IN THE SUPREME COURT OF THE STATE OF NEVADA

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

RESPONDENT/CROSS-APPELLANT'S REPLY BRIEF ON CROSS-APPEAL

DENNIS M. PRINCE, ESQ.
Nevada Bar No. 5092
KEVIN T. STRONG, ESQ.
Nevada Bar No. 12107
EGLET PRINCE
400 South 7th Street, 4th Floor
Las Vegas, NV 89101
Tel.: 702-450-5400
Email: eservice@egletlaw.com
Attorneys for Respondent/Cross-Appellant
Beau R. Orth

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes **Page(s)**

Other Sources **Page(s)**

REPLY BRIEF ON CROSS-APPEAL

An injury victim's right to a complete recovery for all economic losses incurred is a substantial right that deserves the utmost protection. Juries are specifically instructed to award "..[t]he reasonable medical expenses plaintiff has necessarily incurred as a result of the incident." *See* Nev. J.I. 5PID.1. NRS 42.021 deprives only medical malpractice victims of the ability to receive a full and adequate remedy for medical expenses actually incurred. NRS 42.021 also treats various subsets of malpractice victims differently based on whether they have health insurance and the type of health insurance they have. This results in fundamentally unfair outcomes for one distinct subset of injury victims that cannot be justified under heightened rational basis scrutiny or even rational basis scrutiny.

I. RESPONDENT/CROSS-APPELLANT'S CROSS-APPEAL IS RIPE FOR JUDICIAL REVIEW AND SHOULD NOT BE DISMISSED

Appellant/Cross-Respondent Albert H. Capanna, M.D. ("Capanna) reargues that Respondent/Cross-Appellant Beau R. Orth's ("Orth") Cross-Appeal should be dismissed because Beau is not an aggrieved party. Capanna's argument overlooks the significance of the constitutional issue this Court is asked to address. This constitutional issue is of great importance to medical malpractice litigants in Nevada. It is appropriate for this Court to address this legal issue now because the lack of clarity with the statute and its application continues to impact medical malpractice litigants. While Beau does not believe this Court will reverse and

remand to the trial court, the parties have fully briefed this issue, which makes it appropriate for this Court to consider.

Even in *Tam v. Eighth Judicial Dist. Court*, 131 Nev. ___, 358 P.3d 234, 238-39 (2015), which involved an extraordinary writ, this Court addressed the issue of equal protection in relation to NRS 41A.035 even though the district court did not address the issue in its order. The Nevada Supreme Court can consider constitutional issues for the first time on appeal. *Id.* Public policy and judicial economy, both interests that this Court has acknowledged to be paramount when exercising its discretion to decide appellate issues, necessitate a decision on the merits regarding NRS 42.021. *Paley v. Second Judicial Dist. Court*, 129 Nev. ___, 310 P.3d 590, 592 (2013).

II. NRS 42.021 DOES NOT SATISFY EQUAL PROTECTION REQUIREMENTS

Capanna and *Amici Curiae* argue that Beau has not met his burden to show that NRS 42.021 violates the Equal Protection Clauses of the United States and Nevada Constitutions. They both contend that this Court should apply rational basis scrutiny when addressing the constitutionality of NRS 42.021 because Beau and all other victims of medical malpractice are not members of a suspect or quasi-suspect class. Based on the rational basis test, Capanna and *Amici Curiae* argue that NRS 42.201 is constitutional because the statute is rationally related to achieving the Nevada Legislature's goal to reduce malpractice insurance

premiums. Capanna further argues that NRS 42.021 is presumptively valid because the Nevada Legislature and voters may enact rules of evidence that limit damage awards. Finally, Capanna contends that NRS 42.021 is not void for vagueness.

A. A Medical Malpractice Victim's Right to Recover for Personal Injuries is Significant Enough to Analyze the Constitutionality of NRS 42.021 Under Heightened Rational Basis

Capanna presumes that rational basis is the appropriate standard of review for NRS 42.021 because medical malpractice victims are not a suspect class or quasi-suspect class. Appellant's Answering Brief, at 45. Capanna relies on *Barrett v. Baird*, 111 Nev. 1496 (1995) to support this contention. Capanna overlooks that *Barrett* is distinguishable from this case. In *Barrett*, this Court addressed whether NRS 41A.016, which required medical malpractice victims to submit their case to a screening panel before filing their complaints and NRS 41A.009, which limited the commission of medical malpractice to physicians, hospitals, and employees of hospitals, denied medical malpractice victims equal protection under the U.S. and Nevada Constitutions. *Id.* at 1509. The *Barrett* Court applied rational basis scrutiny to the challenged legislation because "the right of malpractice victims to sue for damages caused by medical professionals does not involve a fundamental constitutional right." *Id.* at 1507.

Unlike *Barrett*, which involved an equal protection challenge to a statute that impacted a medical malpractice victim's ***right*** to bring an action, Beau's equal protection challenge of NRS 42.021 involves an entirely different interest, namely an injury victim's ability to obtain a complete recovery of economic damages incurred for which there is no prescribed limit. The right to obtain a complete recovery for economic damages suffered from the negligence of another accrues ***after*** an action is filed, which renders any analysis concerning a party's right to institute an action against a negligent party inapplicable. NRS 42.021 did not deprive Beau of his ability to sue for damages caused by the negligence of Capanna. NRS 42.021 did not place any burdens on Beau while initiating his medical negligence action against Capanna. Thus, Capanna's suggestion that *Barrett* holds that all medical malpractice victims' equal protection challenges to statutes are subject to rational basis review is flawed. Even in *Tam*, which addressed the constitutionality of the statutory cap on noneconomic damages in medical malpractice cases on equal protection grounds, this Court solely relied on the principle that a malpractice victim's ***right to sue*** for damages does not involve a fundamental right. 286 P.3d at 239. Beau does not contend that the right to a complete recovery for all economic damages incurred is a fundamental right. Therefore, this Court is not confined to apply rational basis scrutiny to NRS 42.021

because Beau's equal protection challenge stems from his right to recover all economic damages incurred as a result of a negligent party.

Capanna does not dispute that this Court adopted a heightened rational basis test to address the constitutionality of a statute on equal protection grounds in *Laakonen v. Eight Judicial Dist. Court*, 91 Nev. 506, 509 (1975).[1] Instead, Capanna takes an overly narrow view of *Laakonen* to argue that heightened rational basis is not applicable because the statute at issue in *Laakonen* created substantially dissimilar effects than NRS 42.021. In *Laakonen*, this Court addressed the constitutionality of NRS 41.180. 91 Nev. at 507, 538 P.2d at 574. NRS 41.180 acted as a statutory bar for automobile guest passengers from any recovery of damages for injury resulting from the negligent host driver. *Id.* at 508. In effect, NRS 41.180

> ...denies a defined class of persons, passengers who give no compensation for their ride who are injured by their host's negligence, the right afforded to other classes of tort victims to recover for negligently inflicted injuries.

Id.

The *Laakonen* Court ultimately applied heightened rational basis scrutiny to NRS 41.180. *Id.* at 509. Under this standard of scrutiny, "[e]qual protection is offended if the prohibition is a unreasonable classification without basis in fact,

[1] *Amici Curiae* confusingly claim that Beau requests that this Court create a new heightened basis of review. *See Amici Curiae* Brief, at p. 9. This claim is obviously inaccurate given the *Laakonen* decision.

and unrelated to the objective sought to be accomplished." *Id.* The Court ultimately determined that NRS 41.180 was unconstitutional because the justifications for the statute, namely the protection of hospitality and elimination of collusive suits, did not provide a rational basis necessary to justify the different treatment of injured passengers traveling in vehicles. *Id.* at 509-11.

Like NRS 41.180, which singled out one class of injured persons for disparate treatment, NRS 42.021 deliberately singles out injury victims of medical malpractice with health insurance. Any so-called distinction between the two statutes merely because NRS 41.180 precluded a class of victims from filing a suit for damages disregards the most important similarity between the two statutes, namely that NRS 41.180 denied and NRS 42.021 denies one type of personal injury victim the right to a full remedy for economic losses. The practical effects of both statutes are that they caused continued financial suffering for victims who were injured through no fault of their own, which should not be ignored. Other state supreme courts have, in fact, applied heightened rational basis to statutes similar to NRS 42.021 by relying on their decisions in which they applied this level of scrutiny to virtually identical automobile guest statutes on equal protection grounds. *See Arneson v. Olson*, 270 N.W.2d 125, 133 (N.D. 1978) (relying on heightened rational basis test used in *Johnson v. Hassett*, 217 N.W.2d 771 (N.D. 1974), which involved the constitutionality of an automobile guest statute); *Jones*

v. State Bd. of Medicine, 555 P.2d 399, 410-11 (Idaho 1976) (relying on heightened rational basis test applied in *Thompson v. Hagan*, 523 P.2d 1365 (Idaho 1975), which also involved the constitutionality of an automobile guest statute).

In *Laakonen*, this Court cited to *Reed v. Reed*, 404 U.S. 71, 92 S. Ct. 251 (1971) in support of its adoption of heightened rational basis scrutiny. 91 Nev. at 508. Capanna argues that since *Reed* addressed an Idaho statute that treated similarly situated men and women differently, the statute affected a quasi-suspect class. By pointing this out, Capanna implies that heightened rational basis scrutiny should somehow only apply to quasi-suspect classes that are treated differently, not victims of personal injury. Obviously, this Court was not convinced that heightened rational basis should only apply to statutes involving classifications based upon gender given its application to a statute that treated injured automobile guests differently. *Laakonen*, 91 Nev. at 509. This Court's sound decision to apply heightened rational basis scrutiny to a statute that treated injured automobile guests differently arises from Nevada law "...embrac[ing] a more expansive interpretation of constitutional rights than federal law" in a variety of contexts. *Wilson v. State*, 123 Nev. 587, 595 (2007).

> It is generally true that federal law, whether based on statute or constitution, establishes a minimum national standard for the exercise of individual rights and does not inhibit state governments from affording its citizens greater protections for such rights.

S.O.C., Inc. v. Mirage Casino-Hotel, 117 Nev. 403, 414 (2001).

Capanna also disputes the applicability of *Coburn By & Through Coburn v. Agustin*, 627 F. Supp. 983 (D. Kan. 1985) to this case. Specifically, Capanna alleges the *Coburn* Court applied heightened rational basis because an injured person's right to remedy is a fundamental right afforded by the Kansas Constitution. *Id.* at 994. Capanna's argument misinterprets the decision. Although the *Coburn* Court acknowledged that the Kansas Bill of Rights provides that a person shall have a remedy for injuries suffered, it ***never*** based its decision to apply heightened rational basis on this principle. In fact, the *Coburn* Court stated immediately after citing to the Kansas Bill of Rights that "[w]hile the rights involved in this case ***are significant***, that alone is not enough to trigger heightened scrutiny." *Id.* at 995. The *Coburn* Court never expressly classified the right to a remedy as a "fundamental right." If the *Coburn* Court deemed the right to a remedy a fundamental right, then it would have applied strict scrutiny rather than heightened rational basis. *Id.* at 986 ("The first tier involves a strict scrutiny test by which courts evaluate statutes that...encroach on fundamental rights."). Instead, the *Coburn* Court applied heightened rational basis to a statute that, like NRS 42.021, allowed the introduction of collateral source payments made to the injury victim in medical malpractice cases because "...***the rights at issue are sufficiently important to require that the restrictions on those rights be subjected to a more exacting form of scrutiny than the mere rational basis test.***" *Id.* at 995 (emphasis

added). The importance of the right to a complete recovery for injuries is the same for Kansas's citizens as for Nevadans. Therefore, *Coburn*'s evaluation of a substantially similar statute is applicable in this case, particularly because NRS 42.021 was passed to address the same purported "medical malpractice crisis" as in Kansas.

The undeniable significance of an injured person's right to fully recover economic damages they sustained at the hands of a negligent party warrants the application of heightened rational basis scrutiny to NRS 42.021. Beau's reliance on *Laakonen* is not flawed. NRS 42.021 impinges upon one distinct class of personal injury victims' right to be fairly and justly compensated for injuries resulting from negligence. *Proctor v. Castelletti*, 112 Nev. 88, 91 (1996). NRS 42.021 directly contravenes long-standing Nevada law that a successful plaintiff is entitled to compensation for all of the natural and probable consequences of a defendant's tortious conduct. *Hall v. SSF, Inc.*, 112 Nev. 1384, 1390 (1996). This Court's decision in *Laakonen* was driven by its concern that injury victims of all types receive a full and adequate remedy, regardless of whose negligence causes the injury. This concern is directly implicated by NRS 42.021 because the statute deprives one distinct group of injury victims of the opportunity to recover all economic damages they incurred simply because a politically stronger party caused the injury. The inequitable outcomes that result from NRS 42.021 become even

more pronounced considering that NRS 42.021 allows the introduction of evidence that is not even relevant to the economic damages the jury is responsible for awarding.

B. NRS 42.021 Causes Disparate Treatment of One Distinct Class of Injury Victims Through the Introduction of Evidence This Court Deemed to be Unrelated to the Reasonable Value of Medical Services

Though the right to recover for personal injuries is not a fundamental right, it is nevertheless an important substantive right. *Carson v. Maurer*, 424 A.2d 825, 830 (N.H. 1980); *see also, Hanson v. Williams County*, 389 N.W.2d 319, 325 (N.D. 1986); "...[T]he measure of damages is a substantive right." *Frank Briscoe Co. v. Rutgers*, 327 A.2d 687, 690 (N.J. Super. Ct. 1974).

A full and fair opportunity to recover damages for personal injury victims, including those injured by medical malpractice, addresses not only a financial interest, but also the interest of physical health:

> The right to be indemnified for personal injuries is a substantial property right, not only of monetary value but in many cases fundamental to the injured person's physical well-being and ability to continue to live a decent life.

Hunter v. N. Mason High Sch., 539 P.2d 845, 848 (Wash. 1975).

The Supreme Court of Utah has also recognized that an injured person's right to a complete recovery of damages for personal injury is very closely related to a fundamental right:

> The importance of this right is seen not only from a purely compensatory perspective, but also as a function of the close relation it bears to other rights which are fundamental. Not only is the right to be compensated for injuries closely related to fundamental rights, but additionally, it does not logically fit into the "commercial" rights description which is characteristic of the rational basis standard of review.

Condemarin v. University Hosp., 775 P.2d 348, 354 (Utah 1989).

The vital importance of a victim's right to a complete recovery of economic damages is even more pronounced for victims of medical malpractice, who are already subject to various statutory limitations on their medical negligence claims. *e.g.* $350,000.00 cap on noneconomic damages and abrogation of joint and several liability). As a practical matter, NRS 42.021 acts as a potential indirect cap on economic damages as it invites juries to award less than the reasonable expenses incurred. This Court's adoption of a *per se* rule that bars collateral source evidence acts as an express acknowledgment that an injured person's right to a complete recovery for economic damages sustained at the hands of a tortfeasor is a substantial right. The application of NRS 42.021 has eroded this vital right for Nevada's most defenseless injury victims simply because the negligence stems from medical treatment.

The disparate treatment of medical malpractice victims under NRS 42.021 is even more pronounced because it stems from the admission of irrelevant evidence. This Court has held that payments by insurers and write-downs are

"...irrelevant to a jury's determination of the reasonable value of medical services and will likely lead to jury confusion." *Khoury v. Seastrand*, 132 Nev. ___, 377 P.3d 81, 93 (2016). The application of NRS 42.021 belies this Court's decision in *Khoury* because it allows the jury to consider collateral source payments of differing amounts based on a multitude of factors that do not reflect the reasonable value of medical expenses. *Id.* The amounts paid by collateral sources to medical providers bear no relationship to the value of the medical services to treat the injuries victims sustained as a result of malpractice. Yet, NRS 42.021 creates a scenario in which a jury could arbitrarily decrease an injury victim's award for economic damages based upon irrelevant collateral source evidence. NRS 42.021 also allows medical providers to likely escape their responsibility to fully compensate an injury victim for the reasonable value of all medical expenses incurred as a direct result of their negligent treatment. This outcome actually rewards negligent healthcare. Thus, NRS 42.021 is not even rationally related to the legitimate government purpose for which the statue was supposedly enacted, namely to ensure that quality health care is available in Nevada.

Recently, this Court inherently acknowledged the disparate treatment of medical malpractice victims pursuant to NRS 42.021. *McCrosky v. Carson Tahoe Reg'l Med. Ctr.*, 133 Nev. Adv. Rep. 115 (Dec. 28, 2017). In *McCrosky*, this Court addressed the introduction of the medical malpractice victim's receipt of

collateral source payments from Medicaid even though the jury did not reach this issue at trial. 133 Nev. Adv. Rep. at p. 10. Contrary to Capanna's belief, this Court did not hold that NRS 42.021 is a constitutional exception to the collateral source rule. Instead, this Court solely addressed the issue of whether NRS 42.021 was preempted under federal law. *Id.* In *McCrosky*, this Court did not decide the issue presented here.

It is noteworthy that this Court held that since federal law preempts NRS 42.021(2), the entire statute is unworkable for malpractice victims who receive federal benefits because it results "...in the unintended consequence of doubly reducing plaintiffs' recoveries." *McCrosky*, 133 Nev. Adv. Rep. at p. 12-13. This double reduction manifests itself through a jury's likely reduction in the award for past medical expenses and by allowing the U.S. to recovery Medicaid payments to the plaintiff. *Id.* at p. 12. This holding validates Beau's argument that malpractice plaintiffs who receive self-funded employee health benefit plans pursuant to ERISA cannot enjoy the benefit of NRS 42.021(2) because the anti-subrogation provision of NRS 42.021(2) is preempted under federal law as well. *FMC Corp. v. Holliday*, 498 U.S. 52, 65, 111 S. Ct. 403, 411 (1990).

McCrosky underscores how medical malpractice victims are treated differently under NRS 42.021 depending only on the type of health insurance they have. NRS 42.021, as currently read, allows evidence of payments from all third-

party payers, whether private or public, to be introduced to the jury at trial. Now, medical malpractice victims who are either uninsured, receive health benefits through federal collateral sources such as Medicare and Medicaid, or receive benefits through self-funded employee health benefit plans are not subject to NRS 42.021 at all. As a result, ***only*** those malpractice victims who bought private health insurance or receive private health insurance through self-funded plans are subject to the introduction of collateral source evidence pursuant to NRS 42.021. This is particularly unjust given that collateral source evidence is not even relevant to determine the reasonable value of medical services in the first place. *Khoury*, 377 P.3d at 93.

Yet, the practical effect of NRS 42.021 is that collateral source evidence is relevant for only one distinct group of injury victims (medical malpractice victims) who carry one distinct type of insurance (private health insurance that is not self-funded). This is not equitable, fair, or just, particularly because this Court acknowledged that the application of NRS 42.021 "...likely reduces the amount that juries award to the plaintiff." *McCrosky*, 133 Nev. at p. 12. In light of its current applicability to such a small group of insureds, NRS 42.021 cannot, under any scenario, achieve the legislative purposes for which it was passed, namely to reduce provider malpractice premiums and increase the quality of health care in Nevada. There is simply no legitimate rationale why one distinct group of insureds

should be treated differently than any other group of insureds, especially when they all receive substantially similar health benefits, just from different ***types*** of third-party payers.

C. Complete Deference to the Public's Decision to Vote for the Passage of NRS 42.021 Ignores the Fallacies Upon which the Initiative was Based

Statutes that are enacted as a result of voter initiative can be challenged if the statute violates federal or state constitutional provisions. *Herbst Gaming, Inc. v. Heller*, 122 Nev. 877, 883 (2006). While Capanna cites to *Miller v. Burk*, 124 Nev. 579, 596 (2008) for the proposition that all voter initiatives are subject to presumptions of law and fact, this Court actually limited this deference to voter-enacted constitutional amendments only, not statutes like NRS 42.021. This is likely because voter initiatives involving amendments to the Nevada Constitution must be resubmitted to and approved by voters for a second time in the same manner as they were when first passed. *Miller*, 124 Nev. at 584. This ensures that the public has a complete understanding of the rationale for the proposed constitutional amendment. The same cannot be said for the 2004 voter initiative that led to the enactment of NRS 42.021 because the information upon which the initiative was based was unreliable and inaccurate.

Amici Curiae perpetuate the commonly held misconception that the medical malpractice reform that resulted from the 2004 voter initiative to "Keep Our

Doctors in Nevada" was to combat rising health insurance premiums caused by medical malpractice lawsuits.[2] *See Amici Curiae* Brief, at pp. 3-8. However, the perpetuation of this so-called crisis was not based on any evidence or data. In 2003, the year before the voter initiative that led to the enactment of NRS 42.021 was passed, the Nevada Legislature ordered a subcommittee to study medical malpractice, similar to years past. *See* Report to the 72nd Session of the Nevada Legislature by Legislative Subcommittee to Study Medical Malpractice, Legislative Counsel Bureau Bulletin No. 03-9 (Jan. 2003). The results of this subcommittee's study categorically showed no relationship between medical malpractice claims and rising malpractice insurance premiums even in states that enacted similar medical malpractice reform. *Id.* Yet, this information was overlooked, which ultimately contributed to the passage of the 2004 voter initiative and enactment of NRS 42.021.

Indeed, medical providers' malpractice insurance premiums started to rise in 2001, but not because of medical malpractice claims. Prior to September 11, 2001, a "hard market" was already developing throughout the United States insurance

[2] It is worth nothing that *Amicus Curia* The American Medical Association's primary agenda is to promote tort reform on the state and federal level and that its "highest legislative priority" is to reduce both the number of lawsuits and the amount of damages awarded to plaintiffs across the country. *See* Medical Liability Reform Now!, available at http://www.ama-assn.org; AMA thanks officials for tort reform law, http://www.lasvegassun.com/news/2002/aug/14/ama-thanks-officials-for-tort-reform-law/. These articles demonstrate that the AMA is not a neutral or disinterested organization when it comes to medical liability reform.

industry. *Id.* at p. 11. A "hard market" causes conditions in which premiums are high and coverage is difficult to obtain. *See* Report to Study Medical Malpractice, at p. 11. By contrast, beginning in the late 1980s, before the "hard market" began to develop, the insurance industry felt a "soft market," which resulted in strong competition for the premium dollar and, by extension, constant lower premiums. *Id.* Once the September 11, 2001 terrorist attack occurred, the nation's economy was severely impacted in an adverse way that was felt by businesses and consumers alike, including insurers. *Id.* Notably, cost estimates for the insurance industry varied from $30 billion to $70 billion after September 11, 2001, which led to reinsurers and insurers rapidly increasing rates to cover the costs. *Id.* Medical malpractice insurers were particularly affected because they were previously able to keep rates artificially low by using reserves accumulated in earlier years. *Id.* at p. 12. However, those reserves became depleted in the wake of the economic crisis that developed following 9/11. *Id.* The subcommittee acknowledged that the Insurance Information Institute stated, "that insurers on average have been paying out $1.40 for every dollar they collected in premiums." However, this was a nationwide problem, not just a Nevada problem, that resulted from an economic downturn that reduced insurers' earnings on securities and other investment income that helped offset underwriting losses. *Id.* This problem did not result from medical malpractice lawsuits or doctors leaving Nevada.

An additional factor that led to an increase in premiums was a decision by the St. Paul Company, one of the Nevada's three major medical malpractice insurers since the mid 1990s, to withdraw from the medical malpractice business globally. *See* Report to Study Medical Malpractice, at p. 12. At the time of St. Paul's withdrawal from Nevada, it insured approximately 60 percent of the State's physicians or a total of 1,328 physicians under 522 policies. *Id.* at p. 13. St. Paul's control of the majority of the medical malpractice market allowed it to control premium rates that other insurers followed, which helped lead to artificially low rates. *Id.* However, when St. Paul left, a major insurance competitor was no longer present to drive down insurance rates. *Id.* This led to the remaining malpractice insurers in Nevada to seek and receive multiple increases in medical malpractice premiums from the Insurance Commissioner. *Id.* In August 2001, the CNA Group sought a ***100 percent increase*** in premiums, which Nevada's Insurance Commissioner reduced to 52 percent. *Id.* Other insurers received approval for increases that ranged from seven and a half percent to 20.7 percent. *Id.* Physicians who were insured by St. Paul also experienced an increase in costs resulting from their payment of "tail coverage" because they had to change malpractice insurers. *Id.*

Notably, none of these increased costs for doctors in Nevada resulted from any crisis that resulted from medical malpractice claims in Nevada. In fact, the

subcommittee found no definitive correlation between caps on damage awards in medical malpractice cases, which abrogation of the collateral source rule is intended to achieve, and the rising costs of medical malpractice. *See* Report to Study Medical Malpractice, at pp. 15-17. Yet, voters were inundated with falsities about good doctors leaving Nevada because the uncontrollable amount of "frivolous" medical malpractice claims drove medical malpractice insurance rates to an unreasonably high level. This undermines both Capanna and *Amici Curiae*'s suggestion that the wide margin in which the 2004 voter initiative passed somehow validates NRS 42.021 and the rationale for its passage. Several years later, the physician shortage problem in Nevada still remains, which even *Amici Curiae* acknowledges. *See Amici Curiae* Brief, at pp. 3-4, 7. Therefore, blind deference to the passage of the voter initiative is not relevant to this Court's equal protection analysis because no evidence existed to establish that malpractice premiums for doctors in Nevada would fall from the admission of collateral source evidence.

D. NRS 42.021 Violates Equal Protection Under the Heightened Rational Basis Test

Under the heightened rational basis test, "[e]qual protection is offended if the prohibition is ***an unreasonable classification without basis in fact***, and unrelated to the objective sought to be accomplished." *Laakonen*, 91 Nev. at 509 (emphasis added). The classification must have a "fair and substantial" relation to the legislation. *Id.* As established above, the factual record in 2003 demonstrated

no definitive evidence establishing a correlation between medical malpractice claims and the cost of medical malpractice insurance premiums in Nevada. *See* Subsection C, *supra.* In fact, Nevada's commissioned subcommittee's investigation revealed other causes of increased malpractice insurance premiums for physicians aside from malpractice claims such as bad underwriting and economic downturns. Yet, voters were solely presented with the option that tort reform was the only avenue to solve this so-called crisis and safeguard the health, safety, and welfare of the public. *See Nevada Ballot Questions 2004, Question No. 3, Argument in Support of Question No. 3,* at p. 16.

NRS 42.021 does not come close to protecting the health, safety, and welfare of Nevada's citizens, which was its primarily legislative purpose. Instead, it confers specific benefits on a group of tortfeasors (medical providers) by potentially limiting their direct liability for economic damages caused as a result of their negligence. As it currently reads, NRS 42.021 reduces the culpability of physicians for their negligent acts, which, in turn, reduces the quality of healthcare in Nevada generally.

> If the medical profession is less accountable than formerly because of the special treatment it is afforded by [certain laws], then a relaxation of medical standards may occur with the ***public as the victim***. To find that the protection and special dispensation given to health delivery tortfeasors by [such legislation] is in the best interest of public health is illogical to the point of irrationality.

Hoem v. State, 756 P.2d 780, 783 (Wy. 1988) (emphasis added).

Elimination of the collateral source rule solely in the realm of medical malpractice unquestionably results in a windfall to the defendant tortfeasor or the tortfeasor's insurer to the detriment of the public at large. *Carson*, 424 A.2d at 836. For instance, the introduction of collateral source evidence could lead to an increase in health insurance premiums for the public because insurance companies could potentially be financially responsible for all injuries the victim suffered at the hands of a fully insured medical practitioner. *Id.* As a result, negligent medical providers receive a "...credit against the damage the provider inflicts on its victims in the amount of the value of the victim's independent contractual rights" from their respective health insurer. *Farley v. Engelken*, 740 P.2d 1058, 1066 (Kan. 1987). "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." *Id.* This is precisely what NRS 42.021 does and its effects are felt not only by innocent victims of medical malpractice, but also by all Nevadans.

Heightened rational basis requires a balancing of the interests served and the interests burdened. *Coburn*, 627 F. Supp. at 995. NRS 42.021's different treatment of one specific segment of injury victims differently is borne completely out of protecting a class of tortfeasors and their malpractice insurers who maintain a strong political lobby designed to protect their financial interests. "The restriction of important rights of a disadvantaged class significantly outweighs the

benefits sought to be conferred upon the privileged class." *Coburn*, 627 F. Supp. at 996.

> Constitutional protections exist for litigants regardless of market conditions for insurance companies and the medical industry; concerns about the latter cannot be allowed to overrun the former at the expense of those injured by acts of malpractice.

Hoem, 756 P.2d at 784.

Despite the Nevada Legislature's intent to improve the quality of health care, NRS 42.021 arbitrarily and unreasonably discriminates against plaintiffs of medical malpractice suits because it imposes burdens that restrict their right to recover economic damages. No other plaintiffs who are the victim of personal injury have to face these restrictions and are able to receive full and fair compensation from the wrongdoer. This result makes sense because it deters negligent behavior and disallows the wrongdoer to gain any sort of advantage over the innocently injured party. Conversely, NRS 42.021 reduces verdicts for economic losses, which insulates medical providers from facing the real consequences of their negligent health care.

While this premise may seem to be intended to keep doctors in Nevada, it does nothing to ensure quality health care for Nevada citizens. On the other hand, "...the continued availability and vitality of causes of action against [medical providers] serve an important public policy – the preservation of quality health care for the citizens [of Nevada]." *Hoem*, 756 P.2d at 783. NRS 42.021 does not

serve this policy. NRS 42.021's different treatment of injury victims and tortfeasors is not fairly and substantially related to maintaining quality health care in Nevada.

E. NRS 42.021 is Not Automatically Constitutional Simply Because it Abolishes the Collateral Source Rule and Not a Fundamental Right

Capanna attempts to divert this Court's attention away from the constitutionality of NRS 42.021 by arguing that the collateral source rule is a rule of evidence and that no person has a vested right in a rule of law. Capanna's reliance on *Cramer v. Peavy*, 116 Nev. 575 (2000) to support this argument is not persuasive. In *Cramer*, this Court analyzed the constitutionality of NRS 616C.215(10), the statute that allows evidence of past or future payments made by a worker's compensation insurer to the injured employee, under the separation of powers doctrine. 116 Nev. at 582. It was in this context where the *Cramer* Court held that no person has a vested right in a rule of law or mode or procedure. *Id.* This analysis does not apply to the legal question presented to this Court here because it is not based on Beau's belief that his interest in the rule barring evidence of collateral sources of payment is a fundamental right.

Capanna's implication that NRS 42.021 is somehow constitutional because this Court upheld the constitutionality of NRS 616C.215(10) is equally misguided. Unlike NRS 42.021, which is a complete abrogation of the collateral source rule in medical malpractice claims, NRS 616C.215(10) was "...not intended to eviscerate

the collateral source rule." *Cramer*, 116 Nev. at 580. Rather, NRS 616C.215(10) acknowledges that "...cases involving SIIS benefits are unique from other insurance cases because the jury already knows that the plaintiff has received SIIS benefits if the injury was work related." *Id.* Before NRS 616C.215(10) passed, juries mistakenly believed that the plaintiff was not required to repay SIIS from any damage award. *Id.* at 581. As a result, the Nevada Legislature passed NRS 616C.215(10) to prevent the jury from speculating as to how much the plaintiff received from SIIS and then reduce the jury award. *Id.* By contrast, in medical malpractice claims, the jury has no idea if the plaintiff has or has not received health insurance benefits related to his injuries until the evidence is actually presented. This distinction is critical because the intent behind introducing collateral source evidence in medical malpractice cases is solely to inform the jury that the plaintiff's past medical expenses were already paid and to reduce the award accordingly. In the workers' compensation context, NRS 616C.215(10) "***...cannot be used the defense to imply that the plaintiff has already been compensated, will receive a double recovery if awarded a judgment or has overcharged SIIS.***" *Id.* (emphasis added). Unlike NRS 616C.210(10), NRS 42.021 actually invites they jury to speculate about how much to reduce an award for economic damages because the collateral source payment amounts are

unrelated to the reasonable value of the medical services rendered. *Khoury*, 377 P.3d at 93.

Capanna's attempt to analogize *Zamora v. Price*, 125 Nev. 388 (2009) to this case is similarly unavailing. In *Zamora*, this Court analyzed the constitutionality of NRS 38.259(2), which allows for the admission of the arbitrator's findings at a new trial for cases that are subject to non-binding arbitration. 125 Nev. at 390. Unlike NRS 42.021, NRS 38.259(2) does not hinder a plaintiff's interest in a complete recovery of economic damages he suffered because the statute provides a mandatory instruction that the jury "...must not give undue weight to the arbitrator's decision." *Id.* at 394. NRS 38.259(1) also was challenged on equal protection grounds because it subjected parties to different procedures based on the amount of damages ***claimed*** as opposed to introducing collateral source evidence for one distinct group of injured parties solely to obtain a reduction in the jury award.

Although the recovery amount for personal injury plaintiffs is always uncertain, this does not automatically render NRS 42.021 constitutional. NRS 42.021 adversely impacts a person's right to a complete recovery of economic damages, not the amount of damages he or she seeks. This is true because NRS 42.021 does not place a cap on damages like the statute at issue in *Martinez v. Maruszczak*, 123 Nev. 433 (2007). Capanna simply ignores the distinctions

between different classifications of injury plaintiffs that violate equal protection by asserting that personal injury plaintiffs have a fundamental right to a certain sum of damages. Like all other personal injury plaintiffs, victims of medical malpractice should be allowed to seek a complete recovery of economic damages for the past medical expenses incurred. NRS 42.021 precludes this outcome in violation of equal protection principles.

F. This Court's Recent Decision is Not Dispositive of the Constitutionality of NRS 42.021

Capanna recently cited to this Court's decision in *Peck v. Zipf*, 133 Nev. Adv. Rep. 108 (Dec. 28, 2017) to support his arguments that NRS 42.021 is constitutional. However, in *Peck*, this Court addressed the constitutionality of the expert affidavit requirement for medical malpractice cases enumerated in NRS 41A.071. *Id.* at p. 8. NRS 41A.071 impacts a plaintiff's right to access the courts to pursue a claim, not a plaintiff's right to a complete recovery of economic damages incurred resulting from a tortfeasor's negligence. The expert affidavit requirement was also implemented to "...lower costs, reduce frivolous lawsuits, and ensure that medical malpractice actions are filed in good faith based upon competent medical expert opinion." *Id.* at p. 10. NRS 42.021 was implemented solely to reduce jury award verdicts without any evidence that this would reduce medical malpractice premiums for practitioners and to keep quality health care in

Nevada. Thus, the constitutional challenges in both of these cases are distinguishable, which eliminates the applicability of *Peck* to this action.

G. Although Multiple Jurisdictions Passed Legislation Repealing the Collateral Source Rule in Medical Malpractice Cases, Many Courts Have Not Ruled Upon the Constitutionality of Those Laws

Capanna cites to multiple jurisdictions where the legislatures passed laws that abolish the collateral source rule. However, Beau's case law research revealed that the highest appellate courts in Colorado, Connecticut, Delaware, Iowa, Pennsylvania, Rhode Island, Utah, and Washington have not assessed the constitutionality of these statutes on equal protection grounds. Therefore, Capanna's contention that these states have rejected equal protection challenges to statutes that eliminate the collateral source rule for medical malpractice cases is misleading.

III. NRS 42.021 IS VOID FOR VAGUENESS BECAUSE THE JURY RECEIVES NO GUIDANCE ABOUT HOW TO USE THE COLLATERAL SOURCE EVIDENCE

Capanna generally contends that under relaxed standards, NRS 42.021 places persons of ordinary intelligence on notice about how to use the collateral source evidence presented at trial. This argument fails to address the lack of clarity with regard to what a jury can add or subtract from its award as well as how a judge should instruct the jury regarding its consideration of this evidence. A comparison of NRS 42.021 with NRS 616C.215 is instructive. NRS 616C.215

governs actions filed by injured employees who received worker's compensation benefits related to a workplace injury. NRS 616C.215(10) creates an exception to the collateral source rule and allows the introduction of past or future payments made by a worker's compensation insurer to the injured employee who brought the action. *Cramer*, 116 Nev. at 580.

Unlike NRS 42.021, which provides no parameters regarding how the jury should use the collateral source evidence presented, NRS 616C.215(10) provides a specific jury instruction that the district court must deliver to the jury. *Id.* By way of this instruction, NRS 616C.210(10) ensures that the injured plaintiff is fully and fairly compensated by the negligent third-party despite the jury's consideration of past and future worker's compensation benefits paid to the plaintiff:

> ***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.***

Cramer, 116 Nev. at 581 (emphasis added).

Unlike NRS 616C.215, NRS 42.021 does not provide parameters regarding how the jury is to consider evidence of paid benefits from collateral sources or premiums paid by the plaintiff in securing those benefits. The Nevada Legislature decided that a jury should not be charged with the task of reducing an award by any worker's compensation benefits a plaintiff received or will receive. Yet, NRS 42.021, as written, permits a jury to deduct whatever amount it sees fit from a

medical malpractice victim's award without guidance even though such evidence is irrelevant. *Khoury*, 377 P.3d at 93 (payments, write-downs, or discounts are barred by the collateral source rule because they are irrelevant to the jury's determination of the reasonable value of medical services provided). Absent necessary standards for how the jury is to use collateral source evidence, NRS 42.021 is unconstitutionally vague.

IV. CONCLUSION

Based on the foregoing, Respondent/Cross-Appellant Beau Orth respectfully requests that this Court conclude that NRS 42.021 is unconstitutional because it does not provide equal protection under the law for all victims of personal injury.

DATED this 16th day of January, 2018.

/s/ Dennis M. Prince
DENNIS M. PRINCE, ESQ.
Nevada Bar No. 5092
KEVIN T. STRONG, ESQ.
Nevada Bar No. 12107
EGLET PRINCE
400 South 7th Street, 4th Floor
Las Vegas, NV 89101
Attorneys For Respondent/Cross-Appellant Beau R. Orth

CERTIFICATE OF COMPLIANCE

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

2. I further certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains 6,786 words.

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

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

DATED this 16th day of January, 2018.

/s/ Dennis M. Prince
DENNIS M. PRINCE, ESQ.
Nevada Bar No. 5092
KEVIN T. STRONG, ESQ.
Nevada Bar No. 12107
EGLET PRINCE
400 South 7th Street, 4th Floor
Las Vegas, NV 89101
Attorneys For Respondent/Cross-Appellant Beau R. Orth

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this document was filed electronically with the Nevada Supreme Court on the 16th day of January 2018. Electronic service of the foregoing **RESPONDENT/CROSS-APPELLANT'S REPLY BRIEF ON CROSS-APPEAL** shall be made in accordance with the Master Service List as follows:

Anthony D. Lauria, Esq.
LAURIA, TOKUNAGA GATES& LINN, LLP
601 South Seventh Street, 2nd Floor
Las Vegas, Nevada 89101
alauria@ltglaw.net

Robert L. Eisenberg, Esq.
LEMONS, GRUNDY & EISENBERG
6005 Plumas Street, Suite 300
Reno Nevada 89519
rle@lge.net

/s/ Nicole Littlejohn
An Employee of EGLET PRINCE