

# NEVADA’S MEDICAL MALPRACTICE DAMAGES CAP: ONE FOR ALL HEIRS OR ONE FOR EACH?

Patrick C. McDonnell\*

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## INTRODUCTION

Nevada’s current statute limiting noneconomic damages for medical malpractice took effect November 23, 2004.<sup>1</sup> More than eight years later, however, the state’s trial courts continue to confront a significant question about how the statute should be applied<sup>2</sup>: In cases of fatal medical malpractice, does the “med

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<sup>1</sup> NEV. REV. STAT. § 41A.035 (2011).

<sup>2</sup> See Petition for Extraordinary Writ Relief at 9–10, *Universal Health Servs. Found. v. Eighth Judicial Dist. Court ex rel. Cnty. of Clark*, No. 62209 (Nev. Nov. 30, 2012) [hereinafter *Universal Health Petition*] (noting the “inconsistent rulings” on the question among Nevada trial court judges with three finding for the per-plaintiff application of the cap (including the action generating the Petition) and two ruling for per-incident application; also stating that “[t]his issue continues to appear before different District Courts in Nevada”).

mal cap”<sup>3</sup> apply per incident, or does the cap apply per plaintiff? In other words, may each heir of a person killed by medical malpractice recover up to the statutory limit of \$350,000 in noneconomic damages, or is \$350,000 the maximum noneconomic damages for each group of heirs?

Nevada’s state trial judges disagree on the answer. In 2007, Second Judicial District Judge Steven P. Elliott found the cap applied to the heirs collectively; in effect he ruled that the maximum amount of noneconomic damages recoverable for each incident of fatal medical malpractice is \$350,000 no matter how many plaintiffs sue over that death.<sup>4</sup> In 2010, Eighth Judicial District Judge Stefany Miley effectively ruled the same as Judge Elliott had on the question.<sup>5</sup> But just two weeks after Judge Miley’s decision, Eighth Judicial District Judge Mark Denton came to the opposite conclusion, finding that each heir could recover up to \$350,000.<sup>6</sup>

The Nevada Supreme Court has recognized the dispute as an important one,<sup>7</sup> but has yet to resolve it<sup>8</sup> despite having been petitioned to do so twice.<sup>9</sup> The justices heard oral arguments en banc on the question in 2011,<sup>10</sup> but a couple of months after those oral arguments, while the court apparently was

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<sup>3</sup> Statutory limits on noneconomic damages for medical malpractice are commonly called “med mal caps.” Throughout this Note, I will use this phrase or its singular version.

<sup>4</sup> Order Granting Partial Summary Judgment at 6, *Sieben v. Lifecare Hosps. of N. Nev., Inc.*, No. CV06-00864 (Nev. Dist. Ct. Apr. 9, 2007), 2007 WL 7266257, at \*4 [hereinafter *Sieben Order*] (“[P]ursuant to NRS 41A.035, Plaintiffs may recover no more than \$350,000 in non-economic damages, collectively.”).

<sup>5</sup> Order Regarding Plaintiffs’ Motion Confirming the Applicable Damage Cap Required Under NRS 41A.035 at 2, *Villegas v. Sheikh*, No. A561497 (Nev. Dist. Ct. Jan. 11, 2010), 2010 WL 3711512, at \*1 [hereinafter *Villegas Order Re: Damage Cap*] (“[T]he applicable damage cap is for ALL Plaintiffs and ALL Defendants.”).

<sup>6</sup> Order at 2, *Tremblay v. Blanco-Cuevas*, No. A577086 (Nev. Dist. Ct. Jan. 25, 2010) (motion for partial summary judgment regarding single statutory cap on noneconomic damage and joinder thereto by second defendant denied “because each of the plaintiffs has a separate cause of action under NRS 41.085(2), and NRS 41A.035 uses the term ‘plaintiff’ in the singular”) [hereinafter *Tremblay Order*].

<sup>7</sup> Order Directing Answer at 1, *Villegas v. Eighth Judicial Dist. Court ex rel. Cnty. of Clark*, No. 55825 (Nev. May 3, 2010) (granting plaintiffs’ petition for writ of mandamus or prohibition regarding the *Villegas Order Re: Damage Cap*, *supra* note 5). The grounds for the petition request were that the question presented “important, novel, and purely legal issues necessitating an immediate and definitive determination” by the court. *See* Petition for Writ of Mandamus and Writ of Prohibition; Memorandum of Points and Authorities; Supporting Exhibits at 7–11, *Villegas v. Eighth Judicial Dist. Court ex rel. Cnty. of Clark*, No. 55825 (Nev. Apr. 15, 2010) [hereinafter *Villegas Mandamus Petition*].

<sup>8</sup> Research for this Note ended on March 31, 2013.

<sup>9</sup> Universal Health Petition, *supra* note 2, at 7, *petition denied*, Order Denying Petition for Writ of Mandamus or Prohibition at 2, *Universal Health Servs. Found. v. Eighth Judicial Dist. Court ex rel. Cnty. of Clark*, No. 62209 (Nev. Feb. 15, 2013) [hereinafter *Order Denying Universal Health Petition*]; *Villegas Mandamus Petition*, *supra* note 7, at 1, *petition dismissed*, Order Dismissing Petition at 1, *Villegas v. Eighth Judicial Dist. Court ex rel. Cnty. of Clark*, No. 55825 (Nev. May 31, 2011), 2011 WL 2163538, at \*1 [hereinafter *Order Dismissing Villegas Petition*].

<sup>10</sup> Oral Argument, *Villegas v. Eighth Judicial Dist. Ct. ex rel. Cnty. of Clark*, No. 55825 (Nev. argued Mar. 8, 2011), available at <http://www.nevadajudiciary.us/index.php/oralarguments/1013-villegas-vs-dist-ct-sheikh> [hereinafter *Villegas Oral Argument*].

still trying to sort out how to rule on the matter, the parties settled,<sup>11</sup> and the justices dismissed the petition without deciding the question.<sup>12</sup> The lack of a definitive answer left two more Eighth Judicial District Court judges, Gloria Sturman and Abbi Silver, to wrestle with the question in 2012.<sup>13</sup> In her ruling, Judge Sturman took the extra step of encouraging the state's high court to again take up—and this time resolve—the question because of its “significant controversy.”<sup>14</sup> Apparently, however, the justices will not revisit this difficult and highly politicized question<sup>15</sup> until they have no other choice. In February 2013, the court denied a petition that sought reexamination of the question.<sup>16</sup> The petitioner—the same defendant hospital corporation that had been the respondent in the case that settled after oral argument in 2011<sup>17</sup>—urged the court to “intervene now to decide an important issue of law which has been incongruously decided in the District Courts, and which will significantly affect the proceedings in [ . . . ] many other medical malpractice/wrongful death cases.”<sup>18</sup> But a three-justice panel decided that intervention by way of extraordinary relief was not warranted because the petitioners had “an adequate legal remedy in the form of an appeal from any adverse final judgment.”<sup>19</sup>

In light of the split among trial judges,<sup>20</sup> Judge Sturman's formal

<sup>11</sup> See Stipulation to Withdraw and Dismiss Petition for Writ of Mandamus and Writ of Prohibition at 1–3, *Villegas v. Eighth Judicial Dist. Court ex rel. Cnty. of Clark*, No. 55825 (Nev. May 6, 2011).

<sup>12</sup> Order Dismissing *Villegas* Petition, *supra* note 9.

<sup>13</sup> Decision and Order at 5, *Mehanna v. Universal Health Servs. Found.*, No. A624512 (Nev. Dist. Ct. Sept. 13, 2012) [hereinafter *Mehanna* Order]; Order Denying Defendant's Motion for Partial Summary Judgment at 2–3, *Neal v. Mirza*, No. A-10-631671-C (Nev. Dist. Ct. May 31, 2012) [hereinafter *Neal* Order].

<sup>14</sup> *Neal* Order, *supra* note 13, at 3 (“The Court notes that the issues raised in the instant Motion have provoked significant controversy, and therefore encourages the Nevada Supreme Court to take this issue up on a writ, if pursued.”).

<sup>15</sup> See, e.g., Paul Harasim, *Medical Malpractice Reforms Still Divide*, LAS VEGAS REV.-J., Oct. 26, 2008, at B1 [hereinafter *Harasim, Reforms Still Divide*] (noting that doctors fought a bitter campaign against trial lawyers over the medical malpractice statute in 2004); Paul Harasim & Ed Vogel, *Question 3 Challenged Anew*, LAS VEGAS REV.-J., Sept. 21, 2004, at A1 (noting trial lawyers' multiple lawsuits aimed at keeping Question 3 off the ballot, intense lobbying by proponents and opponents of Question 3, Secretary of State accusing Nevada Supreme Court justices of being biased, placement of a competing measure on the ballot); see also Joelle Babula, *Medical Malpractice Insurance Crisis: Guinn Might Call Special Session*, LAS VEGAS REV.-J., June 11, 2002 at A1 (reporting battle lines being drawn between doctors and trial lawyers and the intense arguments between the two sides spurring the governor to call for a special session of the legislature).

<sup>16</sup> Order Denying Universal Health Petition, *supra* note 9, at 2.

<sup>17</sup> Valley Health System, LLC, represented by the same counsel, Dennis Kennedy of Bailey Kennedy, in both instances. Compare Universal Health Petition, *supra* note 2, at 1 (petitioner Valley Health System, LLC) with *Villegas* Oral Argument, *supra* note 10, at 16:05–16:09 (attorney Dennis Kennedy introducing himself to the court as representing respondent, Valley Health System, LLC).

<sup>18</sup> Universal Health Petition, *supra* note 2, at 2.

<sup>19</sup> Order Denying Universal Health Petition, *supra* note 9, at 2.

<sup>20</sup> Compare *Mehanna* Order, *supra* note 13, at 5 (finding the med mal cap applies to each plaintiff heir individually), *Neal* Order, *supra* note 13, at 3 (concluding that in the wrongful death context the med mal cap applies “per person, per claim, regardless of the number of actors”), and *Tremblay* Order, *supra* note 6, at 2 (denying defendant's motion for partial summary judgment regarding single statutory cap on noneconomic damages because each of

encouragement,<sup>21</sup> and the petitions for extraordinary relief,<sup>22</sup> it appears inevitable that the Nevada Supreme Court eventually will have to resolve the dispute. When the court finally hands down that decision, it will have major ramifications not only for attorneys, plaintiffs, and defendants in such cases, but also for the medical and insurance industries in general in Nevada.

If the cap must be applied per plaintiff in wrongful deaths it will significantly increase the amount of money at stake in lawsuits filed by multiple heirs of dead patients.<sup>23</sup> In each case where there are four or more heirs, for example, a per-plaintiff application of the cap increases the potential maximum award for noneconomic damages by more than a million dollars.<sup>24</sup> That is why plaintiffs' lawyers argue for application of the cap to plaintiffs individually.<sup>25</sup> They contend that this interpretation of the statute better serves justice because when one incident of medical malpractice causes pain and suffering for multiple plaintiffs—as typically happens when one incident of medical malpractice kills a person who has several heirs—the plaintiffs cannot be fairly or adequately compensated by a maximum award of \$350,000 in noneconomic damages that has to be divided among them.<sup>26</sup> The per-plaintiff application of the cap also would offer more contingency fee potential for plaintiffs' lawyers, which would, in turn, provide an incentive for more lawyers to represent more victims of medical malpractice.<sup>27</sup> Advocates of the per-incident application counter that

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the plaintiffs has a separate cause of action under the med mal cap statute and wrongful death statute), *with* Villegas Order Re: Damage Cap, *supra* note 5, at 2 (denying plaintiffs' motion seeking application of per-heir application of med mal cap; finding one cap for all plaintiffs), *and* Sieben Order, *supra* note 4, at 6 (finding that plaintiffs could recover no more than \$350,000 in noneconomic damages, collectively).

<sup>21</sup> Neal Order, *supra* note 13, at 3 (“The Court notes that the issues raised in the instant Motion have provoked significant controversy, and therefore encourages the Nevada Supreme Court to take this issue up on a writ, if pursued.”).

<sup>22</sup> *See, e.g.*, Universal Health Petition, *supra* note 2, at 2; Villegas Mandamus Petition, *supra* note 7, at 1.

<sup>23</sup> Nevada's wrongful death statute, NRS § 41.085, has been interpreted to provide a cause of action to each heir. NEV. REV. STAT. § 41.085 (2011). *See also infra* Part IV. NRS § 41.085 also provides for an action by the personal representative of the decedent's estate, but that action would be for special damages, so it is not relevant to the question examined by this Note. *See, e.g.*, Villegas Oral Argument, *supra* note 10, at 34:42–34:48.

<sup>24</sup> Under the per-action interpretation of the med mal cap that aggregates all plaintiffs as a class, four heirs could receive a maximum of \$350,000 in noneconomic damages, but under the per-plaintiff interpretation, if each heir were to receive \$350,000, the total judgment would be \$1.4 million.

<sup>25</sup> *See, e.g.*, Plaintiffs' Opposition to Defendant Blanco-Cuevas, M.D.'s Motion for Partial Summary Judgment Re: Single Statutory Cap on Non-Economic Damages and Counter-Motion to Declare N.R.S. 41A.035 Unconstitutional at 3–10, Tremblay v. Blanco-Cuevas, No. A577086 (Nev. Dist. Ct. Dec. 31, 2009), 2009 WL 7197774, at \*2–\*7 [hereinafter Tremblay Opposition to Summary Judgment]; Motion for Order Confirming the Applicable Damage Cap Required Under NRS 41A.035 at 4–9, Villegas v. Sheikh, No. A561497 (Nev. Dist. Ct. Sept. 18, 2009), 2009 WL 6869757, at \*3–\*5 [hereinafter Villegas Motion To Confirm Damage Cap].

<sup>26</sup> *See, e.g.*, Villegas Mandamus Petition, *supra* note 7, at 26–27.

<sup>27</sup> *See, e.g.*, Caitlin Haney, *Trend Continues for Personal Injury Damage Caps*, 38 LITIG. NEWS, Winter 2013, at 4, 5 (explaining how damage caps affect plaintiffs' ability to obtain lawyers). A Las Vegas attorney who handled many medical malpractice cases prior to the passage of the med mal cap statute in 2004 explains that he stopped taking such cases and

the cap must be applied per incident to achieve the goal of lowering medical malpractice insurance rates so that Nevada can retain and attract enough health care providers.<sup>28</sup>

There is an additional reason that establishing the correct application of the cap in cases of fatal medical malpractice is a thorny matter for both sides *and* the court: it could be the proverbial camel's nose under the tent. It could force the justices to confront two larger and even more potent questions. The first is: Are there separate caps for each defendant or does one cap apply collectively to all the defendants being sued for any one occurrence of medical malpractice?<sup>29</sup> Take, for example, a plaintiff suing four defendants—a surgeon, nurse, anesthesiologist, and hospital—regarding one incident of medical malpractice. Is that plaintiff's maximum possible total recovery for noneconomic damages \$350,000, or is it \$350,000 *times four*? The second question is the overarching one of whether the limiting of noneconomic damages is constitutional. Numerous other state supreme courts around the nation have had to rule on challenges to the constitutionality of statutory limits on damages and have reached different conclusions.<sup>30</sup> Advocates of the per-plaintiff application of the cap in Nevada typically argue that the med mal cap is unconstitutional.<sup>31</sup>

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ordered the attorneys in his firm to stop taking such cases after the statute took effect because the cases “just didn’t pencil out anymore.” Doug McMurdo, *\$2.3 Million or \$800,000 the Question in Court*, LAS VEGAS REV.-J., Nov. 5, 2009, at 1B. He also says many other firms did the same, for the same reason. *Id.* “Now, people who are impacted by bad doctors will have a hard time finding a good, experienced attorney to represent them.” *Id.* Lawyers are no longer taking meritorious cases because they are no longer economically feasible. Harasim, *Reforms Still Divide*, *supra* note 15, at B1 (describing a man who was left nearly blind by alleged medical malpractice but who was unable to find an attorney to take his case because, they told him, his case was “economically unfeasible”).

<sup>28</sup> *E.g.*, Universal Health Petition, *supra* note 2, at 33 (“Any reading of the statute which allows for multiple awards negates its purpose. The goal was to lower damage awards in an effort to lower malpractice insurance costs and improve access to health care in Nevada—a result that will not be achieved if a loophole is created in the statute.”).

<sup>29</sup> In fact, that question is combined with the wrongful death context question in med mal cap cases examined in this Note. *See, e.g.*, Tremblay Opposition to Summary Judgment, *supra* note 25, at 4–5. The plaintiffs in *Tremblay v. Blanco-Cuevas* and *Villegas v. Sheikh* argued that the cap should be applied separately to various defendants joined in the same action. Villegas Motion To Confirm Damage Cap, *supra* note 25, at 5–6. *See also, e.g.*, Mehanna Order, *supra* note 13, at 4 (ruling that the med mal cap applies on a per-plaintiff, per-defendant basis, rather than on a per-incident basis); Villegas Order Re: Damage Cap, *supra* note 5, at 2 (“[T]he applicable damage cap is for ALL Plaintiffs and ALL Defendants.”).

<sup>30</sup> *See, e.g.*, Haney, *supra* note 27, at 4–5 (noting that in October 2012 the Kansas Supreme Court became the sixteenth state supreme court to conclude that statutory caps on non-economic damages are constitutional and listing seven states that have struck down caps on noneconomic damages as unconstitutional); Carly N. Kelly & Michelle M. Mello, *Are Medical Malpractice Damages Caps Constitutional? An Overview of State Litigation*, 33 J.L. MED. & ETHICS 515, 515 (2005).

<sup>31</sup> *See, e.g.*, Paul Harasim, *Mother’s Death Puts Lawsuit Limits on Line*, LAS VEGAS REV.-J., Aug. 1, 2010, at B1 [hereinafter Harasim, *Mother’s Death*]. *See also, e.g.*, Tremblay Opposition to Summary Judgment, *supra* note 25, at 6–11; Villegas Motion To Confirm Damage Cap, *supra* note 25, at 6–9.

Those broader questions, however, are beyond the scope of this Note and are left to future scholarship.<sup>32</sup>

This Note, instead, focuses specifically on whether Nevada law entitles each heir of a person killed by medical malpractice to recover up to \$350,000 in noneconomic damages. Part I illustrates the med mal cap question in the wrongful death context through two cases in which Eighth Judicial District judges—in a span of two weeks—reached opposite conclusions as to how the cap should be applied.<sup>33</sup> Part II provides a thumbnail history of Nevada's med mal cap and highlights why the history is important to the arguments on both sides of this debate. Part III examines the language of the statute, the dispute over the meaning of “an action” in the statute and the statute's use of singular nouns, and Part IV examines the interplay potential conflicts between the medical malpractice cap statute and the state's wrongful death statute and how they might be harmonized. Part V considers whether the statute is ambiguous and analyzes what is arguably the most critical issue—the legislative intent behind the statute. Part VI examines whether an unpublished Nevada Supreme Court order was a de facto determination that the cap applies per plaintiff. Part VII then considers the arguments for and against using California case law—and which California case law should be used, if any—to resolve this dispute. Part VIII examines the practical and policy implications of one application of the cap versus the other application.

Ultimately, this Note concludes that the med mal cap should be applied per plaintiff in wrongful death cases. The text of the statute, particularly its use of singular nouns, leads to such a conclusion, and so does the meaning that the Nevada Supreme Court has attached to “an action” when used in the contexts of damages caps and wrongful death. Moreover, the only practical way to assess legislative intent for a statutory initiative is through the ballot materials provided to voters, and those materials told voters that the cap would apply to a singular “plaintiff,” and that the change being made to the existing cap statute was the removal of the two exceptions to the cap. The ballot materials did not tell voters that the new cap, unlike the old cap, would apply to plaintiffs in the aggregate.

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<sup>32</sup> The first of the two larger questions would require more time and pages than this Note has been allocated. As for the second, the constitutionality of tort damages caps has been covered by many other authors, including: Haney, *supra* note 27, at 4; Kelly & Mello, *supra* note 30, at 515; Kevin J. Gfell, Note, *The Constitutional and Economic Implications of a National Cap on Non-Economic Damages in Medical Malpractice Actions*, 37 *IND. L. REV.* 773, 775 (2004); Kelly Kotur, Note, *An Extreme Response or a Necessary Reform? Revealing How Caps on Noneconomic Damages Actually Affect Medical Malpractice Victims and Malpractice Insurance Rates*, 108 *W. VA. L. REV.* 873, 880, 882 (2006) (suggesting that the cap's discrimination between similarly-situated groups of medical malpractice victims might violate equal protection); Damian Stutz, Note, *Non-Economic-Damage Award Caps in Wisconsin: Why Ferdon Was (Almost) Right and the Law Is Wrong*, 2009 *WIS. L. REV.* 105, 129.

<sup>33</sup> Compare Villegas Order Re: Damage Cap, *supra* note 5, at 2 (“[T]he applicable damages cap is for ALL Plaintiffs and ALL Defendants.”), with Tremblay Order, *supra* note 6, at 2 (finding the cap does not apply to plaintiff heirs in the aggregate “because each of the plaintiffs has a separate cause of action under NRS 41.085(2), and NRS 41A.035 uses the term ‘plaintiff’ in the singular”).

## I. A TALE OF TWO RULINGS IN CLARK COUNTY

Several of the important issues and implications are more easily understood when viewed through the lenses of two relatively recent Clark County cases in which two trial judges, just two weeks apart, came to opposing conclusions about the proper application of the med mal cap statute.<sup>34</sup> In both cases, multiple heirs argued for the cap to be applied separately to each of them while the defendants argued noneconomic damages could only be \$350,000 maximum in each case, to be divided among the respective heirs.<sup>35</sup>

In *Villegas v. Sheikh*, the plaintiffs were the husband and six children of the late Adeline Villegas.<sup>36</sup> The 65-year-old woman's stomach pain, nausea, and vomiting were severe enough to send her to Southern Hills Hospital and Medical Center's emergency room on August 6, 2007, and after initial tests, a doctor there concluded she might have pancreatitis and needed to be hospitalized immediately.<sup>37</sup> Mrs. Villegas asked to be transferred to a hospital contracted with her insurance company, so the doctor transferred her to Spring Valley Hospital Medical Center with orders for a computerized tomography, or CT, scan of her abdomen to be done as soon as possible so the report of that scan could be provided to her physician.<sup>38</sup> She was transported to Spring Valley Hospital that same afternoon, but the CT scan apparently was never performed.<sup>39</sup>

At Spring Valley, Dr. Mahmud A. Sheikh was in charge of Mrs. Villegas's care.<sup>40</sup> He determined she most likely had pancreatitis, and he allegedly ordered the staff to give Villegas a clear liquid diet.<sup>41</sup> Villegas had been persistently vomiting, however, and the standard of care in treating pancreatitis with significant vomiting, or any abdominal pain with vomiting, is to prescribe for the patient to receive nothing by mouth and instead provide nourishment and medication in a non-oral way, typically intravenously.<sup>42</sup> That way the patient is protected from not only the possibility of inhaling her own vomit but also the damage that might be caused by food or medication going into an inflamed or damaged intestinal tract.<sup>43</sup>

About ten hours after Mrs. Villegas was admitted to Spring Valley Hospital, she developed septic shock, a life-threatening condition caused by severe

<sup>34</sup> Villegas Order Re: Damage Cap, *supra* note 5, at 2 (“[T]he applicable damages cap is for ALL Plaintiffs and ALL Defendants.”); Tremblay Order, *supra* note 6, at 2 (denying motion for partial summary judgment regarding single statutory cap on noneconomic damage “because each of the plaintiffs has a separate cause of action under NRS 41.085(2), and NRS 41A.035 uses the term ‘plaintiff’ in the singular”).

<sup>35</sup> Tremblay Opposition to Summary Judgment, *supra* note 25, at 3–4; Villegas Motion To Confirm Damage Cap, *supra* note 25, at 2.

<sup>36</sup> Complaint at 1–2, *Villegas v. Sheikh*, No. A561497 (Nev. Dist. Ct. Apr. 22, 2008), 2008 WL 8096404, at \*1–\*2.

<sup>37</sup> *Id.* at 3.

<sup>38</sup> *Id.* at 3–4.

<sup>39</sup> *Id.* at 4.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 4–5.

<sup>43</sup> *Id.* at 5.

infection.<sup>44</sup> She died the following day.<sup>45</sup> The autopsy revealed that she had a stomach ulcer that had burst, leaving a hole through which her stomach contents had spilled into her abdominal cavity.<sup>46</sup>

A Hawaii native who had lived in Las Vegas for about a year, Mrs. Villegas had been an employee of the Diagnostic Center of Medicine,<sup>47</sup> of all places. In addition to her husband and six children, Mrs. Villegas was survived by ten grandchildren and three great-grandchildren, as well as five brothers, three sisters, and their families.<sup>48</sup> Mrs. Villegas's husband and the couple's children sued Dr. Sheikh and Valley Health System, doing business as Spring Valley Hospital, alleging that medical malpractice—the failure to do the CT scan within four hours of her admission into the hospital, misdiagnosis of her illness, the oral feeding, and Dr. Sheikh's failure to dictate his admitting note until more than a month after Mrs. Villegas was admitted to the hospital—caused Mrs. Villegas to needlessly suffer and die.<sup>49</sup>

“This was a woman who was in good health otherwise,” the family's lawyer, Peter Wetherall told a Las Vegas newspaper reporter.<sup>50</sup> “And now a husband can't enjoy his retirement years with his wife, and her children and grandchildren are robbed of her affection. The pain and suffering here are very legitimate.”<sup>51</sup>

Under the one-cap-per-incident interpretation of NRS 41A.035, the maximum compensation available to Mrs. Villegas's seven heirs for their pain and suffering is \$350,000. If Mrs. Villegas's children and husband evenly divided that \$350,000, each heir could receive \$50,000 at most. Each heir likely would receive far less than \$50,000, however, because fees of attorneys and medical expert witnesses typically are paid out of awards for noneconomic damages.<sup>52</sup> The per-plaintiff application of the cap, on the other hand, would have increased the potential recovery by millions of dollars for Adeline Villegas's heirs and estate.<sup>53</sup>

But, in an order filed January 11, 2010, Eighth Judicial District Judge Stefany Miley ruled that the med mal cap applies to the class of plaintiffs in the aggregate.<sup>54</sup> She reached the same conclusion about the cap application as Judge Elliott had in Washoe County three years earlier. He had found “that the language of NRS 41A.035 and NRS 41.085 support[ed] Defendants' argument

<sup>44</sup> *Id.* at 4.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> Obituaries, *Villegas, Adeline*, LAS VEGAS REV.-J., Aug. 11, 2007, at B4.

<sup>48</sup> *Id.*

<sup>49</sup> Complaint, *supra* note 36, at 5–7.

<sup>50</sup> Harasim, *Mother's Death*, *supra* note 31, at B1.

<sup>51</sup> *Id.*

<sup>52</sup> See Harry Zavos, *Monetary Damages for Nonmonetary Losses: An Integrated Answer to the Problem of the Meaning, Function, and Calculation of Noneconomic Damages*, 43 LOY. L.A. L. REV. 193, 263 (2009) (“[P]laintiffs rely on noneconomic damages to pay their attorneys' fees.”); see also Joelle Babula, *New Liability Laws Target of Petition*, LAS VEGAS REV.-J., Oct. 3, 2002, at A1 (plaintiffs' attorney Gerald Gillock noting the upfront cost of expert witnesses for medical malpractice cases).

<sup>53</sup> Villegas Motion To Confirm Damage Cap, *supra* note 25, at 5–6.

<sup>54</sup> Sieben Order, *supra* note 4, at 6; but see Villegas Order Re: Damage Cap, *supra* note 5, at 2.



that the noneconomic damages cap limits the recovery to \$350,000 to Plaintiff's collectively."<sup>55</sup> In his six-page order, Judge Elliott provided the analysis that led to his conclusion.<sup>56</sup> In the case he heard, the defendants made most, if not all, of the same arguments made by other defendants sued for alleged medical malpractice resulting in death.<sup>57</sup> Several of those arguments and Judge Elliott's agreement with them will be considered later in this Note. Although Judge Miley did not explain her analysis in her single-paragraph order, it stands to reason that her analysis was similar to Judge Elliott's, given that similar arguments were made in both cases<sup>58</sup> and given that Judge Miley's order noted that the court had "considered the [m]otion, [o]ppositions and [r]eply thereto" before finding that "per NRS 41A.035, the applicable damage cap is for ALL Plaintiffs and ALL Defendants."<sup>59</sup>

Just two weeks after Judge Miley's ruling, however, one of her fellow Eighth Judicial District Court judges, Mark Denton, reached the opposite conclusion in *Tremblay v. Blanco-Cuevas*,<sup>60</sup> which was also a medical malpractice wrongful death case brought by multiple plaintiffs.<sup>61</sup> The plaintiff alleged that Antonius "Tony" Konst's death was caused by failures to "timely and appropriately diagnose and treat complications after a routine gall bladder surgery."<sup>62</sup> "Mr. Konst died as a result of infected intra abdominal abscesses [sic] and sepsis that culminated in multisystem organ failure."<sup>63</sup> The plaintiffs were Mr. Konst's two daughters, three sons, and a special administratrix appointed to pursue claims on behalf of Mr. Konst's estate.<sup>64</sup>

One of the defendant doctors filed a motion for partial summary judgment, asking Judge Denton to find that the med mal cap was \$350,000 total, no matter the number of plaintiffs.<sup>65</sup> Judge Denton denied the motion and based his rejec-

<sup>55</sup> Sieben Order, *supra* note 4, at 6.

<sup>56</sup> *Id.* at 3–6.

<sup>57</sup> *Id.* (summarizing the arguments of defendant for per-incident application of the cap); *see also* Villegas Motion To Confirm Damage Cap, *supra* note 25, at 4–13 (defendant's argument for per-incident application of the cap).

<sup>58</sup> Compare Villegas Motion To Confirm Damage Cap, *supra* note 25, at 4–8 (plaintiffs' argument for per-plaintiff application of the cap), and Villegas Motion To Confirm Damage Cap, *supra* note 25, at 4–13 (defendant's argument for per-incident application of the cap), with Sieben Order, *supra* note 4, at 3–6 (summarizing the arguments of plaintiff and defendant regarding the proper application of the cap).

<sup>59</sup> Villegas Order Re: Damage Cap, *supra* note 5, at 2. The second prong of Judge Miley's conclusion ("ALL Defendants") rejects the plaintiffs' argument, explained generally in the Introduction *supra* and referenced in *supra* note 29 that a separate cap may be applied to each defendant in a lawsuit.

<sup>60</sup> Tremblay Order, *supra* note 6, at 2 (finding the med mal cap does not apply to plaintiff heirs in the aggregate "because each of the plaintiffs has a separate cause of action under NRS 41.085(2), and NRS 41A.035 uses the term 'plaintiff' in the singular").

<sup>61</sup> Tremblay Opposition to Summary Judgment, *supra* note 25, at 2. The plaintiffs were five heirs and a special administratrix for the estate.

<sup>62</sup> *Id.* at 2 n.1.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 2.

<sup>65</sup> Defendant Blanco-Cuevas, M.D.'s Motion for Partial Summary Judgment Re: Single Statutory Cap on Non-Economic Damages at 4, *Tremblay v. Blanco-Cuevas*, No. A577086 (Nev. Dist. Ct. Dec. 9, 2009), 2009 WL 7197773, at \*3 [hereinafter Blanco-Cuevas Motion for Summary Judgment].

tion of the \$350,000-per-lawsuit interpretation not just on the med mal cap statute, but also on Nevada's wrongful death statute,<sup>66</sup> as explained in Part IV.

Judge Denton's ruling, in turn, helped spur the Villegas family's attorney, Peter Wetherall, to seek writ review by the Nevada Supreme Court regarding Judge Miley's opposite conclusion in *Villegas v. Sheikh*.<sup>67</sup> The court granted Wetherall's petition, all parties briefed the case for the justices, and the court heard oral arguments en banc in March 2011.<sup>68</sup> But before the justices could rule—and presumably resolve the longstanding dispute about the proper application of the med mal cap—the case settled, so the court dismissed it.<sup>69</sup>

## II. THE HISTORY OF NRS SECTION 41A.035 AND REASONS WHY ITS PREDECESSOR STATUTE IS KEY TO BOTH SIDES' ARGUMENTS

The history of Nevada's current med mal cap statute, NRS 41A.035, plays an important part in the arguments regarding how the cap should be applied. The current statute is a revision of NRS 41A.031, which was passed by a special session of the Nevada Legislature in August 2002<sup>70</sup> in reaction to a "medical malpractice insurance crisis."<sup>71</sup> Nevada, especially Southern Nevada, did not have enough doctors, particularly in some specialties such as obstetrics.<sup>72</sup> Doctors complained they were being "forced to leave the state, retire early or limit their services because they [could not] find medical malpractice insurance or afford the" rates for the insurance in Nevada.<sup>73</sup>

The state's doctors clamored for tort reform to limit attorney fees and cap jury awards, saying it was the only viable long-term solution. Insurance companies blamed rises in medical malpractice insurance rates on jury awards and "frivolous" lawsuits. Trial attorneys countered that the companies had raised rates to make up for not only "a bad economy, lack of investment returns and poor underwriting skills," but also the insurance companies' own over-eagerness to insure even bad doctors to gain market share.<sup>74</sup>

Nevada lawmakers were "vigorously lobbied" as to how to limit the damages that victims of medical malpractice could recover,<sup>75</sup> and the med mal cap statute that emerged from the 2002 special legislative session wound up being a

<sup>66</sup> Tremblay Order, *supra* note 6, at 2 (denying motion for partial summary judgment regarding single statutory cap on noneconomic damage "because each of the plaintiffs has a separate cause of action under NRS 41.085(2), and NRS 41A.035 uses the term 'plaintiff' in the singular").

<sup>67</sup> Villegas Mandamus Petition, *supra* note 7, at 5.

<sup>68</sup> Villegas Oral Argument, *supra* note 10.

<sup>69</sup> Order Dismissing Villegas Petition, *supra* note 9, at 1.

<sup>70</sup> 2002 Nev. Stat. 3 (2002) (codified at NEV. REV. STAT. § 41A.031) (repealed 2004).

<sup>71</sup> Babula, *supra* note 15, at A1. See Justin Shiroff, *Shielding Hippocrates: Nevada's Expanded Pleading Standard for Medical Malpractice Actions and the Need for Legislative Reform*, 12 NEV. L.J. 231, 235–37 (2011) (describing the crisis); see also Universal Health Petition, *supra* note 2, at 3.

<sup>72</sup> See Babula, *supra* note 15, at A1.

<sup>73</sup> Babula, *supra* note 52, at A1.

<sup>74</sup> Babula, *supra* note 15, at A1.

<sup>75</sup> Universal Health Petition, *supra* note 2, at 3.

compromise that included exceptions to the cap.<sup>76</sup> The pertinent portions of the 2002 statute mandated that “in an action for damages for medical malpractice or dental malpractice, the noneconomic damages awarded to *each plaintiff from each defendant* must not exceed \$350,000” *except* upon a showing, by clear and convincing evidence, of gross negligence or exceptional circumstances.<sup>77</sup>

On September 20, 2002, a Southern Nevada doctor filed the Keep Our Doctors in Nevada, or KODIN, initiative petition with the Nevada Secretary of State’s office.<sup>78</sup> The goal of the petition was to repeal the fledgling NRS 41A.031 and some of its complementary statutes and to substitute a new statutory scheme.<sup>79</sup> A contemporaneous newspaper report based in part on an interview with the doctor who filed the petition described the intent of the initiative this way: “The doctors want to abolish new exceptions to caps on pain and suffering judgments and place limits on attorney fees. They want to ensure that doctors cannot be forced to pay an entire jury award if they are found only partially liable . . . .”<sup>80</sup>

KODIN, funded almost exclusively by the medical and insurance industries,<sup>81</sup> hired a company<sup>82</sup> that collected the requisite number of signatures on petitions, and as a result the Secretary of State validated the initiative in December 2002.<sup>83</sup> Per the Nevada Constitution, the initiative then went to the Nevada Legislature, and because the 2003 Legislature did not enact the proposed statute within the time limit set by the constitution and took no further action on the initiative, the initiative was placed on the ballot of the next succeeding general election in November 2004.<sup>84</sup> Fifty-nine percent of voters statewide then approved “Ballot Question 3,” as the initiative was titled at the polls.<sup>85</sup>

Among the questions at the heart of the debate over the correct application of the cap are not only what changes the new statute made, but also what changes voters were told it would make, how those voters were informed, and how the intention of voters who approved the new med mal cap statute should

<sup>76</sup> Sean Whaley, *Lawmakers Critical of Petition to Alter Medical Malpractice Law*, LAS VEGAS REV.-J., Oct. 4, 2002, at B1; *see also* Babula, *supra* note 52, at A1 (describing “several aspects of tort reform that doctors failed to get included in” NRS 41A.031).

<sup>77</sup> 2002 Nev. Stat. 3, 6 (2002) (codified at NEV. REV. STAT. § 41A.031) (repealed 2004).

<sup>78</sup> Babula, *supra* note 52, at A1.

<sup>79</sup> *See id.*

<sup>80</sup> *Id.*

<sup>81</sup> *See* Nevada 2004 Ballot Measures, *Keep Our Doctors In Nevada*, NAT’L INST. ON MONEY IN STATE POL., <http://www.followthemoney.org/database/StateGlance/committee.phtml?c=1325> (last visited May 14, 2013) (showing compilations of contribution amounts, names of contributors, industries that provided the largest total contributions, and breakdowns of contributions by economic interest and indicating that approximately eighty-eight percent of the KODIN’s \$3.84 million war chest for supporting the passage of the initiative to enact the revised med mal cap statute came from the health and insurance industries).

<sup>82</sup> Babula, *supra* note 52, at A1.

<sup>83</sup> Villegas Mandamus Petition, *supra* note 7, at 17 n.4; *see also* Joelle Babula, *Doctors Group’s Petition Forces Legislature to Consider Proposal*, LAS VEGAS REV.-J., Dec. 3, 2002, at A1.

<sup>84</sup> Universal Health Petition, *supra* note 2, at 3; Villegas Mandamus Petition, *supra* note 7, at 17 n.4.

<sup>85</sup> 2004 Official General Election Results, NEV. SECRETARY OF STATE (Nov. 2, 2004), <http://nvsos.gov/SOSelectionPages/results/2004General/ElectionSummary.aspx>.

be discerned. Advocates of the per-plaintiff interpretation say determinations about the knowledge and intent of those voters must be based on the ballot material the Nevada Secretary of State provided to them,<sup>86</sup> and the only change that ballot material said the new law would make regarding the application of the cap was that the new statute would eliminate the exceptions for gross negligence and exceptional circumstances.<sup>87</sup> Advocates of the per-incident interpretation, on the other hand, say voter knowledge and intent should be judged by the contemporaneous media reports about the initiative and the legislative intent behind Ballot Question 3, an intent the per-incident advocates argue is evident in the vast legislative record related to discussion of the KODIN initiative and alternatives to it proposed in the 2003 legislative session.<sup>88</sup> The proponents of per-incident application of the cap also emphasize that the 2004 changes to the cap statute included removing the “*each* plaintiff” language, which they say was aimed at changing the applicability of the cap and was understood by voters to mean that the new statute would change the application to one cap per incident of medical malpractice.<sup>89</sup>

### III. “IN AN ACTION,” SINGULAR NOUNS, AND PLAIN LANGUAGE

Nevada’s current med mal cap statute is just one sentence:

In an action for injury or death against a provider of health care based upon professional negligence, the injured plaintiff may recover noneconomic damages, but the amount of noneconomic damages awarded in such an action must not exceed \$350,000.<sup>90</sup>

The arguments over the meaning and proper application of the statute start with the sentence’s third word—“action.”<sup>91</sup> “The interpretation of [the med mal cap statute] turns on the definition of ‘action.’”<sup>92</sup> Those who say the cap applies per incident contend that “an action” means an entire lawsuit; those who say the cap applies per plaintiff argue that “an action” means each claim

<sup>86</sup> See Villegas Mandamus Petition, *supra* note 7, at 6, 20; see also Petitioners’ Joint Reply in Support of Their Petition for Writ of Mandamus and Prohibition at 15–18, Villegas v. Eighth Judicial Dist. Court *ex rel.* Cnty. of Clark, No. 55825 (Nev. Sept. 3, 2010) (petition dismissed May 31, 2011) [hereinafter Villegas Reply in Support].

<sup>87</sup> See, e.g., Villegas Oral Argument, *supra* note 10, at 40:35–41:06.

<sup>88</sup> See, e.g., Real Parties in Interest Valley Health System, LLP, d/b/a Spring Valley Hospital Medical Center’s Answering Brief at 8–11, Villegas v. Eighth Judicial Dist. Court *ex rel.* Cnty. of Clark, No. 55825 (Nev. July 2, 2010) [hereinafter Valley Health System Answering Brief].

<sup>89</sup> See, e.g., *id.* at 9–11.

<sup>90</sup> NEV. REV. STAT. § 41A.035 (2011).

<sup>91</sup> See Universal Health Petition, *supra* note 2, at 13–14; Blanco-Cuevas Motion for Summary Judgment, *supra* note 65, at 5; Tremblay Opposition to Summary Judgment, *supra* note 25, at 3–6; Defendant Valley Health System, LLC d/b/a Spring Valley Hospital’s Opposition to Plaintiff’s Motion for Order Confirming the Applicable Damage Cap at 4–7, No. A561497 (Nev. Dist. Ct. Oct. 1, 2009), 2009 WL 6869758, at \*3–\*5 [hereinafter Valley Hospital’s Opposition]; Villegas Motion To Confirm Damage Cap, *supra* note 25, at 4–7.

<sup>92</sup> Universal Health Petition, *supra* note 2, at 13; see also Villegas Oral Argument, *supra* note 10, at 2:48–2:54 (Andre Mura, pro hac vice attorney for petitioner, stating the parties agree that a central question is the meaning of “in an action”).

within a wrongful death lawsuit.<sup>93</sup> “Action” is also a key word in the Nevada wrongful death statute.

The argument that “action” means “lawsuit” is based, in part, on the fact that several of the Nevada Rules of Civil Procedure can be read together to indicate that “a civil action”—because it includes the original claim and any crossclaims, counterclaims and third-party claims—means a judicial proceeding as a whole, not just an individual cause of action.<sup>94</sup> The Nevada Supreme Court relied, in part, on that argument in 1989’s *United Association of Journeymen & Apprentices of Plumbing & Pipe Fitting Industry v. Manson*, wherein the court found “action” to mean an entire lawsuit.<sup>95</sup> The court also had used that definition at least as far back as 1934, noting that the Nevada Constitution states that “[t]here shall be but one form of civil action, and law and equity may be administered in the same action.”<sup>96</sup> The court followed up the excerpt from the state constitution with a quote from a venerable legal lexicon: “An ‘action’ is a judicial proceeding, either in law or equity, to obtain certain relief at [the] hands of [the] court.”<sup>97</sup>

Black’s Law Dictionary similarly defines an “action” as “[a] civil or criminal judicial proceeding.”<sup>98</sup> The entry quotes an 1885 book about pleadings and practice, which says:

An action has been defined to be an ordinary proceeding in a court of justice, by which one party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense. . . . More accurately, it is defined to be any judicial proceeding, which, if conducted to a determination, will result in a judgment or decree.<sup>99</sup>

The Black’s entry for “action” goes on to quote an 1899 book that states: “The terms ‘action’ and ‘suit’ are nearly if not quite synonymous.”<sup>100</sup>

<sup>93</sup> *E.g.*, Blanco-Cuevas Motion for Summary Judgment, *supra* note 65, at 5; Valley Hospital’s Opposition, *supra* note 91, at 4–5.

<sup>94</sup> *See* NEV. R. CIV. P. 2 (“There shall be one form of action to be known as ‘civil action.’”).

<sup>95</sup> *United Ass’n of Journeymen v. Manson*, 783 P.2d 955, 957–58 (1989) (“NRCP 41(e) gives five years for trial of an ‘action’, not of a ‘claim.’ Unlike a claim, an action includes the original claim and any crossclaims, counterclaims, and third-party claims. In fact, NRCP 41(c) specifically states that the rule applies to crossclaims, counterclaims, and third-party claims. NRCP 2 states that ‘[t]here shall be one form of action to be known as “civil action”’ . . . Thus, the original claim and any crossclaims, counterclaims and third-party claims are all part of one ‘action.’”).

<sup>96</sup> *Seaborn v. First Judicial Dist. Court*, 29 P.2d 500, 504–05 (Nev. 1934) (quoting NEV. CONST. art. 6, § 14) (internal quotation marks omitted).

<sup>97</sup> *Id.* at 505 (quoting 1 WORDS AND PHRASES 187 (3d Series) (some internal quotation marks omitted)).

<sup>98</sup> BLACK’S LAW DICTIONARY 32 (9th ed. 2009).

<sup>99</sup> *Id.* (quoting 1 MORRIS M. ESTEE, ESTEE’S PLEADINGS, PRACTICE, AND FORMS § 3, at 1 (Carter P. Pomeroy ed., 3d ed. 1885)) (internal quotation marks omitted).

<sup>100</sup> *Id.* (quoting EDWIN E. BRYANT, THE LAW OF PLEADING UNDER THE CODES OF CIVIL PROCEDURE 3 (2d ed. 1899)). The rest of the excerpt in Black’s reveals that the distinction between the two words was already dissolving more than 113 years ago and is no longer applicable today:

[L]awyers usually speak of proceedings in courts of law as “actions,” and of those in courts of equity as “suits.” In olden time there was a more marked distinction, for an action was considered as terminating when judgment was rendered, the execution forming no part of it. A suit, on

But despite “action” having been defined as “lawsuit” for more than a century, there is a counterargument that “action” has come to mean “cause of action” in Nevada, particularly in the context of damages cap and wrongful death statutes. First, the Nevada Rules of Civil Procedure were copied from, and are identical to, the corresponding Federal Rules of Civil Procedure. An advisory note to FRCP 2 indicates that the “one form of action” language was simply an acknowledgement that suits in law and equity have been merged.<sup>101</sup> The main thrust of the argument against defining “action” as “lawsuit,” however, is that, at least in the context of statutory limits on damages and wrongful death claims, the state’s high court has made “action” a term of art meaning “cause of action.”<sup>102</sup> In *Parker v. Chrysler Motors*, the court’s decision effectively defined “an action” in the wrongful death statute as “cause of action”—even while the court, in its decision, used “an action” to refer to the lawsuit in general.<sup>103</sup>

The court further defined “action” as “cause of action” in the context of a statutory cap on damages in *County of Clark v. Upchurch* and *Arnesano v. State*, opinions that came eight and nine years, respectively, after *Manson*.<sup>104</sup> In 1998, the *Upchurch* court analyzed NRS 41.035, which, like the med mal cap, is a statutory limit on damages, albeit damages recoverable from the State of Nevada and/or its political subdivisions as a result of the state’s limited waiver of sovereign immunity for tort liability.<sup>105</sup> The pertinent portion of NRS 41.035 effective at that time<sup>106</sup> noted:

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the other hand, included the execution. The word “suit,” as used in the Judiciary Act of 1784 and later Federal statutes, applies to any proceeding in a court of justice in which the plaintiff pursues in such court the remedy which the law affords him.

*Id.* at 32–33 (some internal quotation marks omitted).

<sup>101</sup> See FED. R. CIV. P. 2 advisory committee’s note 2 (1937) (“Reference to actions at law or suits in equity in all statutes should now be treated as referring to the civil action prescribed in these rules.”).

<sup>102</sup> See, e.g., Villegas Mandamus Petition, *supra* note 7, at 11, 13–15, 25.

<sup>103</sup> *Parker v. Chrysler Motors Corp.*, 502 P.2d 111, 112 (1972).

<sup>104</sup> *Cnty. of Clark, ex rel. Univ. Med. Ctr. v. Upchurch*, 961 P.2d 754, 757, 759 (Nev. 1998) (considering the words “an award for damages in an action sounding in tort” in NRS 41.035 to be a statutory limitation on damages, and noting that “[t]his court has interpreted the statutory limitation in NRS 41.035 to apply to each cause of action by each claimant”); *Arnesano v. State*, 942 P.2d 139, 141–42, 145 (Nev. 1997), *abrogated by* *Martinez v. Maruszczak*, 168 P.3d 720 (Nev. 2007) as to sovereign immunity of physician employed by state university medical school. *Arnesano* affirmed an award to three heirs on a per-person, per-claim basis up to the limit of the statutory cap in NRS 41.035, a statute that refers to:

An award for damages in *an action* sounding in tort brought under NRS 41.031 or against a present or former officer or employee of the state or any political subdivision, immune contractor or state legislator arising out of an act or omission within the scope of his public duties or employment may not exceed the sum of \$50,000, exclusive of interest computed from the date of judgment, to or for the benefit of any claimant. An award may not include any amount as exemplary or punitive damages.

*Id.* at 140–41 n.1 (emphasis added); see also NEV. REV. STAT. § 41.035 (1995).

<sup>105</sup> *Upchurch*, 961 P.2d at 759.

<sup>106</sup> The limit in the statute was raised to \$75,000 on October 1, 2007 and \$100,000 on October 1, 2011. See NEV. REV. STAT. § 41.035 (2007), available at <http://www.leg.state.nv.us/Statutes/74th/Stats200725.html#Stats200725page3025>.

An award for damages *in an action* sounding in tort brought under NRS 41.031 or against a present or former officer or employee of the state or any political subdivision, immune contractor or state legislator arising out of *an act or omission* within the scope of his public duties or employment may not exceed the sum of \$50,000, exclusive of interest computed from the date of judgment, *to or for the benefit of any claimant*. An award may not include any amount as exemplary or punitive damages.<sup>107</sup>

In reaching its conclusion that the limit applied on a “per-person or per-claimant” basis rather than on a “per-incident or occurrence” or a “per-claim” basis,<sup>108</sup> the *Upchurch* court construed the statute’s use of “an action” to mean “cause of action.”<sup>109</sup>

In 1997, the *Arnesano* court considered how the NRS section 41.035 statutory limit on damages should apply in a wrongful death case, and the court viewed the three plaintiffs in that case as each having “an action” for the purposes of the damages limitation.<sup>110</sup> The court affirmed an award under NRS 41.035 to the three heirs on a per-person, per-claim basis.<sup>111</sup> And in 1972, the court in *Parker* read the term “action” in NRS 12.090 to mean that each heir had a cause of action for wrongful death against which the statute of limitations ran separately.<sup>112</sup>

*Upchurch*, *Arnesano*, and *Parker* support the argument that, at least in the context of statutory limits on damages and wrongful death claims, the court has made “action” a term of art meaning “cause of action.”

The Nevada Rules of Civil Procedure existed when the Court decided *Parker*, *Arnesano*, and *Upchurch*, and the court apparently saw no conflict between its determination about the meaning of “action” in those three cases and the rules’ statement about an “action.” The statutory scheme that was before the court in *Upchurch* and *Arnesano* is comparable to that of the medical cap because material words are identical;<sup>113</sup> each statute refers to an “action,” and in *Upchurch* and *Arnesano* the court’s rulings indicated that reference to “action” in the statute at issue in those cases was, in fact, a reference to a cause of action.<sup>114</sup> The *Upchurch* ruling also pointed to other Nevada

<sup>107</sup> NEV. REV. STAT. § 41.035(1) (1995) (emphasis added).

<sup>108</sup> *Upchurch*, 961 P.2d at 759.

<sup>109</sup> *Id.* (“This court has interpreted the statutory limitation in NRS 41.035 to apply to each cause of action by each claimant.”).

<sup>110</sup> *Id.* at 761 (discussing *Arnesano*’s findings as to “an action,” claims of actions and awards to heirs in *Arnesano*).

<sup>111</sup> *Id.*

<sup>112</sup> *Parker v. Chrysler Motors Corp.*, 502 P.2d 111, 112 (1972).

<sup>113</sup> Compare NEV. REV. STAT. § 41A.035 (2009) (“In an action for injury or death”), with NEV. REV. STAT. § 41.035(1) (1995) (“An award for damages in an action”); Compare also NEV. REV. STAT. § 41A.035 (2009) (“based upon professional negligence”), and NEV. REV. STAT. § 41A.015 (2009) (defining professional negligence as “a negligent act or omission to act”), with NEV. REV. STAT. § 41.035(1) (1995) (“arising out of an act or omission”).

<sup>114</sup> See *Upchurch*, 961 P.2d at 759 (considering the words “an award for damages in an action sounding in tort” in NRS 41.035, a statutory limitation on damages, and noting “[t]his court has interpreted the statutory limitation in NRS 41.035 to apply to each cause of action by each claimant”); *Arnesano* affirmed an award to three heirs on a per-person, per-claim basis up to the limit of the statutory cap in NRS 41.035. *Arnesano v. State*, 942 P.2d 139, 141–42 n.1, 145 (Nev. 1997).

Supreme Court rulings that supported its interpretation of “action.”<sup>115</sup>

*Upchurch* was the sole citation in the conclusions of law section of Judge Sturman’s 2012 ruling in favor of the per-plaintiff application of the cap.<sup>116</sup> And during the *Villegas* oral arguments, one of the Nevada justices talked about the *Upchurch* interpretation of “action” as if it could be a key to resolving the question. When Dennis Kennedy, the attorney who argued on behalf of the respondent hospital system in *Villegas*, attempted to steer the court toward legislative history for the answer to the med mal cap question, one justice pointedly asked Mr. Kennedy whether anything in the legislative history of the med mal cap “expressly addressed, rebutted, or qualified” the interpretation that the court had attached to the word “action” in *Upchurch*, and Mr. Kennedy acknowledged that nothing in the legislative history expressly did.<sup>117</sup>

Mr. Kennedy pointed, instead, to what he and other advocates of the per-incident application of the med mal cap contend is a flaw in the argument to apply the *Upchurch* definition of “in an action” to the current med mal cap statute. The cap statute with which *Upchurch* was concerned<sup>118</sup> limited the tort damages that government and certain government-related tortfeasors could be ordered to pay “to or for the benefit of any claimant.”<sup>119</sup> The 2002 version of the med mal cap included similar language: “to each plaintiff from each defendant,” but that language was left out of the 2004 version.<sup>120</sup> The removal of “to each plaintiff from each defendant” from the statute, defendants say, demonstrates that the new med mal cap was intended to apply to plaintiffs in the aggregate and that without this language the current cap does not apply to “each plaintiff.”<sup>121</sup> That argument also arises in a slightly different light in the context of the debate over voter intent, examined in Part V.A. of this Note. But even without the “each plaintiff” language, the statute can be read to mean that the cap is applied per plaintiff if “action” means “cause of action.” The per-plaintiff reading is possible because of the statute’s use of singular nouns, as is discussed below. Under that reading, the “per plaintiff” language of the old statute is unnecessary and would have been redundant in the current statute. The intentionally restrictive singular use of the nouns in the new statute and the

<sup>115</sup> See, e.g., *Upchurch*, 961 P.2d at 759–60 (citing *State v. Eaton*, 710 P.2d 1370, 1373 (Nev. 1985); *State v. Webster*, 504 P.2d 1316, 1319 (Nev. 1972)).

<sup>116</sup> Neal Order, *supra* note 13, at 3.

<sup>117</sup> *Villegas* Oral Argument, *supra* note 10, at 24:05–24:35. But, Mr. Kennedy added that although the *Upchurch* interpretation was not expressly addressed anywhere in the legislative history, the Nevada Trial Lawyers Association’s lobbyist spoke on the issue in March 2003, when the lobbyist testified to the Senate Committee on Judiciary about the differences between a competing bill and the law proposed by the initiative, pointing out that the competing bill would provide a per-plaintiff, per-defendant cap that would allow each heir in a wrongful death to have his own, independent claim for noneconomic damages, but under the law proposed by the initiative the limit would be “\$350,000 per event with no exceptions.” *Id.* at 24:36–25:28. As explained in Part V(A), however, this Note argues that it does not matter what was said in the Legislature about the initiative because the Legislature did not enact the statute, the voters did.

<sup>118</sup> *Upchurch*, 961 P.2d at 756–60 (regarding NEV. REV. STAT. § 41.035 (1995)).

<sup>119</sup> NEV. REV. STAT. § 41.035(1) (2011).

<sup>120</sup> See, e.g., Valley Health System Answering Brief, *supra* note 88, at 12.

<sup>121</sup> *Id.*



use of “an action,” meaning “a cause of action” or “claim,” could convey the same meaning as “to each plaintiff from each defendant” did in the old statute.

More importantly for the argument regarding *Upchurch*, the court did not specifically tie *Upchurch*'s definition of “in an action” to the prior statute's “to or for the benefit of any claimant” language; the court did not rest its per-plaintiff, per-claim reading on the “any claimant” phrase of the statute. In fact, the phrase “any claimant” only appears in the opinion once, when the court quotes the entire statute. Rather than tying its conclusion about the meaning of “in an action” to the “any claimant” phrase, the *Upchurch* court states that Nevada's consistent legal precedent of interpreting the statute as allowing plaintiffs to recover damages on a per-person, per-claim basis was consistent with “the clear reading of [the statute], which uses the phrases ‘in an action’ (singular), as well as the phrase ‘arising out of an act or omission’ (again singular).”<sup>122</sup>

The per-plaintiff application of the med mal cap is similarly supported by the statutory scheme's use of the singular for not only those same two phrases identified in the *Upchurch* ruling but also other key words. In fact, all of the statutory language that is significant to the med mal cap application question is singular:

*In an action* for injury or death against a provider of health care based upon professional negligence, the injured plaintiff may recover noneconomic damages, but the amount of noneconomic damages awarded in such an action must not exceed \$350,000.<sup>123</sup>

Additionally, NRS 41A.015, which was also enacted through Ballot Question 3, defines “professional negligence” as “a negligent act or omission” and uses the singular form.<sup>124</sup>

If the intention had been for the cap to apply in the aggregate to all plaintiffs suing over any one incident, the statute could have—and arguably should have—been written using the plural form, “plaintiffs.” Instead, the statute says that in an action the plaintiff may be awarded up to \$350,000. And although the Nevada Revised Statutes' preliminary chapter states, “[t]he singular number includes the plural number, and the plural includes the singular,”<sup>125</sup> that same NRS section also includes an exception: singular and plural are not mutually inclusive if “otherwise expressly provided in a particular statute or required by the context.”<sup>126</sup> When medical malpractice is fatal, the med mal cap statute must be considered in the context of the wrongful death statute and that context requires the singular, as explained in Part III of this Note.

The use of the singular in the med mal cap was noted by Judge Denton, Judge Sturman, and Judge Silver as one of the main reasons each ruled in favor of the per-plaintiff application of the cap.<sup>127</sup>

<sup>122</sup> *Upchurch*, 961 P.2d at 761.

<sup>123</sup> NEV. REV. STAT. § 41A.035 (2011) (emphasis added).

<sup>124</sup> *Id.* § 41A.015.

<sup>125</sup> *Id.* § 0.030.

<sup>126</sup> *Id.* (emphasis added).

<sup>127</sup> See, e.g., Tremblay Order, *supra* note 6, at 2; Neal Order, *supra* note 13, at 3; Mehanna Order, *supra* note 13, at 4–5.

## IV. HARMONIZING THE MED MAL CAP AND WRONGFUL DEATH STATUTES

Another basis for Judge Denton, Judge Sturman, and Judge Silver's rulings in favor of the per-plaintiff application of the cap was Nevada's wrongful death statute, NRS 41.085.<sup>128</sup> But the statute was also a main reason that Judge Elliott ruled the opposite way.<sup>129</sup> As that indicates, the two sides of the med mal cap debate also disagree about the meaning of the wrongful death statute, which is understandable because the statute provides plenty of opportunity for disagreement. The two sides ping-pong through the subsections of the wrongful death statute in making their arguments.

First, subsection 2 says that when a person's death "is caused by the wrongful act or neglect of another, the heirs of the decedent and the personal representatives of the decedent *may each maintain an action for damages* against the person who caused the death."<sup>130</sup> Subsection 3 then refers to "[a]n action brought by the heirs" and "*the cause of action* of that decedent brought or maintained by the decedent's personal representatives."<sup>131</sup>

So does the statute mean each heir may maintain his own individual action (plaintiffs' argument), or does it mean the heirs have one action and the personal representatives of the decedent have their own action (defendants' argument)?<sup>132</sup> The plain language here may well favor the defendants' reading of the statute—"an action" (singular) brought by "the heirs" (plural), arguably is most plainly read to mean one action filed by the heirs collectively.<sup>133</sup> The argument is that NRS 41.085(2) allows for, at most, two separate "actions": one brought by the heirs of the decedent for noneconomic damages and another action brought by the personal representative of the estate for economic damages.<sup>134</sup>

The Nevada Supreme Court must construe the provisions of the med mal cap statute in compliance and conformance with other applicable statutory pro-

<sup>128</sup> See Tremblay Order, *supra* note 6, at 2; Neal Order, *supra* note 13, at 3; Mehanna Order, *supra* note 13, at 4.

<sup>129</sup> Sieben Order, *supra* note 4, at 4–5 (noting that the court read the wrongful death statute "as allowing only two separate actions: one brought by the personal representative and one brought by the 'heirs of the decedent' collectively," and that this reading was one of two findings that guided the court's conclusion that the heirs in the case could recover no more than \$350,000 in noneconomic damages, collectively).

<sup>130</sup> NEV. REV. STAT. § 41.085(2) (2011) (emphasis added).

<sup>131</sup> *Id.* § 41.085(3) (emphasis added).

<sup>132</sup> *Id.* § 41.085(2).

<sup>133</sup> This is how Judge Elliott read the statute. See Sieben Order, *supra* note 4, at 4 (noting that the court read the wrongful death statute "as allowing only two separate actions: one brought by the personal representative and one brought by the 'heirs of the decedent' collectively").

<sup>134</sup> See, e.g., Blanco-Cuevas Motion for Summary Judgment, *supra* note 65, at 7; Sieben Order, *supra* note 4, at 4 (agreeing with defendants' argument that the wrongful death statute allows only two separate actions: one brought by the heirs of the decedent collectively and one brought by the personal representative of the estate); see also Villegas Oral Argument, *supra* note 10, at 33:57–34:50 (attorney Dan Polsenberg arguing on behalf of respondent Dr. Shiekh, defendant in the underlying case, the wrongful death statute allows only two separate actions: one brought by the heirs of the decedent collectively and one brought by the personal representative of the estate, and noting that the latter is not an issue in the med mal cap question because the personal representative's damages are economic damages).

visions.<sup>135</sup> Therefore, defendants argue, the med mal cap statute cannot refer to a damages cap applicable to each plaintiff heir because all the heirs are required to sue collectively.<sup>136</sup> Judge Elliott's agreement with that reading of the wrongful death statute was one of two findings<sup>137</sup> that led him to rule that the med mal cap applied collectively to a decedent's heirs.<sup>138</sup>

Judges Denton, Sturman, and Silver, on the other hand, agreed with plaintiffs who focused on subsection 4 of the wrongful death statute, which provides:

The heirs may prove their respective damages in the action brought pursuant to subsection 2 and the court or jury may award each person pecuniary damages for the person's grief or sorrow, loss of probable support, companionship, society, comfort and consortium, and damages for pain, suffering or disfigurement of the decedent.<sup>139</sup>

Under subsection 4, each heir would necessarily have his own cause of action. That makes sense because one heir might have been very close to the decedent, for example, while another heir had been estranged from the decedent. Those two heirs would have different claims as a result of their different degrees of pain or suffering. This is why the wrongful death statute dictates that the heirs must prove "their respective damages," which in turn leads to the conclusion that the damages awardable to each heir are distinct and individual.<sup>140</sup>

Defendants try to counter this by pointing to subsection 3 of the statute: "An action brought by the heirs of a decedent pursuant to subsection 2 and the cause of action of that decedent brought or maintained by the decedent's personal representatives which arose out of the same wrongful act or neglect may be joined."<sup>141</sup> Defendants argue that a part of the statute and the aims of judicial efficiency and equity result in a requirement for all the heirs to bring their claims in the same "action"<sup>142</sup> to prevent a defendant from having to face a series of lawsuits from different plaintiffs over the same death.<sup>143</sup>

But while the *Parker* analysis of NRS 12.090, the similarly worded predecessor of the current wrongful death statute, did note that the "thrust" of the statute "is to have all heirs join in one action," it also emphasized that "[t]he statute does not create a joint cause of action."<sup>144</sup>

Each heir has a separate relational interest in the life of the deceased, and damages are determined according to those separate interests. The mere fact that the

<sup>135</sup> See *Allianz Ins. Co. v. Gagnon*, 860 P.2d 720, 723 (Nev. 1993) ("Whenever possible, this court will interpret a rule or statute in harmony with other rules and statutes.").

<sup>136</sup> See, e.g., *Universal Health Petition*, *supra* note 2, at 19.

<sup>137</sup> The other finding that guided Judge Elliott's ruling was California's interpretation of its med mal cap. *Sieben Order*, *supra* note 4, at 4–5. The California comparison is the subject of Section V of this Note.

<sup>138</sup> See *id.* at 4–6 (agreeing with Defendants' interpretation of the language of NRS 41A.035 and NRS 41.085 and concluding "that the language of NRS 41A.035 and NRS 41.085 support Defendants' argument that the non-economic damages cap limits the recovery to \$350,000 to Plaintiff's [sic] collectively").

<sup>139</sup> NEV. REV. STAT. § 41.085(4) (2011) (emphasis added).

<sup>140</sup> See *id.*

<sup>141</sup> *Id.* § 41.085(3).

<sup>142</sup> See, e.g., *Universal Health Petition*, *supra* note 2, at 18–19.

<sup>143</sup> *Villegas Oral Argument*, *supra* note 10, at 27:44–29:17.

<sup>144</sup> *Parker v. Chrysler Motors Corp.*, 502 P.2d 111, 112 (Nev. 1972).

judgment, if one is recovered, should be in a lump sum does not destroy separability since either the heirs, or the court upon proper application, may apportion the award.

It follows, therefore, that a defense, good against the claim of one heir, is not fatal to the others, any more than a settlement by one could bar the rights of all.<sup>145</sup>

So even if the claims of various heirs *must* (as opposed to “may” or “should, whenever possible”) be joined in one lawsuit, each heir still has his own cause of action. Indeed, Nevada’s wrongful death statute specifies individualized damages and an individualized proof of damages requirement for each heir.<sup>146</sup>

Plaintiffs further argue that the plain language of the wrongful death statute yields a reading that the joinder to which the statute refers is actually joinder into one lawsuit of the heirs’ various causes of action with the cause of action of the personal representative of the estate.<sup>147</sup> And the Nevada Supreme Court, in at least three cases, has held that each heir maintains an individual action for individual damages even if those actions are stated in a single complaint.<sup>148</sup>

Several of Nevada’s rules of statutory interpretation are particularly pertinent to the med mal cap question in the wrongful death context because they deal with harmonization of multiple statutes. Whenever possible, the court must interpret a statute in harmony with other rules and statutes<sup>149</sup> and must “construe statutes such that no part of the statute is rendered nugatory or turned to mere surplusage.”<sup>150</sup> Plaintiffs argue that a per-plaintiff application of the med mal cap rule for wrongful death cases harmonizes the two statutes, allowing the two to co-exist without conflicting with each other. That argument, in a nutshell, goes like this: “Action” in the med mal cap statute means “cause of action,” the wrongful death statute says each heir has a “cause of action,” and the med mal cap statute says the cap applies to each action. Therefore, because each heir has his own cause of action, each heir may collect noneconomic damages up to the \$350,000 cap. A per-lawsuit construction of the cap, on the other hand, would effectively negate or render superfluous the wrongful death statute’s individual-cause-of-action-for-each-heir and individual-damages-for-each-heir provisions. It was this analytical framework that led Judge Denton to hold in his order that the per-plaintiff application of the med mal cap is the only way to harmonize the two statutes.<sup>151</sup>

<sup>145</sup> *Id.*

<sup>146</sup> NEV. REV. STAT. § 41.085(4).

<sup>147</sup> See, e.g., Tremblay Opposition to Summary Judgment, *supra* note 25, at 4.

<sup>148</sup> See *Cnty. of Clark ex rel. Univ. Med. Ctr. v. Upchurch*, 961 P.2d 754, 757, 761 (Nev. 1998) (explaining, approvingly, that the *Arnesano* court treated three heirs of the decedent as maintaining individual actions for the purpose of a statutory damages limitation applicable to “[a]n award for damages in an action”); *State v. Webster*, 504 P.2d 1316, 1320 (Nev. 1972); see also *Parker*, 502 P.2d at 112 (“Each heir has a separate relational interest in the life of the deceased, and damages are determined according to those separate interests.”).

<sup>149</sup> See, e.g., *Albios v. Horizon Cmtys., Inc.*, 132 P.3d 1022, 1028 (Nev. 2006) (citing *Allianz Ins. Co. v. Gagnon*, 860 P.2d 720, 723 (Nev. 1993)); *Allianz Ins. Co.*, 860 P.2d at 723; *Bowyer v. Taack*, 817 P.2d 1176, 1177 (Nev. 1991); *City Council of Reno v. Reno Newspapers, Inc.*, 784 P.2d 974, 978 (Nev. 1989).

<sup>150</sup> *Albios*, 132 P.3d at 1028.

<sup>151</sup> Tremblay Order, *supra* note 6, at 2 (order finding that the cap applies per plaintiff).

At the very least, a per-incident application of the cap in a case brought by numerous plaintiffs could make it very difficult for a “district court judge [to] tr[y] to figure out how in the world to allocate \$350,000 (assuming the plaintiffs prevail) among the plaintiffs,”<sup>152</sup> as Nevada Justice James Hardesty put it during the *Villegas* oral arguments. Dennis Kennedy, the attorney who defended Valley Health System in *Villegas* and other medical malpractice cases,<sup>153</sup> acknowledged to the court that the absence of guidance about allocation in the statute could raise some question about the enforceability of the statute if the cap is applied per incident.<sup>154</sup>

Advocates of the per-incident application of the cap point to another Nevada rule of statutory interpretation specific to harmonization.<sup>155</sup> That rule states that “[w]hen two statutes are clear and unambiguous but conflict with each other when applied to a specific factual situation,” the court must attempt to reconcile the statutes by attempting to read the statutory provisions in harmony, “provided that this interpretation does not violate legislative intent.”<sup>156</sup> A per-plaintiff application of the cap would violate legislative intent, defendants argue.<sup>157</sup>

The problem with this argument is this rule only applies in limited circumstances and as such the rule is arguably inapplicable here. First, in light of different trial judges reaching diametrically opposed conclusions about the meaning of the med mal cap statute, the statute is arguably neither clear nor unambiguous, as further discussed in Part V. But even assuming for the sake of argument that the statute is clear and unambiguous, a per-plaintiff application would not violate “legislative intent” if we are examining the right legislative intent. The med mal statute was passed by voter initiative, so the “legislative intent” here is, in fact, the intent of voters, as explained in Part V.

In sum, analyses of the wrongful death and med mal cap statutes, the related case law, and rules of statutory interpretation support the per-plaintiff application of the med mal cap in wrongful deaths. This is why Judge Denton noted in his two-paragraph order that the \$350,000 cap did not apply to the plaintiffs in the aggregate, because each of the plaintiffs has a separate cause of

<sup>152</sup> *Villegas Oral Argument*, *supra* note 10, at 29:12–30:13.

<sup>153</sup> Mr. Kennedy represented Valley Health System, LLC, the defendant hospital system in *Villegas*. See, e.g., *Villegas Oral Argument*, *supra* note 10. Mr. Kennedy also represented the defendant health system one year later in *Mehanna v. Universal Health Services Foundation*. See *Universal Health Petition*, *supra* note 2.

<sup>154</sup> See *Villegas Oral Argument*, *supra* note 10, at 30:12–31:08. After acknowledging to the court that the statute’s absence of allocation guidance “could” raise some question about its enforceability if the cap is applied per incident, Mr. Kennedy went on to argue that “if you look carefully at the Equal Protection analysis you might come to the opposite conclusion with some of the Equal Protection cases say[ing] you have a right to sue, you have a right to make a claim, but there is no guarantee [as to] what recovery you’ll make, if any recovery.” *Id.* at 30:42–31:08.

<sup>155</sup> See, e.g., *Universal Health Petition*, *supra* note 2, at 18.

<sup>156</sup> *Fierle v. Perez*, 219 P.3d 906, 910–11 (Nev. 2009) (internal citations and quotation marks omitted) (applying the rules of statutory construction to NRS 41A.015 and NRS 41A.017, which were enacted by the same initiative petition and ballot question as NRS 41A.035, and concluding that NRS Chapters 41A and 89 “must be read in harmony.”) The issue of legislative intent is addressed in Part V.A. of this Note.

<sup>157</sup> *Universal Health Petition*, *supra* note 2, at 18–19.

action under the wrongful death statute.<sup>158</sup> The same analytical framework led Judge Sturman to conclude that “in the wrongful death context, the combination of [the med mal cap statute and the wrongful death statute] yields a determination that heirs in the medical malpractice context are subject to a compensatory damage limitation of \$350,000 per person, per claim, regardless of the number of actors.”<sup>159</sup> And, likewise, Judge Silver held that the med mal cap statute’s

use of the singular phrases “the injured plaintiff” and “in an action,” coupled with the wrongful death statute’s use of the phrases “the heirs . . . may each maintain an action,” each heir “may prove their respective damages” and the “jury may award each person pecuniary damages,” clearly indicates each plaintiff heir in a wrongful death case has his or her own action with his or her own recoverable damages.

. . . Here, each Plaintiff Heir is entitled to non-economic damages with a limitation of \$350,000 per plaintiff for any damages other than punitive damages.<sup>160</sup>

#### V. PLAIN LANGUAGE OR PLAINLY AMBIGUOUS?

Obviously, the dispute over the proper application of the med mal cap is largely, if not entirely, one of statutory interpretation. The most fundamental Supreme Court of Nevada rule for statutory interpretation is: If the plain language of a statute is unambiguous, the proper interpretation of that statute is its plain language meaning.<sup>161</sup>

Plaintiffs and defendants contend that the med mal cap statute is not ambiguous and urge the plain language reading of the statute.<sup>162</sup> As explained in Part III of this Note, plaintiffs call for the singular nouns to be read literally, as strictly singular. The statute could have been written using the plural if that was what was meant, just as it could have said that the cap would now apply per incident, if that was what was meant. They also contend that any ambiguity that might arise from the phrase “professional negligence” in the statute is clarified by the comprehensive definition of that phrase in NRS 41A.015, a statute that was added in conjunction with the med mal cap statute and as a result of the same voter initiative ballot question that resulted in the current med mal statute.<sup>163</sup> Defendants, on the other hand, argue that a plain reading of the stat-

<sup>158</sup> Tremblay Order, *supra* note 6, at 2.

<sup>159</sup> Neal Order, *supra* note 13, at 3.

<sup>160</sup> Mehanna Order, *supra* note 13, at 4–5.

<sup>161</sup> *Rosequist v. Int’l Ass’n of Firefighters*, 49 P.3d 651, 653 (Nev. 2002) (“If the plain meaning of a statute is clear on its face, then [this court] will not go beyond the language of the statute to determine its meaning.”).

<sup>162</sup> *See, e.g.*, Universal Health Petition, *supra* note 2, at 12–14 (petitioners—defendants in a lawsuit alleging fatal medical malpractice—arguing that the plain language of the med mal cap statute states that the cap applies to multiple plaintiffs in the aggregate); Tremblay Opposition to Summary Judgment, *supra* note 25, at 3–4 (plaintiffs urging for a plain language reading of the med mal caps that the \$350,000 cap is applicable to each single plaintiff’s action); Villegas Motion To Confirm Damage Cap, *supra* note 25, at 4.

<sup>163</sup> NEV. REV. STAT. § 41A.015 (2011) (“‘Professional negligence’ means a negligent act or omission to act by a provider of health care in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death. The term does not include services that are outside the scope of services for which the provider of health care is licensed or services for which any restriction has been imposed by the applicable

ute, in which action has its generally presumed common-law meaning of “lawsuit,”<sup>164</sup> leads to the conclusion that the cap applies per incident. Turning some of the plaintiffs’ argument on its head, defendants note that the statute could have easily been written to use the phrase “cause of action” if that meaning had been intended.<sup>165</sup>

The position that the statute is unambiguous, however, is highly questionable for several reasons. First, in *Upchurch*, the court referred to the materially identical language of “in an action” as ambiguous,<sup>166</sup> and the meaning of that phrase in NRS 41.035 is key here.<sup>167</sup> But even more fundamentally, the Nevada Supreme Court has defined ambiguous as “susceptible to more than one natural or honest interpretation,”<sup>168</sup> and as “capable of being understood in two or more senses by reasonably informed persons.”<sup>169</sup> The med mal cap would certainly appear to meet that definition of ambiguous. Not only is the meaning of key words in the statute, such as “action,” disputed,<sup>170</sup> but also the meaning of the statute, as it pertains to application of the cap, has been understood by at least two Nevada district court judges to be the opposite of the meaning understood by three other Nevada district court judges.<sup>171</sup> By the very nature of their positions, judges are not only presumed to be reasonably informed, they have a duty to be reasonably informed. Moreover, their law clerks and the attorneys who come before the courts are required to reasonably inform the judges. The fact that several of those judges reached diametrically opposed conclusions about the statute’s meaning evinces that the statute is susceptible to more than one honest interpretation and capable of being understood in at least two senses by reasonably informed persons. Therefore, it is reasonable to conclude that the statute is ambiguous.

#### A. *The Only Relevant Legislative Intent Here Is Voter Intent*

When a statute is ambiguous Nevada courts look beyond the plain meaning to the legislative intent.<sup>172</sup> The Nevada Supreme Court, over the years, has

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regulatory board or health care facility.”). This statute was “[a]dded [to NRS] by 2004 initiative petition, Ballot Question No. 3.” *Id.*

<sup>164</sup> See, e.g., *supra* Part III; see also *Universal Health Petition*, *supra* note 2, at 13–14.

<sup>165</sup> See, e.g., *Universal Health Petition*, *supra* note 2, at 14.

<sup>166</sup> *Cnty. of Clark ex rel. Univ. Med. Ctr. v. Upchurch*, 961 P.2d 754, 761 (Nev. 1998).

<sup>167</sup> See *supra* Part III.

<sup>168</sup> *State v. Granite Constr. Co.*, 40 P.3d 423, 426 (Nev. 2002).

<sup>169</sup> *McKay v. Bd. of Supervisors of Carson City*, 730 P.2d 438, 442 (Nev. 1986).

<sup>170</sup> See *supra* Part III.

<sup>171</sup> Compare *Tremblay Order*, *supra* note 6, at 2 (wherein Judge Denton found that the cap applied per plaintiff, in part, he noted, because the med mal cap statute “uses the term ‘plaintiff’ in the singular”), and *Mehanna Order*, *supra* note 13, at 4–5 (wherein Judge Silver used rationale similar to Denton’s in *Tremblay*), with *Villegas Order Re: Damage Cap*, *supra* note 5, at 2 (wherein Judge Miley found the cap applied per event regardless of the number of plaintiffs), and *Sieben Order*, *supra* note 4, at 6 (wherein Judge Elliott found “that the language of NRS 41A.035 and NRS 41.085 support[ed] Defendants’ argument that the non-economic damages cap limit[ed] the recovery to \$350,000 to Plaintiffs collectively”).

<sup>172</sup> *Granite Constr. Co.*, 40 P.3d at 426. (“When a statute is ambiguous, the intent of the legislature is the controlling factor in statutory interpretation.”).

sorted out how courts should attempt to discern intent of the Legislature,<sup>173</sup> including adopting rules such as: “In construing an ambiguous statute, [the court] must give the statute the interpretation that ‘reason and public policy would indicate the legislature intended.’ ”<sup>174</sup> Advocates of the per-lawsuit interpretation of the med mal cap statute cite actual legislative history to support their argument.<sup>175</sup> They ask the courts to take into account legislators’ statements and testimony from committee hearings regarding the KODIN initiative, known as Initiative Petition 1 (“I.P. 1”) and proposed legislation regarding med mal caps, particularly Senate Bill 97 (“S.B. 97”) and Assembly Bill 1 (“A.B.1”).<sup>176</sup>

The court should not take that legislative history into account, however. The Nevada Legislature did not create or enact this statute; the statute was, rather, created and enacted by voter initiative.<sup>177</sup> The statutory initiative process is not only different from the Legislature’s process but one that the state constitution separates from the Legislature’s process.<sup>178</sup>

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<sup>173</sup> See, e.g., *Pub. Emps.’ Benefits Program v. Las Vegas Metro. Police Dep’t*, 179 P.3d 542, 548 (Nev. 2008) (“When a statute is ambiguous . . . or when it does not address the issue at hand, however, we may look to reason and public policy to determine what the Legislature intended. The import of the statutory language used may be ascertained by examining the background and spirit in which the law was enacted, and the entire subject matter and policy guides our interpretation. Finally, we consider multiple legislative provisions as a whole, construing a statute so that no part is rendered meaningless. Because the statute that we are ultimately concerned with here, NRS 287.010, is ambiguous, we turn to the statute’s historical background and spirit, reason, and public policy to guide us in our interpretation.”); *Washoe Med. Ctr. v. Second Judicial Dist. Court ex rel. Cnty. of Washoe*, 148 P.3d 790, 793 (Nev. 2006) (“When construing an ambiguous statute, legislative intent is controlling, and we look to legislative history for guidance. Finally, we consider ‘the policy and spirit of the law and will seek to avoid an interpretation that leads to an absurd result.’ ”); *Metz v. Metz*, 101 P.3d 779, 783 (Nev. 2004).

<sup>174</sup> *Beazer Homes Nev., Inc. v. Eighth Judicial Dist. Court ex rel. Cnty. of Clark*, 97 P.3d 1132, 1135 (Nev. 2004) (emphasis added) (quoting *State, Dep’t Motor Vehicles v. Vezeris*, 720 P.2d 1208, 1211 (Nev. 1986)).

<sup>175</sup> See, e.g., *Universal Health Petition*, *supra* note 2, at 21–26.

<sup>176</sup> See, e.g., *id.* at 22–26; *Valley Health System Answering Brief*, *supra* note 88, at 1–2; *Villegas Oral Argument*, *supra* note 10, at 23:22–25:29.

<sup>177</sup> NEV. REV. STAT. § 41A.035 (2011) (“Added . . . by 2004 initiative petition, Ballot Question No. 3”).

<sup>178</sup> See *Rogers v. Heller*, 18 P.3d 1034, 1036 (Nev. 2001) (outlining the separation thusly: “Nevada’s Constitution expressly empowers the people to propose, by initiative petition, statutes and amendments to statutes; it requires the Secretary of State to transmit a certified initiative petition to the Legislature as soon as the Legislature convenes. Thereafter, the Legislature must enact or reject the proposed initiative petition without change or amendment within forty days. If the Legislature fails to act within the forty days, or rejects the initiative petition, then the Secretary of State must submit the initiative petition to the electorate for a vote at the next general election. If approved, the Legislature cannot amend, annul, repeal, set aside or suspend the law within three years after it takes effect.”) (internal citations omitted); see also *id.* at 1039–40 (“[I]nitiative legislation is not subject to judicial tampering—the substance of an initiative petition should reflect the unadulterated will of the people and should proceed, if at all, as originally proposed and signed. For this reason, our constitution prevents the Legislature from changing or amending a proposed initiative petition that is under consideration. Like the Legislature, we are not in a position to know whether an initiative’s drafters and signers would want an initiative to proceed without a primary component of the proposal.”).



The intent underlying a “direct democracy” effort such as a statutory initiative is more accurately termed “popular intent” or “voter intent,”<sup>179</sup> but no matter what name it is given, the Nevada Supreme Court has yet to establish rules specifically for ascertaining the intent behind initiative-created state statutes. The court has dealt with discerning intent for a county statute, though, and in that ruling the court appeared to be in favor of examining voter ballot summaries and voter ballot arguments when interpreting a voter initiative.<sup>180</sup> The court also has outlined various ways to try to determine the intent behind a particular type of voter-created statewide law—a provision added to the constitution by initiative.

A constitutional initiative is different from a statutory initiative in at least two ways. It is generally different in that a constitutional initiative “provides more durability than its statutory counterpart.”<sup>181</sup> Nevada’s constitution recognizes that increased durability and uniquely requires<sup>182</sup> that initiative-created constitutional amendments be approved by voters at two consecutive general elections before they are enacted.<sup>183</sup> Statutory initiatives, on the other hand, are enacted after being approved only once at the polls in Nevada.<sup>184</sup> Because they are different, it is not reasonable to presume that rules the court applies to constitutional initiatives are equally and wholly applicable to statutory initiatives. Indeed, in *Miller v. Burk*, a case that advocates of the per-incident application cite for their preferred approach to voter intent, the court’s choice of words repeatedly specify that the decision is referring to a constitutional provision.<sup>185</sup>

*Burk*’s approach is that “we may look to the provision’s history, public policy, and reason to determine what the voters intended,”<sup>186</sup> but that is only one of several possible approaches the court has outlined for ascertaining the voter intent behind constitutional initiatives. Another is found in *Guinn v. Leg-*

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<sup>179</sup> See generally, e.g., Jane S. Schacter, *The Pursuit of “Popular Intent”: Interpretive Dilemmas in Direct Democracy*, 105 YALE L.J. 107 (1995); see also Chris Chambers Goodman, *Examining “Voter Intent” Behind Proposition 209: Why Recruitment, Retention and Scholarship Privileges Should Be Permissible Under Article I, Section 31*, 27 CHICANA/O-LATINA/O L. REV. 59 (2008).

<sup>180</sup> See Sustainable Growth Initiative Comm. v. Jumpers, LLC, 128 P.3d 452, 461 (Nev. 2006) (wherein the court examined the argument included in the sample ballot to determine the voter intent behind a county statutory initiative).

<sup>181</sup> Schacter, *supra* note 180, at 116.

<sup>182</sup> Nevada is the only state to have such a requirement. *Nevada*, INITIATIVE & REFERENDUM INST. AT THE U. OF S. CAL. (2013), <http://www.iandrinstitute.org/Nevada.htm>.

<sup>183</sup> NEV. CONST. art. 19, § 2(4).

<sup>184</sup> *Id.* § 2(3).

<sup>185</sup> *Miller v. Burk*, 188 P.3d 1112, 1119–20 (Nev. 2008) (“To determine a *constitutional provision’s meaning*, we turn first to *the provision’s language*. In so doing, we give that language its plain effect, unless the language is ambiguous. If a *constitutional provision’s language* is ambiguous, meaning that it is susceptible to ‘two or more reasonable but inconsistent interpretations,’ we may look to *the provision’s history, public policy, and reason* to determine what the voters intended. Conversely, when a *constitutional provision’s language* is clear on its face, we will not go beyond that language in determining the voters’ intent or to create an ambiguity when none exists. Whatever meaning ultimately is attributed to a *constitutional provision* may not violate the spirit of that provision.”) (emphasis added) (internal citations omitted).

<sup>186</sup> *Id.* at 1120.

islature of the State of Nevada,<sup>187</sup> and the *Guinn* court's approach is one that is more reasonably and appropriately extended to ascertaining voter intent behind statutory initiatives in general and the med mal cap question in particular. That *Guinn* is the best approach in general is evident in the fact that it is by far the most prevalently used way of discerning intent of voters who approved statutory initiatives.<sup>188</sup> It is the approach that is most appropriate for the med mal question in particular because of the parallels between issues surrounding the med mal cap-wrongful death question and those of the *Guinn* case.

In *Guinn*, the court discerned the meaning of a petition-created constitutional amendment, the gist of which had been considered but not enacted by the Nevada Legislature, had then gone directly to voters through the initiative process and was approved by the voters.<sup>189</sup> The med mal cap statute followed a similar path,<sup>190</sup> except it did not have to go before voters twice.<sup>191</sup> Also at issue in *Guinn* was a conflict between, and conflicting interpretations of, the constitutional initiative and a pre-existing constitutional amendment,<sup>192</sup> just as there are conflicts between and conflicting interpretations of the med mal cap and wrongful death statutes here.<sup>193</sup>

The *Guinn* court stated that when construing a constitutional amendment that is subject to conflicting interpretations, the court looks beyond the plain language of the provision to ascertain the intent of those who enacted the provision at issue.<sup>194</sup> Because voters enacted the constitutional provision at issue in *Guinn*, the court examined "the arguments for and against passage, presented in the voter information and sample ballot pamphlet."<sup>195</sup> Examination of the official ballot materials presented to voters is the same approach that has been found to be the dominant way of discerning the intent of statutes created by initiative.<sup>196</sup> Moreover, it has long been the standard approach in California,<sup>197</sup>

<sup>187</sup> *Guinn v. Leg. of State of Nev.*, 76 P.3d 22 (Nev. 2003).

<sup>188</sup> See, e.g., Schacter, *supra* note 180, at 120–23 (outlining various sources courts consult to determine popular intent). Professor Schacter also notes, however, that studies show many voters base their ballot decisions on information that they get from sources other than the official ballot material. *Id.* at 111.

<sup>189</sup> *Guinn*, 76 P.3d at 25–26.

<sup>190</sup> See Universal Health Petition, *supra* note 2, at 3.

<sup>191</sup> Compare NEV. CONST. art. 19, § 2(3), with *id.* § 2(4).

<sup>192</sup> *Guinn*, 76 P.3d at 25–26.

<sup>193</sup> The conflict between those two statutes is explained above. See *supra* Part IV.

<sup>194</sup> *Guinn*, 76 P.3d at 29 ("In construing the Constitution, our primary objective is to discern the intent of those who enacted the provisions at issue, and to fashion an interpretation consistent with that objective. However, when the enactors' intent cannot be determined, rules of constitutional construction require us to attempt to harmonize differing provisions so as to give as much effect as possible to each provision. We look beyond the plain language of constitutional provisions to ascertain intent 'when a construction is urged which would result in an absurd situation' or when provisions are subject to conflicting interpretations.") (internal citations omitted).

<sup>195</sup> *Id.* at 26 & n.10.

<sup>196</sup> Schacter, *supra* note 180, at 120–23.

<sup>197</sup> See *id.* at 114–15, 120–23 (in which Professor Schacter studied decisions handed down in the decade from 1984–1994); Goodman, *supra* note 180, at 63–64 (noting that in December 2000, the California Supreme Court reviewed the ballot pamphlet materials of Proposition 209 as the guide for the court's attempt to ascertain the voter intent for the proposition, which was a constitutional initiative).

a state not only known for its “heavy usage of direct lawmaking”<sup>198</sup> but, more importantly for the purposes of this Note, the state from which Nevada courts most frequently draw persuasive authority for legal questions upon which Nevada’s case law is thin.<sup>199</sup>

Therefore, because the Nevada Supreme Court used this approach to resolve a relatively similar situation and because it is the approach to ascertain voter intent used in California for statutory initiatives, the court should examine the ballot materials to ascertain voter intent of statutory initiatives in Nevada.

Courts also have common sense reasons to rely mainly, if not exclusively, on official ballot material when attempting to ascertain voter intent. While the traditional search for legislative intent can be difficult, “[t]here are reasons to suspect that a search for ‘popular intent’ will be even more problematic.”<sup>200</sup>

Consider, for example, the mass size of the electorate; the absence of legislative hearings, committee reports, or other recorded legislative history; and the inability of citizen lawmakers to deliberate about, or to amend, proposed ballot measures. In addition, voters are not professional lawmakers, so it is problematic to impute to the electorate the same knowledge about law, legal terminology, and legislative context that courts routinely ascribe—if sometimes only as aspiration—to legislators. These structural dynamics of the direct lawmaking process should further burden what is in any circumstance a problematic quest for the single intent underlying a law.<sup>201</sup>

Therefore, the only realistically manageable way to try to discern voter intent is by examining the ballot materials. Those materials are the only information to which all voters unquestionably had equal access. It also is the information for which it is most reasonable to presume accuracy because the state provides it as the official information about the ballot question and it is subject to judicial review.

In the case of the KODIN initiative, it would be highly unreasonable to presume that all, or even most, voters observed or listened to the Legislature’s discussion of Initiative Petition 1 either in person in Carson City or via live broadcast on the Internet.<sup>202</sup> Granted, contemporaneous newspaper articles and minutes of legislative hearings were also available to the voting public prior to

<sup>198</sup> See Schacter, *supra* note 180, at 115.

<sup>199</sup> See KATHERINE HENDERSON & PAMELA G. ROBERTS, STATE BAR OF NEVADA, NEVADA CIVIL PRACTICE MANUAL § 1.03 (2012) (“California law has been a prominent source of Nevada law since the inception of statehood.”); *see also* Clark v. Lubritz, 944 P.2d 861, 865 n.6 (Nev. 1997) (recognizing that “Nevada’s statute on punitive damages is a verbatim copy of the California punitive damages statute . . . .”); Commercial Standard Ins. Co. v. Tab Constr., Inc., 583 P.2d 449, 451 (Nev. 1978) (wherein the court bases its holding on a ruling of the California Supreme Court and a California appellate court’s application of the rule established by the California Supreme Court).

<sup>200</sup> Schacter, *supra* note 180, at 110.

<sup>201</sup> *Id.*

<sup>202</sup> There is no C-Span-like network that broadcasts Nevada legislative hearings on television or on the radio, but live Internet streaming of the legislature’s committee meetings was available in 2003. See Ed Vogel, *Listen to Legislators on Internet*, LAS VEGAS REV.-J., Mar. 15, 1999, at B1 (reporting the availability of live Internet audio of committee meetings); Sean Whaley, *Legislature’s “Digital Democracy” Lauded*, LAS VEGAS REV.-J., Oct. 27, 2003, at B2 (reporting that live Internet video of committee meetings was available by 2003).

the vote on the KODIN initiative,<sup>203</sup> and given the wide reach of the mass media being expanded by the Internet it is not unreasonable to presume that a majority of voters might have had access to reports about at least some of the legislative discussion about I.P. 1.

In fact, Professor Schacter found that voters rely heavily on informal sources such as the media, to learn about initiatives. Informal sources could give judges a more reliable picture of voters' intent—if judges could take those informal sources properly into account. But judges cannot, and therefore should not.

Asking judges to wade into the domain of media coverage and advertising in search of a singular and dispositive popular intent, however, imagines a judicial task that is onerous and—more significantly—ultimately incoherent. This task seems doomed to fail when measured against the goal of enabling judges to locate a single popular intent. Judicial immersion in the unwieldy body of images, words, and political slogans that may comprise the media coverage and advertising related to a ballot measure is likely to intensify, not reduce, the problems of indeterminacy that already undermine the search for popular intent. Particularly in a high-profile campaign, the mass of media representations is sprawling and diffuse, and it will rarely yield definitive answers about the design of the voters. Consider, for example, the contemporary phenomenon of talk radio. What could we ask judges to distill from such apparently influential, but cacophonous, sources?

In some cases, there will be information in media sources that is relevant to the interpretive issues before the court. When reasonably accessible, direct, and uncontroverted in addressing the question at issue, there are good reasons for courts to consider such information along with other relevant factors. It is quite another thing, however, to suppose that consulting media sources will enable judges to locate a fixed, retrievable popular intent. It is unlikely that intent-based interpretation can find its deliverance by recasting judges as cultural critics or political consultants and asking them to determine which stories, symbols, or sound bites most likely influenced voters and shaped a discrete collective understanding.

In addition, assigning a central place to media sources invites strategic behavior on the part of partisans in the initiative battle, such as attempts to fill the airwaves and the larger public record with characterizations and claims intended to influence subsequent judicial interpretation. In the end, this solution would create as many problems as it would solve.<sup>204</sup>

Although questions about whether voters read and how much they understand are equally valid when applied to the ballot materials, those materials nevertheless constitute the official information that the state provided its voters, and therefore those materials are the best, most reliable, and reasonable place to look for voter intent. The Secretary of State had the official duty of informing voters, through the ballot materials, as to what the amendment to the law meant and what effect it would have.<sup>205</sup> The Secretary of State also is required to be

<sup>203</sup> After transcription, minutes for Nevada Legislature committee hearings were available in 2003 and 2004, as they are now, on the Nevada Legislature web site, <http://www.leg.state.nv.us>. Examples of the media coverage include Ed Vogel, *Doctors Have Backup Plan*, LAS VEGAS REV.-J., Feb. 19, 2003, at B5; Sean Whaley & Ed Vogel, *Lawmakers Set Fast Pace Halfway Through Session*, LAS VEGAS REV.-J., Apr. 23, 2003, at B1; see also Jan Gilbert, *Your Turn Jan Gilbert*, RENO GAZ.-J., May 30, 2003, at A13.

<sup>204</sup> Schacter, *supra* note 180, at 144–45 (internal citations omitted).

<sup>205</sup> NEV. REV. STAT. § 293.250(5) (2011).

accurate and informative in explaining the legal consequences of an initiative.<sup>206</sup> And, as the *Jones v. Heller* writ of mandamus proves, the Secretary of State's fulfillment of those duties is subject to judicial review.<sup>207</sup> Under NRS 293.250(5), the Secretary of State must prepare for voters a condensation and explanation of a ballot question, and that condensation and explanation must be "in easily understood language and of reasonable length."<sup>208</sup> The statutory provision contains no express standards regarding what must be in the condensation and explanation. The court has said that while it recognizes that it might be impossible to include all possible ramifications of a measure, the explanation should not omit pertinent information so as to become misleading.<sup>209</sup>

Here, the ballot material that the Secretary of State provided to voters did not tell voters that the new med mal cap would apply per incident or that in a case with multiple plaintiffs one cap would have to be split among the plaintiffs.<sup>210</sup> Indeed, in their argument to the Nevada Supreme Court, the respondents/defendants in *Villegas* conceded that "the voter ballot is *silent* as to whether the cap on non-economic damages applies on a per-plaintiff, per-defendant basis or on a per-action/per-event basis."<sup>211</sup>

### B. The Phrase That Was Removed

The advocates of the per-plaintiff application of the cap argue that the ballot material did not need to spell out that change for voters because voters had constructive notice by virtue of the new statute's elimination of the phrase "to each plaintiff from each defendant."<sup>212</sup> They argue the removal of that phrase demonstrated to voters that the new statute was intended to apply to plaintiffs in the aggregate and that voters thereby knowingly chose cap damages on a per-event basis.<sup>213</sup> The argument here is based on the California Supreme Court ruling that generally when legislation is enacted by initiative, voters are "deemed to be aware of existing laws and judicial constructions in effect at the time legislation is enacted,"<sup>214</sup> and on a California Court of Appeal decision that says "[b]oth the Legislature and the electorate by the initiative process are deemed to be aware of laws in effect at the time they enact new laws and are conclusively presumed to have enacted the new laws in light of existing laws having direct bearing upon them."<sup>215</sup>

<sup>206</sup> Nev. Judges Ass'n v. Lau, 910 P.2d 898, 903–04 (Nev. 1996).

<sup>207</sup> See generally Order Granting in Part Petition for Writ of Mandamus, *Jones v. Heller*, No. 43940 (Nev. Sept. 18, 2004) (unpublished order) [hereinafter *Jones Order*]; see also *supra* Part V.A.

<sup>208</sup> *Nevada Judges Ass'n*, 910 P.2d at 903 (internal quotation marks omitted).

<sup>209</sup> *Id.*

<sup>210</sup> See DEAN HELLER, SEC'Y OF STATE OF NEV., NEVADA STATEWIDE BALLOT QUESTIONS 2004: TO APPEAR ON THE NOVEMBER 2, 2004 GENERAL ELECTION BALLOT 14–22, available at <http://www.leg.state.nv.us/Division/Research/VoteNV/BalotQuestions/2004.pdf>.

<sup>211</sup> Valley Health System Answering Brief, *supra* note 88, at 8.

<sup>212</sup> *Id.* at 9–12.

<sup>213</sup> *Id.* at 10–12.

<sup>214</sup> *People v. Weidert*, 705 P.2d 380, 384 (Cal. 1985).

<sup>215</sup> *Williams v. Cnty. of San Joaquin*, 275 Cal. Rptr. 302, 305 (Cal. Ct. App. 1990) (citation omitted).

Those California decisions may be persuasive authority, but they are not mandatory authority. Moreover, the same rules could be used to argue in favor of the per-plaintiff interpretation: If voters are deemed to have been aware of existing laws and judicial construction at the time they approved the med mal cap, then they were aware of the existing wrongful death statute and the judicial construction that made “in an action” a term of art meaning “cause of action” in the damages cap/wrongful death context.<sup>216</sup>

Yet another statutory interpretation rule is expressed broadly and generally as: The court presumes that the enactor of a statute is aware of other similar or related statutes. But the court has only applied that presumption where the enactor of a statute has been the Nevada Legislature.<sup>217</sup> The Nevada Supreme Court has not expressly extended that presumption to voter initiatives in which voters effectively “enact” a statute at the polls, and several reasons can be cited to show that it would not be reasonable to extend that critical presumption to the electorate. The electorate, after all, is an exponentially larger and more diverse group than the legislature, and as a result presumptions about what the majority of voters know face a far greater risk of being inaccurate than do presumptions about what the legislature knows. Additionally, unlike voters, legislators swear an oath to perform their duties faithfully and well,<sup>218</sup> and it is reasonable to consider awareness of similar or related statutes to be inherent in the performance of legislative duties faithfully and well. Moreover, the legislature has a staff that is paid, at least in part, to ensure legislators are kept aware of similar or related statutes.<sup>219</sup> For these reasons, it is reasonable to apply this presumption of awareness to the legislature. But the electorate has not sworn any oath, has no official legislative “duty” per se, and has no staff tasked with keeping it aware of statutes that are similar or related to statutes proposed by ballot questions. Therefore, it is not reasonable to apply this presumption to the electorate.

Professor Schacter put it this way:

There is no basis in the literature about initiative campaigns—or in intuitions about elections and voters more generally—to believe that voters have any detailed knowledge about the legal context surrounding the proposed initiative. One can see the case for expecting legislative drafters to be aware of such things as related and prior law, judicial interpretations of similar language, and relevant interpretive canons that reviewing courts may apply. Whether all legislators do, in fact, have this knowledge may be another matter, but given the staff, legislative analyses, and other resources available to professional lawmakers, it is reasonable enough to expect them to know something about the “legal landscape” into which a new law will fit. Because this is

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<sup>216</sup> See *supra* Part III.

<sup>217</sup> See, e.g., *D.R. Horton, Inc. v. Eighth Judicial Dist. Court*, 215 P.3d 697, 702 (Nev. 2009); *Cable v. State ex rel. Emp’rs Ins. Co. of Nev.*, 127 P.3d 528, 531 (Nev. 2006).

<sup>218</sup> See NEV. REV. STAT. § 282.020 (2011).

<sup>219</sup> See LEGISLATIVE COUNSEL BUREAU, NEVADA LEGISLATURE, <http://leg.state.nv.us/Division/LCB/morelcb.cfm> (last visited May 16, 2013) (“The staff services of the Legislative Counsel Bureau are furnished throughout the year for any legislator. Legal advice, fiscal information, and background research are furnished upon request. Services of a more extensive nature are executed when the Legislature so orders by means of a law or resolution. Between sessions, such projects may be requested through the Legislative Commission.”).

not the case with ordinary voters, many of the legal consequences of new initiative laws are systematically unforeseeable to citizen-legislators.<sup>220</sup>

A layman's explanation for deleting the "to each plaintiff from each defendant" language from Nevada's old medical malpractice statute could be that the language would have been redundant and therefore unnecessary in the new statute because the intentionally restrictive singular use of the nouns in the new statute and the use of "an action," meaning "a cause of action" or "claim," conveyed the same meaning as "to each plaintiff from each defendant" did in the old statute.

And while the material that the Secretary of State presented to voters is silent as to per-event application of the cap, that ballot material can easily be read as loud and clear as to the per-plaintiff application because the ballot material also uses the singular when explaining to whom a \$350,000 cap would apply. The final version of the condensation of the KODIN initiative states that it would "limit the amount of noneconomic damages *a person* may recover from a negligent provider of health care in medical malpractice actions."<sup>221</sup> The "Argument In Support of Question 3" which accompanied the KODIN initiative notably used the singular "plaintiff" when it told Nevada voters that "KODIN sets *a \$350,000 limit* on the amount *a medical malpractice plaintiff* can recover for noneconomic damages, like 'pain and suffering.'"<sup>222</sup>

Moreover, the condensation and explanation prepared by the Secretary of State and upon which voters ultimately cast their ballots was, in fact, one that had been revised at the direction of the Nevada Supreme Court.<sup>223</sup>

## VI. A DE FACTO DETERMINATION BY THE NEVADA SUPREME COURT

The initial ballot information prepared by the Secretary of State for Ballot Question 3 was challenged in *Jones v. Heller*.<sup>224</sup> Petitioners for a writ of mandamus asserted "that the condensation and explanation [did] not adequately, fairly and sufficiently describe the initiative and its ramifications, that the argument and rebuttal in support of the initiative contain[ed] factual inaccuracies and misleading statements that the Secretary [of State] should have rejected."<sup>225</sup> A plurality of the court told the Secretary of State that the condensation and explanation were facially deficient and that he had to rewrite it to explain what changes the new cap would make to existing Nevada law.<sup>226</sup> A credible argument can be made that the justices found the only change in the application of the cap made by the new statute was the elimination of the two exceptions to the cap. The order stated that "[n]either the condensation nor the explanation accurately reflects that, if passed, the initiative would *simply* remove the two statutory exceptions to the existing \$350,000 cap."<sup>227</sup>

<sup>220</sup> Schacter, *supra* note 180, at 127–28 (internal citations omitted).

<sup>221</sup> HELLER, *supra* note 211, at 14 (emphasis added).

<sup>222</sup> *Id.* at 16 (emphasis added).

<sup>223</sup> Jones Order, *supra* note 208, at 6.

<sup>224</sup> *Id.* at 1.

<sup>225</sup> *Id.*

<sup>226</sup> *Id.* at 1–2, 6.

<sup>227</sup> *Id.* at 2 (emphasis added).

Although that statement is in the opinion signed by only three of the justices, two additional justices concurred specifically with the “decision to direct the Secretary of State to either correct the inaccuracies in his condensation and explanation or remove Question 3 from the ballot.”<sup>228</sup> And a sixth justice who concurred in part and agreed “that the Secretary of State ought to be required to revise the explanation that accompanies the KODIN initiative ballot question because, as written, it is deficient. It must, even at this late date, be changed so that it is accurate, impartial and disinterested.”<sup>229</sup> Even the lone justice who did not partially concur noted that he agreed that the condensation and explanation was deficient and should be clarified; he dissented because he believed there was insufficient time to do it properly.<sup>230</sup> He wanted to deny the petition because he believed any relief would “seriously disrupt the process of printing and mailing election ballots to Nevada voters.”<sup>231</sup>

Notably, *none* of the opinions states that another deficiency of the condensation and explanation was that the Secretary of State had also failed to point out that another change the initiative would make to the med mal cap would be to apply it per incident.<sup>232</sup> The logical inference here is that unless the justices significantly botched their review and/or writing of their order, the plurality did not see the removal of the per-plaintiff language as changing the cap to a per-incident application. If the justices had understood the new statute to be changing the cap applicability from per plaintiff to per event, they could have, and presumably would have, in the *Jones v. Heller* order, also required the Secretary of State to make that change clear to voters in the condensation. But the justices did not require the Secretary of State to do so.

It would particularly make sense that the court viewed the new statute as retaining the per-plaintiff application of the cap if they were reading “in an action” to mean cause of action, and reading the singular nouns throughout the new statutory language for the cap as singular. In that context, the additional “per-plaintiff” language in the old statute would be redundant and unnecessary and could be removed without effecting a change in the corresponding meaning of the statute.

What to make of *Jones v. Heller*, is further complicated by its classification as an unpublished order.<sup>233</sup> Nevada Supreme Court Rule 123 (NSC 123) says:

An unpublished opinion or order of the Nevada Supreme Court shall not be regarded as precedent and shall not be cited as legal authority except when the opinion or order is (1) relevant under the doctrines of law of the case, res judicata or collateral estoppel; (2) relevant to a criminal or disciplinary proceeding because it affects the same defendant or respondent in another such proceeding; or (3) relevant to an analysis of whether recommended discipline is consistent with previous discipline orders appearing in the state bar publication.<sup>234</sup>

<sup>228</sup> *Id.* at 1 (Shearing, C.J., & Rose, J., concurring in part and dissenting in part).

<sup>229</sup> *Id.* at 1 (Agosti, J., concurring in part and dissenting in part).

<sup>230</sup> *Id.* at 1 (Maupin, J., dissenting).

<sup>231</sup> *Id.*

<sup>232</sup> See generally *id.* (plurality opinion, concurrences and dissents).

<sup>233</sup> *Jones v. Heller*, 131 P.3d 615 (Nev. 2004).

<sup>234</sup> NEV. SUP. CT. R. 123.



The latter two exceptions to the rule are inapplicable here because the question of proper application of the cap is neither relevant to a criminal or disciplinary proceeding nor relevant to an analysis of recommended discipline. An argument can be made, however, that the *Jones v. Heller* order is “relevant under the doctrines of law of the case.” Justice Agosti, in her partial concurrence and partial dissent, and Justice Maupin, in his dissent, each note that the ballot measure itself addressed “some of the most difficult and complex legal doctrines” in the law.<sup>235</sup>

When the *Villegas* petitioners brought the cap question before the Nevada Supreme Court and cited to the unpublished *Jones v. Heller* order they did not, in either their petition<sup>236</sup> or in their oral argument,<sup>237</sup> claim any exception to the rule against unpublished orders. In the past the court has come down relatively hard on briefs that cite unpublished orders of the court as authority, noting that such a citation makes the brief “deficient.”<sup>238</sup> But in *Villegas* the justices did not shut down the petitioners’ use of the order or otherwise speak to the fact that it is an unpublished order<sup>239</sup> even after counsel for the respondents highlighted that the order is unpublished and cited to NSC 123.<sup>240</sup>

In considering whether the court should take *Jones v. Heller* into account, and if so, to what degree, it is worth keeping in mind not only the general rationale behind the rule that unpublished court product has no precedential value but also the limit of the limitation itself.

Generally, unpublished decisions or opinions have no precedential value other than the persuasiveness of their reasoning, as an opinion that is not published is written primarily for the parties who are already knowledgeable of the facts of the particular case, and for this reason, most unpublished decisions do not contain a comprehensive analysis of the legal issues decided by the court.<sup>241</sup>

Courts use their ability to declare an order, decision, or opinion as “unpublished”<sup>242</sup> for a variety of reasons,<sup>243</sup> but one of the general notions as to why “unpublished” court documents should not be precedential is that too often such documents have been “rather hastily prepared, by law clerks or staff attor-

<sup>235</sup> *Jones Order*, *supra* note 208, at 1 n.1 (Agosti, J., concurring in part and dissenting in part); *see also id.* at 1 (Maupin, J., dissenting).

<sup>236</sup> *Villegas Mandamus Petition*, *supra* note 7, at 3, 18–19.

<sup>237</sup> *See generally* *Villegas Oral Argument*, *supra* note 10.

<sup>238</sup> *Nev. Emp’t Sec. Dep’t v. Weber*, 676 P.2d 1318, 1319 (Nev. 1984).

<sup>239</sup> *Villegas Oral Argument*, *supra* note 10.

<sup>240</sup> *Id.* at 18:29–18:52.

<sup>241</sup> Jason B. Binimow, Annotation, *Unpublished Opinions as Precedent*, 105 A.L.R.5th 499, 511 (2003).

<sup>242</sup> They may be declared “unpublished” by the court and withheld from official court reporters, but in today’s world of electronic databases, many, if not most, “unpublished” court documents are, in fact, “published” and widely available online. *See* Martha Dragich Pearson, *Citation of Unpublished Opinions As Precedent*, 55 HASTINGS L.J. 1235, 1290 (2004) (“Many unpublished opinions are available online, both in commercial databases and on the courts’ own web sites.”).

<sup>243</sup> *See generally id.* at 1235–37. In the *Jones v. Heller* order, the Nevada Supreme Court did not explain why it had decided not to publish the order. *See generally* *Jones Order*, *supra* note 208.

neys, with little oversight by judges, and without attention to careful wording or possible future implications.”<sup>244</sup>

The *Jones v. Heller* order was undoubtedly hastily prepared; the plurality opinion notes that the court was dealing with an “emergency”<sup>245</sup> and the first sentence of Justice Maupin’s dissent complains that “the petitioners and the Secretary [of State] have left us with insufficient time to craft a remedy that adequately addresses the deficiencies” of the Question 3 ballot material.<sup>246</sup> But the court heard the case en banc, noted the importance of the matter by writing four opinions spanning fifteen pages, and showed the importance the court was according the case by fast-tracking it. This was, after all, a high-profile case as it involved a decision that had the potential to prevent Nevada’s voters from getting to cast their ballots on a long awaited and hotly debated initiative or at the very least force elections officials to scramble to rewrite and reprint state-wide ballot materials. The Nevada Secretary of State was the respondent in the case. The words used in the four opinions and the way the court handled the petition indicate the court did not take the matter lightly and tried to do everything it could under the circumstances to avoid giving short shrift to such a high-profile case. In sum, other than the fact that it was fast-tracked, it is hard to say definitively that the *Jones v. Heller* order is the kind of court product that fits under the usual reasons for classifying court product as unpublished. It is more reasonable to consider the *Jones v. Heller* order as one for which the justices made every possible effort to craft well-reasoned and sound opinions.

Even if the order was not relevant under the doctrines of law of *Villegas v. Eighth Judicial District Court*, and therefore is not precedential, the order should still be considered as persuasive authority. At the very least, the order documents what several of the justices identified as the change to the cap proposed by Ballot Question 3. Therefore, at least one portion of the order goes directly to the heart of the question here and must be taken into account. The Third Circuit Court of Appeals has stated that an unpublished, non-precedential opinion should be regarded by the court for what it is worth, as the opinion of members of the court in a particular case.<sup>247</sup> Here, the order also appears to be the opinion of members of the court regarding a question that must be answered to enable the court to answer the larger question of how the cap should be applied.

The Nevada Supreme Court itself has recognized the importance and potential usefulness of the court’s unpublished orders, having made unpublished orders available to the public on the court’s website since 2008.<sup>248</sup> When the court announced that it was, in effect, publishing its unpublished orders, it stated:

[M]any lawyers believe that there is value in looking at the unpublished orders because they also indicate the legal thinking and positions of the Supreme Court

<sup>244</sup> Pearson, *supra* note 243, at 1302.

<sup>245</sup> Jones Order, *supra* note 208, at 5.

<sup>246</sup> *Id.* at 1 (Maupin, J., dissenting).

<sup>247</sup> *In re Grand Jury Investigation*, 445 F.3d 266, 276 (3d Cir. 2006).

<sup>248</sup> *Nevada Supreme Court’s Unpublished Decisions Now Posted on Its Website*, NEV. SUP. CT. (Sept. 17, 2008, 1:37 PM), <http://www.nevadajudiciary.us/index.php/archivedarticlelist/282-nevada-supreme-courts-unpublished-decisions-now-posted-on-its-website>.

justices. The justices have long agreed, but technical limitations of the Supreme Court website have prevented the orders from being posted in the same fashion that the published opinions have been for years.<sup>249</sup>

Then-Chief Justice Mark Gibbons added that the court believed that ready access to the unpublished opinions via the website would be “a valuable tool for attorneys.”<sup>250</sup>

Because unpublished orders can “indicate the legal thinking and positions of the Supreme Court justices,”<sup>251</sup> they can be valuable tools not just to attorneys but to the justices themselves. Not all unpublished orders are created equal, of course. Circumstances can make the argument for using a particular unpublished order stronger, when the justices are essentially reconsidering the same question or a question very similar to the one they had considered previously. When a court is dealing with a matter of first impression, an unpublished opinion that spoke to the question before the court is obviously more worthy of consideration because of its potential to aid the court,<sup>252</sup> and that would seem to hold even more true when the unpublished court product had been generated by the very court before which the matter of first impression is subsequently under consideration. A court’s decision about reliance on an unpublished order should be based more on whether the order dealt with an analogous case and whether the order’s “reasoning is sound and persuasive” than on the order’s classification as unpublished.<sup>253</sup> While many other courts share Nevada’s approach that unpublished court product is not binding, many of those still treat unpublished court product, even from other jurisdictions, as persuasive authority.<sup>254</sup>

The respondents in *Villegas* argued that the *Jones v. Heller* order was not a definitive ruling on the meaning of the cap or how it should be applied.<sup>255</sup> The unpublished order, they argued, “doesn’t stand for anything;”<sup>256</sup> it simply told the Secretary of State that he and his staff had not done a very good job of putting the ballot information together and that they needed to rewrite some of the information.<sup>257</sup>

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<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

<sup>251</sup> *Id.*

<sup>252</sup> *See, e.g.*, FED. R. APP. P. 4TH CIR. LOC. R. 36(b); *cf.* *Allen v. Greenville Hotel Partners, Inc.*, 409 F. Supp. 2d 672, 677 n.2 (D.S.C. 2006) (citation of unpublished opinion was warranted where there was no published opinion on point).

<sup>253</sup> *Lindstrom v. AC Prods. Liab. Trust*, 264 F. Supp. 2d 583, 587–88 (N.D. Ohio 2003) (“When the facts of an unpublished decision are similar to the case at hand and the reasoning is sound and persuasive, citation to and reliance on the unpublished opinion is appropriate.”); *accord* *Silvaco Data Sys. v. Intel Corp.*, 109 Cal. Rptr. 3d 27, 45 (Cal. Ct. App. 2010) (opinion modified on denial of rehearing) (Unpublished opinions may have some weight; “[s]ound opinions are the heart of the common law tradition and deserve respect.”).

<sup>254</sup> *See, e.g.*, *Washington v. Cal. City Corr. Ctr.*, 871 F. Supp. 2d 1010, 1028 n.3 (E.D. Cal. 2012). (District court “may cite unpublished California appellate decisions as persuasive authority.”); *Aleman v. AirTouch Cellular*, 146 Cal. Rptr. 3d 849, 862 n.8 (Cal. Ct. App. 2012) (“Although not binding, unpublished federal district court cases are citable as persuasive authority.”).

<sup>255</sup> *Villegas* Oral Argument, *supra* note 10, at 19:01–19:52.

<sup>256</sup> *Id.*

<sup>257</sup> *See* *Jones* Order, *supra* note 208, at 4.

But the court did more than that. The court ordered the Secretary of State to “revise the condensation and explanation of ballot Question 3 so that they accurately reflect the proposed changes to Nevada law.”<sup>258</sup> So even setting aside the point that none of the justices in *Jones v. Heller* pointed out that the new statute would change Nevada law to a per-incident application of the cap, based on their order to the Secretary of State, if he had understood the new statute to be making that change, then he was under orders from the Nevada Supreme Court to point that out in his revised condensation and explanation. But he did not.

The upshot of the *Jones v. Heller* order was that the revised condensation wound up telling voters that “[t]he proposal, if passed, would remove the two statutory exceptions to the existing \$350,000 cap, and limit the recovery of noneconomic damages to \$350,000 per action.”<sup>259</sup>

In conclusion, though the *Jones v. Heller* order is unpublished, it may qualify for one of the exceptions to NSC 123 and could thereby have some precedential value. Even if the order does not qualify for the exception, the decision is persuasive authority on several points, all of which point to a conclusion that the per-plaintiff application of the cap is the correct one.

## VII. THE CALIFORNIA COMPARISON(S)

During the *Villegas* oral argument, Nevada’s chief justice at the time, Michael Douglas, observed to Mr. Kennedy, the counsel for the respondent/defendants, that in looking at the wrongful death statute “as it relates back to” the med mal cap statute,

[W]e have language problems, as usual, with our statutes in the State of Nevada because in the sub[section] 2 it talks about “may each maintain an action” . . . and then in sub[section] 4 talks about claims for damages. And then we get to [the med mal cap statute] which talks about “an action.” So how do we corral these wonderful terms of art so they make sense?<sup>260</sup>

Mr. Kennedy suggested that the court follow the example of the California appellate court that looked to “the legislative intent” for an answer when it was trying to determine the applicability of that state’s medical malpractice cap in the wrongful death context in *Yates v. Pollock*.<sup>261</sup>

Nevada often looks to the more bountiful caselaw of its older and more populous sister state California for guidance,<sup>262</sup> and proponents of the per-law-

<sup>258</sup> *Id.* at 6 (emphasis added).

<sup>259</sup> *HELLER*, *supra* note 211, at 14.

<sup>260</sup> *Villegas Oral Argument*, *supra* note 10, at 31:14–31:59.

<sup>261</sup> *Id.* at 32:07–32:39.

<sup>262</sup> *See* 1 STATE BAR OF NEV., NEVADA CIVIL PRACTICE MANUAL § 1.03 (2012) (“California law has been a prominent source of Nevada law since the inception of statehood.”); *see, e.g.*, *Clark v. Lubritz*, 944 P.2d 861, 865 n.6 (Nev. 1997) (recognizing that “Nevada’s statute on punitive damages is a verbatim copy of the California punitive damages statute”) (internal quotation marks omitted); *Commercial Standard Ins. Co. v. Tab Constr., Inc.*, 583 P.2d 449, 451 (Nev. 1978) (wherein the court bases its holding on a ruling of the California Supreme Court and a California appellate court’s application of the rule established by the California Supreme Court); *Parker v. Chrysler Motors Corp.*, 502 P.2d 111, 112 (Nev. 1972) (wherein the Nevada Supreme Court chose to adopt the reasoning of the California Supreme Court on

suit interpretation point to California statutory and case law to support their argument.<sup>263</sup> They argue that looking west is particularly appropriate here because Nevada's med mal cap statute was modeled on California's Medical Injury Compensation Reform Act (MICRA).<sup>264</sup> Robert W. Shreck, lobbyist for and president of the Nevada State Medical Association, testified to the Nevada Senate Committee on Judiciary in 2003 that the initiative was so modeled,<sup>265</sup> and contemporaneous newspaper articles portrayed the initiative as an attempt to copy California's statute.<sup>266</sup> When the *Villegas* case went to the Nevada Supreme Court in 2010, KODIN itself told the court that its initiative was Nevada's version of MICRA.<sup>267</sup> The MICRA pedigree is a key point for the proponents of the per-incident application of the cap because California has applied its cap per incident to plaintiffs in the aggregate in wrongful death cases since at least 1987.<sup>268</sup> In fact, if MICRA had been so construed by the California Supreme Court instead of a California appellate court, advocates of the per-incident application in Nevada would have had a long-standing rule of statutory construction weighing heavily in their favor: "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.*"<sup>269</sup>

But does the sister state rule at least make California's application of its cap a little more persuasive than it would be otherwise? The Nevada Supreme Court has applied the sister state presumption where the two statutes in question were identical or nearly identical.<sup>270</sup> Here, the two medical malpractice cap

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the same points presented in *Parker* even though California's reasoning was contrary to the view that had been taken by the Nevada district court).

<sup>263</sup> See, e.g., Universal Health Petition, *supra* note 2, at 20, 26–27; Sieben Order, *supra* note 4, at 5.

<sup>264</sup> Valley Health System Answering Brief, *supra* note 88, at 11; see also CAL. CIV. CODE § 3333.2 (West 2012) (California's med mal statute).

<sup>265</sup> See, e.g., *Hearing on S.B. 97 and I.P.1 Before the S. Comm. on the Judiciary*, 2003 Leg., 72d Sess. 3, 6 (Nev. 2003) (statement of Robert W. Shreck, Pres., Nev. State Med. Ass'n) ("The language in I.P. 1 has been in place in other states. It has worked well to control insurance costs and it has been declared constitutional in California.").

<sup>266</sup> See, e.g., Paul Harasim, *Brown Tells Nevadans: Don't Follow California*, LAS VEGAS REV.-J., Oct. 29, 2004, at B1. ("[T]he Medical Injury Compensation Act . . . is now the model for the Keep Our Doctors In Nevada initiative on the Nov. 2 ballot.").

<sup>267</sup> Brief Amicus Curiae on Behalf of Keep Our Doctors In Nevada ("KODIN") and Others Supporting Real Parties in Interest Seeking Denial of the Petition at 3, *Villegas v. Eighth Judicial Dist. Court ex rel. Cnty. of Clark*, No. 55825 (Nev. Aug. 2, 2010) (The KODIN initiative was "modeled on the Medical Injury Compensation Reform Act ('MICRA'), adopted in California. . .").

<sup>268</sup> *Yates v. Pollock*, 239 Cal. Rptr. 383, 385 (Cal. Ct. App. 1987) (finding that only one action can be brought for wrongful death by multiple plaintiffs, thereby preventing multiple actions by individual heirs and the decedent's personal representative, holding that the "plain language [of MICRA] unequivocally manifests a desire to place a \$250,000 cap on awards for noneconomic damages in all medical malpractice litigation, whether recovery is sought by patients who have themselves suffered personal injuries or by the survivors of such victims who initiate suits for wrongful death.").

<sup>269</sup> *Craig v. Circus-Circus Enters., Inc.*, 786 P.2d 22, 23 (Nev. 1990) (emphasis added).

<sup>270</sup> See *id.* (applying the presumption because "Nevada's statute on punitive damages is a verbatim copy of the California punitive damages statute"); *Gilloon v. Humana, Inc.*, 687 P.2d 80, 81 (Nev. 1984) (applying the presumption because "the California medical malpractice statute of limitations . . . in relevant part is nearly identical to ours"). See also *Harvey v.*

statutes are obviously not identical. They are worded differently, the California statute is much longer than the Nevada statute,<sup>271</sup> and one major difference between the two statutes is the dollar amount of the cap is forty percent higher in Nevada's statute. But other than the cap amount, are there so many material differences or such significant material differences as to prevent the two statutes from being "nearly identical"? At least one Nevada trial judge did not think so. Second Judicial District Court Judge Elliott found the language of the two states' statutes "very similar, if not identical in the relevant parts. Both refer to the plaintiff in the singular."<sup>272</sup> He noted that while the California interpretation was only persuasive, not binding, he did find the reasoning and argument of the California interpretation to be directly applicable to the case he had before him, wherein multiple heirs were seeking to have the cap applied per plaintiff.<sup>273</sup>

The relevant portions of the California statute provide that:

(a) In any action for injury against a health care provider based on professional negligence, the injured plaintiff shall be entitled to recover noneconomic losses to compensate for pain, suffering, inconvenience, physical impairment, disfigurement and other nonpecuniary damage.

(b) In no action shall the amount of damages for noneconomic losses exceed two hundred fifty thousand dollars (\$250,000).

(c) For the purposes of this section:

...

(2) "Professional negligence" means a negligent act or omission to act by a health care provider in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death, provided that such services are within the scope of services for which the provider is licensed and which are not within any restriction imposed by the licensing agency or licensed hospital.<sup>274</sup>

So, as Judge Elliott noted, like Nevada does in its statute, California uses the singular nouns "action," "the injured plaintiff," and "negligent act or omission," and the use of the singular did not stop California from applying the cap to wrongful death plaintiffs in the aggregate.<sup>275</sup>

But the *Yates* decision gives absolutely no credence to the use of the singular and does not expressly explain why. Instead, the *Yates* court appears

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Second Judicial Dist. Court, 32 P.3d 1263, 1268 (Nev. 2001) (applying the presumption in a constitutional case where "Nevada's [constitutional] draft mirrored California's language").

<sup>271</sup> California's statute uses fifty-five words to describe the cap alone then goes on for another 163 words to provide definitions of "health care provider" and "professional negligence" that are specific to the statute. The entirety of Nevada's med mal cap statute, on the other hand, is thirty-nine words. The same chapter of the Nevada Revised Statutes that contains the med mal cap also includes two other statutes, also as a result of Ballot Question 3, which define professional negligence (NRS § 41A.015) and "provider of health care" (NRS § 41A.017). The chapter's definition of professional negligence is nearly identical to the definition in the California med mal cap statute, but Nevada's definition of health care provider is very differently worded than California's. Compare NEV. REV. STAT. § 41A.015 (2009), and NEV. REV. STAT. § 41A.017 (2009), with CAL. CIV. CODE § 3333.2 (West 2012).

<sup>272</sup> Sieben Order, *supra* note 4, at 5.

<sup>273</sup> *Id.*

<sup>274</sup> CAL. CIV. CODE § 3333.2.

<sup>275</sup> See *Yates v. Pollock*, 239 Cal. Rptr. 383, 386 (Cal. Ct. App. 1987).

focused on the connection of the cap to the word “action” and on the legislative history of the statute.<sup>276</sup> The sentence structure of Nevada’s med mal cap, on the other hand, directly connects the singular “injured plaintiff” to recovery of the cap amount: “*the injured plaintiff may recover* noneconomic damages, but the amount of noneconomic damages awarded in such an action must not exceed \$350,000.”<sup>277</sup> The comparable portion of California’s statute, on the other hand, directly connects the “action” and the cap: “In no action shall the amount of damage for noneconomic losses exceed two hundred fifty thousand dollars (\$250,000).”<sup>278</sup>

But there are additional and even more significant reasons why the analytical framework of *Yates* is not a good fit for Nevada. California has not defined “action” as “cause of action” in the damages cap/wrongful death context the way Nevada has through its caselaw.<sup>279</sup> Additionally California’s per-incident application in *Yates* was based in large part on the fact that in California, “only one action [can] be brought for the wrongful death of a person thereby preventing multiple actions by individual heirs and the personal representative.”<sup>280</sup>

[Because] the cause of action for wrongful death has been consistently characterized as “a joint one, a single one and an indivisible one[,]” we can but conclude its use of the word “action” in section 3333.2 represents [the California Legislature’s] conscious decision to limit the total recovery for noneconomic loss in such suits to \$250,000.<sup>281</sup>

In other words, California has a “one-action rule” under which the cause of action for wrongful death is joint, single, and indivisible.<sup>282</sup> Nevada, on the other hand, does not have a one-action rule for wrongful death.<sup>283</sup> Additionally, California has not interpreted “action” to mean “cause of action” in the context that Nevada has.<sup>284</sup> On its face, Nevada’s wrongful death statute provides for at

<sup>276</sup> *Id.*; but see *Atkins v. Strayhorn*, 273 Cal. Rptr. 231, 239–40 (Cal. Ct. App. 1990) (finding that the language of the Cal. Civ. Code section 3333.2 supported the *Atkins* court’s conclusion that California’s med mal cap applied separately to independent claims within one lawsuit because “[t]he statute focuses on the ‘injured plaintiff’ who is entitled to recover noneconomic losses in an amount not to exceed \$250,000. Nothing in the statute limits the defendant’s liability to that amount. Had the legislature intended to limit the defendant’s liability encompassing all legal proceedings arising from a single act of professional negligence to \$250,000, it would have included the language ‘single act of negligence’ to accomplish this purpose. . . . [T]he statute does not limit noneconomic damages to ‘a single injury-causing incident.’ Rather, recovery is limited for the discrete injury to each spouse because damages flow from injury, not negligent acts.”).

<sup>277</sup> NEV. REV. STAT. § 41A.035 (2009) (emphasis added).

<sup>278</sup> CAL. CIV. CODE § 3333.2.

<sup>279</sup> See *infra* Part VII.

<sup>280</sup> *Yates*, 239 Cal. Rptr. at 386 (internal quotation marks omitted).

<sup>281</sup> *Id.*

<sup>282</sup> 66 CAL. JUR. 3D *Wrongful Death* § 10 (2013).

<sup>283</sup> See, e.g., Tremblay Opposition to Summary Judgment, *supra* note 25, at 6; see also 1 STATE BAR OF NEV., NEVADA CIVIL PRACTICE MANUAL § 5.06 (“A wrongful death action brought by the heirs may, but need not, be joined to the action brought by the estate. NRS 41.085(3). Because the claims of the heirs and the estate are separate causes of action, they should be subject to permissive joinder, see NRCP 20, as opposed to mandatory joinder, see NRCP 19; see also *Field v. Volkswagenwerk AG*, 626 F.2d 293, 296–300 (3d Cir. 1980).”).

<sup>284</sup> See *infra* Part III.

least *two* actions in a wrongful death—one by the heirs and one by the personal representative of the estate.<sup>285</sup>

In general, the California appellate court came to its conclusion because California's relevant law and statute are, in this context, materially different from Nevada's.<sup>286</sup> Because California's statutory scheme and caselaw pertaining to wrongful death are different from Nevada's and because California's construction of its cap statute did not come from California's highest court, even if Nevada's med mal cap does have a California pedigree, California does not provide the answer to the question of how Nevada's cap should be applied.

It is also worth noting that three years after *Yates* a different California Court of Appeal, held in *Atkins v. Strayhorn* that the state's med mal cap did not bar a separate recovery by a spouse for loss of consortium.<sup>287</sup> The wife's loss of consortium claim was part of a lawsuit in which her husband was suing for medical malpractice damages. The court distinguished between causes of action for wrongful death and those for loss of consortium, noting that wrongful death is a statutory claim while loss of consortium is a common law claim "separate and independent" of a spouse's claim for personal injury. The court also observed that "[h]ad the legislature intended to limit the defendant's liability encompassing all legal proceedings arising from a single act of professional negligence to \$250,000, it would have included the language 'single act of negligence' to accomplish this purpose."<sup>288</sup> Because that language was not in the statute, the court held that the purpose of the cap is to limit recovery for the injury to each spouse because "damages flow from injury, not negligent acts."<sup>289</sup>

Although *Atkins* distinguished *Yates* because of the different theories of recovery and set wrongful death claims under California statutory law aside as a separate matter, *Atkins* nonetheless makes some general observations that the Nevada court should consider if it is going to be guided by California law as to how the cap should be applied. To date, the Nevada Supreme Court has not had an opportunity to fully consider *Atkins* judging from the *Villegas* oral argument, and the petitions and briefs filed with the court. Among the relevant points of *Atkins* was the California appellate court's finding that each injured plaintiff in a lawsuit could recover up to the cap under MICRA, albeit not for claims under California's wrongful death law.<sup>290</sup> Also, the *Atkins* court noted that MICRA focused on "the injured plaintiff" and his entitlement to recover

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<sup>285</sup> See, e.g., Tremblay Opposition to Summary Judgment, *supra* note 25, at 4; Sieben Order, *supra* note 4, at 4–5 (agreeing with defendants' argument that the wrongful death statute allows only two separate actions: one brought by the heirs of the decedent collectively and one brought by the personal representative of the estate); Villegas Oral Argument, *supra* note 10, at 33:57–34:39 (attorney Dan Polsenberg arguing on behalf of respondent Dr. Shiekh, defendant in the underlying case); see also *supra* notes 129–30 and accompanying text.

<sup>286</sup> See *infra* notes 288–97 and accompanying text; see also Villegas Reply in Support, *supra* note 86, at 20; Villegas Mandamus Petition, *supra* note 7, at 17 n.5.

<sup>287</sup> See *Atkins v. Strayhorn*, 273 Cal. Rptr. 231, 233 (Cal. Ct. App. 1990).

<sup>288</sup> *Id.* at 240.

<sup>289</sup> *Id.*

<sup>290</sup> *Id.* at 239–40.



damages up to the cap amount, but the statute did not limit a defendant's liability to the cap amount.<sup>291</sup>

Additionally, if the Nevada court wants or needs to examine other states' rulings to inform its consideration of the specific question presented here, it certainly should not limit itself to California and its appellate courts. It should consider, for example, *Sander v. Geib, Elston, Frost Professional Association*.<sup>292</sup> In that case, the South Dakota Supreme Court was trying to answer a question very similar to the one that this Note is examining: Does a statutory cap on damages in an action for injury or death against a provider of health care based upon professional negligence apply separately to each cause of action, and specifically to wrongful death causes of action?<sup>293</sup> The South Dakota court considered the applicability of South Dakota Codified Laws § 21-3-11, which at the time of *Sander* provided, in language similar to that of the Nevada statute, that “[i]n any action for damages for personal injury or death alleging medical malpractice” total damages could not exceed \$1 million.<sup>294</sup> The court held that, in the context of a wrongful death suit with multiple beneficiaries, each statutory beneficiary had a separate cause of action for wrongful death for purposes of determining the amount of South Dakota's damages cap for medical malpractice actions.<sup>295</sup>

#### VIII. PRACTICAL AND POLICY IMPLICATIONS

Another main argument used against the per-plaintiff application of the cap is that such an application runs counter to the intent of the cap and counter to the practical and public policy purposes of the cap.<sup>296</sup> Judge Elliott cited practical and policy implications as reasons for ruling against per-plaintiff application.<sup>297</sup> He found that “the intent of the damages cap would be frustrated if an indefinite number of individual plaintiffs could each recover up to the capped maximum.”<sup>298</sup> In *Villegas v. Eighth Judicial District Court*, the respondents/defendants complained to the Nevada Supreme Court that “[u]nder the Villegas Estate and Heirs' reading of the statute, jury awards for noneconomic damages could still be in the millions of dollars, depending on the number of plaintiffs, defendants, and claims included in a lawsuit.”<sup>299</sup> Preventing that kind of outcome was the very reason KODIN lobbied for the initial legislative measures aimed at overhauling the predecessor med mal cap statute, the defendants argued.<sup>300</sup> A per-plaintiff interpretation of NRS 41A.035 would thwart the very purpose of the statute, they emphasized.<sup>301</sup>

<sup>291</sup> *Id.* at 240.

<sup>292</sup> *Sander v. Geib, Elston, Frost Prof'l Ass'n*, 506 N.W.2d 107 (S.D. 1993).

<sup>293</sup> *Id.* at 126.

<sup>294</sup> *Id.* at 126–27 (quoting S.D. CODIFIED LAWS § 21-3-11 (1985)) (some emphasis added).

<sup>295</sup> *Id.* at 127.

<sup>296</sup> *E.g.*, Valley Health System Answering Brief, *supra* note 88, at 15.

<sup>297</sup> Sieben Order, *supra* note 4, at 5.

<sup>298</sup> *Id.*

<sup>299</sup> Valley Health System Answering Brief, *supra* note 88, at 15.

<sup>300</sup> *Id.* at 10, 15.

<sup>301</sup> *Id.* at 10–11, 15.

This argument appears flawed for several reasons. First, the public policy of limiting noneconomic damages for the ostensible purpose of improving access to health care could still be served, albeit perhaps to a lesser degree, by a cap that applies on a per-person, per-claim basis because noneconomic damages would still be limited to a fixed, pre-determined amount per cause of action. The now-removed exceptions of the predecessor statute, on the other hand, allowed for unlimited recoveries of noneconomic damages in cases that qualified for the exceptions. That possibility is eliminated under the current statute even when the cap is applied per plaintiff. The public policy of securing what voters apparently believed to be appropriate compensation for noneconomic harm suffered by “the injured plaintiff” would also be served by a per-plaintiff interpretation. The Florida Supreme Court saw it similarly when it found that a per-plaintiff cap, rather than a per-incident cap, would best satisfy the public policies of improving the predictability of claims and securing adequate compensation for injured people.<sup>302</sup> And the California appellate court in *Atkins* concluded that applying a med mal cap per plaintiff instead of per incident did not defeat the goal of the cap because ensuring “the availability of health care and the enforceability of judgments against health care providers by making medical malpractice insurance affordable” could still be realized in the limitation of the amount of damages for each injured plaintiff, thus precluding “the unknown possibility of phenomenal awards for pain and suffering that can make litigation worth the gamble.”<sup>303</sup>

Furthermore, in a footnote, the *Atkins* court said that it could envision a single act by a health care provider that negligently caused injury to multiple unrelated patients—by contaminated medications, for example. “To say these plaintiffs were collectively entitled to \$250,000 because there was only one negligent act would be to render the statute an absurdity.”<sup>304</sup> The court, of course, must seek to avoid statutory interpretations “that lead[ ] to an absurd result.”<sup>305</sup> Applying the cap per plaintiff in Nevada would avoid the type of

<sup>302</sup> *St. Mary’s Hosp., Inc. v. Phillipe*, 769 So. 2d 961, 970 (Fla. 2000) (“[T]he most significant incentive for defendants to concede liability and submit the issue of damages to arbitration is the \$250,000 cap on noneconomic damages. This limitation provides liability insurers with the ability to improve the predictability of the outcome of claims for the purpose of loss planning in risk assessment for premium purposes. This predictability can be obtained by interpreting [Florida’s cap statute] so that each claimant is fairly and reasonably compensated for his or her pain and suffering. Such an interpretation would provide increased predictability in the outcome of the claims as the insurers would no longer be contending with the possibility of exorbitant noneconomic damage awards but would have a fixed dollar amount (\$250,000), which each claimant’s award could not exceed. Moreover, this interpretation does more to promote early resolution of medical negligence claims, as it provides an equitable result which will in turn further encourage claimants to seek resolution through arbitration.”).

<sup>303</sup> *Atkins v. Strayhorn*, 273 Cal. Rptr. 231, 240 (Cal. Ct. App. 1990) (quoting *Fein v. Permanente Med. Grp.*, 695 P.2d 665 (Cal. 1985)) (internal quotation marks omitted).

<sup>304</sup> *Id.* at 239 n.9.

<sup>305</sup> *See, e.g., Fierle v. Perez*, 219 P.3d 906, 911 (Nev. 2009) (internal citations omitted) (internal quotation marks omitted) (applying the rules of statutory construction to NRS §§ 41A.015, 41A.017, which were enacted by the same initiative petition and ballot question as NRS § 41A.035, and concluding that “NRS Chapters 41A and 89 must be read in harmony”).

absurd result the *Atkins* court warned about and would also accomplish the goal of the statute to have no exceptions to the cap. It is reasonable to infer that voters understood the new statute to be more restrictive than its predecessor because the new statute eliminated the exceptions and limited noneconomic damages to a fixed, pre-determined amount for each plaintiff. It also is reasonable to infer that the purpose of the new med mal cap statute was to apply the cap to each plaintiff and not allow any one plaintiff to collect more than \$350,000 for noneconomic damages. In fact, a good argument can be made that voters believed they were voting on \$350,000 as the adequate compensation limit for noneconomic damages for each plaintiff.<sup>306</sup>

That latter argument points to a fundamental problem with the per-incident advocates' policy argument, and it is what ultimately may be the fatal flaw for all of the arguments for per-incident application of the cap. To make their policy argument, the per-incident advocates again rely on minutes of legislative committees, legislative hearings, testimony of lobbyists,<sup>307</sup> newspaper articles and other media reports, all of which are outside the scope of the much more limited "legislative history" relevant here. As discussed in Part V.A., the only "legislative history" that should be considered is the information the state gave the voters to consider when voting on the ballot question.

#### CONCLUSION

A per-plaintiff application of Nevada's med mal cap is the correct application in wrongful deaths for several reasons.

If, as advocates on both sides of the question contend, the statute is not ambiguous, then the med mal cap statute's use of singular nouns points to a plain language per-plaintiff application. The wrongful death statute and Nevada caselaw interpreting its language lead to the conclusion that each plaintiff heir in a wrongful death case has his own action with his own recoverable damages. The Nevada Supreme Court has made "an action" a term of art meaning "cause of action" in the contexts of damages caps and wrongful death. A per-plaintiff application of the cap harmonizes the two statutes.

In the alternative, if the statute is ambiguous, as this Note finds it is, then the court must look to the legislative intent to interpret its meaning.<sup>308</sup> Here, because the statute was the result of a voter initiative, the only "legislative intent" that should be considered is the intent of the voters. Because Nevada charges its Secretary of State with providing voters with the official, impartial explanation of the meaning of a ballot initiative, the most practical and reasonable way to try to ascertain voter intent is to examine the official ballot material. The ballot material did not tell voters that the new statute would apply per incident. Rather, the ballot materials said the cap would apply per plaintiff.

Moreover, apparently neither the Nevada Supreme Court nor the Secretary of State understood the new statute to be changing the cap's application from per plaintiff to per incident. In *Jones v. Heller*, the Nevada Supreme Court examined the initial ballot information the Secretary of State prepared for vot-

<sup>306</sup> *But see supra* Part V.B.

<sup>307</sup> Valley Health System Answering Brief, *supra* note 88, at 1–2, 9.

<sup>308</sup> *Miller v. Burk*, 188 P.3d 1112, 1119–20 (Nev. 2008).

ers to determine whether it met the requirement of advising voters of all the material changes the ballot measure would make to the law,<sup>309</sup> and none of the justices stated that the new statute changed the applicability of the cap from per plaintiff to per event.<sup>310</sup> The court ordered the Secretary of State to revise the ballot information to accurately reflect the initiative's proposed changes to Nevada law, and he did not include in the revised version that the new statute would change the application of the cap from per plaintiff to per incident.

Therefore, the most reasonable conclusion is that the voter intent (i.e., the legislative intent) was to enact the changes that the state had outlined in the ballot information. Because that ballot information did not tell voters that the changes would include a switch from per-plaintiff application to per-event application and because the ballot information used the singular to describe the cap as applicable to "a plaintiff,"<sup>311</sup> voters cannot be held to have intended to enact per-event application. If voters did not intend to make that change, then the current cap remains, like its predecessor, applicable on a per-plaintiff basis. Finally, per-plaintiff application is the only way to harmonize the med mal cap statute with the wrongful death statute, this is not an instance in which Nevada must follow California's example, and the per-plaintiff application fulfills the policy behind the statute.

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<sup>309</sup> Jones Order, *supra* note 208, at 1.

<sup>310</sup> See generally *id.*

<sup>311</sup> See generally HELLER, *supra* note 211, at 14–22.