't create any "classifications" therein. *Instead, it* seems that the Supreme Court's consideration should have been whether the district court's determination was based, even in part, on Rico's immigration status, and if so, whether the "immigration status" of an individual creates a "class" which is protected under the equal protection clause. The Nevada Supreme Court's decision in Rico seems to indicate that "immigration status" is not a "protected class," and is a classification which can be considered by the court in determining child custody. Regardless of the mother's immigration status, she is still the mother of her children, and all other things being equal, it seems that her right to custody of her children should not be dependent on whether or not she is legally or illegally in the United States. The right to raise one's child is an innate right, and therefore, any action to deprive a parent of that right, should probably be analyzed under strict scrutiny. It seems that a different analysis is required than that undertaken by the U.S. Supreme Court in *Plyer v. Doe*, Supra. Additionally, it seems that a mother's right to custody of her children, is a "fundamental right" and any action to deprive her of such custody, should therefore require a "strict scrutiny" analysis.

[51] In *Laakonen v. Eighth Judicial District Court*, 91 Nev. 506, 507, 538 P.2d 574, 575 (1975), the court seemed to use something more than "rational basis," but something less than "intermediate scrutiny." They required the statute to have a "substantial and rational" relationship to the significant government interest. Additionally, in *S.O.C., Inc. v. Mirage Casino-Hotel*, 117 Nev. 403, 23 P.3d 243 (2001), the Nevada Supreme Court indicated that "intermediate scrutiny" would apply in determining whether suppression of commercial

class or the alleged deprivation of a fundamental right. Finally, it seems that even in some cases where there is arguably a fundamental right at issue, or where there is arguably a suspect class at issue, the Nevada Supreme Court has still used the "rational basis" analysis.

CONSIDERATION OF NEVADA SUPREME COURT CASES DEALING WITH MEDICAL MALPRACTICE STATUTES.

The Nevada Supreme Court evaluated a prior statute dealing with medical malpractice in the case of *Barrett v. Baird*.[52] In that case, Barrett claimed that the statute requiring her to proceed through the medical screening panel was unconstitutional and violated her right to a jury trial, equal protection, etc. The Court cited to a previous decision wherein the Court stated that "The purposes of the screening panel are to minimize frivolous suits against doctors, to encourage settlement, and to lower the cost of malpractice premiums and health care."[53] The Court held that NRS 41A.056(2) was "rationally related to those legitimate purposes."[54] The Court noted the following:

> First, the provision attempts to minimize meritless suits against doctors by encouraging plaintiffs to carefully consider the likelihood of prevailing in court after at least four members of the screening panel – composed of three doctors and three members of the Nevada Trial Lawyers Association – have found "no reasonable probability" of malpractice. Second, the provision attempts to encourage settlement in two ways when a claimant is successful before the screening panel . . . Third, by attempting to minimize meritless suits and encourage settlement, the provision attempts to "lower the costs of malpractice premiums and health care."[55]

NRS 41A.016 provided that "No cause of action involving medical malpractice

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speech passes First Amendment muster. (Note that in the *S.O.C.* case, however, the Court did not perform a complete "intermediate scrutiny" analysis, but found that the commercial speech was not constitutionally protected.)

[52] 111 Nev. 1496, 908 P.2d 689 (1995).

[53] *Barrett v. Baird*, 111 Nev. 1496, 908 P.2d 689 (1995), citing *Jain v. McFarland*, 109 Nev. 465, 471, 851 P.2d 450, 455 (1993).

[54] *Id.*, at 1508.

[55] *Id* at 1408, citing *Jain v. McFarland*, 109 Nev. 465, 471, 851 P.2d 450, 455 (1993).

may be filed until the medical malpractice case has been submitted to an appropriate screening panel..." Barrett's claim was not that her right to bring an action for the wrongful death of her husband was a "fundamental right" or that a "suspect classification" was involved. Barrett asserted that "there is no rational reason that the victims of medical negligence by physicians and hospitals be subjected to the burdens of the panel when injured patients of other health care providers are not."[56]

The Nevada Supreme Court indicated that it would not overturn legislation "unless the treatment of different groups 'is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational.' If any state of facts may reasonably be conceived to justify [the legislation] a statutory discrimination will not be set aside."[57]

The Court concluded that the application of the screening panel statute to physicians, hospitals and hospital employees, and not to other health care providers, was a "rational legislative choice." The Court noted that "evidence before the legislature demonstrated that physicians and hospitals were experiencing enormous hikes in malpractice insurance premiums; there was no such evidence concerning the insurance rates of other health care providers." Because the Court "could have concluded" that physicians and hospitals were more affected by the perceived malpractice crisis than other health care providers, the court found that the "rational basis" test was met, and there was no violation of the equal protection clause.[58]

CONSIDERATION OF NEVADA CASES DEALING WITH THE COLLATERAL SOURCE RULE.

Because the issue before the Court is the abrogation of the "collateral source

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[56] *Id* at 1509.

[57] *Id* at 1509-1510, citing *Allen v. State Pub. Emp. Ret. Bd.*, 100 Nev. 130, 136, 676 P.3d 792, 795-96 (1984); *Vance v. Bradley*, 440 U.S. 93, 97, 99 S.Ct. 939, 943, 59 L.Ed.2d 171 (1979); and *State v. District Court*, 101 Nev. 658, 662, 708 P.2d 1022, 1025 (1985).

[58] Id., at 1510.