IN THE SUPREME COURT OF THE STATE OF NEVADA

Albert H. Capanna, M.D., Appellant/Cross Respondent, vs. Beau R. Orth, Respondent/Cross-Appellant	)	No. 69935
Albert H. Capanna, M.D., Appellant, vs. Beau R. Orth, Respondent.	)	No. 70227

MOTION OF THE AMERICAN MEDICAL ASSOCIATION AND THE NEVADA STATE MEDICAL ASSOCIATION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF APPELLANT/CROSS RESPONDENT AND FAVORING AFFIRMATION

The American Medical Association (AMA) and the Nevada State Medical Association (NSMA) seek leave, pursuant to Nev. R. App. P. 29 (a), to file brief as *amici curiae* in favor of Appellant/Cross Respondent and favoring affirmation, attached to this motion. In support of this motion, *amici* state the following:

1. Identification and Purposes of Movants.

(a) The AMA, an Illinois non-profit corporation, is the largest professional association of physicians, residents and medical students in the United States. Additionally, through state and specialty medical societies and other

physician groups seated in the AMA's House of Delegates, substantially all United States physicians, residents and medical students are represented in the AMA's policy making process. The objectives of the AMA are to promote the science and art of medicine and the betterment of public health. AMA members practice in all areas of specialization and in all 50 states, including the State of Nevada.

(b) The NSMA, a Nevada non-profit corporation, is organized and maintained for the benefit of the Nevada physicians who comprise its membership. Its members practice in all specialties. One of the primary purposes of the NSMA is to act on behalf of its members by representing their common interests before the Nevada courts.

2. Interest of Movants

This case concerns the constitutionality of NRS 42.021, which allows defendants in a medical malpractice suit the option of presenting evidence of collateral source payments for medical expenses to a jury for deliberation. NRS 42.021 was enacted into Nevada law as a piece of a comprehensive reform effort of the Keep Our Doctors in Nevada ("KODIN") ballot initiative in 2004. KODIN passed with overwhelming voter support in an era of medical malpractice liability crisis in Nevada, when the state's already limited supply of doctors was forced to leave the state or close their practices due to skyrocketing malpractice premiums.

This initiative was passed with the support of the AMA and NSMA, and has helped to stabilize the state's medical liability insurance market. *Amici* have numerous policies supporting the tort reform in medical malpractice lawsuits. *Amici* therefore have an interest in making sure that, in this case, the Nevada law NRS 42.021 is upheld as constitutional, as the Nevada courts have previously recognized.

3. Issues to be Addressed

The proposed *amicus* brief will address (i) the recent medical malpractice liability crisis of the early 2000's and its exacerbation of the state's ongoing physician shortage, and (ii) the Nevada Supreme Court's recent equal protection decisions supporting the constitutionality of NRS 42.021.

4. Assistance to the Court in the Disposition of the Case

Movants believe that, because of their extensive experience with the history of both the KODIN Initiative and California's MICRA reforms, they can help the Court better appreciate the legal and policy issues that permeate this case.

November 7, 2017

/s/ Catherine M. O'Mara

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Certificate of Service

I certify that the foregoing motion was submitted to the Nevada Supreme Court Clerk of court and delivered by e-mail this 7 day of November, 2017 to:

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EXHIBIT 1

IN THE SUPREME COURT OF NEVADA

Case No. 69935

ALBERT H. CAPANNA, M.D.,

Appellant/Cross Respondent,

vs.

BEAU R. ORTH,

Respondent/Cross-Appellant

Case No. 70227

ALBERT H. CAPANNA, M.D.,

Appellant,

vs.

BEAU R. ORTH,

Respondent.

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IDENTITY AND INTEREST OF *AMICI CURIAE*

Amicus curiae, the American Medical Association (the "AMA"), is the largest professional association of physicians, residents, and medical students in the United States. Additionally, through state and specialty medical societies and other physician groups seated in its House of Delegates, substantially all United States physicians, residents, and medical students are represented in the AMA's policy making process. The objectives of the AMA are to promote the science and art of medicine and the betterment of public health. AMA members practice in every medical specialty area and in every state, including Nevada. *Amicus curiae* the Nevada State Medical Association ("the NSMA") is a Nevada non-profit corporation that represents physicians of all specialties and is the State's largest physician organization.

The *Amici*'s main concern is in maintaining the necessary medical malpractice liability reforms that were enacted in response to the medical malpractice liability crisis Nevadans faced over a decade ago. Medical liability reforms like the collateral source rule reform in NRS 42.021 remain important tools to combat Nevada's ongoing physician shortage and stabilize medical liability insurance premiums.

Amici file this Brief on their own behalves and as representatives of the Litigation Center of the American Medical Association and the State Medical

Societies. The Litigation Center is a coalition among the AMA and the medical societies of each state, plus the District of Columbia, whose purpose is to represent the viewpoint of organized medicine in the courts.

SUMMARY OF ARGUMENT

In 2004, Nevada voters enacted a ballot initiative which included NRS 42.021 as a part of an effort to strengthen the state's existing medical malpractice liability limitations. At the time NRS 42.021 became law, Nevadans were experiencing an urgent medical malpractice liability crisis, which forced doctors to leave Nevada due to spikes in malpractice insurance premiums. Although the enacted legislation and voter initiatives of the early 2000s stabilized physicians' medical liability premium payments, Nevadans still face a physician shortage. Invalidating malpractice liability limitations like NRS 42.021 would run contrary to the legislature's current efforts to create an environment encouraging doctors to both stay in Nevada and move to Nevada to treat its citizens.

NRS 42.021, in fact, required only a modest change in existing law. It mandated that juries in medical malpractice cases be allowed to hear evidence of collateral source payments of medical bills. The juror would then have discretion to decide whether to award or prohibit double recovery for those bills. Nothing in the law would prevent them from awarding double recovery, as they did in this case.

NRS 42.021 rests on sound policy considerations. Claims that it violates constitutional protections are meritless. NRS 42.021 was based on a similar California Statute regarding collateral source payment evidence, California Civil Code §3333.1, which had already withstood constitutional challenges. Moreover, this Court has heard challenges to the statutory scheme to which NRS 42.021 belongs, and in each case has found such limitations to medical malpractice claims to be legitimate and rationally related to a stated governmental purpose. For these reasons, this Court should affirm the trial court's ruling that NRS 42.021 is constitutional.

ARGUMENT

A. NEVADA VOTERS PASSED THE KEEP OUR DOCTORS IN NEVADA BALLOT INITIATIVE IN 2004 TO COMBAT THE ONGOING PHYSICIAN SHORTAGE AND TO REMEDY NEVADA'S MEDICAL LIABILITY CRISIS, WHICH REMAIN LEGISLATIVE PRIORITIES.

Nevada ranks forty-seventh in the United States in a comparison of rate of physicians per 100,000 citizens. Megan Comlossy, *Fact Sheet: Healthcare in Nevada*, LEGISLATIVE COUNSEL BUREAU 3 (2015), https://www.leg.state.nv.us/Division/Research/Publications/Factsheets/HealthCareRankings.pdf. In eight out of Nevada's seventeen counties there are no emergency medicine doctors. AMA HEALTH WORKFORCE MAPPER, https://www.ama-assn.org/about-us/health-workforce-mapper (last visited Nov. 2, 2017). At most, there are 385 emergency medicine doctors for the entire state's nearly three million

residents. Id. Only six counties in Nevada have pediatricians, only five have cardiologists, and only three counties have oncologists. Id. In fact, in Clark County, where the majority of Nevada's population resides, there are sixty-five oncologists meant to serve 1,951,269 Nevadans; a ratio of 30,020 to one. Id. Meanwhile, Clark County residents experience lung, breast, and skin cancer mortality at rates higher than the national average. Institute for Health Metrics and Evaluation, *US County Profile: Clark County, Nevada*, IHME 3,4 (2016), http://www.healthdata.org/sites/default/files/files/county_profiles/US/2015/County_Report_Clark_County_Nevada.pdf.

Amidst an existing physician shortage, Nevada, along with much of the country, experienced a severe health care crisis in the early 2000's. See, American Hospital Association, *Am. Hosp. Ass'n., Prof'l Liability Ins. Survey* (2003) ("Forty-five percent of hospitals reported that the professional liability crisis resulted in the loss of physicians or reduced coverage in emergency departments"); Harris Interactive, Inc. *Common Good*, *Common Good Fear of Litigation Study: The Impact on Med*. 65. (2002) ("More than three-fourths of physicians believed that concern about medical liability litigation negatively affected their ability to provide quality care"); Medical Liability Monitor, *Annual Rate Survey Issue*. (Oct. 2007) ("Premiums in many states more than doubled between 2000 and 2004"). The medical malpractice environment caused liability insurance premiums to

skyrocket, limited the ability of qualified physicians to practice in Nevada, and forced Nevada doctors to make decisions about how and where to practice medicine to the detriment of Nevada patients. At the peak of the crisis, the only level one trauma center in Las Vegas was forced to close temporarily due to skyrocketing liability premiums. Tom Gorman, *Vegas' Only Trauma Unit to Close Today*, L.A. TIMES, (Jul. 3, 2002), http://articles.latimes.com/2002/jul/03/nation/na-trauma3.

Shortly after losing its only level one trauma center, a special session of the Nevada Legislature passed medical malpractice reform legislation. Assemb.B. 1, 18th Spec. Sess. (Nev. 2002). The "expressly-stated purpose" of the statute was to remedy the "serious threat to the health, welfare and safety of [Nevada] residents" caused by the state's "extreme difficulties attracting and maintaining a sufficient network of physicians to meet [Nevadans'] needs." Carl Tobias, *Procedural Provisions in Nevada Medical Malpractice Reform*, 3 NEV. LAW J. 11 (2003); citing Assemb.B. 1, 18th Spec. Sess. (Nev. 2002). The legislation included both substantive and procedural alterations to medical malpractice actions, including setting a cap on non-economic damage awards, shortening the statute of limitations on malpractice actions, and eliminating joint and severable liability. Id. It did not, however, address the collateral source rule, which is the subject of this appeal.

Though the 2002 legislation was aimed at making inroads in the crisis, Nevadans felt the statutory fix did not go far enough. See Minutes, Senate Judiciary Committee, March 24, 2003 (Meyer testimony). The Keep Our Doctors in Nevada ("KODIN") Initiative arose out of substantial support among Nevada voters for strengthening the provisions in the 2002 legislation. Id. The package of reforms in the KODIN Initiative were modeled on California's Medical Injury Compensation Reform Act ("MICRA") of 1975, Tam v. Eighth Jud. Dist. Ct., 358 P.3d 234, 240 (Nev. 2015) ("[t]he legislative history also discusses a comparison between Nevada's statute and California's analogous statute"); see also, Minutes, Assembly Judiciary Committee, May 13, 2003 (Matheis testimony), and were ultimately voted into law on the 2004 November ballot by a margin of 468,059 to 320,129. State of Nevada, *Statewide Ballot Questions*, OFFICE OF THE SECRETARY OF STATE (2004), https://www.leg.state.nv.us/Division/Research/VoteNV/BallotQuestions/2004.pdf. KODIN included the statute at issue in this case, NRS 42.021, which modified the collateral source rule in Nevada and allowed juries to hear evidence of third party payments for plaintiff's health care expenses in medical malpractice cases. NEV. REV. STAT. ANN. § 42.021 (West).

In the years since KODIN and the last medical liability crises, research indicates that stabilizing the medical liability environment remains a critical tool in

combatting physician shortages. States with limits on noneconomic damages generally experience greater increases in the number of doctors per capita. See William E. Encinosa & Fred J. Hellinger, *Have State Caps on Malpractice Awards Increased the supply of Physicians?*, 24 HEALTH AFF. 250 (2005). If a state's legal climate is not competitive, doctors will go elsewhere with profoundly deleterious consequences to that state's health and economy. See Joseph Nixon, Editorial, *Why Doctors are Heading to Texas*, WALL ST. J., May 17, 2008, at A9, abstract available at 2008 WLNR 9419738.

To this day, resolving Nevada's physician shortage remains a top priority for law makers. See Minutes, Senate Judiciary Committee, March 26, 2015 (Manthei testimony); see also, Paul Harasim, *Lawmakers back legislation addressing Nevada's doctor shortage*, LAS VEGAS REV. J., (Aug. 21, 2017), https://www.reviewjournal.com/life/health/lawmakers-back-legislation-addressing-nevadas-doctor-shortage/. Legislators are now focused not only on retaining existing Nevada physicians, but increasing funding for medical residency slots in Nevada with the hope that funding for these positions will encourage residents to stay and practice in Nevada. See, Mattie Quinn, *Las Vegas Shooting Strains Nevada's Doctor Shortage, Prompts Medical Emergency*, GOVERNING (Oct. 3, 2017), http://www.governing.com/topics/health-human-services/gov-las-vegas-shooting-trauma-center-doctor-shortage.html; see also generally, Stacey A.

Tovino, *I Need a Doctor: A Critique of Medicare Financing of Graduate Medical Education*, 71 WASH. & LEE L. REV. 2431 (2014).

To this end, it is well-established that the medical liability environment influences where doctors choose to stay and practice. See Ralph Blumenthal, *More Doctors in Texas After Malpractice Cap*, N.Y. TIMES (Oct. 5, 2007), http://www.nytimes.com/2007/10/05/us/05doctors.html; Chiu-Fang Cou & Anthony T. Lo Sasso, *Practice Location Choice by New Physicians: The Importance of Malpractice Premiums, Damage Caps, and Health Professional Shortage Area Designation*, 44 HEALTH SERV. RES. 1271 (2009), *available at* 2009 WLNR 15574372; Daniel P. Kessler et al., *Impact of Malpractice Reforms on the Supply of Physician Services*, 293 JAMA 2618 (2005). In fact, "many studies demonstrate that professional liability exposure has an important effect on recruitment of medical students to the field and retention of physicians within the field and within a particular state." Robert L. Barbieri, *Professional Liability Payments in Obstetrics and Gynecology*, 107:3 OBSTETRICS & GYNECOLOGY 578, 578 (Mar. 2006). Thus, efforts to undermine the 2002 and 2004 legislation could set Nevada back decades in recruiting and maintaining a stable physician workforce.

B. ORTH'S CLAIM THAT NRS 42.021 VIOLATES THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES OR NEVADA CONSTITUTIONS IS WITHOUT MERIT AND IGNORES ESTABLISHED PRECEDENT.

i. Orth has not met his heavy burden to demonstrate the law is clearly unconstitutional.

Enacted statutes are "clothed" in a presumption of constitutionality. Viale v. Foley, 350 P.2d 721 (Nev. 1960). This Court established that parties who call into question a statute's constitutionality must bear a "heavy burden," and that "every possible presumption will be made in favor of the constitutionality of a statute." Allen v. State, 676 P.2d 792, 794 (Nev. 1984). Furthermore, a court shall only interfere when the challenger has made a "clear showing of invalidity." Tam v. Eighth Jud. Dist. Ct., 358 P.3d 234, 238 (Nev. 2015) *citing* Silvar v. Eighth Judicial Dist. Court, 129 P.3d 682, 684 (Nev. 2006); see also, City of Reno v. County of Washoe, 580 P.2d 460 (Nev. 1978); Mengelkamp v. List, 501 P.2d 1032 (Nev. 1972); State of Nevada v. Irwin, 5 Nev. 111 (1869).

Orth has not demonstrated a clear showing that NRS 42.021 is constitutionally invalid. He heavily relies upon cases from foreign jurisdictions, and he fails to address this Court's recent equal protection decision in Tam (finding that limitations on medical malpractice liability withstand constitutional challenges). 358 P.3d at 239. Moreover, Orth asks this Court to create a new, "heightened" basis of review for medical malpractice cases, though this Court has

routinely applied the minimum scrutiny analysis in cases that do not impinge upon fundamental rights or involve a suspect class, as in the present case. Therefore, Orth has not met his heavy burden to demonstrate that NRS 42.021 clearly violates the constitutions of the United States or Nevada.

ii. The appropriate standard to review NRS 42.021 is rational basis review.

Furthermore, in reviewing the constitutionality of legislation for purposes of equal protection, "[t]he first step in the equal protection analysis is to determine the appropriate standard of scrutiny to apply according to the rights infringed and the classification created." Hamm v. Arrowcreek Homeowners' Ass'n, 183 P.3d 895, 903 (Nev. 2008). In determining the appropriate standard, the question becomes whether any fundamental rights are infringed upon, or whether a "suspect class" is involved. Id. Fundamental rights are rights such as "privacy, marriage, or cases involving a suspect class." Gaines v. State, 998 P.2d 166, 173 (Nev. 2000). Where no fundamental right or suspect class is implicated, a statute, "will survive an equal protection attack so long as the classification withstands 'minimum scrutiny,' i.e., is rationally related to a legitimate governmental purpose." Arata v. Faubion, 161 P.3d 244, 248 (Nev. 2007).

Thus, the Court will not set aside an enacted statute unless "the treatment of different groups 'is so unrelated to the achievement of any combination of

legitimate purposes that we can only conclude that the legislature's actions were irrational." Barrett v. Baird, 908 P.2d 689, 698–99 (Nev. 1995) overruled on other grounds by Lioce v. Cohen, 174 P.3d 970 (Nev. 2008)(quoting Vance v. Bradley, 440 U.S. 93, 97(1979). Moreover, "[i]f any state of facts may reasonably be conceived to justify [the legislation], a statutory discrimination will not be set aside." State v. District Court, 708 P.2d 1022, 1025 (Nev. 1985).

In this case, Orth asserts that allowing the jury to hear evidence of collateral source payments classifies plaintiffs into different categories: 1) whether plaintiffs were injured in malpractice or another tort, 2) whether plaintiffs possess health insurance at the time of treatment or are uninsured, and 3) whether tortfeasors are physicians or not, among other arguments. Orth's Brief 65-72. While the statutory scheme may create different groups, these classifications are reasonable and based on Nevada's legitimate purpose of controlling medical liability insurance rates. Nevada voters had a rational basis for affording certain benefits and protections to induce doctors to stay and practice in their state.

Additionally, Orth argues that this Court should apply a "heightened" rational basis scrutiny because—though acknowledging that victims of medical malpractice are not a suspect class—they are a "particularly vulnerable group." Orth's Brief at 73. However, this assertion ignores not only Fein v. Permanente Medical Group, 695 P.2d 665 (Cal. 1985)(affirming the constitutionality of

California Civil Code §3333.1 upon which NRS 42.021 was based and discussing equal protection at length) but also this Court's prior equal protection decisions, including most recently Tam v. Eighth Jud. Dist. Ct., 358 P.3d 234, 239 (Nev. 2015) (citing Fein as a basis for finding that combating "the rising cost of medical malpractice insurance" serves a legitimate governmental purpose); Barrett v. Baird, 908 P.2d 689, 698–99 (Nev. 1995) overruled on other grounds by Lioce v. Cohen, 174 P.3d 970 (Nev. 2008); see also, State v. Silva, 478 P.2d 591, 594 (Nev. 1970) and Martinez v. Maruszczak, 168 P. 3d 720, 730 (Nev. 2007). Specifically, this Court in Barrett and again in Tam recognized that limitations on medical malpractice actions do not involve either a "fundamental right" or a "suspect classification." Tam, 358 P.3d at 234, 239 (citing Barrett, 908 P.2d at 698-99).

Therefore, this Court has already determined that medical malpractice limitations such as the collateral source rule do not implicate fundamental rights; nor do they involve a suspect class. This Court declined to carve out a new constitutional test for cases involving medical malpractice and instead chose to apply the long-standing doctrine of minimum scrutiny for statutes in the same statutory scheme as NRS 42.021. Thus, "heightened" or intermediate scrutiny is not appropriate, and the Court should apply the minimum scrutiny standard of review in this case.

iii. Limits on medical malpractice liability are rationally related to the state's legitimate interests of reducing the cost of medical malpractice insurance to physicians, stabilizing the medical liability market, and increasing access to healthcare for Nevadans.

Applying the minimum scrutiny level of review, NRS 42.02—which allows juries to hear evidence of third party insurance payments—is rationally related to a legitimate government purpose and withstands Orth's attack. According to this standard, "the reviewing court may hypothesize the legislative purpose behind legislative action" if necessary. Arata v. Faubion, 161 P.3d 244, 249 (Nev. 2007). Again, any limitation to a medical malpractice action will be sustained against an equal protection challenge so long as "any state of facts may be reasonably conceived to justify" the limitations. Tam, 358 P.3d at 234, 239 (citing Barrett, 908 P.2d at 698-99).

In this case, the Court need not hypothesize. The Court in Tam found that limitations to medical malpractice actions "related to the legitimate governmental interest of ensuring that adequate and affordable health care is available to Nevada's citizens." 358 P.3d at 234, 239. Thus, the objective of lowering the cost of malpractice premiums and remedying the malpractice crisis provides a wholly adequate rational basis for legislation limiting a plaintiff's rights in such litigation.

Finally, the California Supreme Court in Fein acknowledged that allowing a jury to hear evidence of collateral source payments would likely result in lower

damage awards, but found that this directly related to MICRA's goal of "reducing the costs incurred by medical malpractice defendants." 695 P.2d at 665. Moreover, Fein determined that "the reduction of such costs would serve the public interest by preserving the availability of medical care throughout the state." Id.

Here, Nevadans considered and approved of a rationale allowing evidence of collateral source payments to be presented to the jury. Collateral source payment information may have the effect of lowering damage awards, but this outcome is rationally related to the state's legitimate interest in creating an environment conducive for physicians to practice. This benefit is conferred not just to physicians, but to the patients they treat and serve. Therefore, NRS 42.021 is rationally related to a legitimate state interest and should be preserved.

CONCLUSION

Nevada legislators responded to an acute physician shortage exacerbated by the early 2000's medical malpractice liability crisis, and Nevadans showed their support by strengthening these legislative efforts. Nevadans need doctors. Creating a favorable malpractice environment for physicians increases access to healthcare and prevents future public health crises like hospital closures. NRS 42.021 is supported by sound policy reasons and is constitutional. Allowing a jury to hear evidence of third party payments serves the legitimate purpose of preventing

double payment for medical malpractice damage awards and promotes the government interest of increasing access to quality healthcare in Nevada.

For these reasons, this Court should affirm the trial court's ruling holding NRS 42.021 to be constitutional.

Respectfully submitted,

By: /s/ Catherine M. O'Mara

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RULE 28.2 CERTIFICATION

I hereby acknowledge that I have read the BRIEF OF THE AMERICAN MEDICAL ASSOCIATION AND THE NEVADA STATE MEDICAL ASSOCIATION IN SUPPORT OF THE APPELLANT/CROSS RESPONDENT, and to the best of my knowledge, information, and belief it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure including the requirement of NRAP 28(e) that every assertion in the brief regarding matters in the record are supported by a reference to the page of the Joint Appendix, where the matter relied on is to be found. I further certify that this brief complies with formatting requirements of NRAP 29 and 32, because it is prepared in proportionally spaced Times New Roman typeface, in 14-point font, and it contains 3,081 words, which is less than half the word limit for the combined reply/answering brief.

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

Dated this __7_ day of November, 2017.

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CERTIFICATE OF MAILING

The undersigned does hereby certify that a true and correct copy of the foregoing BRIEF OF THE AMERICAN MEDICAL ASSOCIATION AND THE NEVADA STATE MEDICAL ASSOCIATION IN SUPPORT OF THE APPELLANT/CROSS RESPONDENT was duly mailed in a first class, postage pre-paid envelope on the 7 day of November, 2017, to the following:

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