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 2

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CHRONOLOGICAL INDEX TO RESPONDENT/CROSS-APPELLANT'S APPENDIX

NO.	DOCUMENT	DATE	VOL.	PAGE NO.
1.	Medical records from McKenna, Ruggeroli and Helmi Pain Specialists / Surgical Arts Center (Plaintiff's Trial Exhibit 7/9)	2/23/2010 (first DOS)	1	1 - 208
2.	MRI Report from Steinberg Diagnostic Medical Imaging	10/6/2010	2	209
3.	Medical records from Desert Institute of Spine Care (Plaintiff's Trial Exhibit 3)	10/12/2010 (first DOS)	2	210 - 335
4.	Scheduling Order from Case No. A-11-648041-C	3/27/2012	2	336 - 338
5.	Initial Expert Witness Disclosure Statement of Defendant Albert H. Capanna, M.D.	11/14/2014	2	339 - 360
6.	Plaintiff's 2nd Supplement to Designation of Expert Witnesses	4/8/2015	2	361 - 399
7.	Plaintiff's 3rd Supplement to Designation of Expert Witnesses	5/8/2015	2	400 - 403
8.	Plaintiff's 7th Supplement to the Early Case Conference List of Documents and Witnesses and NRCP 16.1(a)(3) Pretrial Disclosures	5/15/2015	2	404 - 424
9.	Report by Kevin Yoo, M.D. (provided at May 26, 2015 deposition)	5/26/2015	2	425
10.	Supplemental Expert Witness Disclosure Statement of Defendant Albert H. Capanna, M.D.	5/29/2015	2	426 - 452
11.	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	6/22/2015	3	453 - 461
12.	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	7/9/2015	3	462 - 465

rule" as it relates to medical malpractice claims, this Court believes it appropriate to consider other cases in which the Nevada Supreme Court has addressed the "collateral source rule" and its application.

> Black's Law Dictionary defines the "Collateral Source Rule" as follows:
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> Under this rule, if an injured person receives compensation for his injuries from a source wholly independent of the tortfeasor, the payment should not be deducted from the damages which he would otherwise collect from the tort-feasor. In other words, a defendant tortfeasor may not benefit from the fact that the plaintiff has received money from other sources as a result of the defendant's tort, e.g., sickness and health insurance.[59]

In 1996, the Nevada Supreme Court addressed for the first time the issue of whether collateral source evidence was relevant to an issue at trial other than damages. The district court had allowed such evidence on the ground that it was probative of the plaintiff's malingering.[60] The Nevada Supreme Court, in *Proctor v. Castelletti*, adopted a "per se rule barring the admission of a collateral source of payment for an injury into evidence for any purpose."[61] The Court noted that "Collateral source evidence inevitably prejudices the jury because it greatly increase the likelihood that a jury will reduce a plaintiff's award of damages because it knows the plaintiff is already receiving compensation."[62] The Court went on to state the following:

> While it is true that this rule eviscerates the trial court's discretion regarding this type of evidence, we nevertheless believe that there is no circumstance in which a district court can properly exercise its discretion in determining that collateral source evidence outweighs its prejudicial effect.[63]

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59 *Black's Law Dictionary*, Sixth Edition, 1990, pg. 262.
60 *Proctor v. Castelletti*, 112 Nev. 88, 911 P.2d 853 (1996).
61 *Id.*, at 90.
62 *Id.*, see also *Winchell v. Schiff*, 124 Nev. 938, 945-46, 193 P.3d 946, 951 (2008).
63 *Id.*, at 91.

In *Cramer v. Peavy*,[64] the Nevada Supreme Court was asked to address the constitutionality of NRS 616C.215(10).[65] At trial, Checker Cab made several references to the fact that SIIS had paid some of Cramer's medical expenses. There was also a statement which was an inadvertent misstatement of the law. Cramer argued that the district court's failure to grant a mistrial on the ground that Checker Cab repeatedly informed the jury of SIIS benefits, was reversible. The District Court declined to grant a mistrial, and instructed the jury pursuant to NRS 616C.215. The jury returned a verdict for Checker Cab, and Cramer appealed.[66] The Supreme Court indicated that the way that Checker Cab handled the SIIS issue "skirted the edges of propriety," but the Court indicated the following:

> Having reviewed the legislative history of NRS 616C.215(10, we conclude that the legislature did not intend NRS 616C.215(10) to eviscerate the collateral source rule. Rather, the statute creates a narrow exception to the rule. "The intent of the legislature is the controlling factor in statutory interpretation.[67]

The Court went on to discuss the legislative history of the statute and stated the following:

> . . . the legislature expressed concern about the practice of informing the jury that the plaintiff had received workers' compensation benefits. . . In considering the jury instructions, the legislature expressed its view that cases involving SIIS benefits are unique from other insurance cases because the jury

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[64] 116 Nev. 575, 3 P.3d 665 (2000).

[65] NRS 616C.215(10) required that the jury be instructed that: Payment of workmen's compensation benefits by the insurer, or in the case of claims involving the uninsured employers' claim fund or a subsequent injury fund the administrator, is based upon the fact that a compensable industrial accident occurred, and does not depend upon blame or fault. If the plaintiff does not obtain a judgment in his favor in this case, he is not required to repay his employer, the insurer or the administrator any amount paid to him or paid on his behalf by his employer, the insurer or the administrator.

If you decide that the plaintiff is entitled to judgment against the defendant, you shall find his damages in accordance with the court's instructions on damages and return your verdict in the plaintiff's favor in the amount so found without deducting the amount of any compensation benefits paid to or for the plaintiff. The law provides a means by which any compensation benefits will be repaid from your award.

[66] *Cramer v. Peavy*, 116 Nev. 575, 580, 3 P.3d 665, 668-69 (2000).

[67] *Id.*, at 580, citing *Cleghorn v. Hess*, 109 Nev. 544, 548, 853 P.2d 1260, 1262 (1993).

already knows that the plaintiff has received SIIS benefits if the injury was work related. . . The legislature received evidence that under the system as it then existed, the jury was usually under the mistaken belief that the plaintiff was not required to repay SIIS from any damage award. In an attempt to reach a just verdict, the jury would speculate as to how much the plaintiff had received from SIIS and reduce the award accordingly. Thus, NRS 616C.215(10) was intended to curtail this practice.

Accordingly, NRS 616C.215(10) cannot be used by the defense to imply that the plaintiff has already been compensated, will receive a double recovery if awarded a judgment or has overcharged SIIS. The statute properly informs the jury that the plaintiff has received SIIS benefits and that there is a procedure in place for repaying SIIS from any damage award.[68]

Cramer argued that NRS 616C.215(10) could not be reconciled with *Proctor v. Castelletti,* in which the court adopted a "per se rule barring the admission of a collateral source of payment for an injury into evidence for any purpose."[69] It was challenged as a violation to the "separation of powers doctrine." The Nevada Supreme Court, however, concluded that "the legislature did not exceed its authority in enacting NRS 616C.215(10), and that NRS 616C.215(10) is not superseded by Proctor, but rather is an exception to the per se rule against collateral sources we articulated in that case."[70]

A similar issue was presented to the Nevada Supreme Court in *Tri-County Equipment & Leasing LLC v. Klinke*.[71] In that case, a jury awarded Klinke damages in the amount of $27,510 for medical expenses. Pursuant to negotiated write-downs, Klinke's medical providers accepted substantially less as full payment for their services. Tri County moved the district court to reduce the jury's verdict to the amount "actually paid." The district court denied the motion, and Tri-County appealed.[72] On appeal, Tri-County argued that evidence of workers' compensation payments is admissible as an exception to

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[68] *Id.*, at 580-581, citing Minutes of the Meeting on S.B. 211 Before the Senate Judiciary Comm., 59th Leg. At 4 (Nev., February 23, 1977).

[69] *Id.*, at 582, citing *Proctor v. Castelletti*, 112 Nev. 88, 911 P.2d 853 (1996).

[70] *Id.*, at 582.

[71] 128 Nev. Adv. Op. 33 (June 28, 2012).

[72] *Tri-County Equipment & Leasing, LLC v. Klinke*, 128 Nev. Adv. Op. 33 (2012).

the collateral source rule. The Nevada Supreme Court cited to *Proctor v. Castelletti*, *Cramer v. Peavy*, and discussed NRS 616C.215(10).[73] The Court held that "In a trial governed by Nevada law, the workers' compensation payments made to an injured employee must be admitted as evidence and the proper instruction regarding the jury's consideration of those payments must be given. . . Thus, pursuant to NRS 616C.215(10), the evidence of the amounts actually paid should have been admitted and the clarifying instruction given."[74] The Court went on to state that "Because the amount of workers' compensation payments actually paid necessarily incorporates the written down medical expenses, it is not necessary to resolve whether the collateral source rule applies to medical provider discounts in other contexts."[75] Consequently, the Court reversed the district court and remanded for further proceedings consistent with its opinion.

CONSIDERATION OF RELEVANT CASE LAW FROM OTHER JURISDICTIONS

Since the Nevada Supreme Court has never addressed the constitutionality of NRS 42.021, or the abrogation of the collateral source rule as applied to medical malpractice cases, this Court will also consider the decisions from other jurisdictions which have decided this issue.

Many courts throughout the country have addressed similar issues, and using a "rational basis" analysis, have found that the abrogation of the collateral source rule in medical malpractice cases, does not violate the equal protection clause of the U.S. and State Constitutions.[76]

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[73] *Id.*, citing *Proctor*, 112 Nev. 88, 911 P.2d 853 (1996) and *Cramer v. Peavy*, 116 Nev. 575, 3 P.3d 665 (2000).

[74] *Id.*

[75] *Id.*, citing *Sparks v. State*, 121 Nev. 107, 110-11, 110 P.3d 486, 488 (2005).

[76] *Miller v. Sciaroni, M.D.*, 172 Cal.App.3d, 306, 218 Cal.Rptr. 219 (1985) (California Court found statute fell into the category of economic legislation, applied the rational basis test, and had no difficulty in finding that the statute met a legitimate state interest in protecting a viable state health care delivery system.); *Baker v. Vanderbilt University*, 616 F.Supp. 330 (Tenn. 1985) (Tennessee District Court found that statute was primarily "economic and social legislation," and governed by the rational basis test. The Court had little trouble in upholding the statute, finding it was rationally related to the legitimate objective of reducing malpractice

One case which seems to be very "on point" with the present case, is a case from the Kansas Supreme Court – *Farley v. Engelken*.[77] Since that case is so similar to the case at issue, and since this Court finds that the Kansas Supreme Court's analysis was thorough, unbiased, and compelling, this Court will discuss it in some detail. In *Farley*, the Kansas Supreme Court noted that there were three interlocutory appeals in medical malpractice suits, which were consolidated on appeal for a determination of the constitutionality of KSA 1986 Supp. 60-3403 (hereafter 60-3403)[78]. There were conflicting decisions in the Kansas state courts, as well as in the federal trial courts in Kansas. The primary question on appeal was whether 60-3403 violated the equal protection clauses of the Kansas and U.S. Constitutions. The statute was enacted in 1985 and abrogated the common-law collateral source rule in any medical malpractice liability action.[79]

In *Farley*, the Plaintiffs asserted "that the statute unconstitutionally creates a

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insurance premiums and health care costs.*)*; *Pinillos v. Cedars of Lebanon Hospital Corp.*, 403 So.2d 365 (Fla, 1981) (The Florida Court applied the rational basis test to the challenged statute, and found that the classification created by the statute bore a reasonable relationship to the legitimate state interest of protecting the public health by ensuring the availability of adequate medical care for the citizens of the state.); *Eastin v. Broomfield*, 116 Ariz. 576, 570 P.2d 744 (1977) (The Arizona Court held that a statute which abolished the collateral source rule did not violate the equal protection clause. Although it didn't discuss the "rational basis" test, the Court found that the statute was a legislative response to difficulties faced by doctors and hospitals in obtaining insurance coverage at reasonable rates, and the Court acknowledged the legislature's reason as valid.)

[77] 241 Kan. 663, 740 P.2d 1058 (1987).

[78] KSA 1986 Supp. 60-3403 provides:

Evidence of collateral source payments and amounts offsetting payments; admissibility; effect. (a) In any medical malpractice liability action, evidence of the amount of reimbursement or indemnification paid or to be paid to or for the benefit of a claimant under the following shall be admissible: (1) Medical, disability or other insurance coverage except life insurance coverage; or (2) workers compensation, military service benefit plan, employment wage continuation plan, social welfare benefit program or other benefit plan or program provided by law.

(b) When evidence of reimbursement or indemnification of a claimant is admitted pursuant to subsection (a), the claimant may present evidence of any amounts paid to secure the right to such reimbursement or indemnification and the extent to which the right to recovery is subject to a lien or subrogation rights.

(c) In determining damages in a medical malpractice action, the trier of fact shall consider: (1) The extent to which damages warded will duplicate reimbursement or indemnification specified in subsection (a); and (2) the extent to which such reimbursement or indemnification is offset by amounts or rights specifieid in subsection (b).

(d) The provisions of this section shall apply to any action pending or brought on or after July 1, 1985, regardless of when the cause of action accrued.

(See *Farley* at pg. 666).

[79] *Farley v. Engelken*, 241 Kan. 663, 665, 740 P.2d 1058, 1060 (1987).

class of plaintiffs in tort litigation, insured or otherwise compensated medical malpractice plaintiffs, who are treated differently from all other plaintiffs in tort litigation. The medical malpractice plaintiffs do not receive the benefit of the collateral source rule while all other tort plaintiffs do receive that benefit."[80] It was further asserted that "the statute creates a class of tort litigation defendants, health care providers, who are not subject to the rule, while all other tort defendants are subject to this rule."[81] The Defendants argued that the statute was "constitutional and that the classifications created [were] within the legislature's authority in seeking a remedy to a problem of extreme public interest."[82]

The Kansas Court indicated that "When a statute is attacked on equal protection grounds, the general rule is that the statute is presumed constitutional, and the burden is on the party attacking the statute to prove otherwise. . . In reviewing legislative enactments, the court does not sit to judge the merits or wisdom of the act, the court's limited review of the challenged statute is whether the classifications are reasonable, not arbitrary, and are justified by a legitimate state interest. In other words, does the legislative end justify the classification means?"[83]

In discussing equality and the equal protection clause, the Kansas Court stated the following:

> While equality is the rule and classification the exception, it is readily apparent that complete numerical equality of treatment for all persons is impossible, particularly in a pluralistic, diverse society such as the United States. Thus, some types of classification are inescapable even though they create burdened as well as benefited classes. Classification in application of the law, by its very nature, creates preference to the benefited class. Thus, classification is discriminatory. However, discrimination under proper rules is not prohibited. For instance, equal protection does not require a state to license a blind person to drive a motor vehicle merely because it licenses those with good vision. Nor does equal protection prevent the state from regulating sanitary conditions in restaurants where it does not regulate such conditions in repair shops. We could

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80 *Id.*, at 666.
81 *Id.*, at 666-667.
82 *Id.*, at 667.
83 *Id.*, at 667-668 (citations omitted).

> go on with many illustrations showing that unequal treatment of persons under proper circumstances is essential to the operation of government. On the other hand, the equal protection clause forbids some types of classification. The court's problem has thus been to articulate principles by which constitutional differentiations can be separated from unconstitutional differentiations."[84]

The Kansas Court recognized that the U.S. Supreme Court uses three standards or "levels of scrutiny," in analyzing equal protection claims. "The standard of scrutiny increases with the perceived importance of the right or interest involved and the sensitivity of the classification."[85] The Court discussed each of the three levels of scrutiny, and identified cases in which the Court applies "strict scrutiny," as being those involving fundamental rights including voting, privacy, marriage, and travel, and suspect classifications such as race, ancestry, and alienage. The Court noted that "intermediate scrutiny" was applied to "gender based classifications" and "those based on legitimacy."[86]

The Kansas Court determined that a "heightened scrutiny analysis" was appropriate, based in part upon its finding that "The right of the plaintiff involved in this case is the fundamental constitutional right to have a remedy for an injury to person or property by due course of law."[87] The Court noted that this right was recognized in the Kansas Bill of Rights § 18.[88] The Court noted that the Defendants argued that the statute "does not impair plaintiffs' right to a remedy because Plaintiffs can still sue and recover damages against a health care provider in Kansas; thus, no fundamental right is affected." The Court then stated the following:

> Admittedly, 60-3403 does not eliminate a medical malpractice victim's right to bring suit. However, it impairs his remedy if a jury determines the victim is not entitled to full compensation from the defendant because the victim has received

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[84] *Id.*, at 668.
[85] *Id.*, at 669.
[86] *Id.*, at 669-670.
[87] *Id.*, at 671.
[88] This Court notes that although there does not appear to be a similar provision in the Nevada Constitution, the 5th Amendment right to Due Process in the U.S. Constitution, and the 14th Amendment Equal Protection Clause, seen to provide the same rights.

benefits from independent sources.[89]

The Court concluded that "the right of a victim of medical malpractice to a remedy against the person or persons who wronged him is sufficiently threatened by 60-3403 to require a higher standard of review than the rational basis test."[90] The Kansas Court explained its rationale for applying a higher level of scrutiny as follows:

> The rationale for applying a higher level of scrutiny to this particular legislation is well stated by Learner, Restrictive Medical Malpractice Compensation Schemes: A Constitutional "Quid Pro Quo" Analysis to Safeguard Individual Liberties, 18 Harv. J. on Legis. 143, 184, 189 (1981). Learner compares the political powerlessness of the class of future medical malpractice victims to that of traditional "suspect" and "semi-suspect" classifications – e.g., minorities, women, illegitimates, and aliens. He reasons that certain similar characteristics (e.g., lack of group cohesiveness and political disorganization) justify treating future malpractice victims similarly to other politically powerless, semi-suspect classes who receive judicial protection through an enhanced scrutiny of legislation critically affecting their individual rights. Learner concludes:
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> > "When the legislative balancing process is unduly skewed by the structural inability of the burdened class to form active political coalitions, a court must be sensitive to its institutional role as a counter-majoritarian monitor of legislative legitimacy. The political powerlessness of future medical malpractice victims arguably justifies their status as a semi-suspect class entitled to judicial protection against majoritarian subjugation of individual rights." P. 189.[91]

The Kansas Court noted that in evaluating equal protection challenges to statutes abrogating the collateral source rule in medical malpractice cases, the Supreme Courts of New Hampshire, North Dakota, Ohio, and Idaho, have applied a more rigorous scrutiny than that applied in the rational basis test.[92] They further acknowledged that the Courts in Arizona, Florida, Illinois, and Iowa, opted to apply the less stringent rational

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89 *Farley*, at 672.
90 *Id.*
91 *Id.*, at 672 (citations included).
92 *Id.*, at 673 (citations omitted).

basis test.[93]

In determining whether the equal protection clause of the Kansas Constitution was violated by the statutory abrogation of the collateral source rule in medical malpractice cases, the Kansas Court stated the following:

> In order to resolve this question, we must balance the interests of the burdened class (insured or otherwise compensated victims of medical malpractice) and the benefited class (negligent health care providers and their insurers) with the goal of the legislation (to insure quality and available health care). Finally, we must decide whether the classifications substantially further a legitimate legislative objective.
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> K.S.A. 1986 Supp. 60-3403 singles out a class of persons and organizations (negligent health care providers) for preferential treatment not extended to any other tortfeasors. This particularly narrow class of defendants is relieved of professional accountability for their actions when a plaintiff has received compensation through other means.
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> An examination of the effect of 60-3403 upon the disadvantaged class –insured or otherwise compensated victims of medical malpractice – provides stark contrast. ***These victims of medical malpractice, unlike other tort claimants, are denied compensation from the person or persons who have wronged them. In effect, it gives a 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. Thus, the statute renders the damage award one of need rather than actual compensation for loss.***
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> As pointed out by the Ohio court in *Graley v. Satayatham*, 74 Ohio Op.2d at 320, 343 N.E.2d 832, there can be no satisfactory reason for such separate and unequal treatment. The Ohio court states:
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> > "There obviously is 'no compelling governmental interest' unless it be argued that any segment of the public in financial distress be at least partly relieved of financial accountability for its negligence. To articulate the requirement is to demonstrate its absurdity, for at one time or another every type of profession or business undergoes difficult times, and it is not the business of government to manipulate the law so as to provide succor to one class, the medical, by depriving another, the malpracticed patients, of the equal protection mandated by the constitution. Even remaining with the area of the professions, it is notable that the special consideration given to the medical profession by these statutes is not given to lawyers or dentists or others who are subject

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[93] *Id.*, (citations omitted).

to malpractice suits."[94]

The Court went on to cite to an Arizona Supreme Court decision which held unconstitutional a statute which required medical malpractice actions to be brought within three years from the date of injury, as follows:

> . . . . More importantly, however, we believe that the state *has neither a compelling nor legitimate interest in* providing economic relief to one segment of society by depriving those who have been wronged of access to and remedy by, the judicial system.[95]

The Court discussed the "legislative purpose" in enacting K.S.A. 1986 Supp. 60-3405, by referring to the statute itself, which states:

> Substantial increases in costs of professional liability insurance for health care providers have created a crisis of availability and affordability. This situation poses a serious threat to the continued availability and quality of health care in Kansas. In the interest of the public health and welfare, new measures are required to assure that affordable professional liability insurance will be available to Kansas health care providers, to assure that injured parties receive adequate compensation for their injuries, and to maintain the quality of health care in Kansas.[96]

With regard to the Legislature's purpose for enacting the statute, the Kansas Court provided the following analysis:

> While the legislature's purpose in enacting 60-3403 may have been to increase the quality and availability of health care, application of such a statute is counterproductive. ***It is a major contradiction to legislate for quality health care on the one hand, while on the other hand in the same statute, to reward negligent health care providers.*** As at least one court has observed, if the

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[94] Farley, at 675 (citations included), (emphasis added).

[95] Id., at 676, citing to Kenyon v. Hammer, 142 Ariz. 69, 84, 688 P.2d 961 (1984), emphasis added by the Kansas Court.

[96] Farley, at 676, citing to K.S.A. 1986 Supp. 60-3405.

medical profession is less accountable than formerly, relaxation of the medical standards may occur with the public the victim. . . . Further, while the effect of 60-3403 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. The reasoning of the Supreme Court of New Hampshire . . . is instructive on this point:

> We first note that, '[a]bolition of the [collateral source] rule ... presents the anomalous result that an injured party's insurance company may be required to compensate the victim even though the negligent tortfeasor is fully insured. ***Not only does this abolition patently discriminate against the victim's insurer, it may eventually result in an increased insurance burden on innocent parties.'*** (citation omitted). Thus, although RSA 507-C:7 1 (Supp. 1979) may result in lower malpractice insurance rates for health care providers, it may also increase the cost of insurance for members of the general public because they are potential victims of medical negligence.
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> . . .
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> Finally, although the collateral source rule operates so as to place some plaintiffs in a better financial position than before the alleged wrong, its abolition will result in a windfall to the defendant tortfeasor or the tortfeasor's insurer. Moreover, this windfall will sometimes be at the expense of the plaintiff, because 'in many instances the plaintiff has paid for these [collateral] benefits in the form of ... concessions in the wages he received because of such fringe benefits.' (citations omitted). Thus, when the collateral payments represent employment benefits, the price for the public benefit derived from RSA 507-C:7 1 (Supp. 1979) will be paid solely by medical malpractice plaintiffs.[97]

The Kansas Court concluded that the statute at issue placed a heavy burden not only on the injured plaintiffs, but also on the victim's insurer and potentially the general public. The Court went on to state that "if it is true, as the legislature has determined that a health care 'crisis' exists, the burden of remedying that crisis should not be placed solely upon the shoulders of malpractice victims. Rather, it more appropriately should fall upon those causing the crisis – the negligent health care providers."[98]

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[97] *Farley* at 676-677, citing to *Graley v. Stayatham*, 74 Ohio Op.2d at 320, 343 N.E.2d 832; and *Carson v. Maurer*, 120 N.H. at 939-40, 424 A.2d 825. (emphasis added).

[98] *Farley* at 677. The Kansas Court cites to *Coburn by and through Coburn v. Agustin*, 627 F.Supp. at 995-96; and *Crowe by and through Crowe v. Wigglesworth*, 623 F.Supp. at 706. They note that in *Crowe*, the Judge indicated that ". . . defendants cavalierly refer to the 'obvious' medical malpractice crisis justifying this

The Kansas Supreme Court pointed out a difficulty posed by the statute at issue, which has also been an issue in Nevada:

> We further point out that under K.S.A. 60-3403 in a case involving both medical malpractice and products liability, collateral source evidence would be admissible in the malpractice portion of the trial and inadmissible in the products liability portion. Since a jury would be unable to erase the collateral source evidence once admitted for malpractice purposes, the trial would have to be bifurcated with separate juries on each issue, creating an unworkable administration of justice under comparative fault principles.[99]

The Kansas court concluded that "the classifications created by 60-3403 treat both negligent health care providers and their victims differently from other persons similarly situated and do not substantially further a legitimate legislative objective, contrary to law."[100] Consequently, the Court found the statute to be unconstitutional as it violated the equal protection clause of the State Constitution.

The Supreme Court of Ohio has also addressed a similar issue in *Sorrell v. Thevenir*.[101] At issue was R.C. 2317.45, which required the trial court to deduct from a jury award any collateral benefits received by a plaintiff. The trial court found that the statute failed to meet the strict scrutiny test, and the court applied "strict scrutiny" because it found that the statute violated the fundamental right to a jury trial. The trial court also observed that "the statute was enacted to cure a supposed 'insurance crisis.' There is no demonstrated evidence from which to conclude that a 'crisis' ever existed or that [the law][102] cured this 'crisis.' There is no compelling reason to trample plaintiff's constitutional rights to relieve a particular industry of liability."[103] On appeal, the Court of

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legislation. . . . In the Legislature's haste to remedy the situation, it has overlooked, or more likely, ignored the fundamental cause of the so-called crisis: *it is the unmistakable results not of excessive verdicts, but of excessive malpractice by health care providers*."

99 *Farley* at 678.

100 Id.

101 69 Ohio St.3d 415, 633 N.E.2d 504 (1994).

102 Am.Sub.H.B. No.1, 142 Ohio Laws Part I, 1661

103 *Sorrell v. Thevenir*, 69 Ohio St.3d 415, 416, 633 N.E.2d 504, 506-507 (1994).

Appeals reversed and remanded in a split decision. On appeal to the Ohio Supreme Court, the Court began by stating, "In determining the constitutionality of any statute, we begin our analysis with the principle that all legislative enactments enjoy a strong presumption of constitutionality."[104]

> The Court noted the purpose of the act as follows:
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> The purpose of the act, as stated in its title, is "to make changes in civil justice and insurance law, thereby reducing the causes of the current insurance crisis and preventing future crises, and ensuring the availability and affordability of insurance coverages required by charitable nonprofit organizations, public organizations, political subdivisions, individual proprietors, small businesses, and commercial enterprises."[105]

Another purpose of the statute was apparently to "prevent double recoveries in tort actions. . . . However, opponents of the Act . . . claimed that the insurance industry had contrived an insurance crisis in order to promote and protect 'organized price gouging' by insurance underwriters."[106] The court noted that "In any event, one effect of the Act is to limit the collateral source rule."[107] The Ohio Court discussed the right to a jury trial, and indicated that the right to a jury trial was not just a question of procedure; "the right to jury trial derives from Magna C[]arta. . . For centuries it has been held that the right of trial by jury is a fundamental constitutional right, a substantial right, and not a procedural privilege."[108] The Court held that "R.C. 2317.45 requires trial courts to deduct from a plaintiff's jury award collateral benefits which have been or will be received by the plaintiff, irrespective of whether the collateral benefits are actually duplicated in the jury's verdict. . . . In this respect, courts may, consistent with R.C. 2317.45, enter judgments in

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104 *Id.*, at 418-419, citing *State ex rel. Dickman v. Defenbacher*, 164 Ohio St. 142, 57 O.O. 134, 128 N.E.2d 59, (1955), paragraph one of the syllabus; *Mominee v. Scherbarth*, 28 Ohio St.3d 270, 274, 28 OBR 346, 349, 503 N.E.2d 717, 720 (1986); *Brady v. Safety-Kleen Corp.*, 61 Ohio St.3d 624, 631, 576 N.E.2d 722, 727 (1991).

105 *Id.*, at 420.

106 *Id.*, at 420-421 (citations omitted).

107 *Id.*, at 421.

108 *Sorrell v. Thevenir*, 69 Ohio St.3d 415, 421, 633 N.E.2d 504, 510 (1994), (citations omitted).

disregard of the jury's verdict and thus violate the plaintiff's right to have all facts determined by the jury, including damages."[109] The Court held that the statute encroached upon the "fundamental and inviolate right to trial by jury,"[110] and therefore was unconstitutional under the Ohio Constitution.

With regard to the Ohio Court's equal protection analysis, it applied the "strict scrutiny" test, because they determined that the statutory classification involved a "fundamental right." The Court noted that "R.C. 2317.45 and 2305.27 establish two classifications of tort victims: medical malpractice tort victims and all other tort victims."[111] The Court realized that "Under R.C. 2305.27, jury awards in medical malpractice claims are subject to a collateral source rule different from the rule for awards in all other tort cases."[112] The Court's discussion regarding the purposes of the statute, and its equal protection analysis are informative and instructive, as follows:

> In our view, the ostensible purposes of R.C. 2317.45 do not withstand equal protection scrutiny under a strict scrutiny analysis. Given that one of the purposes of R.C. 2317.45 is to limit double recoveries, the different treatment for medical malpractice tort victims with regard to collateral recovery is not necessary to promote a compelling governmental interest, especially where the statutory classifications are established in response to a crisis that has not clearly been established to have existed. (Citation omitted.)
>
> Moreover, a statutory classification violates the Equal Protection Clause of the Ohio Constitution if it treats similarly situated people differently based upon an illogical and arbitrary basis. (Citations omitted.) The arbitrariness of R.C. 2317.45 in this regard is cogently pointed out by amicus curiae, Ohio Academy of Trial Lawyers:
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> > "If there was an insurance crisis, it would be a crisis affecting all tort defendants. There is no rational reason for distinguishing between medical malpractice tort defendants and all other tort defendants. This disparate treatment can result in vastly different results involving the same injury. For example, two tort victims suffer the identical injury, the laceration of an artery resulting in death. One tort

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109 *Id.*, at 422, (citations omitted).
110 *Id.*
111 *Id.*, at 425.
112 *Id.*

> victim is injured by a piece of broken glass while driving a company truck within the scope of employment. The other tort victim is injured by the medical negligence of a physician who lacerates an artery during an elective surgery procedure. Both tort victims remain in the hospital for ten days before their death. Due to the difference in the collateral source statutes, these two identical injuries may result in vastly different compensation for the victim. The Equal Protection Clause mandates that those similarly situated be similarly treated."

Thus, even under the less stringent rational basis test applied by the majority in *Morris, supra*, we believe that R.C. 2317.45 is constitutionally infirm on equal protection grounds.[113]

The Supreme Court of North Dakota addressed a similar issue in 1978, in the case of *Arneson v. Olson.*[114] In that case, there were various constitutional challenges to various provisions of the Medical Malpractice Act, Chapter 26-40.1. A portion of the Act, Section 26-40.1-08 eliminated the "collateral source" doctrine which had previously been approved by that Court. The Act provided that "damages for bodily injury or wrongful death under the statute, which includes damages for out-of-pocket expense for care, are to be reduced by any 'nonrefundable medical reimbursement insurance benefit, less premiums paid by or for the claimant over the immediate preceding five years.' Thus, the tortfeasor is to have the benefit of insurance privately purchased by or for the tort victim, except to the extent that five years' premiums will be repaid."[115] The trial court found that the Act was unconstitutional, and the decision was appealed to the state Supreme Court. The Supreme Court addressed numerous issues on appeal, including, "Does the near-elimination of the collateral source rule by Section 26-40.1-08 violate the constitutional rights of patients?"[116]

The Court noted that in recent years, a number of states had reacted to what was described as a "medical malpractice crisis."[117] The trial court had entered a finding that

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113 *Sorrell* at 425-426, (citations omitted).
114 270 N.W.2d 125 (1978).
115 *Arneson v. Olson*, 270 N.W.2d 125, 128 (1978).
116 *Id.*, at 130.
117 *Id.*

there really was no "crisis" in North Dakota.[118] The Supreme Court determined that either the "Legislature was misinformed or subsequent events have changed the situation substantially."[119] Consequently, the Court could not find that the trial court's finding was clearly erroneous.[120]

The Court considered the various standards of Constitutional scrutiny, and decided to apply a standard similar to an "intermediate scrutiny" test, as follows:

> In *Johnson v. Hassett*, supra, we referred to the three standards of scrutiny of equal-protection questions for a judicial adjudication of constitutionality which appeared to have evolved in the Federal courts. One is the traditional reasonable or rational basis standard under which a statute will be upheld if its classifications are not patently arbitrary and bear a reasonable relationship to a legitimate government interest. However, if the case involves an "inherently suspect classification" or a "fundamental interest," it is "subjected to strict judicial scrutiny." A third, less clearly defined, category requires a "close correspondence between statutory classification and legislative goals." In *Johnson v. Hassett*, supra, we said that this latter test closely approximates the substantive due-process test historically used by this and other state courts. . . . It is the test we will apply in this case, and it is the test applied by the Idaho court. . .[121]

The Court focused primarily on the monetary limits of recovery, and not on the abolition of the collateral-source doctrine. The Court affirmed the trial court's conclusion that the Act was unconstitutional, and held as follows:

> . . . the "cumulative effect of the limitation of the application of the Act to only one category of health-care professionals (Sec. 26-40.1-02), the arbitrary requirement of consent under conditions of duress, and statutory imposition of "consent" in emergencies (Secs. 26-40.1-03 and 26-40.1-04), the limitation on use of the doctrine of res ipsa loquitur (Sec. 26-40.1-07), and the near abolition of the collateral-source doctrine (Sec. 26-40.1-08) is to violate the right of

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118 *Id.*, at 136.
119 *Id.*
120 *Id.*
121 *Arneson*, at 132-133. (Note that the Court acknowledged that the Wisconsin, Kansas, and Nebraska courts applied the rational-basis test.)

> medical patients in this State to due process of law. We find that the statute is, in respect to these matters, arbitrary and unreasonable and discriminatory, and that the methods adopted have no reasonable relation to the attainment of the results desired.[122]

In the case of *Carson v. Maurer, et al.*[123] the Supreme Court of New Hampshire held that provisions of a medical malpractice statute violated the equal protection clause, in part because it abolished the collateral source rule. The subject malpractice statute, RSA 507-C, "was intended to codify and stabilize the law governing medical malpractice actions and to improve the availability of adequate liability insurance for health care providers at reasonable cost."[124] Plaintiffs argued that the statute violated the equal protection guarantees of the U.S. and New Hampshire Constitutions, in that it "improperly singles out victims of medical negligence, as distinct from victims of other kinds of negligence, for harsh treatment by restricting the means by which they may sue and the damages they may recover for their injuries."[125]

The Court recognized that the medical malpractice statute did establish several classifications, as follows:

> . . . First, it confers certain benefits on tortfeasors who are health care providers that are not afforded to other tortfeasors. Conversely, it distinguishes between those tort claimants whose injuries were caused by medical malpractice and all other tort claimants. . . . The issue is whether any of these classifications violates the equal protection mandate that "those who are similarly situated be similarly treated."[126]

The plaintiffs in that case argued that the statute impinged on a "fundamental right," but the Court noted that "the right to recover for one's injuries is not a fundamental

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122 *Id.*, at 137.
123 120 N.H. 925, 424 A.2d 825 (1980).
124 *Carson v. Maurer, et al.*, 120 N.H. 925, 930, 424 A.2d 825, 830 (1980).
125 *Carson* at 930-931.
126 *Carson* at 931, citing *Estate of Cargill v. City of Rochester*, 119 N.H. 661, 665, 406 A.2d 704, 706 (1979), quoting *Belkner v. Preston*, 115 N.H. 15, 17, 332 A.2d 168, 170 (1975).

right."[127] The Court decided to use an "intermediate scrutiny" analysis, as follows:

> Although the right to recover for personal injuries is not a "fundamental right," it is nevertheless an important substantive right. . . . We now conclude . . . that the rights involved herein are sufficiently important to require that the restrictions imposed on those rights be subjected to a more rigorous judicial scrutiny than allowed under the rational basis test. Consequently, the classifications created by RSA ch. 507-C (Supp. 1979) "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation" in order to satisfy State equal protection guarantees.[128]

The Court noted that although the U.S. Supreme Court had restricted its application of the "intermediate scrutiny" test to cases involving classifications based on gender and illegitimacy, in interpreting the State Constitution, the Court was not confined to federal constitutional standards, and they were free to grant individuals more rights than the Federal Constitution requires. Consequently, the Court held that in determining whether the statute denied medical malpractice victims equal protection, "the test is whether the challenged classifications are reasonable and have a fair and substantial relation to the object of the legislation."[129] The Court noted that if there is no "suspect classification" or a "fundamental right" being affected, "courts will not second-guess the legislature as to the wisdom of or necessity for legislation."[130]

With regard to the specific challenge to the abrogation of the collateral source

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[127] *Carson* at 931.

[128] *Carson* at 931-932 (citations omitted).

[129] *Carson* at 932-933. It should be noted that in *Community Resources for Justice, Inc. v. City of Manchester*, 154 N.H. 748, 917 A.2d 707 (2007), the New Hampshire Supreme Court overruled *Carson v. Maurer*, in part, and restated the new standard as it relates to "intermediate scrutiny":

> To eliminate the confusion in our intermediate level of review and to make our test more consistent with the federal test, we now hold that intermediate scrutiny under the State Constitution requires that the challenged legislation be substantially related to an important governmental objective. The burden to demonstrate that the challenged legislation meets this test rests with the government. . . . To meet this burden, the government may not rely upon justifications that are hypothesized or "invented post hoc in response to litigation," nor upon "overbroad generalizations." (Citing to *U.S. v. Virginia*, 518 U.S. 515, 533 116 S.Ct. 2264, 135 L.Ed.2d 735 [1996].)

[130] *Carson* at 933. (citations omitted).

rule, the court discussed the plaintiffs' argument as follows:

> The plaintiffs argue that . . . by making the collateral source rule unavailable to a single class of tort claimants, unreasonably discriminates against them. Under the collateral source rule, a Plaintiff is permitted to recover in full from the defendant tortfeasor even though he receives compensation from sources other than the defendant. By abolishing the collateral source rule and thereby eliminating the "duplicate recovery" factor that exists in some cases where the rule is applied, the legislature sought to reduce malpractice awards and contain costs in the medical injury reparations system.[131]

The Court then noted the following:

> "[A]bolition of the [collateral source] rule ... presents the anomalous result that an injured party's insurance company may be required to compensate the victim even though the negligent tortfeasor is fully insured. Not only does this abolition patently discriminate against the victim's insurer, it may eventually result in an increased insurance burden on innocent parties." . . . Thus, although RSA 507-C:7 I (Supp. 1979) may result in lower malpractice insurance rates for health care providers, it may also increase the cost of insurance for members of the general public because they are potential victims of medical negligence.[132]

The Court then made an interesting point comparing the case where a Plaintiff pays the premiums for his or her own health insurance, as opposed to when he or she gives concessions in his wages, in exchange for health insurance as an employment benefit. The Court stated the following:

> . . . although the collateral source rule operates so as to place some plaintiffs in a better financial position than before the alleged wrong, its abolition will result in a windfall to the defendant tortfeasor or the tortfeasor's insurer. Moreover, this windfall will sometimes be at the expense of the plaintiff because "in many instances the plaintiff has paid for these (collateral) benefits in the form of . . . concessions in the wages he received because of such

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131 *Carson* at 939, citing to *Moulton v. Groveton Papers Co.*, 114 N.H. 505, 509, 323 A.2d 906, 909 (1974).

132 *Carson* at 939-940, citing Jenkins, 52 S.Cal.L.Rev. at 948.

> fringe benefits. . . Thus, when the collateral payments represent employment benefits, the price for the public benefit derived from RSA 507-C:7 I (Supp. 1979) will be paid solely by medical malpractice plaintiffs.
>
> The above considerations make it apparent that RSA 507-C:7 I (Supp. 1979) arbitrarily and unreasonably discriminates in favor of the class of health care providers. Although the statute may promote the legislative objective of containing health care costs, the potential cost to the general public and the actual cost to many medical malpractice plaintiffs is simply too high. We therefore hold that RSA 507-C:7 I (Supp. 1979) violates the State's equal protection clauses.[133]

In *Rudolph v. Iowa Methodist Medical Center*,[134] the Supreme Court of Iowa held that a statute abrogating the collateral source rule in medical malpractice suits, was constitutional. That court applied the rational basis test, which they described as follows:

> The constitutional safeguard (of equal protection) is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.[135]

The Court acknowledged that "the classification in the present case treats victims of medical malpractice differently than victims of other torts because it denies malpractice victims the benefit of the collateral source rule which is available to other tort victims."[136] The Court went on to explain what the legislature's purpose was in enacting the statute, as follows:

> It thus appears that the legislature's purpose in enacting section 147.136 was to reduce the size of malpractice verdicts by barring recovery for the portion of the loss paid for by collateral benefits. The reduction in verdicts would presumably

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133 *Carson* at 940-941, citing *Moulton v. Groveton Papers Co.*, 114 N.H. at 509, 323 A.2d at 909, and *Cf. Arneson v. Olson*, 270 N.W.2d at 137.

134 293 N.W.2d 550 (1980).

135 Rudolph v. Iowa Methodist Medical Center, 293 N.W.2d 550, 558 (1980).

136 Id.

result in a reduction in premiums for malpractice insurance, making it affordable and available, helping to assure the public of continued health care services.[137]

The Court cited to an Arizona case, dealing with the same issue:

> In an Arizona case which addressed an equal protection challenge to a statute abrogating the doctrine in medical malpractice cases, the court upheld the statute saying:
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> > Nor is the application of the [statute] only to malpractice actions so arbitrary and unreasonable as to deny to medical malpractice claimants equal protection of the laws. The [statute] was intended by the legislature to give the jury the true extent of damages sustained by the plaintiff thereby. By scaling down the size of jury verdicts by the amount of collateral benefits the plaintiff may have received, the legislature could reasonably assume that a reduction in premiums would follow. This was one of the reasons for the Act. The legislature is entitled to proceed "one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind."[138]

The Court noted that "under similar reasoning, other regulations affecting medical malpractice recovery rights have been upheld in the face of an equal protection attack."[139] The Court indicated that cases which had invalidated such regulations were distinguishable and unpersuasive.[140] The Iowa Court indicated that "One who attacks a

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[137] Rudolph at 558.

[138] *Rudolph* at 558, citing *Eastin v. Broomfield*, 116 Ariz. 576 at 585, 570 P.2d at 753, which cited *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489, 75 S.Ct. 461, 465, 99 L.Ed. 563, 573 (1955).

[139] *Rudolph* at 558, citing *Woods v. Holy Cross Hospital*, 591 F.2d at 1174-75; Scoane *v. Ortho Pharmaceuticals, Inc.*, 472 F.Supp. at 472, *Hines v. Elkhart General Hospital*, 465 F.Supp. at 430-31; *Johnson v. St. Vincent Hospital, Inc.*, Ind., 404 N.E.2d 585 (1980) (upholding statutory limitation on amount of recovery); *Everett v. Goldman*, 359 So.2d at 1266-67; *Attorney General v. Johnson*, 282 Md. At 312-13, 385 A.2d at 78-79; *Paro v. Longwood Hospital*, 373 Mass. At --, 369 N.E.2d at 989; *Prendergast v. Nelson*, 199 Neb. At 113-15, 256 N.W.2d 667-68 (involving a statutory limitation on total recovery); *State ex rel. Strykowski v. Wilkie*, 81 Wis.2d at 508-14, 261 N.W.2d at 442-44.

[140] Rudolph at 559, citing Arneson v. Olson, 270 N.W.2d 125, 133, 135-36 (N.D. 1978) (using means scrutiny test); Simon v. St. Elizabeth Medical Center, Ohio Com. Pl. 3 Ohio Op.3d 164, 167, 355 N.E.2d 903, 911 (Ct.C.P. Montgomery County 1976); Graley v. Satayatham, Ohio Com.Pl., 74 Ohio Op.2d 316, 320, 343 N.E.2d 832, 837-38 (Ct.C.P. Cuyahoga County 1976) (both Ohio cases using a strict scrutiny test); American Bank & Trust Co. v. Community Hospital of Los Gatos-Saratoga, Inc., 104 Cal.App.3d 219, 226-235, 163 Cal.Rptr. 513, 516-22 (1980).

statute on equal protection grounds has a heavy burden under the traditional standard."[141] The Court concluded that Plaintiffs did not carry their heavy burden to show that the statute lacked a rational relationship to a legitimate state interest, and consequently, it was not unconstitutional.

The Chief Justice of the Iowa Supreme Court dissented from the above-referenced opinion, and the analysis in his dissenting opinion is also instructive. He agreed with the majority that a traditional equal protection analysis was appropriate, but he indicated that the traditional analysis required that "legislative classifications not be 'arbitrary or unreasonable,' but based 'on a real and substantial difference having a reasonable relation to a legitimate object of government.'"[142]

After reviewing a list of prior cases[143], the Judge concluded, "It is plain that Iowa's collateral source statute arbitrarily reduces the malpractice damage award and thus impinges on a substantive rather than a procedural right."[144] The Judge further pointed out that the statute created classifications of negligent health care providers. He proffered the following example:

> Assume in the case before us the hospital employees who caused William's head to drop backwards were nurses' aides who were not among those favored in the classification "licensed health care provider," and the injury was caused by their inadequate training and supervision. These persons could be named co-defendants with a "licensed health care provider" in the same action by the same plaintiffs for the same injuries and yet under this classification not be accorded the same privileges and immunities. It is in these circumstances, where the statute under scrutiny singles out the group to be protected while excluding others similarly situated, that the courts have held there has been a denial of equal protection of the law.[145]

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141 Rudolph at 559, citing Franks v. Kohl, 286 N.W.2d 663, 669 (Iowa 1979).

142 *Rudolph* at 561-562, citing *Redmond v. Carter*, 247 N.W.2d 268, 271 (Iowa 1976).

143 *Wright v. Central Du Page Hospital Association*, 63 Ill.2d 313, 347 N.E.2d 736 (1976); *State ex rel. Cardinal Glennon Memorial Hospital for Children v. Gaertner*, 583 S.W.2d 107 (Mo. 1979); *Arneson v. Olson*, 270 N.W.2d 125 (N.D. 1978); *Simon v. St. Elizabeth Medical Center*, 3 Ohio Op.3d 164, 355 N.E.2d 903 (Ct.C.P. Montgomery County 1976); *Graley v. Satayatham*, 74 Ohio Op.2d 316, 343 N.E.2d 832 (Ct.C.P. Cuyahoga County 1976).

144 *Rudolph* at 563, citing *Groesbeck v. Napier*, 275 N.W.2d 388, 391 (Iowa 1979).

145 *Rudolph* at 565.

Another case which is very instructive is a case from the California Supreme Court -- *Fein v. Permanente Medical Group.*[146] This case also involved a medical malpractice claim, and a challenge to the constitutionality of the malpractice tort-reform statute in California. Ultimately, the Court found the statute to be valid. The analyses by both the majority and dissenting opinions are instructive.

The Court applied the "rational basis" test in determining whether the statute was constitutional. The majority opinion indicated the following:

> Under the traditional, rational relationship equal protection standard, what is required is that the court "conduct 'a serious and genuine judicial inquiry into the correspondence between the classification and the legislative goals.'"[147]

The Court explained what the "collateral source rule" was in general terms, and then discussed the California statute which altered the rule in medical malpractice cases:

> Under section 3333.1, subdivision (a), a medical malpractice defendant is permitted to introduce evidence of such collateral source benefits received by or payable to the plaintiff; when a defendant chooses to introduce such evidence, the plaintiff may introduce evidence of the amounts he has paid – in insurance premiums, for example – to secure the benefits. Although section 3333.1, subdivision (a) – as ultimately adopted – does not specify how the jury should use such evidence, the Legislature apparently assumed that in most cases the jury would set plaintiff's damages at a lower level because of its awareness of plaintiff's "net" collateral source benefits.
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> . . . .
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> In addition, section 3333.1, subdivision (b) provides that whenever such collateral source evidence is introduced, the source of those benefits is precluded from obtaining subrogation either from the plaintiff or from the medical malpractice defendant. As far as the malpractice plaintiff is concerned, subdivision (b) assures that he will suffer no "double deduction" from his tort

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[146] 38 Cal.3d 137, 695 P.2d 665, 211 Cal.Rptr. 368 (1985).

[147] *Fein v. Permanente Medical Group*, 38 Cal.3d 137, 163, 695 P.2d 665, 684-685, 211 Cal.Rptr. 368, 387 (1985), citing *Cooper v. Bray*, 21 Cal.3d 841, 848, 148 Cal.Rptr. 148, 582 P.2d 604 (1978) (quoting *Newland v. Board of Governors*, 19 Cal.3d 705, 711, 139 Cal.Rptr. 620, 566 P.2d 254 (1977).

> recovery as a result of his receipt of collateral source benefits; because the jury that has learned of his benefits may reduce his tort award by virtue of such benefits, the Legislature eliminated any right the collateral source may have had to obtain repayment of those benefits from the plaintiff. As for the malpractice defendant, subdivision (b) assures that any reduction in malpractice awards that may result from the jury's consideration of the plaintiff's collateral source benefits will inure to its benefit rather than to the benefit of the collateral source.[148]

The California Court cited to its prior case of *Barme v. Wood*,[149] which addressed a constitutional challenge to section 3333.1, subdivision (b) brought by a "collateral source," whose subrogation rights against a malpractice defendant had been eliminated by the statute. The Court upheld the constitutionality of the statute, explaining that "a collateral source has no vested due process right to subrogation and that section 3333.1, subdivision (b) is rationally related to the purposes of MICRA since it reduces the costs imposed on medical malpractice defendants by shifting some of the costs in the area to other insurers."[150]

The Court indicated that:

> Although, by its terms, subdivision (a) simply adds a new category of evidence that is admissible in a medical malpractice action, we recognize that in reality the provision affects the measure of a plaintiff's damage award, permitting the jury to reduce an award on the basis of collateral source benefits of which – but for the statute – the jury would be unaware. Nonetheless ... , .. a plaintiff has no vested property right in a particular measure of damages. Thus, the fact that the section may reduce a plaintiff's award does not render the provision unconstitutional so long as the measure is rationally related to a legitimate state interest.
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> Because section 3333.1, subdivision (a) is likely to lead to lower malpractice awards, there can be no question but that this provision . . . directly relates to MICRA's objective of reducing the costs incurred by malpractice defendants and their insurers.
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> . . . .
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> Moreover, the Legislature clearly did not act irrationally in choosing to modify the collateral source rule as one means of lowering the costs of

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148 *Fein*, at 164-166.

149 37 Cal.3d 174, 207 Cal.Rptr. 816, 689 P.2d 446 (1984).

150 *Fein*, at 166.

malpractice litigation.[151]

The Court concluded that the provision was rationally related to a legitimate state interest and did not violate due process. Although the above-referenced analysis applied to the "due-process" challenge, the Court went on to indicate that "Plaintiff's equal protection challenge to section 3333.1 is equally without merit . . . the Legislature could properly restrict the statute's application to medical malpractice cases because the provision was intended to help meet problems that had specifically arisen in the medical malpractice field."[152]

The Chief Justice of the California Supreme Court strongly dissented, indicating that, "With today's decision, a majority of this court have upheld, in piecemeal fashion, statutory provisions that . . . divest (medical malpractice victims) of the benefit of their own insurance policies."[153] He indicated that "now that the medical malpractice 'crisis' is fading into the past, courts around the country are taking a closer look at medical malpractice legislation."[154]

Chief Justice Bird's dissent focuses in part on the damage cap. He indicated that "this court is urged to apply a heightened level of equal protection scrutiny. However, I do not find it necessary to address that issue, since the limit cannot survive any 'serious and genuine inquiry into the correspondence between the classification and the legislative goals.'"[155] He concluded that "there is no logically supportable reason why the most severely injured malpractice victims should be singled out to pay for special relief to medical tortfeasors and their insurers."[156] He went on to indicate that "The result is a fundamentally arbitrary classification," and "Such arbitrary treatment cannot be justified

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151 *Fein*, at 166.
152 *Fein*, at 167.
153 *Fein*, at 168.
154 *Fein*, at 169.
155 *Fein*, at 172, citing *Carson v. Maurer*, 424 A.2d 825; *Cooper v. Bray*, 21 Cal.3d 841, 848, 148 Cal.Rptr. 148, 582 P.2d 604 (1978), quoting *Newland v. Board of Governors*, 19 Cal.3d 705, 711, 139 Cal.Rptr. 620, 566 P.2d 254 (1977).
156 *Fein* at 173.

with reference to the purpose of the statute."[157]

Chief Justice Bird also strongly dissented from the majority -- specifically its decision regarding the equal protection challenge relating to the abrogation of the collateral source rule. He explained the purpose of the collateral source rule, as follows:

> The collateral source rule bars the deduction of collateral compensation, such as insurance benefits, from a tort victim's damage award. The effect of the rule is to prevent tortfeasors and their insurers from reaping the benefits of collateral source funds, which "are usually created through the prudence and foresight of persons other than the tortfeasor, frequently including the injured person himself.[158]

He went on and indicated the following, with regard to which party should benefit from collateral benefits:

> As this court has observed, the collateral source rule embodies "the venerable concept that a person who has invested years of insurance premiums to assure his medical care should receive the benefits of his thrift. The tortfeasor should not garner the benefits of his victim's providence."[159]

Chief Justice Bird agreed in his dissenting opinion that the statute in question must be reviewed under the "rational relationship test," which requires that "legislative classifications bear a rational relationship to a legitimate state purpose to pass constitutional muster."[160] He identified two purposes, which the statute's proponents contended that it served. The dissent's analysis in that regard, was as follows:

> First, it seeks to eliminate double recoveries by victims. However,

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157 *Fein*, at 173.

158 *Fein*, at 175-176, citing *Hrnjak v. Graymar, Inc.*, 4 Cal.3d 725, 729, 94 Cal.Rptr. 623, 484 P.2d 599 (1971); and generally, Schwartz, The Collateral-Source Rule (1961) B.U.L.Rev. 348, 354; and *Gypsum Carrier, Inc. v. Handelsman* (9th Cir. 1962) 307 F.2d 525, 534-535.

159 *Fein*, at 176, citing *Helfend v. Southern Cal. Rapid Transit Dist.*, 2 Cal.3d 1, 9-10, 84 Cal.Rptr. 173, 465 P.2d 61 (1970).

160 *Fein*, at 176, citing *Brown v. Merlo*, 8 Cal.3d at p. 882, 106 Cal.Rptr. 333, 506 P.2d 212; *Cooper v. Bray*, 21 al.3d at p. 848, 148 Cal.Rptr. 148, 582 P.2d 604.

there is no apparent reason why legislation enacted for this purpose should be limited to medical malpractice victims.

Moreover, as this court has recognized, the collateral source rule "does not actually render 'double recovery' for the plaintiff." Tort victims are not fully compensated for their injuries by their judgments alone. . . . plaintiffs must pay attorneys fees and costs out of their recoveries. . . .

The collateral source rule enables the plaintiff to recover some of these costs from collateral sources. Hence, the rule "will not usually give him 'double recovery,' but partially provides a somewhat closer approximation to full compensation for his injuries." Section 3333.1 will prevent many tort victims from obtaining this relatively full compensation simply because they were injured by a doctor instead of some non-medical tortfeasor.

Furthermore, while supposedly eliminating victims' "windfalls," section 3333.1 provides a windfall to negligent tortfeasors. Under section 3333.1, negligent healthcare providers obtain a special exemption from the general rule that negligent tortfeasors must fully compensate their victims. ***"No reason in law, equity or good conscience can be advanced why a wrongdoer should benefit from part payment from a collateral source .... If there must be a windfall certainly it is more just that the injured person shall profit therefrom, rather than the wrongdoer...."***

The second purpose advanced to justify section 3333.1 is that of reducing the cost of medical malpractice insurance, the overall goal of MICRA. It is argued that the Legislature rationally singled out medical malpractice actions in order to alleviate a "crisis" in medical malpractice insurance rates.

However, the relationship between section 3333.1 and the reduction of malpractice insurance premiums is entirely speculative. There is no requirement that physicians' insurers pass on their savings in the form of lowered premiums. Hence, insurance companies may simply retain their windfall for private purposes. Further, section 3333.1 operates only as a rule of evidence. Juries may choose not to offset collateral compensation. Hence, "a degree of arbitrariness may frustrate the relationship between this provision and attainment of MICRA's goal."[161]

In conclusion, Chief Justice Bird stated this:

. . . [S]ection 3333.1 permits negligent healthcare providers and their insurers to reap the benefits of their victims' foresight in obtaining insurance. This departure from the general rule prohibiting the deduction of collateral source benefits from a judgment is not rationally related to any legitimate state

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[161] *Fein*, at 176-177 (citations omitted, emphasis added).

purpose. Hence, section 3333.1 should be declared unconstitutional.[162]

THOMSON V. PORRECA

As this Court indicated at the time of the oral argument on the subject motion, this Court has no desire, nor intention, to legislate from the bench. It is beyond the purview and the authority of this Court to find a statute invalid, simply because this Court does not agree with the Legislature. On the other hand, however, when a statute is specifically challenged on constitutional grounds, it is the duty and responsibility of the judicial system, to thoroughly evaluate and consider whether the challenged statute does in fact, comply with both the Nevada and United States Constitutions. While the Legislature clearly considers the constitutionality of a proposed bill, it is not the Legislature's specific duty to analyze the constitutionality of a statute, or to know prior to enactment how the statute will be applied. In the present case, we are not even dealing with a statute created by legislative enactment, but by ballot initiative (KODIN/ NRS 42.021). The majority of the electorate was in favor of NRS 42.021 when it was presented on the ballot, but clearly the electorate does not vet a proposed statute for constitutionality. Consequently, this Court's responsibility to evaluate the constitutionality of the subject statute is even greater than if the statute had been enacted by the Legislature. It should also be noted that this Court was not asked to consider the constitutionality of the entire medical malpractice scheme in Nevada. The issue before this Court is simply to determine the constitutionality of NRS 42.021, as it relates to the abolition of the "collateral source rule," in cases involving medical malpractice in Nevada.

In oral argument, Plaintiff's counsel argued that if the subject statute is applied, the defendant in a medical malpractice case would receive a potential benefit that no other defendant in the tort system would receive. Plaintiff's counsel argues that the statute already imposes a cap on non-economic damages, but that there was apparently a decision

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[162] *Fein*, at 178. Note that two other California Supreme Court Justices agreed with Chief Justice Bird, but one wanted to apply an "intermediate scrutiny" analysis instead of the "rational basis" analysis.

to not cap the recovery for economic damages. Plaintiff asserts, however, that the abrogation of the collateral source rule acts as a "hidden cap" on economic damages. Plaintiff argues that in an injury case, the Plaintiff is entitled to recover the reasonable and necessary medical expenses incurred. NRS 42.021 would effectively reduce that recovery, as a jury would likely reduce the Plaintiff's recovery by the amount previously recovered from collateral sources. Consequently, NRS 42.021 acts as a cap or a limitation on the economic damages recoverable in a medical malpractice case.

Plaintiff further argues that NRS 42.021 is unconstitutionally vague, as it relates to the abrogation of the collateral source rule, because once the information comes into evidence, the statute does not provide any instruction with regard to how a jury should use such evidence. The jury is not instructed to reduce the Plaintiff's damages, but they apparently may do so if they so desire. Although Plaintiff's counsel argued a "vagueness" issue at the time of the oral argument in this matter, the "vagueness" analysis was not discussed in any detail in the briefs. The argument set forth in the briefs was focused on an "equal protection" challenge. Consequently, this Court has limited its analysis to an "equal protection" analysis, and not a challenge relating to the "vagueness" of the statute.

Plaintiff also addressed the rights of the entity which provides the collateral benefits to a patient. Under the statute, NRS 42.l021, if a Defendant decides to introduce evidence with regard to the collateral benefits which were paid, the Defendant's determination thereby eliminates the contractual subrogation rights of the entity which paid those benefits. The Plaintiff argues its point as follows: "So not only are we talking about trampling upon the rights of an injured plaintiff, we're talking about trampling upon the rights, contractual rights, important rights of an insurance company."[163]

NRS 42.021 reads as follows:

> **NRS 42.021 Actions based on professional negligence of providers of health care: Introduction of certain evidence relating to collateral benefits; restrictions on source of collateral benefits; payment of future damages by periodic payments. [Effective through December 31, 2011.]**

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[163] See Plaintiff's counsel's argument during 7/2/2012 hearing on subject Motion in Limine.

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 or 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.

3. In an action for injury or death against a provider of health care based upon professional negligence, a district court shall, at the request of either party, enter a judgment ordering that money damages or its equivalent for future damages of the judgment creditor be paid in whole or in part by periodic payments rather than by a lump-sum payment if the award equals or exceeds $50,000 in future damages.

4. In entering a judgment ordering the payment of future damages by periodic payments pursuant to subsection 3, the court shall make a specific finding as to the dollar amount of periodic payments that will compensate the judgment creditor for such future damages. As a condition to authorizing periodic payments of future damages, the court shall require a judgment debtor who is not adequately insured to post security adequate to assure full payment of such damages awarded by the judgment. Upon termination of periodic payments of future damages, the court shall order the return of this security, or so much as remains, to the judgment debtor.

5. A judgment ordering the payment of future damages by periodic payments entered pursuant to subsection 3 must specify the recipient or recipients of the payments, the dollar amount of the payments, the interval between payments, and the number of payments or the period of time over which payments will be made. Such payments must only be subject to modification in the event of the death of the judgment creditor. Money damages awarded for loss of future earnings must not be reduced or payments terminated by reason of the death of the judgment creditor, but must be paid to persons to whom the judgment creditor owed a duty of support, as provided by law, immediately before the judgment creditor's death. In such cases, the court that rendered the original judgment may, upon petition of any party in interest, modify the judgment to award and apportion the unpaid future damages in accordance with this subsection.

6. If the court finds that the judgment debtor has exhibited a continuing pattern of failing to make the periodic payments as specified pursuant to subsection 5, the court shall find the judgment debtor in contempt of court and, in addition to the required periodic payments, shall order the judgment debtor to pay the judgment creditor all damages caused by the failure to make such periodic payments, including, but not limited to, court costs and attorney's fees.

7. Following the occurrence or expiration of all obligations specified in the periodic payment judgment, any obligation of the judgment debtor to make further payments ceases and any security given pursuant to subsection 4 reverts to the judgment debtor.

8. As used in this section:

(a) "Future damages" includes damages for future medical treatment, care or custody, loss of future earnings, loss of bodily function, or future pain and suffering of the judgment creditor.

(b) "Periodic payments" means the payment of money or delivery of other property to the judgment creditor at regular intervals.

(c) "Professional negligence" means a negligent act or omission to act by a provider of health care in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death. The term does not include services that are outside the scope of services for which the provider of health care is licensed or services for which any restriction has been imposed by the applicable regulatory board or health care facility.

(d) "Provider of health care" means a physician licensed under chapter 630 or 633 of NRS, dentist, licensed nurse, dispensing optician, optometrist, registered physical therapist, podiatric physician, licensed psychologist, chiropractor, doctor of Oriental medicine, medical laboratory director or technician, or a licensed hospital and its employees.

(Added to NRS by 2004 initiative petition, Ballot Question No. 3)

Before addressing the "equal protection" analysis, as it relates to the above-referenced statute, this Court will address briefly the "vagueness" or "lack of direction" provided by the statute. First, the statute applies to "action[s] . . . against a provider of health care based upon professional negligence." Although the statute defines "provider of health care" to include almost every conceivable medical practitioner, it is still possible that a medical professional not listed in the statute, may be involved in committing the "professional negligence," or another "act," which causes injury or death to a patient. In that case, all of the medical professionals who are listed in the statute would have the benefits and protections of the statute, but those who were not specifically listed, would not. Consequently, evidence of collateral source payments would be admissible as it relates to some defendants, but not others.

Second, 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..." Plaintiff's counsel made a valid point in oral argument, when he suggested that Plaintiffs may be able to use this language, to cut off an insurance company's subrogation right, if the defense has "introduced evidence" of a collateral source, during discovery. 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.

Third, the statute indicates that "if the defendant elects to introduce such evidence, [evidence of collateral source payments], 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." What if a plaintiff pays monthly for his or her health insurance benefits? What if the treatment that the Plaintiff received was all received during a single month? Is a plaintiff limited to presenting evidence of what he or she paid in health insurance premiums during the month that the treatment was received? If not, can the plaintiff present evidence of his or her

premiums paid to the same health insurance carrier for the past 20 years? The statute provides no guidance on this issue. The statute leaves this issue open for the interpretation of the public, the litigants, and ultimately to the courts. Unfortunately, the courts have no guidance as to the intended application, and consequently, the public will be left with inconsistent decisions from the various trial courts.

Finally, the statute indicates that the defendant may elect to introduce evidence of collateral source payments to a plaintiff, and even if we were to assume that the statute intended to apply only to the introduction of such evidence "during trial," it still provides no guidance with regard to what the jury or judge is supposed to do with such evidence. We can assume that the goal was to reduce malpractice verdicts by informing the jury of collateral source payments already received by the Plaintiff, but the jury is not compelled, instructed, or even told, that they may reduce the Plaintiff's verdict amount by the amount of collateral benefits previously received. Instead, the statute provides no guidance with regard to what the trier of fact is to do with evidence of collateral source payments. Consequently, such vagueness can only lead to inconsistent application. One jury may reduce the Plaintiff's damage award because of the plaintiff's receipt of collateral benefits, while another jury may ignore the collateral benefits completely. Such vagueness and inconsistency in application cannot result in equity and justice.

While there are clearly additional issues relating to "vagueness" which could be discussed, "vagueness" was not the Plaintiff's primary challenge to the subject statute, and consequently, this Court's primary analysis will be with regard to the "equal protection" challenge to NRS 42.021, instead of a potential challenge based upon vagueness.

EQUAL PROTECTION ANALYSIS OF NRS 42.021.

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.[164]

As set forth above, the equal protection provided by the Nevada Constitution, is as follows:

> 1. The Constitution of the State of Nevada provides "equal protection" 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.[165]
>
> In all cases enumerated in the preceding section, and in all other cases where a general law can be made applicable, all laws shall be general and of uniform operation throughout the State.[166]

The first step in this Court's equal protection analysis, is to determine the appropriate level of scrutiny to apply. It is difficult to anticipate what level of scrutiny the Nevada Supreme Court would apply to the present circumstances. It seems relatively clear that the present case does not involve a "fundamental right" or a "suspect class," as those terms have been defined by the United States Supreme Court.[167] Consequently, a "strict scrutiny" analysis would not apply. The question then is whether to apply the "rational basis" test, or an "intermediate scrutiny" analysis. Based upon the above-referenced case analysis, this Court believes that the Nevada Supreme Court would likely apply a "rational basis" analysis to the statute challenged in this case.[168] The Nevada

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

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

[166] Nevada Const. Art. 4 § 21.

[167] Although this specific issue does not seem to have ever been addressed by the Nevada Supreme Court, the Nevada Constitution does indicate that one of the "inalienable rights" granted to citizens of the State of Nevada, is the right to enjoy and defend life. One of the ways that we enjoy, defend, and protect our lives, and our health, is to make sure that we have good quality health care, and qualified competent medical care providers. Additionally, the Constitution indicates that not only do we have the right to possess and protect property, we have the right to "pursue and obtain[]safety and happiness." One of the ways that we pursue and obtain safety and happiness, is to make sure that we have good quality health care, and qualified competent medical care providers. Consequently, there is at least a good argument that the right to protect ourselves against unqualified or incompetent medical care providers, constitutes a "quasi-fundamental" or at a minimum an "important" right, at least pursuant to the language of the Nevada Constitution.

[168] This conclusion is based primarily upon the Nevada Supreme Court's decisions in *Tarango v. SIIS*, 117 Nev. 444, 25 P.3d 175 (2001); *Flamingo Paradise Gaming v. Chanos*, 125 Nev. 502, 520, 217 P.3d 546, 559,

Supreme Court has never applied an "intermediate scrutiny analysis" to an equal protection challenge. The closest it has come was in the case of *Laakonen v. Eighth Judicial District Court*, 91 Nev. 506, 507, 538 P.2d 574, 575 (1975), in which the Court required more than just a "rational basis," and instead required a "substantial and rational relation to the state's purposes."[169]

Very few courts have actually explained the difference between the two lower analyses. The Kansas Supreme Court, in *Farley*, expressed its "heightened scrutiny" analysis, or its "intermediate scrutiny" analysis, as follows:

> In order to resolve this question, we must ***balance the interests of the burdened class*** (insured or otherwise compensated victims of medical malpractice) ***and the benefited class*** (negligent health care providers and their insurers) ***with the goal of the legislation*** (to insure quality and available health care). Finally, we must ***decide whether the classifications substantially further a legitimate legislative objective***.[170]

Conversely, under a "rational basis" analysis, "a statutory classification must be upheld if it rationally furthers a legitimate state purpose or interest."[171]

The Supreme Court of New Hampshire did an excellent job of differentiating between "rational basis" and "intermediate scrutiny" analyses, as follows:

> As currently articulated by the United States Supreme Court, the

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(2009); *State, Private Investigator's Licensing Board v. Taketa*, 105 Nev. 4, 767 P.2d 875, 876 (1989); *Rico v. Rodriguez*, 121 Nev. 695, 120 P.3d 812 (2005); and *Barrett v. Baird*, 111 Nev. 1496, 908 P.2d 689 (1995).

[169] As set forth above, the Nevada Supreme Court stated in *Laakonen*, 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." *Laakonen*, at 514. (emphasis added).

Additionally, in *S.O.C., Inc. v. Mirage Casino-Hotel*, 117 Nev. 403, 23 P.3d 243 (2001), the Court indicated that "intermediate scrutiny" would apply in determining whether suppression of commercial speech passes First Amendment muster, but the Court in that case found that the commercial speech was not constitutionally protected, without undergoing a complete "intermediate scrutiny" analysis.

[170] *Farley v. Engelken*, 241 Kan. 663, 675, 740 P.2d 1058 (1987)(emphasis added).

[171] *State, Private Investigator's Licensing Board v. Taketa*, 105 Nev. 4, 767 P.2d 875, 876 (1989);

federal tests for intermediate scrutiny and rational basis review differ in a number of respects. For instance, ***under intermediate scrutiny, the burden of justifying the classification rests with the government***, see *Virginia*, 518 U.S. at 533, 116 S.Ct. 2264, while ***under rational basis review, the defender of the classification "has no obligation to produce evidence to sustain the ... classification***"; rather, "the burden is on the one attacking the [legislation] to negative every conceivable basis which might support it, whether or not the basis has a foundation in the record." *Heller v. Doe*, 509 U.S. 312, 320-21, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993) (quotation and brackets omitted). Additionally, ***under intermediate scrutiny, the governmental interest must be "important,"*** while ***rational basis requires that the interest be "legitimate."*** Compare *Virginia*, 518 U.S. at 533, 116 S.Ct. 2264, with *Heller*, 509 U.S., at 320, 113 S.Ct. 2637. Moreover, the fit between the means employed and the ends served is different; ***under intermediate scrutiny, the means must be "substantially related"*** to the governmental interest, while ***under rational basis, they need only be "rationally related."*** Compare *Virginia*, 518 U.S., at 533, 116 S.Ct. 2264, with *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). Further, ***under intermediate scrutiny, "the availability of ... alternatives to a ... classification is often highly probative*** of the validity of the classification," while ***under rational basis review, "[t]he fact that other means are better suited to the achievement of governmental ends therefore is of no moment.*** *Tuan Anh Nguyen v. INS*, 533 U.S. 53, 77-78-121 S.Ct. 2053, 150 L.Ed.2d 115 (2001 (O'Connor, J., dissenting).[172]

In the present case, although there is no "fundamental right" or "suspect class" involved, this Court believes that an injured citizen of this State does have an "important right" in being able to seek redress for his or her injuries. As the Supreme Court of New Hampshire has indicated, "the right to recover for one's injuries is not a fundamental right."[173] This Court also follows the New Hampshire Court, however, in concluding "that the rights involved herein are sufficiently important to require that the restrictions imposed on those rights be subjected to a more rigorous judicial scrutiny than allowed under the rational basis test.[174] Since it is unlikely that the Nevada Supreme Court would apply a strict scrutiny analysis, and since the Nevada Court has never specifically applied what has

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[172] *Community Resources for Justice, Inc. v. City of Manchester*, 154 N.H. 748, 917 A.2d 707 (2007) (citations included in original), (emphasis added).

[173] *Carson* at 931.

[174] *Carson* at 931-932 (citations omitted).

become known nationally as an "intermediate scrutiny" analysis, this Court is left in a quandary. Because this Court believes that something more than the traditional "rational basis" test should apply, but since it is unlikely that the Nevada Supreme Court would support an "intermediate scrutiny" analysis, this Court concludes that the standard applied by the Nevada Supreme Court in the case of *Laakonen v. Eighth Judicial District Court*, 91 Nev. 506, 507, 538 P.2d 574, 575 (1975), should apply to the equal protection analysis in the present case. Consequently, this Court requires more than just a "rational basis," but instead requires a "substantial and rational relation to the state's [legitimate] purposes."[175] It should be noted that this is essentially the same analysis that was applied in the *Farley* case, by the Kansas Supreme Court.[176]

The rationale for applying something more than the traditional "rational basis" test, was explained above by the Kansas Supreme Court as follows:

> The rationale for applying a higher level of scrutiny to this particular legislation is well stated by Learner, Restrictive Medical Malpractice Compensation Schemes: A Constitutional "Quid Pro Quo" Analysis to Safeguard Individual Liberties, 18 Harv. J. on Legis. 143, 184, 189 (1981). Learner compares the political powerlessness of the class of future medical malpractice victims to that of traditional "suspect" and "semi-suspect" classifications – e.g., minorities, women, illegitimates, and aliens. He reasons that certain similar characteristics (e.g., lack of group cohesiveness and political disorganization) justify treating future malpractice victims similarly to other politically powerless, semi-suspect classes who receive judicial protection through an enhanced scrutiny of legislation critically affecting their individual rights. Learner concludes:
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> > "When the legislative balancing process is unduly skewed by the structural inability of the burdened class to form active political coalitions, a court must be sensitive to its institutional role as a counter-

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[175] See *Laakonen* at 514. This Court notes that the analysis proposed is something more than the traditional "rational basis" test, but is not as demanding as the "intermediate scrutiny test" applied by various courts.

[176] This Court acknowledges that the U.S. Supreme Court has applied the "intermediate scrutiny" analysis in very few circumstances, and it could be argued that this Court is limited to applying a heightened standard of review in only those instances in which the U.S. Supreme Court has applied it. As the Supreme Court of New Hampshire held, however, in interpreting the Nevada State Constitution, the Nevada Courts are not confined to federal constitutional standards, and we are free to grant individuals more rights than the Federal Constitution requires. *Carson v. Maurer*, 120 N.H. 925, 932, 424 A.2d 825 (1980).

> majoritarian monitor of legislative legitimacy. The political powerlessness of future medical malpractice victims arguably justifies their status as a semi-suspect class entitled to judicial protection against majoritarian subjugation of individual rights."[177]

In applying the above-referenced analysis, the issue that this Court must address is whether the creation of the classifications set forth in NRS 42.021[178] bears a "substantial and rational relation" to a legitimate government purpose. The "legitimate government purpose" which would arguably require such legislation is improving the "health, safety, and welfare of the public," by stopping "double-dipping" in an effort to keep doctors in Nevada.[179]

If such classifications discriminate on an "irrational" basis, or if "all those similarly situated are [not] treated in a like manner,"[180] the classifications cannot stand, and NRS 42.021 is unconstitutional, as a violation of the State and U.S. Constitutional guarantees of equal protection. Additionally, if the proposed bases for the legislation are not related to a "legitimate" governmental purpose, then the statute is unconstitutional.

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[177] *Farley v. Engelken*, 241 Kan. 663, 672, 740 P.2d 1058 (1987).

[178] The classifications created by the statute can be described in two ways: NRS 42.021 "confers certain benefits on tortfeasors who are health care providers that are not afforded to other tortfeasors. Conversely, it distinguishes between those tort claimants whose injuries were caused by medical malpractice and all other tort claimants. . ." *Carson v. Maurer* 120 N.H. 925, 931, 424 A.2d 825, (1980), citing *Estate of Cargill v. City of Rochester*, 119 N.H. 661, 665, 406 A.2d 704, 706 (1979), quoting *Belkner v. Preston*, 115 N.H. 15, 17, 332 A.2d 168, 170 (1975).

[179] NRS 42.021 was passed as Question 3 on the ballot in 2003. The Argument in Support of Question 3, included the following language:

> The Keep Our Doctors In Nevada (KODIN) initiative provides several protections to doctors, patients, and their insurers, while still allowing people who have genuinely been injured as a result of physician negligence to recover economic losses. . . . Third, KODIN stops "double-dipping" by informing juries if plaintiffs are receiving money from other sources for the same injury. . . . KODIN will help stabilize medical malpractice premiums- and help your doctor stay in Nevada.
>
> According to the AMA, Nevada is among a dozen states facing a "full-blown medical liability crisis." KODIN will stabilize Nevada's health care crisis and provide protection for both doctors and patients.
>
> If passed, . . . The health, safety, and welfare of the public will be improved because physicians of all specialties will be more likely to stay in Nevada to practice medicine.

This Court notes that Defense counsel argued in oral argument (with regard to the subject Motion in Limine), that the legitimate governmental purposes of the statute were 1) to provide Nevadans healthcare in this state, because doctors were leaving the state and people couldn't get healthcare here; and 2) to help guarantee that Nevadans would have appropriate healthcare coverage.

[180] *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).

This Court will begin with the analysis of whether "all those similarly situated are treated in a like manner." In performing this analysis, this Court must look at the different classifications created. This Court notes that in the various cases published, involving this same issue, state courts seem to make a determination regarding how they want the case to be resolved, and then determine the classifications that will fit their determinations. For example, if we were to consider the classification of "negligent medical care providers," are they all treated equally under the statute? This is a different inquiry than if we were to address whether "all tortfeasors" are treated equally under the statute. Similarly, if we were to consider the classification of "plaintiffs injured as a result of a medical care provider's negligence," and determine whether such individuals are treated equally under the statute, such an analysis would be substantially different than if we considered the class of "plaintiffs injured as a result of another's negligence." Consequently, the determination of who is "similarly situated," is a pre-requisite before any analysis can occur. The broader the classifications we use, the easier it would be to determine that all individuals in such classifications are not treated equally.

This Court will use the most specific classifications, and address 1) whether all negligent medical care providers are treated equally under the statute; and 2) whether all plaintiffs injured as a result of a medical care provider's negligence, are treated equally under the statute.

In determining whether all negligent medical care providers are treated equally under the statute, (NRS 42.021), the Court considers the following hypothetical situation:

> First, we must assume that two patients suffer similar injuries as the result of the negligence or medical malpractice of two separate doctors. 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 hospital 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. The doctor of the first

patient, pursuant to NRS 42.021 elects to inform the jury about the collateral source payments. Because of that knowledge, the jury awards the Plaintiff only $5,000.00, and consequently, the doctor becomes obligated to pay only $5,000.00.[181] The doctor of the second patient does not get the benefit of a patient's collateral source, and consequently, the jury awards the plaintiff $100,000.00. The doctor becomes obligated to pay $100,000.00. The doctors were similarly situated, with regard to the procedure, the negligence, the injury, and the fact that both were sued. The only thing that differentiates the doctors, is the fact that one of the patients had health insurance, and the other did not. (Something completely out of the control of the doctors). Consequently, the statute does not treat the doctors, who are similarly situated, equally or fairly.

Similarly, in determining whether all plaintiffs injured as a result of a medical care provider's negligence are treated equally under the statute (NRS 42.021), the Court considers a similar hypothetical situation:

> We assume that two patients suffer similar injuries as the 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 hospital 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

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[181] We know that "Collateral source evidence inevitably prejudices the jury because it greatly increase the likelihood that a jury will reduce a plaintiff's award of damages because it knows the plaintiff is already receiving compensation." *Proctor v. Castelletti*, 112 Nev. 88, 911 P.2d 853 (1996); see also *Winchell v. Schiff*, 124 Nev. 938, 945-46, 193 P.3d 946, 951 (2008).

the result of a doctor's negligence, equally or fairly.[182]

As indicated previously, the Supreme Court of Ohio considered a similar hypothetical, in determining the arbitrariness of its statute abrogating the collateral source rule in medical malpractice cases. The Court stated the following:

> If there was an insurance crisis, it would be a crisis affecting all tort defendants. There is no rational reason for distinguishing between medical malpractice tort defendants and all other tort defendants. This disparate treatment can result in vastly different results involving the same injury. For example, two tort victims suffer the identical injury, the laceration of an artery resulting in death. One tort victim is injured by a piece of broken glass while driving a company truck within the scope of employment. The other tort victim is injured by the medical negligence of a physician who lacerates an artery during an elective surgery procedure. Both tort victims remain in the hospital for ten days before their death. Due to the difference in the collateral source statutes, these two identical injuries may result in vastly different compensation for the victim. The Equal Protection Clause mandates that those similarly situated be similarly treated.[183]

Although at first blush NRS 42.021 may seem reasonable and rationally related to the governmental purposes of reducing malpractice awards, reducing malpractice insurance premiums, or avoiding double-dipping, a thorough analysis of the effect of the statute demonstrates that it is constitutionally invalid. Clearly, the citizens of Nevada are entitled to quality health care, and if a multitude of frivolous lawsuits was the cause of increased insurance premiums, which resulted in quality doctors leaving Nevada, the

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[182] If we assume that both patients were represented by attorneys, and that the attorneys fees were charged in accordance with NRS 7.095, the attorney representing the first patient would be entitled to 40% of the $5,000.00 award, ($2,000.00), as an attorney's fee, leaving the patient with $3,000.00. The attorney representing the second patient would be entitled to 40% of the first $50,000.00 ($20,000.00), and 1/3 of the next $50,000.00 ($16,666.66), or $36,666.66 in attorney's fees, leaving the patient with $63,333.34. In reality, there are probably $10,000.00-$20,000.00 in costs incurred in prosecuting a medical malpractice case to trial, and consequently, the first patient would end up "in the hole." Actually, if the attorneys understand the statutory scheme, the first patient never would have been able to find legal counsel to represent him, as it makes no financial sense for an attorney to litigate a case in which he or she is likely to not make more than $2,000. This is even more evidence that the statute, NRS 42.021 doesn't treat the classifications created in the same way -- equally, or fairly.

[183] *Sorrell v. Thevenir*, 69 Ohio St.3d 415, 426, 633 N.E.2d 504, 513 (1994), citing to amicus curiae, Ohio Academy of Trial Lawyers.

Legislature may have had a valid reason for enacting legislation to respond to such a crisis. It is important to note, however, that 1) there is no firm evidence that there was ever a "medical malpractice crisis" in Nevada; 2) there is no firm evidence that "quality" doctors were leaving Nevada, as the result of some "crisis;" 2) there is no firm evidence that "frivolous" lawsuits were a problem, at any time in Nevada; 3) there is no firm evidence that insurance carriers were increasing premiums because of "frivolous lawsuits" in Nevada; 4) there is no firm evidence that if jury awards were reduced health insurance companies would pass along those savings to doctors or patient members; and finally, 5) there is no firm evidence that any of the tort-reform legislation, or petition enactment, has effected the quality or number of health care providers in Nevada. While there may have been some evidence of these issues in 1995, when Assembly Bill 520, Chapter 686 of the N.R.S. was passed, it should be noted that "members of the standing subcommittees in which the bill was heard expressed their frustration with the apparent lack of hard data and solid numbers on which they could rely in making policy decisions."[184] Ultimately, it was not hard documentation or evidence, but a media blitz in 2003-2004, which resulted in the adoption of the KODIN initiative, which in part resulted in NRS 42.021.[185] This Court cannot find that there currently exists any "medical malpractice" or "insurance" crisis in the State of Nevada, which would form a legitimate state interest requiring the discriminatory classifications created by NRS 42.021.

NRS 42.021 provides a benefit to negligent medical care providers that is not available to other negligent tortfeasors, and this benefit is provided at the cost and expense of the victims of such negligence. The effect of NRS 42.021 is as follows:

> First, the negligent health care provider is given special privileges and

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[184] See Report to the 69th Session of the Nevada Legislature by the Legislative Commission's Subcommittee to Study Claims for Medical Malpractice, pg. 6.

[185] This Court additionally notes that while "state-level legislative initiatives abolishing and/or minimizing the reach of the collateral source rule may be perceived as welcomed victories by most tort reformers. . . such perceptions are economically ill-conceived." (See *The Collateral Source Rule and its Abolition; An Economic Perspective*, by Kevin S. Marshall and Patrick W. Fitzgerald, pg. 68).

> immunities not afforded other tortfeasors. Second, the statute creates a special class of tort victims, which, unlike other tort victims, effectively is deprived of the benefits of collateral source payments. Third, the provision under scrutiny creates two classifications of medical malpractice tort victims: those who have paid for financial protection in the event of tort injury, and those who have saved those payments and elected to be self-insurers.[186]

As the Supreme Court of Kansas stated, "These victims of medical malpractice, unlike other tort claimants, are denied compensation from the person or persons who have wronged them. In effect, it gives a 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. Thus, the statute renders the damage award one of need rather than actual compensation for loss."[187] This is contrary to the clear law not only in Nevada, but in the majority of states, that an injured party is entitled to ***compensatory damages*** against a tortfeasor, for the damages proximately or legally caused by the tortfeasor's negligence.[188]

Subsection (2) of NRS 42.021 statutorily eliminates the contractual right to subrogate, possessed by the provider of the collateral source benefits, if evidence of such collateral source is "introduced." Consequently, using the previously referenced hypothetical, the way the statute must be applied, is as follows:

> We assume that two patients suffer similar injuries as the 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 hospital care is $100,000.00. Both patients have health insurance, which pays all but $5,000.00 in co-pays. Both patients bring suit against their respective doctors. At trial, both patients present evidence that they incurred $100,000.00

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186 *Rudolph v. Iowa Methodist Medical Center*, 293 N.W.2d 550 (1980)(dissenting opinion).

187 *Farley v. Engelken*, 241 Kan. 663, 665, 740 P.2d 1058, 1060 (1987).

188 Note that the Nevada Pattern Jury Instructions include an instruction which reads in part as follows: "In determining the amount of losses, if any, suffered by the plaintiff, as a [proximate] [legal] result of the accident in question . . . and you will decide upon a sum of money sufficient to reasonably and ***fairly compensate plaintiff*** for the following items: 1. The reasonable medical expenses plaintiff has necessarily incurred. . ." Nev. J.I. 5PID.1, (emphasis added).

> 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, the Defendant elects not to inform the jury about the collateral source payments, and consequently, the jury awards the plaintiff $100,000.00.

With regard to the first patient, since evidence of the collateral source benefits was "introduced," the insurance carrier who paid $95,000.00 for the patient's medical care, no longer has a subrogation claim against either the patient or the hospital. Consequently, not only did NRS 42.021 penalize the patient, who was unable to recover the full value of his claim, and not only did it benefit the negligent doctor who committed malpractice, because the judgment against the doctor is only $5,000.00 instead of $100,000.00, but additionally, the insurance carrier for the patient, which paid the patient's medical bills and had every intention of recovering those funds through its subrogation rights, now suffers, and the contractual subrogation rights that it had, are statutorily eliminated. The effect is that the negligent doctor and his or her insurance carrier, benefit, at the expense of, and to the detriment of, the negligent free patient, and his or her insurance carrier. As the Supreme Court of New Hampshire stated,

> "(a)bolition of the (collateral source) rule … presents the anomalous result that an injured party's insurance company may be required to compensate the victim even though the negligent tortfeasor is fully insured. Not only does this abolition patently discriminate against the victim's insurer, it may eventually result in an increased insurance burden on innocent parties."[189]

It only follows that if individual's health insurance carriers end up paying for health care that the insurance would otherwise be able to subrogate and recoup, and because of NRS 42.021, they are no longer able to recoup those funds, individual health insurance premiums will ultimately be increased, to pay for the additional losses. In

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[189] *Carson v. Maurer*, 120 N.H. 925, 939-940, 424 A.2d 825, 835 (1980), citing Jenkins, 52 S.Cal.L.Rev. at 948.

essence, the statute will result in innocent patients, who are the victims of a negligent doctor's actions, paying more for health insurance benefits, arguably so that the negligent doctor's insurance premiums won't increase. Why should the innocent patients be required to suffer, so that we can provide a benefit to negligent medical care providers? This simply doesn't make sense.

Again citing the New Hampshire Supreme Court,

> . . . although the collateral source rule operates so as to place some plaintiffs in a better financial position than before the alleged wrong, its abolition will result in a windfall to the defendant tortfeasor or the tortfeasor's insurer. Moreover, this windfall will sometimes be at the expense of the plaintiff because "in many instances the plaintiff has paid for these (collateral) benefits in the form of . . . concessions in the wages he received because of such fringe benefits. Thus, when the collateral payments represent employment benefits, the price for the public benefit derived from (the statute) will be paid solely by medical malpractice plaintiffs.[190]

CONCLUSION

The above analysis makes it apparent that NRS 42.021 arbitrarily and unreasonably discriminates in favor of the class of negligent health care providers. Although the statute may promote the legislative objective of containing health care costs, there is no evidence that this objective is legitimate or necessary, nor is there any evidence that the statute is substantially or rationally related to such purpose. This Court finds and concludes that even using the lower "rational basis" test, NRS 42.021 fails, as the statutory classifications created by the statute do not rationally further a legitimate state or government purpose.[191]

Although equal protection allows different classifications of treatment, in order

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[190] *Carson v. Maurer*, 20 N.H. 925, 940-941, 424 A.2d 825, 836 (1980), citing *Moulton v. Groveton Papers Co.*, 114 N.H. at 509, 323 A.2d at 909.

[191] *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).

to be valid and constitutional, the classifications must be reasonable."[192] "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.'"[193]

Because NRS 42.021 does not rationally further a legitimate governmental purpose, and because the classifications created thereby do not apply uniformly to all who are similarly, or even identically situated, this Court must conclude that NRS 42.021 is unconstitutional, and a violation of the Nevada and U.S. Equal Protection Clauses.

ORDER.

Based upon the foregoing, and good cause appearing,

IT IS HEREBY ORDERED ADJUDGED AND DECREED that Plaintiff's Motion in Limine to Exclude Collateral Source Evidence is hereby **GRANTED.**

DATED this 4 day of September, 2012.

JERRY A. WIESE II
DISTRICT COURT JUDGE, DEPT. XXX

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[192] *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).

[193] *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).

CERTIFICATE OF SERVICE

I hereby certify that on or about this the 4th day of September, 2012, the forgoing **ORDER RE: PLAINTIFF'S MOTION IN LIMINE TO EXCLUDE COLLATERAL SOURCE EVIDENCE,** was e-served, mailed, faxed or a copy was **placed in the attorney's folder** to the following:

BONNE, BRIDGES, MEULLER, O'KEEFE & NICHOLS

PRINCE & KEATING

Vickie Freeman, JEA for Dept XXX

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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 FIFTH SUPPLEMENT TO DESIGNATION OF EXPERT WITNESSES

TO: ALL PARTIES AND THEIR RESPECTIVE COUNSEL HEREIN:

Plaintiff, by and through his counsel of record, EGLET PRINCE hereby supplements his designation of expert witnesses as follows:

DOCUMENTS

1. Kevin Yoo M.D.: Supplemental Report.

//

Plaintiff reserves the right to supplement the above list as documents as discovery continues.

DATED this 17th day of July, 2015.

Respectfully submitted,

EGLET PRINCE

/s/Dennis M. Prince
DENNIS M. PRINCE, ESQ.
Nevada Bar No. 5092
TRACY A. EGLET, ESQ.
Nevada Bar No. 6419
Attorneys for Plaintiff

EGLET PRINCE

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of EGLET PRINCE, and that on July 17, 2015, I caused the foregoing document entitled **PLAINTIFF'S FIFTH SUPPLEMENT TO DESIGNATION OF EXPERT WITNESSES** 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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llee@princekeating.com

/s/Jennifer Buckley
an Employee of EGLET PRINCE

EGLET PRINCE

RE: Beau R. Orth vs. Albert Capanna, M.D.

To whomever this may concern:

I have reviewed the following documents and radiographic studies.

1. Michael Milligan, M.D., medical records;
2. Desert Radiologists, medical records;
3. McKenna and Ruggeroli Pain Specialists, medical records;
4. Clinical Neurology Specialists, medical records;
5. International Neuroscience (Dr. Capanna), medical records and billing;
6. Axiom Imaging of Las Vegas, medical records and billing;
7. University Medical Center, medical records and billing;
8. PBS Anesthesia, medical records and billing;
9. Steinberg Diagnostic Medical Imaging, medical records and billing;
10. Desert Institute of Spine Care, medical records and billing;
11. Southern Hills Hospital, medical records and billing;
12. Keith Kleven Physical Therapy, medical records and billing;
13. Andrew L. Zak, M.D., billing;
14. Desert Radiologists, Medical Imaging Report and billing for study dated 8/31/12;
15. McKenna and Ruggeroli, medical records and billing;
16. Surgical Arts, medical records and billing;
17. Affidavit of Kevin Yoo, M.D. (Plaintiff's expert);
18. Expert report of Reynold Rimoldi, M.D. (defense expert);
19. Expert report of Allan Belzberg, M.D. (defense expert);
20. Expert report of Marc Kaye, M.D. (defense expert);
21. Deposition of Albert Capanna, M.D.
22. Surgical Arts Center, records 2/24/10 – 3/26/14; 3/26/14 – 5/14/14;
23. Deposition transcript of Beau Orth, dated April 14, 2015;
24. Below is a list of films as well as Dr. Cash's May 14, 2015 future medical care and costs letter, forwarded to your attention, via FedEx, on or about May 27, 2015:
25. Desert Radiologists:
    a. February 3, 2009 MRI Lumbar
    b. February 18, 2010 MRI Lumbar;
    c. August 31, 2012 MRI Lumbar;
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29. 2015 Kaye PowerPoint;

30. June 19, 2015 Supp. Kaye PowerPoint;
31. May 27, 2015 deposition transcript of Dr. Cash;
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33. June 15, 2015 condensed deposition transcript of Dr. Kaye;
34. June 17, 2015 condensed deposition transcript of Dr. Rimoldi;
35. June 17, 2015 condensed deposition transcript of Dr. Cash, Volume I;
36. June 23, 2015 condensed deposition transcript of Dr. Cash, Volume II;

After review of the above, here are my following opinions.

Dr. Albert Capanna felt Beau Orth had left leg pain from left L5-S1 disc protrusion and stated he performed L5-S1 microdiscectomy on 9/17/2010. Patient continued to be in pain and repeat MRI on 10/6/2010 clearly reveals that Dr. Capanna had actually performed an L4-5 microdiscectomy. This is without a doubt below standard of care. It is impossible to reach the L5/S1 disc space by performing an L4 laminotomy from above. It was for this reason that Dr. Andrew Cash had to perform a second surgery on Beau Orth on 10/22/2010. Dr. Cash performed re-do microdiscectomy of L4-5 and correct microdiscectomy of L5-S1. Review of further records have not changed my mind with regard to my opinion of the failure of Dr. Capanna to meet standard of care in this patient's care.

The following are my professional medical opinions to a great degree of certainty on the prognosis of Beau Orth. Because of the first surgery at the wrong L4-5 level and the need for subsequent surgery at L4-5 and L5-S1, Beau Orth will more likely than not have chronic back and leg problems including pain, numbness, and weakness. This is because he now has weakened lumbar structures and disc space at L4-5 and L5-S1. He will more likely that not require constant pain management and pain procedures such as epidural steroid injections, facet blocks and facet rhizotomies, and spinal cord stimulator.

It is also more likely than not Beau Orth will require further surgery to his lumbar spine including L4-5 and L5-S1 fusions. Because Beau Orth is so young, such fusion will more likely than not lead to adjacent disc disease requiring fusion at L3-4 within 5 to 15 years of L4-5 and L5-S1 fusion. The next level of L2-3 and then L1-2 will follow in a similar manner.

My opinions of Beau Orth future medical need for lumbar spine surgery is partly based upon the MRI of LS Spine 8/31/2012 and 3/13/2014 that clearly shows dark degenerative changes and disc space collapse that have occurred over the course of 4 years since surgery.

Kevin Yoo, M.D.

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Attorneys for Plaintiff Beau R. Orth

DISTRICT COURT

CLARK COUNTY, NEVADA

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Defendants.

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

PLAINTIFF'S SIXTH SUPPLEMENT TO DESIGNATION OF EXPERT WITNESSES

TO: ALL PARTIES AND THEIR RESPECTIVE COUNSEL HEREIN:

Plaintiff, by and through his counsel of record, EGLET PRINCE hereby supplements his designation of expert witnesses as follows:

DOCUMENTS

1. Kevin Yoo M.D.: Supplemental Report of 7/17/2015 (this is the same report supplemented in Plaintiff's Fifth Supplement to Designation of Expert Witnesses, served on 7/17/2015, however this report is signed and dated.)

Plaintiff reserves the right to supplement the above list as documents as discovery continues.

DATED this 20th day of July, 2015.

Respectfully submitted,

EGLET PRINCE

/s/Dennis M. Prince
DENNIS M. PRINCE, ESQ.
Nevada Bar No. 5092
TRACY A. EGLET, ESQ.
Nevada Bar No. 6419
Attorneys for Plaintiff

EGLET PRINCE

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of EGLET PRINCE, and that on July 20, 2015, I caused the foregoing document entitled **PLAINTIFF'S SIXTH SUPPLEMENT TO DESIGNATION OF EXPERT WITNESSES** 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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/s/Jennifer Buckley
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July 17, 2015

RE: Beau R. Orth vs. Albert Capanna, M.D.

To whomever this may concern:

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Kevin Yoo, M.D.

Kevin Yoo, M.D.

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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, Defendants.	CASE NO. : A-11-648041-C DEPT. NO. : 3 **SUPPLEMENTAL EXPERT WITNESS DISCLOSURE STATEMENT OF DEFENDANT ALBERT H. CAPANNA, M.D.**

Pursuant to N.R.C.P. 16(a)(2), Defendant ALBERT H. CAPANNA, M.D., through his attorneys, Anthony D. Lauria, Esq., of the law firm of Lauria Tokunaga Gates & Linn, LLP, hereby serves this supplemental expert witness disclosure statement as follows:

DOCUMENTS

1. Allan J. Belzberg, MD, FRCS supplemental report dated July 20, 2015 attached hereto as Exhibit "M".

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Defendant reserves the right to supplement the above list of documents as discovery continues.

DATED: July 22, 2015.

LAURIA TOKUNAGA GATES & LINN, LLP

By: */s/ Anthony D. Lauria*
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Attorneys for Defendants

EXHIBIT M

EXHIBIT M

ALLAN J. BELZBERG, MD, FRCSC
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Anthony D. Lauria
LAURIA TOKUNAGA GATES & LINN
1755 Creekside Oaks Drive, Suite 240
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July 20, 2015

Re: Orth v. Capanna

Dear Mr. Lauria:

The following is a supplement to my previous expert neurosurgical report on the above-captioned case.

In general, a micro-discectomy does not change the natural history of degenerative disc disease. Mr. Orth suffered a disc herniation at L5-S1 and this is the cause of any ongoing pain problems, not the fact that he underwent two micro-discectomies rather than one. Unfortunately, even with successful and appropriate spinal surgery, patients may continue to experience residual lumbar pain and radiculopathy. In my opinion, to a reasonable medical probability, Mr. Orth will not require lumbar fusion surgery in the future and the majority of patients with lumbar disc degeneration, such as Mr. Orth, do not require lumbar fusion surgery. It is even less likely that Mr. Orth would ever require fusion surgery at L3-4.

In my medical opinion, Mr. Orth, more likely than not, will have some residual pain related to the disc herniation he suffered at the L5-S1 level. This pain appears to have become a chronic non-debilitating pain which does not require further medical intervention and is the consequence of the L5-S1 disc herniation and was not caused by the surgery performed by Dr. Capanna.

Yours truly,

Allan J. Belzberg, MD, FRCSC

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 the 22nd day of July, 2015, I served a true and correct copy of the foregoing, SUPPLEMENTAL EXPERT WITNESS DISCLOSURE STATEMENT OF DEFENDANT ALBERT H. CAPANNA, M.D.:

☐ 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 Las Vegas, Nevada; and/or

X Via electronic mail; and/or

☐ Via facsimile; and/or

☐ Via Receipt of Copy to the interested parties

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 and ROE BUSINESS ENTITIES I through X, inclusive, Defendants.	CASE NO. A-11-648041-C DEPT. NO. III **DEFENDANT ALBERT H. CAPANNA, M.D.'S SUPPLEMENT TO NRCP 16.1 EARLY CASE CONFERENCE DISCLOSURE OF WITNESSES AND DOCUMENTS**

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 pursuant to N.R.C.P. 16.1(3), hereby supplements his List of Witnesses and Documents, as follows:

II.

DOCUMENTS

A. Defendant CAPANNA may present the following documents at trial:

1. Curriculum Vitae and Fee Schedule for Allan Belzberg, B.Sc., M.D., FRCS (Previously served in Supplemental Expert Witness Disclosure Statement of Defendant Albert H. Capanna, M.D.)

2. Expert Report prepared by Allan Belzberg, B.Sc., M.D., FRCSC (Previously served in Supplemental Expert Witness Disclosure Statement of Defendant Albert H. Capanna, M.D.)

3. Supplemental Expert Report prepared by Allan Belzberg, B.Sc., M.D., FRCSC (Previously served in Supplemental Expert Witness Disclosure Statement of Defendant Albert H. Capanna, M.D.)

4. Curriculum Vitae, Testimony List and Fee Schedule for Marc D. Kaye, M.D. (Previously served in Supplemental Expert Witness Disclosure Statement of Defendant Albert H. Capanna, M.D.)

5. Expert Report prepared by Marc D. Kaye, M.D. (Previously served in Supplemental Expert Witness Disclosure Statement of Defendant Albert H. Capanna, M.D.)

6. Power Point prepared by Marc D. Kaye, M.D. (Previously served in Supplemental Expert Witness Disclosure Statement of Defendant Albert H. Capanna, M.D.)

7. Updated Power Point prepared by Marc D. Kaye, M.D. (Previously served in Supplemental Expert Witness Disclosure Statement of Defendant Albert H. Capanna, M.D.)

8. Curriculum Vitae, Testimony and Fee Schedule for Reynold L. Rimoldi, M.D. (Previously served in Supplemental Expert Witness Disclosure Statement of Defendant Albert H. Capanna, M.D.)

9. Expert Report prepared by Reynold L. Rimoldi, M.D. (Previously served in Supplemental Expert Witness Disclosure Statement of Defendant Albert H. Capanna, M.D.)

10. Supplemental Expert Report prepared by Reynold L. Rimoldi, M.D. (Previously served in Supplemental Expert Witness Disclosure Statement of Defendant Albert H. Capanna, M.D.)

11. The deposition transcript of Albert Capanna, M.D. dated January 15, 2015, and any exhibits thereto.

12. The deposition transcript of Allan Belzberg, M.D. dated May 29, 2015, and any exhibits thereto.

13. The deposition transcript of Marc Kaye, M.D., dated June 15, 2015, and any exhibits thereto.

14. The deposition transcript of Reynold Rimoldi, M.D. dated June 17, 2015, and any exhibits thereto.

15. The deposition transcript of Michelle Bennion, dated April 7, 2015, and any exhibits thereto.

16. The deposition transcript of Eileen Rinaldi, dated April 8, 2015, and any exhibits thereto.

17. The deposition transcript of Anthony Ruggeroli, M.D., dated May 21, 2015, and any exhibits thereto.

18. The deposition transcript of Frank Yoo, M.D., dated May 26, 2015, and any exhibits thereto.

19. The deposition transcript of Andrew Cash, M.D., dated June 17, 2015, and any exhibits thereto.

20. The deposition transcript of Andrew Cash, M.D., dated June 23, 2015, and any exhibits thereto.

21. The deposition transcript of Andrew Cash, M.D., dated May 27, 2015, and any exhibits thereto.

22. The deposition transcript of Stephanie Saxon, dated July 8, 2015, and any exhibits thereto.

23. Article entitled *Microdiscectomy for the treatment of lumbar disc herniation: an evaluation of reoperations and long-term outcomes*, Evid Base Spine Care J., 2014 Oct; 5(2): 77-86.

24. Article entitled *Limited microdiscectomy for lumbar disk herniation: a retrospective long-term outcome analysis*, J. Spinal Disord Tech., 2014 Feb; 27(1):E8-E13.

25. Article entitled *Recurrent disc herniation and long-term back pain after primary lumbar discectomy: review of outcomes reported for limited versus aggressive disc removal*, Neurosurgery, 2009 Feb; 64(2):338-44.

26. **Article entitled** ***Long-term back pain after a single-level discectomy for radiculopathy: incidence and health care cost analysis*****, J Neurosurg Spine, 2010 Feb; 12(2):178-82.**

27. **Article entitled** ***Microdiscectomy for the treatment of lumbar disc herniation: an evaluation of reoperations and long-term outcomes*****, Evid Based Spine CareJ., 2014 Oct; 5(2):77-86.**

28. **Article entitled** ***Mid- to long-term outcome of disc excision in adolescent disc herniation*****, Spine J, 2006 Jul-Aug; 6(4):380-4.**

29. **Article entitled** ***The outcomes of lumbar microdiscectomy in a young, active population: correlation by herniation type and level,*** **Spine (Phila Pa 1976). 2008 Jan 1; 33(1):33-8.**

30. **Article entitled** ***Minimally invasive surgery for lumbar disc herniation: a systematic review and meta-analysis*****, Eur Spine J. 2014 May;23(5):1021-43.**

31. **Article entitled** ***Is the rate of re-operation after primary lumbar microdiscectomy affected by surgeon grade or intra-operative lavage of the disc space?*** **Br J Neurosurg., 2014 Apr; 28(2):247-51.**

32. **Article entitled** ***Reoperation for recurrent lumbar disc herniation: a study over a 20-year period in a Japanese population,*** **J Orthop Sci., 2012 Mar; 17(2): 107-13.**

33. **Article entitled** ***Long-term outcomes of lumbar microdiscectomy in a working class sample*****, Neurocirugia (Astur), 2011 Ju: 22(3):235-44.**

34. **Article entitled** ***The efficacy of minimally invasive discectomy compared with open discectomy: a meta-analysis of prospective randomized controlled trials.***

35. **Article entitled** ***Reoperation rate after surgery for lumbar spinal stenosis without spondylolisthesis: a nationwide cohort study*****. Spine J. 2013 Oct; 13(10):1230-7.**

36. **Article entitled** ***5-year reoperation rates after different types of lumbar spine surgery*****. Spine (Phila Pa 1976). 1988 Apr 1; 23(7):814-20.**

37. **Article entitled** ***Revision surgery following operations for lumbar stenosis*****. J Bone Joint Surg Am. 2011 Nov 2; 93(21):1979-86.**

38. **Article entitled** ***Surgery for spinal stenosis: long-term reoperation rates, health care cost, and impact of instrumentation*****. Spine (Phila Pa 1976). 2014 May 20; 39(12):978-87.**

39. Article entitled *Complications, reoperation rates, and health-care cost following surgical treatment of lumbar spondylolisthesis*. J Bone Joint Surg. Am, 2013 Nov 6; 95(21):e 162.

40. Article entitled *Reoperation rate after surgery for lumbar herniated intervertebral disc disease: nationwide cohort study*. Spine (Phila Pa 1976). 2013 Apr 1; 38(7):581-90

41. Article entitled *Repeat surgery after lumbar decompression for herniated disc: the quality implications of hospital and surgeon variation*. Spine J. 2012 Feb; 12(2):89-97

42. Article entitled *Risk of multiple reoperations after lumbar discectomy: a population-based study*. Spine (Phila Pa 1976). 2003 Mar 15; 28(6):621-7

The above deposition transcripts are equally available to Plaintiff. Copies will be made available upon written request and receipt of payment for duplication.

Discovery is ongoing and Defendant specifically reserves the right to supplement and/or amend this disclosure as needed during the course of discovery. Defendant reserves the right to use any and all records, documents, films or other items produced by the parties pursuant to NRCP 16.1. Defendant also reserve the right to produce any documents disclosed or produced in plaintiff's NRCP 16.1 disclosures, pre-trial disclosures, and expert disclosures.

III.

DEFENDANT'S DEMONSTRATIVE EXHIBITS

1. Defendant may offer, at trial certain Exhibits for demonstrative purposes including, but not limited to, the following:

   a. Actual lumbar plates, screws, surgical tools, and surgical equipment as used in plaintiff's medical treatment and anticipated to be used in future treatment;

   b. Demonstrative and actual photographs and videos of surgical procedures and other diagnostic tests Plaintiff has undergone and will undergo in the future;

   c. Actual diagnostic studies and computer digitized diagnostic studies;

   d. Sample of tools used and will be used in surgical procedures;

   e. Diagrams, drawings, pictures, photos, film, video, DVD and CD ROM of various parts of the human body, diagnostic tests and surgical procedures;

f. Computer simulation, finite element analysis, mabymo and similar forms of computer visualization;

g. Power point images/drawings/diagrams/animations/story boards, of the related incident involved, the parties involved, the location(s) of the subject matter, the parties involved and what occurred in the subject incident;

h. Pictures of Plaintiff prior and subsequent to the subject incident;

i. Surgical Timeline;

j. Medical treatment timeline;

k. Future medical timeline;

l. Charts depicting Plaintiff, Life Care Plans;

m. Charts depicting Plaintiff, Loss of Household Services;

n. Photographs of Plaintiff's Witnesses;

o. Charts depicting Plaintiff's Life Expectancy;

p. Diagrams/Storyboards and computerized digitized power point images;

q. Blow-ups/transparencies/digitized images of medical records, medical bills, photographs and other exhibits;

r. Diagrams/story boards/computer re-enactments;

s. Diagrams/story boards/computerized digitized images of various parts of the human body related to Plaintiff's injuries;

t. Photographs of various parts of the human body related to Plaintiff's injuries;

u. Models of the human body related to Plaintiff's injuries

v. Samples of the needles and surgical tools used in Plaintiff's various diagnostic and therapeutic pain management procedures.

IV.

OBJECTIONS TO PLAINTIFF'S PRE-TRIAL DISCLOSURE

Defendant ALBERT H. CAPANNA, M.D., reserves the right to object to Plaintiff's Pre-Trial Disclosure including any and all documents, witnesses and expert witnesses not previously disclosed.