

**IN THE SUPREME COURT OF THE STATE OF MONTANA**

**SUPREME COURT CAUSE NO. DA 24-0203**

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JOEY ZAHARA,

Plaintiff/Appellant

v.

ADVANCED NEUROLOGY SPECIALISTS,

Defendant/Appellee.

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**APPELLANT ZAHARA'S OPENING BRIEF**

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On appeal from the Eighth Judicial District of the State of Montana, in and for  
Cascade County, Cause No. CDV-14-093; The Honorable John Kutzman

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## STATEMENT OF ISSUES

1. Whether Montana's statutory cap of \$250,000 on non-economic damages incurred by victims of medical malpractice is unconstitutional.
2. In the alternative, whether the statutory cap of \$250,000 limits Zahara's recovery of damages for loss of established course of life.

## STATEMENT OF THE CASE

On June 5, 2013, Plaintiff Joey Zahara suffered a stroke, the effects of which were tragically and profoundly exacerbated by negligent medical treatment. Zahara filed a medical malpractice suit against Dr. William Henning and Advanced Neurology Specialists (collectively, "ANS"). After a four-day trial, on September 15, 2022, a jury found that Dr. Henning negligently foreclosed the administration of clot-dissolving medication (tPA) to Zahara during the treatment of Zahara's stroke in 2013, resulting in catastrophic injuries. (Order, App. 3, ¶ 1).

The jury awarded the following damages:

Past emotional distress	\$1 million
Future emotional distress	\$1.5 million
Past pain and suffering	\$1 million
Future pain and suffering	\$1 million
Past loss of established course of life	\$500,000
Future loss of established course of life	<u>\$1 million</u>
TOTAL	\$6 million.

(Verdict, Court Record ("CR") 238, App. 47).

ANS moved the Court to reduce the \$6 million verdict to \$250,000 pursuant to Mont. Code Ann. § 25-9-411 – the medical malpractice cap. (CR 256). Zahara responded that the statutory cap is unconstitutional. (CR 262).

On January 22, 2024, the district court issued its Order on Constitutionality of the Medical Malpractice Statutory Cap, holding that § 25-9-411 required reduction of the jury’s \$6,000,000 verdict to \$250,000. (App. 3). The Court held that the statutory cap applied to all three forms of damages awarded by the jury – emotional distress, pain and suffering, and loss of established course of life. (App. 27). The district court entered judgment against ANS in the amount of \$250,000, plus costs of \$7,166.60 and statutory interest. (App. 28).

On February 20, 2024, Zahara moved the district court to amend the judgment, asserting that § 25-9-411’s cap does not apply, on its face, to \$1.5 million awarded to Zahara to compensate for past and future loss of established course of life. (CR 277). The district court denied the motion in a written order on April 1, 2024. (App. 29).

Zahara appeals from the order reducing the \$6 million verdict to \$250,000 (App. 3); from the judgment in the amount of \$257,166.60 (App. 28); and from the order (App. 29) denying Zahara’s motion to amend the judgment by applying the cap only to the types of damages listed in § 25-9-411, Mont. Code Ann.

## STATEMENT OF THE FACTS

### A. Zahara's Tort Claim for Personal Injury.

At 6:00 p.m. (18:00) on June 5, 2013, 27-year-old Joey Zahara suffered a stroke. He experienced weakness, paresthesia, facial droop, difficulty standing, and impaired speech. (App. 34). Zahara was rushed to the emergency room ("ER") at Benefis Hospital in Great Falls, Montana, arriving at 18:32. (App. 34). He was evaluated by ER physician, Dr. Kevin Takakuwa. At 19:05, Dr. Takakuwa consulted by telephone with the on-call neurologist, Dr. Henning. (App. 36). Dr. Henning recommended administration of tPA, a drug that dissolves stroke-causing clots. (App. 42). ANS concedes that the accepted standard for administering tPA is within 3 to 4.5 hours after the onset of stroke symptoms. (CR 137, ANS's Statement of Undisputed Facts, ¶ 17). Joey consented to the treatment at 19:23 – well within the 4.5-hour window. (App. 35).

Before tPA was delivered, Joey improved and the drug was withheld. (App. 35). Dr. Takakuwa found that Joey had returned to a baseline condition around 20:40. (App. 35-36). Dr. Weill, a hospitalist, admitted Joey to the hospital for observation. (App. 36).

Dr. Weill documented a History of Present Illness as part of Joey's admission. (App. 37). At 22:00, the stroke reoccurred, opening a new window for

administering tPA until 2:30 a.m. on June 6. (App. 40). Dr. Weill spoke with Dr. Henning by phone, and Dr. Henning considered whether Joey should receive tPA, but rejected administration of the drug. (App. 42).

At trial, Zahara established that Dr. Henning failed to come to the hospital at all, much less within the 25 minutes of the stroke patient's presentation, as required by hospital policy. (Tr. Trans. Day 2, p. 17). Through expert testimony, Joey further established that Dr. Henning's failure to attend to Joey in person led the neurologist to erroneously reject administration of tPA, costing Joey the chance at a better recovery. (*Id.*, 17). Dr. Venkatsubramanian, a neurologist, unequivocally testified that Dr. Henning did not meet the standard of care and his negligence more likely than not caused Joey's permanent injuries. (*Id.*, 16, 35-36).

The jury determined that Dr. Henning was negligent in his treatment of Joey, and that his negligence caused Joey's injuries. (App. 47-48). Having not received tPA, Joey suffers longterm, devastating injuries from his stroke. For the rest of his life, likely fifty years, Joey will suffer daily pain as a result of his inability to use the right side of his body. He will endure unremitting emotional distress from the injury to 35% of his brain, along with socially debilitating issues with memory and depression. He will suffer not just from the inability to pursue life as a fully active man, fully employed worker, and fully engaged father, but

from knowing what he is missing. Considering the evidence, the jury reasonably awarded \$6,000,000 to compensate Joey for his past and future emotional distress, pain and suffering, and loss of established course of life. (App. 48).

**B. Background of Section 25-9-411, Mont. Code Ann.**

The 1997 Montana Legislature enacted § 25-9-411 (“the statutory cap”), which imposes a \$250,000 limit on noneconomic damage awards in medical malpractice cases. The statute reads, in pertinent part:

In a malpractice claim or claims against one or more healthcare providers based on a single incident of malpractice, and award for past and future damages for noneconomic loss deriving from injuries to a patient are subject to an award not to exceed \$250,000.

The statutory cap includes both a “temporary” version and an “effective on occurrence of contingency” version, which becomes effective if the “temporary” version is declared unconstitutional. However, the differences between the two versions of the statute do not affect the constitutional analysis; both versions of the statute are unconstitutional for the same reasons. References in this brief to the statutory cap, and all arguments made regarding its constitutionality, apply to both versions.

## STANDARDS OF REVIEW

The constitutionality of § 25-9-411 is a question of law, and this Court has plenary review of constitutional questions. *State v. Knudson*, 2007 MT 324, ¶ 12, 340 Mont. 167, 174 P.3d 469. Statutes are presumed constitutional, and the party challenging a statute has the burden of proving it unconstitutional or showing that the statute infringes on a fundamental right. *Montana Democratic Party v. Jacobsen*, 2024 MT 66, ¶ 11, 545 P.3d 1074. If the challenger shows an infringement on a fundamental right, no presumption of constitutionality exists, the statute is reviewed under a higher level of scrutiny, and the burden necessarily shifts to ANS to demonstrate that the statute is constitutional. *Id.* If the right is not fundamental but is still protected in the Constitution, or when a fundamental right has been minimally burdened, middle-tier scrutiny applies, which balances the rights infringed against the government interest served by the infringement. *Id.*, ¶ 36.

With respect to whether § 25-9-411 limits damages for loss of established course of life, the interpretation and construction of the statute is a matter of law which is reviewed *de novo* to determine whether the district court's interpretation and construction of the statute is correct. *State v. Brown*, 2009 MT 452, ¶ 6, 354 Mont. 329, 223 P.3d 874.

## SUMMARY OF ARGUMENT

Section 25-9-411, which imposes an arbitrary \$250,000 cap on noneconomic damages suffered by meritorious victims of medical malpractice, is unconstitutional. The trial court erred in finding the statute constitutional based entirely upon a misguided reliance on *Meech v. Hillhaven West, Inc.*, 238 Mont. 21, 776 P.2d 488 (1988), which held that “full legal redress” is not a fundamental right. The trial court all but begged this Court to reverse *Meech*. (App. 19).

Facially, § 25-9-411 cannot pass constitutional muster under any analysis. First, *Meech*, does not control the interpretation of § 25-9-411 when appropriately limited to its facts and holding. Regardless, *Meech* should be distinguished or reversed based on subsequent decisions of this Court determining that full legal redress is a fundamental right. *Bucy v. Edward Jones & Co.*, 2019 MT 173, ¶ 30, 396 Mont. 408, 445 P.3d 812. Second, under this Court’s controlling precedent, Zahara’s rights of equal protection, jury trial, full legal redress, and equal protection – all of which are set forth in the Montana Constitution’s Declaration of Rights – are fundamental rights subject to strict scrutiny analysis. *Kortum-Managhan v. Herbergers NBGL*, 2009 MT 79, ¶ 25, 349 Mont. 475, 204 P.3d 683. Using strict scrutiny analysis, § 25-9-411 must be found unconstitutional because the statute does not promote a compelling government interest using the lease

onerous means. *Driscoll v. Stapleton*, 2020 MT 247, ¶ 18, 401 Mont. 405, 473 P.3d 386. Third, if this Court determines that Zahara’s rights have only been minimally burdened by the statutory cap, the middle-tier analysis applies and requires a finding of unconstitutionality. *Jacobsen*, 2024 MT 66, ¶ 36. Finally, § 25-9-411 fails to meet even the most generous rational relationship test, because the only interest pursued in the statute is cost control for a single industry and the inadequate \$250,000 cap is not rationally related to even that interest. *Satterlee v. Lumberman’s Mut. Cas. Co.*, 2009 MT 368, ¶ 29, 353 Mont. 265, 222 P.3d 566 (declaring § 39-71-710 unconstitutional under rational basis review).

As applied to Zahara, § 25-9-411 violates the right to remedy, full legal redress, and separation of power principles by replacing the jury’s specific, evidence-based verdict with the 1997 Legislature’s arbitrary finding that Zahara is entitled to only \$250,000. The cap defeats the jury’s fundamental right to determine facts at the trial level. *See Lebron v. Gottlieb Memorial Hosp.*, 930 N.E.2d 895, 907 (Ill. 2010). Moreover, the medical malpractice cap constitutes “special legislation” to benefit the medical malpractice insurance industry at Zahara’s expense, in violation of Article II, § 31. *See Wright v. Central Du Page Hospital Ass’n*, 347 N.E.2d 736, 743 (Ill. 1976).

In the alternative, § 25-9-411's definition of "noneconomic loss" does not include damages awarded to Zahara for "loss of established course of life."<sup>1</sup> The reduction of that particular damage, not identified specifically in the statute, infringes on Zahara's constitutional rights as well.

## ARGUMENT

### I. SECTION 25-9-411 IS UNCONSTITUTIONAL ON ITS FACE.

While statutes are presumed constitutional, a facial challenge to a statute's validity succeeds when, as here, "no set of circumstances exist under which the challenged sections would be valid." *City of Missoula v. Mountain Water Company*, 2018 MT 139, ¶ 21, 391 Mont. 422, 419 P.3d 685. "Facial challenges do not depend on the facts of a particular case." *Id.* Section 25-9-411's limitation on the recovery of damages in excess of \$250,000 violates medical malpractice victims' constitutional rights to equal protection, trial by jury, remedy for injury, and due process, irrespective of the facts of a particular victim's case.

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<sup>1</sup>For convenience, throughout Sections I and II of this brief, Zahara will refer to all three types of damages (pain and suffering, emotional distress, and loss of established course of life) as "noneconomic damages," as determined by the district court. (App. 29). However, as shown in Section III of this brief, Zahara disputes the district court's finding that loss-of-established-course damages constitute "noneconomic damages" as defined in § 25-9-411, and asserts that the if the statute is not deemed unconstitutional, the statutory cap does not apply to loss-of-course-of-life damages.

The review of a statute’s constitutionality entails three related inquiries: (1) the nature of the rights at issue – whether fundamental or constitutionally protected; (2) the extent of the infringement on those rights and the resulting determination of the appropriate scrutiny required – strict, intermediate, or rational basis; and (3) whether the statute survives the appropriate scrutiny. *See Jacobsen*, 2024 MT 66, ¶ 34; *Driscoll*, 2020 MT 247, ¶ 18.

**A. The Rights at Issue are Fundamental Rights.**

*1. All rights enumerated in Article II are fundamental.*

In Article II, the Montana Constitution secures specific rights for all citizens. These rights include equal protection of the laws (Art. II, § 4); right to remedy and full legal redress (Art. II, § 16); right to due process (Art. II, § 17); and the right to a jury trial (Art. II, § 26). As rights enunciated in the Declarations of Rights, these are indisputably fundamental rights. “This Court has repeatedly held that the rights enumerated in the Declaration of Rights (Article II) of Montana’s Constitution are fundamental constitutional rights.” *Kortum*, 2009 MT 79, ¶ 25; *citing Yellowstone County v. Billings Gazette*, 2006 MT 218, ¶ 37, 333 Mont. 390, 143 P.3d 135; *State v. Tapson*, 2001 MT 292, ¶ 15, 307 Mont. 428, 41 P.3d 305; *accord Walker v. State*, 2003 MT 134, ¶ 74, 316 Mont. 103, 68 P.3d 872; *Gryczan v. State*, 283 Mont. 433, 449, 942 P.2d 112, 122 (1997).

Fundamental “means that these rights are significant components of liberty.”

*Kloss v. Edward D. Jones*, 2002 MT 129, ¶ 53, 310 Mont. 123, 54 P.3d 1 (J.

Nelson, *concurring*).

2. *Meech does not control.*

Relying entirely on *Meech*, the trial court erred in determining that the right to full legal redress is not a fundamental right, and consequentially erred in applying the wrong standard to the constitutional analysis of all the constitutional rights at issue. The trial court incorrectly concluded that it “cannot grant Mr. Zahara the relief he seeks without violating *Meech*, a controlling decision that a district court simply cannot disregard.” (App. 27).

*Meech*’s reasoning is limited in scope to the employment setting. In *Meech*, this Court reviewed the constitutionality of the Wrongful Discharge from Employment Act, which “established the extent of employers’ liability for wrongful discharge.” 238 Mont. at 25, 776 P.2d at 490. The Act forecloses a discharged employee’s claim to damages for “pain and suffering, emotional distress, compensatory damages, or punitive damages,” and limits a discharged employee’s compensatory damages to four years’ wages less interim wages the employee earned or could have earned. § 39-2-905, Mont. Code Ann. The Court specifically analyzed the second sentence of Article II, § 16, which applies only to

employment disputes: “No person shall be deprived of this full legal redress for injury incurred in employment for which another person may be liable except as to fellow employees and his immediate employer who hired him if such immediate employer provides coverage under the Workmen’s Compensation Laws of this state.” *Id.* at 35, 776 P.2d at 496. The *Meech* Court relied extensively on the record from the Constitutional Convention, which demonstrates that the “full legal redress” provision was added by the Delegates to the remedy guarantee of Article II, § 16 “to address a specific problem” related to workers’ compensation. *Id.* at 38, 776 P.2d at 498.

In reaching its conclusions, the *Meech* Court focused upon the *quid pro quo* legislation already in place at the time of the adoption of § 16 – the Workers’ Compensation Act – and noted that wrongful discharge claims, though torts, are rooted in the employment contract between employer and employee. *Id.* The Court emphasized that the “[Workers’ Compensation] Act’s limitation on noneconomic damages applies long-standing contract law” which disallowed noneconomic damages such as emotional distress. *Id.* at 50, 776 P.2d at 505. That is not true with respect to tort claims, such as medical malpractice. On its own text and logic, *Meech* should be limited to the employment setting.

Moreover, in *Meech* the claimant alleged only a violation of “full legal redress.” “*Meech* allege[d] no other infringement of fundamental rights by operation of the Act. . . .” *Id.* at 44, 776 P.2d at 502. Specifically, as stated by the Court, the only issue in *Meech* was “whether the [Wrongful Discharge] Act’s prohibition on the recovery of noneconomic damages and punitive damages violates Article II, § 16.” *Id.* The *Meech* Court analyzed equal protection, but merely determined that no suspect classifications were present in the Wrongful Discharge Act. *Id.* Here, *Zahara* has established that the statutory cap infringes upon several additional fundamental rights: due process, right to a jury trial, and equal protection. Each constitutional section constitutes a separate and enforceable fundamental constitutional right. *Madison v. Yunker*, 180 Mont. 54, 63, 589 P.2d 126, 131 (1978). *Meech*’s determination regarding “full legal redress” has no bearing or applicability to the other rights at issue in this case.

Make no mistake, *Zahara* asserts that the *Meech* Court erred in holding that Article II, § 16 does not enunciate a fundamental right. However, the decision preceded the full development of this Court’s framework for constitutional analysis. This Court can – and should – reverse *Meech*’s holding regarding the nature of the right to full legal redress, and place the issue squarely within this Court’s consistent constitutional analysis by reaffirming that all rights enunciated

in Article II are fundamental. *Kortum*, 2009 MT 79, ¶ 25. But this Court need not do so to grant relief to Zahara, because *Meech*'s reasoning does not apply to the analysis of the constitutionality of § 25-9-411 at all, and certainly not with respect to the right to a jury trial, equal protection, or due process. Instead, this Court should adhere to its longstanding precedent establishing that Article II rights are fundamental.

**B. The Statutory Cap Impermissibly Infringes on Constitutional Rights, Requiring Strict Scrutiny or Middle-Tier Analysis.**

The next inquiry is the extent of cap's infringement on medical malpractice victims' constitutional rights and the resulting scrutiny to be applied.

Impermissible infringements upon rights guaranteed by the Declaration of Rights (Article II) are afforded the most stringent protection. *Id.* This Court “determine[s] whether a law impermissibly interferes with a fundamental right by examining the degree to which the law infringes upon it.” *Jacobsen*, 2024 MT 66, ¶ 34, *citing Wadsworth v. State*, 275 Mont. 287, 302, 911 P.2d 1165, 1173 (1996); *Driscoll*, 2020 MT 247, ¶ 18. Fundamental rights which are burdened only minimally are reviewed under middle-tier analysis. *Jacobsen*, 2024 MT 66, ¶ 36. The statutory cap impermissibly and pervasively interferes with the constitutional guarantees of equal protection, trial by jury, full legal redress, and due process.

Article II, § 4 of the Montana Constitution assures that “[n]o person shall be denied the equal protection of the laws.” “Equal protection provides a check on governmental action that treats similarly situated persons in an unlike manner.” *Caldwell v. MACo Workers’ Comp. Tr.*, 2011 MT 162, ¶ 14, 361 Mont. 140, 256 P.3d 923. Here, the statutory cap treats victims of medical negligence differently from victims of any other type of negligence. Medical malpractice victims may only recover \$250,000 in noneconomic damages regardless of the findings of the jury, while other tort victims may recover all damages determined by the jury. Other than the occupations of the tortfeasors, the “two groups are equivalent in all respects.” *See Hensley v. Montana State Fund*, 2020 MT 317, ¶ 21, 402 Mont. 277, 477 P.3d 1065. The cap impermissibly – and extensively – impinges on medical malpractice victims’ equal protection rights by treating medical malpractice victims different from other tort victims, and by affording special rights to medical malpractice providers and insurers. *See Arneson v. Olson*, 270 N.W.2d 125, 36 (N.D.1978) (“\$300,000 limitation on recovery in malpractice cases is a violation of the equal protection provision” of North Dakota’s Constitution); *Moore v. Mobile Infirmary Ass’n*, 592 So.2d 156 (Ala. 1991) (\$400,000 cap on noneconomic damages violates equal protection).

Article II, § 26 provides that the “right to a jury trial is secured to all and shall remain inviolate.” The right to trial by jury is guaranteed by the Federal Constitution in Art. III, § 2. Fear that jury trial may be abolished was “an important reason for the adoption of the Bill of Rights.” *Hammer v. Justice Court of Lewis & Clark County*, 222 Mont. 35, 38, 720 P.2d 281, 283 (1986), *citing Schick v. United States* 195 U.S. 65 (1904). In *Hammer*, this Court held that a statute which required prepayment of jury fees was unconstitutional as an impermissible infringement on the “inviolable” right to a jury trial. *Id.*

The jury in this case determined that Zahara suffered past and future noneconomic damages of \$6 million. Reducing the jury award to \$250,000 overwhelmingly and impermissibly infringed on the jury’s role as fact finder, and substituted the Legislature’s nonspecific judgment for the jury’s finding of damages based on the specifics of Zahara’s case. The trial court erroneously concluded that the cap “does not directly impact the right to jury trial,” noting that Zahara obtained a “public jury decision.” (App. 19). This theory ignores that if the right to a jury “is to remain inviolate, it must not diminish over time and must be protected from all assaults to its essential guaranties.” *Sofie v. Fibreboard Corp.*, 112 Wash.2d 636, 656, 771 P.2d 711, 722 (1989) (declaring Washington’s cap unconstitutional as a violation of the right to jury trial). But even if this Court

accepts the trial court's conclusion that the cap does not directly impact the right to a jury trial, this Court must apply "middle-tier" analysis to the supposedly minimal infringement of this constitutionally protected right. *Jacobsen*, ¶ 38.

Article II, § 16 provides that the "courts of justice shall be open to every person, and speedy remedy afforded for every injury of person. . . ." In this provision, "the state constitution fixes the right to a remedy and where it may be sought. The legislature is without power to provide otherwise." *Madison*, 180 Mont. at 63, 589 P.2d at 131. The statutory cap extensively infringes on Zahara's Article II, § 16 right to "a remedy afforded for every injury of person." The extent of the infringement is sweeping, reducing his damage award to a mere 4% of the jury's determination and eliminating **all** future damages. Strict scrutiny is required, but even if the Court determines that this constitutional right is minimally affected by the cap, intermediate scrutiny must be applied. *Jacobsen*, 2024 MT 66, ¶ 34.

Finally, the Montana Constitution guarantees that "[n]o person shall be deprived of life, liberty, or property without due process of law." Mont. Const., Art. II, § 17. Medical malpractice victims are entitled to the process of having damages determined by a jury based on the facts of the case. Mont. Const., Art. II, § 26; *Albinger v. Harris*, 2002 MT 118, ¶ 44, 310 Mont. 27, 48 P.3d 711. "The amount to be awarded is properly left to the finder of fact." *Id.* The statutory cap

completely deprived Zahara the process to which he was due – the determination of damages by a jury. As such, strict scrutiny applies to the due process analysis.

These are not minimal infringements on Zahara’s fundamental rights. A jury determined, as a factual matter within its purview, that Zahara suffered \$6 million in damages. The 1997 Legislature limits Zahara to a recovery of just 4.2% of the jury-established damage. A 95.8% reduction in recovery is a substantial burden. To paraphrase from the dissent in *Meech*, a legal remedy that delivers only 4.2% justice automatically also delivers 95.8% injustice. *Meech*, 238 Mont. at 64, 776 P.2d at 514 (J. Sheehy, *dissenting*).

Given the cap’s extensive infringement on each of these four rights, the trial court erred in applying the “rational basis” test when analyzing the cap’s constitutionality. Moreover, the trial court’s adherence to *Meech*’s application of the rational basis test ignores decades of precedent establishing the “middle-tier” analysis to apply in cases where (1) a statute impinges not on a fundamental right, but a right protected by Montana’s Constitution; or (2) a statute which only minimally burdens a fundamental right. *Jacobsen*, 2024 MT 66, ¶ 36. This Court adopted the intermediate analysis in 1986. *Butte Community Union v. Lewis*, 219 Mont. 426, 433, 712 P.2d 1309, 1313 (1986), *superseded by constitutional amendment*. Three years later, the *Meech* Court refused to apply the (then novel)

middle-tier analysis because “[t]his Court’s decisions have applied the test only where specific directive in the Montana Constitution protected interests in education and welfare.” 238 Mont. at 45, 776 P.2d at 503.

Even if the *Meech* Court’s analysis was correct in 1989, it is demonstrably inaccurate today. In subsequent decades, this Court has applied the middle-tier analysis when a fundamental right is minimally burdened, or when a statute infringes on a non-fundamental right which is constitutionally protected. *Jacobsen*, 2024 MT 66, ¶¶ 34, 36 (middle-tier analysis applied to fundamental right to vote when that right was minimally burdened by statute); *Powell v. State Compensation Ins. Fund*, 2000 MT 321, ¶ 18, 302 Mont. 518, 15 P.3d 877 (“where the right in question has its origin in Montana Constitution, but is not found in the Declaration of Rights, we employ a middle-tier scrutiny.”); *Driscoll*, 2020 MT 247, ¶ 18; *Snetsinger v. Montana University System*, 2004 MT 390, ¶ 18, 325 Mont. 148, 104 P.3d 445.

**C. The Statutory Cap Does Not Withstand Constitutional Scrutiny at any Level.**

The next step in the constitutional inquiry is to determine whether § 25-9-411 survives the appropriate scrutiny, a matter of first impression. Courts across the country have reached different conclusions regarding the constitutionality of medical malpractice caps. *See summary*, Chupkovich, “Statutory Caps: An

Involuntary Contribution to the Medical Malpractice Insurance Crisis or a Reasonable Mechanism for Obtaining Affordable Health Care?”, 9 J. Contemp. Health Law & Policy 337 (Spring 1993). Here, the Montana Legislature enacted a cap more arbitrary, more burdensome, and more oppressive to the most-injured victims than in any other state. Reviewing § 25-9-411 under Montana’s robustly protective Constitution, violation of any one right renders the statutory cap unconstitutional.

1. *The statutory cap impermissibly infringes on Zahara’s right to equal protection.*

This Court examines equal protection claims in three steps:

First, the Court identifies the classes involved and determines if they are similarly situated. Second, the Court determines the appropriate level of scrutiny to apply to the challenged statute. Finally, the Court applies the appropriate level of scrutiny.

*Hensley*, 2020 MT 317, ¶ 18.

- a. *The cap creates classes and treats them disparately.*

As determined by this Court in *Brewer v. Ski-Lift, Inc.*, “[t]he constitutional guarantee of equal protection requires that all persons be treated alike under like circumstances.” 234 Mont. 109, 112, 762 P.2d 226, 228, *superseded by statute*, *Kopeikin v. Moonlight Basin Mgmt., LLC*, 981 F.Supp.2d 936 (D. Mont. 2013). The Skier Responsibility Act provided that skiers assumed all responsibility for

injury resulting from skiing. This Court determined that the Skier Responsibility Act infringed upon skiers' rights to equal protection because "the Act classifies skiers and treats them differently than those who engage in other sports activities which are inherently dangerous." *Id.* "Additionally, the statutes classify ski area operators in their own class, and allow them certain rights not enjoyed by other recreational businesses." *Id.*

Similar to the Skier Responsibility Act, § 25-9-411 classifies victims of medical negligence and treats them differently than victims of all other types of negligence. Moreover, the statute classifies medical providers in their own class, and allows medical providers rights not enjoyed by other tortfeasors or other professions. Further, the statutory cap divides medical malpractice claimants internally: into a class of claimants with noneconomic damage awards exceeding \$250,000 and those with damages below that threshold. The two classes are treated differently, with the first receiving full compensation and the second deprived of recovery.

*b. The cap does not withstand strict scrutiny of its infringement on equal protection.*

Equal protection is a fundamental right entitled to strict scrutiny. *Kortum*, 2009 MT 79, ¶ 25. Under this standard, the State has the burden of showing the law is narrowly tailored to serve a compelling government interest. *Reesor v.*

*Montana State Fund*, 2004 MT 370, ¶ 13, 325 Mont. 1, 103 P.3d 1019.

The Legislature’s interest in reducing malpractice premiums for medical providers is found, if at all, in decreasing medical costs and thus increasing the availability of medical services in the state. *See, e.g., Kenyon v. Hammer*, 688 P.2d 961, 976 (Ariz. 1984). Such an interest is neither compelling nor governmental; the legislative goal is to insulate a private industry from liability, not the state. Some states have determined that medical malpractice caps constitute “special legislation” to benefit one industry. *Wright*, 347 N.E.2d at 743 (\$500,000 cap constituted “special law” in violation of Illinois Constitution). At best, cost control legislation merely serves a legitimate interest. *Satterlee*, 2009 MT 368, ¶ 29.

Critically, under the strict scrutiny standard, even if the statute’s supporter establishes a compelling governmental interest, the proponent must also demonstrate that the Legislature has employed the “least onerous path” to achieve that interest. *Jacobsen*, 2024 MT 66, ¶ 63. The method chosen by the Legislature to reduce insurance premiums – capping noneconomic damages at the random amount of \$250,000 – is not narrowly tailored to reduce its impingement on the rights of the victims of medical malpractice.

Less oppressive methods of controlling costs were available, even in 1997. The Legislature could have established victims’ compensation funds to alleviate

the burden on victims' constitutional rights, as enacted in Louisiana and Indiana. *See Lucas v. United States*, 751 S.W.2d 687, 691 (1988). The Montana Legislature could have tied the statutory cap to the consumer price index, as in Texas, so that the amount of damages available to victims at least keeps pace with inflation. *Id.* at 689; Md. Code Ann., Courts & Jud. Proc., §§ 11-18 (establishing \$500,000 cap which increases \$15,000 per year). The Montana Legislature could have followed Alaska's lead, capping damages for severe physical impairment at \$1,000,000, or \$25,000 multiplied by years of life expectancy, whichever is greater. *Evans ex rel. Kutch v. State*, 56 P.3d 1046, 1049 (Ala. 2002). The Montana Legislature could have capped damages on a percentage basis, or capped recovery from each provider rather than all providers.<sup>2</sup>

The \$250,000 cap is not narrowly tailored to reduce the infringement on fundamental rights. Instead, the Montana Legislature in 1997 enacted an arbitrary, draconian, and static cap of \$250,000 in 1997 dollars for *all* noneconomic claims of *all* persons against *all* providers. Section 25-9-411 is an impermissible and unnecessarily broad infringement of medical malpractice victims' rights to equal protection.

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<sup>2</sup> In pointing out that less onerous methods were available to the Montana Legislature, Zahara does not imply that the statutory cap is "fixable," given the cap's extensive infringement on so many constitutional rights.

c. *The cap does not withstand middle-tier analysis.*

The middle-tier balancing of the asserted interest against the infringement on the constitutional right involves a two-prong analysis: (1) whether ANS has shown that the statute is not arbitrary and is justified by relevant and legitimate state interests; (2) whether the government interest is more important than the right.

*Reesor*, 2004 MT 370, ¶¶40, 41. Section 25-9-411 fails both prongs.

Far from being reasonable, the statutory cap of \$250,000 is patently unfair to victims of medical malpractice. The New Hampshire Supreme Court succinctly summarized the unreasonableness of that state's \$250,000 cap: "It is simply unfair and unreasonable to impose the burden of supporting the medical care industry solely upon those persons who are most severely injured and therefore most in need of compensation." *Carson v. Maurer*, 424 A.2d 825, 837 (N.H. 1980) *reversed on other grounds*, *Community Resources for Justice, Inc. v. City of Manchester*, 154 N.H. 748, 762 (N.H. 2007); *quoted with approval*, *Lucas*, 757 S.W.2d at 692.

Montana's cap is arbitrary and unreasonable in numerous other ways, including the insufficient amount of the limitation (\$250,000). In 1978, North Dakota's Supreme Court expressed dismay over that state's \$300,000 cap, paltry even 45 years ago, noting that "no state court of last resort has upheld a limitation so low." *Arneson*, 270 N.W.2d at 136 (holding North Dakota's cap

unconstitutional on equal protection grounds). The California Supreme Court upheld a \$250,000 cap in *Fein v. Permanente Medical Group*, 695 P.2d 665 (Cal. 1985), but California’s legislature subsequently increased the cap to \$500,000 in wrongful death cases, \$350,000 in other cases, with the caps increasing annually and adjusted for inflation. § 3333.2 Cal. Civ. Code.

Since 1977, the value of \$250,000 has increased 415.40% when adjusted for inflation.<sup>3</sup> Enacted in 1977, Montana’s statutory limit of \$250,000 should be worth \$1,288,478.35 today. *Id.* The static nature of the cap unfairly affects all medical malpractice victims, but especially young victims like Zahara, whose awards for future noneconomic damages are “compensated” in 1997 dollars. Moreover, the statute arbitrarily reduces damages not on a percentage basis or life expectancy standard, but to a set amount, regardless of the specifics of the claim. This unfairly punishes those most severely injured by medical malpractice. *Carson*, 424 A.2d at 837.

Assuming *arguendo* for middle-tier analysis that Montana has a legitimate interest in decreasing medical insurance premiums, that interest is irrelevant to the application of the cap because from the outset the cap has not “worked” to reduce insurance premiums. Notwithstanding the cap, malpractice premiums in Montana

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<sup>3</sup>*CPI Calculator*, <https://www.in2013dollars.com/us/inflation/1977>.

have increased. In March of 2021, the American Medical Association identified Montana as one of the ten states with the largest and most widespread increases in medical malpractice premiums.<sup>4</sup>

The Montana Legislature has repeatedly examined the cap’s effectiveness to reduce premiums, with consistently bad results: medical malpractice rates continue to go up, despite the cap. In 2010, for example, a legislative committee found that Montana is served primarily by two medical malpractice insurers.<sup>5</sup> One of the two insurers, Utah Medical, “increased its premiums in 11 of the last 27 years; in six of those years, premiums jumped 25% or more.” *Id.* The second insurer, The Doctors Co., “has increased premiums in 13 of the past 20 years and decreased rates five times.” *Id.*

In selling the statutory cap to the Montana Legislature, insurance representatives “guaranteed” “that with passage of this bill . . . [malpractice] rates would decrease.” (App. 57). That guarantee was illusory. The so-called

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<sup>4</sup> Jose Guardado, New Data Show the Highest Prevalence of Medical Liability Premium Increases in 15 Years, American Medical Association (Mar. 2021), <https://www.ama-assn.org/system/files/2021-03/prp-mlm-premiums-2020>.

<sup>5</sup>Medical Malpractice Insurance Data for Montana, Montana Legislative Services Division (April 2010) at 1, [https://leg.mt.gov/content/Committees/Interim/2009\\_2010/Children\\_Family/Assigned?Studies/SJR\\_35-medical-malpractice-data.pdf](https://leg.mt.gov/content/Committees/Interim/2009_2010/Children_Family/Assigned?Studies/SJR_35-medical-malpractice-data.pdf).

“evidence” that statutory caps would reduce insurance premiums is best described by the Texas Supreme Court as “a speculative experiment to determine whether liability insurance rates will decrease.” *Lucas*, 757 S.W.2d at 691. Concern with the experimental nature of the cap was shared by some legislators. (App. 105).

In *Carson*, the New Hampshire Supreme Court analyzed the infringement of a \$250,000 cap on the right of equal protection under an intermediate level of review.<sup>6</sup> As in Montana, the New Hampshire legislature’s goal was the reduction of malpractice insurance rates. *Carson*, 424 A.2d at 836. The cap failed intermediate scrutiny for three reasons. The New Hampshire Court determined that the damage awards paid to victims were only a portion of premium costs; that few victims suffered noneconomic losses above the cap; and that the cap did not discourage nonmeritorious claims, but instead denied compensation to the most severely injured who proved meritorious claims. *Id.* at 836- 837. These three reasons apply equally in Montana. Section 25-4-911 fails to meet middle-tier scrutiny because the statute is arbitrary and not justified by relevant state interests.

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<sup>6</sup>In *Community Resources for Justice, Inc.*, 154 N.H. at 762, the New Hampshire Supreme Court revised the intermediate scrutiny test, employing the more stringent test: “substantially related to an important governmental objective.” *Carson* is overruled “to the extent that it did not employ this [more stringent] standard.” *Id.* Thus, New Hampshire’s cap was deemed unconstitutional under a less stringent intermediate standard.

d. *The cap does not withstand even rational basis review with respect to equal protection.*

The rational basis test should not be applied in analyzing the fundamental right to equal protection. Nevertheless, the cap fails to withstand this most lenient standard of review, which analyzes “whether the government’s stated objective bears a rational relationship to a legitimate government interest.” *Reesor*, 2004 MT 370, ¶ 15.

The trial court and the parties agree that in enacting § 25-9-411, the Legislature intended to contain medical malpractice insurance costs. According to the opening statement of HB 309’s sponsor, the cap’s purpose centered on cost control in the medical industry. (App. 57). Proponents of the bill focused their testimony on cost control as well. (App.57-59, 145-148). The trial court described the legislative rationale as “enhancing the business climate by prohibiting large judgments.” (App. 24). ANS acknowledges that the 1997 Legislature intended “to stabilize and lower medical malpractice premiums so that ‘physicians . . . continue delivering services’ in rural areas.” (CR 267, p. 21).

While this Court has recognized that controlling government costs can constitute a legitimate state interest, *Satterlee*, 2009 MT 368, ¶ 29, it remains doubtful that controlling the costs of a private industry constitutes a legitimate *governmental* interest. Nevertheless, Montana law is clear; cost control alone

cannot justify the disparate treatment of medical malpractice victims from other tort victims.

In *Satterlee*, this Court reviewed for constitutionality legislation intended to control costs in the state's workers' compensation system. This Court held that "[a]s long as cost containment is not the sole reason for disparate treatment and it is achieved by a rational means the legislature may attempt to improve the viability of the workers' compensation system without offending the Equal Protection Clause." *Id.* However, "cost alone is insufficient to justify the disparate treatment of different classes." *Id.* "If the Court permitted otherwise, 'cost containment' alone could justify nearly every legislative enactment without regard for the guarantee of equal protection of the law." *Caldwell*, 2011 MT 162, ¶ 34.

Relying on *Duane C. Kohautek, Inc. v. State*, 2018 MT 13, ¶ 27, 391 Mont. 345, 417 P.3d 1105, the trial court constrained its rational basis analysis to consideration of whether § 25-9-411 was "reasonably related to a permissible legislative objective *at the time the legislation [was] enacted.*" (App. 24, emphasis in original). The trial court erred; the \$250,000 cap was arbitrary *even when enacted*. The Legislature arbitrarily set the amount without any data relating the amount – and its static nature – to reduced premiums.

Indeed, the statutory cap fails the rational basis test even as the test was applied in *Meech*. In that case, this Court “concluded that the [Wrongful Discharge] Act relates rationally to promoting Montana’s economic interests” in large part because “the limit [to four years’ wages] is not irrational or so arbitrary that the classification it creates violates equal protection.” *Meech*, 238 Mont. at 48, 776 P.2d at 504. The Court reasoned that the Legislature’s determination that a worker’s recovery should be limited to four years was based on data.

[S]tatistics before the legislature supported the conclusion that most wrongful discharge claimants with reasonable diligence will obtain other employment within the four year period. Therefore, judicial deference for the time period at issue is appropriate.

*Id.*

The same conclusion cannot be reached regarding the arbitrary \$250,000 limit on medical malpractice noneconomic damages. The Legislature set the amount of the cap without any factual or empirical basis that limiting noneconomic damages to \$250,000 was necessary to reduce malpractice insurance premiums, as opposed to a higher amount or a fluctuating amount. The 1997 Montana Legislature “believed” malpractice insurance premiums would decrease based on the experience of other states, (App. 197), yet set a cap much harsher than nearly all other states. A classification such as this one “that is patently arbitrary and bears no rational relationship to a legitimate governmental interest offends equal

protection of laws.” *Jaksha v. Butte-Silverbow County*, 2009 MT 263, ¶ 24, 352 Mont. 46, 213 P.3d 1248 (§ 7-33-4107’s imposition of a maximum age of 34 years to become a firefighter was “wholly arbitrary” and violated equal protection under rational basis review).

Under any level of scrutiny, even rational basis, the statutory cap violates the equal protection rights of victims of medical malpractice. *See Arneson*, 270 N.W.2d at 136 (“\$300,000 limitation on recovery in malpractice cases is a violation of the equal protection provision” of North Dakota’s Constitution, applying an arbitrary or unreasonable standard of review); *Moore*, 592 So.2d at 170 (Alabama’s \$400,000 cap on noneconomic damages violates equal protection); *Estate of McCall*, 134 So.3d 894, 914 (Fla. 2014) (cap is not rationally related to interest of decreasing costs).

2. *The statutory cap impermissibly infringes upon Zahara’s right to trial by jury.*

The Montana Constitution provides that the “right of trial by jury is secured to all and shall remain inviolate.” Mont. Const., Art. II, § 26. The right to a jury trial is fundamental and substantive, requiring the most stringent protection. *Kortum*, 2009 MT 79, ¶ 25. Because the right is fundamental, this Court must apply either strict scrutiny or middle-tier analysis to determine the cap’s constitutionality. *Jacobsen*, 2024 MT 66, ¶ 36.

Strictly construed, not only does ANS establish no compelling interest in controlling costs, but also ANS cannot establish that the statute is narrowly tailored to reduce the cap's burden on Zahara's right to trial by jury. There can be no doubt that application of the statutory cap usurped the jury's role as the fact finder: this jury found damages in the amount of \$6 million, and the Legislature's enactment reduced those damages to \$250,000, without any regard to the facts of Zahara's case. (App. 47). Furthermore, the cap is not narrowly tailored to reduce infringement on the right to a jury trial. Pursuant to § 25-9-411(4), the jury *cannot* be informed of the cap, and, when applied, the cap does not incorporate the jury's findings in any way whatsoever.

Just as the statutory cap does not survive strict scrutiny, the cap fails under middle-tier analysis. ANS cannot demonstrate that the statute is not arbitrary and that the government's interest outweighs the value of the jury trial to Zahara. *Reesor*, 2004 MT 370, ¶ 13. The trial court found that the cap "does not directly impact the right to jury trial" because Zahara obtained a "public jury decision." (App. 19). The trial court concluded that the "Legislature has not said a jury cannot *find* damages above the cap, only that the plaintiff cannot *recover* them." (App. 19). This analysis "pays lip service to the form of the jury but robs the institution of its function" as the fact finder. *Sofie*, 771 P.2d at 721. In personal

injury actions such as this one, “there is no measuring stick by which to determine the amount of damages awarded for pain and suffering other than the intelligence of a fair and impartial trier of fact governed by a sense of justice; each case must of necessity depend on its own peculiar facts.” *Albinger*, 2002 MT 118, ¶ 41.

The trial court expressed dire and appropriate reservations about imposing the cap instead of the jury’s verdict, lamenting “[i]t is unclear how Montana juries can perform their constitutional function if the Legislature can so completely foreordain the result before the first witness even testifies.” (App. 23). However, mistakenly believing that *Meech* controlled, the trial court found that “ultimately, though it is not the province of the trial judge to revise these boundaries.” *Id.*

*Meech* does not control. The statute at issue in *Meech*, unlike § 25-9-411, allowed the jury to set damages based on a constitutionally viable legislative assumption that in the employment setting, those damages should be limited in a way that contract damages were always limited – disallowing punitive or emotional distress damage. Section 25-9-411, conversely, allows the jury to determine damages under the standard always available in tort law, and then usurps the jury’s constitutional function by replacing the jury’s verdict with the Legislature’s random and outdated general limit for noneconomic damages.

Most critically, the state’s interest in cost control cannot outweigh Zahara’s right to a jury trial – a right the Montana Constitution defines as “inviolable.” As noted by the South Dakota Supreme Court a quarter century ago, “five states whose constitutions provide that the right of trial by jury shall remain “*inviolable*” have invalidated damages caps.” *Matter of Cert. of Questions*, 544 N.W.2d 183, ¶ 12 (S.D. 1996) (*superseded by statute, Peterson v. Burns*, 635 N.W.2d 556 (S.D. 2001), citing Kansas, Missouri, Texas, Ohio and Florida (citations above).

Recently, the Kansas Supreme Court held that a statute capping damages for noneconomic losses at \$250,000 in all personal injury cases was facially unconstitutional. *Hillburn v. Enerpipe Ltd.*, 442 P.3d 509, 524 (Kan. 2019). Kansas’s highest court reasoned that “the cap’s effect is to disturb the jury’s finding of fact on the amount of the award. Allowing this substitutes the Legislature’s nonspecific judgment for the jury’s specific judgment.” *Id.* Other jurisdictions in which trial by jury is constitutionally guaranteed have reached the same conclusion – noneconomic damage caps impermissibly interfere with the right to jury trial. *Watts v. Lester E. Cox Med. Centers*, 376 S.W.3d 633, 637 (Mo. 2012); *Atlanta Oculoplastic Surg. v. Nestlehutt*, 691 S.E.2d 218 (Ga. 2010); *Moore*, 592 So.2d at 164; *Sofie*, 771 P.2d at 712; *Smith v. Dept. of Ins.*, 507 So.2d 1080, 1088 (Fla. 1987); *Duren v. Suburban Comm. Hosp.*, 495 N.E.2d 51 (Ohio 1985).

This Court should reach the same result, given the Montana Constitution’s protection of the right to a jury trial as “inviolable.” As in *Hammer*, “the plain language of [Article II, § 26] mandates it. Any other construction renders the language of the constitution meaningless.” 222 Mont. at 39, 720 P.2d at 283.

3. *The statutory cap impermissibly infringes on Zahara’s right to due process.*

The Montana Constitution guarantees that “[n]o person shall be deprived of life, liberty, or property without due process of law.” Mont. Const., Art. II, § 17. Zahara and other medical malpractice victims are entitled – they are “due” – the process of having damages determined by a jury based on the facts of the case. Mont. Const., Art. II, § 26. “[I]t is the duty of the finder of fact to award damages for pain and suffering when the evidence clearly establishes that the plaintiff suffered painful injury and the defendant present no evidence to the contrary.” *Albinger* at ¶ 44 (citations omitted); *see also Breuer v. State*, 2023 MT 242, fn 29 and 30, 414 Mont. 256, 539 P.3d 1147. “The amount to be awarded is properly left to the finder of fact.” *Id.*

The statutory cap deprived Zahara the process to which he was due – the determination of damages by a jury. The statutory cap therefore infringes on the medical malpractice victims’ due process rights. *See Knowles v. United States*, 544 N.W.2d 183 (S.D. 1996); *Morris v. Savoy*, 576 N.E.2d 765 (Ohio 1991).

## II. SECTION 25-9-411 IS UNCONSTITUTIONAL AS APPLIED TO ZAHARA’S TORT VERDICT.

“An as-applied challenge alleges that a particular application of a statute is unconstitutional and depends on the facts of a particular case.” *City of Missoula*, 2018 MT 139, ¶ 25. The facts of this case, determined by a jury, establish that § 25-9-411 is unconstitutional as applied, based on Zahara’s fundamental right to remedy for injury, full legal redress, separation of powers, and the Constitutional prohibition against the grant of special privileges.<sup>7</sup>

### A. The Statutory Cap Impermissibly Infringes Upon Zahara’s Right to a Remedy for Every Injury to Person.

Legislative enactments that serve to obstruct access to courts or redress for injuries violate Article II, § 16, which provides in pertinent part:

Courts of justice shall be open to every person, and speedy remedy afforded for every injury of person, property, or character. . . . Right and just shall be administered without sale, denial, or delay.

In *Madison*, this Court nullified a statute requiring libel victims to demand retraction as a prerequisite to filing suit, holding that the offending statute was “in direct derogation of the clear and unambiguous language of Article II, § 16. . . which mandates that the courts of this state are open to every person, and a remedy

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<sup>7</sup>These constitutional challenges also support Zahara’s facial challenge to § 25-9-411, Mont. Code Ann.

afforded for every injury to character. . . . Thus, the state constitution fixes the right to a remedy and where it may be sought. The legislature is without power to provide otherwise.” *Madison*, 180 Mont. at 63, 589 P.2d at 131.

The statutory cap violates Zahara’s Article II, § 16 right to a “remedy afforded for every injury of person” and full legal redress.” The jury determined that Zahara incurred past noneconomic losses in the amount of \$2.5 million, and future losses of \$3.5 million. The extent of the infringement is drastic; the statutory cap effectively deprives Zahara of *all legal redress* and *any remedy* for most of his past damages and all of his future damages.

Numerous states have declared medical malpractice caps unconstitutional as impermissibly extensive infringements on the states’ similar “remedy for every injury” or “open courts” constitutional provisions. In *Lucas*, the Texas Supreme Court reviewed a statute limiting damages recoverable by medical malpractice victims to \$500,000. Even giving all respect due to the legislative enactment, the Texas court held that the damages cap “unconstitutionally limit[ed] [the victim’s] right of access to the courts for a ‘remedy by due course of law,’” as guaranteed by the Texas Constitution. *Lucas*, 757 S.W.2d at 690. *See also, Smith*, 507 So.2d at 1087–89. (\$450,000 limit on noneconomic damages violated “open courts” provision of Florida Constitution).

In this case, Article II, § 16's guarantees of a remedy for every injury and full legal redress support not just the facial challenge to § 25-9-411, but also the "as applied" challenge. In enacting the statutory caps, the legislature presupposed that noneconomic damage would be awarded *in addition to* significant economic damages. (App. 57, 70, 108, 159). The sponsor and supporters of the cap repeatedly assured that "economic awards for damages are not capped under this bill" and that the limitation would apply to "people who have already been reimbursed for the actual loss due to an injury." (App. 57, 108). Despite the 1997 Legislature's assumption that victims would receive full legal redress for economic damages and the cap would only reduce additional damages, in this case the cap reduced *all* Zahara's damages. Zahara was denied redress for 95.8% of his jury-determined damages.

In addition, because the blanket \$250,000 cap limits *all* noneconomic damages as a single package and requires reduction of future damages in the first instance, as applied to Zahara the cap eliminated his remedy for future damage in total. In fact, the cap eliminated his remedies for emotional distress and loss of established course of life in total, because the cap precluded all damages, and thus any remedy, other than 25% of Zahara's past emotional distress damages (\$1 million). As applied to Zahara, the cap certainly violated his right to a remedy

for “every injury” as he was unable to recover *at all* for future damages of any kind and of past damages for two of the three awards.

**B. The Statutory Cap Violates the Separation of Powers.**

As applied to Zahara’s jury verdict, the cap violates Montana’s separation of powers. The Constitution provides that “[n]o person or persons charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others.” Mont. Const., Art. III, § 1. Judicial power in Montana “is vested in one supreme court, district courts, justice courts, and other such courts as may be provided by law.” Mont. Const., Art. VII, § 1. The nature of this power is “the power or capacity given by law to a court to entertain, hear, and determine the particular case or matter. Judicial power is the authority not only to decide, but to make binding orders and judgments. . . .” *State ex rel. Bennett v. Bonner*, 123 Mont. 414, 425, 214 P.2d 747, 753 (1950).

The trial court was constitutionally vested with the power to determine Zahara’s damages. When entering judgment based on the statutory cap rather than the jury’s verdict, the trial court “had no illusions about \$250,000 sufficiently compensating Mr. Zahara . . . . Plainly it is nowhere close to enough.” (App. 27). “Montana’s Constitution is a prohibition upon legislative powers, rather than a grant of power,” *Jacobsen*, 2024 MT 66, ¶ 14, yet here the statutory cap allowed

the Legislature to exercise judicial power. In essence, the 1997 Montana Legislature rendered a jury verdict in 2022 using 1997 dollar values, and did so with no awareness of the facts of Zahara’s case.

**C. The Statutory Cap Impermissibly Grants a Special Privilege.**

Section 25-9-411 constitutes a “special privilege” granted to ANS and its insurers. Montana’s Constitution requires that “[n]o . . . law making an irrevocable grant of special privileges, franchises or immunities, shall be passed by the legislature.” Mont. Const., Art. II, § 31. The “special privileges” to which this provision refers are those conferred by the government on some citizens, but not all. *See Glodt v. City of Missoula*, 121 Mont. 178, 183, 190 P.2d 545, 548 (1948). As applied to the Zahara verdict, the statutory cap violates Article II, § 31. *See Wright*, 347 N.E.2d at 743 (cap constitutes an impermissible “special privilege” granted to health care providers.)

**III. IN THE ALTERNATIVE, THE CAP DOES NOT APPLY TO DAMAGES FOR LOSS OF ESTABLISHED COURSE OF LIFE.**

**A. The Statutory Cap Does Not Apply to Loss-of-Course-of-Life Damages.**

“In the construction of a statute, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted. . . .” § 1-2-101, Mont. Code Ann.; *State v. Lamb*, 2021 MT 302,

¶ 8, 406 Mont. 368, 498 P.3d 1252. The statutory definition of “noneconomic loss” does not include loss-of-established-course damages. By the plain terms of the statute, this Court should not insert into the definition what has been omitted.

Section 25-9-411 provides that in medical malpractice claims “an award for past and future damages for noneconomic loss may not exceed \$250,000.” In subsection (2), the statute defines “noneconomic loss”:

- (d) “Noneconomic loss” means subjective, nonmonetary loss, including but not limited to:
  - (I) physical and mental pain or suffering;
  - (ii) emotional distress;
  - (iii) inconvenience;
  - (iv) subjective, nonmonetary loss arising from physical impairment or disfigurement;
  - (v) loss of society, companionship, and consortium, other than household services;
  - (vi) injury to reputation; and
  - (vii) humiliation.

Critically, the statute does not include loss-of-course-of-life damages in its list of “noneconomic losses.” That list includes emotional distress damages and pain and suffering damages – both of which were awarded to Zahara by the jury and reduced by the trial court. However, loss-of-established-course damages do not belong in § 25-9-411’s list of noneconomic losses. As held by this Court in *Hern v. Safeco Ins.*, 2005 MT 301, ¶ 38, 329 Mont. 347, 125 P.3d 597, “‘loss of established course of life’ damages are unique to Montana.” A plaintiff with

permanent injuries is “entitled” to recover “reasonable compensation for the destruction of his capacity to pursue an established course of life.” *Id.*; quoting *Callihan v. Burl. Northern Inc.*, 201 Mont. 350, 358, 654 P.2d 972, 977 (1982).

The phrase “but not limited to” does not encompass loss-of-established-course damages, which are of a different kind and category than those enumerated in the statutory definition. “Distinct from compensation for pain/suffering, damages for ‘loss of established course of life’ compensate a permanently injured or disabled plaintiff for the loss of the ability to engage in or pursue chosen life activities that he or she had before the injury.” *Breuer*, 2023 MT 242, fn 28.

The entitlement to this unique form of damages existed for decades prior to the adoption of the statutory cap in 1997. *Rasmussen v. Sibert*, 153 Mont. 286, 456 P.2d 835 (1969). The legislature clearly did not intend to limit this element of damages by statutory cap. If it had so intended, the legislature would have included loss-of-established-course-of-life damages in its list of noneconomic losses. This Court presumes that when enacting legislation, the legislature is aware of the existing law and the Court’s interpretations. *See Musselshell Ranch Co. v. Seidel-Joukova*, 2011 MT 217, ¶ 14, 362 Mont. 1, 261 P.3d 584 574.

In applying the statutory cap to loss-of-established-course damages, the trial court has inserted into the definition of “noneconomic loss” a term omitted by the

legislature. § 1-2-101, Mont. Code Ann. The district court erred in refusing to amend the judgment to preclude application of the statutory cap to the loss-of-established-course damages.

**B. To the Extent § 25-9-411 Reduces Loss-of-Course Damages, the Statute is Unconstitutional.**

Zahara is entitled to recover loss-of-established-course-of-life damages, unique to Montana law, in order to obtain a remedy for injury to his person and full legal redress. To the extent § 25-9-411 attempts to curtail Zahara's fundamental right, both strict and middle-tier analysis result in unconstitutionality. But the deprivation of Zahara's loss-of-course damages fails even rational basis review.

Under the rational basis test, Zahara bears the burden to show that the law is not rationally related to a legitimate government interest. *Reesor*, 2004 MT 370, ¶ 15. Zahara has made that showing with respect to the statute as a whole. But additional grounds exist with respect to loss-of-established-course-of-life damages. The Legislature articulated *no basis whatsoever* for reducing loss-of-established-course damages. The Legislature did not discuss this type of damage, even though the claim for loss-of-course had existed in Montana for decades. There is no evidence that the rates of two national insurance companies providing policies to Montana health care providers are related in any way – much less rationally related – by curtailing these unique-to-Montana damages.

## CONCLUSION

Zahara respectfully requests that this Court declare § 25-9-411's cap on noneconomic damages in medical malpractice actions unconstitutional and remand this matter to the trial court for entry of judgment in accord with the jury's actual verdict of \$6 million.

DATED this 18th day of June, 2024.

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## **CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 11(4)(a), Mont. R. App. P., I certify that the foregoing brief is printed with a proportionately-spaced Times New Roman text typeface of 14 point, is double-spaced, and the word count as calculated by Corel Wordperfect is 9,596, excluding caption, tables, and certificates.

/s/ Martha Sheehy  
Martha Sheehy

## **CERTIFICATE OF SERVICE**

I hereby certify that on 18th day of June, 2024, I electronically filed the foregoing with the Clerk of the Montana Supreme Court using the Okta filing system. I certify that all participants in this appeal are registered eService users and will receive service electronically.

/s/ Martha Sheehy  
Martha Sheehy

## CERTIFICATE OF SERVICE

I, Martha Sheehy, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 06-18-2024:

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