

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

Case No. 70227

District Court Case No. A648041

Electronically Filed
Jul 31 2017 03:22 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

**RESPONDENT/CROSS-APPELLANT'S OPPOSITION TO MOTION TO
DISMISS CROSS-APPEAL**

Respondent/Cross-Appellant, Beau R. Orth ("Beau"), acting by and through his counsel, Dennis M. Prince, Esq. and Kevin T. Strong, Esq., of Eglet Prince, hereby opposes Appellant/Cross-Respondent's Motion to Dismiss Cross-Appeal.

I.

INTRODUCTION

Seventeen months after Beau filed his Notice of Cross-Appeal of the district court's order granting Appellant/Cross-Respondent Albert H. Capanna, M.D.'s ("Capanna") application of NRS 42.021, Capanna moves, for the first time, to dismiss Beau's cross-appeal. Capanna's request for dismissal rests on his contention that Beau is not an aggrieved party because the application of NRS 42.021, which allowed the introduction of evidence of collateral source payments,

did not adversely impact Beau's damages award at trial. Capanna similarly argues that Beau lacks standing because the lower court's ruling on the constitutionality of NRS 42.021 did not harm him. However, Capanna's motion overlooks various instances in which this Court has exercised its discretion to answer important questions that may not properly be before this Court, but that need clarification or resolution. This Court has already, on three prior occasions, declined to grant a petition for writ of mandamus challenging the constitutionality of NRS 42.021. *See Tam v. Eighth Judicial Dist. Court of the State of Nev.*, No. 66065, 2015 Nev. Unpub. LEXIS 1292, 2015 WL 6453603 (Oct. 22, 2015); *Capanna v. Eighth Judicial Dist. Court of Nev.*, No. 66289, No. 66602, 2015 Nev. Unpub. LEXIS 1559 (Dec. 21, 2015); and *Abdelsayed v. Eighth Judicial Dist. Court of the State of Nev.*, No. 67541, 2015 Nev. Unpub. LEXIS 1550 (Dec. 21, 2015).¹ The importance of determining the constitutionality of NRS 42.021 cannot be questioned because its application continues to impact the rights of those who suffer injury at the hands of negligent medical providers. This Court recently determined the constitutionality of NRS 41A.035, which allows for a cap of \$350,000.00 on non-economic damages in medical malpractice actions. *Tam v. Eighth Judicial Dist. Court*, 131 Nev. ___, 358 P.3d 234 (2015). Now is the time

¹ Respondent/Cross-Appellant does not cite to these cases as mandatory authority. Rather, Respondent/Cross-Appellant cites to these cases to illustrate the recurrence with which the constitutionality of NRS 42.021 has been raised before this Court.

for this Court to address another critical statute that affects the presentation of evidence at the time of trial and unfairly impacts victims of medical malpractice. The parallels between those circumstances in which this Court has exercised its discretion to address significant issues of law and the circumstances of this case cannot be questioned.

II.

ARGUMENT

Capanna mistakenly assumes that because the admission of collateral source evidence did not harm Orth at trial, this Court cannot address the constitutionality of NRS 42.201. While a party who is aggrieved by a judgment may appeal that judgment or order, this Court has, on numerous occasions, taken the opportunity to address issues of law that were not raised on appeal or were not properly before it. Orth requests that this Court exercise its discretion with this case and address the constitutionality of NRS 42.021, an important legal question that is ripe for determination.

A. This Court Has The Discretion To Address All Constitutional Issues Raised On Appeal

NRS 42.021 allows a defendant in a medical malpractice action to present evidence of the payments made by collateral sources, such as private or public health insurance, to a jury. The implementation of the statute was solely designed

to lower jury awards for victims of medical malpractice to benefit medical providers by reducing their alleged sky-rocketing medical malpractice premiums. Orth contends NRS 42.021 is unconstitutional because it violates the Equal Protection Clause of the United States and Nevada Constitutions. “When constitutional questions are raised on appeal, [this Court] has the power to address them.” *McCullough v. State*, 99 Nev. 72, 74, 657 P.2d 1157, 1159 (1983). Even in circumstances in which the issues are not properly presented on appeal, this Court is “obligated to consider them on appeal” when they are “...grounded on constitutional questions.” *Hardison v. State*, 84 Nev. 125, 128, 437 P.2d 868, 870 (1968). Even when a party fails to raise a constitutional objection in the trial court, this Court “...may examine constitutional issues on appeal that substantially impact the rights of the litigants.” *Nevadans for Nev. v. Beers*, 122 Nev. 930, 938 n.3, 142 P.3d 339, 344 n.3 (2006) (quoting *Boulder City v. Cinnamon Hills Assocs.*, 110 Nev. 238, 245, 871 P.2d 320, 324 (1994)); see also, *Levingston v. Washoe County by & Through the Sherrieff of Washoe County*, 112 Nev. 479, 482, 916 P.2d 163, 166 (1996). This Court may also examine an issue to “...resolve any lingering doubts...” regarding the constitutionality of a statute. *Beers*, 122 Nev. at 938 n.3, 142 P.3d at 344 n.3.

In *McCullough*, this Court addressed the constitutional issues surrounding the district court’s explanation of the reasonable doubt standard even though the

issue was raised for the first time on appeal, which would ordinarily be a waived issue. *McCullough*, 99 Nev. at 74, 657 P.2d at 1158. In *Hardison*, this Court addressed constitutional issues surrounding the admission of evidence in a criminal trial even though the defense attorney failed to file a motion to suppress prior to trial and failed to make a formal objection during trial. *Hardison*, 84 Nev. at 128, 437 P.2d at 870. In *Beers*, this Court addressed the constitutionality of NRS 259.061 even though its constitutionality was never raised in the trial court. *Beers*, 122 Nev. at 938 n.3, 142 P.3d at 344 n.3.

On numerous occasions, this Court has decided questions that touch upon constitutional issues even though the issues were not properly before the Court. Capanna's lone basis in his motion to dismiss is that Beau's cross-appeal is not properly before the Court because he was not aggrieved by the statute. Therefore, Beau requests that this Court use the same discretion as it did in *McCullough*, *Hardison*, and *Beers* and address the constitutionality of NRS 42.021. NRS 42.021 contravenes this Court's long-standing rule barring the admission of collateral source payments for injury into evidence for any purpose. *Proctor v. Castelletti*, 112 Nev. 88, 90, 911 P.2d 853, 854 (1996). NRS 42.021 treats injured tort victims differently based on who committed the tort that caused the injury. NRS 42.021 discriminates against those victims of medical malpractice who have health insurance and those who do not have health insurance. The issues surrounding

NRS 42.021 that Beau has presented to this Court are undoubtedly of constitutional significance because the application of the statute greatly impacts the rights of personal injury victims in Nevada. Given the arguments Orth presents in his opening brief, there are also lingering doubts about the constitutionality of NRS 42.021 that this Court now has the opportunity to consider. Capanna cannot deny this to be true. Therefore, Beau requests that this Court deny Capanna's motion and address the constitutionality of NRS 42.021, especially because this Court has expressly characterized its review of constitutional issues raised on appeal as an obligation.

B. This Court Has Exercised Its Discretion To Address Important Issues Of Law In The Interests of Judicial Economy And Beau Requests This Court Exercise Such Discretion Here

“[W]here an important issue of law needs clarification and public policy is served...,” this Court has exercised its discretion to consider the issue. *Paley v. Second Judicial Dist. Court*, 129 Nev. ___, 310 P.3d 590, 592 (2013). The interest of judicial economy is the chief standard by which this Court exercises its discretion. *Smith v. Eighth Judicial Dist. Court*, 113 Nev. 1343, 1345, 950 P.2d 280, 281 (1997). Although *Paley* and *Smith* involved this Court's consideration of important issues of law in response to writ petitions, this Court has also addressed issues raised for the first time on appeal in the interests of judicial economy. See *Nevada Power Co. v. Haggerty*, 115 Nev. 353, 365 n.9, 989 P.2d 870, 877 n.9

(1999). “Nevada has an interest in ‘promoting judicial economy by avoiding the specter of piecemeal appellate review.’” *Barbara Ann Hollier Trust v. Shack*, 131 Nev. ___, 356 P.3d 1085, 1090 (2015).

The interests of judicial economy further support Beau’s request that this Court exercise its discretion and consider his cross-appeal. The constitutionality of NRS 42.021 was presented to this Court on three separate occasions in 2015 alone and it will almost surely be raised in numerous future appeals. Although Beau’s past medical expenses were not reduced by the jury despite receiving evidence of collateral source payments, which was made possible by the application of NRS 42.021, this does not mean that most juries will disregard such evidence. As long as a jury is allowed to receive collateral source evidence in medical malpractice cases, the possibility that a victim of malpractice will have his or her damages award reduced remains extraordinarily high. To avoid potential future violations of a malpractice victim’s equal protection under the law and the inevitable appeals that will follow, the interests of judicial economy necessitate that this Court decide Beau’s cross-appeal to determine whether NRS 42.021 is constitutional.

C. The Principles This Court Has Relied Upon To Consider Legal Issues On Appeal That Are Moot Are Equally Applicable To This Case

Capanna’s argument that Beau’s cross-appeal is not properly before this Court because Beau was not aggrieved by the statute is analogous to the issue

being moot. “In Nevada, a moot case is one which seeks to determine an abstract question which does not rest upon existing facts or rights.” *Bisch v. Las Vegas Metro. Police Dep’t*, 129 Nev. ___, 302 P.2d 1108, 1113 (2013). In the same vein, Capanna argues Beau’s cross-appeal was effectively moot upon arrival to this Court because the legal question presented is not based upon an existing violation of Beau’s constitutional rights. However, even if an issue is moot, this Court “...may still consider [a legal question] of widespread importance capable of repetition, yet evading review.” *Id.* (citing *Personhood Nev. v. Bristol*, 126 Nev. 599, 602, 245 P.3d 572, 574 (2010)). This Court may consider such an issue when: (1) the duration of the challenged action is relatively short; (2) there is a likelihood that a similar issue will arise in the future; and (3) the matter is important. *Bisch*, 302 P.3d at 1113; *see also*, *State v. Second Judicial Dist. Court*, 132 Nev. ___, 373 P.3d 63, 65 (2016).

Beau concedes that the first *Bisch* factor is not applicable because the application of NRS 42.021 is not governed by a specific time duration. However, the application of the remaining *Bisch* factors to this case justifies this Court’s consideration of Beau’s cross-appeal. The constitutionality of NRS 42.021 has repetitively been presented to this Court, including three separate times in 2015, but, to this point, has evaded review. The issue of the constitutionality of NRS 42.021 will be routinely litigated in all medical malpractice cases until a decision

from this Court is made. As a result, it is highly likely that this exact issue will arise in future appeals before this Court because trial courts will rule differently on the constitutionality of NRS 42.021. There is no question that this legal question is of significant importance to the victims of medical malpractice and their families. This issue is similarly important to the residents of Nevada because the introduction of collateral source evidence provides protections to medical providers who have fallen below the standard of care while rendering treatment. Negligent medical providers certainly should not receive any protections when their care endangers the lives of Nevada's residents. Yet, the application of NRS 42.021 tacitly creates an environment in which medical care is not administered to Nevada residents in the safest manner possible. All of these considerations highlight the importance of determining whether NRS 42.021 violates equal protection of the law and necessitates that this Court decide upon this issue presented in Beau's cross-appeal.

D. The Potential That Beau May Be Aggrieved by NRS 42.021 If This Court Reverses And Remands This Case Weighs Against Dismissal of Beau's Cross-Appeal

Capanna argues that the possibility that Beau will be aggrieved by the introduction of collateral source evidence if this Court reverses and remands for a new trial is not grounds to hear Beau's cross-appeal. In *Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 843, 124 P.3d 530, 535 (2005), this Court took the

opportunity to address important issues affecting its constructional defect jurisprudence that “...might arise on remand.” Assuming this case is remanded back to the district court and a new trial is ordered, Capanna will be permitted to introduce evidence of collateral source payments Beau received for the injuries he sustained from Capanna’s medical malpractice to a brand new jury. There are no guarantees that a different jury will reach the same outcome as the prior jury and award Beau all of his past medical expenses. The last outstanding issue involving the constitutionality of statutes arising from medical malpractice tort reform is the constitutionality of NRS 42.021. As such, Beau requests that this Court, like in *Shuette*, consider important issues affecting its jurisprudence regarding the constitutionality of Nevada’s medical malpractice statutes.

...

...

...

...

...

...

...

...

...

III.

CONCLUSION

Based on the foregoing, Respondent/Cross-Appellant Beau Orth respectfully requests that this Court deny Appellant/Cross-Respondent Albert H. Capanna, M.D.'s Motion to Dismiss Cross-Appeal.

DATED this 31st day of July, 2017.

EGLET PRINCE

/s/ Dennis M. Prince
DENNIS M. PRINCE, ESQ.
Nevada Bar No. 5092
KEVIN T. STRONG, ESQ.
Nevada Bar No. 12107
400 South Seventh Street, Suite 400
Las Vegas, Nevada 89101

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this document was filed electronically with the Nevada Supreme Court on the 31st day of July 2017. Electronic service of the foregoing **RESPONDENT/CROSS-APPELLANT'S OPPOSITION TO MOTION TO DISMISS 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/ Kimberly Culley
An Employee of EGLET PRINCE