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April 10, 2003

Senator Mark Amodei  
Senate Chambers

Dear Senator Amodei:

You have asked whether, in an action for medical malpractice or dental malpractice, the provision concerning the limitation on noneconomic damages contained in subsection 3 of NRS 41A.031 applies in the circumstances and types of cases described in subsection 2 of NRS 41A.031. To answer your question, we will review the general scheme concerning the limitations on noneconomic damages contained in NRS 41A.031, discuss the application of subsections 2 and 3 of the statute and examine the legislative history concerning the enactment of the statute.

NRS 41A.031 provides:

41A.031 1. Except as otherwise provided in subsection 2 and except as further limited in subsection 3, in an action for damages for medical malpractice or dental malpractice, the noneconomic damages awarded to each plaintiff from each defendant must not exceed \$350,000.

2. In an action for damages for medical malpractice or dental malpractice, the limitation on noneconomic damages set forth in subsection 1 does not apply in the following circumstances and types of cases:

(a) A case in which the conduct of the defendant is determined to constitute gross malpractice; or

(b) A case in which, following return of a verdict by the jury or a finding of damages in a bench trial, the court determines, by clear and convincing evidence admitted at trial, that an award in excess of \$350,000 for noneconomic damages is justified because of exceptional circumstances.

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3. Except as otherwise provided in subsection 4, in an action for damages for medical malpractice or dental malpractice, in the circumstances and types of cases described in subsections 1 and 2, the noneconomic damages awarded to each plaintiff from each defendant must not exceed the amount of money remaining under the professional liability insurance policy limit covering the defendant after subtracting the economic damages awarded to that plaintiff. Irrespective of the number of plaintiffs in the action, in no event may any single defendant be liable to the plaintiffs in the aggregate in excess of the professional liability insurance policy limit covering that defendant.

4. The limitation set forth in subsection 3 does not apply in an action for damages for medical malpractice or dental malpractice unless the defendant was covered by professional liability insurance at the time of the occurrence of the alleged malpractice and on the date on which the insurer receives notice of the claim, in an amount of:

- (a) Not less than \$1,000,000 per occurrence; and
- (b) Not less than \$3,000,000 in the aggregate.

5. This section is not intended to limit the responsibility of any defendant for the total economic damages awarded.

6. For the purposes of this section, "gross malpractice" means failure to exercise the required degree of care, skill or knowledge that amounts to:

- (a) A conscious indifference to the consequences which may result from the gross malpractice; and
- (b) A disregard for and indifference to the safety and welfare of the patient.

Subsection 1 of NRS 41A.031 provides that "[e]xcept as otherwise provided in subsection 2 and except as further limited in subsection 3, in an action for damages for medical malpractice or dental malpractice, the noneconomic damages awarded to each plaintiff from each defendant must not exceed \$350,000." Thus, unless an exception set forth in subsection 2 of NRS 41A.031 applies, and subject to the further limitation contained in subsection 3 of NRS 41A.031, the noneconomic damages awarded to each plaintiff from each defendant must not exceed \$350,000.

Subsection 2 of NRS 41A.031 then sets forth an exception to the \$350,000 limitation set forth in subsection 1. Subsection 2 provides that the limitation set forth in subsection 1 does not apply in the following circumstances and types of cases: (1) a case in which the conduct of the defendant is determined to constitute gross malpractice; or (2) a case in which, following return of a verdict by the jury or a finding of damages in a bench trial, the court determines, by clear and convincing evidence admitted at trial, that

an award in excess of \$350,000 for noneconomic damages is justified because of exceptional circumstances.

Subsection 3 of NRS 41A.031 then sets forth an additional limitation on the recovery of noneconomic damages in an action involving medical malpractice or dental malpractice. Subsection 3 provides that "[e]xcept as otherwise provided in subsection 4, in an action for damages for medical malpractice or dental malpractice, in the circumstances and types of cases described in subsections 1 and 2, the noneconomic damages awarded to each plaintiff from each defendant must not exceed the amount of money remaining under the professional liability insurance policy limit covering the defendant after subtracting the economic damages awarded to that plaintiff." NRS 41A.031(3) (Emphasis added). Subsection 3 further provides that "[i]rrespective of the number of plaintiffs in the action, in no event may any single defendant be liable to the plaintiffs in the aggregate in excess of the professional liability insurance policy limit covering that defendant." Id.

Subsection 4 of NRS 41A.031 provides that, to obtain the benefit of the limitation set forth in subsection 3, a defendant must maintain a specific amount of professional liability insurance. Subsection 4 provides that the limitation set forth in subsection 3 does not apply unless the defendant was covered by professional liability insurance at the time of the occurrence of the alleged malpractice and on the date on which the insurer receives notice of the claim, in an amount of not less than \$1,000,000 per occurrence and not less than \$3,000,000 in the aggregate.

Subsection 5 of NRS 41A.031 then clarifies that the statute "is not intended to limit the responsibility of any defendant for the total economic damages awarded." NRS 41A.031(5). Finally, subsection 6 of NRS 41A.031 defines "gross malpractice" for the purposes of the statute.

To address your specific question as to whether the provision concerning the limitation on noneconomic damages contained in subsection 3 of NRS 41A.031 applies in the circumstances and types of cases described in subsection 2 of NRS 41A.031, we must examine the plain language of NRS 41A.031. Salas v. Allstate Rent-A-Car, Inc., 116 Nev. 1165, 1168 (2000) ("Our objective in construing statutes is to give effect to the legislature's intent. In so doing, we first look to the plain language of the statute.") (citation omitted). It is a well-settled rule of statutory construction that the words in a statute "should be given their plain meaning unless this violates the spirit of the act." State, Dep't of Ins. v. Humana Health Ins. Inc., 112 Nev. 356, 360 (1996) (quoting McKay v. Bd. of Supervisors, 102 Nev. 644, 648 (1986)).

A review of the plain language of the statute indicates that the limitation on noneconomic damages contained in subsection 3 does apply in the circumstances and types of cases described in subsection 2. Subsection 3 of NRS 41A.031 provides that "[e]xcept as otherwise provided in subsection 4, in an action for damages for medical

malpractice or dental malpractice, in the circumstances and types of cases described in subsections 1 and 2, the noneconomic damages awarded to each plaintiff from each defendant must not exceed the amount of money remaining under the professional liability insurance policy limit covering the defendant after subtracting the economic damages awarded to that plaintiff.” Thus, unless a defendant fails to maintain professional liability insurance in the amount required pursuant to subsection 4, the limitation set forth in subsection 3 applies “in the circumstances and types of cases described in subsections 1 and 2.” As discussed previously, the circumstances and types of cases set forth in subsection 2 include: (1) a case in which the conduct of the defendant is determined to constitute gross malpractice; or (2) a case in which, following return of a verdict by the jury or a finding of damages in a bench trial, the court determines, by clear and convincing evidence admitted at trial, that an award in excess of \$350,000 for noneconomic damages is justified because of exceptional circumstances. Additionally, subsection 3 provides that irrespective of the number of plaintiffs in the action, in no event may any single defendant be liable to the plaintiffs in the aggregate in excess of the professional liability insurance policy limit covering that defendant. Therefore, based on the plain language of NRS 41A.031, it is the opinion of this office that in an action for medical malpractice or dental malpractice, the provision concerning the limitation on noneconomic damages contained in subsection 3 of NRS 41A.031 applies in the circumstances and types of cases described in subsection 2 of NRS 41A.031.

This conclusion is further supported by an examination of the legislative history concerning the enactment of NRS 41A.031. A review of the minutes from the respective committees in both houses of the Legislature reveals that the Legislature clearly intended for the limitation on noneconomic damages contained in subsection 3 of NRS 41A.031 to apply in the circumstances and types of cases described in subsection 2 of NRS 41A.031.

In discussing the applicability of the limitation on noneconomic damages contained in subsection 3 of NRS 41A.031 to cases involving gross malpractice or exceptional circumstances, the chairman of the Senate Committee of the Whole, Senator William J. Raggio, summarized the provisions of the statute and explained that the statute contains a general limitation on noneconomic damages of \$350,000, which can then be exceeded under the exceptions contained within the statute, but “[o]verall, there is a cap of the policy limits.” Journal of the Senate Committee of the Whole, July 29, 2002, at page 20. Senator Raggio later reaffirmed this understanding of the statute by stating, in response to a question as to whether the limitation contained in subsection 3 applied to cases involving gross malpractice or exceptional circumstances, that “the bill ... would limit the amount of damages in those cases that come outside the \$350,000 cap to the amount of the professional liability insurance policy.” Journal of the Senate Committee of the Whole, July 31, 2002, at page 39.

Mr. Gerald Gillock, representing the Nevada Trial Lawyers Association, also explained the effect of the limitation contained in subsection 3 in a case involving

exceptional circumstances before the Assembly Committee on Medical Malpractice. Mr. Gillock's testimony is summarized in the minutes as follows:

If the medical bills were \$900,000, for example, the \$100,000 remaining in the policy could be awarded by the judge. That would serve to keep the "exposure of the doctors down to their \$1 million limit for noneconomic losses." Mr. Gillock emphasized it was important to understand that, in those instances, if the economic losses exceeded the \$1 million policy limit, there would be no award for noneconomic losses.

Minutes of the Meeting of the Assembly Committee on Medical Malpractice, July 31, 2002, at page 17. Finally, Mr. John Cotton, representing the Nevada Physicians Task Force, and Mr. Bill Bradley, representing the Nevada Trial Lawyers Association, also engaged in detailed discussions concerning the fact that the limitation contained in subsection 3 of NRS 41A.031 creates a ceiling on the award of noneconomic damages established by the limits of the liability policy of the defendant. See Journal of the Senate Committee of the Whole, July 30, 2002, at pages 10-11. As stated by Mr. Bradley, "[o]n the predictability issue, we are talking about a policy limit. As you know, we have maintained from the beginning that the policy limit is the cap, and has always been the cap." Id. at 19.

Thus, the legislative history concerning NRS 41A.031 indicates that the Legislature clearly understood and intended that the limitation on noneconomic damages contained in subsection 3 of NRS 41A.031 applies in the circumstances and types of cases described in subsection 2 of NRS 41A.031.

### CONCLUSION

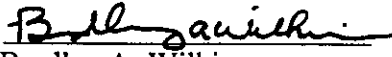
Based upon the plain language of NRS 41A.031, it is the opinion of this office that in an action for medical malpractice or dental malpractice, the provision concerning the limitation on noneconomic damages contained in subsection 3 of NRS 41A.031 applies in the circumstances and types of cases described in subsection 2 of NRS 41A.031. This conclusion is further supported by the extensive legislative history concerning NRS 41A.031, which indicates that the Legislature clearly understood and intended that the limitation on noneconomic damages contained in subsection 3 of NRS 41A.031 applies in the circumstances and types of cases described in subsection 2 of NRS 41A.031.

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If you have any further questions regarding this matter, please do not hesitate to contact this office.

Very truly yours,

Brenda J. Erdoes  
Legislative Counsel

By   
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