

FILED PER 2/1/17 ORDER

IN THE SUPREME COURT OF THE STATE OF NEVADA

TAWNI McCROSKY, individually and
as the natural parent of LYAM
McCROSKY, a minor child,

Appellants,

vs.

CARSON TAHOE REGIONAL
MEDICAL CENTER, a Nevada
business entity,

Respondent.

Supreme Court Case No. 70325

FILED

FEB 01 2017

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

**BRIEF OF AMICUS CURIAE OF THE NEVADA JUSTICE ASSOCIATION
IN SUPPORT OF APPELLANTS**

District Court Case No. 13TRT000281B

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record hereby certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal:

The Nevada Justice Association ("NJA") is a non-profit organization of independent lawyers who represent consumers and share the common goal of improving the civil justice system. NJA aims to ensure that Nevadans' access to the courts and to justice is not diminished. NJA also works to advance the science of jurisprudence, to promote the administration of justice for the public good, and to uphold the honor and dignity of the legal profession.

NJA did not appear in the underlying action and has submitted to this Court a motion for leave to file this brief. It is represented in the pending appeal, as amicus curiae, by Matthew L. Sharp, Esq., of the firm of Matthew L. Sharp, Ltd.

DATED this 28th day of December, 2016.

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SUMMARY OF ARGUMENT

Appellant alleged that the negligence of Respondent Carson Tahoe Regional Medical Center (hereinafter "CTRMC") and Amy Sue Hayes, M.D. caused extensive and life-altering injuries to Appellant Lyam McCrosky.

The NJA addresses two errors made by the District Court. First, the District Court erred when it allowed CTRMC to use NRS 42.021 to introduce evidence that Nevada Medicaid had paid medical bills for Lyam's medical care. Federal law, providing Medicaid with lien and subrogation rights, conflicts with and preempts NRS 42.021.

Second, the District Court erred when it granted partial summary judgment that Dr. Hayes was not the ostensible agent of CTRMC. A trier of fact should evaluate factors to decide ostensible agency. The District Court concluded there were no questions of fact on one factor but questions of fact remained on the other factors for ostensible agency. The District Court misconstrued factors for elements. All factors are not required to establish ostensible agency. The issue of ostensible agency should have been determined by the jury.

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ARGUMENT

A. THE DISTRICT COURT ERRED AS FEDERAL LAW PREEMPTS NRS 42.021.

Under the Supremacy Clause to the United States' Constitution, when a conflict exists between federal law and state law, the federal law preempts the state law. *Rolf Jensen & Assocs. v. Eighth Judicial Dist. Court of Nev.*, 28 Nev. Adv. Rep. 42, 282 P.3d 743, 746 (2012) (holding a "state law must yield when it frustrates or conflicts with federal law."); *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372 (2000) ("A fundamental principle of the Constitution is that Congress has the power to preempt state law. Even without an express provision for preemption, we have found that state law must yield...state law is naturally preempted to the extent of any conflict with a federal statute..."). As the following establishes, a conflict exists between NRS 42.021 and federal law regarding Medicaid's lien and recovery rights. Under the Supremacy Clause, NRS 42.021 is preempted.

1. NRS 42.021 Extinguishes an Insurer or Government Program's Lien and Subrogation Rights.

Nevada common law prohibits the admission of a collateral source of payment for an injury into evidence for any purpose. *Proctor v. Castelletti*, 911 P.3d 853, 112 Nev. 88, 90 (1996). NRS 42.021 is an exception to Nevada's common law collateral source rule. NRS 42.021(1) allows a health care provider to introduce evidence that a health insurer or government program paid for medical bills incurred by a patient.

Once a health care provider uses NRS 42.021(1) to introduce a collateral source into evidence, NRS 42.021(2) provides:

2. A source of collateral benefits introduced pursuant to subsection 1 may not:
 - a. Recover any amount against the plaintiff; or
 - b. Be subrogated to the rights of the plaintiff against a defendant.

Subsections 1 and 2 to NRS 42.021 are interrelated. While subsection 1 allows the health care provider to introduce evidence of a collateral, subsection 2 protects the patient's interests by assuring that the payor's lien or subrogation rights are extinguished once a health care provider chooses to introduce the collateral source into evidence. Without subsection 2, a patient will be penalized and will not be made whole since: (1) the jury will not award medical bills for those bills paid by a collateral; and (2) the patient will have to use the money award for other damages to pay the payor's lien.

2. Federal Law Grants Medicaid Lien and Subrogation Rights.

Medicaid is a federal insurance program jointly financed and operated by the state and federal government. 42 U.S.C. §1396 et. al. Lyam has received benefits from Medicaid. Congress has granted Medicaid with the lien and subrogation rights against any recovery made by Lyam for payments made by Medicaid for medical care caused by the wrongful conduct of a third party.

42 U.S.C. §2651(a) grants lien and subrogation rights to the United States for Medicaid payments made due to the wrongful conduct of a third party. 42 U.S.C.

§1396a(a)(25)(A) and (B) requires the State of Nevada to take steps to: (1) determine if the payments are being made because of the legal liability of a third party; and (2) seek reimbursement for payment made because of the legal liability of a third party. 42 U.S.C. §1396k(a)(1)(a) requires the Medicaid beneficiary to assign to the State of Nevada any rights he may have to recover “payment for medical care from any third party.” As a condition to receiving funding for Medicaid payments, 42 U.S.C. §1396a(a)(25)(H) requires the State of Nevada to enact laws to allow the state to recover payment for medical care caused by the wrongful conduct of a third party.

Pursuant to its federal mandate, the Nevada Legislature has adopted state laws to recognize and enforce Nevada’s subrogation and lien rights for Medicaid payments due to the legal liability of a third party. NRS 422.293(1) provides Medicaid with subrogation rights against a third party. NRS 422.293(3) provides Medicaid with lien rights for any recovery made by a Medicaid beneficiary. NRS 422.293005 provides for personal liability for any person who fails to recognize Nevada’s Medicaid’s lien rights.

Medicaid’s lien and subrogation rights are limited to payments recovered by a Medicaid recipient for medical care for payments made by Medicaid. United States’ Supreme Court has explained:

A federal statute prohibits States from attaching a lien on the property of Medicaid beneficiary to recover benefits paid by the State on the beneficiary’s behalf. 42 U.S.C. §1396p(a)(1). The anti-lien provision preempts a State’s effort to take any portion of a Medicaid beneficiary’s tort judgment or

settlement not 'designated as payments for medical care.' *Arkansas Dept. of Health and Human Servs v. Ahlorn*, 547 U.S. 268, 284, 126 S.Ct. 1752, 164 L.Ed.2d 459 (2006).

Wos v. E.M.A., ___ U.S. ___, 133 S.Ct. 1391, 1395, 185 L.Ed.2d 471,478 (2013).

3. The District Court Erred as NRS 42.021 Is Preempted by Federal Law as It Conflicts with Nevada Medicaid's Federally Mandated Lien and Subrogation Rights.

Federal law governing Medicaid's lien and subrogation rights preempts NRS 42.021. NRS 42.021(2) extinguishes Medicaid's lien subrogation rights when a health care provider uses NRS 42.021(1) to introduce evidence that Medicaid paid medical bills on behalf of a plaintiff. Therefore, NRS 42.021 conflicts with the federal laws providing Medicaid with lien and subrogation rights. Based upon the doctrine of federal conflict preemption, federal law preempts NRS 42.021. The District Court erred in allowing CTRMC to introduce evidence of Nevada Medicaid's payments.

4. District Court Erred In Concluding that NRS 42.021(1) Was Not Preempted.

The District Court agreed that NRS 42.021 conflicted with Medicaid's federally mandated lien and subrogation rights. Nonetheless, the District Court let CTRMC introduce evidence of Nevada Medicaid's payments. The District Court found that NRS 42.021(1) did not conflict with federal law and could be separated from NRS 42.021(2).

The District Court erred for two reasons. First, NRS 42.021(1) is preempted, as it conflicts with Medicaid's federally mandated lien rights. Second, NRS 42.021(1) and (2) cannot be severed. Any other result deprives an injured plaintiff from being made whole.

a. NRS 42.021(1) is preempted.

Medicaid's lien rights are limited to recovery designated as payments for medical care. 42 U.S.C. §1396k(a)(1)(A). NRS 42.021(1) allows for the introduction of Medicaid's payments so the jury doesn't have to award the bills paid for by Medicaid as past or future medical expenses. The plaintiff will not recover payments for medical care paid for by Medicaid. Therefore, NRS 42.021(1) extinguishes Medicaid's lien rights against the plaintiff's recovery. NRS 42.021(1) conflicts the federally mandated Medicaid lien and subrogation rights. NRS 42.021(1) is preempted by federal law.

A finding of preemption is supported by the United States Supreme Court decision in *Wos v. E.M.A.*, 133 S.Ct. 1391. In *Wos*, the Court addressed a North Carolina statute "requiring that up to one-third of any damages recovered by a beneficiary for a tortious injury be paid to the State to reimburse it for payments made for medical treatment on account of the injury." *Id.*, at 1395, citations omitted. The Court held that North Carolina law was preempted because "[t]he Medicaid anti-lien provision prohibits a State from making a claim to any part of a Medicaid

of a Medicaid beneficiary's tort recovery not 'designated as payments for medical care.'" *Id.* at 1398 quoting *Arkansas Dept. of Health and Human Servs v. Ahlorn*, 547 U.S. at 284.

The common fund doctrine has no application to Medicaid. As an example, Medicaid cannot recover its lien against a recovery made for past wage losses. NRS 42.021(1) allows a jury to not award medical bills paid for by Medicaid. Since there is no tort recovery for payments for medical care paid by Medicaid, NRS 42.021(1) eliminates Medicaid's lien rights. NRS 42.021(1) conflicts with Medicaid's federally mandated lien rights and is preempted by federal law.

b. NRS 42.021(1) and (2) are dependent and cannot be severed.

Even if one assumes NRS 42.021(1) is not preempted by federal law, the District Court erred because NRS 42.021 (1) and (2) are dependent and cannot be severed. A statute may only be severed when, after striking the unenforceable portion of the statute: (1) the remaining portion of the statute can stand alone and be given legal effect; and, (2) the Legislature intended for the remainder of the statute to stay in effect despite removal of the offending portion. *Flamingo v. Paradise Gaming*, 125 Nev. 50, 515, 217 P.3d 546, 556 (2009).

As demonstrated in Section I(A)(1), subsections 1 and 2 of NRS 42.021 are interdependent. Under NRS 42.021(1), a health care provider is able to introduce evidence of a collateral source in order that a plaintiff's recovery from the jury is

obligation to pay the third party's lien or subrogation rights. If it strikes NRS 42.021(2) while maintaining NRS 42.021(1), this Court will require a plaintiff to pay a lien for damages he never recovered from the jury. This result is wrong. First, such a rule penalizes the plaintiff for having insurance since he cannot recover medical damages yet still remains obligated to pay his/her insurer for medical bills it paid. Second, it prevents the plaintiff from ever receiving full compensation for his/her injuries.

The purpose of tort damages is to make a plaintiff whole. Under the District Court's interpretation of NRS 42.021, a plaintiff is never made whole. As an example, a plaintiff has \$1,000 in past medical bills that have been paid by a third party. The plaintiff also has \$1,000 in past wage loss. The health care provider introduces evidence of payments made by a third party. The jury awards \$1,000 in past wage loss and \$1,000 in past pain and suffering for a total of \$2,000 but doesn't award \$1,000 in past medical bills. Under the District Court's rationale, the Plaintiff has to use money recovered for past wage loss or pain suffering to pay the third party's lien. The plaintiff is not made whole.

Subsections 1 and 2 of NRS 42.021 cannot be severed. The statute is clearly preempted by federal law.

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5. Since NRS 42.021 Was Preempted, the District Court Committed Reversible Error When It Admitted Evidence of Collateral Source Payments.

Since NRS 42.021 is preempted, the District Court should not have admitted evidence of the Medicaid payments. *Proctor v. Castelletti*, 112 Nev., at 90. The District Court committed reversible error.

The evidence of Medicaid payments permeated the trial. For example, in closing argument, CTRMC stated:

Medicaid exists for a reason. Our government, our country, and our state take care of its own. That's why we have it. And we have heard that Ms. McCrosky has incurred no out-of-pocket medical expense that all of his care and treatment that stands outstanding has been covered and will continue to be covered. Our country and our state takes care of its own.

App. Vo. 15 AA003093-94

The introduction of Nevada Medicaid's payments permeated the trial and sent the message to the jury that Lyam did not deserve to be compensated. The District Court committed reversible error when it introduced evidence of payments made by Nevada Medicaid.

B. THE QUESTION OF OSTENSIBLE AGENCY SHOULD HAVE BEEN DECIDED BY THE JURY.

The District Court erred by granting partial summary judgment in favor of CTRMC on the issue of ostensible agency. In *Schlotfeldt v. Charter Hosp. of Las Vegas*, the Nevada Supreme Court stated, "[t]he ostensible agency theory applies when a patient comes to a hospital and the hospital selects a doctor to serve the

patient.” *Id.*, 112 Nev. 42, 48, 910 P.2d 271, 275 (1996). The Nevada Supreme Court held:

[T]he existence of an agency relationship is generally **a question of fact for the jury** if the facts showing that the agency are disputed... Typical questions of fact for the jury include (1) whether a patient entrusted herself to the hospital, (2) whether the hospital selected the doctor to serve the patient, (3) whether a patient reasonably believed the doctor was an employee or agent of the hospital, **and** (4) whether the patient was put on notice that a doctor was an independent contractor.

Id. at 49. (**Emphasis added**).

The ostensible agency doctrine is not a cause of action, requiring a party to establish specific elements in order to succeed. Ostensible agency is a theory upon which a party can rely to establish the cause of action of negligence. No one factor determines the existence of an ostensible agency. The factors are to be considered by the trier of fact in order to conclude whether an ostensible agency exists. See also *Renown Health, Inc. v. Vanderford*, 126 Nev. Adv. Rep. 24, 235 P.3d 614, 619 (2010) (recognizing that the factors discussed *Schlotfeldt* are typical questions of fact regarding ostensible agency).

The District Court granted partial summary judgment that Dr. Hayes was not an ostensible agent of CTMRC. The District Court found that Lyam’s mother, Ms. McCrosky, was placed on notice that Dr. Hayes was an independent contractor. It based the decision upon some conditions of admissions that Ms. McCrosky was required to sign and were written by CTMRC. The forms stated the doctor was an

independent contractor. However, under *Schlotfeldt*, whether CTRMC's condition of admission placed Ms. McCrosky on notice that Dr. Hayes was an independent contractor was one piece of evidence a jury could have considered in deciding the question of ostensible agency.

Nevada law did not require the Appellants to prove each factor regarding whether one is an ostensible agent. The District Court even admitted that questions of fact existed regarding other *Schlotfeldt* factors for ostensible agency. App. Vol. 4 AA000592-93, 626. Since there were questions fact regarding ostensible agency, the District Court committed reversible error.

In the context of medical malpractice, the District Court's ruling essentially eliminates the claim of ostensible agency. Every hospital has and can write conditions of admissions to include a statement that a doctor is an independent contractor. Every hospital has and can require a patient to sign a condition of admission. If all a hospital has to do to avoid ostensible agency is draft a condition of admission with a statement that a doctor is an independent contractor, the doctrine of ostensible agency will be eliminated in the context of a hospital.

Under *Schlotfeldt*, the jury is allowed to consider the factual circumstance in which the condition of admission is presented or signed. Perhaps, the document was given to the patient after he/she was grievously injured, and the patient could not and did not read the documents. Under the holding in *Schlotfeldt*, the jury is allowed to

evaluate all relevant factors to determine whether a doctor is an ostensible agent of the hospital. A condition of admission with a statement that the doctor is an independent contractor is one piece of evidence the jury can evaluate.

A jury could have concluded that the condition of admission signed by Ms. McCrosky was not sufficient and that other factors were more persuasive to establish that Dr. Hayes was the ostensible agent for CTRMC. The District Court should have allowed the Appellants to pursue the theory of ostensible agency.

CONCLUSION

Based upon the foregoing, the NJA submits this amicus curiae brief as support that the District Court committed reversible error. First, the District Court should not have allowed the introduction into evidence of Medicaid payments as NRS 42.021 is preempted by federal law. Second, the District Court should not have granted summary judgment on the question of ostensible agency as questions of fact existed regarding whether Dr. Hayes was an ostensible agent for CTRMC.

DATED this 28th day of December, 2016.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that his proposed 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) because this brief was prepared in a proportionally-spaced typeface (14-point Times New Roman font) using Microsoft Word.

2. I further certify that this brief complies with the page-or type-volume limitations of NRAP 32(a)(7) because excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionally spaced, has a typeface of 14 points or more and contains 3,660 words.

3. I hereby certify that I have read this amicus curiae 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

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in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 28th day of December, 2016.

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