IN THE SUPREME COURT OF THE STATE OF NEVADA

DARIA HARPER; DANIEL WININGER, Appellants, vs. COPPERPOINT MUTUAL INSURANCE HOLDING COMPANY, an Arizona corporation; COPPERPOINT GENERAL INSURANCE COMPANY, an Arizona corporation; LAW OFFICES OF MARSHALL SILVERBERG, P.C., a California corporation; KENNETH MARSHALL SILVERBERG aka MARSHALL SILVERBERG aka K. MARSHALL SILVERBERG, Respondents.	Case No. 82158

APPEAL
from a decision in favor of Respondents
entered by the Eighth Judicial District Court, Clark County, Nevada
The Honorable Jerry A. Wiese, III, District Court Judge
District Court Case No. A-20-814541-C

APPELLANTS' OPENING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made so the judges of this court may evaluate possible disqualification or recusal. Appellants, Daria Harper and Daniel Wininger, are individuals who, at all times, have been represented by Jason R, Maier, Esq. of Maier Gutierrez & Associates and John P. Blumberg, Esq. of Blumberg Law Corporation, granted leave to associate *pro hac vice* (JA 0052-0055).

JURISDICTIONAL STATEMENT

This is an appeal from the district court's order entered on October 26, 2020, granting the motion of respondents, Copperpoint Mutual Insurance Holding Company and Copperpoint General Insurance Company ("Copperpoint"), to dismiss pursuant to NRCP 12(b)(5) and denying the motion of appellants, Daria Harper and Daniel Wininger, for partial summary judgment pursuant to NRCP 56 (JA 1492-1508). On November 24, 2020, appellants filed notice of appeal and moved to certify the order as final pursuant to NRCP 54(b) (JA 1509-1529; JA 1530-1538). On February 6, 2021, the district court certified the order as final (JA 1546-1570). Thus, this appeal is timely pursuant to NRAP 4(a) and is from an order of final judgment pursuant to NRCP 54(b) and NRAP 3A(b)(1). *See also* March 19, 2021 Order of the Supreme Court.

ROUTING STATEMENT

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), and is presumptively retained by the Supreme Court.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the district court err in granting respondent Copperpoint's motion to dismiss pursuant to NRCP 12(b)(5) and denying appellants' motion for partial summary judgment, based on its conclusion of law that NRS 42.021 does not apply to medical malpractice cases that are settled, rather than taken to trial?

2. If NRS 42.021 applies to medical malpractice settlements, in the case at bar, does the contrary law of Arizona take precedence over Nevada's law?

STATEMENT OF THE CASE

Appellants appeal from an order granting respondents' motion to dismiss pursuant to NRCP 12(b)(5) and from the order denying their motion for partial summary judgment. No material facts are in controversy. The initial issue of law presented is whether NRS 42.021 permits or prohibits a workers' compensation lien or future credit on the settlement proceeds of a medical malpractice action. Appellants contend that NRS 42.021 prohibits such a lien or future credit. Respondents, Law Offices of Marshall Silberberg, P.C. and Kenneth Marshall Silberberg ("Silberberg"), agree. *See* Order of the Supreme Court dated March 19, 2021 at p. 2. Respondent Copperpoint contends it does not. If the Supreme Court concludes, as did the district court, that NRS 42.021 does not apply to the settlement proceeds of a medical malpractice action, then it need go no further because the laws of Arizona and Nevada would be the same. But if the Supreme Court finds that NRS 42.021 prohibits a workers' compensation lien or future credit on the settlement proceeds of a medical malpractice action, then a conflict of laws would exist between Nevada and Arizona because Arizona has not enacted a statute similar to NRS 42.021. In that instance, the Court would have to decide the second legal issue: which state law is applicable in the case at bar?[1]

[1] The order these two issues are to be decided is mandated by the Nevada

Essentially, appellants contend the law of Nevada applies because the medical services forming the basis of the allegations of the underlying medical malpractice case were provided in Nevada by Nevada health care providers licensed by Nevada, and the settlement proceeds were paid by the Nevada health care providers to settle an action prosecuted against them in Nevada. Respondent Copperpoint contends, and the district court agreed, that the law of Arizona applies because appellant Daria Harper is an Arizona resident who was initially injured in Arizona in the course and scope of her employment with an Arizona employer and she then filed for and obtained benefits under the Arizona workers' compensation scheme.

FACTUAL AND PROCEDURAL BACKGROUND

I. FACTUAL BACKGROUND

On August 11, 2014, appellant Daria Harper, a resident of Arizona, sustained a knee injury in Arizona while in the course and scope of her employment with

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Supreme Court. The law of Nevada must be ascertained first because if it is the same as the law of Arizona, no conflict of laws analysis is required. *Tri-County Equipment & Leasing v. Klinke*, 128 Nev. 352, 355, 286 P.3d 593, 595 (2012): "before undertaking a conflict-of-law analysis, a court should determine whether a conflict of law actually exists."

Islander RV Resort, LLC, a limited liability company domiciled in Arizona (JA 0039-0051: Respondents' Answer at p. 2, lines 6-8; Exhibit 1, declaration of Daria Harper, ¶3; Exhibit 3; declaration of John P. Blumberg, ¶5; Exhibit 14). At the time appellant Daria Harper was injured, respondent Copperpoint was the workers' compensation insurer for her employer (JA 0039-0051: Respondents' Answer at p. 2, lines 8-17; Exhibit 1, declaration of Daria Harper, ¶3; Exhibit 10; Exhibit 30; Exhibit 31). Pursuant to the Arizona Workers' Compensation Act (ARS 23-901, *et seq*.), respondent Copperpoint was obligated to and did provide, among other things, necessary medical treatment and income disability payments to appellant Daria Harper (JA 0039-0051: Respondents' Answer at p. 2, lines 11-13; Exhibit 1, declaration of Daria Harper, ¶3).

On June 9, 2015, appellant Daria Harper required and received medical treatment in Las Vegas, Nevada that was related to her original August 11, 2014 injury and respondents paid her medical bills (JA 0039-0051: Respondents' Answer filed June 1, 2020 at p. 2, lines 21-23 and p. 3, lines 15-17; Exhibit 1, declaration of Daria Harper, ¶4). As a result of this medical treatment, (a) appellant 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) appellant Daniel Wininger suffered compensable damages by virtue of his marital relationship with Plaintiff Daria

Harper (JA 0039-0051: Respondents' Answer at p. 2, line 23 to p. 3, line 1; Exhibit 1, declaration of Daria Harper, ¶4; Exhibit 2, declaration of Daniel Wininger, ¶3). On June 7, 2016, appellants filed a complaint in the District Court of Nevada, Clark County ("the underlying medical malpractice action"), alleging that they sustained damages as a result of the medical negligence of five individuals licensed by Nevada to provide medical care, Valley Hospital Medical Center, Inc., a Nevada corporation, and Valley Health Systems, LLC, a Delaware corporation having its primary place of business in Nevada (JA 0039-0051: Respondents' Answer at p. 3, lines 19-23; Exhibit 1, declaration of Daria Harper, ¶5; Exhibit 2, declaration of Daniel Wininger, ¶4; Exhibit 3, declaration of John P. Blumberg, ¶s 6-12; Exhibits 4; Exhibits 15 to 28). Respondent claimed a lien for repayment of financial benefits paid to or on behalf of appellant Daria Harper, pursuant to Arizona statute ARS 23-1023, when it became aware of the underlying medical malpractice action (JA 0039-0051: Respondents' Answer filed June 1, 2020 at p. 4, lines 6-9).

In 2018, the health care providers settled and paid appellants $6,250,000, and the medical malpractice action was then dismissed (JA 1107-1410: Exhibit 1, declaration of Daria Harper, ¶8; Exhibit 3; Exhibit 7). About a month later, appellants, through their attorney, Silberberg, notified respondent that the case had been settled but that, pursuant to NRS 42.021, it was not entitled to a lien (JA 1107-1410: Exhibit 1, declaration of Daria Harper, ¶9; Exhibit 3, declaration of John P.

Blumberg, ¶13; Exhibit 8; Exhibit 22). On October 30, 2019, respondent served a "Notice of Claim Status" on appellant Daria Harper, that stated in part: 1. Pursuant to ARS 23-1023, respondent has a lien against appellant Daria Harper's third-party recovery from the medical malpractice action in an amount equal to compensation and medical, surgical, and hospital benefits paid by respondent. 2. Respondent is entitled to accrued interest on the lien from the date settlement proceeds were disbursed. 3. Respondent is entitled to a future credit against appellant Daria Harper's recovery equal to the amount of money received by appellant Daria Harper in the malpractice action after subtracting expenses and attorney fees. 4. Respondent 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. 5. To the extent the settlement in the malpractice action was less than the workers' compensation benefits provided by respondents, appellant Daria Harper's failure to obtain respondents' prior approval before settling results in forfeiture of her workers' compensation claim (JA 0039-0051: Respondents' Answer at p. 4, lines 19-21; Exhibit 1, declaration of Daria Harper, ¶9; Exhibit 9).

After respondent Copperpoint served the Notice of Claim Status, it terminated payments being made for the services of appellant Daniel Wininger who was being compensated to provide 24-hour per day care to appellant Daria Harper, and on April

2, 2020, respondents sent appellant Daria Harper the letter notifying her that it would terminate all other benefits, in thirty days (JA 0039-0051: Respondents' Answer at p. 5, lines 1-3; Exhibit 1, declaration of Daria Harper, ¶10; declaration of Daniel Wininger, ¶6; Exhibit 10). On May 1, 2020, respondent served its Notice of Claims Status which stated, "Future compensation, medical, surgical, hospital, pharmacy, caretaker & other benefits payable to applicant or behalf of applicant are terminated effective May 2, 2020 until [respondents'] current lien of $3,171,095.00 is fully exhausted." (JA 0039-0051: Respondents' Answer at p. 5, lines 6-9 and 22-23; Exhibit 1, declaration of Daria Harper, ¶11; Exhibit 11).

II. PROCEDURAL BACKGROUND

Appellants filed their complaint on May 4, 2020 (JA 0001-0022). On May 6, 2020, they filed an Errata adding the two exhibits they inadvertently omitted from their complaint (JA 0023-0030). The complaint alleged six causes of action. The first cause of action sought declaratory relief and named all of the defendants including respondents. The second cause of action for injunctive relief named only respondent Copperpoint. These are the causes of action that are in issue in this appeal. The third cause of action for legal malpractice, the fifth cause of action for breach of fiduciary duty and the sixth cause of action for breach of contract named respondent Silberberg, Thomas S. Alch and Shoop, A Professional Law Corporation; the latter being dismissed on January 29, 2021 (JA 1539-1545). The

fourth cause of action for fraud was alleged against only respondent Silberberg.[2] Respondent Copperpoint filed its answer on June 1, 2020 (JA 0039-0051).

On June 26, 2020, appellants filed their motion for partial summary judgment. On September 4, 2020, respondents filed their motion to dismiss under NRCP 12(b)(1), 12(b)(2) and 12(b)(5) or alternately for partial summary judgment (JA 0593-0671). Thereafter, the parties filed opposition and reply papers (JA 0672-0741; JA 1411-1491; JA 1107-1410; JA 0742-1087). The district court set both matters for its October 28, 2020 calendar, but on October 26, 2020, it rendered its Order, stating that a hearing was not necessary (JA 1492-1508). The district court granted respondent Copperpoint's motion to dismiss under NRCP 12(b)(5) and denied appellants' motion for partial summary judgment, concluding that NRS 42.021 does not apply to settlements of medical malpractice cases (JA 1492-1508). In that event, as appellants had pointed out in their papers, the district court did not have to perform a conflict of laws analysis because the laws of Nevada and Arizona

[2] Because resolution of this appeal has a direct effect on these defendants' amount of potential liability, Silberberg has been granted leave to participate in this appellate proceeding as a respondent. *See* Order of the Supreme Court dated March 19, 2021.

are the same. The district court agreed, finding that its statutory interpretation of NRS 42.021 rendered the issue moot (JA 1492-1508). On November 24, 2020, appellants filed their notice of appeal and moved under NRCP 54(b) to certify the October 26, 2020 order as final JA 1530-1538; JA 1546-1570). The district court granted the motion and certified the order as final on February 6, 2021.

SUMMARY OF ARGUMENT

The district court erred in concluding that NRS 42.021 does not apply to settlements of medical malpractice cases. The statute, enacted by the initiative process, was based on the identically-worded California statute which the appellate courts of that state – before the enactment of NRS 42.021 – had concluded applied to settlements of medical malpractice cases, and the ballot summaries did not exempt medical malpractice settlements from the measure's application. Accordingly, the district court should have undertaken a conflict of laws analysis which would have concluded that the law of Nevada, *i.e.*, NRS 42.021, should be applied in the case at bar, thereby precluding respondents' lien rights.

ARGUMENT

I. STANDARD OF REVIEW

A district court's order granting a NRCP 12(b)(5) motion to dismiss is reviewed *de novo*. *Buzz Stew, LLC v. City of North Las Vegas,*124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008). Dismissing a complaint is appropriate "only if it

appears beyond a doubt that [the plaintiff] could prove no set of facts which, if true, would entitle [the plaintiff] to relief." *Id.* at 228, 181 P.3d at 672. A district court's order granting or denying a motion for partial summary judgment is also reviewed *de novo* to determine whether there is no issue of material fact and, if so, whether the moving party is entitled to judgment as a matter of law. *Woods v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). In the case at bar, the material facts regarding the legal issues presented are not in controversy. Thus, if the Supreme Court agrees with the district court's conclusions of law, the district court properly granted the motion to dismiss under NRCP 12(b)(5) and denied appellants' motion for partial summary judgment.

II. NRS 42.021 APPLIES TO SETTLEMENTS

In cases other than medical malpractice, the workers' compensation carrier has a lien in an action by an employee against a third party. NRS 616C.216. Under NRS 42.021, however, a workers' compensation insurance carrier does not have a lien on the judgment rendered in a medical malpractice action by an employee against third parties if the amount payable as a benefit to the plaintiff as a result of the injury was introduced into evidence at trial. Because the underlying medical malpractice action settled, the issue is whether NRS 42.021 applies. No Nevada appellate court has decided the issue. But the Nevada statute is identical to California Civil Code 3333.1. And before NRS 42.021 was enacted, the California

Supreme Court and California Court of Appeal had both interpreted California Civil Code 3333.1 as precluding lien recovery of, or future credit for workers' compensation benefits, if the medical malpractice claim settled.[3]

A. Had The Medical Malpractice Claim Been Tried, NRS 42.021 Would Preclude Respondent Copperpoint From Asserting a Lien or Credit

NRS 42.021, provides: "1. In an action for injury or death against a provider of health care based upon professional negligence, if the defendant so elects, the defendant may introduce evidence of any amount payable as a benefit to the plaintiff as a result of the injury or death pursuant to the United States Social Security Act,

[3] Arizona's statute that permits a lien on statutory workers' compensation benefits in medical malpractice cases *i.e*, ARS 12-565C, differs from NRS 42.021 and California Civil Code 3333.1. ARS 12-565C, provides that "Unless otherwise expressly permitted to do so by statute, no provider of collateral benefits, as described in subsection A, shall recover any amount against the plaintiff as reimbursement for such benefits nor shall such provider be subrogated to the rights of the plaintiff." Because Arizona's workers' compensation statute (ARS 23-1023) expressly permits a lien, respondent Copperpoint would have a lien on appellant Daria Harper's settlement proceeds if Arizona law applies.

any state or federal income disability or worker's compensation act, any health, sickness or income-disability insurance, accident insurance that provides health benefits or income-disability coverage, and any contract or agreement of any group, organization, partnership or corporation to provide, pay for or reimburse the cost of medical, hospital, dental or other health care services. If the defendant elects to introduce such evidence, the plaintiff may introduce evidence of any amount that the plaintiff has paid or contributed to secure the plaintiff's right to any insurance benefits concerning which the defendant has introduced evidence. 2. A source of collateral benefits introduced pursuant to subsection 1 may not: (a) Recover any amount against the plaintiff; or (b) Be subrogated to the rights of the plaintiff against a defendant."

"[S]ection 2 protects plaintiffs by prohibiting collateral sources from recovering against prevailing plaintiffs." *Woods, supra,* 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Accordingly, had appellant Daria Harper proceeded to trial in her underlying medical malpractice action, respondent Copperpoint would have been barred from recovering any amount from said appellant whether by lien, subrogation, reimbursement or otherwise if evidence of the amount respondent paid to or on her behalf had been introduced into evidence at trial.

It is noteworthy that NRS 42.021 does not require that a case proceed to verdict or judgment; rather, the statute requires only that the collateral source

evidence be "introduced" to have the effect of barring a collateral source lien. If NRS 42.021 were held not to apply to medical malpractice settlements, parties who wanted to settle a medical malpractice case and have the benefit of barring a workers' compensation lien, would have to enter into the charade of a two-phase settlement agreement that required them in phase one to begin a trial where evidence of the collateral source payments was introduced into evidence, then immediately inform the district court of the settlement thereby ending the trial. That would be an absurdity. As the Nevada Supreme Court said in *Sheriff, Clark County v. Burcham*, 124 Nev. 1247, 1253, 198 P.3d 326, 329 (2008), "statutory construction should always avoid an absurd result." The Supreme Court of Arizona had a similar, albeit more colorful analysis: "If proper construction of the statute requires such absurdities, then we would have to agree with Mr. Bumble, in 'Oliver Twist', when he said: 'If the law says that; the law is an ass.' If a literal (interpretation) of the language leads to a result which produces an absurdity, it is our duty to construe the act, if possible, so that it is a reasonable and workable law." *City of Phoenix v. Superior Court In and For Maricopa County*, 101 Ariz. 265, 267, 419 P.2d 49, 51 (1966).

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B. The Voter Initiative by Which NRS 42.021 was Enacted Explained that No Source of Collateral Benefits, Including Workers' Compensation, Would Have a Lien on a Plaintiff's Financial Recovery in a Medical Malpractice Case

NRS 42.021 became law in 2004. It was enacted after being presented to Nevada voters by ballot initiative.[4] In ascertaining how to interpret a law passed by a voter initiative, the "primary objective is to discern the intent of [the voters] who enacted the provisions at issue, and to fashion an interpretation consistent with that objective." *Guinn v. Nevada State Legislature*, 119 Nev. 460, 471, 76 P.3d 22, 29 (2003). "To determine the voter intent of a law that was enacted by a ballot initiative, the court will look to the ballot initiative's explanation and argument sections. *Piroozi v. Eighth Jud. Dist. Co.,* 131 Nev. 1004, 1008, 1011, 363 P.3d 1168, 1171, 1173 (2015). "Examining the ballot materials to determine voter intent is appropriate because "[t]hose materials are the only information to which all voters unquestionably had equal access. Patrick C. McDonnell, *Nevada's Medical*

[4] *See* Secretary of State, Statewide Ballot Questions 16 (2004), https://www.leg.state.nv.us/Division/Research/VoteNV/BallotQuestions/2004.pdf; *McCrosky v. Carson Tahoe Reg'l Med. Ctr.,* 133 Nev. 930, 936, 408 P.3d 149, 155 (2017).

Malpractice Damages Cap: One for All Heirs or One for Each, 13 Nev. L.J. 983, 1009 (2013)." *Piroozi* at 1011, fn. 1, 363 P.3d at 1173, fn. 1. Indeed, the Nevada Supreme Court previously looked to the argument in favor of the subject ballot initiative in *McCrosky, supra,* 133 Nev. 930, 936, 408 P.3d 149, 155. The ballot question put to Nevada voters stated, in part, that the initiative would "prohibit third parties who provided benefits as a result of medical malpractice from recovering such benefits from a negligent provider of health care…." The Secretary of State's explanation stated, in part: "If passed, the proposal would not change the reduction of the injured person's damages, but the third parties would no longer be permitted to recover from the wrongdoer the expenses they have paid on behalf of a medical malpractice victim." Accordingly, the ballot material indicated third parties (such as respondent Copperpoint) that provided benefits as a result of medical malpractice (such as to appellant Daria Harper) would no longer be permitted to recover such benefits. There was no mention that the proposal was limited to situations where collateral source evidence was introduced at trial and, therefore, there was no consideration by the voters that it would not apply to settlements of medical malpractice claims. Other rules of statutory interpretation yield the same result.

C. Other Rules of Statutory Interpretation Support Interpreting NRS 42.021 by Looking at the Manner California Interprets Its Initiatives

"[T]he Nevada Supreme Court has yet to establish [other] rules specifically

for ascertaining the intent behind initiative-created state statutes." McDonnell, *supra,* 13 Nev. L.J. 983, 1007. To create predictability, courts will fill gaps in the law. *Rivero v. Rivero*, 125 Nev. 410, 426, 216 P.3d 213, 225 (2009). To fill such gaps, "Nevada … courts have looked to the law of other jurisdictions, particularly California." *Crockett & Myers, Ltd. v. Napier, & Kirby, LLP,* 583 F.3d 1232, 1237 (9th Cir. 2009) ("[w]here Nevada law is lacking, its courts have looked to the law of other jurisdictions, particularly California" *quoting Mort v. United States*, 86 F.3d 890, 893 (9th Cir. 1996)); *see also*, McDonnell, *supra,* 13 Nev. L.J. 589, 1018-1019, *citing Commercial Standard Ins. Co. v. Tab Contr., Inc*., 94 Nev. 536, 583 P.2d 449, 451 (1978). This principle applies to gaps created by cases or statutory enactment. "When a … statute is taken from another state, we look to the construction given that provision by the originating state when construing the Nevada equivalent decision." *Cheung v. Eighth Dist. Court ex rel. Cty of Clark*, 121 Nev. 867, 879-880, 124 P.3d 550, 559 (2005) (adopting California law). Where "California's and Nevada's … statutes are similar in purpose and language … we look to California law for guidance on this issue [of its scope]." *Shapiro v. Welt* 133 Nev. 35, 39, 389 P.3d 262, 268 (2017); *see also Massey v. Litton*, 99 Nev. 723, 726, 669 P.2d 248, 250 (1983) ("We look to decisions construing statutes worded similarly."). More particularly, when a state adopts a statute of another state, it is presumed that the judicial decisions of that state interpreting the statute are also adopted. *Ex parte*

Skaug, 63 Nev. 101, 107-108, 164 P.2d 743, 746 (1945) (adopting California law).

These principles of statutory interpretation apply to statutes enacted by the initiative process. As discussed in the preceding point, (a) Nevada law on interpreting such statutes is sparse and has not had to go further than a review of the materials provided to voters regarding the scope and extent of an initiative and (b) Nevada courts look to California where, as here, there are no Nevada decisions on point. In California, it is established that the entity enacting a statute, whether the state legislature or the voters through the initiative process, is deemed to be aware of existing laws and judicial construction in effect when enacted. *People v. Perez,* 4 Cal.5th 1055, 1067-1068, 232 Cal.Rptr.3d 51, 61, 416 P.3d 42, 61 (2018); *People v. Gonzales*, 2 Cal.5th 858, 869, 216 Cal.Rptr.3d 285, 293, 392 P.3d 437, 445 (2017); *Hill v. NCAA,* 7 Cal.4th 1, 23, 26 Cal.Rptr.2d 834, 847, 865 P.2d 633, 646 (1994); *In re Lance W.,* 37 Cal.3d 873, 890, fn. 11, 210 Cal.Rptr. 631, 642, fn. 11, 694 P.2d 744, 755, fn. 11 (1985). Accordingly, these question arise: when NRS 42.021 was adopted through the initiative process in 2004, were the voters adopting California's Civil Code 3333.1? And if so, were the California judicial decisions also adopted? As discussed below, the answers to both questions are "yes."

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D. The Language of NRS 42.021 Was Taken from California law, and at the Time of its Enactment, California Appellate Courts Had Held (And Still Hold) That Workers' Compensation Carriers Have No Right to a Lien or Credit From a Medical Malpractice Settlement

The language of section 2 of NRS 42.021 is nearly identical to subdivision (b) of California's Civil Code 3333.1 (the difference being syntax, not substance). Section 3333.1, enacted in 1975, states:

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

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

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

Section 3333.1 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) to preclude the enforcement of a lien if the prosecution of the medical malpractice action resolves by settlement before trial. In *Barme, supra*, an injured worker who had received worker's compensation benefits sued the health care providers for medical malpractice, claiming that they had caused him additional injury. The self-insured employer filed a complaint in intervention, seeking reimbursement of the compensation it had paid to the plaintiff. The trial court dismissed the complaint in intervention on the ground that California Civil Code 3333.1 precluded such recovery. The California Supreme Court affirmed the dismissal, despite the fact that there had been neither a settlement nor a trial. In other words, the California Supreme Court held that, under no circumstances, could a collateral source payor of benefits recover money from the proceeds of a medical malpractice lawsuit.

Five years later, the precise issue presented by the case at bar, *i.e.*, whether a workers' compensation carrier could claim credit for a medical malpractice settlement, was decided in *Graham, supra.* The *Graham* court address the issue of

whether subdivision (b) applied to cases that are settled rather than tried. The employer in *Graham* correctly asserted that "under the clear and unambiguous language of the statute, the employer's right to credit is not affected unless there is a trial at which the medical malpractice defendant introduces evidence of workers' compensation benefits," and in that case, "the medical malpractice action was settled rather than tried." *Graham, supra*, 210 Cal.App.3d 499, 507, 258 Cal.Rptr. 376, 381. Nevertheless, the California Court of Appeal concluded that subdivision (b) also applied to settlements. The Court began by explaining that "courts resist blind obedience' to statutory language when its literal interpretation would defeat" its objective. *Id*. at 507, 258 Cal.Rptr. at 381. It then reasoned that California Civil Code 3333.1 cannot be interpreted in a way that would discourage settlements. *Id*. at 508, 258 Cal.Rptr. at 382.

NRS 42.021 should be interpreted in the same manner as the California Supreme Court and California Court of Appeal have interpreted California Civil Code 3333.1, *i.e*., (1) it bars a workers' compensation carrier from reimbursement or entitlement to a credit from the proceeds of a medical malpractice lawsuit, and (2) applies regardless of whether the proceeds arise from a settlement or a lawsuit. Otherwise, the absurdity discussed in II-A, *supra*, (*i.e*., charade trials) would become the mandatory method by which medical malpractice cases are settled. If this Court determines that NRS 42.021 does not apply to settlements, it need not go further;

under both the laws of Nevada and Arizona respondent Copperpoint would have a lien, or is otherwise entitled to a future credit, on the settlement proceeds. If this Court agrees that NRS 42.021 should be interpreted to preclude a lien or future credit on the settlement proceeds of a medical malpractice action, then this Court would need to proceed with a conflict of laws analysis to determine whether Arizona law or Nevada law applies to the circumstances presented by this matter, *unless* NRS 42.021 is either procedural or evidentiary in nature.

III. BECAUSE NRS 42.021 IS EVIDENTIARY IN NATURE, NO CONFLICT OF LAWS ANALYSIS IS REQUIRED

In *Tri-County Equipment & Leasing, supra*, 128 Nev. 352, 286 P.3d 593, the issue was whether evidence of California's workers' compensation payments was admissible in a personal injury trial in Nevada. The Nevada Supreme Court concluded that the law of Nevada should be applied because (1) the law of Nevada did not conflict with the law of California, but (2) "[e]ven if a conflict existed, Nevada law would apply because the statutory provision at issue, NRS 616C.215(10), is an evidentiary rule. *See Cramer v. Peavy*, 116 Nev. 575, 580, 3 P.3d 665, 669 (2000) (explaining that NRS 616C.215(10) relates to what a jury can consider); *see also* Restatement (Second) of Conflict of Laws § 138 (1971) ('The local law of the forum determines the admissibility of evidence.')." *Tri-County Equipment Leasing, supra*, 128 Nev. 352, 355, fn. 3, 286 P.3d 593, 595, fn.3.

Nevada has evidentiary rules pertaining to when collateral source evidence will be admissible. In general, collateral source evidence is prohibited because it will prejudice the jury. *Bass-Davis v. Davis,* 122 Nev. 442, 454, 134 P.3d 103, 110 (2006); NRS 48.035. One exception is NRS 616C.215(10), which states, in pertinent part: "In any trial of an action by the injured employee, or in the case of his or her death by the dependents of the employee, against a person other than the employer or a person in the same employ, the jury must receive proof of the amount of all payments made or to be made by the insurer or the Administrator."

Another evidentiary rule exception is NRS 42.021. In medical malpractice cases, it specifically permits evidence of payments by collateral sources which would otherwise be per se inadmissible. *McCrosky, supra*, 133 Nev. 930, 936, 408 P.3d 149, 154. Arizona also has a statute that permits evidence of payments by collateral sources in medical malpractice cases, *i.e.*, ARS 12-565C. Arizona's statute differs from NRS 42.021 in that it exempts statutory liens (such as workers' compensation) if evidence of collateral source payments was introduced. Nevertheless, both the Nevada and Arizona statutes pertain to evidentiary rules, and thus, the law of Nevada applies. If this Court agrees, it need go no further. NRS 42.021 prevents and prohibits respondent Copperpoint from asserting a lien or credit on the settlement proceeds generated by appellants' underlying medical malpractice matter. But if this Court concludes that NRS 42.021 is not evidentiary in nature,

then it will need to undertake a conflict of laws analysis.

IV. NRS 42.021, NOT THE CONTRARY LAW OF ARIZONA, MUST BE APPLIED WHERE NEVADA HEALTHCARE PROVIDERS NEGLIGENTLY TREATED WORK-RELATED INJURIES OF AN ARIZONA EMPLOYEE WHO SUED THEM IN NEVADA FOR MEDICAL MALPRACTICE, THEN SETTLED HER CASE

As discussed above, NRS 42.021 and ARS 12-565C both deal with the admissibility of collateral source evidence in medical malpractice cases, but Arizona differs in that liens imposed by statute (such as workers' compensation liens) are exempt from the preclusion on enforcement. If the *effect* of the evidentiary rule is deemed to be substantive, Nevada law would still apply.

Nevada has adopted the Restatement (Second) of Conflict of Laws ("Restatement") as the relevant authority for Nevada's choice-of-law jurisprudence in tort cases. *General Motors Corp. v. Eighth Judicial Dist. Court of State of Nev. ex rel. County of Clark*, 122 Nev. 466, 473, 134 P.3d 111, 116 (2006). Furthermore, Nevada deems a subrogation claim that derives from a tort to be a tort claim in a conflict of laws analysis. *Dictor v. Creative Management Services, LLC*, 126 Nev. 41, 46, 223 P.3d 332, 335 (2010). Subrogation claims include claims for reimbursement of workers' compensation benefits. Indeed, *Dictor* quoted from *Federated Rural Elec. v. R.D. Moody & Associates*, 468 F.3d 1322, 1326 (11th Cir. 2006): "A subrogation claim arising from a tort … is properly characterized as a

tort claim for choice of law purposes…. *Swain v. D & R Transp. Co.*, 735 F. Supp. 425, 427-28 (M.D. Ga. 1990)." In *Swain*, the claim was by a workers' compensation carrier seeking subrogation of the benefits it had paid. Accordingly, Nevada deems a subrogation claim, including one by a workers' compensation carrier, to be a tort claim in a conflicts of law analysis. As explained in *General Motors Corp, supra*, 122 Nev. 466, 474, 134 P.3d 111, 117, section 145 of the Restatement governs Nevada's choice-of-law analysis in tort cases unless the Restatement contains a section that specifically addresses the particular tort involved. These specific torts are listed in sections 146 to 155 of the Restatement.[5] Section 146 governs choice-of-law issues in personal injury claims. *General Motors Corp, supra*, 122 Nev. 466, 474, 134 P.3d 111, 117. A medical malpractice claim is a type of personal injury. *See Wyeth v. Rowatt*, 126 Nev. 446, 462, 244 P.3d 765, 776 (2010), applying section 146 to a case against the manufacturer of a drug that allegedly caused breast cancer, citing to *Massey, supra*, 99 Nev. 723, 725-26, 669 P.2d 248, 250-51, a medical

[5] Sections 146 to 155 respectively govern personal injury (146), injuries to tangible things (147), fraud and misrepresentation (148), defamation (149), multistate defamation (150), injurious falsehoods (151), right of privacy (152), multistate invasion of privacy (153), interference with marital relationship (154) and malicious prosecution and abuse of process (155).

malpractice action.[6]

Section 146 states that the rights and liabilities of the parties are governed by the 'local law of the state where the injury occurred' unless 'some other state has a more significant relationship to the occurrence under the principles stated in section 6.'" *General Motors Corp., supra*, 122 Nev. 466, 474, 134 P.3d 111, 117. "Section 6 identifies the following principles: (1) A court, subject to Constitutional

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[6] If medical malpractice is not considered to be an action for "personal injury," section 145 of the Restatement would govern because no other section specifically addresses this particular tort. *See General Motors Corp.*, 122 Nev. 466, 474, 134 P.3d 111, 117. Section 145, which also requires an analysis using section 6 factors, states: "(1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6. (2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include: (a) the place where the injury occurred, (b) the place where the conduct causing the injury occurred, (c) the domicile residence, nationality, place of incorporation and place of business of the parties, and (d) the place where the relationship, if any, between the parties is entered."

restrictions, will follow a statutory directive of its own state on choice of law. (2) When there is no such directive, [such as in this case] the factors relevant to the choice of the applicable rule of law include (a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of interested states and the relative interests of those states in the determination of the particular issue, (d) the protections of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied." *Id*. at 474, 134 P.3d at 116-117. "These principles are not intended to be exclusive and no one principle is weighed more heavily than another." *Id*., 134 P.3d at 117.

Although no Nevada appellate court has applied section 6 principles to a medical malpractice conflict-of-laws analysis, other courts have done so, identifying the following factors: (1) the state where the patient chose to seek medical treatment, (2) the state where the patient has a reasonable expectation that the health-care provers will be governed by the laws licensing and regulating them, (3) the state where the physicians or other involved health providers practice or where the hospital is located, (4) the state that licenses and regulates the physicians or other involved health-care providers or hospitals, (5) the state where the health-care providers have a reasonable expectation that they will be governed by the laws licensing and regulating the health-care providers, (6) the state where the injury-

causing conduct occurred, (7) the state where the injury occurred and (8) the state whose citizens should be liable for the negligence attributable to them. *Grover v. Isom, 137 Idaho* 770, 53 P.3d 821 (2002); *Ginsberg ex rel. Ginsberg v. Quest Diagnostics, Inc*., 441 N.J.Super. 198, 117 A.3d 200 (App.Div. 2015); *Drs. Groover, Christie & Merritt, P.C. v. Burke*, 917 A.2d 1110, (D.C. 2007). Recognizing that factors are not given equal weight, these courts have pointed out that the state with the most significant state interest is the state where the medical malpractice occurred because it is the state that licenses and regulates the health-care providers that injured the patient/plaintiff.

Grover, supra, 137 Idaho 770, 53 P.3d 821, was a medical malpractice case against an oral surgeon and a certified registered nurse anesthesiologist brought by their patient who had a stroke while undergoing oral surgery. The patient lived in Idaho and had seen her dentist in Idaho who recommended extraction of two teeth, and referred her to Dr. Isom whose office was in Ontario, Oregon. Although their office was in Oregon, Dr. Isom and the nurse also lived in Idaho. The trial court concluded that the law of Oregon rather than Idaho applied and, after judgment was rendered against the patient/plaintiff, she appealed. In affirming, the Idaho Supreme Court discussed the section 6 factors as follows:

> "These policies support the application of Oregon law. The needs of the interstate and international systems are not likely

implicated in this case. In considering relevant policies of other states it is clear that Oregon has an interest in making certain that oral surgeons practicing in Oregon are subject to Oregon laws and the Oregon standard of care. The defendants would justifiably expect to be governed by Oregon law, since they were licensed in Oregon and in this case conducted their business in Oregon. 'The basic policy of negligence law is to allow a person to recover from injury proximately caused by another's violation of a duty of reasonable care.' *DeMeyer*, 103 Idaho [327] at 330, 647 P.2d [783]at 786 [(1982)]. As a general rule, a victim should recover under the system in place where the injury occurred. Predictability and ease in determining and applying law are also better served by applying Oregon law, because it is a simple policy that the place of the injury should generally govern the choice of law.

"The Grovers are correct that in *DeMeyer*, the Court of Appeals held that the place of the injury does not always control the choice of law. However, that case and this case are distinguishable. In DeMeyer the plaintiff and her sister were driving through Oregon at the time of an automobile accident. *Id*. at 328, 647 P.2d at 784. The Court of Appeals ruled that under subpart (d) of Restatement Section 6 none of the parties had any expectation that Oregon law would apply. *Id*. at

329, 647 P.2d at 785. The Court of Appeals described the plaintiffs' presence in Oregon as 'fortuitous,' as the plaintiffs were simply driving through Oregon while going between Washington and Idaho. *Id*. at 330, 647 P.2d at 786.

"This case is factually different. Grover's presence in Oregon was not fortuitous – she purposely went to Oregon for the operation. Isom and Berg were practicing in Oregon and had every expectation that Oregon law would govern their business in Oregon.

"The conduct causing the injury itself, as well as the injury itself, occurred in Oregon. Isom's place of business was located in Oregon. The only factor that justifies the application of Idaho law is that the parties are Idaho residents. Every other factor supports the application of Oregon law. The district court properly ruled that Oregon substantive law applied to this case." *Grover, supra*, 137 Idaho at 773-774, 53 P.3d at 824-25.

Ginsberg, supra, 441 N.J.Super. 198, 117 A.3d 200 was a medical malpractice action prosecuted on behalf of an infant suffering from Tay-Sachs disease against a gynecologist, Dr. Rubinstein, and a hospital, Hackensack University Medical Center (HUMC) among other health care providers, some of whom were from New York. The parents/plaintiffs were residents of New York. The mother traveled to New

Jersey to be treated there by Dr. Rubinstein. He referred plaintiffs to HUMC in New Jersey where they underwent genetic counseling. The trial court ruled that the law of New York applied to all defendants. After determining that an actual conflict of laws existed, the appellate court concluded that the law of New Jersey, rather than New York, should apply to these health-care providers. The court explained:

> "With respect to Dr. Rubinstein, HUMC, and Duncan, it is especially significant that each of them is a professional or hospital located in, licensed in, and regulated by the State of New Jersey. Professionals and their patients have a reasonable expectation that the laws of the state of licensure will govern the professional licensee's activities in the state where the services were provided. New Jersey has strong public policies in the regulation of health care professionals where licensed in and who practice in this state, as well as the regulation of hospitals that are licensed in this state….
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> "Although the New Jersey health care professionals apparently believe it is more advantageous to their litigation interests in this particular case to have the law of another state govern their conduct, there are very strong public policies and real-world expectations of professionals and patients that support applying to such professionals

> the law of the state where they are licensed and in which they provided services to the plaintiff patient. In this regard, we take judicial notice… that patients frequently travel across state lines to be treated by a physician who is a surgeon or specialist because of that individual's expertise. Patients also may be drawn to a hospital in another state for the same reasons, or may have an emergency condition while they are in the state temporarily. In such circumstances, there should be a strong presumption that the laws of the state of licensure and treatment govern the patient's care in that state, subject to concerns of feasibility and fairness. (Footnotes omitted.)" *Id*. at 222-23, 117 A.2d at 234-35.

In *Drs. Groover, Christie, & Merritt, P.C., supra*, 917 A.2d 1110, the patient/plaintiff was a resident of the District of Columbia who traveled to Maryland for medical treatment by physicians/defendants whose misdiagnosis caused her to have a stroke. The issue was whether to apply the law of Maryland that imposed a cap on non-economic damages or that of the forum, *i.e*., District of Columbia, which did not. The trial court held that the law of the District of Columbia applied. The Court of Appeals disagreed and held that Maryland law applied because the Restatement's jurisdictional elements were present, *i.e.* "a) the place where the injury occurred; b) the place where the conduct causing the injury occurred; c) the domicile, residence, nationality, place of incorporation and place of business of the parties; and d) the

place where the relationship is centered." *Id.* at 117. The Court of Appeals also counted as a factor the interest of Maryland in limiting financial liability of health care providers by imposition of damage caps, which the District of Columbia did not have.

In the case at bar, all of the significant factors weigh in favor of applying the law of Nevada, *i.e.,* (1) the state where the patient chose to seek medical treatment – Nevada, (2) the state where the patient has a reasonable expectation that the health-care provers will be governed by the laws licensing and regulating them – Nevada, (3) the state where the physicians or other involved health providers practice or where the hospital is located – Nevada, (4) the state that licenses and regulates the physicians or other involved health-care providers or hospitals – Nevada, (5) the state where the health-care providers have a reasonable expectation that they will be governed by the laws licensing and regulating the health-care providers – Nevada, (6) the state where the injury-causing conduct occurred – Nevada, (7) the state where the injury occurred – Nevada, and (8) the state whose citizens should be liable for the negligence attributable to them – Nevada. And, as the Court of Appeals found in *Drs. Groover, Christie, & Merritt, P.C., supra*, 917 A.2d 1110, the state with the most significant interest is the state where the medical malpractice occurred because it is the state (a) that licenses and regulates the health-care providers that injured the patient/plaintiff and (b) that imposed damage caps in medical malpractice cases.

Arizona has no damage caps in medical malpractice cases. The only connection to Arizona is that Plaintiff, Daria Harper, was domiciled and employed there and that the workers' compensation benefits were paid pursuant to the Arizona workers' compensation scheme. Such involvement, which had nothing to do with the tort that was the basis of the medical malpractice lawsuit, is not a factor to be considered. *Drs. Groover, Christie & Merritt, P.C. v. Burke, supra*, 917 A.2d 1110, 1117: "GCM's activities in the District had nothing to do with the tortious conduct at issue in this lawsuit…." Therefore, regardless of whether NRS 42.021 is deemed to be evidentiary or substantive, the law of Nevada must take precedence over the law of Arizona.

CONCLUSION

The district court erred in concluding that NRS 42.021 does not apply to settlements of medical malpractice litigation because (a) it is identical to the California statute which was interpreted to apply to settlements before being presented to the Nevada voters, (b) the ballot summary presented to the voters clearly stated, without exception for settlements, that "third parties would no longer be permitted to recover from the wrongdoer the expenses they have paid on behalf of a medical malpractice victim" and (c) otherwise, settling parties will be forced to conduct a charade-trial to satisfy the "introduction of evidence" requirement and then dismiss the case. Because NRS 42.021 is evidentiary in nature, it should be

applied without the need for a conflict of laws analysis. Regardless, such an analysis yields the result that Nevada law must apply.

Accordingly, the order granting respondent Copperpoint's motion to dismiss under NRCP 12(b)(5) should be reversed with direction to the district court to proceed in a manner consistent with the court's opinion.

DATED this 21st day of June, 2021.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE PURSUANT TO NRAP 28.2

I hereby certify that I have read this opening brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Rules of Appellate Procedure, and in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I further certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman. I further certify that this brief complies with the page limitations of NRAP 32(a)(7) because it does not exceed 14,000 words and 1,300 lines of text, as this brief contains 7,724 words and 659 lines of text.

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I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 21st day of June, 2021.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 21st day of June, 2021, this document was electronically filed with the Nevada Supreme Court. Electronic service of the foregoing: **APPELLANTS' OPENING BRIEF** and **VOLUMES I – VII** of the **JOINT APPENDIX** shall be made in accordance with the Master Service List as follows:

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