IN THE SUPREME COURT OF THE STATE OF NEVADA

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

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, an individual,

Respondents.

Case No. 82158

APPELLANTS' RESPONSE TO RESPONDENTS' MOTION FOR JUDICIAL NOTICE AND SEPARATE MOTION FOR JUDICIAL NOTICE

Appellants, Daria Harper and Daniel Winninger, by and through their attorneys, MAIER GUTIERREZ & ASSOCIATES and BLUMBERG LAW CORPORATION, file this response to Respondents' motion that this Court take judicial notice of the unpublished memorandum opinion of the Arizona Court of Appeals Opinion in *Harper v. Indus. Comm'n of Ariz.*, No. 1 CA-IC 21-0010, 2021 WL 6122141 at 1–3, (Ariz. Ct. App. Dec. 28, 2021.

Pursuant to NRAP 27(a)(3)(B), Appellants move this Court to take judicial notice of the Petition for Review by the Arizona Supreme Court of the memorandum

opinion of the Arizona Court of Appeals, filed January 27, 2021.

I.
INTRODUCTION

In Respondents' motion that this Court take judicial notice of the memorandum opinion of the Arizona Court of Appeals, they correctly set forth the law and standards for this Court to consider taking judicial notice; therefore, those authorities will not be repeated here. However, Respondents filed their motion before the opinion of the Arizona Court of Appeals became final, and a Petition for Review was timely filed in the Arizona Supreme Court, which is currently pending. Therefore, in response to Respondents' motion, Appellants move this Court to take judicial notice of the Petition for Review.

II.
RELEVANT FACTS

Attached hereto as Exhibit "A" is the Petition for Review filed by Daria Harper in the Supreme Court of Arizona. Attached hereto as Exhibit "B" is the proof of filing the Petition for Review. Note that there is a typographical error in the case name, *i.e.*, Appellant's attorney is identified rather than appellant. Attached as Exhibit "C" are pages from the Website of the Arizona Supreme Court showing the filing.

III.
ARGUMENT

A. The opinion is not final.

An opinion of the Arizona Court of Appeals is not final until the time for filing a Petition for Review has expired, or the Arizona Supreme Court has denied review. Arizona Rule of Civil Appellate Procedure 23 provides that "(A) Unless any party files a timely motion for reconsideration, a party must file a petition for review within 30 days after entry of the Court of Appeals' decision." The opinion of the Arizona Court of Appeals was rendered on December 28, 2021. The petition for review was timely filed on January 27, 2022.

A decision of the Arizona Court of Appeals becomes final only when that court issues its mandate. Arizona Rule of Civil Appellate Procedure 24 provides:

> (a) The mandate is the final order of the appellate court, which may command another appellate court, superior court or agency to take further proceedings or to enter a certain disposition of a case. An appellate court retains jurisdiction of an appeal until it issues the mandate. (b) An appellate court will issue the mandate in an appeal as follows: (1) If no party files a petition for review, the Court of Appeals clerk must issue the mandate when the time for the filing a petition expires. (2) If a party filed a petition for review, the Court of Appeals

clerk must issue the mandate 15 days after the receipt by the clerk of a Supreme Court order denying the petition for review.

Accordingly, because the Arizona Court of Appeals did not issue its mandate, and the Appellant in that case timely filed her Petition for Review, the opinion of the Court of Appeal is not final and not citable.

B. Citation to the opinion is not permitted.

Further, the memorandum opinion cannot be cited as in the Nevada case at bar. Arizona Rule of Civil Appellate Procedure 28(c) provides as follows:

> Memorandum decisions shall not be regarded as precedent nor cited in any court except for (1) the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case, or (2) informing the appellate court of other memorandum decisions so that the court can decide whether to publish an opinion, grant a motion for reconsideration, or grant a petition for review.

In *Southwest Airlines Co. v. Arizona Dept. of Revenue*, 197 Ariz. 475, 478, 4 P.3d 1018, 1021 (Ariz. Ct. App. 2000), the Arizona Court of Appeals was asked to take judicial notice of memorandum opinions that had addressed issues similar to one pending before that court. The Court held that it could not take judicial notice pursuant to Rule 28(c) because none of the predicate requirements existed.

Similarly, in the instant case, none of the predicate requirements exist. Although Respondents argue that the decision of the Arizona Court of Appeals would be the law of the case, however, that flies in the face of the definition of "law of the case." In *Dancing Sunshines Lounge v. Industrial Com'n of Arizona* 149 Ariz. 480, 482, 720 P.2d 81, 83 (1986), the Arizona Supreme Court held:

> The term "law of the case" refers to a legal doctrine providing that the decision of a court in a case is the law of that case on the issues decided throughout all subsequent proceedings in both the trial and appellate courts, provided the facts, issues and evidence are substantially the same as those upon which the first decision rested.

The key words are "of that case" which refers to the specific case and parties. In other words, it is the law of the Arizona case, not the Nevada case.

C. The Arizona opinion did not contain a conflict of laws analysis.

In its memorandum opinion, the Arizona Court of Appeals determined that the law of Arizona and not the law of Nevada applied to that controversy. Respondents apparently are informing this Court that it should not make a determination of whether Nevada law applies and should defer to the Arizona Court of Appeals. They cite no authority for such proposition, and a perusal of the memorandum opinion shows that the Arizona Court of Appeals did not perform a conflict of laws analysis. As such, there is no precedential value.

IV.
CONCLUSION

The memorandum opinion of the Arizona Court of Appeals cannot be cited. But even if it could be cited, the absence of a conflict of laws analysis makes the memorandum opinion of no import. And finally, because the Arizona case is pending a grant or denial of review in the Arizona Supreme Court, the opinion of the Arizona Court of Appeals is not final and cannot be referred to. Therefore, Appellants request that this court deny Respondents' motion that it take judicial notice of the memorandum opinion of the Arizona Court of Appeals.

DATED this 1st day of February, 2022.

Respectfully submitted,

/s/ Jason R. Maier

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DECLARATION OF JOHN P. BLUMBERG IN SUPPORT OF APPELLANTS' RESPONSE TO RESPONDENTS' MOTION FOR JUDICIAL NOTICE AND SEPARATE MOTION FOR JUDICIAL NOTICE

I, JOHN P. BLUMBERG, declare that I represent appellants Daria Harper and Daniel Wininger and, based on my personal knowledge, can and would testify to the truth of the following facts:

1. I am an attorney duly licensed to practice law in California and admitted *pro hac vice* to represent plaintiffs/appellants in this lawsuit. I am knowledgeable of the facts contained herein and am competent to testify thereto.

2. I am over the age of eighteen and I have personal knowledge of all matters set forth herein. If called to do so, I would competently and truthfully testify to all matters set forth herein.

3. Attached as **Exhibit A** is a true copy of the Petition for Review filed by Daria Harper in the Arizona Supreme Court.

4. Attached as **Exhibit B** is a true copy of the proof of filing the Petition for Review in the Arizona Supreme Court. The document incorrectly identifies Mr. Alan Schiffman, attorney for appellant as the appellant.

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5. Attached as **Exhibit C** is a true copy of a page from the website of the Arizona Supreme Court evidencing the timely filing of the Petition for Review in the Arizona Supreme Court.

I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

DATED this 1st day of February, 2022.

/s/ John P. Blumberg
JOHN P. BLUMBERG, ESQ.

CERTIFICATE OF SERVICE

I certify that on the 1st day of February, 2022, this document was electronically filed with the Nevada Supreme Court. Electronic service of the foregoing: **APPELLANTS' RESPONSE TO RESPONDENTS' MOTION FOR JUDICIAL NOTICE AND SEPARATE MOTION FOR JUDICIAL NOTICE** shall be made in accordance with the Master Service List as follows:

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An Employee of MAIER GUTIERREZ & ASSOCIATES

EXHIBIT “A”

SUPREME COURT
STATE OF ARIZONA

DARIA HARPER, Petitioner Employee, v. THE INDUSTRIAL COMMISSION OF ARIZONA, Respondent. ISLANDER RV RESORT, Respondent Employer, COPPERPOINT GENERAL INSURANCE COMPANY, Respondent Carrier.	**Case No. _____** Arizona Court of Appeals Case No. 1 CA-IC 21-0010 ICA Claim No.: 20142520533

PETITION FOR REVIEW

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Introduction

This matter relates to an Arizona Workers' Compensation claim, filed by Daria Harper ("Harper") an Arizona resident, employed by an Arizona employer. Harper had the misfortune of being the victim of medical malpractice in Nevada. The Court of Appeals decision[1] failed to engage in any meaningful analysis of the choice of law question presented by this case. Its analysis began and ended with Harper choosing to file her workers' compensation claim in Arizona. It failed to consider the significance of the following:

1. Harper could only file her workers' compensation claim in Arizona.
2. Harper's medical malpractice claim (MMC) arose out of a subsequent event that could only be presented under Nevada law.
3. That Nevada law precludes enforcement of a workers' compensation carrier lien against a medical malpractice settlement.[2]

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[1] Exhibit 1.

[2] No Nevada appellate court has ruled on whether its medical malpractice collateral source rule set forth in N.R.S. § 42.021 applies to pre-trial settlements. If a tort matter proceeds to trial and a defendant introduces evidence of payment of damages from collateral sources in a medical malpractice action, the statute precludes a workers' compensation carrier from enforcing a lien. Harper has an appeal pending before the Nevada Supreme Court to answer whether N.R.S. § 42.021 applies to a pretrial settlement. Harper asks that this court take judicial notice that oral argument is scheduled for February 17, 2022. (Exhibit 2.) Harper contends that N.R.S. § 42.021 applies equally to recoveries made as a result of trials and settlements.

Issue Decided By The Court Of Appeals Presented for Review

Harper's decision to file her workers' compensation claim in Arizona is the sole criteria for determining whether Arizona law applies to not only the creation, but the reach/enforcement of the workers' compensation carrier lien established by A.R.S. § 23-1023 ("the Lien").

Additional Issues Presented To, But Not Decided By, The Court Of Appeals That The Supreme Court Should Decide

1. Does the fact that CopperPoint is asserting that its lien extends to Harper's third party medical malpractice claim presented in Nevada, which claim was based upon the conduct of Nevada medical providers, implicate choice of law issues that must be addressed where the laws of Nevada dealing with medical malpractice claims are based upon a recovery system that is diametrically opposite the Arizona system upon which Arizona's workers' compensation lien law, A.R.S. § 23-1023, is premised?

2. If Nevada law must be considered, does N.R.S. § 42.021 apply to pretrial settlements?

3. Do choice of law principles require the application of Nevada law to determine the reach or enforceability of the Lien?

Statement of Material Facts

Harper, an Arizona resident, sustained a compensable workers' compensation knee injury in Arizona while employed by an Arizona employer on August 11, 2014. CopperPoint is the responsible workers' compensation carrier and has paid benefits. HF00179, 02243. Harper underwent two surgeries in Arizona for the injury. HF02266. Following the second surgery she experienced severe symptoms that required emergency transport to a hospital in Arizona, but because of the severity of her condition she then was transferred to a hospital in Nevada. HF02266; 02291-92. While at the Nevada hospital Harper was rendered quadriplegic. HF02292.

Harper subsequently retained counsel to investigate and present medical malpractice/negligence claims. HF02281. She thereafter filed a medical malpractice lawsuit against multiple Nevada defendants for conduct and omissions that occurred in Nevada. HF02243, 02267; 00346-53. No claim was brought against any Arizona medical providers and none of the conduct that served as a basis of the lawsuit was alleged to have occurred in Arizona. HF00346-47.

A mediation was held on May 2, 2018, with respect to Harper's and her husband's MMC against the Nevada defendants. Settlements were reached totaling $6,250,000. Attorney Marshall Silberberg advised Harper that CopperPoint did not have a valid and enforceable lien. HF02285.

Although the settlement agreements contained language that Harper would pay liens, including workers' compensation liens, which possibly included CopperPoint's lien (see ALJ decision at HF02244); the releases specifically provided that the agreement to pay the liens applied to liens "that are permitted by law." HF00062; HF00075 (incorporating statements into ALJ Findings 7 and 8). When Silberberg reviewed the releases with Harper he again told her that CopperPoint did not have a lien that could reach her settlement. HF02289.

In addition, the release signed by Harper with Valley Hospital Residency Program and its doctors specifically implicated N.R.S. § 42.021 by stating:

> 10. COLLATERAL SOURCE EVIDENCE, Pursuant to N.R.S. § 42.021, and as allowed by the Court in the above described action, Defendants introduced evidence of Plaintiffs' health insurance for payment of Plaintiffs' past medical expenses. Defendants intended to argue that Plaintiffs were not entitled to an award of past medical payments by reason of the payment by Plaintiffs' insurer. The parties agree and acknowledge by reason of the admission of collateral source evidence, there was a substantial likelihood the jury would not have awarded my damages for past medical expenses or related costs.

HF00083.

On July 2, 2018, following the settlement, Silberberg advised CopperPoint that it could not enforce its Lien against Harper's medical malpractice claim because the injury had occurred in Nevada and the claim was filed, litigated, and resolved there. HF00249-50.

On October 30, 2019, CopperPoint issued a Notice of Claim Status asserting its lien under A.R.S. § 23-1023 and seeking other remedies. Harper timely filed a Request for Hearing. HF02243. The ALJ then issued his decision finding that CopperPoint was entitled to enforce its lien against the settlement proceeds, HF02243-48, which decision he affirmed on review. HF02255-57. In addition, the ALJ denied Harper's motion to hold the proceedings in abeyance pending a final appellate court decision in Nevada concerning whether N.R.S. § 42.021 applies to pretrial settlements. *Id.*

Standard of Review

Questions of law in workers' compensation matters are reviewed de novo by this Court. *Young v. Indus. Comm'n*, 204 Ariz. 267, 270 ¶ 14 (App. 2003).

Reasons to Grant the Petition

Undecided Legal Issue: No Arizona decision has resolved the question of the reach of ARS § 23-1023 to a third-party claim arising out of liability for a post-injury event where another state's law controls damages, which is substantively different from Arizona's third-party recovery system.

Important Issues Of Law Have Been Incorrectly Decided: The Court of Appeals decided that because Harper chose to file her workers' compensation in Arizona, Arizona law controlled the workers' compensation lien. This determination is both too simplistic and wrong. Choice of law principles do not rest

solely on a single factor. A proper choice-of-law analysis should conclude that Nevada law controls if the ARS § 23-1023 lien attaches to her medical malpractice settlement.

Arizona Courts should not be guessing at interpretations of Nevada law. The Court of Appeals should have awaited the decision of Nevada courts on this issue, rather than dodging the more complicated choice of law analysis.

A. The fact that Harper filed her workers' compensation claim in Arizona should not end the inquiry as to what law controls its right to enforce its lien concerning Harper's Nevada MMC.

The Court of Appeals recognized that Arizona's Workers' Compensation Act gives an insurer a lien to recover the benefits paid when a third party compensates the worker for damages resulting from that injury to avoid double recovery. A.R.S. § 23-1023(D); *see also Martinez v. Indus. Comm'n,* 168 Ariz. 307, 310 (App. 1991). The Court of Appeals held that Arizona law applies to a workers' compensation claim filed in Arizona and, therefore, the lien is enforceable. *Quiles v. Heflin Steel Supply Co.,* 145 Ariz. 73, 77, 699 P.2d 1304 (App. 1985); *see also Jackson v. Eagle KMC L.L.C.,* 245 Ariz. 544 (2019) (affirming *Quiles).* But what happens when an Arizona claimant is entitled to third-party recovery in a different state that deals with the double-recovery issue differently? Arizona's statutory scheme allows an injured worker to recover all her damages from a third party but enforces the lien to avoid double recovery.

Nevada's statutory scheme prevents double-recovery by introducing collateral source evidence in the medical malpractice claim. Its law provides that a defendant medical provider may introduce evidence that collateral source benefits, i.e., workers' compensation benefits, were paid. If collateral source evidence is introduced, the lienholder is not entitled to payment of its lien. N.R.S. § 42.021. States, including Nevada, adopted this statutory scheme to reduce MMC recoveries to drive down medical malpractice premiums.[3] The intent was to preclude the same double recovery by the injured worker that A.R.S. § 23-1023(D) was designed to address but benefit the medical providers rather than lienholders who paid the collateral benefits.

The decisions in *Quiles* and *Jackson* were premised upon RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 185 ("§ 185").[4] But the facts of these cases are different than the facts in this case. The differences reflect why they should not be determinative of this matter.

Mr. Quiles was a truck driver injured while delivering a load for his California employer to Arizona. He intervened in a negligence claim his workers' compensation carrier brought against the Arizona corporation that allegedly caused his injuries. The court applied § 185 to hold that California law controlled the

[3] *See Graham v. Workers' Comp. Appeals Bd.*, 258 Cal. Rptr. 376 (App. 1989); *see also* § 3.C, *infra.*

[4] All references to the RESTATEMENT will be identified by section number.

rights between Quiles, a California resident, his California employer, and the workers' compensation carrier that paid benefits under California law. The court permitted Quiles to intervene and present his claim in Arizona because California law permitted such intervention. The court noted that Arizona has adopted a policy of allowing a worker injured in a multistate context to choose the state to seek workers' compensation. *Quiles*, 145 Ariz. at 77-78. Though Arizona's workers' compensation law would have precluded Quiles from presenting his matter, he was permitted to do so since he had filed his workers' compensation claim in California.

Jackson similarly involved an injured truck driver in a multistate context. The Court applied § 185 and Nebraska law to hold that the injured worker could maintain her third-party action against an Arizona defendant and that the provisions of Arizona's workers' compensation act that would assign the claim to the carrier did not apply. The Court found that A.R.S. § 23-904(C) had not abrogated the rule established by *Quiles*. Instead, because Jackson had filed her workers' compensation claim in Nebraska, even though she could have filed it in Arizona, Nebraska law would apply to determine if an assignment of the claim was required.

Harper's case presents an entirely different issue. This case does not involve an injured worker engaged in multistate activities who "chose" in which state to

file her workers' compensation claim. Harper was an Arizona resident working for an Arizona employer injured in Arizona. She had no choice but to file her claim in Arizona. *See* A.R.S. § 23-904(A).

Harper had no basis to pursue her MMC, arising out of events separate from her on-the-job injury, anywhere but Nevada. Nevada law controlled liability, evidence and damages. *See* RESTATEMENT § 6 (Choice of Law Principles), § 145 (General Principle – most significant relationship test), § 146 (Personal Injuries) and § 171 (Damages). Read together, these sections all dictate the application of Nevada law. Other than the fact that Harper lived in Arizona, Nevada had the most significant relationship to the MMC because the negligent medical care was rendered in Nevada by providers licensed and residing in Nevada.[5] Therefore, neither the *Quiles* nor *Jackson* decisions should end the inquiry in this matter.

B. Choice of Law Principles Require Consideration of Nevada Law in Deciding The Enforceability/Reach of The Lien.

Harper recognizes that the general rule established by § 185 finds that the state's statutory scheme that pays the workers' compensation benefits determines what interest the benefit payor has in a third-party tort recovery for the same injury.

[5] Arizona and Nevada follow the RESTATEMENT for tort matters. *See Jackson v. Chandler*, 204 Ariz. 135, 137 (2003); *General Motors Corp. v. Eighth Judicial Dist. Ct. ex rel. Clark Cnty*., 134 P.3d 111, 116 (Nev. 2006). Thus, both states rely on the same factors in determining jurisdiction of tort claims and whether a lien is enforceable against a third-party recovery resulting from a medical malpractice claim.

Comment (a) describes the rationale for this rule. The intent of § 185 is to have it apply when the payer of workers' compensation benefits asserts rights to the injured worker's recovery against the tortfeasor **on account of the same injury**. This section does not direct what state law applies when a payor asserts rights against a ***subsequent injury***. It also does not address when the law of the payor's state directs that another state's law should apply under the application of its own choice of law principles. While § 185 does not address the subsequent injury, the most significant relationship test established by §§ 145, 146 and 171 should apply and the *Quiles* and *Jackson* decisions do not control this case.

In a more analogous situation, Montana found that § 185 was inapplicable. *Oberson v. Federated Mut. Ins. Co.*, 126 P.3d 459, 462-63 (Mont. 2005). *Oberson* arose from an injury to a Michigan resident (Brian Musselman), who suffered an incapacitating head injury working in Montana for his Michigan-based employer. He filed his worker's compensation claim in Michigan but filed his personal injury suit against the third-party tortfeasors in Montana. The personal injury claim resulted in a $11,296,800 judgment in his favor. *Id.* at 2-3. The workers' compensation insurer, Federated Mutual Insurance Company (Federated) filed a subrogation claim against Musselman in Michigan's workers' compensation court. *Id.* at 3. In response, Oberson, Musselman's conservator, filed a declaratory action in Montana contending that Montana law barred Federated's subrogation claim,

and Montana law governed the enforceability of Federated's subrogation interest under a tort conflict of laws analysis. *Id.* Federated countered with two alternate arguments. First, citing § 185, it argued that the law of Michigan should apply since the worker's compensation claim was processed there and Michigan would allow enforcement of the subrogation claim. Second, Federated argued that the Montana courts lacked jurisdiction to determine the issue.

The Montana Supreme Court rejected the application of § 185 and held that the matter should be analyzed under the most significant relationship test outlined in § 145. *Oberson*, 126 P.3d at ¶13. The court found that the state where the workers' compensation benefits were paid was "of no legal consequence" because the money sought by Federated "flowed directly from Musselman's injury in Montana" where Montana law dictated Musselman's recovery of damages. *Id.* Thus the court rejected application of § 185. *Id.*

Here, Nevada has the most significant relationship to Harper's MMC. Thus, this Court must determine its laws and apply them if they conflict with Arizona's law, consistent with §§ 145, 146 and 171. Choice of law issues exist in this matter because if the lien is found to reach Harper's third-party recovery, it will receive payment of its lien that she was not permitted to recover under Nevada law.[6]

[6] Harper acknowledges that the Lien would be enforceable if she had a medical malpractice claim against Arizona providers or in any other state that does not have a collateral source rule like Nevada's.

Under Nevada's collateral source rule, neither the worker's compensation lien, nor a credit against future compensation is applicable if the medical malpractice matter proceeds to trial and the doctor-defendant introduces evidence of collateral source payments. N.R.S. § 42.021. Because the laws of Arizona and Nevada[7] yield diametrically opposite results, a choice of law analysis is required. *Pounders v. Enserch E&C, Inc.*, 232 Ariz. 352 (2013); *see also Tri-County Equip. & Leasing, LLC v. Klinke*, 286 P.3d 593, 595 (Nev. 2012).

C. Nevada Law Prohibits A Collateral Source From Asserting A Lien Or Credit To Pretrial Settlements

Nevada law provides defendant medical providers the protection of N.R.S. § 42.021 to reduce a plaintiff's recovery based on collateral source payments. It expressly prohibits a lien or future credit by a collateral source payor if the tort matter proceeds to trial and a defendant introduces evidence of the collateral source payments. Nevada's law takes a different path than Arizona to accomplish the same goal – avoiding a double recovery.[8] Nevada's statute 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 . . . **worker's compensation act**, . . .

[7] Note 2, *supra*.

[8] Arizona's collateral source rule set forth in A.R.S. § 12-565C specifically allows statutory liens such as those established by A.R.S. §23-1023 to be enforced.

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.**"

N.R.S. § 42.021 (emphasis added). "[S]ection 2 protects plaintiffs by prohibiting collateral sources from recovering against prevailing plaintiffs." *McCrosky v. CA.R.S. on Tahoe Reg. Med. Ctr.*, 408 P.3d 149, 155 (Nev. 2017). It is undisputed that N.R.S. § 42.021 applies to matters which proceed to trial. The question that Nevada courts have not specifically addressed is whether it applies to pretrial settlements.

1. Harper's settlement agreement acknowledges that collateral source payments would be introduced at trial mandating application of N.R.S. § 42.021 and barring CopperPoint from reaching her settlement or claiming a credit.

Paragraph 10 of the settlement agreement between Harper, Valley Hospital Residency Program, and others, reflects that the parties contemplated introducing evidence at trial reflecting the collateral source payments made by CopperPoint. (HF 00083.) It is important to note that N.R.S. § 42.021 does not require a case to proceed to verdict or judgment; it only requires that the collateral source evidence be "introduced" to have the effect of barring a collateral source lien.

An agreement that reflects a defendant's intent to introduce evidence of collateral source payments should have the same effect as if the matter actually proceeded to trial and evidence of the collateral source payments was introduced

and the matter then settled. The logic is clear: if the reach of a lien against a malpractice claim is prohibited by its introduction at trial, it should be similarly prohibited by reference to it in the settlement documents.

2. Not applying N.R.S. § 42.021 to settlements results in an absurd statutory construction.

The Nevada statute resulted from a 2004 ballot initiative. *McCrosky,* 408 P.3d at 155. In Nevada, interpreting a law passed by a voter initiative requires determining the voters' intent and "to fashion an interpretation consistent with that objective." *Guinn v. Nevada State Legislature*, 76 P.3d 22, 29 (Nev. 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. Ct. Clark Cnty.*, 1011, 363 P.3d 1168, 1171, 1173 (Nev. 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.'" *Id.* 363 P.3d at 1173, n.1. (quoting Patrick C. McDonnell, *Nevada's Medical Malpractice Damages Cap: One for All Heirs or One for Each*, 13 Nev. L.J. 983, 1009 (2013) ("McDonnell")). Nothing in the materials related to the initiative expressed that the prohibition against recovering collateral source was limited to only cases that proceeded to trial. The materials related to the initiative noted it "prohibit third parties who provided benefits as a result of medical malpractice from recovering such benefits from a negligent provider of health care

. . . . ” 2004 Ballot Questions at 14. 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.” *Id.* Accordingly, the ballot material indicated that third parties that provided benefits because of medical malpractice 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 suggestion to the voters that it would not apply to settlements.

Any different result would force the parties into a sham trial to get to the stage where a defendant introduces evidence of collateral source payments, then settle. Requiring such an undertaking would be an absurdity and a waste of judicial time and resources. “Statutory construction should always avoid an absurd result.” *Clark County Sheriff v. Burcham*, 198 P.3d 326, 329 (Nev. 2008). This Court also recognizes that absurd statutory construction must be remedied by construing the language in a reasonable matter. *City of Phoenix v. Superior Court*, 101 Ariz. 265, 267 (1966).

3. The language of N.R.S. § 42.021 is nearly identical to a California statute that holds the prohibition against liens or future credits applies to cases that settle.

The language of N.R.S. § 42.021(2) is nearly identical to California Civil Code § 3333.1(b) (The difference being syntax, not substance.) California Civil Code § 3333.1 states in relevant part:

> (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 … worker's compensation act….
>
> (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.

Enacted in 1975, California courts have interpreted it to preclude enforcement of a lien or future credit if the medical malpractice action resolves by settlement before trial. *Barme v. Wood*, 689 P.2d 446 (Cal. 1984) (addressing settlement); *Graham v. Workers' Comp. Appeals Bd.*, 258 Cal. Rptr. 376 (App. 1989) (prohibiting future credit).

N.R.S. § 42.021 should be interpreted in the same manner as the California Courts 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 earlier, *i.e.*, charade trials, would become the mandatory method of settling medical malpractice cases. Nevada looks to the interpretation of California law where statutes are similarly worded. *Shapiro v. Welt* 389 P.3d 262, 268 (Nev. 2017); *see also Massey v. Litton*, 669 P.2d 248, 250 (Nev. 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*, 164 P.2d 743, 746 (Nev. 1945) (adopting California law.)

If this Court determines that N.R.S. § 42.021 does not apply to settlements, it need not go further; under both the laws of Nevada and Arizona CopperPoint would have a lien and be entitled to a future credit to the extent the settlement proceeds, after attorney's fees, exceeds the lien. If this Court agrees that N.R.S. § 42.021 should be interpreted to preclude a lien or future credit on Harper's settlement proceeds of Harper's MMC this Court's analysis is done.

Conclusion

Harper does not dispute that CopperPoint has a lien. If she had been able to present and obtain a recovery against Arizona medical providers, it would have reached that recovery. The lien would also have applied to any third-party claim arising out of her initial injury. Considering the restrictions imposed by Nevada's

medical malpractice statute and its collateral source rule, the lien should not extend to her Nevada medical malpractice claim. Otherwise, Harper's recovery is diminished by both the reduced damages paid by medical providers who know they are not going to be held responsible to pay for the collateral benefits received **and** then by having to repay those collateral benefits from the reduced recovery. This is precisely what Nevada's law was intended to avoid and which the choice of law rule should preclude.

DATED this 27th day of January, 2022.

SCHIFFMAN LAW OFFICE, P.C.

/s/ Alan M. Schiffman
Counsel for Plaintiff/Appellant/Petitioner

Certificate of Compliance

This document: (1) uses Times New Roman 14-point proportionately spaced typeface for text *and* footnotes; (2) contains 4,055 words (by computer count); and (3) averages less than 280 words per page, including footnotes and quotations.

Certificate of Service

The undersigned lawyer certifies that he electronically filed this document with the Clerk of the Arizona Supreme Court and electronically delivered copies of it to the following:

- Mr. Kirk A. Barberich, Lundmark, Barberich, La Mont & Slavin, P.C., 333 East Osborn Road, Suite 150, Phoenix, AZ 85012
- Gaetano Testini, Chief Legal Counsel, Industrial Commission of Arizona-Legal Dept, 800 West Washington, Suite 303, Phoenix, AZ 85007

/s/ Alan M. Schiffman

EXHIBIT 1

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

DARIA HARPER, *Petitioner*,

v.

THE INDUSTRIAL COMMISSION OF ARIZONA, *Respondent,*

ISLANDER RV RESORT, *Respondent Employer*,

COPPERPOINT GENERAL INSURANCE COMPANY, *Respondent Carrier*.

No. 1 CA-IC 21-0010
FILED 12-28-2021

Special Action - Industrial Commission
ICA Claim No. 20142-520533
Carrier Claim No. 14G01532
The Honorable Kenneth J. Hill, Administrative Law Judge

AFFIRMED

COUNSEL

Schiffman Law Office PC, Phoenix
By Alan M. Schiffman
Counsel for Petitioner Employee

Industrial Commission of Arizona, Phoenix
By Gaetano J. Testini
Counsel for Respondent

Lundmark Barberich LaMont & Slavin PC, Phoenix
By Kirk A. Barberich
Counsel for Respondent Employer and Carrier

MEMORANDUM DECISION

Judge Jennifer M. Perkins delivered the decision of the Court, in which Presiding Judge Cynthia J. Bailey and Judge Maria Elena Cruz joined.

P E R K I N S, Judge:

¶1 Daria Harper appeals the Industrial Commission of Arizona's ("ICA") award declaring a worker's compensation lien enforceable against third-party recovery proceeds. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 Harper injured her knee in 2014 while working for Islander RV Resort. CopperPoint General Insurance Company accepted her worker's compensation claim, and she received benefits. Harper's treatment included several surgeries. Complications from her second surgery led to emergency surgery in June 2015 at Valley Hospital in Las Vegas, Nevada. Negligence from her treatment in Nevada caused her to become a quadriplegic.

¶3 In August 2015, CopperPoint filed a Notice of Claim Status under A.R.S. § 23-1023(D), asserting its right to a lien on any proceeds Harper recovered from a third party for negligence. Harper did not respond to that notice. In 2016, she filed a medical malpractice lawsuit in Nevada against Valley Hospital and the doctors who treated her. Harper settled the matter in 2018 for $6.25 million, including about $1.25 million in attorneys' fees and costs. In October 2019, CopperPoint issued a second lien notice, asserting its statutory lien against the proceeds from the Nevada lawsuit ("Proceeds"). Harper filed a timely hearing request, claiming CopperPoint's lien could not reach the Proceeds.

¶4 In May 2020, CopperPoint issued a notice asserting a lien of about $3.2 million against future benefits owed to Harper and suspending benefit payments to Harper until she paid the lien in full. Harper filed a declaratory judgment action in Nevada, claiming that Nevada law precluded CopperPoint's lien from reaching the Proceeds. The Nevada trial court dismissed the action in October 2020, concluding Arizona law applied

to the lien and Nevada law did not preclude CopperPoint from enforcing it. Harper appealed that ruling.

¶5 Before the Nevada trial court issued its ruling, the ICA held a hearing on Harper's challenge to CopperPoint's October 2019 lien notice. Harper did not dispute the lien's validity, but she argued Nevada law governed the lien and prohibited CopperPoint from reaching the Proceeds. CopperPoint argued Harper could not challenge the lien because she failed to request a hearing when CopperPoint issued the 2015 lien notice. CopperPoint also contended Arizona law governed the lien and permitted enforcement against third-party recovery proceeds.

¶6 The Administrative Law Judge ("ALJ") determined Harper could challenge the lien because "CopperPoint effectively reopened the issue when it issued the [October 2019 lien notice], which [Harper] timely protested." After concluding Arizona law governed the lien's enforceability, the ALJ declared CopperPoint's lien enforceable against the Proceeds under A.R.S. § 23-1023(D). Harper requested administrative review, and the ALJ affirmed his ruling. This special action review followed. We have jurisdiction to review an ICA award under A.R.S. §§ 12-120.21(A)(2), 23-951(A) and Arizona Rule of Procedure for Special Actions 10.

DISCUSSION

¶7 We defer to the ALJ's factual findings but review questions of law *de novo*. *Young v. Indus. Comm'n*, 204 Ariz. 267, 270, ¶ 14 (App. 2003).

¶8 An Arizona worker injured on the job may sue a third party for compensation when the third party's negligence contributed to the worker's injury. But to the extent the worker accepts workers' compensation benefits, Arizona law creates a lien in favor of the workers' compensation insurance carrier for recovery of the amount of benefits paid when a third party also compensates the worker for her injuries. A.R.S. § 23-1023(D).

¶9 These liens "require the third party to pay what he would normally pay if there were no workers' compensation, to reimburse the carrier for its compensation expenditure, and to allow the compensation beneficiary to enjoy the excess of the damage recovery over compensation." *Mannel v. Indus. Comm'n*, 142 Ariz. 153, 155 (App. 1984). And § 23-1023(D) "furthers the general policy of preventing an employee from obtaining the double recovery that would result if he received both compensation

benefits and damages from a third party." *Martinez v. Indus. Comm'n*, 168 Ariz. 307, 310 (App. 1991).

¶10 Both parties assert legal error in the ICA's Award. CopperPoint contends Harper cannot challenge the lien because she failed to protest the initial lien notice. But CopperPoint disregards the lien notice it issued in October 2019. Harper timely protested the October 2019 lien notice, and she challenged the lien's applicability to the Proceeds. CopperPoint's October 2019 lien notice informed Harper of her right to request a hearing if she disagreed with it. *See* A.R.S. § 23-947(A) (allowing 90 days to request a hearing after a party issues a lien notice). The ALJ did not err in allowing Harper to challenge the lien's applicability to the Proceeds.

¶11 Harper contends: (1) Nevada law applies to the enforcement of CopperPoint's lien; and (2) Nevada law prohibits such enforcement against the Proceeds.

¶12 When an employee receives workers' compensation, the law of the state of compensation governs third-party actions, including lien subrogation. *Quiles v. Heflin Steel Supply Co.*, 145 Ariz. 73, 77 (App. 1985). In *Quiles*, a California company's employee sustained an injury while working in Arizona. The employee filed a workers' compensation claim in California and received benefits from the insurance carrier. The insurance carrier later sued a third party for negligently injuring the employee in Arizona, seeking recovery for benefits paid to the employee. We held that California's compensation law applied, rendering the insurance carrier a proper party plaintiff. *Id*. at 78; *see also Cofer v. Indus. Comm'n*, 24 Ariz. App. 357, 358 (App. 1975) (injured workers choose where to file their claims). The Arizona Supreme Court approved our *Quiles* holding in *Jackson v. Eagle KMC L.L.C.*, 245 Ariz. 544 (2019).

¶13 Harper chose to file her claim in Arizona. Arizona law thus applies and permits CopperPoint's enforcement of its lien against the Proceeds.

CONCLUSION

¶14 We affirm.

EXHIBIT 2

IN THE SUPREME COURT OF THE STATE OF NEVADA

DARIA HARPER, AN INDIVIDUAL; AND DANIEL WININGER, AN INDIVIDUAL,
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, A/K/A MARSHALL SILBERBERG, A/K/A K. MARSHALL SILBERBERG, AN INDIVIDUAL,
Respondents.

No. 82158

FILED

JAN 05 2022

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
DEPUTY CLERK

ORDER SCHEDULING ORAL ARGUMENT

This court has determined that oral argument would be of assistance in resolving the issues presented in this matter. Accordingly, oral argument is scheduled for February 17, 2022, at 10:00 a.m., in Las Vegas. The argument shall be limited to 30 minutes.

It is so ORDERED.

_____, J.
Hardesty

cc: Maier Gutierrez & Associates
Blumberg Law Corporation
Hooks Meng & Clement
Lipson Neilson P.C.
McBride Hall
Kjar, McKenna & Stockalper LLP

EXHIBIT “B”

ATTACHMENT COVER PAGE

ARIZONA SUPREME COURT

STREET ADDRESS: 1501 W. Washington

MAILING ADDRESS:

CITY AND ZIP CODE: Phoenix, AZ 85007

BRANCH NAME: Arizona Supreme Court

WEBSITE: www.azcourts.gov/clerkofcourt

ATTACHMENT NAME: **PETITION - Petition for Review to Arizona Supreme Court: Petition For Review to Arizona Supreme Court**

(ENDORSED)
ELECTRONICALLY FILED

Arizona Supreme Court
on **Jan 27, 2022 11:00 PM MST**

CLERK OF THE COURT
Tracie K. Lindeman

By Deputy Clerk: *JN*

CASE NAME: **Mr Alan Schiffman vs. Industrial Commission of Arizona**

CASE NUMBER: CV-22-0023

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EXHIBIT “C”

Arizona Supreme Court

Civil Petition for Review - Industrial Commission

CV-22-0023-PR DARIA HARPER v ICA/ISLANDER RV RESORT et al

Appellate Case Information

Case Filed: 27-Jan-2022

Case Closed:

Dept/Composition

Side 1. DARIA HARPER, Petitioner

(Litigant Group) DARIA HARPER

- **Daria Harper**

Attorneys for: Petitioner

Alan M Schiffman, Esq. (AZ Bar No. 4257)

Side 2. THE INDUSTRIAL COMMISSION OF ARIZONA, Respondent

(Litigant Group) THE INDUSTRIAL COMMISSION OF ARIZONA

- **Industrial Commission of Arizona**

Attorneys for: Respondent

Gaetano J Testini, Esq. (AZ Bar No. 20941)

Side 3. ISLANDER RV RESORT, Respondent Employer

(Litigant Group) ISLANDER RV RESORT/COPPERPOINT GENERAL INSURANCE COMPANY

- **Islander RV Resort**
- **Copperpoint General Insurance Company, Respondent Carrier**

Attorneys for: Respondent Employer/Carrier

Kirk A Barberich, Esq. (AZ Bar No. 11386)

Side 4. COPPERPOINT GENERAL INSURANCE COMPANY, Respondent Carrier

CASE STATUS

Jan 27, 2022....Pending

PREDECESSOR CASE(S)	Cause/Charge/Class	Judgment/Sentence	Judge, Role <Comments>	Trial	Dispo
1 CA	1 CA-IC 21-0010				
ICA	20142-520533		Comments: (none)		
INSCA	14G01532		Comments: (none)		

2 PROCEEDING ENTRIES

1.	27-Jan-2022	FILED: Petition For Review to Arizona Supreme Court; Memorandum Decision (Petitioner Harper)
2.	27-Jan-2022	FILED: Motion to Exceed Word Limit (Petitioner Harper)