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 SILBERBERG, P.C., A CALIFORNIA CORPORATION; KENNETH MARSHALL SILBERBERG AKA MARSHALL SILBERBERG AKA K. MARSHALL SILBERBERG, AN INDIVIDUAL,

Respondents.

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RESPONDENTS LAW OFFICES OF MARSHALL SILBERBERG, P.C. AND KENNETH MARSHALL SILBERBERG AKA MARSHALL SILBERBERG'S ANSWERING BRIEF

ROBERT C. McBRIDE, ESQ.
Nevada Bar No.: 007082
HEATHER S. HALL, ESQ.
Nevada Bar No.: 010608
McBRIDE HALL
8329 W. Sunset Road, Suite 260
Las Vegas, Nevada 89113
Phone: (702) 792-5855

ROBERT L. McKENNA, III, ESQ.
Nevada Bar No.: 8853
JAMES J. KJAR, ESQ.
California Bar No.: 94027
(admitted pro hac vice)
JON R. SCHWALBACH, ESQ.
California Bar No.: 280785
(admitted pro hac vice)
KJAR, MCKENNA & STOCKALPER, LLP
841 Apollo Street, Suite 100
El Segundo, California 90245
Phone: (424) 217-3026

Attorneys for Respondents
Law Offices of Marshall Silberberg, P.C. and Kenneth Marshall Silberberg AKA Marshall Silberberg

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 in order that the Justices of this Court may evaluate possible disqualification or recusal.

Respondent, Kenneth Marshall Silberberg aka Marshall Silberberg is an individual. Respondent Law Offices of Marshall Silberberg, P.C. is an entity. There are no parent corporations or publicly owned companies owning more than ten percent of the stock in this entity.

LAW FIRMS APPEARING FOR RESPONDENTS IN THE CASE OR EXPECTED TO APPEAR IN THIS COURT:

Robert C. McBride, Esq. and Heather S. Hall, Esq. of the law firm of MCBRIDE HALL and Robert L. Mckenna, III, Esq., James J. Kjar, Esq., and Jon R. Schwalbach, Esq. of the law firm of KJAR McKENNA & STOCKALPER, LLP represent Respondents.

Dated this 26th day of August, 2021. McBRIDE HALL

/s/ Robert C. McBride

_____

ROBERT C. McBRIDE, ESQ.
Nevada Bar No.: 007082
HEATHER S. HALL, ESQ.
Nevada Bar No.: 010608
8329 W. Sunset Road, Suite 260
Las Vegas, Nevada 89113
Attorneys for Respondents
Law Offices of Marshall Silberberg, P.C.
and Kenneth Marshall Silberberg AKA
Marshall Silberberg

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SUMMARY OF ARGUMENT

Respondents Law Offices of Marshall Silberberg, P.C. and Kenneth Marshall Silberberg AKA Marshall Silberberg (collectively "Respondents") submit this brief pursuant to the Court's order dated August 12, 2021. Order, Aug. 12, 2021; see also Order, March 19, 2021 (Law Offices of Marshall Silberberg, P.C. and Kenneth Marshall Silberberg shall remain as respondents). They concur with appellants that NRS 42.021 applies to medical malpractice actions that are settled rather than tried. To that end, they present this brief addressing California law interpreting California Civil Code section 3333.1 ("Section 3333.1"), from which NRS 42.021 was derived.

California decisions interpreting Section 3333.1 are persuasive authority in Nevada courts interpreting NRS 42.021. The latter was derived from the former. In fact, it is presumed that the adoption of NRS 42.021 incorporated preceding California Supreme Court's interpretations of Section 3333.1. California appellate decisions hold that Section 3333.1 applies to cases that are settled (in addition to cases that are tried).

Furthermore, neither NRS 616A.010 nor the Court's decision in *Law Offices of Barry Levinson, P.C. v. Milko,* 124 Nev. 355, 363-364, 184 P.3d 378, 384-385 (2008) ("*Milko*") preclude or diminish the effect of this Court's reliance on California's decisional authority interpreting and applying Section 3333.1

The text of the two nearly identical statutes is presented below:

NRS 42.021 (1)-(2) (added 2004)

"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, 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."

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California Civil Code section 3333.1, subds. (a)-(b) (added 1975)

"(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."

LEGAL ARGUMENT

I. California's Civil Code Section 3333.1, On Which NRS 42.021 Is Based, Provides That Workers' Compensation Carriers Are Not Entitled To A Lien Or Credit From A Medical Malpractice Settlement

A. NRS 42.021 Was Presumptively Adopted With The Construction Given To California's Civil Code Section 3333.1, From Which It Was Derived

NRS 42.021 was adopted in 2004. It was derived from California Civil Code section 3333.1, one provision of California's Medical Injury Compensation Reform Act ("MICRA"), which was adopted in 1975. NRS 42.021 (1) & (2) are near verbatim copies of Section 3333.1, subdivisions (a) and (b). See, e.g., *Clark v. Lubritz,* 113 Nev. 1089, 1096, 944 P.2d 861 fn. 6 (1997) ("Nevada's statute on punitive damages is a verbatim copy of the California punitive damages statute.... [W]e have adhered to the rule of statutory interpretation that when a statute is derived from a sister state, it is presumably adopted with the construction given it by the highest court of the sister state." (citation omitted)).

NRS 42.021 was presumptively adopted with the construction given to Section 3333.1 by the California Supreme Court. A statute derived from a sister state is presumably adopted with the construction given it by the sister state's highest

courts. *State ex rel. Harvey v. Second Judicial District Court*, 117 Nev. 754, 763, 32 P.3d 1263, 1269 (2001).

Not only was NRS 42.021 presumptively adopted with the construction given to Section 3333.1 by the California Supreme Court, this Court has relied on California courts' decisions, including decisions by the California Court of Appeal, as persuasive authority in interpreting NRS 42.021. See, e.g., *Tam v. Eighth Judicial District Court*, 131 Nev. 792, 797-799, 358 P.3d 234, 238-239 (2015); see also *Zhang v. Barnes*, 132 Nev. 1049 (2016) (unpublished decision, No. 67219, Sept. 12, 2016, 2016 WL 4926325, at *5).

B. Section 3333.1 Bars Liens And Workers Compensation Credit Rights Not Only In Cases That Are Tried, But Also In Cases That Are Settled

Section 3333.1 is construed by California courts to apply to bar liens and workers compensation credit rights not only in cases that are tried, but also in cases that are settled. The California courts so construed Section 3333.1 many years prior to the adoption of NRS 42.021.

In 1984, in *Barme v. Wood*, 37 Cal.3d 174, 689 P.2d 446 (1984) ("*Barme*"), the California Supreme Court reviewed a challenge by a self-insured employer who had paid worker's compensation benefits to a worker who had sued a health care provider for medical malpractice. The employer filed a complaint in intervention to

recover those benefits from the medical malpractice defendants. *Prior to any trial or settlement,* the trial court granted summary judgment for the medical malpractice defendant on the ground that the claim was barred by Section 3333.1, subdivision (b). *Barme,* 37 Cal.3d at 177-178, 689 P.2d at 447-448. The Supreme Court rejected the employer's constitutional challenge to the statute, and affirmed the judgment applying the bar of Section 3333.1, subdivision (b). In fact, the Supreme Court in *Barme,* as described in a subsequent Court of Appeal decision, "upheld the summary judgment, recognizing that the practical effect of section 3333.1 is to reduce the plaintiff's recovery in any medical malpractice case where collateral source benefits are payable, *regardless of whether the plaintiff obtains recovery in trial or otherwise.*" *Graham v. Workers' Compensation Appeals Board,* 210 Cal.App.3d 499, 508, 258 Cal.Rptr. 376, 382 (1989) ("*Graham*"), emphasis added.

Then, in 1989, in *Graham, supra,* 210 Cal.App.3d 499, 258 Cal.Rptr. 376, the California Court of Appeal considered the questions of whether Section 3333.1 applies to an employer's claim for credit for future benefits (*Graham, supra,* 210 Cal.App.3d at 504-507, 258 Cal.Rptr. at 379-381) and whether Section 3333.1 applies to cases that are settled rather than tried (*Graham, supra,* 210 Cal.Ap.3d at 507-508, 258 Cal.Rptr. at 381-382).

As to the first question, the Court of Appeal held that under subdivision (b) of Section 3333.1, the collateral source is barred from subrogating plaintiff's claim

against the medical malpractice defendant. *Graham, supra,* 210 Cal.App.3d at 505-506, 258 Cal.Rptr. at 380-381. The Court explained that although California Labor Code section 3852 permits employers to subrogate plaintiff's claims against tortfeasors, the conflict in statutes must be resolved in favor of Section 3333.1 because it is the most recently enacted statute. Additionally, the Court explained, this result is consistent with Section 3333.1's legislative history, in which an earlier draft of the legislation preserving subrogation rights that were "expressly provided by statute" was eliminated from the draft legislation before enactment. *Ibid.* Furthermore, the Court held that Section 3333.1 applied equally to an employer's claim for credit. It reached this conclusion because Section 3333.1 expressly applies to any amount "*payable* to the plaintiff." *Graham, supra,* 210 Cal.App.3d at 506, 258 Cal.Rptr. at 380, emphasis in original; Cal. Civ. Code, § 3333.1, subd. (a). The Court further explained that this result was "clearly intended" by the Legislature in enacting Section 3333.1. *Graham, supra,* 210 Cal.App.3d at 506, 258 Cal.Rptr. at 381.[1]

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[1] "Payable" includes the future tense; it is not limited to past, already paid amounts. See *Sacramento County Alliance of Law Enforcement v. County of Sacramento,* 151 Cal.App.4th 1012, 1017, 60 Cal.Rptr.3d 202, 206 (2007) ["courts give the words of the statute their usual, ordinary meaning"]. In *Jarrett v. Allstate Ins. Co.,* 209 Cal.App.2d 804, 26 Cal.Rptr. 231 (1962), the Court of Appeal held that amounts "payable" include future benefits: "The word 'payable' is defined as '[that which] may, can, or should be paid . . . [that] is to be paid . . . .' Certainly an ordinary person would understand by a reading of the clause that the loss there referred to would not

As to the second question, the Court of Appeal held that Section 3333.1 applies to cases that are settled rather than tried. It concluded that such construction was required because it was the interpretation that "most nearly effectuates the purpose of the Legislature." *Graham, supra,* 210 Cal.App.3d at 507, 258 Cal.Rptr. at 381. That is, it interpreted Section 3333.1, not a workers' compensation statute governed by Labor Code section 3202. It was the logical import of Section 3333.1's purpose as part of MICRA, a tort reform statute, which was to "protect California's health care delivery system by reducing the cost of medical malpractice insurance." *Graham, supra,* 210 Cal.App.3d at 508, 258 Cal.Rptr. at 381. It also stated an *additional* reason too – that a more restrictive construction would be contrary to the purposes of both MICRA and the workers' compensations statutes. *Graham, supra,* 210 Cal.App.3d at 508, 258 Cal.Rptr. at 382.

The construction applied to Section 3333.1 in *Barme* and *Graham* has not since changed.

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be the amount of the actual damages caused by the accident, but the amount of such damages which were to be paid[.]" *Jarrett v. Allstate Ins. Co., supra,* 209 Cal.App.2d at 812, 26 Cal.Rptr. at 235.

C. Neither NRS 616A.010 Nor *Law Offices Of Barry Levinson, P.C. v. Milko* Preclude Or Diminish The Effect Of This Court's Reliance On California Case Law Interpreting Section 3333.1

Neither NRS 616A.010 nor the Court's decision in *Milko, supra,* 124 Nev. 355, 184 P.3d 378, preclude or diminish the effect of this Court's reliance on California's decisional authority interpreting and applying Section 3333.1, California's analog to NRS 42.021. Indeed, *Graham* and *Barme* do not interpret any worker's compensation law. Rather, they interpret Section 3333.1.

First, construing Civil Code Section 3333.1 to apply to settlements does not turn on California's statutory directive to liberally construe workers compensation statutes to the benefit of injured employees. That directive applies to interpretation of the provisions of the Labor Code governing workers' compensation, codified in Division 4 (commencing with Labor Code section 3200) and Division 5 (commencing with Labor Code section 6300) of the Labor Code.[2] It does not apply to interpretation of other statues, such as Civil Code section 3333.1. Rather, it turns

[2] California Labor Code section 3202 provides that "This division and Division 5 (commencing with Section 6300) shall be liberally construed by the courts with the purpose of extending their benefits for the protection of persons injured in the course of their employment." Cal. Lab. Code, § 3202. Notably, Section 3333.1 has the effect of reducing benefits to a plaintiff/injured employee, indicating that a liberal construction of workers' compensation statutes to benefit injured employees is not involved in its interpretation.

merely on interpretation of Civil Code section 3333.1, not on any part of the Labor Code.

Barme is devoid of any reference to construction of statute in light of the directive to do so liberally to the benefit of injured employees.

Furthermore, the holding in *Graham, supra,* 210 Cal.App.3d at 506-508, 258 Cal.Rptr. at 381-382, that Section 3333.1 applies to cases that are settled rather than tried, is based on the appellate court's interpretation of Section 3333.1, not a workers compensation statute. *Graham* involved issues of statutory construction, specifically whether Civil Code section 3333.1, which abrogated the collateral source rule in medical malpractice actions, prevented an employer from obtaining credit against future benefits it owed to the injured employee under certain credit provisions of the Labor Code (*Graham, supra,* 210 Cal.App.3d at 504-505, 258 Cal.Rptr. at 379-381) and whether it applied to cases that were settled rather than tried (*Graham, supra,* 210 Cal.App.3d at. 507-508, 258 Cal.Rptr. at 381-382). That case did not involve any public policy considerations concerning the interpretation of a worker's compensation statute or policy.

Indeed, *Graham's* rationale for its holding that Section 3333.1 applies to cases that were settled rather tried does not rely on a liberal interpretation of any Labor Code provision addressing workers' compensation. *Id.* at 507-508. It is not dependent on reliance on the statute that requires liberal construction of workers'

compensation statutes to protect worker's benefits. *Graham's* separate holding that Section 3333.1 applies to credits as well as past benefits is based on the Court's construction and interpretation of Section 3333.1. *Graham, supra,* 210 Cal.App.3d at 504-507, 258 Cal.Rptr. at 379-381.

The decision's reference to Labor Code section 3202 (in the discussion of Section 3333.1's application to credits) and the purpose of the workers' compensation statutes (in the discussion of Section 3333.1's application to settlements) does not prevent reliance on *Graham.* This is because *Graham's* holdings, to the extent that they are even based on a liberal construction of worker's compensation statutes, are *also* based on the interpretation of Section 3333.1, which is not a worker's compensation statute. See *Milko, supra,* 124 Nev. at 364, 184 P.3d at 385 ("[a]lthough in *MacBride* we referred to our former policy of liberally construing workers' compensation laws in favor of the claimant, our interpretation of 'violently' *was also based upon* the plain meaning of the statutes" (emphasis added)).

Third, the cases interpreting Section 3333.1 as applying to settlements pre-date the enactment of NRS 616A.010. There is no indication that the Legislature intended to overturn that precedent. See, e.g., *Milko, supra,* 124 Nev. at 364, 184 P.3d at 385 ("Although the Legislature enacted the neutrality rule 10 years after *MacBride,* at no point has it amended the statutory definitions of 'accident' or

'injury' in a way that alters the *MacBride* interpretations. Therefore, we presume that the Legislature approves of the *MacBride* interpretations, and we conclude that the neutrality rule does not require us to overturn 25 years of precedent by redefining 'accident' and 'injury.'").

Fourth, *Milko* does not preclude reliance on all cases from a jurisdiction in which liberal construction of workers compensation statutes is the law. Rather, it rejects tests of workers' compensation laws derived from jurisdictions in which liberal construction thereof is the law. *Milko, supra*, 124 Nev. at 364, 184 P.3d at 384. Here, the pertinent points of *Barme* and *Graham* do not involve application of any "test," let alone any construction of a California's workers' compensation law.

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CONCLUSION

For the forgoing reasons, and the reasons stated in Appellants' Opening Brief, the Court may and should rely on the California court decisions construing Section 3333.1 as applying to cases that are settled, rather than tried, and it should reverse the order denying Appellants' motion for partial summary judgment and granting respondents Copperpoint Mutual Insurance Holding Company and Copperpoint General Insurance Company's motion to dismiss.

Dated this 26th day of August, 2021. McBRIDE HALL

/s/ Robert C. McBride

_____

ROBERT C. McBRIDE, ESQ.
Nevada Bar No.: 007082
HEATHER S. HALL, ESQ.
Nevada Bar No.: 010608
8329 W. Sunset Road, Suite 260
Las Vegas, Nevada 89113
Attorneys for Respondents
Law Offices of Marshall Silberberg, P.C.
and Kenneth Marshall Silberberg AKA
Marshall Silberberg

NRAP 28.2 CERTIFICATE OF COMPLIANCE

1. I, Robert C. McBride, hereby certify that Respondents LAW Offices of Marshall Silberberg, P.C. and Kenneth Marshall Silberberg aka Marshall Silberberg's Answering Brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

2. I further certify that this Brief complies with the page- or type-volume limitations of NRAP 32(a)(7), excluding the parts of the brief exempted by NRAP 32(a)(7)(C), because it is proportionally spaced, has a typeface of 14 points or more and contains 2,639 words.

3. Finally, I hereby certify that I have read this Brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this Brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules

of Appellate Procedure.

Dated this 26th day of August, 2021. McBRIDE HALL

/s/ Robert C. McBride

ROBERT C. McBRIDE, ESQ.
Nevada Bar No.: 007082
HEATHER S. HALL, ESQ.
Nevada Bar No.: 010608
Attorneys for Respondents
Law Offices of Marshall Silberberg, P.C.
and Kenneth Marshall Silberberg AKA
Marshall Silberberg

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 26th day of August, 2021, service of the foregoing **RESPONDENTS LAW OFFICES OF MARSHALL SILBERBERG, P.C. AND KENNETH MARSHALL SILBERBERG AKA MARSHALL SILBERBERG'S ANSWERING BRIEF** was served electronically to all parties of interest through the Court's CM/ECF system as follows:

Jason R. Maier, Esq.
MAIER GUTIERREZ & ASSOCIATES
8816 Spanish Ridge Avenue
Las Vegas, NV 89148
and
John P. Blumberg
BLUMBERG LAW CORPORATION
444 West Ocean Blvd., Suite 1500
Long Beach, CA 90802-4330
Attorneys for Appellants, Daria Harper and Daniel Wininger

Dalton L. Hooks, JR., Esq.
Sami Randolph, Esq.
HOOKS MENG & CLEMENT
2820 West Charleston Blvd., Suite C-23
Las Vegas, Nevada 89102
Attorneys for Respondents Copperpoint Mutual Insurance Holding Company and Copperpoint General Insurance Company

David A. Clark, Esq.
LIPSON NEILSON PC
9900 Covington Cross Drive, Suite 120
Las Vegas, NV 89144
Attorneys for Respondents Shoop, A Professional law Corporation and Thomas S. Alch

/s/ Candace P. Cullina
An employee of
McBRIDE HALL