IN THE SUPREME COURT OF THE STATE OF NEVADA

BARRY JAMES RIVES, M.D. and LAPAROSCOPIC SURGERY OF NEVADA, LLC, Appellants/Cross-Respondents, vs. TITINA FARRIS and PATRICK FARRIS, Respondents/Cross-Appellants.	No.: 80271 Appeal from the Eighth Judicial District Court, the Honorable Joanna S. Kishner Presiding
BARRY JAMES RIVES, M.D. and LAPAROSCOPIC SURGERY OF NEVADA, LLC, Appellants, vs. TITINA FARRIS and PATRICK FARRIS, Respondents.	No.: 81052 Appeal from the Eighth Judicial District Court, the Honorable Joanna S. Kishner Presiding

RESPONDENTS/CROSS-APPELLANTS' REPLY BRIEF ON CROSS-APPEAL

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III. INTRODUCTION

In their opening brief on cross-appeal, Plaintiffs asked this Court to reverse the District Court's reduction of non-economic damages according to NRS 41A.035, within the judgment on jury verdict, since this statute has been preempted by the ERISA plan in this case. Respondents/Cross-Appellants' Amended Answering Brief on Appeal and Opening Brief on Cross-Appeal ("ROBC") 70–71. Plaintiffs previously provided this Court with the de novo standard of review for constitutional and preemption issues. ROBC 6–7; *see, e.g., Nanopierce Techs., Inc. v. Depository Tr. & Clearing Corp.*, 123 Nev. 362, 370, 168 P.3d 73, 79 (2007). Plaintiffs also argued in support of the District Court's ruling that the ERISA plan in this case preempts NRS 42.021. ROBC 45–48. This other preemption argument regarding NRS 42.021 was based, in part, on *McCrosky v. Carson Tahoe Reg'l Med. Ctr.*, 133 Nev. 930, 937, 408 P.3d 149, 155 (2017) ("NRS 42.021 was not intended to operate as a "*double* reduction" of a plaintiff's recovery.") (emphasis in original). Building on the District Court's prior findings regarding the ERISA plan in this case and the legal determinations regarding the preemption of NRS 42.021, Plaintiffs' essential argument for the preemption of NRS 41A.035 is that the ERISA plan in this case preempts this statute. Otherwise, Plaintiffs would be unfairly subject to the double reduction discussed in *McCrosky*.

Defendants' answering brief on cross-appeal responds with the following arguments: (1) no federal statute conflicts with NRS 41A.035; (2) no federal law conflicts with NRS 41A.035; (3) a non-economic damages cap, such as NRS 41A.035, cannot be preempted; and (4) the ERISA plan in this case was not a self-funded plan, such that preemption does not apply. Appellants/Cross-Respondents' Reply Brief on Appeal and Answering Brief on Cross-Appeal ("AABC") 56–61. Plaintiffs now reply.

IV. LEGAL ARGUMENT

A. DEFENDANTS FAILED TO RAISE THESE RESPONSES CHALLENGING PREEMPTION IN THE DISTRICT COURT.

Defendants failed to raise these responses challenging preemption in the District Court. In the hearing following the jury's verdict but before judgment was entered, the District Court reduced the non-economic damages amounts to $350,000, while rejecting Plaintiffs' preemption argument. 15 Appellants/Cross-Respondents' Appendix ("AA") 3313–3351. This reduction is reflected in the judgment on the jury's verdict. 12 AA 2479–2482. Notably, Defendants did not raise any of the responses they now have in this Court before the District Court. Thus, the new responses in Defendants' answering brief on cross-appeal should be disregarded. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981). Nevertheless, Plaintiffs acknowledge that this Court may consider constitutional

issues for the first time on appeal. *See Levingston v. Washoe County by & Through the Sheriff of Washoe County*, 112 Nev. 479, 482, 916 P.2d 163, 166 (1996) ("[I]ssues of a constitutional nature may be addressed when raised for the first time on appeal."). Therefore, the Court should first consider disregarding Defendants' new responses raised in this cross-appeal. Yet, if the Court chooses to consider Defendants' new responses, the Court should fully consider all the constitutional issues raised in this cross-appeal, including those from Plaintiffs.

B. THERE CAN BE NO DISPUTE THAT THE ERISA PLAN IN THIS CASE IS SELF-FUNDED AND, THEREFORE, PREEMPTION APPLIES.

There can be no dispute that the ERISA plan in this case is self-funded and, therefore, preemption applies. Not surprisingly, Defendants maintain their position that the ERISA plan in this case is not self-funded. But, in maintaining this position, Defendants ignore the evidence in the record. For example, the medical documents reflect that Titina's medical bills were paid by MGM's self-funded plan. 7 Respondents/Cross-Appellants' Appendix ("RA") 944–950. The MGM plan is established and maintained as an ERISA plan. 5 AA 1010. The insurance documents that were admitted as Court's Exhibit No. 13 contain the designation "UMR" or "UMR MGM Resorts." 7 RA 944–950. Although Defendants scoff at Plaintiffs' citation to *Med Flight Air Ambulance v. MGM Resorts Int'l*, 2017 U.S. Dist. LEXIS 193428, *10–11, 2017 WL 5634116 (unpublished), this case assists in

the interpretation of the information in the record that Defendants avoid. Thus, there can be no dispute that the ERISA plan in this case is self-funded and, therefore, preemption applies.

C. NRS 41A.035 OPERATES AS A DOUBLE REDUCTION IN LIGHT OF THE ERISA PLAN IN THIS CASE AND SHOULD BE PREEMPTED.

NRS 41A.035 operates as a double reduction in light of the ERISA plan in this case and should be preempted. Defendants contend that there must be a federal statute or federal law to preempt NRS 41A.035. But, in asserting this argument, Defendants attempt to sidestep *McCrosky*. Importantly, this Court explained in *McCrosky* that where federal funding, even in part, applies to an ERISA plan, preemption applies. *See id.*, 133 Nev. at 937, 408 P.3d at 155. It is noteworthy that the ERISA plan in this case does not exempt the recovery of non-economic damages, such as pain and suffering. 5 AA 1005–1046. In fact, it specifically allows for the recovery of "damages." 5 AA 1038.

Although Defendants argue conflict preemption with regard to a specific federal statute that conflicts with NRS 41A.035, their cited case *Munda v. Summerlin Life & Health Ins. Co.*, 127 Nev. 918, 267 P.3d 771 (2011) refers to ERISA cases as field preemption because "ERISA section 514(a) expressly preempts all state laws that 'relate to' any employee benefit plan." *Id.*, 127 Nev. at 924, 267 P.3d at 775

(citing *Cervantes v. Health Plan of Nev., Inc.*, 127 Nev. 789, 794, 263 P.3d 261, 265 (2011)).

Ultimately, Defendants' argument based upon health and safety exclusions within ERISA, which was not raised in the District Court, strays too far from the holding of *McCrosky*. The point of Plaintiffs' argument is that the ERISA plan in this case has a right to recover all "damages." 5 AA 1038. *Cf.* 42 U.S.C. § 2651(a) (identifying the United States' right to recover "damages"). In fact, the ERISA plan specifically mentions that "recoveries" includes "but is not limited to, recoveries for medical, dental or other expenses, attorneys' fees, costs and expenses, pain and suffering, loss of consortium, wrongful death, lost wages and any other recovery of any form of damages or compensation whatsoever." 5 AA 1038.

The plain language of NRS 41A.035 undoubtedly limits Plaintiffs' non-economic damages to $350,000: "In an action for injury or death against a provider of health care based upon professional negligence, the injured plaintiff may recover noneconomic damages, but the amount of noneconomic damages awarded in such an action must not exceed $350,000, regardless of the number of plaintiffs, defendants or theories upon which liability may be based." Thus, if the ERISA plan and NRS 41A.035 were to both operate in this case, Plaintiffs would, in fact, be affected by a prohibited double reduction of the non-economic damages amounts awarded by the jury. *See McCrosky*, 133 Nev. at 937, 408 P.3d at 155; 5 AA 1005–

1046; 12 AA 2475–2476. Thus, preemption of NRS 41A.035 should apply under the facts of this case.

V. CONCLUSION

In summary, Plaintiffs ask this Court to determine that the ERISA plan in this case operates to preempt NRS 41A.035, such that the full amount of the jury's verdict should be reinstated.

Dated this 7th day of May 2021.

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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) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 28.1(e)(2) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

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3. Finally, I hereby certify that I have read this 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 the Nevada Rules of Appellate Procedure.

Dated this 7th day of May 2021.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **RESPONDENTS/CROSS-APPELLANTS' REPLY BRIEF ON CROSS-APPEAL** was filed electronically with the Supreme Court of Nevada on the 7th day of May 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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