IN THE SUPREME COURT OF THE STATE OF NEVADA

ALBERT H. CAPANNA, M.D.,
Appellant/Cross-Respondent,
vs.
BEAU R. ORTH,
Respondent/Cross-Appellant.
_____/

ALBERT H. CAPANNA, M.D.,
Appellant,
vs.
BEAU R. ORTH,
Respondent.
_____/



No. 69935

No. 70227

**MOTION TO DISMISS CROSS-APPEAL**

Appellant/Cross-Respondent Capanna hereby moves to dismiss the cross-appeal of respondent/cross-appellant Orth, on the grounds that Orth is not an aggrieved party and he lacks standing to assert his cross-appeal contentions.

**Background**

This is a medical malpractice lawsuit in which Orth fully prevailed at trial. His cross-appeal challenges an order denying a motion to declare one part of NRS 42.021 unconstitutional. This statute establishes certain requirements in medical malpractice cases. Orth's cross-appeal only challenges the portion of the statute that allows introduction of evidence of collateral source payments for a medical malpractice plaintiff's medical expenses. RAB 60-81.

Orth's cross-appeal argues that the district court improperly denied Orth's pretrial motion to declare the statute unconstitutional, and that Capanna introduced evidence of collateral source payments at trial. RAB 60-61. Orth's cross-appeal brief concedes that, despite the collateral source evidence, the jury nevertheless "awarded Beau $136,300.49, ***the entirety of his past medical expenses***." RAB 61 (emphasis added). Orth also expressly concedes that "the jury ***did not*** reduce Beau's recovery for past medical expenses." *Id.* (emphasis added).

Orth's concessions on these points are factually correct. In his closing argument, Orth's counsel argued to the jury that Orth incurred a grand total of $136,300.49 in past medical expenses. 22 A.App. 5189:17-19. Orth's counsel asked the jurors not to consider how much was paid by Orth's insurance, and he argued that there was no reason for the jurors to discount Orth's medical expense damages. 22 A.App. 5186:7-11; 5189:12. The jury accepted counsel's argument and did not reduce the medical expense damages based upon the collateral source payments. Instead, the jury awarded Orth ***all*** of the past medical expenses he requested, down to the penny: $136,300.49. 23 A.App. 5299:11-12.

Although the jury made no deduction whatsoever for the collateral source evidence, and although Orth therefore suffered absolutely no harm from the district court's ruling, Orth nonetheless filed a cross-appeal. Apparently recognizing possible jurisdictional issues regarding the cross-appeal, his brief argues that his

cross-appeal is somehow "justified" for two reasons. First, he argues that if this court remands the case for a new trial, the second jury will receive evidence of collateral source payments. Second, he argues that district courts and litigants in medical malpractice cases "need clarity on this issue." RAB 61. His brief therefore argues that, given these "potential ramifications," the constitutional issue is ripe. *Id.*

**Orth is not an aggrieved party**

"A party **who is aggrieved** by an appealable judgment or order may appeal from that judgment or order, with or without first moving for a new trial." NRAP 3A(a) (emphasis added). This court "has consistently taken a restrictive view of those persons or entities that have standing to appeal as parties." *Valley Bank of Nevada v. Ginsburg,* 110 Nev. 440, 446, 874 P.2d 729, 734 (1994). This court "has jurisdiction to entertain an appeal only where the appeal is brought by an aggrieved party." *Id.* Under NRAP 3A(a), only aggrieved parties have the right to appeal. *Id.*; see also *Frank Settelmeyer & Sons, Inc., v. Smith & Harmer, Ltd.,* 124 Nev. 1206, 1212, 197 P.3d 1051, 1055 (2008) ("Under NRAP 3A(a), only aggrieved parties to the district court action may appeal.").

In *City of Reno v. Civil Service Com'n of City of Reno,* 117 Nev. 855, 34 P.3d 120 (2001), the City of Reno filed an appeal from a district court denial of a petition for judicial review. The district court's order, however, had actually given the City the relief that the City had requested, as an alternative form of relief in the order.

Because the City had received the relief it requested in the district court, this court held that the City was not an aggrieved party, and the City's appeal was dismissed. *Id.* at 857, fn. 3, 34 P.3d at 121fn. 3.

The jurisdictional requisite for aggrieved parties has been frequently applied to cross-appeals. The case of *Calloway v. City of Reno,* 116 Nev. 250, 993 P.2d 1259 (2000), overruled on other grounds by *Olson v. Richard,* 120 Nev. 240, 89 P.3d 31 (2004), was a construction defect appeal in which the City of Reno filed a cross-appeal. The City contended that the district court erred in dismissing the City's cross-claims against the developer and contractor. But the district court had granted the City's motion for summary judgment and dismissed all of the homeowners' claims against the City. The *Calloway* court held: "Because the City prevailed in the district court, the City is not an aggrieved party." *Id.* at 271, 993 P.2d at 1272. The court therefore dismissed the City's cross-appeal for lack of jurisdiction. *Id.*

Another cross-appeal dismissal occurred in *Wohlers v. Bartgis,* 114 Nev. 1249, 969 P.2d 949 (1998), where the plaintiff received an insurance bad faith judgment against the defendants. The defendants appealed, and the plaintiff filed a cross-appeal. The plaintiff's cross-appeal challenged a district court order denying a post-judgment motion for sanctions. The motion for sanctions was brought in the context of the defendants' motion for a new trial, and the district court had denied the motion for a new trial. Therefore, the *Wohlers* court held that the plaintiff was

not aggrieved with respect to post-judgment issues, and her cross-appeal was therefore dismissed. *Id.* at 1269, fn 10, 969 P.2d at 963, fn 10.

Similarly, the aggrieved party requirement was applied to the cross-appeal in *Ford v. Showboat Operating Company,* 110 Nev. 752, 877 P.2d 546 (1994). The plaintiff sued for intentional infliction of emotional distress and sexual harassment. The district court granted summary judgment to the defendant, and the plaintiff appealed. The defendant filed a cross-appeal, which challenged certain language in the district court's order that the defendant thought was wrong. The *Ford* court ordered the defendant to show cause why the cross-appeal should not be dismissed for lack of jurisdiction. The court then dismissed the cross-appeal. The court held: "A party who prevails in the district court and who does not wish to alter any rights of the parties arising from the judgment is not aggrieved by the judgment."[1] *Id.* at 756, 877 P.2d at 549 (emphasis omitted).

The aggrieved party requirement was also applied to a cross-appeal in *Farnham v. Farnham,* 80 Nev. 180, 391 P.2d 26 (1964), where the defendant prevailed in the district court, but where he nevertheless filed a cross-appeal raising certain issues. The court dismissed the cross-appeal, holding: "Though Gerald's

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[1] *Ford* recognized *Sierra Creek Ranch v. J.I. Case,* 97 Nev. 457, 634 P.2d 458 (1981), for the proposition that a respondent who prevailed in the district court could be considered an aggrieved party, and could therefore maintain a cross-appeal, where the respondent "sought to increase its rights under the judgment." *Ford,* 110 Nev. at 757, 877 P.2d at 549-50.

notice of cross-appeal also purports to appeal from the judgment, it is ineffective because he won the case below and is not an 'aggrieved party' entitled to appeal." *Id.* at 184, 391 P.2d at 28.

In the present case, the district court allowed collateral source payments to be admitted into evidence, pursuant to NRS 42.021. Orth's counsel asked the jury not to consider the evidence in determining Orth's damages for past medical expenses. The jury accepted counsel's argument and awarded Orth the entirety of his past medical expenses, without any reduction. His cross-appeal does not seek to increase the award or in any way alter his rights arising from the judgment. Accordingly, based upon NRAP 3A(a) and the cases discussed above, Orth is not aggrieved by the district court's ruling, and his cross-appeal should be dismissed.

**Orth does not have standing to cross-appeal**

The jurisdictional requirement for an aggrieved party can also be considered a standing requirement. In arguing that this court would be "justified" in accepting his cross-appeal, Orth argues: "Should this Court determine the district court committed reversible error and remand this case for a new trial, a jury will once again receive evidence of collateral source payments." RAB 61. He expressly recognizes that this is merely a "potential" ramification in this case. *Id.* His argument is based upon speculation about what might happen in the future—an

argument that does not give him standing to raise his cross-appeal challenge to the constitutionality of the statute.

In *Leavitt v. Siems,* 130 Nev. Adv. Op. 54, 330 P.3d 1 (2014), the plaintiff filed a medical malpractice lawsuit, and she attached an expert affidavit to the complaint, as required by statute. The defendants prevailed at trial, and the plaintiff appealed. In her appeal, she challenged the constitutionality of the statute requiring expert affidavits in medical malpractice cases. The *Leavitt* court held that the issue was not reviewable, because the plaintiff's expert affidavit removed any element of harm that she may have experienced from any alleged constitutional violation in the statute. As such, she lacked standing to raise the constitutional statutory challenge, because litigated matters "must present an existing controversy, not merely the prospect of a future problem." *Id.* at ____, 330 P.3d at 3.

Similarly, in *Resnick v. Nevada Gaming Comm'n,* 104 Nev. 60, 752 P.2d 229 (1988), the appellant had a licensing dispute with the Nevada Gaming Commission. As part of his appeal, he made certain constitutional arguments dealing with his ongoing license application process. The *Resnick* court held: "Resnick's entire constitutional argument is based on a purely conjectural premise—that in the future, he will be denied a license, and therefore deprived of property or liberty. He is assuming an outcome which may not occur." *Id.* at 65, 752 P.2d at 232. The *Resnick* court then held: "At this point, the Board and Commission hearings are on hold, and

we do not know what the Commission decision will eventually be. Resnick's argument that he will be deprived of property or liberty is therefore purely conjectural." *Id.*

In rejecting the appellant's argument in *Resnick*, the court noted that Nevada has a long history of requiring an actual justiciable controversy as a predicate to judicial relief. *Id.* at 65-66, 752 P.2d at 233. Litigated matters "must present an existing controversy, not merely the prospect of a future problem." *Id.*

Here, Orth is requesting this court to issue a decision that deals with his "potential" future problem. RAB 61. His potential future problem would only occur again if (1) this court reverses the judgment and remands for a new trial, **and** (2) the case does not settle or otherwise get resolved before the retrial, **and** (3) the second jury rejects Orth's arguments, adopts an approach different from the first jury, and applies the collateral source evidence to reduce Orth's award of past medical expenses. Like *Leavitt* and *Resnick*, Orth's argument—which he expressly recognizes as only dealing with "potential" ramifications—merely presents the prospect of a future problem that may never occur. And like *Leavitt* and *Resnick*, this court should hold that Orth does not have aggrieved-party standing for his cross-appeal challenge to the statute.

Orth also argues that district courts and litigants in other medical malpractice cases "need clarity" on the issue he raises in his cross-appeal. He is essentially

requesting an advisory opinion dealing with constitutionality of the statute. This court has repeatedly and consistently held that its duty is **not** to render advisory opinions, but rather, to resolve actual controversies. See *Personhood Nev. v. Bristol*, 126 Nev. 599, 602, 245 P.3d 572, 574 (2010); *NCAA v. University of Nevada*, 97 Nev. 56, 57, 624 P.2d 10, 10 (1981). This court will not render advisory opinions on abstract questions. *Applebaum v. Applebaum*, 97 Nev. 11, 12, 621 P.2d 1110, 1110 (1981). This court is "not authorized to enter into a determination of the constitutionality of a statute on a supposed or hypothetical case which might arise thereunder." *Magee v. Whitacre*, 60 Nev. 202, 212, 106 P.2d 751, 752 (1940).

Because Orth was not harmed by the district court's ruling on the constitutionality of the statute, he has no standing to challenge the ruling. This court should decline Orth's invitation to render a purely advisory opinion regarding constitutionality of the statute.[2]

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[2] One of Orth's cross-appeal arguments is that NRS 42.021 unfairly precludes health insurance companies from asserting subrogation rights. RAB 62. He does not have standing to assert potential rights of health insurance companies. See *Elley v. Stephens,* 104 Nev. 413, 416-17, 760 P.2d 768, 771 (1988) (appellant did not have standing to assert "someone else's potential legal problem" regarding constitutionality of statute).

## Conclusion

For the foregoing reasons, the court should dismiss Orth's cross-appeal dealing with the collateral source issue in NRS 42.021.

DATED: July 10, 2017

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## CERTIFICATE OF SERVICE

I certify that I am employee of Lemons, Grundy & Eisenberg and that on this date the foregoing was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master service list as follows:

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