IN THE SUPREME COURT OF THE STATE OF MONTANA

SUPREME COURT CAUSE NO. DA 24-0203

JOEY ZAHARA,
Plaintiff and Appellant/Cross-Appellee,
v.
ADVANCED NEUROLOGY SPECIALISTS,
Defendant and Appellee/Cross-Appellant.

ANSWER BRIEF OF APPELLEE AND BRIEF OF CROSS-APPELLANT ADVANCED NEUROLOGY SPECIALISTS

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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Appearances for Defendant and Appellee/Cross-Appellant Advanced Neurology Specialists:

Peter J. Stokstad
Elijah L. Inabnit
GARLINGTON, LOHN &
ROBINSON, PLLP
350 Ryman Street
PO Box 7909
Missoula, MT 59807-7909
Phone (406) 523-2500
Fax (406) 523-2595
pjstokstad@garlington.com elinabnit@garlington.com

Appearances for Plaintiff and Appellant/Cross-Appellee Joey Zahara:

Daniel J. Flaherty
Paul Gallardo
FLAHERTY GALLARDO LAW
PO Box 1968
Great Falls, MT 59403
Phone (406) 727-8537
daniel@greatfallsfirm.com
paul@greatfallsfirm.com

Martha Sheehy
SHEEHY LAW FIRM
PO Box 584
Billings, MT 59103
Phone (406) 252-2004
Msheehy@sheehylawfirm.com

Appearance for Amici Curiae American Medical, Association, Montana Medical Association and Montana Hospital Association :

Justin K. Cole
GARLINGTON, LOHN & ROBINSON, PLLP
P. O. Box 7909
Missoula, MT 59807-7909
Phone (406) 523-2500
Fax (406) 523-2595
jkcole@garlington.com

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INTRODUCTION

Since 1995, it has been the law of Montana that a medical negligence plaintiff can recover unlimited economic damages, punitive damages, and up to $250,000 in noneconomic damages.

Montana's noneconomic damages cap, Montana Code Annotated § 25-9-411 ("the Cap")—like similar caps in a majority of states—was enacted to rein in excessive jury verdicts that were driving up medical malpractice premiums and directly harming the public by increasing health care costs and forcing practitioners to cut services. Since the Cap's enactment, insurance premiums have stabilized, creating incentives for health care providers to offer more and better services.

Similar caps in other states have been challenged on constitutional grounds similar or identical to those raised by Appellant Joey Zahara here. But "only a few states have declared such caps unconstitutional." *MacDonald v. City Hosp., Inc.*, 715 S.E.2d 405, 422 (W. Va. 2011). "[T]he majority of jurisdictions that have considered the constitutionality of caps on noneconomic damages in medical malpractice actions" have upheld them. *Id.* (collecting cases). Courts upholding caps have largely done so on the grounds that it is the Legislature's exclusive province to determine the law governing the damages available for a particular cause of action.

Consistent with this consensus position—and correctly interpreting the Montana Constitution and governing precedent—the district court upheld Montana's Cap. This Court should do the same.

This Court should also reject Zahara's attempt to narrow the Cap's scope by excluding loss-of-established-course-of-life damages from its application. As the district court correctly concluded, the Cap applies to damages for any type of "subjective, nonmonetary loss," and this Court's case law places loss-of-established-course-of-life damages squarely in that category.

If this Court invalidates the Cap or otherwise reverses, it should address Appellee Advanced Neurologist Specialists' ("ANS") conditional cross-appeal and order a new trial on the ground that ANS's trial strategy would have changed if it had known that the Cap would not apply. Parties litigate differently when their exposure for noneconomic damages is unlimited. If the Cap is not valid, ANS should have an opportunity to try this case guided by knowledge of the law that will apply.

Independently, the Court should order a new trial because the district court erred in admitting a prejudicial and irrelevant hospital document, which Zahara's counsel used to confuse the jury. The district court compounded its error by refusing to give ANS's requested jury instructions, which could have lessened

some of the confusion. The cumulative effect of these errors deprived ANS of a fair trial.

STATEMENT OF THE ISSUES

Issue One: Whether the Cap is constitutional.

Issue Two: Whether the Cap applies to damages for loss of established course of life.

Issue Three: Whether, if this Court reverses the decisions below in whole or in part, ANS is entitled to a new trial because: (i) ANS would have litigated the case differently if it knew the Cap did not apply; and/or (ii) ANS was prejudiced at trial by the admittance and misuse of hospital documents.

STATEMENT OF THE CASE

I. Nature of the Case

In 2013, Zahara suffered a stroke and was treated at Benefis Health Systems ("Benefis"). He filed a medical negligence action against ANS—Dr. William Henning's practice group. Dr. Henning provided on-call neurology services to Benefis.

After a four-day trial, a jury determined that Zahara suffered $6 million in noneconomic damages. After the verdict, on motion of ANS, the district court applied the Cap and entered judgment of $250,000 plus fees and costs.

In this appeal, Zahara challenges the Cap's constitutionality and scope.[1]

A. The Legislature exercised discretion to limit noneconomic damages in medical malpractice cases.

Montana's Cap provides that "[i]n a malpractice claim . . . an award for past and future damages for noneconomic loss may not exceed $250,000." § 25-9-

[1] Zahara erroneously contends that his appeal applies *both* to the Cap applied by the district court and what he calls the "contingency" version of the Cap, which becomes effective if the operative cap is invalidated. (O.B. 14.) Any challenge to the "contingency" version is unripe, because it is not in effect and has not been applied. *E.g.*, *Hodges v. United States*, No. CV-19-46-GF-BMM, 2022 U.S. Dist. LEXIS 3185, at *5 (D. Mont. Jan. 6, 2022) (challenge to cap's constitutionality was "not yet ripe, because the Cap has yet to be triggered"); *Osborne v. Billings Clinic*, No. CV-14-126-BLG-SPW, 2015 U.S. Dist. LEXIS 196852, at *2-3 (D. Mont. Dec. 16, 2015) (similar).

411(1)(a). "All claims for noneconomic loss deriving from injuries to a patient are subject to an award not to exceed $250,000." *Id.*

The statute defines "noneconomic loss" as a "subjective, nonmonetary loss" and, provides a non-exhaustive list of examples "*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." § 25-9-411(5)(d) (emphasis added).

Montana enacted the Cap in 1995 based on evidence that limiting noneconomic damages could help stabilize malpractice insurance rates for physicians. [Appellant Zahara's App'x 57, 145, June 18, 2024 ("App'x").] Evidence showed that such rates were becoming "exorbitant," due in large part to the "open ended" nature of physicians' potential liability in medical malpractice actions. [App'x 57, 145.] During its deliberations, the Legislature considered testimony from insurers and practitioners explaining that a cap could help reduce or stabilize premiums by limiting the potential for unpredictable and outsized damages. [App'x 57, 63, 70.] Similar caps in California and Colorado had reduced insurance premiums. [App'x 72-73, 75-77.]

Stabilizing insurance premiums was one goal. Another was to encourage more physicians to practice in Montana and to offer a wider array of services. [App'x 57,145.] Witnesses testified that the high costs of malpractice insurance in Montana in the 1990s had led local physicians to offer fewer services. [App'x 66, 70, 78, 145–48, 195–96.]

After balancing the social costs and benefits, the Legislature exercised its policymaking authority to enact the Cap. It made this decision after weighing testimony from witnesses who opposed the Cap and raised many of the same legal and policy arguments that Zahara raises in his brief. [*E.g.*, App'x 98–101, 148-51, 207–11.]

Montana is no outlier in capping noneconomic damages. As of January 2023, about half of the states have some form of noneconomic damages cap, although the nature of the caps varies significantly.[2] For example, Utah has capped noneconomic damages at $450,000, a figure that is not subject to adjustment for inflation. Utah Code § 78B-3-410(d). By contrast, Indiana caps *total* damages in medical malpractice actions at $1.8 million dollars. Ind. Code § 34-18-14-3(a)(5) (2024).

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[2] American Medical Association, *Medical Liability Reform Now! 2024: The Facts You Need to Know to Address the Broken Medical System* 12 (2024), https://www.ama-assn.org/system/files/mlr-now.pdf ("Medical Liability Reform").

B. Montana's Cap is an important part of the State's efforts to stabilize the market for malpractice insurance.

"A large body of research shows that caps on noneconomic damages lead to improved access to care for patients, constrained medical liability premium growth, lower claim frequency, reduced average claim payments and lower health care costs."[3] According to a 1993 study by the U.S. Office of Technology Assessment—which was published before the Cap's enactment— "caps on damages were the only type of State tort reform that consistently showed significant results in reducing the malpractice cost indicators."[4] This does not mean that damages caps are perfect. As Zahara points out, Montana insurance premiums have risen in some years notwithstanding the Cap. But this point begs the question: how much larger and more frequent would the increases have been without the Cap?

Studies also suggest that increases in Montana's premiums were a response to larger forces effecting insurance markets nationwide. A study by the American Medical Association ("AMA") explained "[i]t is not atypical for there to be hard and soft markets, for premiums to go up and down, as this is part of the insurance

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[3] Medical Liability Reform, *supra*, at 12.

[4] U.S. Congress, Office of Tech. Assessment, *Impact of Legal Reforms on Medical Malpractice Costs*, OTA-BP-H-1, at 64 (1993), https://ota.fas.org/reports/9329.pdf.

cycle."[5] Recent increases can be explained by a current hard market. But "at this stage the current hard market is not as severe and is spreading at a slower pace than the one from 20 years ago." *Id*. at 5.

FACTUAL AND PROCEDURAL BACKGROUND

At approximately 6:00 p.m. on the evening of June 5, 2013, Zahara fell to the floor and began experiencing symptoms of a stroke. [App'x 37, 41]; [Tr. Proceedings Jury Trial Day 1 at 226–27, Sept. 12, 2022 ("Tr. Day 1").] He was taken to Benefis at approximately 6:30 p.m. where he presented with severe neurological deficits and was initially treated by emergency room physician Kevin Takakuwa, M.D. [App'x 34.] Shortly before 7:00 p.m., Dr. Takakuwa called Dr. Henning, the on-call neurologist. [App'x 36.] Dr. Henning recommended administering tissue plasminogen activator ("tPA"), a medication that can dissolve blood clots within the brain. [App'x 36]; [Tr. Day 1 at 276–77]; [Tr. Proceedings Jury Trial Day 3 at 37–39, 49–50, 147, Sept. 14, 2022 ("Tr. Day 3").] As a result of known risks of tPA, including the risk of hemorrhaging, Zahara initially refused the treatment. [App'x 35]; [Tr. Day 3 at 38–39, 148, 174.] Although he subsequently changed his mind, his condition spontaneously improved before the

[5] José Guardado, *Prevalence of Medical Liability Premium Increases Unseen Since 2000s Continues for Fourth Year in a Row*, American Medical Ass'n Policy Research Perspectives 6 (Apr. 2023), https://www.ama-assn.org/system/files/prp-mlm-premiums-2022.pdf.

medication could be administered. [App'x 35.] This occurred around 7:30 p.m. and Dr. Takakuwa decided not to administer the tPA as a result. [App'x 35, 37.]

At some point, Zahara's care was transferred to Dr. Timothy Weill, who was working as a hospitalist that evening. [Tr. Proceedings Jury Trial Day 2 at 224–25, Sept. 13, 2022 ("Tr. Day 2".] Dr. Weill admitted Zahara for observation overnight. [Tr. Day 2 at 225–26.] Dr. Weill first spoke to Dr. Henning around 8 or 9 p.m., after examining Zahara. [Tr. Day 2 at 197, 228.] They agreed that tPA was no longer indicated. [Tr. Day 2 at 229.] Dr. Henning instructed Dr. Weill to begin administering aspirin and to order diagnostic tests for the next day. [Tr. Day 2 at 229.]

At approximately 10:00 p.m., Zahara again experienced severe stroke symptoms. [App'x 40.] When Dr. Weill returned, he observed a return of significant neurological deficits. [Tr. Day 2 at 239–241.] Around 10:40 p.m., Dr. Weill again called Dr. Henning. [Tr. Day 2 at 246–47.] By Dr. Henning's calculations, it was approximately four hours and forty minutes after the onset of symptoms at 6:00 p.m., which meant that it was beyond the 4.5 hour window in which tPA could be safely administered. [App'x 42–43; Tr. Day 2 at 197, 205, 207, 247; Tr. Day 3 at 52–53.] No tPA was administered.

The completeness of Zahara's improvement at 7:30 p.m. was a key issue because tPA can be administered to a stroke victim only during a limited window.

[Tr. Day 1 at 278–79; Tr. Day 2 at 193–94; Tr. Day 3 at 42.] Dr. Henning and Zahara's expert, Dr. Chitra Venkatasubramanian, agreed that window was 4.5 hours from the onset of symptoms. [Tr. Day 1 at 279; Tr. Day 2 at 194.] However, the Parties disputed when the 4.5 hour tPA window began. And, as the district court observed, "[t]he evidence about the completeness and duration of this 7:30 symptom improvement conflicted." [App'x 5.] Zahara contended that his symptoms had completely resolved at 7:30 p.m. which would reset the 4.5-hour window from this time. Based on this, Dr. Venkatasubramanian opined that it was a breach of the standard of care for Dr. Henning to advise against administering tPA at 10:40 p.m. [Tr. Day 2 at 29, 34–35, 38.]

Dr. Henning used 6:00 p.m. as the start of the relevant window because he understood that Zahara's 7:30 p.m. recovery, though significant, was not complete and that some neurologic deficits remained such that the window had not reset. [Tr. Day 2 at 204–06.] Based on those residual deficits, Dr. Henning calculated the relevant tPA window as having expired by the time he was contacted regarding Zahara's symptoms worsening at 10:40 p.m. [Tr. Day 2 at 205, 208–09.]

There was also significant dispute over whether the standard of care required Dr. Henning to appear and evaluate Zahara in person. [Tr. Day 3 at 26 –28.] Dr. Henning testified to his compliance with the standard of care and that the on-call service was designed to provide phone consultation to the physicians attending in

person, with the neurologist going in only if requested. [Tr. Day 2 at 215–16]; [Tr. Day 3 at 22–23.] ANS's expert, Dr. Wayne Clark likewise opined that the standard of care did not require Dr. Henning to attend Zahara in person on June 5. [Tr. Day 3 at 189–90, 212.] In contrast, Dr. Venkatsubramanian testified that the applicable standard of care required personal attendance. [Tr. Day 1 at 288.]

As a result of his stroke, Zahara has suffered from long-term injuries, including limited use of the right side of his body. He ultimately filed suit against ANS and the matter was tried in front of a jury over four days, with the jury reaching its verdict on September 15, 2022. On the eve of trial Zahara withdrew all his claims for economic damages. Zahara sought only noneconomic damages and did not present testimony from a vocational expert or other expert to establish medical expenses, lost wages, or other forms of economic damage. [App'x 3.]

The jury determined that Dr. Henning was negligent. [App'x 47–48.] It awarded Zahara $6 million in noneconomic damages: $1 million for past emotional distress; $1.5 million for future emotional distress; $1 million for past pain and suffering; $1 million for future pain and suffering; $500,000 for loss of established course of life; and $1 million for future loss of established course of life. [App'x 48.]

Following the verdict, ANS moved to apply the Cap. In response, Zahara argued the cap was unconstitutional. [App'x 10.] Resolving the issue, the district

court applied the Cap relying on *Meech v. Hillhaven West*, 238 Mont. 21, 776 P.2d 488 (1989), where this Court "considered and rejected many of the arguments that Mr. Zahara now advances." [App'x 13.] The district court entered judgment for $250,000, plus costs of $7,166.00 and post-judgment interest. [App'x 28.]

Following entry of judgment, Zahara filed a motion under Montana Rule of Civil Procedure 59(e) to increase the judgment from $250,000 to $1,750,000. [App'x 29.] Zahara argued that the $1.5 million in damages the jury awarded for loss-of-established-course-of life were not subject to the Cap. [App'x 29.] The district court denied the motion, recognizing that "[m]ultiple decisions applying Montana law confirm that loss of established course of life is indeed an unliquidated and subjective general damage" that falls within the Cap's scope. [App'x 31.]

The jury's verdict was the result of confusion of the issues owing to Zahara's introduction of irrelevant and highly prejudicial Benefis documents which were admitted over ANS' repeated objections. The specific document was titled: "Stroke/TIA < 3 hours onset-arrival clinical guidelines" ("the Benefis Document"), which outlined a timeline for stroke treatment that included a column headed "< 25 minutes from arrival:" with a line stating "Neurologist and coordinator arrival." (Trial Ex. 5, Sept. 13, 2022.) Zahara used this document at trial to argue that

Benefis had a policy requiring that Dr. Henning arrive at the bedside within 25 minutes of receiving call to assess a stroke patient.

ANS objected that the Benefis Document was inadmissible under Montana Rule of Evidence 901(a), because the authenticating testimony was inconsistent with Zahara's depiction.[6] [ANS' App'x 252-63, Aug. 21, 2024]; [ANS' App'x 283-86]; [ANS' App'x 241-51]; [Tr. Proceedings, Sept. 13, 2022 ("Tr. Day 2.5")]. While Zahara's counsel had used the Benefis Document in discovery to assert that it established a hospital *requirement* that on-call neurologists report to a stroke patient's bedside within 25 minutes, Kathy Hill, the C.O.O. of Benefis, who was subpoenaed to authenticate the document, testified that there was no 25-minute requirement and that coming in was an individual decision based on medical judgment.]; [Tr. Day 2 at 167-173]; [Tr. Day 2.5 at 4-5]; [Tr. Day 3 at 211-12]. ANS also argued the Benefis Document should be excluded under Montana Rules of Evidence 402 and 403. [ANS' App'x 241-51]; [Tr. Day 2.5]. As Dr. Henning was not employed at Benefis, Benefis deferred to his judgment, the Benefis Document did not create a requirement on Dr. Henning, and it was not material to establish the applicable standard of care, it was irrelevant. [ANS' App'x 241-51];

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[6] The dispute over the Benefis Document arose out of Zahara's use of the document in depositions and was the subject numerous motions, including, *inter alia,* two motions in limine filed by ANS, [ANS' App'x 283-86]; [ANS' App'x 265-76]; [ANS' App'x 254]. *See also, e.g.* [Tr. Day 3 at 211-12] (perpetuated deposition of Dr. Clark played for the jury).

[Tr. Day 2.5 at 8-9.] Moreover, the document would be extremely prejudicial. [Tr. Day 2.5 at 8-9.] It was highly likely that, based on the document, the jury may find ANS liable based solely on Dr. Henning's noncompliance with the Benefis Document.

The district court ultimately admitted the Benefis Document. [Tr. Day 2.5 at 17–18.] Zahara's counsel made every effort to capitalize on the document at trial—and to confuse the jury regarding its import. In his opening statement, Zahara's counsel emphasized that the case was "about Dr. Henning's choices," and that "Dr. Henning chose not to come in and see Joey Zahara when he was told about his life-threatening stroke." [Tr. Day 1 at 189]; *Id*. at 190. Although the Benefis Document did not create an obligation, counsel stated that Dr. Henning "had an obligation to come in." [Tr. Day 1 at 190.]

During Ms. Hill's testimony, Zahara's attorneys used leading questions to solicit favorable testimony suggesting in-person attendance was obligatory—questioning to which ANS's counsel repeatedly objected.[7] [Full Tr. Kathy Hill's Testimony 9–10, Sept 13, 2022 ("Tr. Hill").] At one point, the court admonished

[7] In her Amended Notice of Filing Appeal Transcripts, the Official Court Reporter labeled "(3) Kathy Hill's Testimony outside the presence of the jury – September 13, 2022" as being the transcript outside of the presence of the jury. However, that transcript portrays testimony that occurred in the presence of the jury and "(2) Jury Trial Day 2 – September 13, 2022," pages 148-188, occurred outside the presence of the jury.

Zahara's counsel: "I[] can't let you lead her through this and I'm not going to." [Tr. Hill 11.] Nonetheless, counsel persisted in questioning that made it appear as if the Benefis document created a requirement that an on-call neurologist report within 25 minutes.

Immediately following Ms. Hill's testimony, Zahara's counsel called Dr. Henning—and continued to exploit the document. After verifying Dr. Henning's name, counsel's first question was: "What about Joey Zahara's presentation, when you learned about it at seven o'clock, caused you to deviate from these guidelines."[8] [Tr. Day 2 at 190.] The district court sustained ANS's objection to that question—but the damage had been done. [Tr. Day 2 at 190.] The issue returned to the court when both sides requested jury instructions regarding the document. [Tr. Day 3 at 328-33] ANS requested an instruction that hospital policies do not establish the standard of care. [Tr. Day 3 at 328–29]; [ANS' App'x 235-40]. Zahara requested an instruction that such policies are relevant to the standard of care. [Tr. Day 3 at 329]; [ANS' App'x 227-34]. The district court rejected both. [Tr. Day 3 at 329.] ANS subsequently requested the court instruct the jury that it is "not here to determine whether or not [Dr. Henning] breached a

[8] Dr. Henning testified that he had not been familiar with the Benefis Document prior to testifying at trial. [Tr. Day 2 at 191.]

hospital policy." [Tr. Day 3 at 332.] The district court again refused the instruction. [Tr. Day 3 at 332–33.]

In closing, Zahara's counsel repeatedly suggested that the jury could find ANS liable based on Dr. Henning's violation of a hospital policy: "Dr. Henning got that third call and he made a choice. . . . The choice was not to come in, not to talk to Joey, not to give tPA." [Tr. Proceedings Jury Trial Day 4 at 189, Sept 15, 2022 ("Tr. Day 4").] As counsel later summarized, "[w]e're not demanding that Dr. Henning live at the hospital and wait for every emergency to come in the door." [Tr. Day 4 at 200.] "Physicians can have their time and be on call, but when they take call and they sign up for that duty, when a call comes in, you go. You're required to go." [Tr. Day 4 at 200.]

STATEMENT OF THE STANDARDS OF REVIEW

Issue 1: "This Court exercises plenary review of constitutional issues." *Big Sky Colony, Inc. v. Mont. Dep't of Labor & Indus.*, 2012 MT 320, ¶ 16, 368 Mont. 66, 291 P.3d 1231 (citation omitted). Accordingly, it reviews for correctness the district court's ruling that Montana's damages cap is constitutional. *Id*.

Issue 2: Whether the cap applies to damages for loss of established course of life is a question of statutory interpretation. This Court "review[s] a lower court's statutory interpretation as a question of law for correctness." *State v. Crazymule*, 2024 MT 58, ¶ 8, 415 Mont. 536, 545 P.3d 66 (citation omitted).

Issue 3: The district court did not rule on ANS's request for a new trial, because the request only becomes operative if this Court reverses. One component of the conditional cross-appeal addresses the district court's error in admitting the Benefis document. Evidentiary rulings are generally reviewed for abuse of discretion. *In re T.W.*, 2006 MT 153, ¶ 8, 332 Mont. 454, 139 P.3d 810. But the "standard of review is plenary to the extent that a discretionary ruling is based on a conclusion of law. In such circumstances, [this Court] must determine whether the court correctly interpreted the law." *Id.* (citation omitted).

SUMMARY OF THE ARGUMENT

Zahara's Appeal: This Court should affirm the decisions below.

1. The Cap does not infringe on any right that is protected by the Montana Constitution. This Court need not apply any level of constitutional scrutiny to Zahara's claims to reach that conclusion. When the scope of the relevant constitutional provisions is analyzed in light of history and precedent, it is clear that the Cap does not impede on any protected right.

Even if it did, the Cap would survive. The Legislature enacted the Cap based on rising medical malpractice insurance premiums linked to exorbitant damage awards. Rising premiums, in turn, were causing Montana health care providers to cut services and stop practicing. The evidence also showed that similar caps were effective at lowering or stabilizing rate increases in nearby states.

2. The Cap applies to loss-of-established-course-of-life damages, which compensate for nonmonetary, subjective losses that fall squarely within the Cap.

ANS's Conditional Cross-Appeal: If this Court reverses the decisions below, it should order a new trial.

3. ANS's trial strategy would have differed if it had known it was litigating a case with uncapped noneconomic damages.

4. Independent of the Cap, ANS should get a new trial because the district court erred in admitting a Benefis document that Zahara's counsel used to confuse the jury.

ARGUMENT

I. The Cap is Constitutional.

As with all statutes, this Court begins its constitutional analysis by presuming the Cap is constitutional. *Brown v. Gianforte*, 2021 MT 149, ¶ 32, 404 Mont. 269, 488 P.3d 548. "Every possible presumption must be indulged in favor of" its validity. *Hernandez v. Bd. of Cnty. Comm'rs*, 2008 MT 251, ¶ 15, 345 Mont. 1, 189 P.3d 638.

"The party challenging a statute's constitutionality bears the heavy burden of proving the statute is unconstitutional 'beyond a reasonable doubt.'" *Brown*, ¶ 32 (quoting *Molnar v. Fox*, 2013 MT 132, ¶ 49, 370 Mont. 238, 301 P.3d 824). And where, as here, a party raises a facial challenge, he faces the even heavier burden of "demonstrat[ing] that no set of circumstances exists under which the challenged sections would be valid." *City of Missoula v. Mt. Water Co*., 2018 MT 139, ¶ 21, 391 Mont. 422, 419 P.3d 685 (quotes and citation omitted).

Zahara has failed to carry his burden in several respects.

A. This Court need not address levels of scrutiny as Zahara has not established the infringement of a right.

Zahara asserts that strict scrutiny should apply because the Cap infringes on fundamental rights. (Appellant Zahara's Opening Br. 19–29, June 18, 2024 ("O.B.").) But that assertion is beside the point, because the Cap does not burden any constitutional right to trigger any tier of scrutiny. As explained by the Court, a

party need not "demonstrate that a law survives strict scrutiny or any level of scrutiny where the movant fails to make out a prima facie case of a violation of its constitutional rights." *Netzer Law Office, P.C. v. State*, 2022 MT 234, ¶ 34, 410 Mont. 513, 520 P.3d 335. Here, as explained more thoroughly below, Zahara has not made out a prima facie case, which requires analysis of the nature and scope of the constitutional provision and a showing that the challenged statute burdens something within the provision's scope. Zahara hardly attempts such analysis and, to the extent he tries, he misapprehends the scope of what the Montana Constitution guarantees.

Zahara's failure to analyze constitutional questions as this Court requires is the basis for his analysis of *Meech*. The district court relied heavily on *Meech* to reject Zahara's constitutional arguments. That reliance was well founded. *Meech* remains good law. [App'x 18.] As recently as 2014, this Court approvingly cited *Meech* to reiterate that article II, § 16 does not guarantee a fundamental right to "full legal redress." *N. Pac. Ins. Co. v. Stucky*, 2014 MT 299, ¶ 31, 377 Mont. 25, 338 P.3d 56.

As the district court concluded, *Meech* is relevant to many of Zahara's claims. In *Meech*, the Court upheld Montana's Wrongful Discharge From Employment Act, which capped economic and noneconomic damages. 238 Mont.

at 24–26. The plaintiff argued that the statute violated his rights to full legal redress and equal protection. *Id.* at 26. The Court rejected both arguments.

With respect to plaintiff's full redress claim, the court held that the Montana Constitution does not guarantee a particular remedy. *Id.* at 26. Beginning with an analysis of the history and scope of the right allegedly implicated, article II, § 16, the Court explained that the provision evolved from earlier constitutional provisions "framed to provide for equality in the administration of justice." *Id.* at 27. Its language imposes "a mandate aimed exclusively at the courts." *Id.* at 30. It does not restrict the Legislature. *Id.*

Because article II, § 16 does not restrict the Legislature, it does not prevent the Legislature from "alter[ing] common-law causes of action." *Id.* Indeed, throughout the State's history, the Legislature has repeatedly abrogated common law causes of action or constricted liability. *Id.* at 33 (collecting examples). That history shows that "the law, for a variety of policy reasons, refuses to provide a cause of action, remedy and redress for every injury." *Id.* at 34.

The *Meech* Court did not discuss tiers of scrutiny because, with no right infringed, the analysis was complete. A similar method of analysis applies here.

There is no merit to Zahara's contention that "*Meech* should be limited to the employment setting." (O.B. 21.) Although the law at issue was employment related, the Court's constitutional analysis had nothing to do with employment or

contract law. Zahara does not point to any error in the Court's analysis of article II, § 16's scope or the Legislature's power to alter common law remedies.

Zahara is also incorrect in his assertion that the Court was interpreting only the second sentence of article II, § 16 relating to employment disputes. The historical analysis was focused on the first sentence, and its discussion of the second sentence was to illustrate that the 1972 amendments to the Constitution did not alter the Legislature's historic authority to alter common law causes of action. *Meech*, 238 Mont. at 26–42.

Separately, there is no merit to Zahara's request that this Court overrule *Meech*. (O.B. 22.) Zahara has not explained why the Court's constitutional analysis is flawed—nor does he grapple with the *other* precedents this Court would need to overrule. *E.g.*, *Filip v. Jordan*, 2008 MT 234, ¶ 12, 344 Mont. 402, 188 P.2d 1039; *Ross v. City of Great Falls*, 1998 MT 276, ¶ 34, 291 Mont. 377, 967 P.2d 1103; *Shea v. North-Butte Mining Co.*, 55 Mont. 522, 532-33, 179 P. 499, 502 (1919).

Zahara misconstrues the Court's holding when he suggests that *Meech* held "that Article II, § 16 does not enunciate a fundamental right." (O.B. 22.) The Court did not hold that article II, § 16 does not create *any* fundamental rights. Rather, the Court held that it did not create the right plaintiff contended existed within the language "full legal redress"– *i.e.,* a right to recover all damages a

plaintiff could have recovered at common law. *See Meech*, 238 Mont. at 26 ("no such 'fundamental right' is created by article II, section 16").

In short, *Meech* remains good law, as do the cases relying on it. As the district court concluded, it provides a straightforward path to affirmance. But regardless, as illustrated below, this Court can affirm without relying on *Meech*.

B. The Cap does not violate any constitutional rights.

1. The Cap does not violate equal protection.

Turning to Zahara's specific arguments, Zahara first contends that the Cap violates Montana's Equal Protection Clause, which provides that "[n]o person shall be denied equal protection of the laws." Mont. Const. art. II, § 4. "The basic rule of equal protection is that persons similarly situated with respect to a legitimate governmental purpose of the law must receive like treatment." *Planned Parenthood v. State*, 2024 MT 178, ¶ 26 (quote and citation omitted). This Court evaluates potential equal protection violations under a three-step process: (1) it identifies the classes involved to determine if they are "similarly situated"; (2) it determines the appropriate level of scrutiny to be applied to the challenged statute; and (3) it applies the appropriate level of scrutiny. *Id*.

Zahara's claim falters at step one because the Cap does not "affect[] two or more similarly situated groups in an unequal manner." *Mont. Cannabis Indus. Ass'n v. State*, 2016 MT 44, ¶ 15, 382 Mont. 256, 368 P.3d 1131 ("*MCIA*") (quotes

and citations omitted). "The goal of identifying a similarly situated class is to isolate the factor allegedly subject to impermissible discrimination." *Planned Parenthood*, ¶ 27 (quotes and citation omitted). "[T]wo groups are similarly situated if they are equivalent in all relevant respects other than the factor (here, the [Cap]) constituting the alleged discrimination." *Id.* If the challenged law does not discriminately impact similarly situated groups, the analysis ends. *MCIA*, ¶¶ 15–18. "[W]hether the challenged statute creates a discriminatory classification is informed by the statute's purpose." *MCIA*, ¶ 17 (citation omitted).

Zahara principally argues that the Cap discriminates between medical malpractice plaintiffs and other tort plaintiffs. (O.B. 24, 30.) But such plaintiffs are not similarly situated. Under Montana law, a medical malpractice claim is distinct from a claim for general negligence. *See* § 25-9-411(5)(c) (defining medical malpractice). The distinction between malpractice plaintiffs and other tort plaintiffs is a "fundamental difference" that "plainly relates to the underlying justification of the statute." *See MCIA*, ¶ 18 (citation omitted). As Zahara acknowledges, the Cap was enacted to "contain medical malpractice insurance costs." (O.B. 37.) It does so by capping noneconomic damages recoverable by malpractice plaintiffs. Because the plaintiffs are distinct, equal protection analysis is not triggered.

Zahara also contends (O.B. 30) that the Cap implicates equal protection because it creates disfavored subclasses among medical malpractice plaintiffs based on the size of the plaintiff's noneconomic damages. But the plain text of the Cap forecloses this contention as all malpractice claims are subject to the same cap. *Lucas v. United States*, 807 F.2d 414, 421 (5th Cir. 1986) (finding no equal protection subclass because "[e]very malpractice victim is limited by the statute.").

There also is no merit to Zahara's suggestion (O.B. 30) that the Cap implicates equal protection because it benefits a distinct class of tortfeasors—namely, medical providers. As this Court has recognized: "a statute does not violate the right to equal protection simply because it benefits a particular class, as discrimination only exists when people in similar circumstances are treated unequally." *Gazelka v. St. Peter's Hosp.*, 2018 MT 152, ¶ 16, 392 Mont. 1, 420 P.3d 528 (quotes and citations omitted).

Moreover, Zahara has not shown that medical providers—who have a privileged, physician-patient relationship with the plaintiff—are similarly situated to other tortfeasors. *See Kasayuli v. United States*, No. 3:12-cv-0241-HRH, 2014 U.S. Dist. LEXIS 189578, at *5 (D. Alaska Oct. 22, 2014) (recognizing "the lack of similarity between health care providers such as defendant and other tortfeasors"). Further, any differential treatment permissibly relates directly to the

Cap's purpose: controlling increases in insurance premiums that medical providers—but not other tortfeasors—would otherwise incur without the Cap.

Because Zahara has not shown that the Cap treats similarly situated parties unequally, "it is not necessary . . . to analyze [Zahara's] challenge further." *Vision Net, Inc. v. State*, 2019 MT 205, ¶ 16, 397 Mont. 118, 447 P.3d 1034 (collecting cases).

2. The Cap does not violate the right to trial by jury.

Even though Zahara had a jury trial, he contends (O.B. 40-44) that the Cap infringed on his right to a jury trial. Zahara is incorrect.

Article II, § 26 of the Montana Constitution provides that "[t]he right of trial by jury is secured to all and shall remain inviolate." The district court correctly concluded that the Cap does not infringe any protections encompassed within that right. [Add. 19.] Section 26 protects a party's right to have a jury resolve all questions of fact. *Linder v. Smith*, 193 Mont. 20, 23, 629 P.2d 1187, 1189 (1981). That right is not implicated by the Cap because "[t]he Legislature has not said a jury cannot *find* damages above the Cap, only that the plaintiff cannot *recover* them." [App'x 19.]

A damages cap is analytically similar to other mechanisms courts use to conform the jury's factual determinations to the law. As another court has explained, a "damage cap enacted by the legislature represents law, similar to an

element of a claim to which the trial court must comport the jury's factual determinations." *Judd v. Drezga*, 2004 UT 91, ¶ 34, 103 P.3d 135. Courts also reduce jury awards to conform them to governing law, like the collateral source rule. As this Court observed in *Schuff v. A.T. Klemens & Son*, Montana's collateral source statutes "serve to limit a party's recovery for damages." 2000 MT 357, ¶ 115, 303 Mont. 274, 16 P.3d 1002. Nonetheless, they are routinely applied, and "[t]he reduction of a jury award based on a collateral source statute" is a "question[] of law." *Id.* ¶ 29. Because the reduction is legal, it does not infringe on the jury's role.

History confirms that legal limitations on jury-awarded damages do not infringe on the right to trial by jury. As this Court explained, the scope of right to trial by jury is defined by the right as it "existed at the time of the adoption of the Constitution of the state, or of the seventh amendment to the United States Constitution." *Chessman v. Hale*, 31 Mont. 577, 585, 79 P. 254, 256 (1905). At the time Montana's 1889 Constitution was adopted, juries determined factual issues, like the amount of damage, but did not decide the legal remedies to which litigants were subject. *Id*. Consistent with this early practice, Montana courts reduced jury awards based on existing law. *E.g., Palmer v. Murray*, 8 Mont. 174, 185, 19 P. 553, 558 (1888) (reducing a jury verdict that awarded interest because

no statute authorized interest); *Randall v. Greenhood*, 3 Mont. 506, 512 (1880) (same). The Cap is consistent with this historical practice.

As Zahara notes (O.B. 43–44), there are a smattering of cases where other state courts have concluded that similar caps violate the right to jury trial. But "the great weight of persuasive authority on the question of whether statutory damages caps violate the constitutional jury right supports" the Cap's constitutionality. *Siebert v. Okun*, 2021-NMSC-016, ¶ 52, 485 P.3d 1265, 1277. As of 2021, "[o]f the thirty jurisdictions to consider whether a statutory cap on damages violates the constitutional right to trial by jury, twenty-four have upheld such caps, reasoning that a statutory limit on recovery is a matter of law within the purview of the state legislature." *Id.* ¶ 53 n.3. Nine of those states have language identical to Montana's insofar as they make the jury right "inviolate."[9]

Zahara argues that the Cap "usurps the jury's constitutional function by replacing the jury's verdict with the Legislature's" determination as to the

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[9] *Learmonth v. Sears, Roebuck & Co.*, 710 F.3d 249, 259–64 (5th Cir. 2013) (Mississippi law); *Chan v. Curran*, 237 Cal. App'x 4th 601, 628 (App'x2015); *Kirkland v. Blaine Cnty. Med. Ctr.*, 4 P.3d 1115, 1118–20 (Idaho 2000); *Phillips v. Mirac, Inc.*, 685 N.W.2d 174, 180–83 (Mich. 2004); *Gourley ex rel. Gourley v. Neb. Methodist Health Sys., Inc.*, 663 N.W.2d 43, 75 (Neb. 2003); *Tam v. Eighth Jud. Dist. Ct.*, 131 Nev. 792, 796-98, 358 P.3d 234, 238 (2015); *Siebert v. Okun*, 2021-NMSC-016, ¶ 51, 485 P.3d 1265 (N.M. 2021); *Larimore Pub. Sch. Dist. No. 44 v. Aamodt*, 2018 ND 71, ¶¶ 24–32, 908 N.W.2d 442 (2018); *Horton v. Or. Health & Sci. Univ.*, 376 P.3d 998, 1040 (Ore. 2016); *McClay v. Airport Mgmt. Servs., LLC*, 596 S.W.3d 686, 690-93 (Tenn. 2020).

appropriate amount of noneconomic damages. (O.B. 42.) But, as the district court correctly observed, there is no support for Zahara's assumption that "the constitutional right to jury *trial* includes the right to *judgment* in the full amount of the jury's award without legislative interference." [App'x 20.] Zahara cites no case law suggesting the right encompasses a right to a judgment in the full amount of the jury's award.

Zahara also cannot reconcile his position with well-established case law recognizing that the Legislature may completely abrogate a common-law cause of action—and thus deprive a plaintiff of *any* jury determination as to liability or damages. *Filip*, ¶ 12; *Ross*, ¶ 34. If the Legislature can eliminate entirely a cause of action that would have gone to a jury at common law, then the Legislature can take the narrower step of capping one type of damage available for a common-law claim without violating article II, section 26.

3. The Cap does not violate due process.

Zahara's due process argument is largely duplicative of his argument concerning the right to trial by jury. He argues that medical malpractice plaintiffs are "due" to have their damages determined by a jury, and that the cap deprives them of that right. (O.B. 44.)

This argument fails because Zahara has not carried his burden of persuasion. It was his burden to establish a due process violation "beyond a reasonable doubt."

Brown, ¶ 32 (citation omitted). But he devotes just two conclusory paragraphs to the argument and does not even clarify whether he is asserting a procedural or substantive due process claim. (O.B. 44.)

In any event, the due process arguments fail for largely the same reasons his arguments fail regarding his jury right. As explained above, the Cap does not prevent a jury from making a factual determination of damages. It is only *after* the jury has made that determination that the court applies a legal cap to that jury-determined amount. And Zahara has not cited any legal authority that he is entitled to receive all the damages a jury awards.

4. The Cap does not deny Zahara a right to a remedy.

Zahara next pivots to as-applied challenges, contending (O.B. 45–46) that the cap uniquely infringes on his right to a remedy under article II, § 16 of the Montana Constitution. As relevant here, it provides that "[c]ourts of justice shall be open to every person, and speedy remedy afforded for every injury of person, property, or character."

Zahara's argument lacks merit. Article II, § 16 does not guarantee a plaintiff a right to a particular remedy. [App'x 18–19.] As the district court reasoned, "*Meech* unequivocally holds that no one has a vested right to the continuation of any common law rule, and no one has a fundamental right to recover all the damages they can persuade a jury to award." [App'x 19.] But the Court need not

rely on *Meech* for that proposition. Other cases hold the same thing: "there is 'no fundamental right to any particular cause of action, remedy, or redress.'" *Brady v. PPL Mont., LLC*, 285 Fed. Appx 332, 335 (9th Cir. 2008) (quoting *Francetich v. State Comp. Mut. Ins. Fund*, 252 Mont. 215, 220, 827 P.2d 1279, 1283 (1992)).

Zahara simply misconstrues the scope of article II, §16 in making this argument. As this Court has explained, "[t]he constitutional guarantee under Section 16 mandates that the courts be 'accessible to all persons alike, without discrimination, at the time or times and the place or places appointed for their sitting." *Tooke v. Miles City Prod. Credit Ass'n*, 234 Mont. 387, 393–94, 763 P.22d 1111, 1116 (quoting *Shea*, 179 P. at 501); *see Kortum-Managhan v. Herbergers NBGL*, 2009 MT 79, ¶¶ 25, 27, 349 Mont. 475, 204 P.3d 693 (characterizing article II, § 16 as guaranteeing "access to the courts").[10] It "guarantees the right to *access* the courts to *seek* a remedy for wrongs recognized by common law or statutory authority." *N. Pac. Ins. Co.*, ¶ 31 (emphasis added). It does not guarantee *recovery* of every remedy sought.

Zahara was not denied anything encompassed within article II, § 16's protection. He was not denied access to the courts—he received a four-day trial.

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[10] The second clause in article II, § 2 references "full legal redress," but that clause pertains only to employees' "third-party suits for injuries sustained during the course of their employment" and is thus irrelevant to Zahara's suit. *Trankel v. Dep't of Military Affairs*, 282 Mont. 348, 359, 938 P.2d 614 (1997).

Nor was he denied the ability to "seek" a remedy. He sought—and the jury determined—damages. Thereafter, the district court applied the law to the award and entered judgment in the amount permitted by law.

Madison v. Yunker does not dictate a different conclusion. 180 Mont. 54, 589 P.2d 126 (1978). There, this Court invalidated a statute that required a plaintiff to seek a retraction from a publication before suing it for libel. *Id.* at 63–64. The Court concluded that the precondition to suit violated article II, § 16, because it imposed an obstacle to getting into court and deprived the plaintiff of a remedy for libel guaranteed elsewhere in the Constitution. *Id.* at 63. That is categorically different than a legal cap imposed after a full jury trial.

Zahara misses the mark when he asserts that the Cap "effectively deprives" him "of all legal redress and any remedy for most of his past damages and all of his future damages." (O.B. 46.) Zahara received a full jury trial, and he still has a public declaration in the form of a verdict that he suffered $6 million in injuries. Further, the Cap does not distinguish between past and future damages, only between economic and noneconomic damages.

To be sure, the Cap diminished the amount he could recover. But he still received a legal and monetary remedy for his noneconomic damage. Moreover, Zahara could have pursued economic damages, which are not subject to the Cap. He chose not to. That strategic choice was fully within his rights and had the

desired effect—the jury was searching for a calculable damage to base its award on, submitting a question requesting the amount of Zahara's medical and legal expenses. [Tr. Day 4 at 36.] But the resulting reduction in his noneconomic damage award should not be used as leverage to invalidate a vital state policy.

As Zahara notes (O.B. 46) a few state courts have invalidated caps under analogous open courts provisions. But "[a] majority of jurisdictions have held that a cap on damages does not violate the open courts and right to remedy provisions of their state constitutions." *Gourley*, 663 N.W.2d at 73–74 (collecting pre-2003 decisions); *see also C.J. v. State Dep't of Corrs*., 151 P.3d 373, 379 (Alaska 2006); *Judd* , 2004 UT 91, ¶¶ 10–18.

The Utah Supreme Court's decision in *Judd* is a good example. *See* 2004 UT 91, ¶¶ 10–18. There, the court rejected an as-applied challenge to Utah's then-$250,000 cap on noneconomic damages based on Utah's Open Courts Clause, Utah Const. article I, § 11. The court recognized "that such a cap heavily punishes those most severely injured." *Id.* ¶ 16. But that did not render the cap constitutionally invalid. The effect of a cap is only to "diminish[]" not "eliminate[]" a malpractice patient's remedy. *Id.* ¶ 10. And it is not unconstitutional "merely because it does so." *Id.* ¶ 16. Rather, it found Utah's comparable cap reasonable given "it is targeted to control costs in one area where costs might be controllable." *Id.*

5. The Cap does not violate separation of powers.

Zahara also errs when he argues that the Cap violates article III, § 1 of the Montana Constitution, which divides the government into three branches and provides "[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.[11]

Zahara contends that the cap "allowed the Legislature to exercise judicial power" in capping damages. (O.B. 48–49.) That contention is incorrect, largely "[f]or the same reasons the cap does not violate the right to a jury trial." *Gourley*, 663 N.W.2d at 76. As explained above, the jury's role is limited to making factual determinations concerning damages. That role was not infringed when the Legislature imposed the Cap. Nor was the judiciary's role infringed when the district court applied the law as written to the jury's award.

The Legislature has well-established authority to establish the legal framework for damages-precisely what the Cap does. Indeed, as recently noted by the Court, Montana's Constitution provides the legislature the "exclusive authority to enact" laws while providing the judiciary with "exclusive authority and duty to

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[11] This Court should subject Zahara's separation-of-powers challenge to the same no-set-of-circumstances standard applied to facial challenges. *City of Missoula*, ¶ 15. Despite labeling this claim as-applied, he has not pointed to any facts that render the cap a violation of the separation of powers in his "particular case" as opposed to any other plaintiff's. *Id.* ¶ 25.

adjudicate the nature, meaning, and extent of applicable constitutional, statutory, and common law." *Bullock v. Fox*, 2019 MT 50, ¶ 26, 395 Mont. 35, 435 P.3d 1187 (citing Mont. Const. arts. III, § 1, VI, § 4(1), VII, § 1); *see also Phillips v. City of Whitefish*, 2014 MT 186, ¶ 29, 375 Mont. 456, 330 P.3d 442 ("The power to *make and repeal laws* resides in the legislative branch." (emphasis added)); *Larson v. State*, 2019 MT 28, ¶ 42, 394 Mont. 167, 434 P.3d 241 ("Within constitutional limits, this Court and its subordinate courts have the exclusive authority and duty to adjudicate the nature, meaning, and extent of applicable constitutional, statutory, and common law and to render appropriate judgments thereon in the context of cognizable claims for relief.").

Many states have rejected similar separation of-power claims.[12] As these decisions recognize, there is "long-established role for legislative involvement in jury trials," ranging from establishing standards of proof to determining the "elements of torts." *Judd*, 2004 UT 91, ¶ 38. "Given that extensive role in so many aspects of the jury trial process, it is incorrect to view the right to a jury determination of the facts of the case to be so broad as to prohibit any legislative involvement in the types and extent of damages that may be awarded." *Id.*

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[12] *E.g.*, *Judd*, 2004 UT 91, ¶ 38; *MacDonald*, 715 S.E.2d at 415; *Garhart ex rel. Tinsman v. Columbia/Healthone, L.L.C.*, 95 P.3d 571, 581 (Colo. 2004); *Gourley*, 663 N.2d at 76; *Pulliam v. Coastal Emerg. Servs.*, 509 S.E.2d 307 (Va. 1999).

The Legislature's role in defining jury awards in Montana is well established. *E.g.*, *Schuff*, ¶ 114 (requiring a reduction in damages for collateral sources). This Court would be diverging from longstanding precedent if it concluded that the Legislature lacked authority to enact laws relating to available damages.

6. The Cap does not violate the prohibition on granting special privileges.

Zahara also asserts (O.B. 49) that the Cap violates article II, section 31 of the Montana Constitution, which prohibits the legislature from passing a law "making any irrevocable grant of special privileges." This Court should not consider the argument because Zahara did not make it below. [*See* App'x 13.] It is therefore not preserved for appeal. *Burton v. Adams*, 2002 MT 236N, ¶ 10.

Moreover, Zahara has not carried his burden of demonstrating beyond a reasonable doubt that the cap is unconstitutional. *Brown*, ¶ 32. The opening brief contains no explanation as to why the cap violates this provision. It does not even identify who is apparently receiving special privileges. The lack of specificity is inadequate to merit further consideration. S*ee, e.g., Allmaras v. Yellowstone Basin Prop*., 248 Mont. 477, 483, 812 P.2d 770, 773 (1991) (observing that it is appellant's burden to provide analysis and authority before declining to address due process challenge based on appellant's failure to carry this burden).

C. Though inapplicable, the Cap survives even heightened scrutiny.

Because the Cap does not infringe on any fundamental right (or regulate a suspect class), this Court need not address questions of scrutiny. At most, rational basis review would apply. To the extent they apply scrutiny, "[a] majority of jurisdictions apply a rational basis or other similar test and determine that a statutory cap on damages does not violate equal protection" or other constitutional provisions. *Gourley*, 663 N.W.2d at 71 (collecting cases). A recurring theme in these cases is that "malpractice victims with noneconomic losses that exceed $250,000 do not constitute a suspect class and the right of recovery of tort damages is not a fundamental right." *Hoffman v. United States*, 767 F.2d 1431, 1435 (9th Cir. 1985).

The Cap easily survives rational basis review, but it would survive heightened scrutiny as well. As discussed above, the Legislature enacted the Cap to make quality health care more accessible by lowering medical malpractice insurance premiums. This is a legitimate purpose: "Ensuring the availability and affordability of health care services, as well as reducing the costs of medical malpractice insurance, are legitimate legislative objectives." *Est. of McCarthy v. Mont.* 2nd *Jud. Dist. Ct.*, 1999 MT 309, ¶ 19, 297 Mont. 212, 994 P.2d 1090.[13]

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[13] Because the Cap was intended to expand the accessibility of health care, and not just contain health care costs, Zahara's arguments (O.B. 37–38) as to the insufficiency of cost-containment as a legislative rationale are irrelevant.

The Cap is not only rationally related, but also narrowly tailored, to that purpose. The Legislature considered evidence that medical malpractice premiums were growing significantly and that the high premiums were causing physicians to cut services. As discussed above, the Legislature also weighed evidence that similar caps had been successful in lowering premiums in other states and that Montana's insurers would adjust their rates if the cap were enacted. The Cap was the *only* viable solution. At the time of the cap's enactment, a federal study concluded that "damages caps were the *only* type of State tort reform that consistently showed significant results in reducing the malpractice cost indicators."[14]

Zahara argues that the Cap has not worked. (O.B. 34–36.) But that argument is legally irrelevant. Constitutional scrutiny is backward looking, focusing on the information available to the Legislature when it made its decision. *City of Missoula*, ¶ 27. Nor is the argument based in fact. Even if insurance premiums have risen, Zahara does not dispute that premiums likely would have risen more absent the Cap. And, contrary to his suggestion, the evidence regarding rate increases is inconclusive. Some sources suggest that "[i]n recent years, rates

[14] OTA, *Impact of Legal Reforms*, *supra*, at 64 (1993) (emphasis added).

have been holding steady or decreasing" in Montana.[15] Evidence also suggests that Montana's rates are in-line with national premiums—confirming the Cap has successfully stabilized rates.[16]

The Cap's success is also supported by the increasing numbers of physicians who provide services in Montana.[17] Removal of the Cap could deter such service expansion and risk returning Montana to the situation in the 1990s, when physicians were cutting services.

There is no merit to Zahara's suggestion (O.B. 33–34) that the Cap is unreasonable because the Legislature chose not to adjust the amount annually for inflation. "Presumably the legislature was aware of the effects of inflation and could have opted for some cap indexed to inflation." *Est. of Verba v. Ghaphery*, 552 S.E.2d 406, 411 (W. Va. 2001) (quote and citation omitted). "That the legislature did not index the cap to inflation but set forth an absolute dollar amount does not render the cap unconstitutional." *Id.* (quote and citation omitted). The

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[15] Cunningham Group, *Montana Malpractice Insurance* (2024), https://www.cunninghamgroupins.com/medical-malpractice-insurance-by-state/montana/.

[16] *Id.*

[17] *See* Arati Dahl & Susan Skillman, *Montana's Physician Workforce* 2021, at 2, Univ. of Wash. Ctr. for Health Workforce Studies (2022), https://familymedicine.uw.edu/chws/wp-content/uploads/sites/5/2022/08/Montana_Physicians_July-2022.pdf

amount of the Cap is a complicated socioeconomic decision that falls within the Legislature's prerogative.

II. The Cap Applies to Loss of Established Course of Life Damages

As an alternative to invalidating the Cap, Zahara contends that loss-of-established-course-of-life damages should be exempted from its scope. (O.B. 49–52.) Zahara's fallback position also lacks merit.

A. Loss of established course of life damages are a "noneconomic loss" subject to the Cap.

On its face, the Cap applies to any noneconomic damage, which the statute specifically defines as a "subjective, nonmonetary loss." § 25-9-411(2)(d). Beyond this definition, which clearly implicates loss of established course of life damages, the Legislature added a *non-exhaustive* list of examples. *Id.* YetZahara contends (at 49–50) that loss-of-established-course-of-life damages should be excluded from the cap because they are not specifically listed in the statute's definition of a noneconomic loss.

The district court correctly rejected that argument. "[T]he statutory list is, by the plain language . . . non-exclusive." [App'x 30.] As this Court has previously explained, the language "including but not limited to" in § 25-9-411(2)(d) means the subsequent list of examples is not exhaustive. *S&P Brake Supply, Inc. v. Daimler Trucks N. Am., LLC*, 2018 MT 25, ¶ 12, 390 Mont. 243, 411 P.3d 1264.

Zahara's attempts to cast the list as definite are unpersuasive. "In effect, Mr. Zahara invokes the '*expressio unius est exclusion alterius*' canon of statutory construction without specifically naming it." [App'x 30.] But as the district court pointed out, that canon is inapplicable where, as here, the legislature made clear that the statutory list was not intended to be exhaustive. *E.g.*, *People v. Brooks*, 23 Cal. App'x 5th 932, 943, 233 Cal. Rptr. 3d 606, 615 (Cal. App'x 2018) (*expressio unius* "does not apply to an item in an illustrative list, such as we have here, as indicated by the language 'including but not limited to'").

Under the statute's plain language, any form of damage is subject to the cap if it is "subjective" and "nonmonetary," regardless of whether specifically enumerated in the list of exemplar damages. *See* § 25-9-411(5)(d). Loss of established course of life damages are both.

First, as the district court concluded, loss-of-established-course-of-life damages are "intrinsically subjective" in nature. [App'x 33.] "Subjective" means something that is "[b]ased on an individual's perceptions, feelings, or intentions, as opposed to externally verifiable phenomena." *Black's Law Dictionary* (Bryan A. Garner ed., 12th ed. 2024). Loss-of-established-course-of-life damages are inherently based in a plaintiff's individual perceptions, as they are intended to "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 v. State, 2023 MT 242, ¶ 32 n.28, 414 Mont. 256, 539 P.3d 1147(quote and citations omitted).

At trial, Zahara appreciated this subjectivity. In closing, Zahara's counsel asked the jury to assess such damages based on the mental harm Zahara experienced from the loss of freedom of movement he suffered and his inability to "have the career of his choice." [Tr. Proceedings Pl. Closing Arg. 22, Sept. 15, 2022 ("Pl. Closing Tr.").] Counsel offered the jury no expert or objective evidence to calculate such damages, other than invoking loss of "Joey's hopes and dreams." [Pl. Closing Tr. 22.]

Second, loss-of-established-course-of-life damages are noneconomic. Noneconomic losses are "nonmonetary." *Black's Law Dictionary* (Bryan A. Garner ed., 11th ed. 2019). By contrast, an "[e]conomic loss" is "[a] monetary loss such as lost wages or lost profits." This Court has already distinguished established-course-of-life damages from economic losses. *See State Farm Mut. Auto. Ins. Co. v. Freyer*, 2013 MT 301, ¶ 36, 372 Mont. 191, 312 P.3d 403 (distinguishing loss of course of life damages from economic damages and describing claims for these damages in wrongful death case as being "measured, *not by the economic loss* to the [plaintiff], but, rather, the emotional, physical, and monetary support the decedent would have provided [the plaintiff]" (emphasis added)). In other words, there is no substance to Zahara's objection that loss-of-

established-course-of-life damages "are of a different kind and category than those enumerated in the statutory definition." (O.B. 51.) Because such damages are subjective and nonmonetary—the two statutory requirements—it is irrelevant whether they compensate a distinct injury from other types of noneconomic damages.

Zahara's position also contradicts established case law. As the district court explained, "[m]ultiple decisions applying Montana law confirm that loss of established course of life is indeed an unliquidated and subjective general damage," akin to the other damages listed in § 25-9-411(5)(d). [App'x 31.] For example, in *Rasmussen v. Sibert*, this Court categorized *both* pain and suffering damages and loss-of-established-course-life damages together as "general damages." 153 Mont. 286, 296, 456 P.2d 835, 840–41 (1969). The court distinguished those general damages from the economic damages the plaintiff won for damage to real property and medical expenses. *Id.* at 840.

To be sure, in *Breuer*, this Court recognized that loss-of-established-course-of-life damages are "[d]istinct from compensation for pain/suffering." *Breuer*, ¶ 32 n.28. But the fact that such damages compensate different harms—as do many of the expressly listed types of damages—does not mean they do not fit within the Cap's scope. To the contrary, in *Breuer*, this Court considered it so obvious that loss-of-established-course-of-life damages were nonmonetary in

nature that it did not question combining pain and suffering damages with loss-of-established-course-of-life damages when explaining the jury's damages award. *Id.* ¶ 16.

There also is no merit to Zahara's contention that loss-of-established-course-of-life damages should not be subject to the cap because such damages were recognized as a distinct category of damages when the Legislature enacted the Cap. (O.B. 51.) In 1995, it was well established that such damages were noneconomic damages akin to pain and suffering and thus would fall within the statutory definition without the Legislature having to specifically mention them. *E.g*, *Rasmussen*, 153 Mont. at 296.[18] The Legislature had no need to specifically identify all possible noneconomic damages when it provided a definition for "noneconomic loss" and provided a non-exhaustive list of examples. § 25-9-411(2)(d).

None of the cases Zahara cites (O.B. 50–51) suggest a contrary conclusion. As the district court recognized, those cases "hold only that an injured plaintiff *can* recover *money* for loss of established course of life." [App'x 33] (emphasis in

[18] In his Rule 59 Motion below, Zahara relied heavily on the Cap's legislative history to argue that the Cap did not apply. [ANS' App'x 25-26] Zahara abandons those arguments in his opening brief and should not be permitted to revive them in his reply brief. As ANS explained in its filing below, such arguments lack merit in any event. [ANS App'x 12-16].

original). *E.g.*, *Hern v. Safeco Ins. Co. of Ill.*, 2005 MT 301, ¶ 38, 329 Mont. 347, 125 P.3d 597 (recognizing that plaintiffs with qualifying injuries are "entitled" to "reasonable compensation for the destruction of [their] capacity to pursue an established course of life"). But "[d]amages are *always* monetary," so that is not a distinguishing feature. [App'x 33] (emphasis in original).

B. Zahara's constitutional arguments regarding the loss of established course of life damages are unpreserved and meritless.

Returning to constitutional arguments, Zahara contends that, to the extent the Cap applies to loss-of-established-course-of-life damages, it is unconstitutional. (O.B. 52.) This Court should not consider Zahara's argument because it is not preserved. Zahara never argued that point below. *See* [ANS' App'x 18-226]; *Burton*, ¶ 10. The Court should be especially reluctant to consider Zahara's argument given its underdevelopment. He devotes just two paragraphs to the argument. (O.B. 52.) That is far from establishing unconstitutionality beyond a reasonable doubt.

In any event, Zahara's argument lacks merit. He cites no authority supporting his contention that he "is entitled to recover loss-of-established-course-of-life damages." (O.B. 52.) As explained above, "no one has a vested interest in any rule of common law." *Meech*, 238 Mont. at 31. As a corollary, the Legislature has authority to restrict established-course-of-life damages. *Id.* at 33–34.

There also is no merit to Zahara's contention that restricting established -course-of-life damages lacks a rational basis because the Legislature did not specifically discuss this type of damage. (O.B. 52.) The Legislature was focused on the effects of subjective, nonmonetary- damages for which there is no objective or measurable metric. [App'x 57.] Because loss-of-established-course-of-life damages fall within that category, the Legislature had no need to discuss them specifically.

CONDITIONAL CROSS-APPEAL

III. If the Court Reverses, A New Trial is Warranted

If this Court reverses, it should also order a new trial. A court may grant a new trial "on the application of the party aggrieved" on certain specified "causes materially affecting the substantial rights of the party." Mont. Code Ann. § 25-11-102. Relevant grounds include an "irregularity in the proceedings of the court, jury, or adverse party or any order of the court or abuse of discretion by which either party was prevented from having a fair trial." § 25-11-102(1).

Rule 59(a)(1)(A) of the Montana Rules of Civil Procedure likewise provides that a court may grant a new trial "after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in a Montana state court."

Here, if this Court reverses part of the judgment, it should also order a new trial for the two reasons explained below.

A. ANS would have litigated the case differently in the absence of the Cap.

If the Cap is unconstitutional, this Court should also order a new trial. As out--of--state courts have recognized, a new trial is warranted where applying a change-in-law to a case posttrial would prejudice a party, especially if the party's trial decisions "were governed in reliance" upon a law that is no longer applicable. *E.g., Banks v. ICI Ams., Inc.,* 450 S.E.2d 671, 675–76 (Ga. 1994).

Here, the existence of the Cap is a judicial fact upon which ANS relied in litigating this case. Although the Cap was not at issue during the trial,[19] its existence informed every part of ANS's strategy, including its settlement and trial strategy.

Litigating a case with no upper limit to noneconomic damages is vastly different than litigating a case with such damages capped at $250,000. The litigation risks to defendants like ANS are particularly severe given the increasingly large jury awards for noneconomic damages in states without caps—with some noneconomic damage awards reaching $100,000,000 for non-debilitating injuries.[20]

Had ANS known the cap would not apply, it would have considered presenting evidence on the special damages Zahara suffered. For example, ANS would have considered introducing evidence establishing Zahara's past and future medical expenses, lost earnings, and vocational prospects. Such evidence would have provided information that the jury could have used to ground its noneconomic damages. In reliance on the law that was in effect, ANS made the strategic choice

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[19] Montana law prohibits mention of the cap to the jury. § 25-9-411(4).

[20] *E.g.*, Verdict, *Thapa v. St. Cloud Orthopedic Assocs, Ltd.*, No. 19-cv-2568, ECF No. 156 (jury award of $100,000,000 in noneconomic damages for permanent but not debilitating injury to one leg).

not to incur the expense of developing that evidence. A strategic choice that would have been different if the Cap did not apply.

In Montana, as elsewhere, "[t]he guiding principle of [the] legal system is fairness," and courts "must tenaciously adhere to the ideal that both sides of a lawsuit be guaranteed a fair trial." *Putro v. Baker*, 147 Mont. 139, 147-48, 410 P.2d 717, 722 (1966). Here, in order to ensure that both parties have a fair opportunity to litigate their case with knowledge and understanding of the law that applies, this Court should order a new trial if it finds the Cap unconstitutional.

B. Independent of the Cap, a new trial is warranted given the erroneous admission of the Benefis Document.

If the Court reverses, it also should order a new trial because the district court abused its discretion when it admitted the Benefis Document over ANS's objections. It compounded the error when it failed to instruct the jury that the documents were irrelevant to the standard of care. This is one of those "instances in which the prejudicial matter at issue undermines the fairness to such a degree that a new trial is the only remedy." *Havens v. State*, 285 Mont. 195, 200, 945 P.2d 941, 944 (1997).

Here, the district court made two errors with respect to the Benefis Document. Over ANS's objections, the district court admitted these documents and after Zahara's counsel used it extensively at trial to confuse the jury about the standard of care, the district court failed to instruct the jury that the policy was

irrelevant to their determination of liability. As explained below, both errors warrant a new trial.

1. The district court erred in admitting the Benefis Document.

As an initial matter, the trial court abused its discretion in admitting the Benefis Document under Rule of Evidence 901(a) and failing to exclude it under Rules 402 and 403.

a. The Benefis Document was not properly authenticated.

During discovery and even on appeal, Zahara continues to use the Benefis Document for the following proposition: "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." (*See,* O.B. 13;) But the testimony from Zahara's authenticating witness outside the presence of the jury made clear that the Benefis Document did not establish a mandatory policy. Ms. Hill testified that it did not create a requirement that consulting neurologists appear bedside within 25 minutes. (Tr. Day 2 at 167-173.) Ms. Hill agreed the Benefis Document was distinct from a policy and was a "guideline" that served to "help[ ] the [Benefis ED] staff understand what could happen in a typical patient with a typical diagnosis." (Tr. Day 2 at 167, 169). The discrepancy between Zahara's portrayal and Hill's testimony means the document was not properly authenticated under Rule 901.

Under Rule 901(a), "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." A proponent may satisfy this requirement by, among other things, introducing testimony of a witness with knowledge "that a matter is what it is claimed to be." Mont. R. Evid. 901(b)(1).

Zahara did not provide sufficient evidence that the document was what he claimed. Zahara claimed—and continues to claim—the Benefis Document created a mandatory in-person attendance requirement. But the testimony he used to authenticate the document contradicts that claim. Accordingly, it should not have been admitted.

b. Although irrelevant, any relevance of the Benefis Document was vastly outweighed by its prejudicial effect.

Even if the Benefis Document had been properly authenticated, the court should have excluded it under Rules 402 and 403. Rule 402 prohibits the admission of "[e]vidence which is not relevant," while Rule 403 provides that relevant "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury."

Here, the Benefis Document was not relevant. Montana law is clear that hospital policies do not, by themselves, establish the standard of care. *Dalton v. Kalispell Reg'l Hosp.*, 256 Mont. 243, 247, 846 P.2d 960, 962 (1993). Other states have reached the same conclusion.[21] Were it otherwise, hospitals would be discouraged from adopting such guidelines for fear of creating heightened liability standards. The document was especially irrelevant given Hill's testimony that the documents did not create mandatory obligations, Benefis deferred to the training and judgment of its providers, and that she was not qualified to speak to the standard of care applicable to an on-call neurologist. [Tr. Day 2 at 167-173] Simply put, evidence raising the question of whether Dr. Henning complied with a document that did not create a requirement at a hospital where he was not employed does not have any tendency "to make the existence of any fact that is of consequence . . . more probable or less probable" and is thus irrelevant and inadmissible. Mont. R. Evid. 401, 402.

Even if the Benefis Document had some relevance, it should have been excluded because any relevance was "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Mont. R. Evid.

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[21] *Kentucky Guardianship Administrators, LLC v. Baptist Healthcare Sys.*, Inc., 635 S.W.3d 14, 37 (Ky. 2021); *Damgaard v. Avera Health*, 108 F. Supp.3d 689, 699 (D. Minn. 2015); *Melick v. William Beaumont Hosp.*, No. 319495, 2015 Mich. App'x LEXIS 756, at *3-4 (Mich. Ct. App'x Apr. 16, 2015).

403. The introduction of the Benefis Document confused the issues by raising the question of whether Dr. Henning complied with a document that was not a requirement at a hospital where he was not employed, distracting from the focus of this medical malpractice action—whether Dr. Henning complied with the applicable standard of care as established by expert testimony. The legitimate question of fact as to whether Zahara's expert, Dr. Venkatasubramanian, who testified that the applicable standard of care required personal attendance, credibly established duty and breach in this case, in the face of the testimony of both Dr. Henning and his expert, Dr. Clark, who testified that the applicable standard of care did not require personal attendance, was distracted from by allusion to violation of a document that did not create a requirement or set the standard of care. This shift of focus created a prejudicial emphasis on Dr. Henning's noncompliance with the Benefis Document and a substantial danger that the jury was misled to finding ANS liable solely based on Dr. Henning's noncompliance with a document that did not establish the applicable standard of care.

Zahara's counsel invited such a verdict at trial. As explained above, counsel used his opening to tell an (incorrect and legally irrelevant) story that Dr. Henning chose not to come in even though he had "an obligation" to do so. [Tr. Day 1 at 190.] Zahara's counsel asked prejudicial questions of Dr. Henning implying that he deviated from hospital policy. And although the court sustained ANS's

objection to the questioning, the damage was done. [Tr. Day 2 at 190.] At closing, too, Zahara's counsel repeatedly suggested that ANS should be found liable because Dr. Henning did not comply with his duty to attend Zahara in person. [Tr. Day 4 at 200.]

In these circumstances, the admittance of the Benefis Document warrants a new trial. *Breuer*, ¶¶ 40-41 (ordering new trial where district court abused its discretion in excluding certain evidence and the exclusion of that evidence "materially prejudiced the State's right to a fair trial").

2. The court erred in refusing to give a jury instruction related to the Benefis Document.

The district court compounded its error by refusing to provide a curative instruction. To mitigate some of the prejudice caused by the Benefis Document, ANS requested instructions that hospital policies do not establish the standard of care. [Tr. Day 3 at 328–29]; [ANS' App'x 227-34]; [ANS' App'x 235-40]. In the alternative, it asked the court to remind the jury that it was not tasked with determining whether Dr. Henning violated a hospital policy. [Tr. Day 3 at 332.] The district court erred when it denied both requests.

As established above, hospital policies do not establish the applicable standard of care. Accordingly, the law required the district court to give one of the instructions suggested by ANS. Such an instruction would have made clear to the jury that the Benefis Document did not establish the standard of care, and that the

jury could not find ANS liable based on Dr. Henning not coming in unless it also accepted Dr. Venkatasubramanian's testimony as to what the standard of care required.

It is the duty of district courts "to instruct the jurors, fully and correctly, on the applicable law of the case, and to guide, direct, and assist them toward an intelligent understanding of the legal and factual issues involved in their search for truth." *Billings Leasing Co. v. Payne*, 176 Mont. 217, 225, 577 P.2d 386, 391 (1978) (quotation marks omitted). When a district court fails to do so, a new trial is warranted. *Schuff v. Jackson*, 2002 MT 215, ¶ 39, 311 Mont. 312, 55 P.3d 387.

CONCLUSION

For the reasons stated above, this Court should affirm the decisions of the court below. If the Court reverses the decisions in whole or in part, it should grant ANS a new trial. As part of its directions on remand, the Court should make clear that the Benefis Document is inadmissible.

DATED this 21st day of August, 2024.

GARLINGTON, LOHN & ROBINSON, PLLP

/s/ Peter J. Stokstad
Peter J. Stokstad
Elijah L. Inabnit

Attorneys for Defendant and Appellee/Cross-Appellant Advanced Neurology Specialists

CERTIFICATE OF COMPLIANCE

Pursuant to the Montana Rules of Appellate Procedure, I hereby certify that the Brief of Appellee/Cross-Appellant Advanced Neurology Specialists is printed with a proportionately spaced Times New Roman typeface of 14 points; and is double spaced except for lengthy quotations or footnotes. The word count does not exceed 12,500 as granted by Court Order dated August 13, 2024. The exact word count is _12,443__ words as calculated by my Microsoft Word software, excluding the Tables of Contents, Table of Authorities, Certificate of Compliance, and Certificate of Service.

DATED this 21st day of August, 2024.

__/s/ Peter J. Stokstad_____

CERTIFICATE OF SERVICE

I, Peter J. Stokstad, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee and Cross to the following on 08-21-2024:

Elijah Laurel Inabnit (Attorney)
Garlington, Lohn & Robinson PLLP
P.O. Box 7909
Missoula MT 59807
Representing: Advanced Neurology Associates
Service Method: eService

Paul Gallardo (Attorney)
1026 1st Avenue South
Great Falls MT 59401
Representing: Joey Zahara
Service Method: eService

Martha Sheehy (Attorney)
P.O. Box 584
Billings MT 59103
Representing: Joey Zahara
Service Method: eService

Daniel J. Flaherty (Attorney)
PO Box 1968
Great Falls MT 59403
Representing: Joey Zahara
Service Method: eService

Justin K. Cole (Attorney)
Garlington, Lohn & Robinson, PLLP
P.O. Box 7909
Missoula MT 59807
Representing: American Medical Association, Montana Medical Association, Montana Hospital Association
Service Method: eService

Electronically signed by Lianna Roberts on behalf of Peter J. Stokstad
Dated: 08-21-2024