

IN THE SUPREME COURT OF THE STATE OF NEVADA

INDICATE FULL CAPTION:

DARIA HARPER; DANIEL WININGER
Appellants.

vs.

COPPERPOINT MUTUAL INSURANCE
HOLDING COMPANY, ET AL.

Respondents.

No. 82158

DOCKETING

CIVIL APPEALS

Electronically Filed
Dec 18 2020 12:42 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

GENERAL INFORMATION

Appellants must complete this docketing statement in compliance with NRAP 14(a). The purpose of the docketing statement is to assist the Supreme Court in screening jurisdiction, identifying issues on appeal, assessing presumptive assignment to the Court of Appeals under NRAP 17, scheduling cases for oral argument and settlement conferences, classifying cases for expedited treatment and assignment to the Court of Appeals, and compiling statistical information.

WARNING

This statement must be completed fully, accurately and on time. NRAP 14(c). The Supreme Court may impose sanctions on counsel or appellant if it appears that the information provided is incomplete or inaccurate. *Id.* Failure to fill out the statement completely or to file it in a timely manner constitutes grounds for the imposition of sanctions, including a fine and/or dismissal of the appeal.

A complete list of the documents that must be attached appears as Question 27 on this docketing statement. Failure to attach all required documents will result in the delay of your appeal and may result in the imposition of sanctions.

This court has noted that when attorneys do not take seriously their obligations under NRAP 14 to complete the docketing statement properly and conscientiously, they waste the valuable judicial resources of this court, making the imposition of sanctions appropriate. See KDI Sylvan Pools v. Workman, 107 Nev. 340, 344, 810 P.2d 1217, 1220 (1991). Please use tab dividers to separate any attached documents.

1. Judicial District Eighth Department 30
County Clark Judge Jerry A. Wiese, III
District Ct. Case No. A-20-814541-C

2. Attorney filing this docketing statement:

Attorney Jason R. Maier, Esq. Telephone (702) 629-7900
Firm Maier Gutierrez & Associates
Address 8816 Spanish Ridge Avenue, Las Vegas, Nevada 89148

Client(s) Daria Harper and Daniel Wininger

If this is a joint statement by multiple appellants, add the names and addresses of other counsel and the names of their clients on an additional sheet accompanied by a certification that they concur in the filing of this statement.

3. Attorney(s) representing respondents(s):

Attorney Dalton L. Hooks, Jr., Esq. Telephone (702) 766-4672
Firm Hooks Meng & Clement
Address 2820 W. Charleston Boulevard, Suite C-23, Las Vegas, Nevada 89123

Client(s) Copperpoint Mutual Insurance Holding Company; Copperpoint General Insurance

Attorney _____ Telephone _____
Firm _____
Address _____

Client(s) _____

(List additional counsel on separate sheet if necessary)

4. Nature of disposition below (check all that apply):

- | | |
|--|---|
| <input type="checkbox"/> Judgment after bench trial | <input checked="" type="checkbox"/> Dismissal: |
| <input type="checkbox"/> Judgment after jury verdict | <input type="checkbox"/> Lack of jurisdiction |
| <input checked="" type="checkbox"/> Summary judgment | <input checked="" type="checkbox"/> Failure to state a claim |
| <input type="checkbox"/> Default judgment | <input type="checkbox"/> Failure to prosecute |
| <input type="checkbox"/> Grant/Denial of NRCP 60(b) relief | <input type="checkbox"/> Other (specify): _____ |
| <input type="checkbox"/> Grant/Denial of injunction | <input type="checkbox"/> Divorce Decree: |
| <input checked="" type="checkbox"/> Grant/Denial of declaratory relief | <input type="checkbox"/> Original <input type="checkbox"/> Modification |
| <input type="checkbox"/> Review of agency determination | <input type="checkbox"/> Other disposition (specify): _____ |

5. Does this appeal raise issues concerning any of the following?

- ☐ Child Custody
- ☐ Venue
- ☐ Termination of parental rights

6. Pending and prior proceedings in this court. List the case name and docket number of all appeals or original proceedings presently or previously pending before this court which are related to this appeal:

Not applicable.

7. Pending and prior proceedings in other courts. List the case name, number and court of all pending and prior proceedings in other courts which are related to this appeal (e.g., bankruptcy, consolidated or bifurcated proceedings) and their dates of disposition:

Not applicable.

8. Nature of the action. Briefly describe the nature of the action and the result below:

Plaintiffs sought a declaration invalidating the claim by an Arizona worker's compensation insurance company that it had an enforceable lien against the settlement proceeds from a Nevada medical malpractice case that alleged that the negligence of Nevada doctors aggregated a work-related injury of an Arizona resident receiving medical care in Nevada. Arizona law permits a lien under such circumstances. NRS 42.021 prohibits a lien when evidence of the insurance benefits is introduced at the trial of a medical malpractice case. NRS 42.021 is identical to California statutory law but the California Supreme Court and Court of Appeal have long held that their statute that prohibits liens does not require a trial and applies to settlements of medical malpractice cases. Plaintiffs brought a motion for partial summary judgment and the defendant insurance company brought a motion to dismiss. In denying the motion for partial summary judgment, the district court held that NRS 42.021 does not apply to settlements, and in granting the motion to dismiss found that because Nevada law and Arizona law were not in conflict, Arizona's law permitting a lien on the proceeds of the medical malpractice settlement governed the rights of the parties.

9. Issues on appeal. State concisely the principal issue(s) in this appeal (attach separate sheets as necessary):

1. Should NRS 42.021 apply to settlements of medical malpractice cases, as the identical California statute was interpreted by the California Supreme Court in *Barme v. Wood*, 37 Cal.3d 174, 207 Cal.Rptr. 816, 689 P.2d 446 (1984) and by the California Court of Appeal in *Graham v. Workers' Comp. Appeals Bd.*, 210 Cal.App.3d 499, 258 Cal.Rptr. 376 (1988)?
2. Should NRS 42.021, which was enacted by initiative, be interpreted as applying to all plaintiff recoveries in medical malpractice cases, based on the ballot description in the initiative submitted to the voters?
3. If NRS 42.021 applies to a settlement of a medical malpractice case, under conflict of laws analysis, does Nevada law take precedence over Arizona law where the malpractice took place in Nevada, the doctors were Nevada residents, and the lawsuit was prosecuted in Nevada?
4. If NRS applies to a settlement of a medical malpractice case, and if Arizona law conflicts, does Nevada law govern because NRS 42.021 is evidentiary in nature?

10. Pending proceedings in this court raising the same or similar issues. If you are aware of any proceedings presently pending before this court which raises the same or similar issues raised in this appeal, list the case name and docket numbers and identify the same or similar issue raised:

Not applicable.

11. Constitutional issues. If this appeal challenges the constitutionality of a statute, and the state, any state agency, or any officer or employee thereof is not a party to this appeal, have you notified the clerk of this court and the attorney general in accordance with NRAP 44 and NRS 30.130?

☒ N/A

☐ Yes

☐ No

If not, explain:

12. Other issues. Does this appeal involve any of the following issues?

☐ Reversal of well-settled Nevada precedent (identify the case(s))

☐ An issue arising under the United States and/or Nevada Constitutions

☒ A substantial issue of first impression

☒ An issue of public policy

☐ An issue where en banc consideration is necessary to maintain uniformity of this court's decisions

☐ A ballot question

If so, explain: See Item Nos. 8 and 9.

13. Assignment to the Court of Appeals or retention in the Supreme Court. Briefly set forth whether the matter is presumptively retained by the Supreme Court or assigned to the Court of Appeals under NRAP 17, and cite the subparagraph(s) of the Rule under which the matter falls. If appellant believes that the Supreme Court should retain the case despite its presumptive assignment to the Court of Appeals, identify the specific issue(s) or circumstance(s) that warrant retaining the case, and include an explanation of their importance or significance:

This case involves a substantial issue of first impression regarding whether NRS 42.021 applies to settlements and, if so, whether it creates a conflict of laws, particularly as to the dismissed CopperPoint defendants. These are matters raising as a principal issue a question of first impression and statewide public importance pursuant to NRAP 17(a)(11)-(12).

14. Trial. If this action proceeded to trial, how many days did the trial last? 0 _____

Was it a bench or jury trial? N/A _____

15. Judicial Disqualification. Do you intend to file a motion to disqualify or have a justice recuse him/herself from participation in this appeal? If so, which Justice?
No.

TIMELINESS OF NOTICE OF APPEAL

16. Date of entry of written judgment or order appealed from Oct 26, 2020

If no written judgment or order was filed in the district court, explain the basis for seeking appellate review:

Not applicable. Written order entered on October 26, 2020.

17. Date written notice of entry of judgment or order was served None

Was service by:

☐ Delivery

☐ Mail/electronic/fax

18. If the time for filing the notice of appeal was tolled by a post-judgment motion (NRCP 50(b), 52(b), or 59)

(a) Specify the type of motion, the date and method of service of the motion, and the date of filing.

☐ NRCP 50(b) Date of filing N/A

☐ NRCP 52(b) Date of filing N/A

☐ NRCP 59 Date of filing N/A

NOTE: Motions made pursuant to NRCP 60 or motions for rehearing or reconsideration may toll the time for filing a notice of appeal. See AA Primo Builders v. Washington, 126 Nev. ____, 245 P.3d 1190 (2010).

(b) Date of entry of written order resolving tolling motion N/A

(c) Date written notice of entry of order resolving tolling motion was served N/A

Was service by:

☐ Delivery

☐ Mail

19. Date notice of appeal filed Nov 24, 2020

If more than one party has appealed from the judgment or order, list the date each notice of appeal was filed and identify by name the party filing the notice of appeal:
Not applicable.

20. Specify statute or rule governing the time limit for filing the notice of appeal, e.g., NRAP 4(a) or other

NRAP 4(a)

SUBSTANTIVE APPEALABILITY

21. Specify the statute or other authority granting this court jurisdiction to review the judgment or order appealed from:

(a)

- | | |
|---|---------------------------------------|
| <input checked="" type="checkbox"/> NRAP 3A(b)(1) | <input type="checkbox"/> NRS 38.205 |
| <input type="checkbox"/> NRAP 3A(b)(2) | <input type="checkbox"/> NRS 233B.150 |
| <input type="checkbox"/> NRAP 3A(b)(3) | <input type="checkbox"/> NRS 703.376 |
| <input type="checkbox"/> Other (specify) _____ | |

(b) Explain how each authority provides a basis for appeal from the judgment or order:

In the order entered on October 26, 2020, the district court granted the CopperPoint defendants' motion to dismiss and denied the motion for partial summary judgment filed by plaintiffs, thereby dismissing the CopperPoint defendants in their entirety.

22. List all parties involved in the action or consolidated actions in the district court:

(a) Parties:

COPPERPOINT MUTUAL INSURANCE HOLDING COMPANY; COPPERPOINT GENERAL INSURANCE COMPANY; LAW OFFICES OF MARSHALL SILVERBERG, P.C.; KENNETH MARSHALL SILVERBERG; THOMAS S. ALCH; and SHOOP, A PROFESSIONAL LAW CORPORATION.

(b) If all parties in the district court are not parties to this appeal, explain in detail why those parties are not involved in this appeal, *e.g.*, formally dismissed, not served, or other:

The legal malpractice case against the remaining attorney-defendants is predicated on the negligence of the attorney-defendants in ignoring CopperPoint's claimed worker's compensation lien pursuant to NRS 42.021. The determination of whether there is a lien pursuant to NRS 42.021 affects the legal malpractice defendants. It is unknown why the remaining attorney-defendants have not joined in this appeal.

23. Give a brief description (3 to 5 words) of each party's separate claims, counterclaims, cross-claims, or third-party claims and the date of formal disposition of each claim.

Declaratory Relief against All Defendants. 10/26/20 as to CopperPoint Defendants.
Injunctive Relief against CopperPoint Defendants. 10/26/20.
Legal Malpractice and Breach of Fiduciary Duty against Attorney-Defendants.
Fraud and Breach of Contract against Silberberg Defendants.

24. Did the judgment or order appealed from adjudicate ALL the claims alleged below and the rights and liabilities of ALL the parties to the action or consolidated actions below?

☐ Yes

☒ No

25. If you answered "No" to question 24, complete the following:

(a) Specify the claims remaining pending below:

Legal Malpractice and Breach of Fiduciary Duty against Attorney-Defendants.
Fraud and Breach of Contract against Silberberg Defendants.

(b) Specify the parties remaining below:

LAW OFFICES OF MARSHALL SILVERBERG, P.C.; KENNETH MARSHALL SILVERBERG; THOMAS S. ALCH; and SHOOP, A PROFESSIONAL LAW CORPORATION.

(c) Did the district court certify the judgment or order appealed from as a final judgment pursuant to NRCP 54(b)?

☐ Yes

☒ No

(d) Did the district court make an express determination, pursuant to NRCP 54(b), that there is no just reason for delay and an express direction for the entry of judgment?

☐ Yes

☒ No

26. If you answered "No" to any part of question 25, explain the basis for seeking appellate review (e.g., order is independently appealable under NRAP 3A(b)):

The motion to certify order entered on 10/26/20 as final pursuant to NRCP 54(b) is presently set for hearing on December 30, 2020.

27. Attach file-stamped copies of the following documents:

- The latest-filed complaint, counterclaims, cross-claims, and third-party claims
- Any tolling motion(s) and order(s) resolving tolling motion(s)
- Orders of NRCP 41(a) dismissals formally resolving each claim, counterclaims, cross-claims and/or third-party claims asserted in the action or consolidated action below, even if not at issue on appeal
- Any other order challenged on appeal
- Notices of entry for each attached order

VERIFICATION

I declare under penalty of perjury that I have read this docketing statement, that the information provided in this docketing statement is true and complete to the best of my knowledge, information and belief, and that I have attached all required documents to this docketing statement.

Daria Harper & Daniel Wininger
Name of appellant

Jason R. Maier
Name of counsel of record

Dec 18, 2020
Date

/s/ Jason R. Maier
Signature of counsel of record

Clark County, Nevada
State and county where signed

CERTIFICATE OF SERVICE

I certify that on the 18th day of December, 2020, I served a copy of this completed docketing statement upon all counsel of record:

- ☐ By personally serving it upon him/her; or
- ☒ By mailing it by first class mail with sufficient postage prepaid to the following address(es): (NOTE: If all names and addresses cannot fit below, please list names below and attach a separate sheet with the addresses.)

See attached sheet for mail service list.

Dated this 18th day of December, 2020

/s/ Natalie Vazquez
Signature

CERTIFICATE OF SERVICE

I certify that on the 18th day of December, 2020, I served a copy of this completed docketing statement upon all counsel of record, by mailing it by first class mail with sufficient postage prepaid to the following address(es):

Dalton L. Hooks, Jr., Esq.
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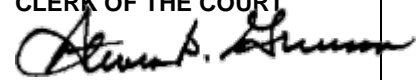
and

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/s/ Natalie Vazquez

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Department 30

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Attorneys for Plaintiffs

DISTRICT COURT

CLARK COUNTY, NEVADA

DARIA HARPER, an individual; and DANIEL
WININGER, an individual,

Plaintiffs,

vs.

COPPERPOINT MUTUAL INSURANCE
HOLDING COMPANY, an Arizona
corporation; COPPERPOINT GENERAL
INSURANCE COMPANY, an Arizona
corporation; LAW OFFICES OF MARSHALL
SILBERBERG, P.C., a California corporation;
KENNETH MARSHALL SILBERBERG aka
MARSHALL SILBERBERG aka K.
MARSHALL SILBERBERG, an individual;
THOMAS S. ALCH aka THOMAS STEVEN
ALCH, an individual; SHOOP, A
PROFESSIONAL LAW CORPORATION, a
California corporation; DOES 1-50, inclusive,

Defendants.

Case No.:
Dept. No.:

COMPLAINT

DEMAND FOR JURY TRIAL

Arbitration Exemptions:

1. Action for Declaratory Relief
2. Action for Injunctive Relief
3. Damages in Excess of \$50,000

Plaintiffs hereby demand a trial by jury and complain and allege against defendants as follows:

GENERAL ALLEGATIONS

1. At all times mentioned, plaintiffs, DARIA HARPER and DANIEL WININGER, were married and residents of the state of Arizona.

2. On or about August 11, 2014, plaintiff DARIA HARPER sustained a knee injury while in the course and scope of her employment. Her employer was insured by defendant COPPERPOINT GENERAL INSURANCE COMPANY, duly incorporated under the laws of Arizona as an Arizona corporation, which is now also known and doing business as COPPERPOINT MUTUAL INSURANCE HOLDING COMPANY, duly incorporated under the laws of Arizona as an Arizona corporation, and is also known as COPPERPOINT MUTUAL INSURANCE COMPANY and/or COPPERPOINT INSURANCE COMPANIES (collectively "COPPERPOINT"). Pursuant to the Arizona Workers' Compensation Act (Arizona Revised Statutes section 23-901, *et seq.*) defendant COPPERPOINT was obligated to provide, among other things, necessary medical treatment and income disability payments to plaintiff DARIA HARPER.

3. On or about June 9, 2015, plaintiff DARIA HARPER required medical treatment in Las Vegas, Nevada that was related to her original August 11, 2014 injury. As a result of this medical treatment, (a) plaintiff DARIA HARPER suffered serious injury resulting in quadriplegia, significant pain, suffering, emotional distress and economic damages for the cost of future care, as well as lost income and earning capacity and (b) plaintiff DANIEL WININGER suffered compensable damages by virtue of his marital relationship with plaintiff DARIA HARPER.

4. At all times mentioned, defendant KENNETH MARSHALL SILBERBERG, also known as MARSHALL SILBERBERG and K. MARSHALL SILBERBERG was, and is, licensed to practice law in California, a resident of Los Angeles County, California and a principal and/or owner of defendant LAW OFFICES OF MARSHALL SILBERBERG, P.C., located in Orange County, California (hereafter, "defendant SILBERBERG" or "defendants SILBERBERG.")

5. At all times mentioned herein, defendant THOMAS STEVEN ALCH, also known as THOMAS S. ALCH ("ALCH"), was and is licensed to practice law in California and Nevada. From May 2018 to the present, ALCH was an agent and/or employee of defendant SHOOP, A PROFESSIONAL LAW CORPORATION ("SHOOP"). SHOOP was and is a corporation duly

1 incorporated under the laws of California and located in Los Angeles County, California and is liable
2 for the negligent acts and omissions of its agent and/or employee defendant ALCH.

3 6. The true names and capacities, whether individual, corporate, associate, partnership or
4 otherwise, of the defendants herein designated as DOES 1-50, inclusive, are unknown to plaintiffs,
5 who therefore sue said defendants by such fictitious names. Plaintiffs will seek leave of the Court to
6 insert the true names and capacities of such defendants when the same have been ascertained and will
7 further seek leave to join said defendants in these proceedings.

8 7. This court has jurisdiction because the complaint arises out of events, claims, actions
9 and omissions relating to a lawsuit prosecuted in the District Court of Clark County, Nevada,
10 specifically but without limitation: (a) defendant THOMAS STEVEN ALCH is licensed to practice
11 law in Nevada and was attorney of record for plaintiffs in Nevada; (b) defendant KENNETH
12 MARSHALL SILBERBERG was admitted to practice in District Court of Clark County, pro hac vice
13 and was counsel of record for plaintiffs in Nevada; (c) defendants COPPERPOINT GENERAL
14 INSURANCE COMPANY, and/or COPPERPOINT MUTUAL INSURANCE HOLDING
15 COMPANY, aka COPPERPOINT MUTUAL INSURANCE COMPANY, aka COPPERPOINT
16 INSURANCE COMPANIES, and DOES 1-10 conduct business in Nevada, paid medical bills of
17 plaintiff DARIA HARPER to Nevada health care providers, and claims entitlement to reimbursement
18 of those paid medical bills from money received by plaintiffs pursuant to the laws of and litigation in
19 Clark County, Nevada.

20 8. On or about March 10, 2016, defendant SILBERBERG (a) agreed to represent
21 plaintiffs in a medical malpractice lawsuit to be filed and prosecuted in Nevada and (b) entered into
22 an agreement with ALCH to jointly represent plaintiffs, DARIA HARPER and DANIEL
23 WININGER. On or about June 7, 2016, defendant ALCH filed a complaint in the District Court of
24 Nevada, Clark County, as Case Number A-16-738004-C (“the underlying medical malpractice
25 action”), alleging that plaintiffs sustained damages as a result of the medical negligence of the named
26 health care providers (“health care providers”). Thereafter, (a) defendant ALCH sponsored defendant
27 KENNETH MARSHALL SILBERBERG to be admitted, pro hac vice, to practice law in Nevada for
28 the purpose of jointly representing plaintiffs, (b) defendant KENNETH MARSHALL SILBERBERG

1 was admitted, pro hac vice, to practice law in Nevada; and (d) defendant KENNETH MARSHALL
2 SILBERBERG associated with defendant ALCH as attorney for plaintiffs in the underlying medical
3 malpractice action.

4 9. At all relevant times, defendants, ALCH and SILBERBERG, acted in concert with one
5 another, were agents for each other, and are vicariously liable for the negligent acts and omissions of
6 each other, whether acting jointly or severally.

7 10. When defendant COPPERPOINT became aware of the above-described underlying
8 medical malpractice action, it (a) asserted, in writing, its right to participate in any settlement thereof
9 and (b) claimed, in writing, its entitlement to a lien for repayment of financial benefits paid to or on
10 behalf of plaintiff DARIA HARPER pursuant to Arizona statute A.R.S. § 23-1023. At all times
11 mentioned herein, defendants ALCH and SILBERBERG, were aware of these assertions and claims
12 made by defendant COPPERPOINT and, as of March, 2018, they were aware that COPPERPOINT's
13 lien claim was \$2,768,656.65. Nevertheless, defendants, ALCH and SILBERBERG, advised
14 plaintiffs that COPPERPOINT had no legal right to claim a lien on the proceeds from any judgment
15 against or settlement with the health care providers and, therefore, could not claim a portion of any
16 such settlement or judgment and that COPPERPOINT would continue to be legally obligated to pay
17 for her care costs and disability.

18 11. In the underlying medical malpractice action, (a) the medical experts for both plaintiff
19 DARIA HARPER and the health care providers agreed that she would require 24-hour per day care
20 for the remainder of her life, (b) the economic expert retained by defendants, ALCH and
21 SILBERBERG, determined that the present value of the cost of DARIA HARPER's required future
22 care was \$14,291,374 and that she incurred past and future earnings losses of \$322,579, and (c) the
23 economic expert retained by the health care providers determined that the present value of the cost of
24 DARIA HARPER's future care would be \$12,057,480.

25 12. Based on the advice from defendants, ALCH and SILBERBERG, plaintiffs settled
26 with the health care providers for the total sum of \$6,250,000.00. Thereafter, in or about July 2018,
27 the lawsuit was dismissed and the settlement monies were paid by the settling health care providers,
28 from which defendants, ALCH and SILBERBERG, distributed to themselves attorney's fees of

1 \$1,130,737 and reimbursement of costs of \$125,070. On or about September 18, 2018, defendant
2 SILBERBERG told plaintiffs, for the first time, (a) that COPPERPOINT was still claiming a lien on
3 the settlement proceeds, (b) that COPPERPOINT might pursue its lien claim in a legal action, and (c)
4 that plaintiffs should be prepared to defend such legal action and pay COPPERPOINT the amount of
5 its lien if it was successful in prosecuting its lien claim.

6 13. On or about October 30, 2019, defendant COPPERPOINT served the “Notice of Claim
7 Status”, attached hereto as **Exhibit “1”** and made a part hereof by reference, on plaintiff DARIA
8 HARPER, that stated in part:

- 9 • Pursuant to A.R.S. § 23-1023, CopperPoint has a lien against Claimant's third-party
10 recovery from a medical malpractice action (Case No. A-16-738004-C) brought in
11 the District Court of Clark County, Nevada, in an amount equal to compensation
12 and medical, surgical, and hospital benefits paid by CopperPoint.
- 13 • CopperPoint is entitled to accrued interest on the lien from the date settlement
14 proceeds were disbursed.
- 15 • CopperPoint is entitled to a future credit against Claimant's recovery equal to the
16 amount of money received by the Claimant in the malpractice action after
17 subtracting expenses and attorney fees.
- 18 • CopperPoint is not required to pay claimant compensation or medical, surgical, or
19 hospital benefits until the claimant's post-settlement accrued entitlement to
20 compensation and medical benefits exceeds the credit amount.
- 21 • To the extent the settlement in the malpractice action was less than the workers'
22 compensation benefits provided by CopperPoint, Claimant's failure to obtain
23 CopperPoint's prior approval before settling results in forfeiture of her workers'
24 compensation claim.

25 14. The lien amount claimed by defendant COPPERPOINT is \$3,171,095.

26 15. After defendant COPPERPOINT served the above-described Notice of Claim Status,
27 it terminated payments being made for the services of plaintiff DANIEL WININGER who was being
28 compensated to provide 24-hour per day care to plaintiff DARIA HARPER; and on April 2, 2020,

1 sent plaintiff DARIA HARPER the letter, attached as **Exhibit “2”** and made a part hereof by
2 reference, notifying her that it would terminate all benefits, in thirty days.

3 16. At all pertinent times, Nevada law, specifically, Nev. Rev. Stat. § 42.021, provided as
4 follows:

5 1. In an action for injury or death against a provider of health care based
6 upon professional negligence, if the defendant so elects, the defendant may
7 introduce evidence of any amount payable as a benefit to the plaintiff as a
8 result of the injury or death pursuant to the United States Social Security
9 Act, any state or federal income disability or worker's compensation act,
10 any health, sickness or income-disability insurance, accident insurance that
11 provides health benefits or income-disability coverage, and any contract or
12 agreement of any group, organization, partnership or corporation to
13 provide, pay for or reimburse the cost of medical, hospital, dental or other
14 health care services. If the defendant elects to introduce such evidence, the
15 plaintiff may introduce evidence of any amount that the plaintiff has paid
16 or contributed to secure the plaintiff's right to any insurance benefits
17 concerning which the defendant has introduced evidence.

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

21 17. At all pertinent times, Arizona law, specifically Ariz. Rev. Stat. Ann. § 23-1023D,
22 provided as follows:

23 If the employee proceeds against the other person, compensation and
24 medical, surgical and hospital benefits shall be paid as provided in this
25 chapter and the insurance carrier or other person liable to pay the claim shall
26 have a lien on the amount actually collectable from the other person to the
27 extent of such compensation and medical, surgical and hospital benefits
28 paid. This lien shall not be subject to a collection fee. The amount actually

1 collectable shall be the total recovery less the reasonable and necessary
2 expenses, including attorney fees, actually expended in securing the
3 recovery. In any action arising out of an aggravation of a previously
4 accepted industrial injury, the lien shall only apply to amounts expended for
5 compensation and treatment of the aggravation. The insurance carrier or
6 person shall contribute only the deficiency between the amount actually
7 collected and the compensation and medical, surgical and hospital benefits
8 provided or estimated by this chapter for the case. Compromise of any claim
9 by the employee or the employee's dependents at an amount less than the
10 compensation and medical, surgical and hospital benefits provided for shall
11 be made only with written approval of the insurance carrier or self-insured
12 employer liable to pay the claim.

13 18. At all pertinent times, Arizona law, specifically Ariz. Rev. Stat. Ann. § 12-565,
14 provided as follows:

15 A. In any medical malpractice action against a licensed health care provider,
16 the defendant may introduce evidence of any amount or other benefit which
17 is or will be payable as a benefit to the plaintiff as a result of the injury or
18 death pursuant to the United States social security act, any state or federal
19 workers' compensation act, any disability, health, sickness, life, income-
20 disability or accident insurance that provides health benefits or income-
21 disability coverage and any other contract or agreement of any group,
22 organization, partnership, or corporation to provide, pay for, or reimburse
23 the cost of income-disability or medical, hospital, dental or other health care
24 services to establish that any cost, expense, or loss claimed by the plaintiff
25 as a result of the injury or death is subject to reimbursement or
26 indemnification from such collateral sources. Where the defendant elects to
27 introduce such evidence, the plaintiff may introduce evidence of any
28 amount which the plaintiff has paid or contributed to secure his right to any

1 such benefits or that recovery from the defendant is subject to a lien or that
2 a provider of such collateral benefits has a statutory right of recovery against
3 the plaintiff as reimbursement for such benefits or that the provider of such
4 benefits has a right of subrogation to the rights of the plaintiff in the medical
5 malpractice action.

6 B. Evidence introduced pursuant to this section shall be admissible for the
7 purpose of considering the damages claimed by the plaintiff and shall be
8 accorded such weight as the trier of the facts chooses to give it.

9 C. Unless otherwise expressly permitted to do so by statute, no provider of
10 collateral benefits, as described in subsection A, shall recover any amount
11 against the plaintiff as reimbursement for such benefits nor shall such
12 provider be subrogated to the rights of the plaintiff.

13 19. Nev. Rev. Stat. Ann. § 42.021 is verbatim of California Civil Code section 3333.1,
14 which provides as follows:

15 (a) In the event the defendant so elects, in an action for personal injury
16 against a health care provider based upon professional negligence, he may
17 introduce evidence of any amount payable as a benefit to the plaintiff as a
18 result of the personal injury pursuant to the United States Social Security
19 Act, any state or federal income disability or worker's compensation act,
20 any health, sickness or income-disability insurance, accident insurance that
21 provides health benefits or income-disability coverage, and any contract or
22 agreement of any group, organization, partnership, or corporation to
23 provide, pay for, or reimburse the cost of medical, hospital, dental, or other
24 health care services. Where the defendant elects to introduce such evidence,
25 the plaintiff may introduce evidence of any amount which the plaintiff has
26 paid or contributed to secure his right to any insurance benefits concerning
27 which the defendant has introduced evidence.

28 (b) No source of collateral benefits introduced pursuant to subdivision (a)

1 shall recover any amount against the plaintiff nor shall it be subrogated to
2 the rights of the plaintiff against a defendant.

3 20. In *Barme v. Wood*, 37 Cal.3d 174, 207 Cal. Rptr. 816, 689 P.2d 446 (Cal. 1984), an
4 injured worker who had received worker’s compensation benefits sued the health care providers for
5 medical malpractice, claiming that they had caused him additional injury. The worker’s compensation
6 insurance company filed a complaint in intervention, seeking reimbursement of the compensation it
7 had paid to the plaintiff. The California Supreme Court held that the right of a worker’s compensation
8 insurance company to seek recovery of its statutory lien – even when there had not yet been a trial,
9 precluded recovery and dismissed the complaint in intervention.

10 21. In *Graham v. Workers' Comp. Appeals Bd.*, 210 Cal. App. 3d 499, 258 Cal. Rptr. 376,
11 (Cal. Ct. App. 1989), the California Court of Appeal addressed the issue of whether a worker’s
12 compensation insurance company that had paid compensation to the plaintiff could claim credit for
13 future compensation based on money the plaintiff had received in a medical malpractice settlement.
14 The California Court of Appeal held that the lien preclusion provisions of Civil Code section 3333.1,
15 subdivision (b) applied, to settlements of medical malpractice lawsuits as well as to trials where
16 collateral source evidence was introduced.

17 22. In 2004, NRS 42.021 was enacted after being presented to Nevada voters by ballot
18 initiative. (Secretary of State, Statewide Ballot Questions 16 (2004),
19 <https://www.leg.state.nv.us/Division/Research/VoteNV/BallotQuestions/2004.pdf>.) (*McCrosky v.*
20 *Carson Tahoe Regional Medical Center*, 133 Nev. 930, 408 P.3d 149 (2017). The ballot question put
21 to Nevada voters stated, in part, that the initiative would “prohibit third parties who provided benefits
22 as a result of medical malpractice from recovering such benefits from a negligent provider of health
23 care” The Secretary of State’s explanation stated, in part: “If passed, the proposal would not
24 change the reduction of the injured person’s damages, but the third parties would no longer be
25 permitted to recover from the wrongdoer the expenses they have paid on behalf of a medical
26 malpractice victim.”

27 23. Although California Civil Code section 3333.1 and Nevada NRS 42.021 are identical,
28 and although the California Supreme Court and California Court of Appeal have found that insurance

1 companies providing benefits to a medical malpractice plaintiff have no lien against, or may take
2 credit for, money received by a medical malpractice plaintiff in a settlement before trial, no Nevada
3 appellate court has ever addressed the issue.

4 **FIRST CAUSE OF ACTION**

5 **(Declaratory Relief)**

6 **(Alleged by Both Plaintiffs Against All Defendants)**

7 24. Plaintiffs repeat and re-allege the allegations of the preceding paragraphs of the
8 complaint as though fully set forth herein, and incorporate the same herein by reference.

9 25. An actual controversy has arisen and now exists between plaintiffs and defendants
10 concerning the respective rights and duties of plaintiffs on the one hand and defendant
11 COPPERPOINT on the other hand. Defendant COPPERPOINT contends that it is entitled to a lien
12 and/or credit for money received by plaintiff DARIA HARPER pursuant to Ariz. Rev. Stat. Ann. §
13 23-1023D and that it is entitled to terminate the benefits that it has/had been making for plaintiff
14 DARIA HARPER's benefit. Plaintiffs contend – and plaintiffs are informed and believe and thereon
15 allege that all defendants other than COPPERPOINT contend – that defendant COPPERPOINT is not
16 entitled to any lien or credit because Nevada NRS 42.021 should be interpreted as precluding such
17 lien if a medical malpractice claim is settled and is and/or was not entitled to terminate the benefits
18 that it has/had been making for plaintiff DARIA HARPER's benefit and must forthwith pay those
19 benefits it has withheld with interest at the legal rate.

20 26. Plaintiffs desire a judicial determination of their rights and duties, and a declaration as
21 to whether defendant COPPERPOINT is entitled to any lien or credit and/or credit for money received
22 by plaintiffs from the above-described settlement and whether defendant COPPERPOINT remains
23 and has always remained obligated to making the above-described benefits and must forthwith pay
24 those benefits it has withheld with interest at the legal rate.

25 27. A judicial declaration is necessary and appropriate at this time under the circumstances
26 in order that plaintiffs may ascertain their rights and duties.

27 28. As a direct and proximate result of the aforementioned actions of defendants, and each
28 of them, plaintiffs have been required to engage the services of an attorney, incurring attorney's fees

1 and costs to bring this action.

2 **SECOND CAUSE OF ACTION**

3 **(Injunctive Relief)**

4 **(Alleged by Both Plaintiffs Against Defendants COPPERPOINT MUTUAL INSURANCE**
5 **HOLDING COMPANY, COPPERPOINT GENERAL INSURANCE COMPANY)**

6 29. Plaintiffs repeat and re-allege the allegations of the preceding paragraphs of the
7 complaint as though fully set forth herein, and incorporate the same herein by reference.

8 30. Plaintiffs rely on the workers' compensation benefits paid by defendant
9 COPPERPOINT for the necessary and essential living and medical needs of plaintiff DARIA
10 HARPER. Based on its claim that it has no further obligation to pay worker's compensation benefits,
11 defendant COPPERPOINT will cease making any payments to or on behalf of plaintiffs on May 2,
12 2020.

13 31. The threatened conduct of defendant COPPERPOINT, unless and until enjoined and
14 restrained by order of this Court, will cause great and irreparable injury to plaintiffs. The \$14,291,374
15 life care plan itemized the medical and care needs of plaintiff DARIA HARPER. The net proceeds
16 that were not invested in annuities have been largely expended for goods and services that are
17 necessary for the survival of plaintiff DARIA HARPER. Because COPPERPOINT terminated
18 payments for the services of plaintiff DANIEL WININGER, plaintiffs' sole monthly income from
19 annuities is \$8,333, which is greatly exceeded by the monthly expenses for medical supplies
20 (including bladder supplies, bowel program, personal care and respiratory); medical equipment
21 (including vent, oxygenator condenser and oxygen canisters), appointments with four doctors,
22 therapists and nurses, and prescription medications. Additionally, because plaintiff DARIA HARPER
23 requires 24-hour per day care, plaintiff DANIEL WININGER must provide such services, but without
24 compensation therefor.

25 32. Plaintiffs have no adequate remedy at law for the above-described injuries in that they
26 do not have the financial means to provide for plaintiff DARIA HARPER's above-described needs.

27 33. As a proximate result of the wrongful conduct of defendant COPPERPOINT, plaintiff
28 DANIEL WININGER has been damaged in the sum of \$2,950 per month and will continue to be

1 damaged so long as the wrongful conduct of COPPERPOINT continues. As a proximate result of the
2 threatened conduct of defendant COPPERPOINT, if not restrained, plaintiff DARIA HARPER will
3 be damaged. The full amount of the damages respectively incurred by plaintiffs, DARIA HARPER
4 and DANIEL WININGER, will be proven at trial.

5 34. As a direct and proximate result of the actions of defendants, and each of them,
6 plaintiffs sustained damages in a sum in excess of \$15,000.

7 35. As a direct and proximate result of the aforementioned actions of defendants, and each
8 of them, plaintiffs have been required to engage the services of an attorney, incurring attorney's fees
9 and costs to bring this action.

10 **THIRD CAUSE OF ACTION**

11 **(Legal Malpractice)**

12 **(Alleged by Both Plaintiffs Against Defendants LAW OFFICES OF MARSHALL**
13 **SILBERBERG, P.C., KENNETH MARSHALL SILBERBERG aka MARSHALL**
14 **SILBERBERG aka K. MARSHALL SILBERBERG, THOMAS S. ALCH aka THOMAS**
15 **STEVEN ALCH, SHOOP, A PROFESSIONAL LAW CORPORATION)**

16 36. Plaintiffs repeat and re-allege the allegations of the preceding paragraphs of the
17 complaint as though fully set forth herein, and incorporate the same herein by reference.

18 37. Defendants were negligent in their advice to plaintiffs that defendant CopperPoint had
19 no lien on a settlement because (a) the issue had never been determined by a Nevada appellate court
20 and (b) Nevada attorneys representing plaintiffs in medical malpractice cases do not ignore workers'
21 compensation lien claims or advise their clients that such lien claims should be ignored. But for the
22 negligent legal advice, plaintiffs would not have settled their case for \$6,250,000 and, instead, would
23 have (a) required that defendants seek a judicial determination whether there would be a worker's
24 compensation lien, and (b) if such judicial determination held that there would be a worker's
25 compensation lien, reject the settlement and insisted that defendants, ALCH and SILBERBERG, try
26 the case to verdict or judgment. If the case had been tried, a collectible judgment in the amount no
27 less than \$15,313,953 would have been obtained, thus damaging plaintiffs in the sum of not less than
28 \$9,063,953.

1 38. As a legal and proximate result of the wrongful withholding by defendant,
2 SILBERBERG, of money to which plaintiffs were entitled, charging excessive attorney's fees,
3 reimbursing himself for costs to which he was not entitled, and failure to obtain refunds of money
4 deposited with the Clark County Superior Court, plaintiffs are entitled to further damages from
5 defendant SILBERBERG in amounts to be proven at trial. Defendants ALCH and SHOOP are jointly
6 and severally liable with defendant SILBERBERG for their failure to obtain refunds of money
7 deposited with the Clark County Superior Court which were charged as a cost to plaintiffs. If, after
8 the settlement money was deposited into the client trust account of defendant SILBERBERG,
9 defendants ALCH AND SHOOP were aware that defendant SILBERBERG was charging excessive
10 attorney's fees, or reimbursing himself for costs to which he was not entitled, then defendants ALCH
11 and SHOOP are jointly and severally liable to plaintiffs in amounts to be proven at trial.

12 39. If there is a judicial determination that defendant COPPERPOINT has a lien and is
13 entitled to credit for payments made to plaintiffs, then as a legal and proximate result of the negligence
14 of defendants SILBERBERG, ALCH and SHOOP, plaintiffs have sustained damages which include,
15 but are not limited to, lost future workers' compensation benefits, an amount necessary to satisfy the
16 lien of defendant COPPERPOINT in amounts to be proven at trial, and the damages that would have
17 been awarded if the lawsuit had been tried. Alternatively, if there is a judicial determination that
18 defendant COPPERPOINT has no lien and is not entitled to credit for plaintiffs' medical malpractice
19 settlement, plaintiffs will have sustained damages for the cost of retaining attorneys to represent her
20 in connection with (a) Arizona workers' compensation proceedings, (b) Nevada declaratory and
21 injunctive relief claims, and (c) incurring costs to achieve such declaration, the total amount of which
22 will be proven at trial.

23 40. As a direct and proximate result of the actions of defendants, and each of them,
24 plaintiffs sustained damages in a sum in excess of \$15,000.

25 41. As a direct and proximate result of the aforementioned actions of defendants, and each
26 of them, plaintiffs have been required to engage the services of an attorney, incurring attorney's fees
27 and costs to bring this action.

28 ///

1 **FOURTH CAUSE OF ACTION**

2 **(Fraud)**

3 **(Alleged by Both Plaintiffs Against Defendants LAW OFFICES OF MARSHALL**
4 **SILBERBERG, P.C., KENNETH MARSHALL SILBERBERG aka MARSHALL**
5 **SILBERBERG aka K. MARSHALL SILBERBERG)**

6 42. Plaintiffs repeat and re-allege the allegations of the preceding paragraphs 1-23 of the
7 complaint as though fully set forth herein, and incorporate the same herein by reference.

8 43. On or about December 26, 2015, defendants SILBERBERG entered into a "Contingent
9 Fee Agreement" with plaintiffs that provided, in pertinent part:

10 This Agreement is made this 26 day of December, 2015, by and between
11 Daria Harper and Daniel Wininger (hereinafter designated as 'Client') and
12 the LAW OFFICES OF MARSHALL SILBERBERG (hereinafter
13 designated as 'Attorney'). . . . If, and to the extent that, Client's claims are
14 for medical malpractice subject to Section 6146 of the California Business
15 & Professions Code (MICRA), Client agrees to pay for the services herein
16 described and prosecution of such claims, the fee of 40% of the first
17 \$50,000.00 recovered; 33.33% of the next \$50,000.00; 25% of the next
18 \$500,000.00; and 15% of all sums recovered in excess of \$600,000.00.

19 44. At all times herein mentioned, Nev. Rev. Stat. Ann. § 7.095 provided in pertinent part:

20 An attorney shall not contract for or collect a fee contingent on the amount
21 of recovery for representing a person seeking damages in connection with
22 an action for injury or death against a provider of health care based upon
23 professional negligence in excess of: (a) Forty percent of the first \$50,000
24 recovered; (b) Thirty-three and one-third percent of the next \$50,000
25 recovered; (c) Twenty-five percent of the next \$500,000 recovered; and (d)
26 Fifteen percent of the amount of recovery that exceeds \$600,000.

27 45. At all times herein mentioned, California Business and Professions Code § 6146 (a)
28 provided in pertinent part:

1 An attorney shall not contract for or collect a contingency fee for
2 representing any person seeking damages in connection with an action for
3 injury or damage against a health care such person's alleged professional
4 negligence in excess of the following limits: (1) Forty percent of the first
5 fifty thousand dollars (\$50,000) recovered. (2) Thirty-three and one-third
6 percent of the next fifty thousand dollars (\$50,000) recovered. (3) Twenty-
7 five percent of the next five hundred thousand dollars (\$500,000) recovered.
8 (4) Fifteen percent of any amount on which the recovery exceeds six
9 hundred thousand dollars (\$600,000).

10 46. California Rules of Professional Conduct Rule 4-200 (A), in effect until October 31,
11 2018, provided that “A member shall not enter into an agreement for, charge, or collect an illegal or
12 unconscionable fee.”

13 47. Pursuant to Nevada law, (a) plaintiff DARIA HARPER had claims for economic
14 damages and for non-economic damages of \$350,000, the maximum recovery permitted for non-
15 economic damages in medical malpractice cases, and (b) plaintiff DANIEL WININGER had a claim
16 for loss of consortium, for which he would be entitled to a maximum recovery of \$350,000. In July
17 2018, after settlement agreements for a total of \$6,250,000 had been executed by the parties,
18 defendants SILBERBERG allocated \$1,050,000 as plaintiff DANIEL WININGER’s share of the
19 settlement monies and then charged plaintiffs \$297,498.00 for his attorney’s fees on plaintiff DANIEL
20 WININGER’s allocated amount.

21 48. Defendants SILBERBERG knew (a) that his “Contingent Fee Agreement” provided
22 that plaintiffs, collectively, and not severally, would be charged the statutory attorney’s fees (b) that
23 even if plaintiff DANIEL WININGER was obligated to pay his attorney’s fees based on a separate
24 calculation, the maximum allocation would not be \$1,050,000, but, rather, only \$350,000, and (c) that
25 plaintiffs were not legally sophisticated and relied on him to act honestly and according to his fiduciary
26 duty owed to them. Defendants SILBERBERG concealed from plaintiffs the above-referenced facts
27 for the purpose of misleading them into believing that the attorney fee allocation was in accordance
28 with the “Contingent Fee Agreement” and the law governing the limitations pertaining to attorney’s

1 fees. Moreover, defendants SILBERBERG affirmatively represented to plaintiffs that the allocation
2 to plaintiff DANIEL WININGER was proper, as were the attorney's fees charged separately and
3 based on said allocation. Defendants SILBERBERG concealed and misrepresented the above-
4 mentioned facts for the purpose of obtaining an illegal fee from plaintiffs to which he was not entitled,
5 and being their attorney, plaintiffs reasonably relied on defendants SILBERBERG's representations.
6 As a legal and proximate result of defendants SILBERBERG's fraud, plaintiffs were damaged in a
7 sum of approximately \$140,330.03 which is the difference between the attorney's fees to which
8 defendants SILBERBERG was entitled, and the amount he took.

9 49. Plaintiffs' damages, including emotional distress were a foreseeable consequence of
10 defendants SILBERBERG's fraud which was despicable and undertaken with a conscious disregard
11 of the rights of plaintiffs, thereby entitling plaintiffs to an award of punitive damages therefor.

12 50. If defendants ALCH and SHOOP were aware of the illegal fee charged by defendants
13 SILBERBERG, and accepted a portion of those fees for themselves, then defendants ALCH and
14 SHOOP are similarly liable to plaintiffs for fraud, and the legal and proximate cause of plaintiffs'
15 damages alleged in this cause of action.

16 51. As a direct and proximate result of the actions of defendants, and each of them,
17 plaintiffs sustained damages in a sum in excess of \$15,000.

18 52. As a direct and proximate result of the aforementioned actions of defendants, and each
19 of them, plaintiffs have been required to engage the services of an attorney, incurring attorney's fees
20 and costs to bring this action.

21 **FIFTH CAUSE OF ACTION**

22 **(Breach of Fiduciary Duty)**

23 **(Alleged by Both Plaintiffs Against Defendants LAW OFFICES OF MARSHALL**
24 **SILBERBERG, P.C., KENNETH MARSHALL SILBERBERG aka MARSHALL**
25 **SILBERBERG aka K. MARSHALL SILBERBERG, THOMAS S. ALCH aka THOMAS**
26 **STEVEN ALCH, SHOOP, A PROFESSIONAL LAW CORPORATION)**

27 53. Plaintiffs repeat and re-allege the allegations of the preceding paragraphs 1-23 and 42-
28 52 of the complaint as though fully set forth herein, and incorporate the same herein by reference.

1 54. California Rules of Professional Conduct 4-100(B)(4), in effect until October 31, 2018,
2 California Rules of Professional Conduct 1.15(7), in effect beginning November 1, 2018, and Nevada
3 Rules of Professional Conduct, Rule 1.15(d), all required that attorneys promptly distribute to their
4 client money belonging to their client. At all times herein mentioned, defendant SILBERBERG was
5 obligated, as a California attorney and attorney permitted to practice, pro hac vice in Nevada, to
6 comply with the California and Nevada Rules of Professional Conduct.

7 55. From approximately July 19, 2018 to approximately April 30, 2010, and in violation
8 of the California Rules of Professional Conduct 4-100(B)(4), in effect until October 31, 2018,
9 California Rules of Professional Conduct 1.15(7), in effect beginning November 1, 2018, and Nevada
10 Rules of Professional Conduct, Rule 1.15(d), defendants SILBERBERG kept, and did not distribute,
11 money belonging to plaintiffs from the settlement proceeds. Plaintiffs were damaged in a sum to be
12 proven at trial by the loss of interest on said sums.

13 56. California Rules of Professional Conduct, Rule 2-200 (A)(1), in effect until October
14 31, 2018, provided that, “A member shall not divide a fee for legal services with a lawyer who is not
15 a partner of, associate of, or shareholder with the member unless: The client has consented in writing
16 thereto after a full disclosure has been made in writing that a division of fees will be made and the
17 terms of such division.” At all times herein mentioned, defendants ALCH, SHOOP and
18 SILBERBERG were obligated, as California attorneys, to comply with the California Rules of
19 Professional Conduct.

20 57. At no time did plaintiffs enter into an attorney-client contract with defendants ALCH
21 or SHOOP, and at no time did plaintiffs consent in writing to any division of fees by which defendants
22 SILBERBERG would pay money to defendants ALCH and/or SHOOP. Plaintiffs believe that
23 defendant SILBERBERG shared the fees he deducted from plaintiffs’ share of the settlement money
24 with defendants ALCH and SHOOP.

25 58. Defendants SILBERBERG took money belonging to plaintiffs as a result of charging
26 and receiving attorney fees in excess of the amount allowed by law, and charging costs to plaintiffs
27 that should have been paid by defendants SILBERBERG.

28 59. At all times, defendants SILBERBERG owed a fiduciary duty of loyalty and fidelity

1 to plaintiffs, pursuant to which he was required, among other things, not to put his interests ahead of
2 those of plaintiffs, to promptly deliver to plaintiffs all money in his possession that belonged to
3 plaintiffs, not to charge plaintiffs for costs that he should personally bear, and not to subtract money
4 from plaintiffs' financial recovery for attorney fees to which he was not entitled, either pursuant to
5 contract or the statutory requirements of California Business and Professions Code section 6146 and
6 Nevada NRS 7.095.

7 60. Defendants SILBERBERG put his financial interests ahead of the interests of plaintiffs
8 and violated his fiduciary duties to plaintiffs as follows: (a) by failing, for approximately twenty
9 months, to deliver all money in his possession that belonged to plaintiffs, (b) charging plaintiffs for
10 costs for which he should have personally borne, including fees for membership in the Nevada State
11 Bar, and (c) charging illegal attorney's fees in excess of those agreed upon in his contract with
12 plaintiffs and those permitted by California Business and Professions Code section 6146 and Nevada
13 NRS 7.095. Additionally, in 2020, after defendants SILBERBERG entered into a contract to retain a
14 Nevada lawyer for the benefit of plaintiffs which required that he be personally responsible for
15 payment of attorney's fees and costs, he used money belonging to plaintiffs to pay said fees and costs.

16 61. As a result of the breach of fiduciary duties by defendants SILBERBERG, plaintiffs
17 have suffered pecuniary damages and emotional distress damages in sums to be proven at trial.

18 62. Plaintiffs' emotional distress was a foreseeable consequence of defendants
19 SILBERBERG's breach of fiduciary duties which was despicable and undertaken with a conscious
20 disregard of the rights of plaintiff, thereby entitling plaintiffs to an award of punitive damages therefor.

21 63. Plaintiffs are currently unaware whether defendants ALCH or SHOOP knew that
22 defendants SILBERBERG was charging plaintiffs illegal attorney's fees in excess of those agreed
23 upon in his contract with plaintiffs and those permitted by California Business and Professions Code
24 section 6146. If said defendants did know, then they are similarly liable to plaintiffs for fraud, and
25 the legal and proximate cause of plaintiffs' damages alleged in this cause of action.

26 64. As a direct and proximate result of the actions of defendants, and each of them,
27 plaintiffs sustained damages in a sum in excess of \$15,000.

28 65. As a direct and proximate result of the aforementioned actions of defendants, and each

1 of them, plaintiffs have been required to engage the services of an attorney, incurring attorney's fees
2 and costs to bring this action.

3 **SIXTH CAUSE OF ACTION**

4 **(Breach of Contract)**

5 **(Alleged by Both Plaintiffs Against Defendants LAW OFFICES OF MARSHALL**
6 **SILBERBERG, P.C., KENNETH MARSHALL SILBERBERG aka MARSHALL**
7 **SILBERBERG aka K. MARSHALL SILBERBERG)**

8 66. Plaintiffs repeat and re-allege the allegations of the preceding paragraphs 1-23 and 42-
9 65 of the complaint as though fully set forth herein, and incorporate the same herein by reference.

10 67. The "Contingency Fee Contract" between plaintiffs and defendants SILBERBERG
11 required that attorney fees be based on the net recovery after deduction of the cost of prosecution.
12 Said defendant calculated that his prosecution costs were \$125,070, leaving a net recovery of
13 \$6,124,930, entitling said defendant to the sum of \$990,406.16 as his attorney fees. The deduction by
14 defendants SILBERBERG of \$1,130,737.00 exceeded the contractual agreement, amounting to a
15 breach of contract. Plaintiffs have been damaged by the breach of contract in the amount of
16 \$140,330.84.

17 68. As a direct and proximate result of the actions of defendants, and each of them,
18 plaintiffs sustained damages in a sum in excess of \$15,000.

19 69. As a direct and proximate result of the aforementioned actions of defendants, and each
20 of them, plaintiffs have been required to engage the services of an attorney, incurring attorney's fees
21 and costs to bring this action.

22 **PUNITIVE DAMAGES**

23 70. Plaintiffs repeat and re-allege the allegations of the preceding paragraphs 1-23 and 42-
24 65 of the complaint as though fully set forth herein, and incorporate the same herein by reference.

25 71. As a direct and proximate result of the aforementioned wrongful conduct of
26 defendants, and each of them, the actions of defendants were intended to cause injury to plaintiffs
27 and/or was despicable conduct carried on by defendants with a willful and conscious disregard of the
28 rights of plaintiffs and/or was an intentional misrepresentation, deceit or concealment of material facts

known to defendants with the intention, implied or in fact, to deprive plaintiffs of property, legal rights, or fraud within NRS 42.005, entitling an award of punitive and/or exemplary damages in an amount appropriate to punish and/or set an example of defendants.

PRAYER FOR RELIEF

Wherefore, plaintiffs pray for judgment against defendants, and each of them, as follows:

1. On the first cause of action for declaratory relief against all defendants:

a. For a declaration that defendant COPPERPOINT GENERAL INSURANCE COMPANY aka COPPERPOINT MUTUAL INSURANCE HOLDING COMPANY aka COPPERPOINT MUTUAL INSURANCE COMPANY aka COPPERPOINT INSURANCE COMPANIES is not entitled to any lien and/or credit for money received by plaintiffs as a result of the settlements they entered into regarding District Court, Clark County, Nevada Case No. A-16-738004-C and that defendants are obligated (a) to continue all benefits it previously provided and is required to provide in the future for plaintiff DARIA HARPER, (b) to forthwith reinstate all benefits it previously provided for plaintiff DARIA HARPER that were terminated and (c) to forthwith pay for the services of plaintiff DANIEL WININGER that it previously paid but were terminated, with interest thereon at the legal rate;

b. For reasonable attorney's fees and costs incurred in this action; and

c. For such other and further relief as the Court may deem just and proper.

2. On the second cause of action for injunctive relief against defendants COPPERPOINT GENERAL INSURANCE COMPANY aka COPPERPOINT MUTUAL INSURANCE HOLDING COMPANY aka COPPERPOINT MUTUAL INSURANCE COMPANY aka COPPERPOINT INSURANCE COMPANIES:

a. For issuance of a temporary restraining order, preliminary injunction and permanent injunction restraining and enjoining defendants COPPERPOINT GENERAL INSURANCE COMPANY and COPPERPOINT MUTUAL INSURANCE HOLDING COMPANY and COPPERPOINT MUTUAL INSURANCE COMPANY and COPPERPOINT INSURANCE COMPANIES (a) from terminating any of the benefits it is providing for plaintiff DARIA HARPER and (b) to forthwith reinstate all benefits it previously provided for plaintiff DARIA HARPER that

1 were terminated, and forthwith pay for the services it previously paid for the services of plaintiff
2 DANIEL WININGER that were terminated, with interest thereon at the legal rate;

- 3 b. For damages in an amount in excess of \$15,000, to be proven at trial;
- 4 c. For reasonable attorney's fees and costs incurred in this action; and
- 5 d. For such other and further relief as the Court may deem just and proper.

6 3. On the third cause of action for legal malpractice against defendants LAW OFFICES
7 OF MARSHALL SILBERBERG, P.C., KENNETH MARSHALL SILBERBERG aka MARSHALL
8 SILBERBERG, aka K. MARSHALL SILBERBERG, THOMAS S. ALCH aka THOMAS STEVEN
9 ALCH, SHOOP, A PROFESSIONAL LAW CORPORATION:

- 10 a. For damages in an amount in excess of \$15,000, to be proven at trial;
- 11 b. For an award of reasonable attorney's fees and costs incurred in this action; and
- 12 c. For such other and further relief as the Court may deem just and proper.

13 4. On the fourth cause of action for fraud against defendants LAW OFFICES OF
14 MARSHALL SILBERBERG, P.C., KENNETH MARSHALL SILBERBERG aka MARSHALL
15 SILBERBERG aka K. MARSHALL SILBERBERG:

- 16 a. For damages in an amount in excess of \$15,000, to be proven at trial;
- 17 b. For pecuniary damages and emotional distress damages in an amount in excess
18 of \$15,000, to be proven at trial;
- 19 c. For punitive and/or exemplary damages pursuant to NRS 42.005 in an amount
20 appropriate to punish and/or set an example of defendants;
- 21 d. For an award of reasonable attorney's fees and costs incurred in this action; and
- 22 e. For such other and further relief as the Court may deem just and proper.

23 5. On the fifth cause of action for breach of fiduciary duty against defendants LAW
24 OFFICES OF MARSHALL SILBERBERG, P.C., KENNETH MARSHALL SILBERBERG aka
25 MARSHALL SILBERBERG aka K. MARSHALL SILBERBERG, THOMAS S. ALCH aka
26 THOMAS STEVEN ALCH, SHOOP, A PROFESSIONAL LAW CORPORATION:

- 27 a. For damages in an amount in excess of \$15,000, to be proven at trial;
- 28 b. For pecuniary damages and emotional distress damages in an amount in excess

1 of \$15,000, to be proven at trial;

2 c. For punitive and/or exemplary damages pursuant to NRS 42.005 in an amount
3 appropriate to punish and/or set an example of defendants;

4 d. For an award of reasonable attorney's fees and costs incurred in this action; and

5 e. For such other and further relief as the Court may deem just and proper.

6 6. On the sixth cause of action for breach of contract against defendants LAW OFFICES
7 OF MARSHALL SILBERBERG, P.C., KENNETH MARSHALL SILBERBERG aka MARSHALL
8 SILBERBERG aka K. MARSHALL SILBERBERG:

9 a. For damages in an amount in excess of \$15,000, to be proven at trial;

10 b. For an award of reasonable attorney's fees and costs incurred in this action; and

11 c. For such other and further relief as the Court may deem just and proper.

12 DATED this 4th day of May, 2020.

13 Respectfully submitted,

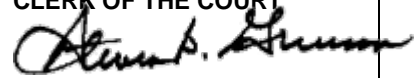
14 **MAIER GUTIERREZ & ASSOCIATES**

15 /s/ Jason R. Maier

16 JASON R. MAIER, ESQ.
17 Nevada Bar No. 8557
18 8816 Spanish Ridge Avenue
Las Vegas, Nevada 89148

19 JOHN P. BLUMBERG, ESQ.
20 California Bar No. 70200
21 (to be admitted pro hac vice)
22 **BLUMBERG LAW CORPORATION**
23 444 West Ocean Blvd., Suite 1500
24 Long Beach, California 90802-4330

25 *Attorneys for Plaintiffs*
26
27
28



ERR

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Attorneys for Plaintiffs

DISTRICT COURT

CLARK COUNTY, NEVADA

DARIA HARPER, an individual; and DANIEL
WININGER, an individual,

Plaintiffs,

vs.

COPPERPOINT MUTUAL INSURANCE
HOLDING COMPANY, an Arizona
corporation; COPPERPOINT GENERAL
INSURANCE COMPANY, an Arizona
corporation; LAW OFFICES OF MARSHALL
SILBERBERG, P.C., a California corporation;
KENNETH MARSHALL SILBERBERG aka
MARSHALL SILBERBERG aka K.
MARSHALL SILBERBERG, an individual;
THOMAS S. ALCH aka THOMAS STEVEN
ALCH, an individual; SHOOP, A
PROFESSIONAL LAW CORPORATION, a
California corporation; DOES 1-50, inclusive,

Defendants.

Case No.: A-20-814541-C
Dept. No.: 30

ERRATA TO COMPLAINT

Plaintiffs file this errata to the complaint that includes Exhibits "1" and "2" that were

1 inadvertently omitted.

2 DATED this 6th day of May, 2020.

3 Respectfully submitted,

4 **MAIER GUTIERREZ & ASSOCIATES**

5
6 /s/ Jason R. Maier

7 JASON R. MAIER, ESQ.
8 Nevada Bar No. 8557
8816 Spanish Ridge Avenue
Las Vegas, Nevada 89148

9 JOHN P. BLUMBERG, ESQ.
10 California Bar No. 70200
11 *(to be admitted pro hac vice)*
12 **BLUMBERG LAW CORPORATION**
444 West Ocean Blvd., Suite 1500
Long Beach, California 90802-4330

13 *Attorneys for Plaintiffs*

EXHIBIT 1

EXHIBIT 1

NOTICE OF CLAIM STATUS

Carrier or Self-Insured Name and Address CopperPoint General Insurance Company / CLAIMS DEPT. P.O. Box 33069 Phoenix, AZ 85067-3069
Authorized Third Party Administrator (TPA) Name and Address
Claimant's Name and Address DARIA HARPER 3336 DATE PALM DR. LAKE HAVASU CITY, AZ 86404

ICA Claim No.	20142520533
Soc. Sec. No.	###/###/####
SSN not required if correct ICA claim number is provided	
Carrier Claim No.	14G01532
Employer	ISLANDER RV RESORT LLC
Address	LAKE HAVASU CITY, AZ 86403
	LAKE HAVASU CITY, AZ 86403
Date of Injury	08/11/2014

- ☐ 1. Claim is accepted.
- ☐ 2. Claim is denied.
- ☐ 3. No temporary compensation paid because the claimant has not currently sustained a temporary disability entitlement attributable to this injury beyond seven consecutive days.
- ☐ 4. Enclosed check for _____ for period of _____ through _____. Seven days deducted if disability is less than 14 calendar days. Payment has been made based on 66 ⅔ percent of the wage of _____ based on the following:
 - ☐ A. Statutory minimum or estimated monthly wage pending determination of Average Monthly Wage within 30 days.
 - ☐ B. Average monthly wage at time of injury (see attached calculation), subject to final determination by the Industrial Commission of Arizona within 30 days.
- ☐ 5. Return to light duty effective _____. Per A.R.S. §23-1044(A) and A.R.S. §23-1062(D) benefits are payable at least monthly. Return to regular duty effective _____.
- ☐ 6. Temporary compensation and active medical treatment terminated on _____ because claimant was discharged.
- ☐ 7. Injury resulted in no permanent disability.
- ☐ 8. Injury resulted in permanent disability. Amount of permanent benefits, if any, and supportive medical maintenance benefits, if any, will be authorized by separate Notice.
- ☐ 9. Petition to Reopen accepted.
- ☐ 10. Petition to Reopen denied.
- ☒ 11. Other:

• Pursuant to A.R.S. § 23-1023, CopperPoint has a lien against Claimant's third-party recovery from a medical malpractice action (case No. A-16-738004-C) brought in the District Court of Clark County, Nevada, in an amount equal to compensation

Mailed on: 10/30/2019 By: Jeff de Veuve

Copy to: Industrial Commission of Arizona (Authorized Representative) Tel. #: (602) 631-2966

The insurance carrier/employer will, upon request, provide claimant a copy of the medical report to support Findings 5, 6, 7 or 8.

NOTICE TO CLAIMANT: If you do not agree with this NOTICE and wish a hearing on the matter, your written Request for Hearing must be received at either office of the Industrial Commission listed below within NINETY (90) DAYS after the date of mailing of this Notice, pursuant to A.R.S. 23-941 and 23-947. IF NO SUCH APPLICATION IS RECEIVED WITHIN THAT NINETY DAY PERIOD, THIS NOTICE IS FINAL.

AVISO AL RECLAMANTE: Si usted no esta de acuerdo con este AVISO, y desea una audiencia en este caso, su peticion por escrito pidendo una audiencia debiera ser recibida en cualquiera de las oficinas de la Comision Industrial a las direcciones abajo indicadas dentro de NOVENTA (90) DIAS despues de la fecha de este AVISO, de acuerdo con las leyes A.R.S. 23-941 y 23-947. SI DICHA PETICION NO ESTA RECIBIDA DENTRO DEL PERIODO DE NOVENTA (90) DIAS, ESTE AVISO SERA CONSIDERADO FINAL.

Phoenix
Office: Industrial Commission of Arizona
800 W Washington Street
Phoenix, Arizona 85007-2922

PO Box 19070
Phoenix, AZ 85005-9070

Tucson
Office: Industrial Commission of Arizona
2675 E Broadway
Tucson, Arizona 85716-5342

THIS FORM APPROVED BY THE INDUSTRIAL COMMISSION OF ARIZONA FOR CARRIER USE

Date: 10/30/19
Claimant Name: Daria Harper
Claim Number: 14G01532

11. Continued from page 1

- and medical, surgical, and hospital benefits paid by CopperPoint.
- CopperPoint is entitled to accrued interest on the lien from the date settlement proceeds were disbursed.
- CopperPoint is entitled to a future credit against Claimant's recovery equal to the amount of money received by the Claimant in the malpractice action after subtracting expenses and attorney fees.
- CopperPoint is not required to pay claimant compensation or medical, surgical, or hospital benefits until the claimant's post-settlement accrued entitlement to compensation and medical benefits exceeds the credit amount.
- To the extent the settlement in the malpractice action was less than the workers' compensation benefits provided by CopperPoint, Claimant's failure to obtain CopperPoint's prior approval before settling results in forfeiture of her workers' compensation claim.

CC: Marshall Silberberg
William Stephens Collins
LAW OFFICES OF MARSHALL
SILBERBERG
3333 Michelson Drive, Suite 710
Irvine, CA 92612

EXHIBIT 2

EXHIBIT 2



30101 Redwood Street, Suite 200
Lake Havasu City, AZ 86404
(928) 855-1234

April 2, 2020

VIA CERTIFIED AND U.S. MAIL

Ms. Daria Harper
3336 Date Palm Drive
Lake Havasu, AZ 86404

Re: Daria Harper
Claim No.: 14G01532
DOI: 08/11/2014
Employer: Islander RV Resort LLC

Dear Ms. Harper:

We are writing to you with regard to the status of your workers' compensation claim and CopperPoint Mutual Insurance Company's ("CopperPoint") lien rights. As you already know, you settled your medical malpractice action (Case No. A-16-738004-C in the District Court of Clark County, Nevada) without CopperPoint's consent, as is required by Arizona law. You also have not resolved CopperPoint's lien for the worker's compensation benefits paid to you. As you are also well aware, CopperPoint has tried to work toward a resolution of these matters for over a year through your counsel but to no avail. As a result, there are presently pending proceedings before the Arizona Industrial Commission pertaining to CopperPoint's lien.

Throughout the last several years, and despite the lack of cooperation on your behalf in seeking resolution of the lien, CopperPoint has continued to pay to you a full range of workers compensation benefits which to date amounts to millions of dollars. CopperPoint has tried repeatedly to work with you on resolving the lien, even though you did: a) not bother to inform CopperPoint of the settlements when they were reached, b) failed to obtain CopperPoint's consent to the settlements as required by law, and c) continually refused to provide the amounts of the settlements. In fact, the amounts paid appear to exceed the amount of funds received by you personally in the settlement of your litigation.

CopperPoint is entitled to interest on the lien amount since the date of your medical malpractice settlements in 2018. Further, CopperPoint is entitled to a credit against future workers compensation payments to you equal to the amount of money you received in the medical malpractice settlements less appropriate expenses and attorneys' fees.

CopperPoint has been very accommodating in seeking a resolution of the lien issue for so long. This is especially true given the medical malpractice settlements were effectively and intentionally kept secret from CopperPoint. Moreover, when CopperPoint learned on its own of the settlements, information concerning the amount and terms of the settlements were still withheld and no attempt to resolve the lien was made on your behalf. As of this letter, we are approximately five months since the filing of CopperPoint's Notice of Claim Status and there still has been no

action by you to address CopperPoint's outstanding lien. Nevertheless, CopperPoint continued to pay full workers compensation payments to you even though it was not legally required. However, this benevolent conduct by CopperPoint cannot continue indefinitely.

Therefore, please be informed:


**COPPERPOINT WILL TERMINATE PAYMENT OF YOUR
WORKERS' COMPENSATION BENEFITS EFFECTIVE THIRTY DAYS
FROM THE DATE OF THIS LETTER.**

No further benefits will be paid until your post-settlement accrued entitlement to compensation and medical benefits exceeds CopperPoint's credit for its lien. It is anticipated this may result in no further benefits becoming payable in the future.¹

If you have any questions, please feel free to contact us.

Very truly yours,

COPPERPOINT MUTUAL INSURANCE COMPANY

By 
Ginny Arnett Caro

cc: Adam Palmer, Esq.

¹ Moreover, to the extent the settlement in your malpractice action was less than the workers' compensation benefits provided by CopperPoint, your failure to obtain CopperPoint's prior approval before settling the malpractice claim results in a forfeiture of your workers' compensation claim.

**DISTRICT COURT
CLARK COUNTY, NEVADA
-oOo-**

DARIA HARPER, an individual; and)
DANIEL WININGER, an individual,)
)
Plaintiffs,)
)
vs.)
)
COPPERPOINT MUTUAL INSURANCE)
HOLDING COMPANY, an Arizona Corp.;)
COPPERPOINTI GENERAL INSURANCE)
COMPANY, an Arizona Corp; LAW OFFICES)
OF MARSHALL SILVERBERG, P.C., a)
California Corp.; KENNETH MARSHALL)
SILVERBERG aka MARSHALL SILVERBERG)
Aka K. MARSHALL SILVERBERG, an)
Individual; THOMAS S. ALCH aka THOMAS)
STEVEN ALCH, an individual; SHOOP, A)
PROFESSIONAL LAW CORPORATION, a)
California Corporation, DOES 1-50, inclusive,)
)
Defendants.)
)
_____)

CASE NO.: A-20-814541-C
DEPT NO.: XXX

ORDER

The above-referenced matter is scheduled for a hearing on 10/28/20 with regard to Defendant Copperpoint's Motion to Dismiss or Motion for Summary Judgment; Defendant Shoop's Motion to Dismiss; Defendant Alch's Motion to Dismiss or for Summary Judgment; Defendant Marshall Silverberg's Joinder to Alch's Motion to Dismiss or for Summary Judgment; and Plaintiff's Motion for Partial Summary Judgment. Pursuant to A.O. 20-01 and subsequent administrative orders, this matter is deemed "non-essential," and may be decided after a hearing, decided on the papers, or continued. This Court has determined that it would be appropriate to decide this matter on the papers, and consequently, this Order issues.

COPPERPOINT'S MOTION TO DISMISS.

FACTUAL INFORMATION.

1 Plaintiff, Daria Harper, is an Arizona resident, who was employed by an Arizona
2 employer that carried workers' compensation insurance with Defendant, Copperpoint
3 General Insurance Company (Copperpoint). Plaintiff was initially injured in Arizona
4 during her employment with Islander RV Resort, and she filed for and obtained
5 workers' compensation benefits in Arizona. Plaintiff required medical treatment in Las
6 Vegas, and was injured as a result of medical negligence. Plaintiff then filed a medical
7 malpractice/professional negligence suit in Clark County, Nevada. The industrial claim
8 was administered in accordance with the provisions of the Arizona Workers'
9 Compensation Act, and Defendant Copperpoint paid benefits of approximately
10 \$3,171,095. With regard to Plaintiff's professional negligence claim in Nevada, Plaintiff
11 received \$6,250,000.00 in settlement funds. Plaintiff claims her recovery was limited
12 by NRS 42.021 which would diminish her recovery by the admission of evidence that
13 medical bills and lost earnings were paid by workers' compensation. But that same
14 statute would preclude a lien by the workers' compensation carrier if such payments
15 were admitted at trial. Defendant, Copperpoint, has ceased paying Plaintiff benefits,
16 claiming that it now has a credit for \$3,171,095, and it is not required to pay further
17 benefits until it has recouped its lien. Plaintiff filed an action in Clark County, Nevada,
18 seeking declaratory and injunctive relief. Plaintiff seeks a declaratory judgment that
19 Copperpoint is required to continue paying workers' compensation benefits.

20 **SUMMARY OF LEGAL ARGUMENTS.**

21 Copperpoint argues that Plaintiffs' claims for declaratory and injunctive relief
22 must be dismissed pursuant to NRCP 12(b)(1), 12(b)(2), and 12(b)(5). Copperpoint
23 argues that Pursuant to NRCP 12(b)(1), the Court lacks subject matter jurisdiction.
24 Where a statute provides an administrative remedy, declaratory relief is inappropriate.
25 See *Baldonado v. Wynn Las Vegas, LLC.*, 124 Nev. 951, 964 (2008). In matters of
26 workers' compensation, NRS §616A.020 provides that the "rights and remedies
27 provided in chapters 616A to 616D, inclusive, of NRS" to a claimant who suffers a
28 workplace injury "shall be exclusive." Under Arizona law, ARS §23-1022 provides that
the workers' compensation system is an injured worker's exclusive remedy against both
the employer and the employer's workers' compensation carrier. As a result, NRS
§616A.020 bars an injured worker from filing any action in District Court regarding his

1 or her workers' compensation claim prior to the conclusion of the Department of
2 Administration's administrative appeals process.

3 Copperpoint argues that under Nevada law, this court is without subject-matter
4 jurisdiction to provide declaratory or injunctive relief in the instant case. First,
5 Plaintiffs did not adhere to the administrative appeals process, which pursuant to *Reno*
6 *Sparks Convention Visitors Auth. v. Jackson*, 112 Nev. 62, 67 (1996), strips the
7 Department of Administration and any subsequent judicial court of jurisdiction.
8 Second, pursuant to NRS §233B.135, in reviewing a workers' compensation
9 administrative decision, the District court is limited to either 1) affirming the order or
10 2) setting the order aside in whole or part. NRS § 233B.135 does not allow the District
11 Court to grant any form of declaratory or injunctive relief in a workers' compensation
12 matter.

13 Copperpoint argues that the case must be dismissed for lack of personal
14 jurisdiction pursuant to NRCP 12(b)(2). Copperpoint cites to *Arbella Mut. Ins. Co. v.*
15 *Eighth Judicial Dist. Court*, in which the Nevada Supreme Court stated that:

16 To obtain jurisdiction over a non-resident defendant, a plaintiff must show: (1)
17 that the requirements of the state's long-arm statute have been satisfied, and (2)
18 that due process is not offended by the exercise of jurisdiction. First, Nevada's
19 long-arm statute, NRS 14.065, reaches the limits of due process set by the
20 United States Constitution. Second, the Due Process Clause of the Fourteenth
21 Amendment requires a nonresident defendant to have "minimum contacts" with
22 the forum state sufficient to ensure that exercising personal jurisdiction over
23 him would not offend "traditional notions of fair play and substantial justice."
24 The defendant must have sufficient contacts with the forum such that he or she
25 could reasonably anticipate being hauled into court there.

26 See *Arbella Mut. Ins. Co. v. Eighth Judicial Dist. Court*, 122 Nev. 509, 513 (2006). In
27 *Sinatra v. Nat'l Enquirer, Inc.*, the Ninth Circuit Court of Appeals stated that:

28 When a defendant challenges the sufficiency of personal jurisdiction, the
plaintiff bears the burden of establishing personal jurisdiction over the
defendant.

See *Sinatra v. Nat'l Enquirer, Inc.*, 854 F.2d 1191, 1194 (9th Cir. 1988).

Copperpoint argues that here, Plaintiffs have not established that Nevada courts
have personal jurisdiction over the Copperpoint Defendants. The Copperpoint
Defendants are Arizona Corporations, and in this case, an Arizona Corporation
provided workers' compensation coverage and benefits under Arizona law to Harper's
Arizona employer. Plaintiff, Harper, a resident of Arizona, received benefits from

1 Defendant, Copperpoint, under Arizona workers' compensation law. Copperpoint
2 Mutual Insurance Holding Company did not provide workers' compensation insurance
3 to Harper's employer nor administer benefits under Harper's claim, and otherwise has
4 no connection to Harper. Based on these facts, Copperpoint argues that Plaintiffs have
5 not established that this Court has personal jurisdiction over Copperpoint Mutual or
6 Copperpoint General.

7 Copperpoint next argues that pursuant to NRCP 12(b)(5), the Plaintiff's claims
8 must be dismissed, because even viewing the facts in the light most favorable to the
9 Plaintiffs, the requirements for declaratory relief remain unmet. Citing to NRS
10 616A.020, Copperpoint argues that the rights and remedies contained in NRS 616A
11 through 616D are the exclusive means of securing compensation for an industrial
12 injury. Similarly, ARS 23-1022 provides that the Arizona workers' compensation
13 system is the exclusive remedy for an Arizona worker, such as Harper, who sustains an
14 industrial injury.

15 Copperpoint argues that Plaintiff's second cause of action for "injunctive relief,"
16 is a remedy, not a cause of action.

17 Copperpoint argues that Copperpoint Mutual Insurance Holding Company must
18 be dismissed as it did not administer Harper's Workers' Compensation Claim, and
19 owed no duty to Harper. There are no possible set of facts under which Plaintiff may
20 obtain any relief against Copperpoint Mutual. Alternatively, Copperpoint argues that if
21 the Court is not willing to dismiss the Plaintiff's Complaint, Copperpoint is entitled to
22 Summary Judgment pursuant to NRCP 56 because there are no genuine issues of
23 material fact remaining regarding Copperpoint's statutory lien on Plaintiff's medical
24 malpractice settlement, and Copperpoint is entitled to judgment as a matter of law.

25 Copperpoint argues that NRS § 616C.215, which conclusively governs matters of
26 workers' compensation subrogation matters, contains no lien limitation simply because
27 the aggravating injury arose from medical malpractice. Indeed, in *Tri-County Equip. &*
28 *Leasing, LLC v. Klinke*, the Nevada Supreme Court determined that NRS §
616C.215(10) "creates an exception to the collateral source rule." See *Tri-County Equip.*
& Leasing, LLC v. Klinke, 128 Nev. 352, 356 (2012). In *Klinke*, the Nevada Supreme
Court stated that:

The collateral source doctrine does not change this result. As noted, this court
has adopted a per se rule barring the admission of a collateral source of payment

1 for an injury into evidence for any purpose. Nevada recognizes a limited
2 exception to the collateral source rule for workers' compensation payments. In
3 *Cramer v. Peavy*, this court expressly held that NRS 616C.215(10) creates an
4 exception to the collateral source rule. Pursuant to NRS 616C.215(10), "[i]n any
5 trial of an action by the injured employee . . . against a person other than the
6 employer or a person in the same employ, the jury must receive proof of the
7 amount of all payments made or to be made by the insurer or the Administrator
8 [of the Division of Industrial Relations]." The court must then instruct the jury
9 to follow the court's damages instructions without reducing any award by the
10 amount of workers' compensation paid, thus leaving unaltered the general
11 substantive law on calculating damages. The jury-instruction language
12 specifically suggested by the statute reads:

13 Payment of workmen's compensation benefits by the insurer, or in the
14 case of claims involving the Uninsured Employers' Claim Account or a
15 subsequent injury account the Administrator, is based upon the fact that
16 a compensable industrial accident occurred, and does not depend upon
17 blame or fault. If the plaintiff does not obtain a judgment in his or her
18 favor in this case, the plaintiff is not required to repay his or her
19 employer, the insurer or the Administrator any amount paid to the
20 plaintiff or paid on behalf of the plaintiff by the plaintiff's employer, the
21 insurer or the Administrator. If you decide that the plaintiff is entitled to
22 judgment against the defendant, you shall find damages for the plaintiff
23 in accordance with the court's instructions on damages and return your
24 verdict in the plaintiff's favor in the amount so found without deducting
25 the amount of any compensation benefits paid to or for the plaintiff. The
26 law provides a means by which any compensation benefits will be repaid
27 from your award.

28 We have previously recognized that this statute benefits both the plaintiff and
the defendant by preventing jury speculation as to workers' compensation
benefits received. 616C.215(10)'s application to "any trial" gives the statute
universal applicability to trials involving a plaintiff receiving workers'
compensation payments, at least when the plaintiff is required to first use any
recovery to reimburse the insurer for amounts paid.

See *Tri-County Equip. & Leasing, LLC v. Klinke*, 128 Nev. 352, 355–56 (2012)

(quotations omitted and emphasis added by Copperpoint).

In Opposition, the Plaintiffs argue that Defendant Copperpoint's Motion should
be denied because 1) Nevada's workers compensation statutes do not apply to Plaintiff;
2) personal jurisdiction exists because the Copperpoint Defendants do business in
Nevada; and 3) NRS 42.021 takes precedence over Arizona law regarding the
prohibition of a lien on the proceeds from medical malpractice case.

Plaintiffs argue that NRS 616A.020, 616C.315 and 616C.345 only apply to
injured workers who seek workers' compensation pursuant to Nevada law and
employers, and declaratory and injunctive relief causes of action are not covered by the

1 NIIA. Plaintiffs cite to *Conway v. Circus Circus*, 116 Nev. 870, 8 P.3d 837 (2000),
2 wherein the Nevada Supreme Court held that “the exclusive remedy portion of the NIIA
3 does not bar injunctive relief.” *Id.* at 876. Plaintiffs further argue that Arizona
4 Workers’ Compensation statutes do not apply. They claim that the only part of the case
5 subject to the exclusivity provision, the determination whether Plaintiff was entitled to
6 benefits and the amount of those benefits, has been completed. Plaintiffs cite to *State*
7 *Comp. Fund of Ariz. v. Fink* (Fink), 224 Ariz. 611, 233 P.3d 1190 (App. 2010), *State*
8 *Compensation Fund v. Ireland* (Ireland) 174 Ariz. 490, 851 P.2d 115 (App. 1992), and
9 *Stout v. State Compensation Fund* (Stout), 197 Ariz. 238, 243, 3 P.3d 1158, 1163 (App.
10 2000.), as support for the contention that the Courts have jurisdiction and authority
11 over lien issues arising from workers’ compensation actions. Plaintiffs further argue
12 that (1) CopperPoint General Insurance Company is licensed and does business in
13 Nevada, as do other CopperPoint entities; (2) CopperPoint Mutual Insurance Holding
14 Company holds itself out to the public as doing business in Nevada; (3) CopperPoint
15 Mutual Insurance Holding Company has created ambiguity regarding which
16 CopperPoint entity has terminated Plaintiff’s benefits; (4) the cause of action arises out
17 of purposeful contact with Nevada that includes (a) a lien claim for money paid to the
18 Nevada health care providers that treated plaintiff, (b) a claim of the right to have
19 participated in (and by inference, prevent) any settlement of the Nevada medical
20 malpractice action, and (c) claiming a right to reimbursement of and a credit on the
21 proceeds of a settlement of a Nevada medical malpractice lawsuit paid by Nevada
22 health care providers; and (5) CopperPoint Mutual Insurance Holding Company does
23 business as and is also known as CopperPoint Mutual Insurance Company, which is the
24 same entity as CopperPoint Insurance Company, which is licensed and does business in
25 Nevada.

26 In opposing the request for Summary Judgment, Plaintiffs “conceded that
27 CopperPoint Defendants’ lien claim would be valid, but for NRS 42.021 which prohibits
28 the lien.” Plaintiffs suggest that the court must first determine if Nevada Law takes
precedence over Arizona law, and if so, summary judgment must be denied. Plaintiffs
suggest that NRS 42.021 applies to and is part of the Nevada workers’ compensation
scheme, but is specifically limited to medical malpractice third-party actions by an
employee who has collected workers’ compensation benefits. Plaintiffs argue that

1 “Unlike NRS 616C.215(10), NRS 42.021 precludes an employer or workers’
2 compensation carrier which has provided the injured employee benefits from
3 recovering any portion of those benefits by lien, subrogation or otherwise.”

4 Plaintiffs cite to the case of *Tri-County Equip. & Leasing, LLC*, 128 Nev. 352,
5 286 P.3d 593, which cites to NRS 616C.215(10), but Plaintiffs argue that the Court’s
6 analysis there only applies “when the plaintiff is required to first use any recovery to
7 reimburse the insurer for amounts paid.” See Opposition at pgs. 21-22, citing NRS
8 616C.215(10). Plaintiff argues that pursuant to NRS 42.021, a plaintiff pursuing a
9 medical malpractice action is not required to use any recovery to reimburse the insurer
10 that provided him or her with workers’ compensation benefits.

11 **LEGAL ANALYSIS.**

12 Based upon the foregoing, this Court finds and concludes that when an
13 industrial injury claim is brought in Arizona, by an Arizona resident, and is handled
14 and processed according to Arizona laws and statutes, the Arizona law applies to the
15 industrial injury claim. When some of the treatment is rendered in Nevada, as part of
16 that industrial injury claim, Arizona law still applies, to some extent, but if the
17 treatment were, for example, not paid for, it would be the Nevada law, which would
18 control and would provide a mechanism for the Nevada medical care provider to obtain
19 relief and payment. In the present case, the injured worker, Plaintiff, was required to
20 obtain some medical care in Nevada, as part of her Arizona industrial injury claim.
21 That treatment was apparently rendered in a negligent manner, resulting in a medical
22 malpractice claim in Nevada. The Plaintiff resolved that medical malpractice claim by
23 way of a settlement in the amount of \$6,250,000.00. Copperpoint claims that it has no
24 obligation to pay additional benefits in the industrial injury claim, until Plaintiff
25 reimburses it the \$3,171,095.00 which Copperpoint has paid in benefits. Copperpoint’s
26 claim is correctly based on Arizona law, as that is the law that applies to the industrial
27 injury claim. Plaintiff contends that Copperpoint is not entitled to a lien, because NRS
28 42.021 prevents a lien by any collateral source against the Plaintiff.¹

¹ This Court notes that it has previously held NRS 42.021 to be unconstitutional, as a violation of the Takings Clause of the United States Constitution. The constitutionality of the statute was not challenged by either of the parties in this case, and consequently, this Court has no right or ability to adjudicate the constitutionality, and consequently, the Court will proceed as if the parties have stipulated to the constitutionality of that statute.

1 NRS 42.021 reads in pertinent part as follows:

2 NRS 42.021 Actions based on professional negligence of providers of health care:
3 Introduction of certain evidence relating to collateral benefits; restrictions on source of collateral
4 benefits; payment of future damages by periodic payments.

5 1. In an action for injury or death against a provider of health care based upon
6 professional negligence, if the defendant so elects, the defendant may introduce evidence
7 of any amount payable as a benefit to the plaintiff as a result of the injury or death
8 pursuant to the United States Social Security Act, any state or federal income disability
9 or worker's compensation act, any health, sickness or income-disability insurance,
10 accident insurance that provides health benefits or income-disability coverage, and any
11 contract or agreement of any group, organization, partnership or corporation to provide,
12 pay for or reimburse the cost of medical, hospital, dental or other health care services. If
13 the defendant elects to introduce such evidence, the plaintiff may introduce evidence of
14 any amount that the plaintiff has paid or contributed to secure the plaintiff's right to any
15 insurance benefits concerning which the defendant has introduced evidence.

16 2. A source of collateral benefits introduced pursuant to subsection 1 may not:

17 (a) Recover any amount against the plaintiff; or

18 (b) Be subrogated to the rights of the plaintiff against a defendant.

19 Although the Plaintiff argues that NRS 42.021 applies to settlements as well as to
20 cases that are taken to Trial, this Court concludes the opposite. The statute specifically
21 provides that "if the defendant so elects, the defendant may introduce evidence . . ."
22 and if the Defendant does so, "the plaintiff may introduce evidence of any amount that
23 the plaintiff has paid or contributed to secure the plaintiff's right to any insurance
24 benefits. . ." And finally, a collateral source "*introduced pursuant to subsection 1* may
25 not recover any amount against the plaintiff." (*Id.*, emphasis added).

26 The purpose of this statute was to preclude double-dipping in medical
27 malpractice cases. The Defendants would have the "option" to determine whether they
28 wanted to introduce evidence of the amounts payable by insurance carriers or other
collateral sources. Although the settlement documents in this case attempt to include
language to suggest that this was considered as part of the settlement, the statute
makes no reference to a "settlement." The "introduction of evidence," only applies to
Trial, and not to a settlement negotiation. Consequently, while NRS 42.021 would
arguably have applied if this case were taken to Trial, there is no suggestion in the
statute, nor in any Nevada case law, that it applies to a settlement, and consequently,
NRS 42.021 cannot preclude Copperpoint's lien or offset, pursuant to Arizona workers'
compensation law.

Based upon the foregoing analysis and this Court's interpretation of NRS 42.021,
the remainder of the arguments are essentially rendered moot. This Court notes that in
addressing a Motion to Dismiss, the Court must view all factual allegations in the light

1 most favorable to the non-moving party, and the Complaint should be dismissed only if
2 it appears beyond a doubt that the Plaintiff could prove no set of facts, which, if true,
3 would entitle Plaintiffs to relief. *Buzz Stew, LLC v. City of North Las Vegas*, 124 Nev.
4 224, 181 P.3d 670 (2008). Even viewing the evidence in the light most favorable to the
5 Plaintiffs, this Court finds that there are no set of facts, which if true, would entitle the
6 Plaintiffs to relief, as it relates to the interpretation of NRS 42.021.

7 Consequently, based upon the foregoing, and other good cause appearing,
8 **IT IS HEREBY ORDERED** that Defendant Copperpoint's Motion to Dismiss
9 is hereby **GRANTED**.

10 **ALCH'S MOTION TO DISMISS OR FOR SUMMARY JUDGMENT.**

11 **FACTUAL INFORMATION**

12 Plaintiff's Complaint alleges 6 causes of action, and a claim for punitive
13 damages. Only 3 claims address the Defendant, Thomas Alch: the 3rd cause of action
14 for legal malpractice, the 4th cause of action for fraud, and the 5th cause of action for
15 breach of fiduciary duty.

16 Defendant, Alch, argues that Plaintiffs' claims for punitive damages for fraud
17 and breach of the fiduciary duty are inappropriate because the alleged breach of
18 fiduciary duty is duplicative of the claim for legal malpractice, and Plaintiffs have failed
19 to alleged fraud against Defendant with sufficient specificity. Finally, Alch argues that
20 Plaintiffs cannot sustain the burden for punitive damages by clear and convincing
21 evidence.

22 It appears that Alch began working on the case while at the office of Bruce G.
23 Fagel & Associates. In September of 2017, he became an employee of Defendant,
24 Shoop. Alch argues that he did not attend the mediation before Retired Judge Stuart
25 Bell. Silberberg informed him of the settlement amount, the up-front cash portion was
26 received and distributed by Mr. Silberberg, and Mr. Alch was allegedly not involved in
27 any of those processes.

28 **SUMMARY OF LEGAL ARGUMENTS**

Defendant Alch argues that the Complaint is not specific enough relating to the
allegations of fraud. The case law requires that "the circumstances that must be

1 detailed include averments to the time, the place, the identity of the parties involved,
2 and the nature of the fraud or mistake.” *Brown v. Kellar*, 97 Nev. 582, 583-84, 636
3 P.2d 874, (1981). Further, Alch argues that to set forth a claim for fraud, a plaintiff
4 must allege the following elements: (1) A false representation made by the defendant;
5 (2) defendant's knowledge or belief that its representation was false or that defendant
6 has an insufficient basis of information for making the representation; (3) defendant
7 intended to induce plaintiff to act or refrain from acting upon the misrepresentation;
8 and (4) damage to the plaintiff as a result of relying on the misrepresentation.
9 *Barmettler v. Reno Air, Inc.*, 114 Nev. 441, 447, 956 P.2d 1382, 1386 (1998). Plaintiff
10 only alleges that “If said defendants did know [that Silberberg was charging an
11 excessive fee], and accepted a portion of those fees for themselves, then they are
12 similarly liable to plaintiffs for fraud.” Alch argues that he was not involved in the
13 distribution of the settlement, nor was he involved in any discussions or
14 communications with Harper or Mr. Wininger regarding fees and costs.

15 Alch argues that “a cause of action for legal malpractice encompasses breaches
16 of contractual as well as fiduciary duties because both ‘concern the representation of a
17 client and involve the fundamental aspects of an attorney-client relationship.’” *Stalk v.*
18 *Mushkin*, 199 P.3d 838, 843 (2009). Consequently, Alch argues that any claim for
19 breach of a fiduciary relationship is subsumed in the claim for legal malpractice.

20 Finally, Alch argues that Plaintiffs’ claim for punitive damages should be
21 dismissed because the Plaintiffs cannot establish facts sufficient to support by clear and
22 convincing evidence that the Defendants are guilty of fraud, oppression, or malice.

23 The Court notes that the Silberberg Defendants filed a Joinder.

24 Plaintiffs argue that breach of a fiduciary duty is different from negligence, and a
25 claim for breach of fiduciary duty is not duplicative of a claim for legal malpractice.
26 Plaintiffs argue that the damages recoverable for legal malpractice do not include
27 damages for emotional suffering or emotional distress, but such damages would
28 arguably be recoverable for a breach of fiduciary duty.

With regard to the fraud claim, Plaintiffs argue that there are sufficient facts
alleged against Silberberg, and that the 4th cause of action for fraud is not alleged
against the Defendant, Alch.

1 **LEGAL ANALYSIS**

2 Based upon the foregoing, this Court finds and concludes that the allegations
3 alleged against Silberberg relating to fraud are sufficient to put the defendant on notice
4 of the claims against him, and satisfy the elevated standard of pleading required by the
5 rules. Because the Plaintiffs have confirmed that the 4th cause of action for fraud is not
6 alleged against Defendant Alch, the Court hereby confirms that the 4th cause of action
7 for fraud does not apply to the Defendant, Alch. As it relates to the claim for breach of
8 fiduciary duty, although the *Stalk v. Mushkin* case seems to indicate that the claim is
9 subsumed in a claim for legal malpractice, the Court can see how there could be a
10 distinction, as the elements are different, and the potential damages could be different.
11 Consequently, the Court finds and concludes that they are separate and distinct causes
12 of action, and may both be maintained. With regard to the claim for punitive damages,
13 although this Court sits as a gatekeeper, the ultimate determination as to whether the
14 evidence supports fraud, oppression, or malice against the Defendants will be up to the
15 trier of fact. Because this Court cannot dismiss a claim unless it appears beyond a
16 doubt that the Plaintiff could prove no set of facts, which, if true, would entitle
17 Plaintiffs to relief, the Court cannot dismiss the claims as requested by the Defendants
18 herein. *Buzz Stew, LLC v. City of North Las Vegas*, 124 Nev. 224, 181 P.3d 670 (2008).
19 Similarly, with regard to the request for summary judgment, NRCP 56 indicates that
20 summary judgment is only appropriate if no genuine issues of material fact remain.
The Court's above-referenced analysis confirms that genuine issues of material fact
remain.

21 Consequently, based upon the foregoing, and good cause appearing,

22 **IT IS HEREBY ORDERED** that Alch's Motion to Dismiss or for Summary
23 Judgment, and the Silberberg Defendants' Joinder, are hereby **DENIED**.

24 **SHOOP'S MOTION TO DISMISS.**

25 **FACTUAL INFORMATION**

26 Defendant Shoop, a Professional Law Corporation, claims to be a complete
27 stranger both to Nevada and to the underlying representation which is the basis of this
28 lawsuit. Shoop claims to have no contacts at all with Nevada that would confer general
jurisdiction. Further, Shoop alleges that neither he individually nor as Shoop APLC

1 had any involvement in the underlying case, nor shared in any of the fees generated
2 from it.

3 4 **SUMMARY OF LEGAL ARGUMENTS**

5 Shoop correctly argues that there are two types of personal jurisdiction – general
6 jurisdiction and specific jurisdiction. General jurisdiction exists over a defendant who
7 has “substantial” or “continuous and systematic” contacts with the forum state. Shoop
8 contends that his home and base of operations are not in Nevada. Further, Shoop lacks
9 any substantial, continuous, or systematic contacts with Nevada. Shoop does not
10 conduct business in Nevada, and is not licensed in Nevada. Shoop APLC’s principal,
11 David Shoop, is not licensed in Nevada, and neither Shoop entity has ever earned
12 income in Nevada. With regard to “specific” jurisdiction, the relationship must arise
13 out of contacts that the “defendant himself” creates with the forum state, and Shoop
14 argues that he has none.

15 In evaluating specific personal jurisdiction, courts consider two factors: (1)
16 whether the defendant purposefully availed itself of the privilege of acting in the forum
17 state or purposefully directed its conduct towards the forum state; and (2) whether the
18 cause of action arose from the defendant’s purposeful contact or activities in
19 connection with the forum state, such that it is reasonable to exercise personal
20 jurisdiction. *Tricarichi v. Coöperative Rabobank, U.A.*, 440 P.3d 645, 650 (Nev. 2019).
21 In analyzing whether specific personal jurisdiction exists in a tort action, courts apply
22 the “effects test” derived from *Calder v. Jones*, 465 U.S. 783, 104 S.Ct. 1482, which
23 considers whether the defendant (1) committed an intentional act, (2) expressly aimed
24 at the forum state, (3) causing harm that the defendant knows is likely to be suffered in
25 the forum state. *Tricarichi v. Cooperative Rabobank, supra*, 440 P.3d at 650. Shoop
26 argues that none of these factors justifies the Court exercising personal jurisdiction
27 over him or his business.

28 The Plaintiffs simply request additional time to do discovery to be able to obtain
the information necessary to establish personal jurisdiction over the Shoop Defendants.
The Plaintiffs do cite to the Settlement Agreement, which indicates Shoop APLC as one
of the attorneys for Plaintiffs, which is at least some evidence that Shoop had some
involvement in the case.

1 **LEGAL ANALYSIS**

2 Based upon the foregoing, there is at least some evidence that Shoop had some
3 involvement in the underlying case. That may not be enough to justify the Court's
4 exercise of personal jurisdiction over Shoop individually and Shoop APLC. The Nevada
5 Supreme Court has indicated in the past, however, that it may be an abuse of the
6 Court's discretion to dismiss a case, in light of a request for NRCP 56(d) relief, at the
7 beginning of the case, and without allowing the Plaintiff the opportunity to conduct at
8 least some discovery.

9 Based upon the foregoing, and good cause appearing,

10 **IT IS HEREBY ORDERED** that the hearing on this motion is **CONTINUED**
11 for approximately 120 days **to February 24, 2021, at 9:00 a.m.** If the Plaintiff has
12 additional information to support its opposition, such information should be set forth
13 in a **supplemental Opposition, filed on or before February 10, 2021**, allowing
14 the Defendant until **February 17, 2021, to file any necessary response.**

15 **PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

16 **FACTUAL INFORMATION**

17 Plaintiffs have alleged two causes of action against Copperpoint, and this Motion
18 seeks partial summary judgment as to those causes of action, ie., the first cause of
19 action for declaratory relief on the question of whether Defendant, Copperpoint has a
20 lien, or is otherwise entitled to a future credit, on the settlement proceeds and the
21 second cause of action for appropriate injunctive relief if Plaintiff prevails on the first
22 cause of action.

23 **SUMMARY OF LEGAL ARGUMENTS**

24 The Court appreciates the Plaintiffs' citation to voluminous California law, which
25 may arguably support the Plaintiffs' position, but the Court has already stated its
26 position above, with regard to NRS 42.021.

27 **LEGAL ANALYSIS**

28 Although the Plaintiff argues that NRS 42.021 applies to settlements as well as to
cases that are taken to Trial, this Court concludes the opposite. The statute specifically

1 provides that “if the defendant so elects, the defendant may introduce evidence . . .”
2 and if the Defendant does so, “the plaintiff may introduce evidence of any amount that
3 the plaintiff has paid or contributed to secure the plaintiff’s right to any insurance
4 benefits. . .” And finally, a collateral source “*introduced pursuant to subsection 1* may
5 not recover any amount against the plaintiff.” (*Id.*, emphasis added).

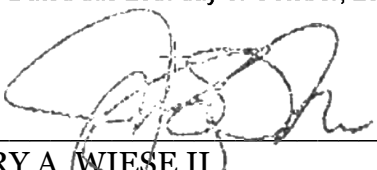
6 The purpose of this statute was to preclude double-dipping in medical
7 malpractice cases. The Defendants would have the “option” to determine whether they
8 wanted to introduce evidence of the amounts payable by insurance carriers or other
9 collateral sources. Although the settlement documents in this case, attempt to include
10 language to suggest that this was considered as part of the settlement, the statute
11 makes no reference to a “settlement.” The “introduction of evidence,” only applies to
12 Trial, and not to a settlement negotiation. Consequently, while NRS 42.021 would
13 arguably have applied if this case were taken to Trial, there is no suggestion in the
14 statute, nor in any Nevada case law, that it applies to a settlement, and consequently,
15 NRS 42.021 cannot preclude Copperpoint’s lien or offset, pursuant to Arizona workers’
16 compensation law. Although the settlement agreement indicates that the Defendant
17 would have sought to introduce such evidence at Trial, that never transpired in this
18 case, and consequently, NRS 42.021 cannot apply. If the Nevada Legislature desired to
19 have NRS 42.021 apply to “settlements” as well as “trials,” they could have included
20 language so indicating.

21 Based upon the foregoing analysis and this Court’s interpretation of NRS 42.021,
22 this Court has no choice but to deny the Plaintiffs’ requested relief.

23 Consequently, based upon the foregoing, and other good cause appearing,
24 **IT IS HEREBY ORDERED** that Plaintiffs’ Motion for Partial Summary
25 Judgment is hereby **DENIED**.

26 Dated this 25TH day of October, 2020.

27 Dated this 26th day of October, 2020

28 
JERRY A. WIESE II
DISTRICT COURT JUDGE
EIGHTH JUDICIAL DISTRICT COURT
DEPARTMENT 25B5 2CE7
Jerry A. Wiese
District Court Judge

1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

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6 Daria Harper, Plaintiff(s)

CASE NO: A-20-814541-C

7 vs.

DEPT. NO. Department 30

8 Copperpoint Mutual Insurance
9 Holding Company, Defendant(s)

10
11 **AUTOMATED CERTIFICATE OF SERVICE**

12 This automated certificate of service was generated by the Eighth Judicial District
13 Court. The foregoing Order was served via the court's electronic eFile system to all
recipients registered for e-Service on the above entitled case as listed below:

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1 If indicated below, a copy of the above mentioned filings were also served by mail
2 via United States Postal Service, postage prepaid, to the parties listed below at their last
3 known addresses on 10/27/2020

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