IN THE DISTRICT COURT OF DOUGLAS CO

JACKSON CUENCA, a minor, by and through his Parents and Next Friends, John Cuenca and Emily Cuenca; **EMILY CUENCA**, individually; and **JOHN CUENCA**, individually, Plaintiffs, v. **PHYSICIANS CLINIC, INC.**; and **THE NEBRASKA METHODIST HOSPITAL**, Defendants. **STATE OF NEBRASKA**, Intervenor.	CASE NO. CI12-5413 **PLAINTIFFS' MOTION TO ALTER OR AMEND JUDGMENT**

COMES NOW, Plaintiff Jackson Cuenca ("Jackson"), a minor, by and through John Cuenca and Emily Cuenca, Jackson's parents and next friends, Plaintiff John Cuenca ("Mr. Cuenca") and Plaintiff Emily Cuenca ("Mrs. Cuenca" and together with Jackson and Mr. Cuenca, "Plaintiffs"), by and through their attorneys, and, pursuant to Neb. Rev. Stat. § 25-1329, hereby move for the Court to alter or amend the amount of the judgment it entered for Plaintiffs on April 6, 2017 (the "Judgment Date"), in the aggregate amount of $2,500,000.00 (the "Judgment Amount"), for all of, but not limited to, the reasons set forth herein.

1. Neb. Rev. Stat. § 25-1329 states:

> A motion to alter or amend a judgment shall be filed no later than ten days after the entry of the judgment. A motion to alter or amend a judgment filed after the announcement of a verdict or decision but before the entry of judgment shall be treated as filed after the entry of judgment and on the day thereof.

2. On Tuesday, October 25, 2016, the jury in this case rendered a verdict in favor of Plaintiffs and against Defendant Physicians Clinic, Inc. ("PCI"), and Defendant The Nebraska Methodist Hospital ("TNMH"), for the following amounts:

	Economic	Non-Economic	Total
Jackson	$6,442,000.00	$2,500,000.00	$8,942,000.00
Mrs. Cuenca	$1,828,000.00	$500,000.00	$2,328,000.00
Mr. Cuenca	$0.00	$250,000.00	$250,000.00
		Total Damages =	**$11,520,00.00**

3. On April 5, 2017, the Court reduced the amounts rendered by the jury's verdicts and it entered the Judgment Amount on the Judgment Date, in favor of Plaintiffs and against PCI and TNMH, jointly and severally, for the following amounts with respect to each Plaintiff:

	Economic	Non-Economic	Total
Jackson	-----	-----	$1,750,000.00
Mrs. Cuenca	-----	-----	$500,000.00
Mr. Cuenca	-----	-----	$250,000.00
		Total Damages =	**$2,500,000.00**

4. The reduction of the jury's verdict by $9,020,000, materially affected the substantive rights of Plaintiffs as outlined herein.

DEFENDANTS' ACTIONS ARE AN AFFRONT TO THE ACT, PUBLIC POLICY AND COMMON SENSE

5. The actions by Defendants are in direct violation of §§ 2824 and 2827 of the Nebraska Hospital Medical-Liability Act, Neb. Rev. Stat. § 44-2801, *et seq.*, as amended from time to time (the "Act"), the legislative history of the Act, the regulations issued by the Nebraska Department of Insurance under Title 210, Chapter 32 - Nebraska Hospital-Medical Liability Act Excess Liability Fund Residual Malpractice Insurance Authority ("Title 210"), and public policy.

6. "'Insurance is a contract by which one party assumes specified risks of the other party for a consideration, and promises to pay him or his beneficiary an ascertainable sum of money on the happening of a specified contingency.'" *Safeco Ins. Co. of America v. Husker Aviation, Inc.*, 211 Neb. 21, 24-25, 317 N.W.2d 745, 748 (Neb.,1982) (*quoting Adolf v. Union Nat. Life Ins. Co.*, 170 Neb. 38, 44, 101 N.W.2d 504, 508-09 (1960))].

7. As a condition of qualifying for liability limitations under the Act, the Act requires Defendants to purchase a professional liability insurance policy.

8. The Zurich Policy on which Defendants rely to qualify under the Act is not a policy of insurance. Simply put, the Zurich Policy is **NOT** insurance.

9. Zurich has assumed no specified risk and has made no promise to pay anyone any ascertainable sum of money upon the happening of any specified contingency. *Safeco, supra.* The Zurich Policy, whatever it is, is not a policy of insurance and, consequently, it does not qualify either Defendant for liability limitations under and protections of the Act.

10. Further and most importantly, Zurich was specifically instructed by the Nebraska Department of Insurance on more than one occasion that the specimen policy forms used in the Zurich Policy, if used by a health care provider to demonstrate proof of financial responsibility under the Act, must be properly amended and/or updated in order to comply with the Act and Title 210. Zurich and/or Defendants did not follow such guidance by the Nebraska Department of Insurance, and, as such, certain of the specimen policy forms used in the Zurich Policy do not meet the requirements of the Act and/or Title 210.

11. Given the above and in addition to other reasons not set forth herein, Plaintiffs request that the judgment entered by the Court on the Judgment Date for the Judgment Amount be vacated and judgment entered for each Plaintiff in the full amount awarded by the jury. To that end, Plaintiffs request a new and full evidentiary hearing on the factual issue of whether the Zurich Policy constitutes "insurance," as defined by Nebraska law so that Plaintiffs may have an opportunity to introduce the entirety of their evidence, rather than the limited portions previously allowed.

NEITHER DEFENDANT IS A "QUALIFIED HEALTH CARE PROVIDER"

12. A health care provider's liability is limited only if it demonstrates that it meets and complies with the statutory requirements of the Act.

13. The Act substantially changes the common-law relationships between some health care providers and patients. If a "health care provider" (as such term is defined under the Act) takes certain actions to qualify under and maintain compliance with the Act, such patient's exclusive remedy in tort is limited to damages permitted by the Act unless a patient takes certain actions. Neb. Rev. Stat. § 44-2821(2). The Act specifically provides that if a health care provider does not take those actions, common law remedies are available, without limitation, to a patient. Neb. Rev. Stat. § 44-2821(1).

14. Because the Act changes common-law it must be strictly construed. *Devney v. Devney*, 295 Neb. 15, 24, 886 N.W.2d 61, 68 (2016) ("We have consistently held that statutes which effect a change in the common law are to be strictly construed."). The health care provider seeking the diversion from common law responsibility must demonstrate entitlement to the diversion, *Simonsen v. Swenson*, 104 Neb. 224, 177 N.W. 831, 832 (1920) (physician who breached common law confidentiality privilege by disclosing to authorities information relevant to public health bore burden of demonstrating disclosure was statutorily privileged), and in doing so must show "strict compliance" with statutory requirements. *Casey v. Burt Cty.*, 59 Neb. 624, 81 N.W. 851, 852 (1900) ("[A] strict compliance with the provisions of statutes of this nature must be shown before benefits or rights sought to be secured under it can be obtained or enforced.").

15. Neither Defendant strictly adhered to the requirements of the Act for several reasons including, but not limited to, the following:

a. **Defendants' Proof of Financial Responsibility Does NOT Comply** – The proof of financial responsibility submitted by Defendants to the Nebraska Department of Insurance, the Zurich Certificate,[1] does not comply with the requirements of the Act and/or Title 210, due to the following reasons:

i. **"Premium Charged" NOT Listed as required by § 004.01B(4) of Title 210** – On the Zurich Certificate provided to the Nebraska Department of Insurance, Defendants indicated that they, in addition to the other entities listed on the Zurich Certificate,[2] were charged a combined annual premium of $478,323 for the Zurich Policy.[3] However, according to the Declarations Page for the Zurich Policy, Defendants were charged a different amount that was materially less than the amount on the Zurich Certificate.

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[1] ACORD™ Certificate of Liability Insurance for the Zurich 2010 Policy produced by The Harry A. Koch Co., LLC, as producer, with Nebraska Methodist Health System, Inc., as the named insured, Zurich, as Insurer A, and the Nebraska Excess Liability Fund, as certificate holder (the "Zurich Certificate").

[2] Additional listed insureds on the Zurich Certificate are as follows: (a) The Nebraska Methodist Hospital; (b) The Nebraska Methodist Hospital Foundation; (c) Physicians Resources, Inc.; (d) Physicians Clinic, Inc.; (e) Nebraska Methodist College of Nursing and Allied Health; and (f) Methodist Health Partners, Inc.

[3] Zurich American Insurance Company ("Zurich") Policy Number HPC594472601 produced by The Harry A. Koch Co., LLC, as producer, to Nebraska Methodist Health System, Inc., as the named insured, with an effective policy period of December 1, 2009 to December 1, 2010.

ii. **"Surcharge Paid" as required by § 44-2824 of the Act** – Defendants **did not** pay the correct surcharge to the Nebraska Excess Liability Fund since the surcharge amount was based on an incorrect premium.

iii. **"Deductible Amount(s)" NOT Listed as required by § 004.01B(7) of Title 210** – The Zurich Certificate does not indicate any applicable deductible amount for the Zurich Policy. However, according to "Endorsement #7 – General Purpose Endorsement" to the Zurich Policy ("Endorsement #7"), the Zurich Policy has deductible amounts of $500,000 (Each Medical Incident) and $3,000,000 (Aggregate Claims Made) for: (A) TNMH; and (B) PCI TNMH (both as "Insured hospital[s] of the 'Named Insured' which qualif[y] under and participate in the Nebraska Excess Liability Fund pursuant to [the Act]").

b. **The Zurich Policy is NOT Compliant with the Act/Title 210** – Pursuant to § 4.01 of Title 210, "[t]he use of deductibles on a policy of professional liability insurance utilized to establish proof of financial responsibility is acceptable with the provision that the insurer **must** pay any settlement or judgment and then may be reimbursed by the insured for the deductible set out in the policy." **[Emphasis added]**. The Nebraska Department of Insurance, on more than one occasion, has emphatically stated the importance of compliance with this particular provision. Endorsement #7 provides, "[o]ur obligation to pay…shall apply only to that amount of the damages in excess of any Deductible Amount(s) stated in the Schedule above." The deductible amounts are the same as the liability limits of the Zurich Policy, meaning that Zurich makes no promise to pay anyone anything. In other words, Zurich has no obligation to pay under the Zurich Policy even if Defendants are unable to pay the deductible amounts. Endorsement #7 continues, 'We [Zurich] *may* pay any part of all of any Deductible Amount(s) to effect settlement…." **[Emphasis added]**. Again, the language creates no obligation for Zurich to pay anything. In sum, since there is no requirement that Zurich **must** pay, the Zurich Policy does not comply with the Act and Title 210.

c. **Use of Risk-Loss Trust is NOT Authorized Under the Act** – Pursuant to the Act, neither Defendant is allowed to utilize a risk-loss or self-insured trust as the primary source of repayment and, consequently, as proof of financial responsibility. Neb. Rev. Stat. § 44-2827.01. Even if Defendants were statutorily allowed to do so under the Act, neither Defendant has provided proof that such self-insured trust was approved by the Director of the Nebraska Department of Insurance (the "Director") and that the Director's written approval has been properly renewed. Defendants produced evidence, and stated through counsel, of proof of financial responsibility through the Nebraska Methodist Health System Self Insurance Trust Fund (the "Self-Insured Trust"). Indeed, the Self-Insured Trust stated as the organization's mission or most significant activities the following: "To provide a fund to pay claims for medical malpractice & other general liability expenses." However, the Self-Insured Trust is not an admitted medical malpractice insurance carrier in the State of Nebraska and is not otherwise a mode by which Defendants can demonstrate required financial responsibility. Further, Defendants' own evidence shows that a policy from Zurich, on which they alternatively rely, does not provide required primary coverage, but only excess liability umbrella coverage.[4]

d. **Proper Notice to Patients NOT Posted** – "In order to qualify under the...Act, a health care provider must file proof of financial responsibility, pay an annual surcharge into the excess liability fund, **and post a notice of qualification under the...Act.**" *Lozada For and on Behalf of Lozada v. U.S.*, 974 F.2d 986, 987 (1992) [**Emphasis added**]. Pursuant to § 004 of Title 210, a health care provider must, among other things, "post notice of qualification under the Act

[4] ACORD™ Certificate of Liability Insurance produced by The Harry A. Koch Co., LLC, as producer, with Nebraska Methodist Health System, Inc., as the named insured, the Self-Insured Trust as "Insurer A" and Zurich, and Nebraska Methodist Health System, as certificate holder. This ACORD™ Certificate of Liability Insurance was provided to Plaintiffs by Defendants on August 22, 2012, during the discovery process. The underlying Self-Insured Trust policy is policy number NMHS20111 and has an effective time period of December 1, 2011 through December 1, 2012. The underlying Zurich policy listed on this ACORD™ Certificate of Liability Insurance is policy number HPC983014801.

in accordance with § 009 of Title 210."[5] Specifically, a health care provider must have, at the time of the events giving rise to the lawsuit against it, posted a sign in the waiting room or other suitable location, containing a notice that the provider against whom the suit was filed, is covered by the Act. Neither Defendant showed that at the time of Jackson's and Mrs. Cuenca's injuries, it had a proper sign in a suitable location that contained a notice that it was covered by the Act. Rather, the "proof" of notice produced by Defendants supports the conclusion proving the absence of the statutory demanded signage for both PCI and TNMH.

e. **Correct Notice to Patients NOT Posted** – Defendants produced evidence that shows signs that were purportedly posted at the time of Jackson's injuries indicating "Methodist Health System" and "The Nebraska Methodist Health System" are "qualified health care providers" under the Act. Plaintiffs do not concede that such signs were properly posted; however, assuming such signs were found in suitable locations, they do not indicate the names of Defendants: (1) The Nebraska Methodist Hospital; and (2) Physicians Clinic, Inc. Further, it was the negligent conduct of Susan A. Westcott, M.D. ("Dr. Westcott"), among others employed by PCI, which led to the jury's verdict against both Defendants. As such, there should have also been signage for Dr. Westcott, an allegedly "qualified health care provider" and Defendants produced no evidence there was any such signage.

f. **Licensure** – To "qualify" under the Act, a health care provider must meet the requirements of Neb. Rev. Stat. § 44-2824. In this action, the most fundamental element is proof that both Defendants are health care providers as defined by Neb. Rev. Stat. § 44-2803. As required by *Devney* and *Casey*, *supra*, there can be no presumption that these Defendants meet the statutory definition of a health care provider. They must prove entitlement to that status. Neither

[5] § 009 of Title 210 states that "[a] qualified health care provider shall provide notice to his or her patients that he or she has qualified under the Act by continuously posting in his or her waiting room or other suitable location a sign stating: "(Name of Health care provider) has qualified under the provisions of the Nebraska Hospital-Medical Liability Act. Patients will be subject to the terms and conditions of the Act unless they file a refusal to be bound by that Act with the Director of Insurance of the State of Nebraska."

Defendant has offered sufficient proof that it is properly licensed or authorized by law in accordance with the mandate of the Act.

16. Given the above and in addition to other reasons not set forth herein, Plaintiffs request that the judgment entered by the Court on the Judgment Date for the Judgment Amount be vacated and judgment entered for each Plaintiff in the full amount awarded by the jury. To that end, Plaintiffs request a new and full evidentiary hearing on the factual issue of whether either PCI and TNMH is a "qualified health care provider," so that Plaintiffs may have an opportunity to introduce the entirety of their evidence, rather than the limited portions previously allowed.

THE ACT AS A WHOLE IS UNCONSTITUTIONAL

17. The issue of whether the Act is constitutional could not arise unless and until there was a jury verdict for Plaintiffs in excess of the amounts prescribed by the Act and a judgment was entered.

18. As the Court may recall, Plaintiffs initially challenged the constitutionality of the Act in the Complaint and they renewed such challenge in the First Amended Complaint when they stated:

> Notwithstanding any filing by the Defendants for the special benefits, privileges and protection of such act, Plaintiffs allege that the [Act] is unconstitutional in whole or in part because it violates the Seventh and Fourteenth Amendments of the Constitution of the United States, as well as the following provisions of the Constitution of the State of Nebraska: Article 1, §§ 1, 3, 6, 13, 16, 21, 25, 26; Article II, § 1; Article III, §18; Article V, § 2; Article VI, § 1 and Article XII, § 10(c).

19. Additionally, Plaintiffs continued to challenge the constitutionality of the Act for all of the reasons outlined in Plaintiffs' Brief in Opposition to Motion to Reduce the Aggregate Jury Verdict shared with the Court on December 21, 2016 (a true and correct copy of which is attached hereto, marked as Exhibit A and incorporated by reference). Such reasons include, but are not limited to, the following:

a. Violation of the Federal Right to a Jury Trial;

b. Seventh Amendment Preservation of Jury Authority Over Damages;

c. Seventh Amendment Guarantee Applicable to States;

d. Violation of Nebraska Right to a Jury Trial;

e. Violation of Federal-State Constitutional Takings Clauses;

f. Burden on Right of Access to the Courts;

g. Violation of Equal Protection;

h. Neb. Rev. Stat. § 44-2825 Fails Strict-Scrutiny Analysis; and

i. Substantive Due Process (as further discussed below).

20. Plaintiffs reiterate their challenge to the constitutionality of the Act for all of the aforementioned reasons and those reasons cited herein.

21. Given that the jury rendered a verdict that exceeded the amounts prescribed by the Act in favor of Plaintiffs and judgment was entered for Plaintiffs on the Judgment Date, the issue of whether the Act is constitutional can now be heard.

22. Plaintiffs request that the judgment entered by the Court on the Judgment Date for the Judgment Amount be vacated as to the issue of the constitutionality of the Act, and that a new judgment be entered determining that the Act as a whole is unconstitutional.

THE LIABILITY LIMITATIONS DEPRIVE PLAINTIFFS OF DUE PROCESS OF LAW

23. The plaintiffs in *Gourley ex rel. Gourley v. Nebraska Methodist Health Sys., Inc.*, 265 Neb. 918, 936, 663 N.W.2d 43, 64 (2003), did not argue that the due process clause of the Nebraska Constitution, Neb. Const. art. I, § 3, applied to their case. Plaintiffs do here, and in particular, substantive due process.

24. In *Gourley*, Justice J. Ferrard argued in his concurring opinion that under substantive due process, the State could not properly put a cap on economic damages, even if it could do so on noneconomic damages, especially where there was evidence that economic damages equaled or exceeded the cap amount. Plaintiffs adopt those arguments.

25. While Plaintiffs believe, and continue to argue that no cap—whether economic, noneconomic, or both—is applicable here, both for constitutional and statutory reasons, at a bare minimum substantive due process makes the cap here, as applied to economic damages, unconstitutional. As the Court will recall, the jury awarded economic damages in the aggregate amount of $8,270,000: (a) $6,442,000 to Jackson; and (b) $1,828,000 to Mrs. Cuenca. The cap therefore cannot apply to the aggregate of $8,270,000 in economic damages.

"NOTICE" AND DUE PROCESS

26. Defendants' failures to inform their dependent fiduciaries (*i.e.*, patients) that by accepting treatment under the Act they were waiving common law remedies preclude Defendants from gaining the benefit of the Act's limitations on those remedies.

27. By failing to post the required notices as previously discussed above, both Defendants breached a statutory duty owed to Jackson and Mrs. Cuenca under the Act and a fiduciary duty arising from their respective relationships as health care providers to Jackson and Mrs. Cuenca. *Gonzalez v. Union Pac. R.R. Co.*, 282 Neb. 47, 72–73, 803 N.W.2d 424, 446 (2011) ("A fiduciary duty arises out of a confidential relationship which exists when one party gains the confidence of the other and purports to act or advise with the other's interest in mind."); *King v. Bryant*, 2017 WL 382910, at *8 (N.C. Jan. 27, 2017) (finding relationship exists between patient and health care provider because it exists "'in all cases where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence.'")(quoting *Abbitt v. Gregory*, 201 N.C. 577, 598, 160 S.E. 896, 906 (1931)).

28. The right to bring a common-law suit in court is protected by the First Amendment to the United States Constitution, *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 387 (2011) ("the Petition Clause protects the right of individuals to appeal to courts and other forums established by the government for resolution of legal disputes"), and by the Nebraska Constitution. Article 1, §§ 3, 13. "[P]laintiffs have a right to pursue recognized causes of action in court" absent legislative preclusion of that right. *Gourley ex rel. Gourley v. Nebraska Methodist Health Sys., Inc.*, 265 Neb. 918, 952, 663 N.W.2d 43, 74 (2003). *See* Neb. Rev. Stat. § 49–101 (adopting the common law). Here, the legislature made no absolute change in a patient's right; change is contingent on voluntary waiver by patients.

29. Only "knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences" suffice to waive this right. *State v. Schneider*, 263 Neb. 318, 322, 640 N.W.2d 8, 12 (2002) (internal quotations omitted). The Act respects a patient's choice by requiring health care providers to notify such patient of his/her capacity to retain his/her rights and the common law demands the same of health care provider-fiduciaries.

30. The Act provides no specific remedy for a breach of fiduciary duty by a health care provider. But given the duty was imposed on a provider-fiduciary for the purpose of allowing a patient to make a knowing and intelligent choice to waive his/her common law remedies, *see Bauermeister v. McReynolds*, 254 Neb. 118, 119, 575 N.W.2d 354, 355 (1998)("[I]t is the duty of the fiduciary to fully inform the other party of all the facts relating to the subject matter of the transaction which come to the knowledge of the fiduciary and which are material for the other

party to know for the protection of that party's interests"), the congruent remedy is depriving such provider-fiduciary of the benefit it would have received absent the breach, *id.*; *see*, e.g., *Anderson v. Bellino*, 265 Neb. 577, 591, 658 N.W.2d 645, 658 (2003). That remedy is readily implemented here by simply denying Defendants the benefit of liability limitations and the other protections of the Act.

31. Plaintiffs request that the judgment entered by the Court on the Judgment Date for the Judgment Amount be vacated as to the Court's general determination of constitutionality, and if the Court is unwilling to find the Act as a whole is unconstitutional, a judgment should be entered determining that the signage requirements are unconstitutional, and therefore even if Defendants had complied—and they have offered no proof they did—the cap would still not be applicable.

PLAINTIFFS WERE DEPRIVED OF DUE PROCESS OF LAW

32. On December 16, 2016, Plaintiffs served a subpoena on The Harry A. Koch Co., LLC (the "Koch Co."), requesting among other documents, the Zurich Policy.

33. On December 20, 2016, the Koch Co. filed a motion to quash the subpoena.

34. On December 21, 2016, this matter, among others, came before the Court and the Court ruled that Plaintiffs' subpoenas—including the subpoena served on the Koch Co.—were deemed moot based upon the Court's continuance, and the parties were instructed to "work together to issue new subpoenas to all parties from whom they seek testimony or evidence on the remaining motions." The Court's ruling was finalized on January 9, 2017, and entered by the Court on January 10, 2017.

35. On January 17, 2017, Plaintiffs served a second Subpoena Duces Tecum on the Koch Co. to produce, among other documents, the Zurich Policy including all attachments, endorsements and amendments thereto. The Koch Co. as well as Defendants filed motions to quash Plaintiffs' second subpoena.

36. At the hearing on February 16, 2017, the Court ordered the Koch Co. to produce the Zurich Policy as well as the other documents requested by Plaintiffs (Case Exhibits 441-445). The Koch Co. produced some of the requested documents, which totaled over 850 pages, but not all of them.

37. The voluminous insurance documents produced by the Koch Co. and Defendants for the first time at the February 16th hearing, necessitated that Plaintiffs contact expert witnesses to review and opine on their contents.

38. On March 24, 2017, Plaintiffs designated Jay Angoff ("Mr. Angoff"), and Allan I. Schwarz ("Mr. Schwarz"), as expert witnesses who would appear at the hearing scheduled on April 5, 2017, and provide testimony regarding, among other things, the Zurich Policy and Defendants status as "qualified health care providers" (as such term is defined under the Act).

39. During the afternoon of March 24, 2017, Plaintiffs also served a subpoena on Beverly J. Anderson, a former Nebraska Department of Insurance employee who was expected to testify as to her communications with Zurich and the instructions and guidance she provided to Zurich regarding its specimen policy forms and the requirements of the Act and Title 210.

40. On March 30, 2017, the Court indicated that it understood the issues in this case and was prepared to rule on the issues before the Court. On this date, the Court also indicated that at the hearing scheduled for April 5, 2017, "neither [party] will be able to call any witnesses, including expert witnesses," however, both parties "will be permitted to make an offer of proof if so desired."

41. At the hearing on April 5, 2017, Plaintiffs offered a significant amount of new and material evidence regarding the issue of Defendants' qualification under the Act, and their compliance with the Act and Title 210.

42. These questions regarding Defendants' qualification under the Act, and their compliance with the Act and Title 210 are issues of *fact*, not law.

43. At the conclusion of the hearing on April 5, 2017, the Court ruled from the bench, announcing its determination that the Act was constitutional and it reduced the jury's awards to the Judgment Amount, as had been proposed earlier by Defendants. The Court did so without having had a meaningful opportunity to review and consider the documentary evidence submitted by Plaintiffs, and after having declined to hear relevant and material expert testimony on the factual issue of Defendants being qualified under the Act in order to receive its benefits, including the application of the cap.

44. Because the Court did not have a meaningful opportunity to consider the noteworthy and substantial evidence offered by Plaintiffs at the April 5th hearing, Plaintiffs were denied proper due process.

45. Given the above and in addition to other reasons not set forth herein, Plaintiffs request that the judgment entered by the Court on the Judgment Date for the Judgment Amount be vacated and judgment entered for each Plaintiff in the full amount awarded by the jury. To that

end, Plaintiffs request a new and full evidentiary hearing on the factual issue of whether either PCI and TNMH is a "qualified health care provider," so that Plaintiffs may have an opportunity to introduce the entirety of their evidence.

PROCEDURAL ISSUE

46. Plaintiffs are entitled to have a judgment entered based on the amount of the jury verdict, as the law then establishes authorized post-judgment proceedings, including a motion for new trial and/or a motion to alter or amend judgment.

47. Nothing in the law authorizes a post-verdict motion to move the Court to enter a judgment different than what the jury determined.

48. Plaintiffs respectfully suggest that the procedure followed by the Court here: (a) allowing Defendants to file a post-verdict motion to change the amounts awarded by the jury; and (b) thereafter entering judgment for something other than what the jury determined, is an incorrect procedure. Plaintiffs suggest the correct procedure is entry of judgment for what the jury awarded, followed by the filing of any of the authorized post-trial motions if a party is unhappy with the jury's verdict and the judgment entered pursuant to it

49. This issue is raised to preserve it for appeal, as Plaintiffs intend to ask the Nebraska Court of Appeals and/or the Nebraska Supreme Court to clarify the procedure to be followed when a jury verdict is in excess of the applicable cap under the Act—assuming the Act survives Plaintiffs' constitutional challenges.

PAYMENT OF PRE-JUDGMENT INTEREST

50. Pursuant to Neb. Rev. Stat. § 45-103.02, Plaintiffs also move the Court to alter or amend the judgment to include an award of pre-judgment interest for the reasons set forth below.

51. Neb. Rev. Stat. § 45-103.02 states:

> (1) Except as provided in section 45-103.04, interest as provided in section 45-103 shall accrue on the unpaid balance of unliquidated claims from the date of the plaintiff's first offer of settlement which is exceeded by the judgment until the entry of judgment if all of the following conditions are met: (a) The offer is made in writing upon the defendant by certified mail, return receipt requested, to allow judgment to be taken in accordance with the terms and conditions stated in the offer; (b) The offer is made not less than ten days prior to the commencement of the trial; (c) A copy of the offer and proof of delivery to the defendant in the form of a receipt signed by the party or his or her attorney is filed with the clerk of the court in which the action is pending; and (d) The offer is not accepted prior

> to trial or within thirty days of the date of the offer, whichever occurs first. (2) Except as provided in section 45-103.04, interest as provided in section 45-104 shall accrue on the unpaid balance of liquidated claims from the date the cause of action arose until the entry of judgment.

52. On September 9, 2013, which was more than ten days before the trial began on October 11, 2016, Plaintiffs made a written offer to settle the case for the sum of $1,400,000, pursuant to Neb. Rev. Stat. § 45-103.02 ("the Settlement Offer"). A copy of the Settlement Offer is attached hereto, marked as Exhibit B and incorporated by reference.

53. On September 13, 2013, Plaintiffs filed with the clerk of the court a Proof of Service By Affidavit along with a copy of the Settlement Offer and proof of delivery to Defendants in the form of a receipt signed by counsel for Defendants (the "Proof of Service Filing" attached hereto as Exhibit B and incorporated herein by reference). As shown by Exhibit C, the Settlement Offer was made by certified mail, return receipt requested.

54. The Settlement Offer was neither accepted within thirty (30) days of the date of the Settlement Offer nor was the Settlement Offer accepted by Defendants prior to the commencement of the trial on October 11, 2016.

55. The Court entered judgment on the Judgment Date for the Judgment Amount, which exceeded the Settlement Offer.

56. Given the above, Plaintiffs have met all of the conditions set forth in Neb. Rev. Stat. § 45-103.02.

57. Pursuant to Neb. Rev. St. § 45-103, "[f]or decrees and judgments rendered on and after July 20, 2002, interest on decrees and judgments for the payment of money shall be fixed at a rate equal to two percentage points above the bond investment yield, as published by the Secretary of the Treasury of the United States, of the average accepted auction price for the first auction of each annual quarter of the twenty-six-week United States Treasury bills in effect on the date of entry of the judgment."

58. As published by the State of Nebraska Judicial Branch, the judgment interest rate in effect on the Judgment Date was 2.641% (the "Judgment Interest Table" attached hereto as Exhibit D and incorporated herein by reference).

59. There are 1,305 days from September 9, 2013, through the Judgment Date.

60. As this Motion to Alter or Amend Judgment makes clear, Plaintiffs do not concede the validity of the Judgment Amount, but as a matter of law, with all the requirements of Neb Rev. Stat. § 45-103.02 having been met, Plaintiffs are unquestionably entitled to prejudgment interest.

61. If the Court denies this Motion to Alter or Amend Judgment as to the issues other than pre-judgment interest, then Plaintiffs respectfully suggest they are entitled to have the judgment altered or amended to include pre-judgment interest, calculated as required by law, on the Judgment Amount.

62. If the Court grants this Motion to Alter or Amend Judgment in a manner which increases the aggregate amount awarded to Plaintiffs in the judgment, then Plaintiffs request that the altered or amended judgment include an award of pre-judgment interest, calculated as required by law.

WHEREFORE, Plaintiffs pray that the Court alter or amendment its Judgment, entered on the Judgment Date, as requested above, and that the Court hold an evidentiary hearing so that all parties have a full and fair opportunity to present all their evidence on the subjects raised by this Motion to Alter or Amend Judgment.

Dated this 17th day of April, 2017.

JACKSON CUENCA, a minor, by and through his Parents and Next Friends, John Cuenca and Emily Cuenca; **JOHN CUENCA**, individually; and **EMILY CUENCA**, individually, Plaintiffs

By: _____

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NOTICE OF HEARING

You are hereby notified that the foregoing Motion will be heard before the Honorable Marlon A. Polk, Douglas County District Court, 5th Floor, Courtroom 506, on May 10, 2017 at 1:00 pm or as soon thereafter as counsel may be heard.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing document was served by emailing same on this 17th day of April, 2017, to the following counsel:

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IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

JACKSON CUENCA, a minor, by and through his Parents and Next Friends, John Cuenca and Emily Cuenca; **EMILY CUENCA**, individually; and **JOHN CUENCA**, individually,	)	No. CI 12-5413
Plaintiffs,	)	
v.	)	
PHYSICIANS CLINIC, INC., and **THE NEBRASKA METHODIST HOSPITAL**,	)	
Defendants.	)	

PLAINTIFFS' BRIEF IN OPPOSITION TO MOTION TO REDUCE THE AGGREGATE JURY VERDICT OF $11,520,000, TO $1,750,000 (INCLUDING ARGUMENTS AS TO THE CONSTITUTIONALITY OF THE NEBRASKA HOSPITAL-MEDICAL LIABILITY ACT)

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EXHIBIT A

PLAINTIFFS' BRIEF IN OPPOSITION TO MOTION TO REDUCE THE AGGREGATE JURY VERDICT OF $11,520,000, TO $1,750,000 (INCLUDING ARGUMENTS AS TO THE CONSTITUTIONALITY OF THE NEBRASKA HOSPITAL-MEDICAL LIABILITY ACT)

Section 1. Introduction

Defendants Physicians Clinic, Inc. (the "Clinic") and The Nebraska Methodist Hospital (the "Hospital" and together with the Clinic, "Defendants") have filed a motion asking the Court to enter a single, aggregate judgment in the amount of $1,750,000, despite the fact after finding in favor of all three Plaintiffs and against both Defendants, the jury in this case made three *distinct* awards: (1) $8,942,000 in total damages to the minor Plaintiff, Jackson Cuenca ("Jackson"); (2) $2,328,000 in total damages to Plaintiff Emily Cuenca ("Mrs. Cuenca"); and (3) $250,000 in total damages to Plaintiff John Cuenca ("Mr. Cuenca"). The aggregate damages awarded by the three separate verdicts are $11,520,000.

There is no statute which permits multiple acts of negligence (here, by a physician and a midwife employed by the Clinic, and nurses employed by the Hospital) against separate individuals (mother and son), giving them separate claims against the entities which employed them, to be combined into a single award of one cap.

As will be demonstrated below:

1. The Clinic and the Hospital were not properly insured in the manner required by the Nebraska Hospital-Medical Liability Act, Neb. Rev. Stat. §44-2801. *et seq.* ("NHMLA" or the "Act");
2. Certified nurse-midwives are not covered by the Act;
2. Neither the Clinic nor the Hospital had the signs required by the Act posted at all, much less signs in compliance with the Act;

4. The Hospital could not be covered by the Act because it was not properly licensed as required by the Act.

5. The signage requirement is itself unconstitutional, and

6. The damage cap is unconstitutional.

The Supreme Court of Nebraska recently said, "We are not at liberty to add language to the plain terms of a statute to restrict its meaning." *State v. Frederick*, 291 Neb. 243, 249, 864 N.W.2d 681, 686-687 (2015).

The Eighth Circuit agrees. "A legislature expresses its purpose through words. When engaged in statutory construction, it is the duty of the courts to ascertain meaning from the words, and "neither to add nor to subtract, neither to delete nor to distort." *Argus Leader Media v. United States Department of Agriculture*, 740 F.3d 1172, 1176 (8th Cir. 2014).

The United States District Court for the District of Nebraska agrees as well. Under Nebraska law, "It is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language; neither is it within the province of a court to read anything plain, direct, and unambiguous out of a statute." *City of Lincoln v. Windstream Nebraska, Inc.*, 800 F. Supp.2d 1030, 1037 (D. Neb. 2011), citing *State ex rel. Douglas v. Herrington*, 206 Neb. 516, 294 N.W.2d 330, 334 (1980)

And perhaps the most applicable language for a situation in which there is no language in the statute which would permit the interpretation being sought, can be found in *Pucket v. Hot Springs School District No. 23-2*, 526 F.3d 1151, 1159 (8th Cir. 2008): When "statutes are straightforward and clear, legislative history and policy arguments are at best interesting, at worst distracting and misleading, and in neither case, authoritative."

Section 2. Exhibits

The following exhibits are attached hereto and incorporated by reference:

A Affidavit of Joseph P. Cullan, with attachments

B Affidavit of John Cuenca

C Affidavit of Emily Cuenca

D Screen shot from the Department of Health and Human Services Web site re The Nebraska Methodist Hospital 1

E Screen shot from the Department of Health and Human Services Web site re The Nebraska Methodist Hospital 2

F Screen shot from the Department of Health and Human Services Web site re Physicians Clinic, Inc. 1

G Screen shot from the Department of Health and Human Services Web site re Physicians Clinic, Inc. 2

H Regulations from the Department of Insurance as to NHMLA required signage language, size, and fonts, etc.

I Sample NHMLA notice for Physicians Clinic, Inc., in the size and format required by the Department of Insurance Regulations;

J Sample NHMLA notice for The Nebraska Methodist Hospital, in the size and format required by the Department of Insurance Regulations;

K Sample NHMLA notice for Susan D. Westcott, M.D., in the size and format required by the Department of Insurance Regulations; and

L Affidavit of Joseph P. Cullan, attesting to the authenticity of the copies of the documents provided as exhibits and attachments.

Section 3. The Clinic and the Hospital Have Failed to Prove Qualification Under the Act

and Compliance with the Signage Requirement.

A. The Issue of Insurance

The Clinic and the Hospital have raised the argument that the $11,520,000 aggregate verdict in favor of the Plaintiffs must be reduced to the $1,750,000 cap established by the Act. Plaintiffs agree that §44-2825 sets that cap. Plaintiffs agree that §44-2824 partially sets out what the Clinic and the Hospital were required to do in order to qualify for the benefits of the Act, including the cap. The evidence produced by the Clinic and the Hospital, as well as the evidence adduced by Plaintiffs, however, demonstrates just the opposite.

The Act requires that each healthcare provider wishing to qualify under the Act must have primary insurance coverage in the amount of $500,000 per occurrence, with an aggregate of at least $1,000,000 for all occurrences or claims within one year, and an aggregate of $3,000,000 for hospitals. *Cf.*, §44-2827. In pertinent part, §44-2827 also states: "Financial responsibility of a health care provider may be established *only* by filing with the director proof that the health care provider is insured pursuant to sections 44-2837 to 44-2839 or by a policy of professional liability insurance in a company authorized to do business in Nebraska." [Emphasis added.] The Nebraska Director of Insurance identifies insurance companies authorized to provide such insurance on the Department's Web Site. One of those companies is, indeed, the Zurich American Insurance Company identified in the attachments to the Affidavit from Stephanie L. Hobelman, CISR, CIC (the "Hobelman Affidavit").

The problem with that letter attesting to insurance coverage is that, as shown by Plaintiffs' evidence at the hearing on December 21, 2016, and by the documents attached to the affidavit of Joseph P. Cullan, Ex. A, the Zurich American insurance policy is an *umbrella* policy. An umbrella policy is, by definition, one which comes into play only after the limits of coverage

are exhausted by the *primary* insurance coverage. And here, the primary "insurance coverage" comes from self-insurance, *not* an insurance policy, for which premiums are paid, issued by one of the authorized carriers.

The closest the Act comes to permitting self-insurance for the first $500,000 of any claim is in §44-2827.01, which authorizes certain persons and entities to establish a risk-loss trust. However, only a general acute hospital, certain hospitals operated by the Board of Regents, and a physician employed by the Board of Regents can establish financial responsibility with a risk-loss trust. §44-2827.01(1). Even assuming the Hospital, here, is a general acute hospital, it has not offered evidence that it has complied with the standards set out in §44-2827.01, and been approved by the Director of Insurance...and was so at the time of the events giving rise to this litigation. Nothing in §44-2827.01 authorizes the Clinic to be self-insured, at all, and nothing in this statute authorizes an entity *other* than the Hospital itself to establish a risk-loss trust. The Court is respectfully reminded that defendants have only relied on their claimed Zurich insurance coverage, which is an umbrella policy, not primary.

The evidence shows that the Clinic and the Hospital have paid no premiums to Zurich themselves, but rather that someone else appears to have done so, *i.e.*, according to the reasonable inferences to be drawn from the exhibits to the Hobelman Affidavit, any premiums for the umbrella policy were paid by Nebraska Methodist Health Systems, a non-party to this litigation.

If the Legislature had wanted to offer healthcare providers the option of being self-insured for the minimum required coverage, it was certainly capable of doing so. However, it specified insurance policies issued by insurance companies, with the narrow exceptions of §44-2827.01, and those exceptions are not applicable here.

Frederick, *Argus Leader*, *Windstream* and *Pucket*, all agree that when it comes to statutory construction, courts have no power to add to or subtract from the language set out in the statute at issue. There is no language in the Act which allows the use of self-insurance as the primary coverage, followed by the Excess Liability Fund stepping in to pay the amount of a legitimate cap-applicable award up to the limits in effect at the time of the negligence giving rise to the judgment.

The Clinic and the Hospital do not have the required insurance coverage, and the fact the Department of Insurance apparently—and inaccurately—believes they do, is irrelevant. For this reason alone, the Clinic and the Hospital are not covered by the Act, and the cap cannot apply to the three separate awards in this case.

B. Certified Nurse-Midwives are Not Covered by the Act

§44-2803 of the Act defines those health care providers which are covered by it:

> Health care provider means: (1) A physician; (2) a certified registered nurse anesthetist; (3) an individual, partnership, limited liability company, corporation, association, facility, institution, or other entity authorized by law to provide professional medical services by physicians or certified registered nurse anesthetists; (4) a hospital; or (5) a personal representative as defined in section 30-2209 who is successor or assignee of any health care provider designated in subdivisions (1) through (4) of this section.

A certified nurse-midwife does not appear on this list. As the Court will recall, part of the evidence offered by Plaintiffs was that the negligence of Cecilia S. Norton, C.N.M. ("Midwife Norton"), caused or contributed to cause the injuries to Jackson and Mrs. Cuenca.

It may be that the Clinic, as the employer of Midwife Norton, will now try to make the belated argument that she falls under the coverage of the Act because she was employed by the Clinic, which appears to be—but has not been shown by the Clinic to in fact be—an "entity authorized by law to provide professional medical services by physicians or certified registered nurse anesthetists." Nothing anywhere in the Act, considered as a whole, suggests that

individuals other than a physician or a certified registered nurse anesthetist can be covered by the Act and its cap. Nothing anywhere in the Act suggests that as long as "X" is an entity which provides medical services through physicians and/or certified registered nurse anesthetists, *anyone* employed by "X"—including midwives—can be covered by the Act and its cap.

As noted above, *Frederick*, *Argus Leader*, *Windstream* and *Pucket*, hold that a court cannot add language to a statute. If the Legislature had felt there was a "crisis" relating to registered nurses, or midwives, or lab technicians, or anyone else who provides professional medical services to a patient, the Legislature could have included those categories of health care providers within the Act's coverage. The Legislature chose not to do so, and thus this Court cannot do so.

There is no cap applicable to the damages awarded as a result of the negligence of Midwife Norton.

C. Neither the Clinic Nor the Hospital Had Any Statutory Signage Posted

§44-2821(4) of the Act requires a sign to be posted in the healthcare provider's waiting room "or other suitable location," in the size and form specified by the Director of Insurance, stating that the healthcare provider "has qualified under the provisions of the Nebraska Hospital-Medical Liability Act. Patients will be subject to the terms and provisions of that act unless they file a refusal to be bound by the act with the Director of Insurance of the State of Nebraska." As provided in Exhibit H, the signage language specified by the regulations of the Department of Insurance contains additional information requiring the patient to also notify the healthcare provider as soon as possible of the election to opt out of the Act's coverage.

The affidavits of Mr. Cuenca and Mrs. Cuenca, copies of which are attached hereto, respectively marked as Exhibits B and C and incorporated by reference, clearly and

unequivocally establish that there were no signs anywhere they were in the Clinic's office or in the Hospital advising them that "Physicians Clinic, Inc." (the healthcare entity claiming coverage under the Act here) or "The Nebraska Methodist Hospital" (the Hospital—a distinct legal entity—claiming coverage under the Act here) had "qualified under the provisions of [the NHMLA], etc."

Both the Clinic and the Hospital have admitted the truth of the affidavits of Mr. and Mrs. Cuenca. Setting aside any other considerations about signage, the evidence already offered, plus the evidence to be adduced by Plaintiffs at the December 21, 2016, hearing demonstrate that the only signs the Clinic and the Hospital had were signs they posted stating that *Nebraska Methodist Health System* was covered by the Act, etc.

How can a patient opt out of the Act and the cap with respect to a particular healthcare provider if the patient is never notified that the particular healthcare provider is covered by the Act? The unquestioned purpose of the signs is to, in theory, notify patients about the existence of the Act so that if they read through all those statutory sections and find out unless they opt out they are limited to the amount of the cap no matter how catastrophic the damages a negligent doctor or hospital causes, the patients can then decide whether to opt out.

Even accepting as true that the signs relating to "Nebraska Methodist Health System" were in a proper location in the Clinic and the Hospital at the relevant times, telling Mr. or Mrs. Cuenca while they were at the Clinic to see Dr. Westcott, or while they were at the Hospital so Mrs. Cuenca could give birth, that some alleged entity called "Nebraska Methodist Health System" was covered by some Act patently *does not and never could* advise any patient that Dr. Westcott, the Clinic and/or the Hospital were claiming to be qualified under the Act. As an examination of the Web site of the Nebraska Secretary of State discloses, there is a corporation

named "Nebraska Methodist Health Systems, Inc.," but there is no entity call "Nebraska Methodist Health System."

The Clinic and the Hospital are separate and distinct legal entities. They are entirely separate from whatever type of legal entity "Nebraska Methodist Health System" may be. If those entities are claiming coverage by the Act—as they are clearly attempting to do in these post-trial, pre-entry-of-judgment proceedings—then those entities and *only those entities* were required to be identified in the signage.

If defendants have met their burden to prove they meet the definitions of healthcare providers who can be covered by the act, which they have not, then there are three elements to coverage by the Act in order for the cap to apply to any given healthcare provider: (1) the financial element of proof of insurance; (2) the financial element of payment of the surcharge, and (3) proof that the required signage was posted in a proper location.

Even if the Clinic and the Hospital had actual primary insurance policies through Zurich American—which Plaintiffs do not concede—both of them have failed to produce evidence they ever had a sign anywhere on their premises which notified the Cuencas or anyone else that either of them were claiming to be qualified under the Act, and instead focus on signage for the dismissed defendant the Nebraska Methodist Health System.

Once again, the principles of *Frederick*, *Argus Leader*, *Windstream* and *Pucket*, are applicable. Even if there was evidence that "Nebraska Methodist Health System" paid premiums for the primary insurance coverage required by the Act (again, Plaintiffs do not concede that to be so), nothing in §44-2821(4) allows a holding company to substitute itself for the subsidiary entity in the required sign. A sign relating to "the System" conveys nothing about Dr. Westcott, the Clinic or the Hospital, and there is no way to read any such possibility into the Act and/or the

regulations set out by the Department of Insurance.

The admitted absence of any sign identifying the Clinic and the Hospital claiming to be qualified under the Act means both entities are not covered by the Act and the statutory cap is not applicable.

D. The Improper Intrusion of Non-Party Nebraska Methodist Health Systems, Inc., Into These Post-Trial Proceedings

As shown by the affidavit of Joseph P. Cullan, lead counsel for Plaintiffs in this case, a copy of which is attached hereto, marked as Exhibit A and incorporated by reference, including all attachments to Ex. A, and by the Court's records, the following summarizes the involvement of Nebraska Methodist Health Systems, Inc. ("NMHS"), in this case.

1. NMHS was a named defendant when this suit was filed.
2. NMHS filed a motion seeking its dismissal from the case, along with a supporting brief, arguing that it had nothing to do with the day-to-day operations of the Defendant entities, and was not the employer of any of the then-named individual defendants.
3. Clearly based on these representations, Plaintiffs agreed to dismiss NMHS from the case and did so via a joint stipulation.
4. At the trial, the jury was instructed that former individual Defendants Susan A. Westcott, M.D. ("Dr. Westcott"), and Midwife Norton were employees of the Clinic, acting in the course and scope of their employment, and that the nurses who were alleged to be negligent were employees of the Hospital and were acting in the course and scope of the employment. Both the Hospital and the Clinic admitted they were vicariously liable for any negligence the jury found with

respect to their respective employees.

5. The Clinic and the Hospital never previously claimed, as they implicitly do now, that somehow any coverage that NMHS might have under the Act (which Plaintiffs do not concede to be true) also applies to them.

Based on the representations of defense counsel and NMHS, that entity was dismissed from this case. Plaintiffs implicitly agreed not to involve NMHS in discovery, and as the record reflects, did not do so. Yet suddenly NMHS has become part of this case, or rather, the Clinic and the Hospital are attempting to make it part of this case, after the trial is over. The Clinic and the Hospital have not offered any evidence about any relationship that currently exists, or might have existed at the time of the events giving rise to this litigation, between NMHS and either or both the Clinic and the Hospital.

Allowing evidence about an entity long since dismissed from the case constitutes a serious deprivation of Plaintiffs' due process rights under both the Nebraska and Federal Constitutions. The issue here is not whether NMHS is now or ever was covered by the Act, but whether the Clinic and the Hospital are entitled to coverage. Defendants should not be allowed to introduce evidence, nor should the Court consider any already offered, about NMHS, when Plaintiffs have never had the opportunity to do any discovery prior to trial with respect to any issue in this case, including but not limited to coverage under the Act, with respect to NMHS, and certainly have no method now by which discovery could be compelled after the trial.

None of the information supplied about NMHS can properly be used to make a ruling on any of the post-trial issues so far raised in this case.

E. The Other Signage Failures

§44-2821(4) requires that the sign advising patients that a particular healthcare provider

is qualified under the Act be posted in "his or her waiting room or other suitable location." That language plainly and unequivocally means *every* healthcare provider (as defined in the Act) has to have such a sign. Here, at a minimum, there should have been a sign for Dr. Westcott and for the Clinic itself, on the Clinic premises in an appropriate location. How else could a patient of Dr. Westcott (such as Mrs. Cuenca and her then-unborn child) know that Dr. Westcott was claiming qualification under the Act so that a decision could be made to opt out? But the Clinic has admitted it never had a sign for itself or for Dr. Westcott, only a sign relating to an entity no patient would have any reason to associate with any individual doctor at the Clinic or the Clinic itself.

The letters provided with the Hobelman Affidavit expressly state the following instruction:

> As a reminder, a qualified health care provider shall post and keep post in a suitable location *where all patients may easily see it*, a sign of the size and type prescribed by the Director stating they have qualified under the provisions of the Nebraska Hospital-Medical Liability Act 44-2821(4). [Emphasis added.]

While the Act itself refers to a waiting room or an alternate suitable location, it is clear from the this letter that the state agency charged with enforcing the signage requirements and tracking opt-outs, has interpreted the statutory language to mean a place where all patients can easily see the sign.

The Clinic and the Hospital have offered no such evidence. All the Hospital has said is that the signs were in unspecified locations in its main lobby, and in the Emergency Department, and offered the inadmissible conclusions that those were locations which met the standards of the Act. Similarly, the Clinic has said that "for clinics in the Women's Hospital Medical Office Building where [the Clinic] obstetrics and gynecology and nurse midwife clinic is located we had this signage (size 8 x 10) posted in the reception area." It is common knowledge that most

hospitals have multiple entrances, and the Hospital here has offered no evidence that its main lobby—a phrase implying there are other lobbies—is the sole way in which patients can come into the Hospital. There is also no evidence that the "reception area" is the sole entrance providing access to the Clinic, located in this medical office building.

It should also be noted that the regulations provide that the sign should be 8.5 x 11 inches, and the Clinic has admitted it decided to provide a sign even smaller than that already-small space. Nor have either the Clinic or the Hospital produced evidence that their signs met the font size requirements set out in the regulations.

Respectfully, proof of the mere existence of a sign isn't enough, even if the sign were to identify the correct healthcare provider claiming qualification under the Act. The statute also requires a specific location: the waiting room, or an alternative suitable location where, as the Department of Insurance has phrased it, "all patients may easily see it."

The Clinic and the Hospital have failed to provide such evidence. Statutes in derogation of the common law must be strictly construed, and a statute such as the Act, which deprives only one type of plaintiff in the State of Nebraska of his or her common law right to unlimited damages, is obviously such a statute. Nothing in the Act allows "substantial compliance" as opposed to strict compliance. Even the Legislature implicitly recognized that by stating there is no retroactive coverage, *i.e.*, if the healthcare provider was not covered at the time of the claimed negligence, taking the steps to become qualified (and post the signage) has no retroactive effect. §44-2824(4).

The signage requirement must be strictly construed, and in the absence of evidence from the Clinic and the Hospital demonstrating strict compliance (as opposed to some claim of "substantial compliance"), neither entity has coverage under the Act and the caps are not

applicable to the various awards.

Section 4. The Invalidity of Defendants' Five Affidavits

Defendants have served five affidavits in support of their attempt to prove they care covered by the Act and therefore the caps which would be then applicable to the three separate jury awards apply. As shown by Plaintiffs' Motions to Strike the Affidavits of Stephanie L. Hobelman, Karina Weibel, Mary Thomas, Joseph S. Miller, MD, FAAFP, and John Marshall, CRM, ERMCP, CIC, AAI, together with all of the supporting exhibits and briefs, all of which are incorporated herein by reference, a substantial part, if not the majority, of each affidavit fails to meet the legal standards for a valid affidavit, including but not limited to multiple instances of making statements not in fact supported by personal knowledge, multiple instances of relying on hearsay, and multiple instances of offering opinions and conclusions.

As a matter of law, considered in the aggregate, the purported "evidence" offered by those defense affidavits is inadequate and insufficient to serve as a foundation for granting the relief sought by the Clinic and the Hospital in its motion: Reduction of three *separate* awards to three *separate* Plaintiffs to a single cap.

Section 5. Hospital and Clinic Licensure

It appears that neither the Clinic nor the Hospital are currently properly licensed, and were not properly licensed at the time of the events giving rise to this litigation. Attached hereto, marked as Exhibits D, E, F, and G and incorporated by reference, are screen shots from the Web site of the Department of Health and Human Services (Exs. D, E) and the Clinic (Exs. F, G).

The Act defines a hospital as an entity licensed under the Health Care Facility Licensure Act. §44-2806. The Department of Health and Human Services seems to indicate both that the Hospital has had no license since 2002, and that the Clinic is unlicensed as well. While §44-

2803(3) appears to be the provision which the Clinic might fall under, *i.e.,* as an entity "authorized by law to provide professional medical services by physicians," with all due respect, the Court cannot base its ruling on speculation and conjecture, or on an *assumption* that the Hospital was properly licensed at the time of the events giving rise to this litigation, or that the Clinic was. Any representations or assurances their counsel might make about these Defendants being properly licensed is, of course, proof of nothing. Neither the Clinic nor the Hospital have provided any evidence whatsoever that they met the licensing requirements imposed by the Act at the relevant time.

The two-step logic is plain. First, if the Clinic and/or the Hospital are not properly licensed, they do not fall within any definition of healthcare providers who can be covered by the Act. Second, if they do not fall within the parameters of those definitions, they cannot be covered.

The lack of evidence of proper licensing defeats any claim that the Act applies to the three separate jury awards in this case, and therefore no cap can be applicable to any of them.

Section 6. The Opt-Out Provision

The problem for the Clinic and the Hospital is that even if the Court concludes Defendants have somehow met the financial responsibility elements of NHMLA qualification and coverage, Defendants' failure to prove they have met the patient opt-out notification element, establishes that they do not qualify under the Act, and therefore no caps are applicable.

§44-2821 sets out the third element of qualification and coverage: providing proper notice to patients of their right to opt out of the Act, thereby making Defendants liable to the patient under the common law. For the convenience of the Court and counsel, the statutory language is:

(1) Any health care provider who fails to qualify under the Nebraska Hospital-Medical Liability Act shall not be covered by the provisions of such act and shall be subject to liability under doctrines of common law. If a health care provider shall not so qualify, the patient's remedy shall not be affected by the terms and provisions of the act.

(2) If a health care provider shall qualify under the act, the patient's exclusive remedy against the health care provider or his or her partner, limited liability company member, employer, or employees for alleged malpractice, professional negligence, failure to provide care, breach of contract relating to providing medical care, or other claim based upon failure to obtain informed consent for an operation or treatment shall be as provided by the act unless the patient shall have elected not to come under the provisions of the act. Unless the patient or his or her representative shall have (a) elected not to be bound by the terms of the act, (b) filed such election with the director in advance of any treatment, act, or omission upon which any claim or cause of action is based, and (c) notified the health care provider of election as soon as is reasonable under the circumstances that such patient has so elected, it shall be conclusively presumed that the patient has elected to be bound by the terms and provisions of the act. Such election may be made by either legal parent for an unborn or newborn child. Unless a legal parent of an unborn child or the guardian or other representative of a minor or incompetent makes the election in the manner provided in the act for such unborn person, minor, or incompetent, such person shall be deemed to be subject to the terms and provisions of the act.

(3) An election of a patient not to be bound by the act shall be effective for a period of two years after filing unless such election is withdrawn by the patient and shall be ineffective after such two-year period unless renewed in writing and filed with the director. The patient or his or her representative may revoke the election in writing at any time and a copy of such revocation shall be forwarded to the director within five days after the same is made.

(4) Each health care provider who has qualified under the act shall post and keep posted in his or her waiting room or other suitable location a sign of a size and type to be prescribed by the director stating: (name of health care provider) has qualified under the provisions of the Nebraska Hospital-Medical Liability Act. Patients will be subject to the terms and provisions of that act unless they file a refusal to be bound by the act with the Director of Insurance of the State of Nebraska.

Under §44-2821, there are clearly three methods by which a healthcare provider, *i.e.*, a provider who meets the definitions set out in the Act, could fail to be covered by the Act, and become subject to common law claims, which have no cap on damages: (1) the provider fails to meet, or is unable to meet, the financial standards [§44- 2821(1)], or (2) the provider is qualified

(meets the financial standards), but the patient opts out [§44-2821(2)], or (3) the provider fails to post and maintain the required notice to patients [§44- 2821(4)].

The Legislature decided to create an "opt-out" provision for patients vis-à-vis coverage by the Act, but before a patient can make that decision, the patient has to know the right exists. The Legislature therefore required all healthcare providers who met the financial elements of qualification to *also* post a notice containing the specified language, in a "waiting room or other suitable location" in a "size and type" prescribed by the Director of Insurance.

The Department of Insurance first published regulations relating to the Act that went into effect in September of 1989, in Title 210, Chapter 32 of the Nebraska Administrative Regulations. Those regulations were subsequently amended, but the changes were technical, rather than substantive in nature. What was then published on the Department's Web site was a "redlined" version, showing the original text and the changes being made. It appears that that "redlined" version has remained on the State's Web site for some twenty years. A copy of the "redlined" regulations is attached hereto, marked as Exhibit H and incorporated by reference. The patient notification regulation appears in §32.009, at page H-6 of Ex. H. The notice text appears at H-7 to H-8.

In very plain English, §44-2821(4) instructed both Defendants to post, *and keep posted*, a sign in the format specified by the Department of Insurance. The Department of Insurance specified that the sign had to be at least 8.5 x 11 inches, that the font size for the heading had to be 90-point boldface, and the font for the body of the notice had to be 32-point boldface. The plain language of §44-2821(4) required both Defendants, at the time they *first* met the financial elements of qualification, to post the patient notice, and from that date forward, to *maintain* that notice, *i.e.*, continuously keep that notice posted in the location or locations in the Hospital and

Clinic necessary to provide their patients with a reasonable opportunity to be informed of their opt-out right under the Act.

The vacuum created by the hospital's lack of evidence relating to this crucial and indispensable element of the Act is telling. Devoid of any evidence that any signs identifying the claims of Dr. Westcott, the Clinic and the Hospital of having qualified under the Act, this vacuum is lethal to Defendants' position.

In the absence of proof of the third element of NHMLA qualification—proper patient notification—the Act itself, including the cap, does not apply to either the Clinic or the Hospital and does not apply to this case.

This issue is one of statutory interpretation. Both the Supreme Court of Nebraska and the Eight Circuit agree on the standards for doing so.

In *Watkins v. Watkins*, 287 Neb. 693, 699, 829 N.W.2d 643, 649 (2103), the Nebraska Supreme Court said:

> Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Blaser v. County of Madison*, 285 Neb. 290, 826 N.W.2d 554 (2013). In discerning the meaning of a statute, we must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense. *Id.* If the language of a statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning. *Bridgeport Ethanol v. Nebraska Dept. of Rev.*, 284 Neb. 291, 818 N.W.2d 600 (2012).

Similarly, in *Stanley v. Cottrell, Inc.*, 784 F.3d 454, 465-466 (2015), the Eighth Circuit said:

> As with any question of statutory interpretation, we turn first to the plain language of the statute. *Hardt v. Reliance Std. Life Ins. Co.*, 560 U.S. 242, 251, 130 S.Ct. 2149, 176 L.Ed. 2d 998 (2010). In ascertaining the plain meaning of a statute, we "presume that a legislature says in a statute what it means and means in a statute what it says." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253, 112 S.Ct. 1146, 117 L.Ed. 2d 391 (1992). If the words are unambiguous, our inquiry is complete. *Id.* at 254, 112 S.Ct. 1146. But when a statutory provision is susceptible to more than one interpretation, we examine other authorities to determine legislative intent. *Owner–Operator Indep. Drivers Ass'n v. Supervalu, Inc.*, 651 F.3d 857,

863 (8th Cir. 2011).

There is nothing vague or ambiguous about §44-2821, considered by itself, or in relation to the Act as a whole. There is no rational basis for arguing that the opt-out notice provision is not as much a necessity to obtain the protections of the Act as meeting the financial elements.

No Nebraska case has been found mentioning the mandatory posting of a notice under the Act. However, in *Lozada v. United States*, 974 F.2d. 986 (8th Cir. 1992), the issue was whether the United States, having admitted liability in a claim of medical malpractice, was covered by the then-cap of $1,000,000. The Eighth Circuit said at 987:

> In order to qualify under the Nebraska Act, a health care provider must file proof of financial responsibility, pay an annual surcharge into the excess liability fund, and post a notice of qualification under the Nebraska Act.

Id. at 988. The two-judge majority then engaged in rather convoluted reasoning to conclude the United States was covered by the cap, despite the fact it had never complied with the financial requirements nor was a notice posted in its hospital.

In the excellent dissent by Senior Circuit Judge Heaney, he agreed with the majority on the point of what the Act required, saying at 974 F.2d at 989:

> In order to qualify for the protection of the Nebraska Act, a health care provider must meet three qualifications: (1) it must file proof of financial responsibility, (2) it must pay an annual surcharge to the excess liability fund, and (3) it must post a notice informing prospective patients that they will be subject to the terms of the Nebraska Act "unless they file a refusal to be bound by the act with the Director of Insurance of the State of Nebraska." Neb. Rev. Stat. § 44– 2821, 2824 (1988).

The Eighth Circuit, therefore, has already interpreted the NHMLA as requiring a healthcare provider—here, both the Hospital and the Clinic—to meet three elements in order to qualify for the protections of the Act, the main one of which is, of course, the cap: (1) file proof of financial responsibility; (2) pay an annual surcharge to the excess liability fund, and (3) *post and maintain the notice. Id.*

Under the statutory interpretation standards of *Watkins* and *Stanley*, *supra*, and the unequivocal interpretation set out in *Lozada*, *supra*, Defendants have failed to prove they qualify for the protection of the Act. The statutory cap of $1,750,000 therefore has no relevance to and no bearing on the three separate verdicts against the Clinic and the Hospital, in the aggregate amount of $11,520,000 .

It can hardly be questioned that since the Clinic and the Hospital are seeking to be sheltered by the Act from having to pay the $11,520,000 verdict, they have the burden to *prove* all three elements of qualification. They have patently failed to do so. Plaintiffs could therefore have simply rested on that failure of proof as the basis for the Court's ruling that in the absence of proof of the third element of coverage (patient notification), Defendants are not protected by the Act.

However, Plaintiffs have gone a step further, and provided evidence which demonstrates that on the dates at issue here, Defendants failed to provide Mr. and/or Mrs. Cuenca with any notice of the opt-out provisions because they chose to post signs (assuming that to be true) that said *someone other than Dr. Westcott, the Clinic and the Hospital* here, claimed to have qualified for coverage under the Act.

Black's Law Dictionary (9th Ed. 1990) defines "suitable" at 1572 as: "(Of goods, etc.) fit and appropriate for their intended purposes." *Webster's Third New International Dictionary* (1986) defines the word at 2286 as "adapted to a use or purpose: FIT <food [suitable] for human consumption> <a [suitable] stream for canoeing> <a style [suitable] for news announcement>."

In other words, something is suitable when it achieves its intended purpose. The stream could be used for canoeing, and therefore was "suitable" for that purpose, just as it might have been "suitable" for other purposes, such as fishing. The food was capable of being consumed by

human beings without causing them harm, and therefore was "suitable" for that purpose.

What, then, is the purpose for the location of the statutory notice? To provide patients with a reasonable opportunity to learn of their opt-out right in order to decide whether to exercise that right. The Legislature decided a health care provider's waiting room was an eminently suitable, fit, and appropriate location to place the notice in order to achieve its goal. Except in highly unusual circumstances, you do not walk into a waiting room, check in, and then immediately walk right out to go to the room where your examination or treatment will be done. In a waiting room, you generally *wait*. And in the confines of a waiting room, while waiting, you have ample opportunity to look around and see what there is to see in the room, including a statutory notice with the right language relating to who was claiming NHMLA qualification. The Hospital could have put a proper opt-out notice in its waiting room, but chose not to do so.

Having deliberately eliminated the most logical and statute-defined suitable location for providing the required opt-out notice, the Hospital then had, and still has, an obligation to post the notice in an alternative *suitable* location. Remembering that a suitable location for the opt-out notice is one which provides every patient with a reasonable opportunity to see it, per the Department of Insurance's own instructions in Exhibits A and B to the Hobelman Affidavit, the question becomes: Is a sign in some unknown location in the Hospital's main lobby, where there is no evidence that this is the sole method by which all patients enter the Hospital, other than Emergency Room patients, a suitable location?

The answer is again simple: No.

It is a fact of modern medical life, of which the Court may certainly take judicial notice, that barring the most unusual circumstances, *all* non-emergency patients are going to be in a waiting room for some period of time, whether a comparatively minor amount of time, or

definitely major, before being seen by their health care provider. That is true whether the provider is a physician or a hospital. In a sense, a patient's presence in a waiting room might be considered a mandatory part of the process of receiving health care.

Going through a main lobby is hardly a "mandatory" part of receiving medical treatment at the hospital. There is no evidence that every patient goes through the main lobby before going to a waiting room to receive the services for which he or she is there.

A statutory notice at some unspecified location in a main lobby, instead of in the Hospital's waiting rooms is, however, an eminently suitable location for achieving a different goal: ensuring that the vast majority of patients who come to the Hospital will be unlikely to ever see the sign. And the greater the number of patients who are unlikely to see the sign, the lower the risk that anyone will opt out of NHMLA, and thereby put the hospital at risk of being hit with part of an $11,520,000 common law, non-capped judgment for medical malpractice.

For all the reasons stated above, the Clinic and the Hospital have failed to prove they qualify for coverage under the NHMLA. They are therefore not entitled to any of the benefits of the Act, including but not limited to the application of the cap. The aggregate judgment of $11,520,000 is a valid one and enforceable.

Section 7. Unconstitutionality of NHMLA Patient Opt-Out Notification Procedure

The NHMLA is essentially a statute aimed at protecting the financial resources of health care providers by eliminating a patient's common law right to sue a negligent provider to obtain whatever compensatory damages the jury might assess, based on the nature and extent of the patient's injuries, and "substituting" for that common law right a cap which limits the total damages a patient may receive. Where, as here, the negligence of multiple persons during labor and delivery causes a newborn child to sustain catastrophic injuries which will require millions

of dollars over the child's lifetime to provide proper medical care and meet other needs, such as housing, transportation, etc., the Legislature has determined that the patient and very likely the State's taxpayers should suffer, rather than the negligent provider by: (a) limiting the damage award to less than the amount a catastrophically injured patient will need during his or her lifetime, and (b) potentially shifting the burden to the taxpayer to provide for limited medical care for the patient once the jury award runs out.

The argument will of course be made that the Legislature did not entirely wipe out a patient's common law right to sue without a damage cap, because it also provided two ways in which a patient's common law right to sue without capped damages can be reinstated: (1) the negligent health care provider fails to qualify for the protection of the NHMLA, or (2) the patient opts out of the Act.

As demonstrated above that these Defendants have failed to qualify for coverage under the Act, and therefore Plaintiffs are entitled, under the common law, to receive the full $11,520,000 which the jury determined in a full and fair trial to be an appropriate award for their injuries.

If the Court somehow determines that the Hospital and the Clinic qualified for the coverage of the cap, then the cap is still invalid because it unconstitutionally deprived the minor child's parents, and the parents themselves, of adequate notice of their right, individually and on behalf of their then-unborn child, to opt out of the NHMLA and reinstate their respective common law rights to sue for negligent medical treatment, without a cap on damages.

If you only look at the fact that notice of the right to opt out is required to be given to every patient, then it might appear that the Legislature went as far as it was constitutionally required to go. The problem with that assumption is that instead of providing for a fair and

understandable notice, with sufficient time to make a meaningful decision, the Legislature set up a procedure that is for all practical purposes designed to increase the odds *against* a patient opting out, with the odds against opting out being something akin to the odds against winning three consecutive Powerball jackpots, each in excess of a hundred million dollars.

The NHMLA effectively nullified a patient's right to "open courts" (Neb. Const. art. I, sec. 13) and the patient's "inviolable" right to a jury trial (Neb. Const. art. I, sec. 6) by depriving the patient of a full and fair remedy, as determined by a jury. The Legislature then, in theory though not in practical reality, gave patients the ability to reinstate their common law right to sue for uncapped damages by opting out of NHMLA coverage with respect to any or all of their health care providers, or, the patient can waive those important constitutional rights by *not* opting out of the NHMLA. The "opt-in" procedure is to do nothing, *i.e.*, not opt out.

A patient's waiver of his or her constitutional rights, or, indeed, any right granted to him or her by law, "must be made voluntarily, knowingly, and intelligently." *State v. Gunther*, 271 Neb. 874, 883, 716 N.W.2d 691, 700 (2006). Moreover, the due process clauses of both the Nebraska and Federal Constitutions require that any invasion of a person's liberty or property interests, both of which are implicated here, "requires that parties deprived of such interests be provided adequate notice and an opportunity to be heard." *Hass v. Neth*, 265 Neb. 321, 326, 657 N.W.2d 11, 19 (2003). To be adequate, such notice must be timely and "reasonably calculated to inform the person concerning the subject and issues involved." *Whitesides v. Whitesides*, 290 Neb. 116, 123, 858 N.W.2d 858, 865 (2015).

Pursuant to the regulations issued by the Nebraska Department of Insurance, this is the patient opt-out notification language the Clinic and the Hospital were supposed to provide to all of their patients, as well as the notice which should have been provided with respect to Dr.

Westcott:

NOTICE

> [Physicians Clinic, Inc.] [The Nebraska Methodist Hospital] [Susan D. Westcott, M.D.] has qualified under the provisions of the Nebraska Hospital-Medical Liability Act (Neb. Rev. Stat. §§44-2801 through 44-2855). Patients will be subject to the terms and provisions of that act unless they file a refusal to be bound by the act with the Director of Insurance of the State of Nebraska and notify the above health care provider of the election as soon as is reasonable under the circumstances that such patient has so elected.

As can be seen, while §44-2821(4) has a period after "State of Nebraska," the Department of Insurance added the requirement of notification of the health care provider of that election "as soon as is reasonable under the circumstances."

The above sample text obviously doesn't comply with the regulation that requires 90-point font for the word "Notice" and 32-point font for the text. Attached hereto, marked as Exhibit I, Exhibit J and Exhibit K and incorporated by reference is a copy of what the notices in this case *should* have looked like, using the proper font sizes. Each of these three sample notices occupies a full 8.5 x 11 inch sheet of paper with one-inch margins.

These are the two major things the notice does *not* tell a patient: (1) The NHMLA requires you to notify the Director of Insurance of your decision to opt out of capped damages, and opt-in to your common law right of uncapped damages, *before* the treatment is provided, and (2) that by doing nothing, you are waiving common law rights against your health care provider and constitutional rights as well, if he or she is negligent, including but not limited to uncapped damages.

The Legislature's language for the so-called "notice," *i.e.*, without considering the "tell your health care provider, too" phrase, can only be described as deliberately deceptive. The language: (a) tells patients to "file" a refusal, but doesn't say it has to be in writing; (b) doesn't tell patients the opt-out filing is only good for two years; (c) doesn't tell patients where to file the

opt-out refusal, and most important of all: (d) *doesn't tell the patient the refusal has to be filed before any treatment.* In significant circumstances, such as emergency treatment or arrival for childbirth, there is no practical or appropriate way to provide notice to the Director of Insurance prior to treatment. Even in the setting of a doctor's office waiting room, even with an as-prescribed notice, patients will have no reason to know they have to do anything *before* going in to see the doctor.

Even accepting, solely for the sake of argument, that a patient whose illness may be severe and requiring immediate medical care, would understand that the "filing" requirement means written, as opposed to email, texting or a telephone call, a document is generally not "filed" with a court until it is actually received and file-stamped. That in turn would mean that even if a patient turned around, left the waiting room, immediately mailed an opt-out notice to an address they found with their cell phone, and came back in for treatment, if there was medical negligence that day, the opt-out "filing" would be ineffective because it wasn't received before the treatment was given.

The addition of the "tell your health care provider, too" language only makes the so-called "notice" *more* deceptive. When read as any person of ordinary intelligence and understanding would read it, the notice tells patients to file the opt-out with the Department of Insurance, *and* tell the health care provider you've done so, *both* "as soon as is reasonable under the circumstances." While there may be some highly technical grammatical principle under which the "as soon as possible" phrase refers only to health care provider notification—a two stage process of filing with the Department of Insurance first, and when that is done (the opt-out is received) then tell your provider as soon as possible—ordinary patients are not ordinarily grammarians with that degree of analytical expertise.

The statutory requirement that the opt-out decision be received by the Department of Insurance before any care is provided by the health care provider to whom the opt-out is applicable is totally unreasonable, and unnecessarily burdensome.

Consider a situation in which there actually is a notice and the patient sees it, but the patient needs emergency or time-sensitive care. Can anyone seriously believe that the patient will delay medical treatment by the several days required to locate the Department of Insurance mailing address, prepare and mail the opt-out, and wait three days on the assumption that is sufficient for the Department to receive and "file-stamp" the opt-out? Particularly when nothing in the notice advises the patient the opt-out has to be done before any emergency or urgent, but not quite an emergency, care is received.

It is a common experience, and one of which this Court can certainly take judicial notice, that the days of just walking into your doctor's office and being seen for non-emergency examination, diagnosis and/or treatment, are long, *long* gone. Waiting weeks or months for an appointment is not uncommon. Yet the Legislature's scheme would require the non-emergency patient to cancel the appointment he or she has waited so long for, reschedule it—undoubtedly with another long wait—and go home to do the opt-out process.

Given that the so-called "notice" only cites a statute but doesn't give the patient a clue as to what it means, implicitly requires an ordinary individual to figure out how to do legal research, and then wade through the hundreds of paragraphs in the Act, trying to understand the meaning of the legalistic language, and in all likelihood missing the connection between the cap and opting out serving as reinstating the patient's right to pursue uncapped damages if injured by a provider's negligence. The statutory notice procedures place an undue burden on patients, and are inherently unrealistic and impractical.

Designing this type of "notice" procedure, with the unquestionably foreseeable result that the patient will "opt in" for receiving the care he or she needs and "opt out" of exercising the right to opt out of NHMLA coverage for the health care provider, was utterly reckless, and demonstrates a complete legislative disregard for the well-being of Nebraska patients. The procedure is, of course, merely part of a legislative plan to promote the well-being of health care providers at the expense of patients and taxpayers.

There is, unfortunately, no way to know what percentage of patients actually receive this notice, much less understand it and take action to opt out, since all information about that is supposed to be secret under the regulations issued by the Director of Insurance. Oddly enough, the secrecy rules don't appear to apply to healthcare provider defendants, who were able to obtain a letter from the State which ignores the secrecy requirements and concludes that the Cuencas did not opt out. Plaintiffs do not disagree, since Dr. Westcott, the Clinic and the Hospital never provided them with even the sparse "notice" set out by the statute. The point, though, is that if all information about who opts out is to be secret, that logically includes disclosing whether someone did or did not opt out. The State has deliberately ignored its own regulations to help keep these healthcare providers from being liable for the aggregate $11,520,000 in damages awarded to Plaintiffs by the jury.

The State of Nebraska does have intelligently designed, effective and intellectually honest methods by which patients can be informed of their rights and provided an opportunity to opt out of "X." By way of example, currently there are over 1,400 hospitals, medical clinics, physicians, pharmacists and various health care professionals across Nebraska participating in the Nebraska Health Information Initiative (NeHII). (see https://nehii.org) NeHII is a system to share health records between healthcare providers across the State of Nebraska.

In practice, nearly every patient in Nebraska seen by a medical practitioner is presented with a document that informs him or her of NeHII and provides an opportunity to opt out. Opting out is done by having the patient review an informational document specifically presented to them for that purpose, and if the opt-out decision is made, a simple check in a box on the form accomplishes it. NeHII is not taking away a common law right, nor is it placing any limitation upon a constitutional right. NeHII is simply seeking to share their health information with medical practitioners throughout the State of Nebraska.

NeHII is just one example of a setting in which the medical industry has no incentive to hide a patient's right to opt out. Unfortunately, the medical industry has *every* reason to conceal a patient's right to reinstate common law actions for uncapped damages in the event of medical negligence. And the Legislature has ably assisted the medical industry in achieving that goal by creating a "notice" procedure of the right for a patient to opt out of NHMLA coverage and the cap that is deliberately deceptive and fails to provide adequate notice of a patient's rights.

Due process under both the Nebraska and Federal Constitutions requires notice and an opportunity to be heard at a meaningful time and in a meaningful manner. In a frequently cited opinion, the United States Supreme Court, in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 339, 70 S. Ct. 652, 657, 94 L.Ed. 865 (1950), said:

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. (Citations omitted.) The notice must be of such nature as reasonably to convey the required information, *
>
> * * and it must afford a reasonable time for those interested to make their appearance, * * *."

Nearly ninety years ago, in the context of criminal statutes, the Supreme Court of the United States addressed the fundamental principles of notice, in *Connally v. General*

Construction Company, 269 U.S. 385, 46 S. Ct. 126, 70 L. Ed. 322 (1926). The Court said:

> That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law; and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.

269 U.S. at 391, 46 S. Ct. at 127. And later in the opinion, 269 U.S. at 393, 46 S. Ct. at 128:

> The dividing line between what is lawful and unlawful cannot be left to conjecture. The citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions. A criminal statute cannot rest upon an uncertain foundation. The crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue. Penal statutes prohibiting the doing of certain things, and providing a punishment for their violation, should not admit of such a double meaning that the citizen may act upon the one conception of its requirements and the courts upon another.'

Mullane and *Connally* are not literally applicable to the issues here. But conceptually, they indeed are.

The NHMLA takes away every patient's constitutional and common law right to sue for uncapped damages in the event of injuries due to medical negligence. Having made the decision to give patients the right to opt out of the NHMLA and opt in to reinstatement of their common law and constitutional rights, the Legislature was constitutionally bound to provide adequate and meaningful notice, with "meaningful" necessarily having a definition that the notice is understandable (this is what is happening, this is what your rights are) and that the notice is provided far enough in advance that the recipient has a reasonable opportunity to make an informed decision.

To paraphrase the first *Connally* excerpt:

> A notice of a patient's right to reinstate uncapped common law damages which is given in terms so vague that patients of common intelligence must necessarily

> guess at its meaning and differ as to its application violates the first essential of due process of law."

And to paraphrase the second excerpt:

> A statutory notice to patients of their rights cannot rest upon an uncertain foundation. The patient's rights, and the elements constituting their exercise, must be so clearly expressed that the ordinary patient can intelligently choose, in advance, what course he or she wishes to pursue. A notice should not admit of such a double meaning that the patient may act upon the one conception of its requirements and the courts upon another."

The simplest, most direct, most honest method of notifying patients of their opt-out right under the NHMLA, particularly given the legislative requirement that opting out must take place prior to medical treatment, would have been to create a notice form that sets out in plain English what the NHMLA does, set out the existence of the cap, set out the right to opt out of that limitation and reinstate the right to sue for uncapped damages, and then require the patient to opt in or opt out on that form, a copy of which would have to be sent to the Department of Insurance. Would being truthful to patients about their opt-out rights lessen the potential for medical negligence? Perhaps not in a literal sense. But it is certainly a logical possibility that a health care provider who gave a patient the above-described notice and the patient chose to reinstate the common law, would have a greater incentive to be much more careful in providing medical services. Under the current state of the law, health care providers have the ordinary professional incentive "to do no harm," but at the same time they have the safeguard of knowing that even if they catastrophically injure a patient so as to require millions of dollars to provide medical treatment and other ordinary needs over a lifetime, they're off the hook for anything over the cap, and the patient himself or herself, and perhaps eventually the taxpayers, will be on the hook for the cost of the provider's negligence.

The statutory "notice" procedure is patently unconstitutional, so that even if Defendants and Dr. Westcott had provided the requisite notice to the Cuencas, which they did not, the cap

would still not apply to the $11,520,000 (round figure) aggregate jury awards in this case.

Section 8. Unconstitutionality of the Nebraska Hospital-Medical Liability Cap

A. Introduction

If this Court determines that the Clinic and the Hospital are qualified health care providers pursuant to Neb. Rev. Stat. § 44-2825, it should still decline to apply the statutory cap to reduce the fair and proper jury verdict in this matter because it violates the U.S. and Nebraska Constitutions. First, it violates the Seventh Amendment's right to trial by jury (U.S. Const. amend. VII), as well as the cognate "inviolate" jury-trial right found in Article I, Section 6 of the Nebraska Constitution. Second, it constitutes a taking of property without just compensation under the Fifth Amendment to the U.S. Constitution. Third, it unconstitutionally burdens the right of access to the courts. Finally, it treats the most catastrophically injured patients unequally with those who are less severely injured as a result of medical malpractice, in violation of the Fourteenth Amendment and Article I, Section 3 of the Nebraska Constitution.

B. Violation of the Federal Right to a Jury Trial.

The right to trial by jury is of foundational importance to American constitutional government and was, in part, responsible for our country's birth. The Declaration of Independence charged England with "depriving us in many cases, of the benefit of trial by jury." Decl. of Indep. ¶ 20 (U.S. 1776). Whenever "the jury right was threatened in the colonial era, the citizen reaction was generally swift and hostile." Stephan Landsman. *The Civil Jury in America: Scenes from an Unappreciated History,* 44 Hastings L.J. 579, 594 (1993).

The right to trial by jury was of such paramount importance to the nation's founders that it was the only right universally secured by all 13 original American state constitutions. *Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 341 (1979) (Rehnquist, J., dissenting) (citations omitted). As

Professor Wolfram has written, the "nascent American nation demonstrated at virtually every important step in its development that trial by jury was the form of trial in civil cases to which people and their politicians were strongly attached." Charles W. Wolfram, *The Constitutional History of the Seventh Amendment,* 57 Minn. L. Rev. 639, 656 (1973).

Without its guarantee, the U.S. Constitution would never have been ratified: "One of the strongest objections originally taken against the constitution of the United States was the want of an express provision securing the right of trial by jury in civil cases." *Parsons v. Bedford,* 28 U.S. (3 Pet.) 433, 445 (1830) (Story, J.). The Bill of Rights added to secure the U.S. Constitution's ratification included the Seventh Amendment's civil jury-trial right to assure, *inter alia,* that legislators did not interfere with a jury's prerogatives. Wolfram, 57 Minn. L. Rev. at 664-65. This history establishes that the "[m]aintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." *Dimick v. Schiedt,* 293 U.S. 474, 486 (1935). The jury trial right is thus one of the "great ordinances of the Constitution." *Springer v. Phillipine Islands,* 277 U.S. 189, 209 (1928) (Holmes, J.)).

To determine the application of the Seventh Amendment's jury-trial right, federal courts employ a historical test, consisting of two questions: 1) "whether we are dealing with a cause of action that either was tried at law at the time of the founding or is at least analogous to one that was;" and, 2) whether the particular trial decision must fall to the jury in order to preserve the substance of the common-law right as it existed in 1791." *Markman v. Westview Instruments, Inc.,* 517 U.S. 370, 376 (1996) (citations omitted).

Both questions can be answered affirmatively here. Medical malpractice cases were recognized at common law long before the nation was founded and were tried before juries. *See,*

e.g., Wright v. Central DuPage Hosp. Ass'n, 347 N.E.2d 736, 742 (1976) (recognizing that actions for medical malpractice are rooted in Anglo-American common-law); *Weidrick v. Arnold,* 835 S.W.2d 843, 846 (Ark. 1992) (citing Prosser, Law of Torts, § 32, p. 161, fn. 32 (4th Ed. 1971), to recognize that medical malpractice "had its origins at common law" and that the first recorded case dates back to the year 1374). *See also* Allan McCoid, *The Care Required of Medical Practitioners,* 12 Vand. L. Rev. 549, 550 (1959). The historical inquiry plainly supports application of the Seventh Amendment here.

C. Seventh Amendment Preservation of Jury Authority Over Damages

As for the second *Markman* question, one of the jury's indisputable responsibilities, as judges of the facts, is the assessment of damages. Longstanding precedent establishes that the determination of compensatory damages "involves only a question of fact." *St. Louis, I.M. & S.R. Co. v. Craft,* 237 U.S. 648, 661 (1915), *cited with approval in Cooper Indus., Inc. v. Leatherman Tool Group, Inc.,* 532 U.S. 424, 437 (2001). The United States Supreme Court has further recognized that juries have always served as the "judges of damages." *Feltner v. Columbia Pictures Television,* 523 U.S. 340, 353 (1998), quoting with approval, *Townsend v. Hughes,* 86 Eng. Rep. 994, 994-945 (C.P. 1677); *Dimick,* 293 U.S. at 486 (a plaintiff "remain[s] entitled . . . to have a jury properly determine the question of liability and the extent of the injury by an assessment of damages. Both are questions of fact.") (emphasis added); *Kennon v. Gilmer,* 131 U.S. 22, 29-30 (1889) (a "court has no authority . . . in a case in which damages for a tort have been assessed by a jury at an entire sum, . . . to enter an absolute judgment for any other sum than that assessed by the jury [unless] the plaintiff elected to remit the rest of the damages").

A jury's incontrovertible authority to set–and not merely suggest–damages was settled at least as far back as the time of Sir Edward Coke. Austin Scott, *Trial by Jury and the Reform of*

Civil Procedure, 31 Harv. L. Rev. 669, 675 (1918). Coke defined tort "Damages" as "the recompence that is given by the jury to the plaintiff . . . for the wrong the defendant hath done unto him." 2 E. Coke, THE FIRST PART OF THE INST. OF THE LAWS OF ENGLAND § 257a (1628; 19th ed., 1832).[1] If any English scholar rivaled Coke for his influence on American understanding of the common law, it was Sir William Blackstone[2] who stressed it is solely the jury's province to "assess the damages . . . sustained by the plaintiff in consequence of the injury." 3 W. Blackstone, Commentaries on the Laws of England 376 (1766). Thus, if "*damages are to be recovered, a jury must . . . assess them.*" *Id.*, 3 Blackstone at 376 (emphasis added). Summarizing this history, the U.S. Supreme Court recognized

> that "by the law the jury are judges of the damages." *Lord Townshend v. Hughes*, 86 Eng. Rep. 994, 994-995 (C.P. 1677). Thus in *Dimick v. Schiedt*, 293 U.S. 474(1935), the Court stated that "the common-law rule as it existed at the time of the adoption of the Constitution" was that "in cases where the amount of damages was uncertain[,] their assessment was a matter so peculiarly within the province of the jury that the Court should not alter it." Id., at 480. And there is overwhelming evidence that *the consistent practice at common law was for juries to award damages.*

Feltner, 523 U.S. at 353 (emphasis added; internal marks and parallel citations omitted). In sum, "from the beginning of trial by jury," damages and juries were regarded as inseparable, with "[t]he amount of damages . . . a 'fact' to be found by the jurors." Charles T. McCormick, Handbook on the Law of Damages 24 (1935), cited in *Lakin v. Senco Prods., Inc.*, 987 P.2d 463, 470 (Or. 1999) (striking compensatory damage cap under Oregon's "inviolate" guarantee of a jury trial).

As early as 1852, the Supreme Court stated that, in actions cognizable at common law, the amount of damages that may be due in a particular case "has always been left to the discretion of the jury." *Day v. Woodworth*, 54 U.S. 363, 371 (1851); *Missouri Pac. Ry. Co. v. Humes*, 115 U.S. 512, 521 (1885) (same). Indeed, according to the Court, "nothing is better

settled than that, in . . . actions for torts where no precise rule of law fixes the recoverable damages, it is the peculiar function of the jury to determine the amount by their verdict." *Barry v. Edmunds*, 116 U.S. 550, 565 (1886), *quoted with approval* in, *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 16 (1991)).

Because that history is part and parcel of construing the Seventh Amendment, the U.S. Supreme Court has held that recalculating damages after the jury has reached a verdict concerning damages constitutes a remittitur. *Hetzel v. Prince William County,* 523 U.S. 208, 211 (1998). The bottom line, the Court said, was that "requiring the District Court to enter judgment for a lesser amount than that determined by the jury without allowing petitioner the option of a new trial, cannot be squared with the Seventh Amendment['s jury-trial guarantee]." *Id.* Essentially, *Hetzel* holds that, unless the plaintiff waives the jury-trial right, the court must order judgment on the verdict or permit a new jury trial to determine the damages because of the Seventh Amendment's mandate.

These precedents explain why in *Feltner,* the Court emphatically rejected the defendant's argument that the jury's job was complete when it reached its verdict and that the constitutional jury-trial guarantee "does not provide a right to a jury determination of the amount of the award." *Id.* at 354. Instead, the *Feltner* Court emphasized held that any other approach to finalizing the award of damages would fail "'to preserve the substance of the common-law right of trial by jury,'" as required by the Constitution. *Id.* at 355 (citation omitted).

Thus, as *Feltner* concluded, "*if a party so demands, a jury must determine the actual amount of . . . damages.*" *Id.* at 354-55 (emphasis added). The right established by the Seventh Amendment "includes the right to have a jury determine the *amount* of . . . damages." *Id.* at 353 (emphasis in original). Nebraska's damage cap improperly takes that constitutionally consecrated

authority away, substituting a legislative one-size-fits-all determination divorced from the record established in the case from the jury's binding determination. The cap violates the right to trial by jury.

D. Seventh Amendment Guarantee Applicable to States.

The only time the Supreme Court directly determined whether the Seventh Amendment applies to the States was in *Walker v. Sauvinet,* 92 (2 Otto) U.S. 90 (1875), where it rejected its application. It acknowledged that position some 62 years later in *Palko v. Connecticut*, 302 U.S. 319 (1937), which held that the Fourth Amendment was not applicable to the states. *Palko* was subsequently overruled, with respect to the Fourth Amendment, by *Wolf v. Colorado,* 338 U.S. 25 (1949), and *Mapp v. Ohio,* 367 U.S. 643 (1961). The Supreme Court has since incorporated the bulk of the Bill of Rights through the Fourteenth Amendment as applicable to the States. *See generally* Michael Kent Curtis, No State Shall Abridge: The Fourteenth Amendment and The Bill of Rights (Duke Univ. Press 1990) Amendment incorporation has not been briefed or argued before the Supreme Court since and recent precedent demonstrates that incorporation is not foreclosed by *Walker.*

Walker was decided under a wholly different incorporation doctrine inquiry than is utilized today. In *Heller v. District of Columbia,* 554 U.S. 570 (2008), the Court acknowledged that *United States v. Cruikshank,* 92 U.S. 542 (1875), decided the same year as *Walker,* had held that the Second Amendment merely limited congressional action and did not prohibit States from interfering with the right to bear arms. *Id.* at 553. Subsequently, in *Presser v. Illinois,* 116 U.S. 252 (1886), relying on prior case law, including *Cruikshank,* the Court once again said that the Second Amendment "has no other effect than to restrict the powers of the national government." *Id.* at 265 (citing *Cruikshank,* 92 U.S. at 553; *Barron v. Baltimore,* 32 U.S. 243 (1833)).

Although *Heller* involved a federal jurisdiction (the District of Columbia) and provided the Court with no reason to revisit the question of Second Amendment incorporation, anticipating that its ruling would encourage similar challenges to statutes and ordinances throughout the states, the Court stated:

> With respect to *Cruikshank's* continuing validity on incorporation, a question not presented by this case, we note that *Cruikshank* also said that the First Amendment did not apply against the States and *did not engage in the sort of Fourteenth Amendment inquiry required by our later cases.*

Heller, 128 S.Ct. at 2813 n. 23 (emphasis added).

By making that statement, the Court placed lower federal courts on notice that mere acceptance of *Cruikshank's* holding constituted an abdication of the courts' responsibility for applying modern incorporation analysis. As such, in cases where litigants sought to apply *Heller's* holding to state statutes and ordinances, federal district courts were able to "best perform their role in our hierarchical judicial system by treating the Supreme Court's modern incorporation jurisprudence as law." Nelson Lund, *Anticipating Second Amendment Incorporation: The Role of the Inferior Courts,* 59 Syracuse L. Rev. 185, 187 (2008). He added, "[t]here is no legal requirement that lower courts 'wait' for the Supreme Court to apply the *Duncan* [*v. Louisiana,* 391 U.S. 145 (1968)] due process test to the right to keep and bear arms." *Id.* at 196.

The Court formalized that requirement two years later in *McDonald v. City of Chicago,* 561 U.S. 742, 767 (2010) ("Our decision in *Heller* points unmistakably to the answer."), where it ruled the Second Amendment applies to the States and described both the history and the expansion of the incorporation doctrine. Under the current test for incorporation, set forth by the Court in *McDonald,* there should be no doubt that the protections of the Seventh Amendment right to trial by jury also apply against the states.

As recalled by the McDonald Court, for the first fifty-seven years after the Fourteenth Amendment was adopted, from 1868 until 1925, the Supreme Court repeatedly rejected arguments that any particular provision of the Bill of Rights applied to the States through the Fourteenth Amendment's Due Process Clause. It was during this period that the Court ruled that the Seventh Amendment right to trial by jury was not incorporated.

Since 1925, however, the Supreme Court has steadily expanded the list of Bill of Rights protections that apply against the states. *Id.* at 764 n. 12 (listing decisions incorporating particular rights). Following *McDonald*, the only protections in the Bill of Rights that have not been fully applied to the states are the Third Amendment's protection against quartering of soldiers; the Fifth Amendment's grand jury indictment requirement; the Sixth Amendment's requirement of a unanimous jury verdict; the Seventh Amendment's right to a jury trial in civil cases; and the Eighth Amendment's prohibition on excessive fines. *Id.* at 765 n.13. Moreover, as the Supreme Court noted: "Our governing decisions regarding . . . the Seventh Amendment's civil jury requirement long predate the era of selective incorporation." *Id.* That statement supports engaging in a new analysis.

An examination of the standard for incorporation articulated in *McDonald* makes plain that, just like the protections of the Second Amendment, the protections of the Seventh Amendment ought to apply against the states. In the modern era of "selective incorporation," "the governing standard is not whether any 'civilized system [can] be imagined that would not accord the particular protection.' Instead, the Court inquire[s] whether a particular Bill of Rights Guarantee is fundamental to *our* scheme of ordered liberty and system of justice," *id.* at 764 (quoting *Duncan*, 391 U.S. at 149, n.14), or "whether this right is 'deeply rooted in this Nation's history and tradition.'" *Id.* at 767 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

Under these criteria, the Seventh Amendment qualifies for incorporation. The Supreme Court has frequently spoken of the Seventh Amendment guarantee as "fundamental." *See, e.g., Hodges v. Easton*, 106 U.S. 408, 412 (1882) ("the trial by jury is a fundamental guaranty of the rights and liberties of the people"); *Jacob v. New York City*, 315 U.S. 752, 752-53 (1942) ("right of jury trial in civil cases" is a "right so fundamental and sacred to the citizen [that it] should be jealously guarded by the courts"); *see also Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 338 (1979) (Rehnquist, J., dissenting) ("The right of trial by jury in civil cases at common law is fundamental to our history and jurisprudence."). Moreover, it is essential to a fair trial. *See, e.g., Simler v. Conner*, 372 U.S. 221, 222 (1963); *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525, 537-39 (1958).

It is likewise "of ancient origin," *Dimick v. Schiedt*, 293 U.S. 474, 485 (1935),[3] and was one of the rights enshrined in the Magna Carta.[4] The civil jury was a hallmark of British common law; Blackstone proclaimed the right to trial by jury as the "principal bulwark of our liberties," "the glory of the English law," and "the most transcendent privilege which any subject can enjoy." 3 William Blackstone, *Commentaries on the Common Law of England* 350, 379 (1992 reprint) (1765).[5]

The American colonists brought the civil jury with them to the New World. As Justice Story recognized: "The trial by jury in all cases, civil and criminal, was as firmly and universally established in the colonies as in the mother country." 1 Joseph Story, *Commentaries on the Constitution of the United States,* § 165 at 117 (Melville M. Bigelow, 5th ed. 1905) (1833). Indeed, efforts by the British to restrict the role of the jury in the colonies (in order to exercise greater control over the colonists) played an important role in the decision to seek independence. *See Parklane Hosiery*, 439 U.S. at 340 (Rehnquist, J., dissenting) ("[T]he right of trial by jury

was held in such esteem by the colonists that its deprivation at the hands of the English was one of the important grievances leading to the break with England.").[6] Only after the Bill of Rights, including the Seventh Amendment, was added was the Constitution ratified.[7]

Respect for the civil jury trial right remained strong throughout the decades between the ratification of the Constitution and the adoption of the Fourteenth Amendment. Indeed, at the time the Fourteenth Amendment was ratified, the constitutions of "[t]hirty-six out of thirty-seven states . . . guaranteed the right to jury trials in all civil or common law cases." Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 Texas L. Rev. 7, 77 (2008).[8] By comparison, as the Supreme Court noted in *McDonald*, only "22 of the 37 States in the Union had state constitutional provisions explicitly protecting the right to keep and bear arms." 561 U.S. at 777 (citing Calabresi & Agudo). Yet even this smaller majority of states was sufficient for the Court to declare the right to keep and bear arms one of the "foundational rights necessary to our system of Government" and "among those fundamental rights necessary to our system of ordered liberty." *Id.*

Thus, under the modern doctrine of selective incorporation, as most recently elucidated by the Supreme Court in *McDonald*, there can be no question that the Seventh Amendment guarantee meets the requirements for incorporation against the States through the Due Process Clause of the Fourteenth Amendment. It is both "fundamental to *our* scheme of ordered liberty and system of justice" and "deeply rooted in this Nation's history and tradition." As in *McDonald*, the argument against incorporation of the Seventh Amendment "is nothing less than a plea to disregard 50 years of incorporation precedent and return . . . to a bygone era." *Id.* at 780.

Because once a right has been incorporated, it must "'be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment.'" *Id.* at 765 (quoting *Malloy v. Hogan*, 378 U.S. 1, 10 (1964)), the Seventh Amendment must be applied to Nebraska's damage cap as the *Feltner* Court instructed, thereby mandating the cap's invalidation.

E. Violation of Nebraska Right to a Jury Trial.

The Nebraska Constitution guarantees that "[t]he right of trial by jury shall remain inviolate," and limits legislative authority concerning the jury to authorizing "trial by a jury of a less number than twelve in courts inferior to the District Court" and "a verdict in civil cases in any court by not less than five-sixths of the jury." Neb. Const. art. I, § 6. The guarantee is intended "to preserve the right to a jury trial as it existed at common law and under the statutes in force when the Constitution was adopted." *State ex rel. Douglas v. Schroeder*, 222 Neb. 473, 475-76, 384 N.W.2d 626, 629 (1986) (citations omitted). In this respect, the Nebraska jury trial right follows the same historical exegesis as does the Seventh Amendment right, relying on the historical common law to define the constitutionally guaranteed province of the jury. It thus should provide the same result as does the federal right.

In *Gourley v. Nebraska Methodist Health System, Inc.*, 265 Neb. 918, 663 N.W.2d 43 (2003), the Nebraska Supreme Court nonetheless upheld the damage cap at issue here against a jury-trial challenge by declaring that the jury's responsibility is "factfinding, which includes a determination of damages," but that the court "applies the law to the facts." Id. at 953-54, 663 N.W.2d at 75, relying on *Adams v. Children's Mercy Hosp.*, 832 S.W.2d 898 (Mo. 1992) (en banc). However, the Missouri Supreme Court has repudiated its prior holding in *Adams*, overruling it in *Watts v. Lester E. Cox Med. Centers*, 376 S.W.3d 633, 636 (Mo. 2012).

The analysis in *Watts* is instructive. Like that of Nebraska, Missouri's Constitution declares the right of trial by jury to be "inviolate." Mo. Const. art. I, sec. 22(a). The word "inviolate" is no ordinary term, but a superlative of unique and monumental weight that appears nowhere else in the Nebraska Constitution. As the Missouri Supreme Court explained, "'inviolate' means 'free from change or blemish, pure or unbroken.'" *Watts,* 376 S.W.3d at 638 (citation omitted). It added, "if the statutory cap changes the common law right to a jury determination of damages, the right to trial by jury does not "remain inviolate" and the cap is unconstitutional." *Id.* It thus held that the cap "directly curtails the jury's determination of damages and, as a result, necessarily infringes on the right to trial by jury when applied to a cause of action to which the right to jury trial attaches at common law." *Id.* at 640.

In *Watts,* the Missouri Supreme Court acknowledged that *Adams* "reasoned that a statutory cap on damages lets the jury do its job and then simply directs the court not to enter the full amount of the verdict in the judgment if the amount of non-economic damages exceeds the statutory cap," in order to all the court to apply the law to the jury-determined facts. *Id.* at 641-42 (Mo. 2012). It was that determination that the Nebraska Supreme Court relied upon. However, the *Watts* Court found "four flaws in the Adams rationale." *Id.* at 642. First, it "misconstrues the nature of the right to trial by jury" and "deprives the individual of his or her right to the damages awarded by the jury. *Id.* Second, Adams "specifically permits legislative limitation of an individual constitutional right," a result that "is untenable for the simple reason that a statutory limit on the state constitutional right to trial by jury amounts to an impermissible legislative alteration of the Constitution." *Id.*

Third, *Adams* relies upon *Tull v. United States,* 481 U.S. 412 (1987), "for the proposition that the right to jury trial does not extend to the determination of damages, even though

determining the facts is the jury's primary function." *Id.* at 643 (Mo. 2012). However, the Missouri Supreme Court noted that the U.S. Supreme Court corrected the misreading of *Tull* that *Adams* and other state court decisions [including the Nebraska Supreme Court in *Gourley*] had relied upon in *Feltner*. *Id.* at 643-44. Finally, *Adams* [like *Gourley*] failed to consider applicable state precedents, citing instead *Etheridge v. Med. Ctr. Hosp.*, 237 Va. 87, 376 S.E.2d 525 (1989), a case the Missouri Supreme Court called "analytically irrelevant because, unlike Missouri's guarantee that the right to trial by jury shall "remain inviolate," the Virginia Constitution merely states that "trial by jury is preferable to any other, and ought to be held sacred." Va. Const. art. I, § 11. *Watts,* 376 S.W.3d at 644. It added, that "different language entails a different analysis." *Id.*

Thus, as *Watts* held, *Adams* was built on a flawed foundation of cases that cannot support its ruling. Plaintiffs submit the same can be said of *Gourley*. Other states that guarantee an inviolate right to a jury trial have similarly found that a legislated cap on damages may not be reconciled with the inviolate right to trial by jury. *See, e.g., Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt,* 691 S.E.2d 218, 223 (Ga. 2010) (a legislatively required reduction of damages determined by a jury "clearly nullifies the jury's findings of fact regarding damages and thereby undermines the jury's basic function."); *Lakin v. Senco Prods., Inc.*, 987 P.2d 463, 473 (Or. 1999).(even if the statute "does not prohibit a jury from assessing . . . damages, to the extent that the jury's award exceeds the statutory cap, the statute prevents the jury's award from having its full and intended effect" and is unconstitutional); *Moore v. Mobile Infirmary Ass'n,* 592 So. 2d 156 (Ala. 1991); *Sofie v. Fibreboard Corp.,* 771 P.2d 711, 716-17 (Wash. 1989); *Smith v. Department of Insurance*, 507 So.2d 1080, 1088-89 (Fla. 1987) (a plaintiff whose "jury verdict is being arbitrarily capped" is not "receiving the constitutional benefit of a jury trial as we have heretofore understood that right.").

These courts have rejected the distinction that the legislature may intrude upon the jury's constitutional role. Georgia's Supreme Court put it this way:

> [While] the Legislature has authority to modify or abrogate the common law, we do not agree with the notion that this general authority empowers the Legislature to abrogate *constitutional* rights that may inhere in common law causes of action. Likewise, while we have held that the Legislature generally has the authority to define, limit, and modify available legal remedies, the exercise of such authority simply cannot stand when the resulting legislation violates the constitutional right to jury trial.

Nestlehutt, 691 S.E.2d at 223-24 (citations omitted).

In addition, the Oregon Supreme Court concluded that

> [a]lthough it is true that [the Oregon cap statute] does not prohibit a jury from assessing . . . damages, to the extent that the jury's award exceeds the statutory cap, the statute prevents the jury's award from having its full and intended effect. We conclude that to permit the legislature to override the effect of the jury's determination of . . . damages would "violate" plaintiffs' right to "Trial by Jury" guaranteed in [the Oregon Constitution]. Limiting the effect of a jury's . . . damages verdict eviscerates "Trial by Jury" as it was understood in 1857 and, therefore, does not allow the common-law right of jury trial to remain "inviolate."

Lakin v. Senco Products, Inc., 987 P.2d 463, 473, op. clarified, 987 P.2d 476 (Or. 1999).

Plainly, as *Feltner* held, this interference fails to preserve the common-law authority of a jury. The approach adopted by courts that say juries' authority to assess damages may be limited renders the jury-trial guarantee more charade rather than fundamental right, more advisory than constitutional command deserving of respect, and more about a right to an audience than a factfinder. If those courts' approach is correct, then there is no limit on the Legislature's authority to reassess facts found by the jury, whether they constitute assessed compensatory damages, apportionment among tortfeasors, or even the fact of liability. Plainly, legislative authority does not extend so far as to prevent a jury's determination, in matters constitutionally committed to their determination, from having its full and intended effect without offending the party's right to a jury trial.

F. Violation of Federal-State Constitutional Takings Clauses.

The Fifth Amendment prohibits government from taking private property for public purposes without just compensation. U.S. Const. amend. V. The Nebraska Constitution contains a similar guarantee. Neb. Const. art. I, sec. 21. One of the "first principles" of takings jurisprudence and the purpose for which the Takings Clause was adopted is that government may not force some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole. *Armstrong v. United States*, 364 U.S. 40, 49 (1960). Yet, that is precisely what Neb. Rev. Stat. § 44-2825 was designed to do—to place the burden of solving purported issues in health-care accessibility and physician insurability on the shoulders of a few persons most catastrophically injured through medical malpractice. Nebraska's arbitrary damage cap effects a taking of property without just compensation.

Section 44-2825 does so by limiting the collectible amount of adjudicated compensation only after a jury places a fair value on the property deprivation that Plaintiffs have suffered. This statutory limitation in essence dictates that a portion of Plaintiffs' cause of action and a portion of their protectable interest in bodily integrity—both cognizable property interests—must be sacrificed for a purported "public" purpose—*i.e.*, alleviating the expenses of negligent tortfeasors and their insurers by transferring a portion of Plaintiffs' property interests to them. This taking of cognizable property interests is not constitutionally permissible without just compensation, and Nebraska law provides none.

The idea of property and its relationship to constitutional rights in American law is derived from the work of John Locke, who, in his most influential work, wrote that preservation of property was the "great and chief end" of government and expressed the widely accepted view that a person "has a property in his own person." John Locke, Second Treatise of Government

71, 17 (T. Peardon ed., 1952); *id.* at 98-99 (property means the "property men have in their persons as well as goods."). Thus, the constitutional Framers, who read and supported their views by citing Locke, used the term "property" in a sense that embraced injuries to person as well as injuries to real property and chattels. Laurence Tribe & Michael Dorf, On Reading the Constitution 70-72 (1991) (Locke's theories on natural rights provided a basis for the Framers' views on private property).

Similarly, James Madison, the most influential of those responsible for our Constitution and Bill of Rights, viewed property as "embrac[ing] everything to which a man may attach a value and have a right; and which leaves to everyone else the like advantage." James Madison, *Property, in* 6 *The Writings of James Madison* 101 (G. Hunt ed. 1906). Madison further wrote that "a man has property in his opinions and the free communication of them," as well as "has property very dear to him in the safety and liberty of his person." *Id.* He added, "That is not a just government, nor is property secure under it, where the property which a man has in his personal safety and personal liberty, is violated by arbitrary seizures of one class of citizens for the service of the rest." *Id.* at 102.

What is more, the Supreme Court itself recognizes that "[n]o right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." *Union Pacific Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891); *see also Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (citing *Rochin v. California*, 342 U.S. 165 (1952); *Washington v. Harper*, 494 U.S. 210, 237 (1990) (Stevens, J., concurring in part and dissenting in part) ("Every violation of a person's bodily integrity is an invasion of his or her liberty."). Although the Court has discussed bodily integrity as a liberty

interest, it is a distinction without a difference, because "a fundamental interdependence exists between the personal right to liberty and the personal right in property," and "[n]either could have meaning without the other." *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972).

Here, there can be little doubt that Plaintiffs have alleged damage to their "property in [their] own person" and have sought compensation for that damage. A determination of responsibility for that damage and appropriate compensation through a full and fair trial on the merits is one of the fundamental guarantees of Due Process. *See Lindsey v. Normet,* 405 U.S. 56, 77 (1972). The result of such a full and fair trial are not subject to legislative revision.

Moreover, the Supreme Court has declared that "a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause." *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 428-29 (1982) (emphasis added). *See also Martinez v. California,* 444 U.S. 277, 281-82 (1980). A tort plaintiff thus has a private property interest in his or her common-law cause of action for damages as a result of medical negligence. *See In re Aircrash in Bali, Indonesia on Apr. 22, 1974,* 684 F.2d 1301, 1312 (9th Cir. 1982) ("There is no question that claims for compensation are property interests that cannot be taken for public use without just compensation.").

The Court has further noted that "one of the hallmarks of traditional tort liability is the availability of a broad range of damages to compensate the plaintiff 'fairly for injuries caused by the violation of his legal rights.'" *United States v. Burke,* 504 U.S. 229, 235 (1992) (quoting *Carey v. Piphus,* 435 U.S. 247, 257 (1978)), *superseded by statute,* 26 U.S.C. § 104(a)(2). *See also Prather v. Eisenmann,* 200 Neb. 1, 11, 261 N.W.2d 766, 772 (1978), citing *Abel v. Conover,* 170 Neb. 926, 104 N.W.2d 684 (1960) ("The measure of recovery in all civil cases is compensation for the injury sustained."). Because the arbitrary legislative cap does not result in

fair compensation for injuries and violates the due process guarantee of "fundamental fairness," *see, e.g., Panetti v. Quarterman,* 2007551 U.S. 930, 949 (2007) ("the protection afforded by procedural due process includes a 'fair hearing' in accord with fundamental fairness") (citation omitted), it produces a result at odds with the findings of that hearing and cannot be fundamentally fair.

When the State, for a supposedly public purpose, takes a portion of that compensation away, it participates in the impairment of that property interest without just compensation, in violation of the Fifth Amendment. *See Brown v. Legal Found. of Washington,* 538 U.S. 216, 233 (2003). The compensation due is not set by the taker of property but is measured by the property owner's loss. *Id.* at 236. To satisfy the mandate of the Fifth Amendment, just compensation must equal "the full monetary equivalent of the property taken." *United States v. Reynolds,* 397 U.S. 14, 16 (1970). That factual question of just compensation is determined by a jury, not by legislative act.

The property taken has the monetary value a jury places upon it after due deliberation on the evidence, as reviewed by the trial court. The damage cap interferes with this property interest by arbitrarily assigning the cause of action a lesser value, and as such is a taking of private property without just compensation within the meaning of the Takings Clause. In setting the damage cap, the Legislature either improperly displaces the fact-finding role of the jury or imposes a limitation, not because the limitation is a fair estimate of damages, but because it is supposedly pursuing a public policy purpose. *Cf. Salgado v. Cty. of Los Angeles,* 967 P.2d 585, 591 (Cal. 1998) (noting that the California cap on non-economic damages "is not a legislative attempt to estimate the true damages suffered by plaintiffs, but rather an attempt to control and reduce medical malpractice insurance costs by placing a predictable, uniform limit on the

defendants' liability for noneconomic damages."). As such, it cannot be described as anything but a taking.

It would be improper to denigrate this property interest as an interest in an abstract remedial scheme, any more than treating the seizure of land through eminent domain as abstract interest in a remedial scheme. Just as a State could not, consistent with the Fifth Amendment, seize property pursuant to a law that also arbitrarily devalues the property and forecloses judicial review of what constitutes just compensation, Nebraska cannot enact a law permitting private parties to use the judiciary to seize a portion of Plaintiffs' compensatory damage award because it unilaterally determines the property seized has no value. See Gulf Power Co. v. United States, 187 F.3d 1324, 1333 (11th Cir. 1999) ("[I]t is ultimately the responsibility of the judicial branch to ensure that the compensation awarded for a taking satisfies the constitutional standard of just compensation."); Monongahela Navigation Co. v. United States, 148 U.S. 312, 327-28 (1983) ("The right of the legislature . . . to apply the property of the citizen to the public use, and then to constitute itself the judge of its own case, to determine what is the 'just compensation' it ought to pay therefor, . . . cannot for a moment be admitted or tolerated under our [C]onstitution.").

The just compensation due is readily ascertainable here, because the "taking" occurs after the jury has, in its verdict, determined the monetary value of Plaintiffs' property. Nor can the legislated limit on recovery be considered a function of the Legislature's authority to alter common law causes of action, because under that rationale, the Legislature would be free to alter any future cognizable cause of action for recovery, without regard to the Takings Clause, by dictating the value of the property taken for a public purpose in advance. The Supreme Court has emphatically rebutted that rationale.

In *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), the Court rejected the

argument that a state could, consistent with the federal Takings Clause, enact a general law that all property the state designates as easements for roadways, no matter the size or assessed value of the property, cannot be worth more than $50,000. *Id.* at 831 ("Had California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis in order to increase public access to the beach, rather than conditioning their permit to rebuild their house on their agreeing to do so, we have no doubt there would have been a taking."). It did not matter that the law predated the plaintiffs' injury, that they were thus "on notice" before seeking to rebuild their home, or that they enjoyed no fundamental constitutional right to build a home at that location. The effect of the law was plain: no owner could seek compensation above the legislatively determined $50,000 limit, even if a jury determined the value of what the plaintiffs were forced to give up was 100-fold greater. In essence, the price of permission to rebuild the plaintiffs' home was the granting of an easement for which they might sue for no more than $50,000. Such a law is, in effect, indistinguishable from the damages cap at issue here, which arbitrarily devalues the injury suffered by medical malpractice plaintiffs so that, regardless of the jury's determination, their noneconomic compensation cannot exceed a set amount and therefore forecloses judicial review of what constitutes just compensation. Both such laws are plainly inconsistent with the federal Takings Clause.

Just as a State could not, consistent with the Takings Clause, exact a price from plaintiffs to pursue a cause of action they plainly have a right to pursue by seizing part of that property for a public use, Nebraska cannot enact a law to redirect a portion of Plaintiffs' noneconomic damages award for public purposes and treat the seized property as having no value. See Monongahela Navigation, 148 U.S. at 327-28 ("The right of the legislature . . . to apply the property of the citizen to the public use, and then to constitute itself the judge of its own case, to

determine what is the 'just compensation' it ought to pay therefor, . . . cannot for a moment be admitted or tolerated under our [C]onstitution."); Hudson v. Palmer, 468 U.S. 517, 539 (1984) (O'Connor, J., concurring) ("[T]he just compensation requirement means that the remedies made available must adequately compensate for any takings that have occurred.").

Nebraska's prohibition on taking property is virtually identical but applies even more strongly. Article I, section 21 states that the "property of no person shall be taken *or damaged* for public use without just compensation therefor." (emphasis added). The Nebraska Supreme Court has recognized that the use of the word "damaged" covers even a temporary imposition for a public purpose. *Gledhill v. State,* 123 Neb. 726, 243 N.W. 909, 911 (1932). It has also recognized that the value of "just compensation" is a question for the jury. *Kohl v. State, Dep't of Roads,* 214 Neb. 348, 352, 334 N.W.2d 173, 177 (1983). Here, the jury has spoken, and the difference between the capped amount and the verdict constitutes just compensation. The cap is thus unconstitutional, or the State of Nebraska must make up the difference.

G. Burden on Right of Access to the Courts.

The fundamental right of access to the courts is "grounded in the Article IV Privileges and Immunities Clause, the First Amendment Petition Clause, the Fifth Amendment Due Process Clause, and the Fourteenth Amendment Equal Protection and Due Process Clauses." *Christopher v. Harbury,* 536 U.S. 403, 415 n. 12 (2002). It provides "a separate and distinct right to seek judicial relief for some wrong." *Id.* at 415. Nebraska's Constitution has an explicit provision to the same effect. *See* Neb. Const. art. I, sec. 13. Access to the courts must be "meaningful," and not merely hypothetical. *See Mathews v. Eldridge,* 424 U.S. 319, 333 (1976). It may not be impaired and cannot "be defeated under the name of local practice[,] . . . local practice shall not be allowed to put unreasonable obstacles in the way." *Davis v. Wechsler,* 263 U.S. 22, 24-25

(1923) (Holmes, J.).

The impairment of access to the courts brought about by Section 44-2825 is not theoretical, but is the direct result of limiting recoverable damages. However, "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection." *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 163 (1803). Our courts have also long recognized that the "'cardinal principle of damages in Anglo-American law is that of *compensation* for the injured caused to plaintiff by defendant's breach of duty.'" *Carey v. Piphus,* 435 U.S. 247, 255 (1978) (quoting 2 F. Harper & F. James, Law of Torts § 25.1, at 1299 (1956) (emphasis in original).

Moreover, in *Walters v. National Association of Radiation Survivors,* 473 U.S. 305 (1985), the Supreme Court made plain that a limitation that deters lawyers from taking cases, where lawyers are essential to bring the claim, amounts to a constitutional violation. There can be no doubt that the complexity of a medical malpractice action requires sophisticated legal representation, which will not be available to victims if damages are significantly constricted. Medical malpractice litigation already involves significant costs that are not present in other types of civil litigation. *See* Randolph I. Gordon & Brook Assefa, *A Tale of Two Initiatives: Where Propaganda Meets Fact in the Debate Over America's Health Care,* 4 Seattle J. for Soc. Just. 693, 706 (Spring/Summer 2006). As one scholar wrote:

> Assessing the merits of any case usually costs at least $2,000 (as of 1991), and most cases will require an expenditure of $5,000 to $10,000 before counsel can be sure that the case is meritorious. If the case goes to trial, costs may exceed $50,000, and expenditures of $75,000 or more are not extraordinary.

Frank M. McClellan, Medical Malpractice: Law, Tactics and Ethics 102 (1994). In fact, the costs, particularly hourly fees of experts, have climbed precipitously since those figures were

established. One recent study noted that "the cost of taking a medical malpractice suit to court can be up to $450,000." David A. Hyman & Charles Silver, *Medical Malpractice Litigation and Tort Reform: It's the Incentives, Stupid,* 59 Vand. L. Rev. 1085, 1117 n.111 (2006) (quotation marks and citation omitted).

If compensatory damages are to be the principle means by which redress can be had and they themselves are limited to an arbitrary figure, the cap becomes an unjustifiable financial barrier to access to the courts. In *Boddie v. Connecticut,* 401 U.S. 371 (1971), the U.S. Supreme Court invalidated a fee requirement instituted by the state that was intended to prevent frivolous litigation. Yet, as the Court has also observed, even a legitimate concern such as the "dangers of baseless litigation" are insufficient to justify legislative efforts that would seriously cripple the vindication of rights through the judicial process. *United Mine Workers of Am., Dist. 12 v. Illinois State Bar Ass'n,* 389 U.S. 217, 223 (1967) (citations omitted).

The foreclosure of access to the courts effectuated by the cap on an economic basis strikes at the heart of the access guarantee. Given that it is the "duty of every State to provide, in the administration of justice, for the redress of private wrongs," *Missouri Pac. Ry. Co. v. Humes,* 115 U.S. 512, 521 (1885). Nebraska cannot burden access to the courts in this manner. This Court accordingly should hold that the cap is an unconstitutional restriction on access.

H. Violation of Equal Protection

The Fourteenth Amendment's guarantee of equal protection of the laws assures that similarly situated persons are equal before the law and must be treated alike. *Cleburne v. Cleburne Living Center,* 473 U.S. 432, 439 (1985). Neb. Rev. Stat. § 44-2825 plainly violates this guarantee by imposing different and additional burdens on the most catastrophically injured parties when caused by an act of medical negligence. These plaintiffs do not receive the full

measure of their damages, as determined by a jury, while those who suffer lesser injuries are fully compensated. The irrationality of protecting negligent health-care providers who cause ruinous injuries that may require millions of dollars of future medical care with protection from liability and imposing those future costs on the plaintiffs should be obvious and fails to even meet a rationality standard. These medical-malpractice claimants, by virtue of the cap do not enjoy the same rights to full compensation and do not bear the same burden by virtue of receiving arbitrarily diminished compensation for their proper claims. *See Nordlinger v. Hahn,* 505 U.S. 1, 10 (1992) (the Equal Protection Clause "keeps governmental decisionmakers from treating differently persons who are in all relevant aspects alike."). After all, the "'purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.'" *Sioux City Bridge Co. Dakota Cnty.,* 260 U.S. 441, 445 (1923), quoting *Sunday Lake Iron Co. v. Wakefield Twp.,* 247 U.S. 350, 352 (1918).

I. Neb. Rev. Stat. § 44-2825 Fails Strict-Scrutiny Analysis.

Equal-protection analysis employs strict scrutiny when a fundamental right is burdened. *Cleburne,* 473 U.S. at 440. Here, as established *supra,* the fundamental rights of trial by jury and access to the courts are burdened.[9] Strict scrutiny requires that the challenged law be narrowly tailored to serve a compelling state interest. *Republican Party of Minnesota v. White,* 536 U.S. 765, 775 (2002).

The cap was enacted in 1976 "to address a perceived medical liability crisis." *Gourley,* 265 Neb. at 937, 663 N.W.2d at 64. The Legislature determined that there was a problem recruiting health care providers to the state, resulting in a problem in the availability of health

care, as well as "too large a percentage of the cost of malpractice insurance [being] received by individuals other than the injured party." *Id.* at 944, 663 N.W.2d at 69, quoting § 44-2801.

However, a crisis is not a permanent condition, and conditions have changed in the nearly 40 years since its enactment.[10]

The federal Government Accounting Office determined that, between 1991 and 2001, the U.S. physician population grew at a 26 percent, twice the rate of overall population growth. GAO, Physician Workforce: Physician Supply Increased in Metropolitan and Nonmetropolitan Areas but Geographic Disparities Persisted, GAO-04-124, at i (Oct. 2003), available at http://www.gao.gov/new.items/d04124.pdf. During that period, no state, whether it had a damage cap of not, failed to increase its physician population. In Nebraska, the GAO reported that the overall physician population in metropolitan areas increased from 262 per 100,000 to 300 per 100,000, an increase of 14.5 percent, while the increase in non-metropolitan areas was 38.5 percent (increasing per 100,000 from 83 to 115). Id. at 25. By comparison, New Hampshire, which had no cap on damages during the relevant period, experienced increases of 19 percent and 22.5 percent, respectively, id. at 25, indicating that physician recruitment is unrelated to the existence of a damage cap.

In addition, the continued growth of the fund created by the Nebraska Hospital-Medical Liability Act created an Excess Liability Fund, which pays the capped judgments of participating health-care providers up to $2,250,000 per occurrence for incidents occurring after December 31, 2014. As reported by the Fund, its assets have steadily risen from $60.35 million in 2005 to $92.95 million in 2014. Nebraska Hospital-Medical Liability Act Excess Liability Fund, Annual Report, Table 1, p. 1 (Dec. 31, 2014). Annual paid losses and loss expense has also diminished during that same period from $14.1 million to $6.58 million. *Id.* During 2014, the Fund's

operating reserve increased by $5.45 million. *Id.* at 4. Thus, the Fund is actuarially sound, capable of paying the liability found by the jury in this case without financial stress, and does not suggest a crisis in health care affordability or availability.

A number of state supreme courts that have examined caps under their own equal-protection clauses have condemned the legislative arbitrariness of these one-size-fits-all burdens placed on the most severely injured patients. In the words of the New Hampshire Supreme Court, "[i]t is simply unfair and unreasonable to impose the burden of supporting the medical care industry solely upon those persons who are most severely injured and therefore most in need of compensation." *Carson v. Maurer,* 424 A.2d 825, 837 (N.H. 1980), *overruled on other grounds by Comty. Res. for Justice, Inc. v. City of Manchester,* 917 A.2d 707 (N.H. 2007).[11]

The Wisconsin Supreme Court, on a rational basis analysis, reached the same conclusion. *Ferdon ex rel. Petrucelli v. Wisconsin Patients Comp. Fund,* 701 N.W.2d 440, 465 (Wis. 2005). It added, even if the legislature believed the 0tort system broken or badly in need of repair, "'the cap imposed here seeks to fix that system at the sole expense of those most seriously injured. That strikes us as neither fair nor equitable.'" *Id.* at 467, quoting *Martin v. Richards,* 531 N.W.2d 70, 92 (Wis. 1995). Moreover, in the view of one justice on the Missouri Supreme Court, "[i]t is difficult to conceive of the necessity of a health care policy that expressly relies on discrimination against the small number of unfortunate individuals who suffer the most debilitating, painful, lifelong disabilities as a result of medical negligence." *Klotz v. St. Anthony's Medical Center,* 311 S.W.3d 752, 782 (Mo. 2010) (Teitelman, J., concurring) (noting the equal protection problems raised by Missouri's cap on noneconomic damages in medical malpractice cases). *See also Best v. Taylor Machine Works,* 689 N.E.2d 1057, 1077 (Ill. 1997).

Because the cap imposes the costs of another's negligence on the most severely injured

victims of medical malpractice, it treats medical-malpractice claimants differently and irrationally by imposing the excess costs of the malpractice on them and them alone. It fails equal protection.

J. Substantive Due Process

Plaintiff also respectfully suggests that the cap and the notice provisions violate substantive due process, and the minor Plaintiff's right to life, liberty and the pursuit of happiness.

Section 9. New Hospital or Clinic Arguments or Evidence on the NHMLA (Non-Constitutional)

In this brief, Plaintiffs have pointed out multiple occasions where the Clinic and/or the Hospital failed to offer evidence to support their arguments. It is possible, therefore, that either or both Defendants will attempt to file a Reply Brief to provide new evidence and/or supply new arguments with respect to their claimed coverage by the NHMLA.

Plaintiffs respectfully object to any attempt by either Defendant to do so, and request that if the effort is made, it be denied. However, if the Court permits new evidence or arguments or theories, etc., then Plaintiffs also respectfully suggest they have a due process right to file a supplemental brief to respond to the new material. As noted in *Mullane*, *supra*, the essence of due process is notice and a meaningful opportunity to be heard in response. Allowing either Defendant (should thery attempt to do so) to present new evidence, new theories, and new arguments in a reply brief, when Plaintiff would normally have no right or opportunity to respond, would constitute a denial of both notice and an opportunity to be heard.

Section 10. Summary and Conclusion

Plaintiffs and the admissions of both Defendants have demonstrated that neither the Clinic nor the Hospital ever complied with the signage requirements of the Act because the only signs they

posted—even accepting solely for the sake of argument the signs were in a suitable location—"notified" patients that some entity other than the one in which the patients were located, *i.e.*, the offices of the Clinic or the Hospital premises, had qualified for coverage under some Act. Not one of those signs ever mentioned Dr. Westcott, the Clinic or the Hospital.

For all the reasons stated above, on a purely factual basis and under the standards of strict construction of statutes in derogation of the common law, the NHMLA does not apply to the three separate jury awards in this case totaling $11,520,000 in round figures.

For all the reasons stated above, both the notice provision and the cap are unconstitutional.

The Court should enter judgment precisely in the amounts awarded by the jury, since there is no legal or factual basis for applying the cap to this case.

FOOTNOTES

1. Coke was "widely recognized by the American colonists 'as the greatest authority of his time on the laws of England.'" Payton v. New York, 445 U.S. 573, 594 (1980). See also Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 29 (1991) (Scalia, J., concurring) (recognizing Coke's unrivaled influence on American constitution writers). Coke's gloss on Magna Carta, from which the jury right is derived, "was widely accepted and imported by early American colonists who incorporated it into state constitutions." Jennifer Friesen, State Constitutional Law §6.2(a), at 349 n.16 (1996).

2. Blackstone's Commentaries were widely accepted as "the most satisfactory exposition of the common law of England. . . . [U]ndoubtedly, the framers of the Constitution were familiar with it." Schick v. United States, 195 U.S. 65, 69 (1904).

3. Cf. McDonald, 561 U.S. at 767 ("Self-defense is a basic right, recognized by many legal systems from ancient times").

4. "No Freeman shall be taken or imprisoned, or be disseised of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any other wise destroyed; nor will We not pass upon him, nor condemn him, but by lawful judgment of his Peers, or by the Law of the land." Magna Carta of King John, Chap. 39 (1215).

5. Cf. McDonald, 561 U.S. at 768 ("Blackstone was able to assert that the right to keep and bear arms was 'one of the fundamental rights of Englishmen.'").

6. Cf. McDonald, 561 U.S. at 768 ("King George III's attempt to disarm the colonists in the 1760's and 1770's 'provoked polemical reactions by Americans invoking their rights as Englishmen to keep arms.'").

7. Cf. McDonald, 561 U.S. at 768 ("those who were fearful that the new Federal

Government would infringe traditional rights such as the right to keep and bear arms insisted on the adoption of the Bill of rights as a condition for ratification of the Constitution. . .. This is surely powerful evidence that the right was regarded as fundamental in the sense relevant here.").

8. "Fully 98% of all Americans in 1868 lived in jurisdictions where they had a fundamental state constitutional right to jury trial in all civil or common law cases." Id.

9. To warrant strict scrutiny, an outright violation of the fundamental right is not necessary, merely that the right be burdened or implicated. Otherwise, equal protection would merely be duplicative of the fundamental right otherwise separately guaranteed.

10. Because of the timing required for Plaintiffs' response to Defendants' motion, Plaintiffs have not had the time to muster all the evidence available to demonstrate the lack of a current crisis. Should the Court not find other grounds sufficient to resolve this issue in Plaintiffs' favor, Plaintiffs hereby request the opportunity to place the information, all of which would be subject to judicial notice, into the record and further argue this issue of equal protection.

11. The New Hampshire Supreme Court overruled Carson because it determined that the test used in Carson did not go far enough in protecting against legislative "justifications that are hypothesized or 'invented post hoc in response to litigation,' [or] 'overbroad generalizations.'" Community Resources, 917 A.2d at 721. Carson held that intermediate scrutiny applied, but used a rational-basis analysis. Community Resources corrected that and used a more rigorous standard. New Hampshire would thus find the statute more grossly unconstitutional under the new standard.

JACKSON CUENCA, a minor, by and through his Parents and Next Friends, John Cuenca and Emily Cuenca; **JOHN CUENCA**, individually; and **EMILY CUENCA**, individually, Plaintiffs

By: _____

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing document was served by email and by hand delivering same on this 21st day of December, 2016 to:

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_____

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

JACKSON CUENCA, a minor, by and through his Parents and Next Friends, John Cuenca and Emily Cuenca, **EMILY CUENCA**, Individually, and **JOHN CUENCA**, Individually, Plaintiffs, v. **PHYSICIANS CLINIC, INC.; NEBRASKA METHODIST HEALTH SYSTEM, INC.**, d/b/a Methodist Health System, and **THE NEBRASKA METHODIST HOSPITAL**, Defendants.	CASE NO. CI12-5413 **AFFIDAVIT OF JOSEPH P. CULLAN**

Comes now Joseph P. Cullan, M.D., J.D., of lawful age, who being first duly sworn, on his oath deposes and states:

1. I am lead counsel for Plaintiffs in the above-captioned matter.

2. This Affidavit is based on my personal knowledge.

3. Plaintiffs originally filed this medical malpractice lawsuit in the District Court of Douglas County, Nebraska on June 12, 2012.

4. Paragraph 16 of the complaint alleges, "Defendants do not qualify for coverage under the Nebraska Hospital-Medical Liability Act, §44-2801 et. seq. R.R.S. 1943, as amended ("NHMLA") and have failed to comply with the requirements of the Act. Plaintiffs therefore demand strict proof of any claim by any Defendant of coverage under or compliance with the Act."

5. The original complaint was filed against the following defendants:

   a. Physicians Clinic, Inc. ("PCI")

   b. Susan A. Westcott, M.D. ("Dr. Westcott")

   c. Cecelia S. Norton, C.N.M. ("Midwife Norton")

EXHIBIT A

d. Nebraska Methodist Health System, Inc., d/b/a Methodist Health System ("NMHS"); and

e. The Nebraska Methodist Hospital (the "Hospital").

6. On July 11, 2012 Jeffery Nix, attorney for the Defendants, filed a motion to dismiss NMHS pursuant to Nebraska Pldg. Rule 12(b)(1) for lack of subject matter jurisdiction because said entity is not a real party in interest. A copy of that motion is attached hereto, marked as Attachment 1 and incorporated by reference.

7. On July 26, 2012, a brief and affidavit in support of the NMHS' motion to dismiss was prepared by defense counsel and said brief was offered to this Court and sent to Plaintiffs. The brief, a copy of which is attached hereto marked as Attachment 2 and incorporated by reference, represented all of the following as true:

a. NMHS was not engaged in the business of operating the Hospital;

b. NMHS, the Hospital and PCI are separate entities;

c. In simple terms, NMHS did not, and does not, control the Hospital or PCI;

d. NMHS does not have power to hire or terminate employees of the Hospital or PCI;

e. NMHS has separate Articles of Incorporation from that of the Hospital and PCI; and

f. NMHS is not a real party in interest.

8. Thereafter, on August 29, 2012 a joint stipulation to dismiss NMHS without Prejudice, was filed with the Court based upon the representations from Sara Juster and attorneys for Defendants that NMHS is not associated with the Hospital or PCI, and that NMHS is a completely different legal entity from the Hospital and PCI, and that NMHS was not involved in the care and/or treatment of the Plaintiffs. A copy of the stipulation is attached hereto, marked as Attachment 3 and incorporated by reference.

9. On September 7, 2012, the applicable defendants answered the operative complaint and in paragraph 10 of the answer, the applicable defendants allege that this action is subject to and governed by Nebraska Hospital-Medical Liability Act, § 44-2801 et. seq. R.R.S. 1943, as amended (the "Act") and that Plaintiffs are required to plead and prove compliance with the Act. A copy of the Answer is attached hereto, marked as Attachment 4 and incorporated by reference.

10. On August 24, 2012, Defendants filed answers to Plaintiffs' First Set of Interrogatories and addressed the issue of insurance as in the following manner: "See attached Certificate of Liability Insurance. These answering Defendants are also qualified pursuant to the Nebraska Hospital Medical Liability Act." A copy of the applicable interrogatory response and the Certificate of Liability Insurance is attached hereto, marked as Attachment 5 and incorporated by reference.

11. On August 24, 2012, Defendants served responses to Plaintiffs' First Set of Request for Production wherein request for production number 13, the applicable defendants failed to produce any valid insurance information for the applicable timeframe of the negligence in this case. A copy of Defendants' responses to the request is attached hereto, marked as Attachment 6 and incorporated by reference.

12. Defendants have never supplemented their answers to interrogatories or responses to request for production on the issue of the applicability of the NHMLA.

13. Jury Instruction number 2 states, "Defendants admit that they provided prenatal care to Plaintiff Emily Cuenca and that they provided medical care to Plaintiff Emily Cuenca during her labor and delivery of Plaintiff Jackson Cuenca. PCI admits that it was the employer of both Dr. Westcott and Midwife Norton. The Nebraska Methodist Hospital admits that it was the employer of the nurses who provided care to Plaintiffs Emily Cuenca and Jackson Cuenca." A copy of jury instruction number 2 is attached hereto, marked as Attachment 7 and incorporated by reference.

14. Jury Instruction 10 states, "A corporation can act only through its employees or agents. A corporation is bound by the knowledge possessed by its employees and agents. It is also bound by such acts or omissions of its employees as are within the scope of their employment and by such acts or omissions of its agents as are within the scope of their authority as agents. As a matter of law, at the time of the occurrence, Dr. Westcott and Midwife Norton, were acting within the scope of their employment as employees of PCI. As a matter of law, at the time of the occurrence, all of the nurses were acting within the scope of their employment as employees of the Nebraska Methodist Hospital." A copy of jury instruction number 10 is attached hereto, marked as Attachment 8 and incorporated by reference.

15. After the trial, on November 28, 2016, defendants provided an affidavit from Stephanie Hobelman, CISR, CIC with several attachments. A copy of the letter and attachments

are attached hereto, marked as Attachment 9 and incorporated by reference.

16. Exhibit A and Exhibit B to the Hobelman Affidavit are addressed to the dismissed defendant Nebraska Methodist Health Systems, 8511 West Dodge Road, Linda Kazakevicius, Omaha, NE, 68114 and references the dismissed defendant Nebraska Methodist Health Systems as a qualified healthcare provider under the term of the Nebraska Hospital Medical Liability Act.

17. Exhibit A states, "On December 10, 2009 we received $XXXXXX, which represents XX% of the premium which you are being charged by Zurich American Insurance Company for $500,000/$3,000,000 limits coverage. Your renewal coverage with the Act is effective from December 1, 2009 to December 1, 2010.

18. Exhibit B states, "On December 10, 2009 we received $XXXXXX, which represents XX% of the premium which you are being charged by Zurich American Insurance Company for $500,000/$1,000,000 limits coverage. Your renewal coverage with the Act is effective from December 1, 2009 to December 1, 2010.

19. Paragraph 3 of both exhibit A and B states, "A qualified health care provider shall post and keep posted in a suitable location where all patients may easily see it, a sign of the size and type prescribed by the Director stating they have qualified under the provisions of the Nebraska Hospital-Medical Liability Act 44-2821(4).

20. Page 2 of Exhibit A to the Hobelman Affidavit lists several addressees including, but not limited to, defendants PCI and NMH.

21. Page 5 of exhibit B lists Dr. Westcott as an additional addressee.

22. Midwife Norton is not a listed addressee on either exhibit A or B of the Hobelman Affidavit.

23. As of December 20, 2016, Midwife Norton has not produced evidence of signage in compliance with paragraph 3 exhibit A or 44-2821(4).

24. As of December 20, 2016, PCI has not produced a picture nor other evidence of a signage in compliance with paragraph 3 of exhibit A or 44-2821(4).

25. As of December 20, 2016, the Hospital has not produced a picture nor evidence of a signage in compliance with paragraph 3 of the letter or 44-2821(4).

26. As of December 20, 2016, Dr. Westcott has not produced evidence of signage in compliance with paragraph 3 of exhibit B letter or 44-2821(4).

27. On page 2 of attachment 5, the dismissed defendant NMHS is the covered entity

on the insurance sheet as provided by the defense during discovery. The document makes no reference to insurance coverage for any named defendant in the above captioned matter.

28. Further page 2 of attachment 5 denotes the Zurich Policy, #HPC983014801, as an umbrella policy, not a primary policy, with limits of $1,000,000/$3,000,000.

29. Page 2 of attachment 5 identifies Nebraska Methodist Self-Insured Tru [sic], #NMHS20111, as the primary insurance policy.

30. The Nebraska Methodist Self-Insured Tru [sic] is not an authorized malpractice carrier as identified by the Nebraska Department of Insurance. See attached copy of authorized medical malpractice carriers as downloaded from the Department of Insurance Web site, which is marked as Attachment 10 and incorporated by reference.

31. Dr. Westcott, Midwife Norton, PCI, and NMH are not mentioned as covered persons or entities on page 2 of attachment 5 and as of December 20, 2016 the defense has not produced any document identifying any defendant as a covered entity by an authorized malpractice carrier for the state of Nebraska.

32. The documents provided as Attachments to this Affidavit are true and correct copies of the originals, according to my best information and belief.

Further, affiant sayeth not.

Joseph P. Cullan

Subscribed and sworn to before me, a notary public, this 21 day of December, 2016.

Notary Public

My commission expires:

GENERAL NOTARY - State of Nebraska
ROSALYN CRATE
My Comm. Exp. January 13, 2020

IN THE DISTRICT COURT FOR DOUGLAS COUNT

JACKSON CUENCA, A Minor, by and through his Parents and Next Friends, JOHN and EMILY CUENCA, and JOHN and EMILY CUENCA, Individually, Plaintiffs, vs. PHYSICIANS CLINIC, INC.; SUSAN A. WESTCOTT, M.D.; CECELIA S. NORTON, C.N.M..; NEBRASKA METHODIST HEALTH SYSTEM, INC., d/b/a Methodist Health System, and THE NEBRASKA METHODIST HOSPITAL Defendants.	CASE NO.: CI 12-5413 **MOTION TO DISMISS (RULE 12(b)(6))**

COME NOW the undersigned Defendants and request this Court dismiss Plaintiffs' Complaint. In support of this Motion, Defendants submit that, pursuant to Neb. Pldg. R. 12(b)(6), Plaintiffs, John Cuenca and Emily Cuenca, have failed to state facts sufficient to constitute a cause of action for loss of consortium. In addition, request is hereby made to dismiss Defendant, Nebraska Methodist Health System, Inc., pursuant to Neb. Pldg. R. 12(b)(1) for lack of subject matter jurisdiction because said entity is not a real party in interest. This motion shall be based on the pleading in this matter, on affidavit, on a brief of the law and facts and any other evidence presented at hearing.

WHEREFORE, the undersigned Defendants request that this Court enter its Order dismissing Plaintiffs' Complaint.

ATTACHMENT 1

Dated this 10th day of July, 2012.

PHYSICIANS CLINIC, INC.; and
SUSAN A. WESTCOTT, M.D.;
CECELIA S. NORTON, C.N.M..;
NEBRASKA METHODIST HEALTH SYSTEM, INC,
d/b/a Methodist Health System, and
THE NEBRASKA METHODIST
HOSPITAL, Defendants,

By: _____

Jeffrey A. Nix, (NE) #23842
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NOTICE OF HEARING

Take notice that hearing on Defendants' Motion to Dismiss (Rule 12(b)(6)) shall be heard before the Honorable Marlon Polk in the District Court of Douglas County, Nebraska, Courtroom No. 10, Fourth Floor, on the 8th day of August, 2012 at 1:00 p.m.

_____
Jeffrey A. Nix, #23842

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing document was served, via United States mail, postage prepaid, this 10th day of July, 2012, upon the following:

Mr. Patrick Cullan
Mr. Joseph Cullan
Cullan & Cullan, L.L.C.
1113 Harney Street
Omaha, NE 68102

_____

00153/0032143/00268750

IN THE DISTRICT COURT FOR DOUGLAS COUNTY, NEBRASKA

JACKSON CUENCA, A Minor, by and through his Parents and Next Friends, JOHN and EMILY CUENCA, and JOHN and EMILY CUENCA, Individually, Plaintiffs, vs. PHYSICIANS CLINIC, INC.; SUSAN A. WESTCOTT, M.D.; CECELIA S. NORTON, C.N.M..; NEBRASKA METHODIST HEALTH SYSTEM, INC., d/b/a Methodist Health System, and THE NEBRASKA METHODIST HOSPITAL Defendants.	)	CASE NO.: CI 12-5413

BRIEF IN SUPPORT OF MOTION TO DISMISS 12(b)(6)

Prepared and submitted by:

Jeffrey A. Nix, (NE) #23842
SODORO, DALY & SODORO, P.C.
7000 Spring Street
Omaha, NE 68106
(402) 397-6200 - telephone
(402) 397-6290 - fax
jnix@sodorolaw.com

ATTACHMENT 2

I. FACTS

Plaintiffs, Jackson Cuenca, a minor, by and through his Parents and Next Friends, and John and Emily Cuenca, individually (hereinafter collectively referred to as "Plaintiffs"), filed a medical negligence action against the moving Defendants. Plaintiffs' Complaint asserts that the purported negligence of the Defendants resulted in damages and injuries (Plaintiff's Complaint, pp. 5-7, paragraphs 6-9).

Plaintiffs claim that Defendant, Nebraska Methodist Health System, Inc. (hereinafter referred to as NMHS) owned and operated Methodist Hospital. (Id., pp. 2-3, paragraph 13).

Plaintiffs John and Emily Cuenca (hereinafter referred to as "the Parents") further assert a loss of consortium claim. Specifically, the Parents allege they have suffered a loss of their child's "care, comfort, companionship, etc . . ." (Id., p. 9)

II. THE PARENTS HAVE IMPROPERLY ALLEGED A CLAIM FOR LOSS OF CONSORTIUM

The Parents are alleging a loss of consortium due to the injuries sustained by their child. (Id.) However, Nebraska does not recognize such a claim.

In discussing a parent's claim regarding an injured child, the Court in Guenther by Guenther v. Stollberg, 242 Neb. 415, 416, 495 N.W. 2d 286 (1993), noted:

> We have defined consortium to mean comfort, society, love and protection . . . But while we have recognized that a parent has a cause of action for the loss of a nonfatally injured minor child's services, we have neither been cited to nor are we aware of any case in which we have permitted a parent to recover for the loss of a nonfatally injured minor child's consortium.

(Citations omitted)

Therefore, parents are barred from asserting a claim for loss of consortium. Instead, a parent's claim is restricted to only the child's loss of economic services during minority as well as economic expenses they will likely incur related to the child's medical treatment. Macku By and Through Macku v. Drackett Products, Co., 216 Neb. 176, 179, 343 N.W. 2d 58, 60 (1984) ("... the claim of a parent is based on the loss of services during minority and the necessary expenses of treatment for the injured child.") (Citations omitted)

As discussed above, there is no binding authority in Nebraska which recognizes the Parents cause of action for loss of their child's consortium in the case at bar. Hence, said claim should be dismissed.

III. NEBRASKA METHODIST HEALTH SYSTEM, INC. IS NOT A REAL PARTY IN INTEREST

A party can object to an action by asserting it is not a real party in interest. This is accomplished pursuant to a Nebr. Pldg. R. 12(b)(1) motion to dismiss for lack of subject matter jurisdiction. Such a party may rely on evidence outside the pleadings to establish a lack of subject matter jurisdiction. Washington v. Conley, 273 Neb. 908, 913, 734 N.W. 2d 306, 311 (2007).

As more thoroughly discussed in the Affidavit of Sara Juster, NMHS was not engaged in the business of operating the Nebraska Methodist Hospital. Thus, Plaintiffs have improperly alleged that NMHS and Nebraska Methodist Hospital should be "collectively referred to as 'Methodist Hospital'." (Plaintiff's Complaint, p. 3, paragraph 14) Plaintiffs are likewise incorrect in alleging NMHS (as "Methodist Hospital") is liable related to the subject labor and delivery. (Id., p. 6, paragraph 7 and p. 9) NMHS, Nebraska Methodist Hospital and Physicians Clinic, Inc. are separate entities. In simple terms, NMHS did not, and does not, control Nebraska Methodist Hospital and

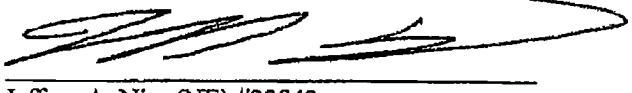
Physicians Clinic, Inc. NMHS does not have power to hire or terminate the Hospital and Clinic's employees. Furthermore, NMHS has a separate Articles of Incorporation from that of the Hospital and the Clinic.

IV. CONCLUSION

As stated more thoroughly above, Nebraska does not recognize the Parents' claim for loss of their child's consortium resulting from the child's nonfatal injuries. Additionally, NMHS is not a real party in interest. Thus, the Complaint should be dismissed.

Respectfully Submitted,

PHYSICIANS CLINIC, INC.; and
SUSAN A. WESTCOTT, M.D.;
CECELIA S. NORTON, C.N.M;
NEBRASKA METHODIST HEALTH SYSTEM,
INC, d/b/a Methodist Health System, and
THE NEBRASKA METHODIST
HOSPITAL, Defendants,

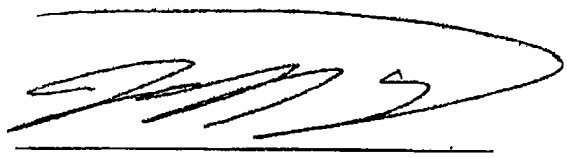
By: 

Jeffrey A. Nix, (NE) #23842
SODORO, DALY & SODORO, P.C.
7000 Spring Street
Omaha, NE 68106
(402) 397-6200 - telephone
(402) 397-6290 - fax
jnix@sodorolaw.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing document was served, via United States mail, postage prepaid, this 26th day of July, 2012, upon the following:

Mr. Patrick Cullan
Mr. Joseph Cullan
Cullan & Cullan, L.L.C.
1113 Harney Street
Omaha, NE 68102



00153/0032143/00268750

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

JACKSON CUENCA, a minor, by and through his Parents and Next Friends, John and Emily Cuenca, **EMILY CUENCA**, Individually, and **JOHN CUENCA**, Individually, Plaintiffs, vs. **PHYSICIANS CLINIC, INC.**; **SUSAN A. WESTCOTT, M.D.**; **CECELIA S. NORTON, C.N.M.**; **NEBRASKA METHODIST HEALTH SYSTEM, INC.**, d/b/a Methodist Health System, and **THE NEBRASKA METHODIST HOSPITAL**, Defendants.	CASE NO. CI 12-5413 JOINT STIPULATION TO DISMISS DEFENDANT NEBRASKA METHODIST HEALTH SYSTEM WITHOUT PREJUDICE

All parties to the above-captioned matter hereby stipulate to the dismissal of Defendant Nebraska Methodist Health System, d/b/a Methodist Health System, from this case, without prejudice, subject to the following conditions:

1. No other Defendant will be dismissed from this case as a result of this Joint Stipulation.

2. The remaining Defendants will not object to Plaintiffs' discovery requests, or refuse to provide responsive information, on the ground that the information is in the possession, custody or control of Nebraska Methodist Health System.

3. The remaining Defendants reserve the right to make any other objections to Plaintiffs' discovery requests that Defendants deem appropriate.

JACKSON CUENCA, a minor, by and through his parents, and Next Friends, JOHN CUENCA and EMILY CUENCA, EMILY CUENCA, Individually, JOHN CUENCA, Individually,

By _____
Patrick Cullan #23576
Joseph Cullan #22145

Jeffrey Nix, for the Defendants

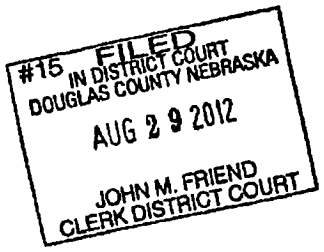
ATTACHMENT 3

1113 Harney St.
Omaha, NE 68102
(402) 397-7600
ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing document was served by mailing same via First Class United States Mail, postage prepaid this ____ day of August, 2012 to the following counsel:

[redacted]
Jeffrey Nix
Sodoro, Daly &Sodoro, P.C.
200 Century Professional Plaza
7000 Spring Street
Omaha, NE 68106
ATTORNEYS FOR DEFENDANTS


#15 FILED
IN DISTRICT COURT
DOUGLAS COUNTY NEBRASKA
AUG 29 2012
JOHN M. FRIEND
CLERK DISTRICT COURT

IN THE DISTRICT COURT FOR DOUGLAS COUNTY, NEBRASKA

JACKSON CUENCA, A Minor, by and through his Parents and Next Friends, John and Emily Cuenca, EMILY CUENCA, Individually, and JOHN CUENCA, Individually, Plaintiffs, vs. PHYSICIANS CLINIC, INC.; SUSAN A. WESTCOTT, M.D.; CECELIA S. NORTON, C.N.M..; and THE NEBRASKA METHODIST HOSPITAL Defendants.	CASE NO.: CI 12-5413 **ANSWER**

COMES NOW the undersigned Defendants, and for the Answer to Plaintiffs' Complaint, admit, deny and allege as follows:

1. Defendants are without knowledge as to the statistical information concerning the Plaintiffs and denies same.
2. Defendants deny each and every other allegation of the Plaintiffs' Complaint excepting those allegations constituting admissions in favor of the answering Defendants and against the interests of the Plaintiffs.
3. Defendants admit that at all relevant times they were qualified within the meaning of the Nebraska Hospital Medical Liability Act and enjoy all the rights and privileges provided thereunder.
4. The undersigned Defendants allege that the care provided to the Plaintiffs met the applicable standard of care for healthcare providers under the same or similar

circumstances in Omaha, Douglas County, Nebraska, or a similar community.

5. The undersigned Defendants allege that the alleged injuries/damages complained of by Plaintiffs were not proximately caused by any treatment, actions, or inactions, of the undersigned Defendants.

6. The undersigned Defendants allege that Plaintiffs have failed to state facts sufficient to constitute a cause of action against the answering Defendants.

7. The undersigned Defendants allege that Plaintiffs failed to mitigate their damages.

8. The undersigned Defendants deny the nature and extent of Plaintiffs' injuries/damages, if any, and places the Plaintiffs on strict proof.

9. The undersigned Defendants deny liability as alleged in Plaintiffs' Complaint.

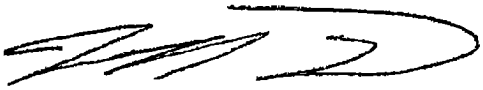
10. Allege that this action is subject to and governed by the Nebraska Hospital Medical Liability Act and that Plaintiff is required to plead and prove compliance with such.

11. Allege that this action is barred by the applicable statute of limitations.

12. Allege that, pursuant to a previous stipulation, Nebraska Methodist Health System, Inc., d/b/a Methodist Health System, was dismissed as a party in this action.

WHEREFORE, these answering Defendants pray that Plaintiffs' Complaint be dismissed and costs taxed to Plaintiffs.

PHYSICIANS CLINIC, INC.; and
SUSAN A. WESTCOTT, M.D.;
CECELIA S. NORTON, C.N.M.; and
THE NEBRASKA METHODIST
HOSPITAL, Defendants,

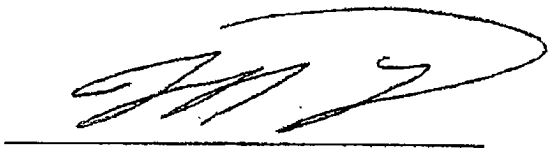
By: 

Jeffrey A. Nix, (NE) #23842
SODORO, DALY & SODORO, P.C.
7000 Spring Street
Omaha, NE 68106
(402) 397-6200 - telephone
(402) 397-6290 - fax
jnix@sodorolaw.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing document was served, via United States mail, postage prepaid, this 7th day of September, 2012, upon the following:

Mr. Patrick Cullan
Mr. Joseph Cullan
Cullan & Cullan, L.L.C.
1113 Harney Street
Omaha, NE 68102



00153/0032143/00272509.wpd

11-15. For each primary, excess, umbrella or other insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment, state:

a. The name of the insurance company;

b. The policy number or other identification;

c. The policy limits, on a per person and/or per incident or event basis;

d. If the policy is a "declining value" policy, *i.e.*, a policy in which the policy limits are reduced by attorney fees, litigation expenses, etc., for each such policy state with particularity each event, occurrence, type of fee, type of expense, or anything else which will or may cause the policy limits to be reduced, both in general and with specific reference to this litigation, and

e. If the company has asserted that the policy does not provide coverage for the occurrence described in the Complaint, then explain in detail the basis for the alleged exclusion or lack of coverage.

ANSWER: See attached Certificate of Liability Insurance. These answering Defendants are also qualified pursuant to the Nebraska Hospital Medical Liability Act.

16. Please describe with specificity the nature of your relationship with Dr. Westcott M.D., Cecelia S. Norton C.N.M., and Physicians Clinic, Inc.

ANSWER: Dr. Westcott has privileges to perform care at Nebraska Methodist Hospital. Ms. Norton has a scope of practice at Nebraska Methodist Hospital. Nebraska Methodist Health System, Nebraska Methodist Hospital and Physicians Clinic, Inc. are separate entities.

17. Please state the name and job title of each employee, agent, servant, or ostensible or apparent agent of Methodist Hospital who provided healthcare services to Emily Cuenca and Jackson Cuenca in the 24 hours before and after the birth of Jackson Cuenca.

ANSWER: Objection. Vague, ambiguous, burdensome and overbroad.

CERTIFICATE OF LIABILITY INSURANCE

DATE (MM/DD/YYYY): 12/1/2011

THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AFFIRMATIVELY OR NEGATIVELY AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW. THIS CERTIFICATE OF INSURANCE DOES NOT CONSTITUTE A CONTRACT BETWEEN THE ISSUING INSURER(S), AUTHORIZED REPRESENTATIVE OR PRODUCER, AND THE CERTIFICATE HOLDER.

IMPORTANT: If the certificate holder is an ADDITIONAL INSURED, the policy(ies) must be endorsed. If SUBROGATION IS WAIVED, subject to the terms and conditions of the policy, certain policies may require an endorsement. A statement on this certificate does not confer rights to the certificate holder in lieu of such endorsement(s).

PRODUCER	CONTACT NAME:	
The Harry A. Koch Co. P.O. Box 45279 Omaha NE 68145-0279	PHONE (A/C, No, Ext): 402-861-7000	FAX (A/C, No):
	E-MAIL ADDRESS:	
	INSURER(S) AFFORDING COVERAGE	NAIC #
INSURED	INSURER A : Nebraska Methodist Self-Insured Tru	
Nebraska Methodist Health System, Inc. 8511 West Dodge Road Omaha NE 68114	INSURER B : Zurich American Insurance Company	16535
	INSURER C :	
	INSURER D :	
	INSURER E :	
	INSURER F :	

COVERAGES **CERTIFICATE NUMBER: 2020901247** **REVISION NUMBER:**

THIS IS TO CERTIFY THAT THE POLICIES OF INSURANCE LISTED BELOW HAVE BEEN ISSUED TO THE INSURED NAMED ABOVE FOR THE POLICY PERIOD INDICATED. NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THIS CERTIFICATE MAY BE ISSUED OR MAY PERTAIN, THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND CONDITIONS OF SUCH POLICIES. LIMITS SHOWN MAY HAVE BEEN REDUCED BY PAID CLAIMS.

INSR LTR	TYPE OF INSURANCE	ADDL INSR	SUBR WVD	POLICY NUMBER	POLICY EFF (MM/DD/YYYY)	POLICY EXP (MM/DD/YYYY)	LIMITS	
A	GENERAL LIABILITY			NMHS20111	12/1/2011	12/1/2012	EACH OCCURRENCE	$2,000,000
	X COMMERCIAL GENERAL LIABILITY						DAMAGE TO RENTED PREMISES (Ea occurrence)	$100,000
	CLAIMS-MADE X OCCUR						MED EXP (Any one person)	$5,000
	X PROF LIABILITY						PERSONAL & ADV INJURY	$2,000,000
	X CLAIMS MADE						GENERAL AGGREGATE	$9,000,000
	GEN'L AGGREGATE LIMIT APPLIES PER:						PRODUCTS - COMP/OP AGG	$9,000,000
	POLICY PRO-JECT LOC							$
	AUTOMOBILE LIABILITY						COMBINED SINGLE LIMIT (Ea accident)	$
	ANY AUTO						BODILY INJURY (Per person)	$
	ALL OWNED AUTOS / SCHEDULED AUTOS						BODILY INJURY (Per accident)	$
	HIRED AUTOS / NON-OWNED AUTOS						PROPERTY DAMAGE (Per accident)	$
								$
B	X UMBRELLA LIAB X OCCUR			HPC983014801	12/1/2011	12/1/2012	EACH OCCURRENCE	$1,000,000
	EXCESS LIAB CLAIMS-MADE						AGGREGATE	$3,000,000
	DED RETENTION $							$
	WORKERS COMPENSATION AND EMPLOYERS' LIABILITY						WC STATU-TORY LIMITS / OTH-ER	
	ANY PROPRIETOR/PARTNER/EXECUTIVE OFFICER/MEMBER EXCLUDED? Y/N	N/A					E.L. EACH ACCIDENT	$
	(Mandatory in NH)						E.L. DISEASE - EA EMPLOYEE	$
	If yes, describe under DESCRIPTION OF OPERATIONS below						E.L. DISEASE - POLICY LIMIT	$

DESCRIPTION OF OPERATIONS / LOCATIONS / VEHICLES (Attach ACORD 101, Additional Remarks Schedule, if more space is required)

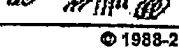
CERTIFICATE HOLDER

Nebraska Methodist Health System; Attn: Linda Kazakevicius
8511 West Dodge Road
Omaha NE 68114

CANCELLATION

SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, NOTICE WILL BE DELIVERED IN ACCORDANCE WITH THE POLICY PROVISIONS.

AUTHORIZED REPRESENTATIVE



Nebraska Hospital-Medical Liability Act
Excess Liability Fund

Bruce R. Ramge
Director of Insurance and Fund Administrator

In Reply:
c/o Michael C. Davlin, Esq.
2120 S. 72nd Street, Suite 1200
Omaha, NE 68124
402/391-6777 • Fax 402/390-9221
Email: mcdavlaw@aol.com

941 "O" Street, Lincoln, NE 68508
402/471-2201 • Fax 402/471-2990

August 13, 2012

Jeffrey A. Nix, Esq.
Sodoro, Daly & Sodoro
7000 Spring
Omaha, NE 68106

Re: Cuenca v. Physicians Clinic

Dear Mr. Nix:

Pursuant to your request, this is to advise that, concerning the above-referenced action, Physicians Clinic, Inc., Susan Westcott, MD, Cecilia Norton CNM, Nebraska Methodist Health System, Inc. and Nebraska Methodist Hospital were all qualified and all entitled to Excess Fund coverage for actions taken on the date(s) involved in this action.

Thank you.

Respectfully yours,

Michael C. Davlin
Claims Administrator

9. From the time you first provided healthcare services to Mrs. Cuenca relating to her pregnancy, and/or the labor and delivery of Jackson, all physical or electronic records of correspondence or communications in any form between you and any person or entity where the subject matter in whole or in part was the healthcare services you provided to Jackson or Emily. This request expressly does not include correspondence or communications between you and your attorney or his or her law firm.

RESPONSE: Objection. Vague, ambiguous, overbroad, burdensome and peer review privileges.

10. All rules, regulations, protocols, policies, procedures, guidelines, etc., of Methodist Hospital, which were in effect November of 2010, relating in whole or in part to obstetrical, labor and delivery or related healthcare services, including but not limited to fetal heart monitoring.

RESPONSE: See attached fetal heart monitoring policies and list of policies.

11. All physical documents or records, or electronically stored information identified by you in response to Plaintiff's First Interrogatories:

RESPONSE: See attached.

12. A list of all medical literature, *e.g.*, treatises, textbooks, periodicals, learned articles, etc., or other informational or educational materials, whether in physical or electronic form, relating in whole or in part to obstetrics and/or fetal heart monitoring, which were in your possession, custody or control in November of 2010, including but not limited to medical literature, informational or educational materials, and which were available to the labor and delivery nurses or any other agents, servants or employees of Methodist Hospital.

RESPONSE: Not aware of any such "list".

13. If you claim you were covered by and in compliance with the Nebraska Hospital-Medical Liability Act, §44-2801 *et. seq.*, R.R.S. 1943, as amended ("NHMLA"), on January 1, 2011, and thereafter, please produce the physical or electronic records which demonstrate both coverage and compliance with the terms and conditions of the NHMLA.

RESPONSE: Objection. Vague, ambiguous, burdensome, not relevant and overbroad.

INSTRUCTION NO. 2

A. Plaintiffs' Claims

This case involves the labor of Plaintiff Emily Cuenca and the delivery of Plaintiff Jackson Cuenca on November 28, 2010 at the Nebraska Methodist Hospital. The Plaintiffs Jackson Cuenca and Emily Cuenca claim that they were rendered negligent medical care by the Defendants Physicians Clinic, Inc. and the Nebraska Methodist Hospital, by and through their employees, Susan Westcott, MD, Cecelia Norton, a certified nurse midwife, and staff nurses and that such negligence resulted in injury to Jackson Cuenca and Emily Cuenca and damages to Jackson Cuenca, Emily Cuenca and John Cuenca.

Plaintiffs claim that the Defendants Physicians Clinic, Inc. and the Nebraska Methodist Hospital were negligent in one or more of the following:

1. In failing to properly manage the labor of Plaintiff Emily Cuenca;
2. In failing to properly manage the delivery of Plaintiff Jackson Cuenca;
3. In failing to adequately inform Plaintiffs of all available treatment choices so that Plaintiffs could make a reasonable and informed decision regarding treatment; and
4. In failing to properly apply the forceps during the delivery of Plaintiff Jackson Cuenca

Defendants admit that they provided prenatal care to Plaintiff Emily Cuenca and that they provided medical care to Plaintiff Emily Cuenca during her labor and delivery of Plaintiff Jackson Cuenca. Defendant Physicians Clinic, Inc. admits that it was the employer of both Susan Westcott, MD and Cecilia Norton, the midwife.

GIVEN BY
ATTACHMENT 7

INSTRUCTION NO. 2
(continued)

The Nebraska Methodist Hospital admits that it was the employer of the nurses who provided care to Plaintiffs Emily Cuenca and Jackson Cuenca.

The Defendants deny that any care they provided to Plaintiffs Jackson Cuenca and Emily Cuenca was professionally negligent. The Defendants claim that at all times all of the care providers acted as reasonable care providers in similar circumstances would have acted. The Defendants further maintain that they are not a cause of any injury to the Plaintiffs.

B. BURDEN OF PROOF

Before the Plaintiff Jackson Cuenca, a minor through his parents John and Emily Cuenca, can recover against a Defendant, the Plaintiff Jackson Cuenca must prove, by the greater weight of the evidence, each and all of the following:

1. That a Defendant was negligent in one or more of the ways claimed by the Plaintiff Jackson Cuenca;

2. That this negligence was a proximate cause of damage to Plaintiff Jackson Cuenca; and

3. The nature and extent of that damage.

GIVEN BY

INSTRUCTION NO. 2
(continued)

Before the Plaintiff Emily Cuenca can recover against Defendant, the Plaintiff Emily Cuenca must prove, by the greater weight of the evidence, each and all of the following:

1. That a Defendant was negligent in one or more of the ways claimed by the Plaintiff Emily Cuenca;

2. That this negligence was a proximate cause of damages to Plaintiff Emily Cuenca; and

3. The nature and extent of that damage.

Before the Plaintiff John Cuenca can recover against a Defendant, the Plaintiff John Cuenca must prove, by the greater weight of the evidence, each and all of the following:

1. That a Defendant was negligent in one or more of the ways claimed by the Plaintiff Emily Cuenca;

2. That this negligence was a proximate cause of some damage to Plaintiff Emily Cuenca;

3. That the damage to Plaintiff Emily Cuenca is a proximate cause of some damage to the Plaintiff John Cuenca; and

4. The nature and extent of that damage.

GIVEN BY

INSTRUCTION NO. 2
(continued)

B. EFFECT OF FINDINGS

If a Plaintiff has not met his or her burden of proof, then your verdict must be for the Defendants and against that Plaintiff and you must complete Verdict Forms No. 4, 5 or 6 which will be provided to you at the end of these instructions.

On the other hand, if a Plaintiff has met his or her burden of proof, your verdict must be for that Plaintiff and against one or both of the Defendants and you must decide how much money will fairly compensate that Plaintiff for their injuries or damages. To do that you must complete Verdict Forms No. 1, 2 or 3 which will be provided to you at the end of these instructions.

GIVEN BY

INSTRUCTION NO. 10

A corporation can act only through its employees or agents. A corporation is bound by the knowledge possessed by its employees and agents. It is also bound by such acts or omissions of its employees as are within the scope of their employment and by such acts or omissions of its agents as are within the scope of their authority as agents.

As a matter of law, at the time of the occurrence, Susan A. Westcott, M.D. and Cecelia Norton, Certified Nurse Midwife, were acting within the scope of their employment as employees of Physicians Clinic, Inc.

As a matter of law, at the time of the occurrence, all of the nurses were acting within the scope of their employment as employees of the Nebraska Methodist Hospital.

GIVEN BY

ATTACHMENT 8

fund CRF eff 2009

STATE OF NEBRASKA

DEPARTMENT OF INSURANCE
Ann M. Frohman
Director

Dave Heineman
Governor

December 11, 2009

NEBRASKA METHODIST HEALTH SYSTEMS
8511 WEST DODGE ROAD
% LINDA KAZAKEVICIUS
OMAHA NE 68114

RE: Nebraska Hospital-Medical Liability Act
See Attached List

Dear Healthcare Provider:

On December 10, 2009, we received $[redacted], which represents [redacted]% of the premium which you are being charged by Zurich American Insurance Company for $500,000/$3,000,000 limits coverage. Your renewal coverage with the Act is effective from December 1, 2009 to December 1, 2010.

On December 1, 2010, your current coverage under the Act will expire. Each year, before your coverage expires, it will be necessary for you to send us a new proof of insurance and pay the applicable surcharge in order to continue coverage from that date. Please note that the surcharges are based on the full premium without credit for any deductible that may be applicable.

As a reminder, a qualified health care provider shall post and keep posted in a suitable location where all patients may easily see it, a sign of the size and type prescribed by the Director stating they have qualified under the provisions of the Nebraska Hospital-Medical Liability Act 44-2821(4).

If you have any questions regarding this transaction or the Act, please write or call the Nebraska Department of Insurance at (402) 471-2201.

Sincerely,

Stephanie Hobelman, CISR, CIC
Insurance Analyst
Nebraska Excess Liability Fund

EXHIBIT
A
ATTACHMENT 9

Additional Addressees:

NEBRASKA METHODIST HEALTH SYSTEMS
METHODIST HEALTH PARTNERS INC
NEBRASKA METHODIST COLLEGE OF NURSING AND ALLIED HEALTH
NEBRASKA METHODIST FOUNDATION
NEBRASKA METHODIST HOSPITAL (THE)
PHYSICIANS CLINIC INC
PHYSICIANS RESOURCES, INC.

Lincoln Stn. MDS 2009

STATE OF NEBRASKA

DEPARTMENT OF INSURANCE
Ann M. Frohman
Director

Dave Heineman
Governor

December 11, 2009

NEBRASKA METHODIST HEALTH SYSTEMS
8511 WEST DODGE ROAD
% LINDA KAZAKEVICIUS
OMAHA NE 68114

RE: Nebraska Hospital-Medical Liability Act
See Attached List

Dear Healthcare Provider:

On December 10, 2009, we received $[redacted], which represents [redacted]% of the premium which you are being charged by Zurich American Insurance Company for $500,000/$1,000,000 limits coverage. Your renewal coverage with the Act is effective from December 1, 2009 to December 1, 2010.

On December 1, 2010, your current coverage under the Act will expire. Each year, before your coverage expires, it will be necessary for you to send us a new proof of insurance and pay the applicable surcharge in order to continue coverage from that date. Please note that the surcharges are based on the full premium without credit for any deductible that may be applicable.

As a reminder, a qualified health care provider shall post and keep posted in a suitable location where all patients may easily see it, a sign of the size and type prescribed by the Director stating they have qualified under the provisions of the Nebraska Hospital-Medical Liability Act 44-2821(4).

If you have any questions regarding this transaction or the Act, please write or call the Nebraska Department of Insurance at (402) 471-2201.

Sincerely,

Stephanie Hobelman, CISR, CIC
Insurance Analyst
Nebraska Excess Liability Fund

EXHIBIT
Witness
B

Additional Addressees:

KEVIN M AHLERS, MD
MIKALA ALBERTSON, MD
GARY J ANTHONE, MD
EMILIO ARISPE, MD
STEVEN T BAILEY, MD
CRAIG A BASSETT, MD
ANN MARIE BAUSCH, MD
JIRI B BEDRNICEK, MD
PAIGE S BERRYMAN, MD
JULIA K BISHOP, MD
DANIEL G BOHI, MD
PRIYANKA BORAH, MD
LORI B BRUNNER-BUCK, MD
STEVEN BUDA, MD
MARK DWIGHT CARLSON, MD
ABBY CHELOHA, MD
JUDE T COOK, MD
TERENCE M COONEY, MD
NANCY E CORNISH, MD
RUSSEL L COWLES III, MD
M. SUZAN CRABB, DO
DAVID R CROTZER, MD
ABELARDO C CRUZ, MD
RAMONA DARYANI, MD
DENNIS DE ROIN, MD
SCOTT M DEBATES, MD
ELIZABETH DENMAN, MD
MARGARITA DICKEY, MD
TAMARA DOEHNER, MD
MICHAEL JOHN DOMALAKES, MD
BERNARD W DOUGLAS, MD
RANDY DUCKERT, MD
GREGORY L EAKINS, MD
DEANNA L EDWARDS, MD
GEORGE J EMODI, MD
CAREY ERTZ, DO
JOHN JAMES FERGUSON, MD
FRED W FEUERSTEIN, MD
LEWIS JOSEPH FISHER, MD
ROBERT J FONDA, MD
MARK G FRANCO, MD
LAURA A FRIGYES, MD
STUART B FRIGYES, MD
JOHN GENTRY, MD
SARAH V GERNHART, MD

AMIR S GHOLAMI, MD
MICHAEL F GITTER, MD
NORMAN L GROSBACH, MD
GARY JOSEPH GUSTAFSON, MD
LANETTE MCKOWN GUTHMANN, MD
MICHAEL J HALLER, MD
CHRISTINE HANS, MD
KATHERINE HANSON, MD
MANJU B HAPKE, MD
KRISTIE D HAYES, MD
GENE N HERBEK, MD
KRISTEN L HOFFMAN, MD
TIEN-SHEW WILLIAM HUANG, MD
TY D HUEBERT, MD
HAROLD R HUFF, MD
GREGORY HUTTEGER, DO
SHEILA M ISAACSON, MD
JOEDY RAY ISTAS, MD
KAYVON D IZADI, MD
REBECCA JACOBI, MD
AJOY JANA, MD
CHRISTINE JEFFREY, MD
KENT D JOHNSON, MD
CAROLEE V JONES, MD
SUSAN D KEASLING, MD
DARREN R KEISER, MD
MICHELLE S KNOLLA, MD
SHANE KOHL, MD
RUDOLF KOTULA, M.D.
KATRENA LACEY, MD
DEANNA J LARSON, MD
JOHN R LOHRBERG, MD
DANIEL D LYDIATT, MD
CHERYL R MACDONALD, MD
MARK MAHLOCH, MD
DAWN P MALENE, MD
JOHN W MARKUS, MD
CHARLES W MARLOWE, MD
ANDREA G MARSH, MD
THOMAS EDWARD MARTIN, MD
NANCY B MATHEWS, MD
ANDREW J MAXWELL, MD
PATRICK J MCCARVILLE, MD
JOSEPH T MCCASLIN, MD
REBECCA J MCCRERY, MD
HARRY E MCFADDEN, MD
KATHARAINE I MCLEESE, MD

KAREN K MEYER, MD
OLEG N MILITSAKH, MD
ALI MIRMIRAN, MD
PETER C MORRIS, MD
PAUL S MUELLER, MD
DIANA NEVINS, MD
ROSANN C NICHOLS, MD
HEATHER OBREGONV
MARK D OMAR, MD
DALE W ORTON, MD
STEVEN M OSBORN, MD
DONALD R OWEN, MD
NICOLE PAULMAN, MD
DEBORAH A PERRY, MD
ALLISON PHILLIPS, MD
MARK A PITNER, MD
JAMES EDWARD QUINN, MD
JOAN ELIZABETH QUINN, MD
ANDREW G RASMUSSEN, MD
JAMES A REILLY JR, MD
REBECCA B REILLY, MD
ERIC C RICE, MD
ALAN T RICHARDS, MD
VIRGINIA M RIPLEY, MD
ERIC RODRIGO, MD
CHARLES P ROGERS, MD
SCOTT G ROSE, MD
LESLIE E SCHECHTMAN, DO
CLAYTON SCHROEDER, MD
KELLY SCHROEDER
AMY SCHUETT, MD
JUDITH ANN SCOTT, DO
LYNN K SCOTT, MD
GREGORY CHARLES SEVERSON, MD
WILLIAM A SHIFFERMILLER, MD
GREGORY S SMITH, MD
WILLIAM W SMITH, MD
TIFANY L SOMER-SHELY, MD
DAVID W STAMM, MD
DAVID STEARNES, DO
JAMES M STEIER, MD
CAROL A STESSMAN, MD
KENDRA E SWANSON, MD
EDWARD J TAYLOR, MD
JANE THEOBALD, MD
LACI LAFLEUR THEUNISSEN, MD
ALAN G TORELL, MD

CHRISTINA V TSENG, MD
PAUL J VANA, MD
AMANDA VOTRUBA, MD
DOUGLAS J WEEDMAN, MD
WILLIAM DAVID WEIDNER, MD
MATTHEW C WEILAND, DO
SUSAN A WESTCOTT, MD
LISA L WHITCOMB, MD
STEVEN MAX WILLIAMS, MD
THOMAS LEE WILLIAMS, MD
BRIDGETT D WILSON, MD
SCOTT L WILSON, MD
BRAD WINTERSTEIN, MD
DOROTHY A ZINK, MD
STEVEN H ZUBER, MD

NEBRASKA

DEPARTMENT OF INSURANCE

(/)

Medical Malpractice

Hospital-Medical Liability Information

Contact Person:
Stephanie Hobelman, CISR, CIC
(402)471-4651
(402)742-2387 (Fax)

Claim Information:
Mike Devlin
2120 S. 72nd Street, Suite 1200
Omaha, NE 68124
(402)505-3161
(402)390-9221 (Fax)

NOTICE OF HEARING – Hospital-Medical Liability Surcharge Determination for the Year 2017 (/news/notice-hearing-%E2%80%93-hospital-medical-liability-surcharge-determination-year-2017)

NOTICE OF HEARING – Hospital-Medical Liability Surcharge Determination for the Year 2016 (/sites/doi.nebraska.gov/files/doc/notice07_4.pdf)

NOTICE OF HEARING – Hospital-Medical Liability Surcharge Determination for the Year 2015 (/sites/doi.nebraska.gov/files/doc/notice07%20%281%29_0.pdf)

NOTICE OF HEARING - Hospital-Medical Liability Surcharge Determination for the Year 2014 (/sites/doi.nebraska.gov/files/doc/notice09_2.pdf)

Admitted Medical Malpractice Carriers (/sites/doi.nebraska.gov/files/doc/admitted_medical_malpractice_carriers.pdf)

Frequently Asked Questions (/sites/doi.nebraska.gov/files/doc/faq.pdf)

Chapter 32 - Nebraska Hospital-Medical Liability Act Excess Liability Fund Residual Malpractice Insurance Authority (/sites/doi.nebraska.gov/files/doc/Chapter-32.pdf)

Professional Liability Residual Fund Application (/sites/doi.nebraska.gov/files/doc/residual1.pdf)

Yearly Hospital-Medical Liability Surcharge Determinations

Nebraska Hospital-Medical Liability Act Annual Reports

The Nebraska Department of Insurance
941 O Street
PO Box 82089
Lincoln, Nebraska 68501-2089
Phone: 402-471-2201
Consumer Affairs Hotline: 877-564-7323 (in-State Only)

Contact the Webmaster (mailto:DOI.Webmaster@Nebraska.gov)
Employee Site (/nebraska-department-insurance-intranet)
Get Update Notices (/get-update-notices)

Select Language ▼

ATTACHMENT 10

Admitted Medical Malpractice Carriers-Physicians & Surgeons

Capitol Indemnity Corporation
1600 Aspen Commons, Suite 300
Middleton, WI 53562
(800) 475-4450

Capson Physicians Insurance Company
221 W. 6th Street, Suite 301
Austin, TX 78701
(512) 609-7900

Continental Casualty Company
CNA Center
Chicago, IL 60685
(312) 822-5653

Copic Insurance Company
P.O. Box 17540
Denver, CO 80217
(720) 858-6000

The Doctors' Company
185 Greenwood Road
P.O. Box 2900
Napa, CA 94058
(800) 421-2368

The Medical Protective Company
P.O. Box 15021
Fort Wayne, IN 46815
(800) 348-4669

Medicus Insurance Company
4807 Spicewood Springs Blvd, Bldg 4-100
Austin, TX 75789
(512) 879-5211

MHA Insurance Company
3100 West Road, Building #1, Suite 200
East Lansing, MI 48823
(800) 313-5888

MMIC Insurance Inc.
7701 France Avenue South, Suite 500

Minneapolis, MN 55435
(800) 328-5532

Proassurance Wisconsin
P.O. Box 45650
Madison, WI 53744
(800) 279-8331

PPIC (Preferred Professional Insurance Company)
P.O. Box 540658
Omaha, NE 68154
(402) 392-1566

Zurich American Insurance Company
1400 American Lane
Tower 1, 19th Floor
Schaumburg, IL 60196
(847) 605-6000

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

JACKSON CUENCA, a minor, by and through his Parents and Next Friends, John Cuenca and Emily Cuenca; **EMILY CUENCA**, individually; and **JOHN CUENCA**, individually, Plaintiffs, v. **PHYSICIANS CLINIC, INC.**; and **THE NEBRASKA METHODIST HOSPITAL**, Defendants.	CASE NO. CI12-5413 **AFFIDAVIT OF JOHN CUENCA**

COMES NOW, John Cuenca, of lawful age, who being first duly sworn, on her oath deposes and states:

1. I am a Plaintiff in the above captioned action.

2. This Affidavit is based on my personal knowledge.

3. I was physically present at the primary health care facility located at 707 North 190th Plaza, Elkhorn, Nebraska 68022 (the "Hospital") and some of the adjacent medical office buildings on several occasions between August 2010 and December 2010.

4. I was physically present at the office buildings adjacent to the Hospital for prenatal visits on September 1, 2010, September 15, 2010, September 29, 2010, October 3, 2010, October 26, 2010, November 10, 2010, November 16, 2010, and November 22, 2010. On each occasion my then unborn son, Jackson Cuenca ("Jackson"), and my wife Emily Cuenca were being treated by employees of Physicians Clinic, Inc., a Nebraska corporation ("PCI").

5. On approximately five occasions between September 21, 2010 and October 19, 2010, my wife, Emily Cuenca, and I attended birthing classes in the medical office building adjacent to the Hospital. During one of the birthing classes, we were given a tour of the Hospital.

6. On November 28, 2010, my wife was admitted to the Hospital and treated by employees of The Nebraska Methodist Hospital ("TNMH") and PCI and later discharged on or about December 1, 2010.

EXHIBIT B

7. At no time was I ever provided notice that TNMH was qualified under the provisions of the Nebraska Hospital-Medical Liability Act, § 44-2801 et. seq. R.R.S. 1943, as amended (the "Act").

8. At no time was I provided notice that PCI was qualified under the provisions of the Act.

9. I observed my surroundings at the Hospital and adjacent medical office buildings in all areas described in Paragraphs 4-6 above.

10. During my visits to the Hospital and the adjacent medical office buildings during the time period from August 2010 through December 2010, I never saw any notice or sign that mentioned anything about TNMH and the Act. Specifically, there was no notice or sign, which said, "The Nebraska Methodist Hospital has qualified under the provisions of the Nebraska Hospital-Medical Liability Act. Patients will be subject to the terms and provisions of the Act unless they file a refusal to be bound by the Act with the Director of Insurance of the State of Nebraska."

11. During my visits to the Hospital and the adjacent medical office buildings during the time period from August 2010 through December 2010, I never saw any notice or sign that mentioned anything about PCI and the Act. Specifically, there was no notice or sign, which said, "Physicians Clinic, Inc. has qualified under the provisions of the Nebraska Hospital-Medical Liability Act. Patients will be subject to the terms and provisions of the Act unless they file a refusal to be bound by the Act with the Director of Insurance of the State of Nebraska."

12. In January 2012, shortly after my wife and I retained Cullan & Cullan L.L.C., I retraced my steps at the Hospital and the adjacent medical office buildings and to again specifically look for any notice or sign relating to the Act, as described above.

13. Further, I have returned to the Hospital and adjacent medical office buildings on different occasions since 2012, including a recent visit in December 2016.

14. Based upon my observations, from October 2010 through and including December 2016 there was no notice or sign (as described in Paragraphs 10 and 11 above) in any location in the Hospital or adjacent medical office buildings where I would have had an opportunity to observe them prior to making a choice to have my wife and unborn son obtain and receive healthcare.

15. Prior to the delivery of Jackson on November 28, 2010, I was informed that Midwife Cecilia S. Norton, C.N.M. ("Midwife Norton") was employed by PCI.

16. Further, on November 28, 2010 I met Susan A. Westcott, M.D. ("Dr. Westcott") for the first time and understood she was also employed by PCI.

17. It was my understanding in 2010 and it remains so today, that Dr. Westcott and Midwife Norton are not qualified healthcare providers under the terms of the Act because neither of them nor their employer, PCI, informed me of their supposed qualification under the Act as necessitated by § 44-2821(4).

18. My wife and I selected PCI and TNMH for my family with the belief that there would be no statutory cap on damages since neither complied with the provisions of the Act regarding proper signage.

Further affiant sayeth naught.

JOHN CUENCA

On this 20 day of December, 2016, personally appeared before me John H Cuenca, who being first duly sworn on his oath stated that the facts contained in the above and foregoing Affidavit of John Cuenca (the "Affidavit") are true and correct according to his best information and belief, and that he executed the Affidavit as his free act and deed.

State of: NE
County of: Douglas

Notary Public

GENERAL NOTARY - State of Nebraska
JODY K. SALES
My Comm. Exp. January 13, 2020

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

JACKSON CUENCA, a minor, by and through his Parents and Next Friends, John Cuenca and Emily Cuenca; **JOHN CUENCA**, individually; and **EMILY CUENCA**, individually, Plaintiffs, v. **PHYSICIANS CLINIC, INC.**; and **THE NEBRASKA METHODIST HOSPITAL**, Defendants.	CASE NO. CI12-5413 **AFFIDAVIT OF EMILY A. CUENCA**

COMES NOW, Emily A. Cuenca, of lawful age, who being first duly sworn, on her oath deposes and states:

1. I am a Plaintiff in the above captioned action.

2. This Affidavit is based on my personal knowledge.

3. I was physically present at the primary health care facility located at 707 North 190th Plaza, Elkhorn, Nebraska 68022 (the "Hospital") and some of the adjacent medical office buildings on several occasions between August 2010 and December 2010.

4. I was physically present at the office buildings adjacent to the Hospital for prenatal visits on September 1, 2010, September 15, 2010, September 29, 2010, October 3, 2010, October 26, 2010, November 10, 2010, November 16, 2010, and November 22, 2010. On each occasion my then unborn son, Jackson Cuenca ("Jackson"), and I were being treated by employees of Physicians Clinic, Inc., a Nebraska corporation ("PCI").

5. On approximately five occasions between September 21, 2010 and October 19, 2010, my husband, John Cuenca ("John"), and I attended birthing classes in the medical office building adjacent to the Hospital. During one of the birthing classes, we were given a tour of the Hospital.

6. On November 28, 2010, I was admitted to the Hospital and treated by employees of The Nebraska Methodist Hospital ("TNMH") and PCI and later discharged on or about December 1, 2010.

EXHIBIT C

7. At no time was I ever provided notice that TNMH was qualified under the provisions of the Nebraska Hospital-Medical Liability Act, § 44-2801 et. seq. R.R.S. 1943, as amended (the "Act").

8. At no time was I provided notice that PCI was qualified under the provisions of the Act.

9. I observed my surroundings at the Hospital and adjacent medical office buildings in all areas described in Paragraphs 4-6 above.

10. During my visits to the Hospital and the adjacent medical office buildings during the time period from August 2010 through December 2010, I never saw any notice or sign that mentioned anything about TNMH and the Act. Specifically, there was no notice or sign, which said, "The Nebraska Methodist Hospital has qualified under the provisions of the Nebraska Hospital-Medical Liability Act. Patients will be subject to the terms and provisions of the Act unless they file a refusal to be bound by the Act with the Director of Insurance of the State of Nebraska."

11. During my visits to the Hospital and the adjacent medical office buildings during the time period from August 2010 through December 2010, I never saw any notice or sign that mentioned anything about PCI and the Act. Specifically, there was no notice or sign, which said, "Physicians Clinic, Inc. has qualified under the provisions of the Nebraska Hospital-Medical Liability Act. Patients will be subject to the terms and provisions of the Act unless they file a refusal to be bound by the Act with the Director of Insurance of the State of Nebraska."

12. In January 2012, shortly after John and I retained Cullan & Cullan L.L.C., I retraced my steps at the Hospital and the adjacent medical office buildings to again specifically look for any notice or sign relating to the Act, as described above.

13. Further, I have returned to the Hospital and adjacent medical office buildings on different occasions since 2012, including a recent visit in December 2016.

14. In both October 2010 and October 2016 there was no notice or sign (as described in Paragraphs 10 and 11 above) in any location in the Hospital or adjacent medical office buildings where I would have had an opportunity to observe them prior to me making a choice to obtain and receive healthcare for both myself and Jackson.

15. Prior to the delivery of Jackson on November 28, 2010, I was informed that Midwife Cecilia S. Norton, C.N.M. ("Midwife Norton") was employed by PCI.

16. It was my understanding in 2010 and it remains so today, that Midwife Norton and Dr. Westcott are not qualified healthcare providers under the terms of the Act because neither of them nor their employer, PCI, informed me of their supposed qualification under the Act as necessitated by § 44-2821(4).

17. My husband and I selected PCI and TNMH for Jackson and I with the belief that there would be no statutory cap on damages.

Further affiant sayeth naught.

EMILY CUENCA

Emily Cuenca

On this 20 day of December, 2016, personally appeared before me Emily A Cuenca, who being first duly sworn on her oath stated that the facts contained in the above and foregoing Affidavit of Emily (the "Affidavit") are true and correct according to her best information and belief, and that she executed the Affidavit as her free act and deed.

State of: NE.
County of: Douglas

Notary Public

GENERAL NOTARY - State of Nebraska
JODY K. SALES
My Comm. Exp. January 13, 2020

License Details

Name on License	The Nebraska Methodist Hospital
Administrator	JOHN FRASER
Owner	NEBRASKA METHODIST HEALTH SYSTEM
Owner Category	NON PROFIT - C
Address on License	8303 DODGE STREET OMAHA, NE 68114
Telephone	(402) 354-4000
Facility Type	HOSPITAL
License Status	CLOSED-OWNER
Closed Date	01/31/2002
Title 18 Beds	Unknown
Title 19 Beds	Unknown
Title 18/19 Beds	Unknown
ICF Beds	Unknown
IMR Beds	Unknown
Total Active Certified Beds	Unknown
Total Active Licensed Beds	Unknown

EXHIBIT D

License Search

Satisfaction Survey

Results

HOSPITAL

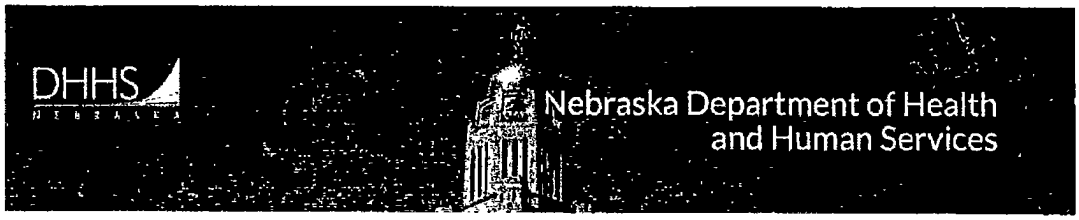
Back to top
HOSPITAL
NURSING HOME (NH)

The Nebraska Methodist Hospital	Status: CLOSED-OWNER	OMAHA, NE

NURSING HOME (NH)

The Nebraska Methodist Hospital	Status: CLOSED-OWNER	OMAHA, NE

EXHIBIT E



License Search

Satisfaction Survey

Results

LAB-CLIA

Back to top
LAB-CLIA

Physicians Clinic, Inc.	Status: CLOSED-OWNER	OMAHA, NE
Physicians Clinic, Inc.	Status: CLOSED-OWNER	OMAHA, NE
Physicians Clinic, Inc.	Status: CLOSED-OWNER	NORFOLK, NE

EXHIBIT F

Physicians Clinic Inc.	Status: CLOSED-OWNER	OMAHA, NE
Physicians Clinic, Inc.	Status: CLOSED-OWNER	OMAHA, NE
Physicians Clinic, Inc.	Status: CLOSED-OWNER	OMAHA, NE

EXHIBIT G

Title 210 - NEBRASKA DEPARTMENT OF INSURANCE

Chapter 32 - NEBRASKA HOSPITAL-MEDICAL LIABILITY ACT EXCESS LIABILITY FUND RESIDUAL MALPRACTICE INSURANCE AUTHORITY

001. Authority. This rule is promulgated pursuant to the authority granted under Neb.Rev.Stat. Sections §44-2854.01, §44-2821(4), §44-2829 and §44-2837, as amended.

002. Purpose. The purpose of this rule is to implement and administer those provisions of the Nebraska Hospital-Medical Liability Act pertaining to the surcharge levied on qualified health care providers under the Excess Liability Fund, notices provided by the Excess Liability Fund to qualified health care providers, administration and management of the residual malpractice insurance authority, notification to patients by qualified health care providers and such other matters as may be necessary to promote the efficient operation of the Act in accordance with its terms.

003. Definitions.

003.01 The definitions set forth in the Nebraska Hospital-Medical Liability Act, Neb.Rev.Stat. §44-2801 et. seq., as amended, shall be adopted and applied unless the context otherwise requires.

003.02 Act shall mean Nebraska Hospital-Medical Liability Act;

003.03 Cancellation shall mean termination of the qualification of a health care provider due to cessation of professional liability insurance by:

003.03A The professional liability insurer pursuant to Section Neb.Rev.Stat. §44-2836(5)(b);

003.03B The Residual Malpractice Authority of insurance coverage provided pursuant to ~~Sections~~ Neb.Rev.Stat. §§44-2837 ~~to~~ through 44-2839; or

003.03C The health care provider.

003.04 Expiration of qualification shall mean that the qualification of the health care provider has ended as a result of not renewing his or her qualification;

003.05 Initial qualification shall mean first time qualification or qualification following an interruption in qualification;

003.06 Qualification shall mean that the health care provider has complied with all of the requirements of ~~Section~~ Neb.Rev.Stat. §44-2824;

003.07 Renewed qualification shall mean renewal of an existing qualification so that qualification is continuous and uninterrupted;

003.08 Suspension shall mean suspension of a health care provider's qualification pursuant to ~~Section~~ Neb.Rev.Stat. §44-2829 for failure to pay the surcharge premium or primary insurance premiums under ~~Sections~~ Neb.Rev.Stat. §§44-2837 ~~to~~ through 44-2839.

004. Qualification. In order to qualify under the Act, a health care provider must file with the Director proof of financial responsibility pursuant to ~~Section~~ Neb.Rev.Stat. §44-2827 and pay the surcharge and any special surcharge levied on all health care providers pursuant to ~~Sections~~ Neb.Rev.Stat. §§44-2829 ~~to~~ through 44-2831 and shall post notice of qualification under the Act in accordance with Section 009.

004.01 Proof of Financial Responsibility. Financial Responsibility of a health care provider may be established only by filing with the Director proof that the health care provider is currently insured pursuant to ~~Sections~~ Neb.Rev.Stat. §§44-2837 ~~to~~ through 44-2839 or by a policy of professional liability insurance in a company authorized to do business in Nebraska.

The use of deductibles on a policy of professional liability insurance utilized to establish proof of financial responsibility is acceptable with the provision that the insurer must pay any settlement or judgment and then may be reimbursed by the insured for the deductible set out in the policy. The full premium, without credit for the deductible, must be reported on the proof of financial responsibility and the applicable surcharge will be based upon that full premium.

004.01A The following constitutes acceptable proof of financial responsibility:

004.01A(1) certificate of professional liability insurance;

004.01 A(2) copy of professional liability insurance policy or declarations page

004.01A(3) written statement or binder from insurance company representative or agent

004.01B Proof of financial responsibility shall provide the following information:

004.01 B(1) name of each qualified health care provider and insurer;

004.01 B(2) limits of coverage;

004.01 B(3) policy inception and expiration date;

004.01 B(4)premium for insurance coverage for limits required to qualify under the act without credit for deductibles, if applicable;

004.01 B(5) any retroactive dates, if applicable;

004.01 B(6) whether qualification is on an occurrence or a claims-made basis; and

004.01 B(7) deductible amount, if any.

004.02 Qualification Effective Date.

004.02A Initial Qualification. An initial qualification is effective upon the date the health care provider's proof of financial responsibility is received by the Director on the condition that the Director also receives the required surcharge not later than 30 days thereafter. In no event shall a health care provider's qualification become effective prior to the effective date of the professional liability insurance coverage filed by the health care provider. If the Director does not receive the surcharge for an initial qualification within such 30 day period, the qualification shall not become effective until the surcharge is received by the Director along with current proof of financial responsibility.

004.02B Renewed Qualification. A health care provider's qualification expires on the date his or her proof of financial responsibility expires unless the Director receives proof of renewed financial responsibility on or before that date. The health care provider will be given a grace period of 30 days following the expiration of his or her proof of financial responsibility to submit proof of renewed financial responsibility. Qualification does not continue past the expiration date of the health care provider's proof of financial responsibility if the Director does not receive the proof of renewed financial responsibility within the 30 day grace period.

004.03 Cancellation of Qualification. In the event the professional liability insurance policy filed by the health care provider to qualify under the Act is terminated by cancellation pursuant to ~~Section~~ Neb.Rev.Stat. §44-2836, the health care provider's qualification under the Act also terminates automatically

on the effective date of the cancellation without notice from the Excess Liability Fund unless the Director receives a replacement proof of financial responsibility on or before the cancellation date. The Director shall endeavor to notify the health care provider of the effect of the cancellation of primary coverage on his or her qualification under the Act within five (5) business days of receipt by the Director of notice of such cancellation.

004.04 Suspension of Qualification. If the annual premium surcharge is not paid in accordance with the Sub~~S~~section 005.01 time period, the qualification of the health care provider shall be suspended until the annual surcharge premium is paid. Such suspension shall not be effective as to patients claiming against the health care provider unless, at least 30 days before the effective date of the suspension, a written notice giving the date upon which suspension becomes effective has been provided by the Director to the health care provider. During the period that the suspension is effective, the health care provider is not qualified under the Act and is not provided coverage by the Excess Liability Fund. Notification of suspension to the health care provider must be given in accordance with Sub~~S~~section 006.02.

005. Surcharge premium.

005.01 As required by ~~Section~~ Neb.Rev.Stat. §44-2829 of the Act, all health care providers who have qualified under the Act shall contribute to the Excess Liability Fund. The surcharge is due and payable within 30 days after the health care provider has provided proof of financial responsibility to the Director and annual thereafter in such amounts as may be determined by the Director.

005.02 As required by ~~Section~~ Neb.Rev.Stat. §44-2830, effective on January 1 of each year, the Director shall adjust the amount of the surcharge to maintain the Excess Liability Fund at a level which is sufficient to pay all anticipated claims for the next year and to maintain an adequate reserve for future claims. Prior to making such adjustment, the Director shall conduct a public hearing concerning the proposed adjustment and shall give due regard to the size of the existing Fund, the number and size of potential claims against the Fund, the number of participating providers, and other pertinent factors utilizing sound actuarial principles. Any decrease in the annual surcharge percentage shall not operate to entitle a health care provider to a refund of any portion of the previously paid surcharge.

006. Notification of health care providers. The Excess Liability Fund shall provide the following notices to health care providers as appropriate.

006.01 Expiration Notice. If the Director has not received renewed proof of

financial responsibility from a health care provider on or before the date such health care provider's professional liability insurance policy expires, the Excess Liability Fund shall cause a notice to be sent to the health care provider advising that if such proof is not received by the Director within 30 days, the qualification will expire on the date of the expiring proof of responsibility as set forth in Sub~~S~~section(s) 004.02B.

006.02 Suspension Notice. If the Director has not received the health care provider's required surcharge premium within 30 days after the health care provider has provided proof of financial responsibility in accordance with 004.02B, the Excess Liability Fund shall cause a notice to be sent to the health care provider pursuant to ~~Section~~ Neb.Rev.Stat. §44-2829 advising that the Excess Liability Fund has not received the required surcharge; that the health care provider's qualification under the Act shall be suspended on a stated effective date not less than 30 days after the date of notice if the required surcharge is not paid and further stating that the suspension shall continue until the surcharge is paid.

006.03 Notice Acknowledging Qualification. Within five business days of receipt of the proof of financial responsibility and the required surcharge premium, the Excess Liability Fund shall notify the health care provider:

006.03A Whether the provider is qualified; and

006.03B If the provider is qualified, the qualification effective and expiration dates.

006.04 Manner of Notice. All notices provided in Sub~~S~~section(s) 006 shall be sent by United States Mail, postage pre-paid to the health care providers last known address. Proof of mailing of the notices required by Sub~~S~~sections 006.01 and 006.02 shall be maintained. All notification periods shall begin to run on the date of mailing the notice.

007. Form of coverage. The coverage provided to a qualified health care provider under the Excess Liability Fund shall be either on an occurrence or on a claims-made basis and shall be the same as the insurance coverage provided by the insured's policy with the exception of the retroactive date. If the health care provider is no longer qualified under the Act and his or her professional liability insurance coverage was on a claims-made policy, the health care provider will no longer receive coverage under the Excess Liability Fund unless the health care provider purchases extended reporting endorsement coverage from the Fund. This coverage extends the time in which a claim may be made for incidents which occurred during the period of qualification under the Act. If the health care provider changes insurers and his or her professional liability insurance coverage was on a claims- made policy, the health care provider will no longer receive

coverage under the Excess Liability Fund for prior acts unless the health care provider purchases extended reporting endorsement coverage from the insurer being replaced and the Fund. If the replacing insurer provides prior acts coverage back to the initial qualification date, extended reporting endorsement coverage is not needed.

008. Residual malpractice insurance authority. If, after diligent effort, a health care provider has been unable to obtain malpractice liability insurance and has been declined by at least two insurers authorized and writing medical malpractice liability insurance in the State of Nebraska, provided there are two such companies, the health care provider may apply for such coverage through the residual malpractice insurance authority. The application shall be made on a form prepared by the residual malpractice insurance authority which has been filed with and approved by the Department of Insurance. The application shall be accompanied by evidence of the two declinations in the form of letters from the declining insurer. If the application is accepted, the coverage shall be issued at the rates established by the Nebraska Department Insurance.

Qualification through the Residual Malpractice Insurance Authority shall be subject to the provisions of Sub~~S~~section 004.02B regarding renewed qualification; Sub~~S~~section 004.04 regarding suspension of qualification;

Section 005 regarding surcharge premium and Section 006 regarding notification to health care providers. Qualification under the Residual Malpractice Insurance Authority shall be on an occurrence form basis. As a condition for participating in the Residual Malpractice Insurance Authority, the health care provider must also maintain qualification in the Excess Liability Fund.

009. Patient notification. A qualified health care provider shall provide notice to his or her patients that he or she has qualified under the Act by continuously posting in his or her waiting room or other suitable location a sign stating:

(Name of Health Care Provider) has qualified under the provisions of the Nebraska Hospital-Medical Liability Act. Patients will be subject to the terms and conditions of the Act unless they file a refusal to be bound by that Act with the Director of Insurance of the State of Nebraska.

In addition to the foregoing information, the sign may include the following language:

This notice is being provided as required by the Nebraska Hospital-Medical Liability Act~~, Section~~ Neb.Rev.Stat. §44-2821(4), ~~R.R.S. Neb. 1943~~ as amended.

The sign to be posted will measure at least 8 1/2" x 11" and shall be printed in substantially similar size and style of type as that used in the attached notice.

010. Confidentiality. Certain records of the Excess Liability Fund and the residual

malpractice insurance authority shall be confidential and shall not be subject to disclosure as public records. These records include, but are not limited to the following:

010.01 Medical records in any form concerning any person and records of elections filed under Neb.Rev.Stat. §44-2821;

010.02 Any and all records regarding claims filed under the Act;

010.03 Any and all records which represent the work product of an attorney or of the Excess Liability Fund which are related to preparation for litigation under the Act.

010.04 Any records regarding specific case reserves;

010.05 Any examination or actuarial work papers; and

010.06 Any underwriting records of a professional liability insurer or the Residual Malpractice Insurance Authority.

011. Severability clause. The invalidity of any one or more provisions of this Rule shall not affect any other provision of this Rule or any part thereof, and in case of any such invalidity, this rule shall be construed as if such invalid provisions had not been inserted.

012. Operative date. This rule shall become operative on September 1, 1989.

NOTICE

has qualified under

(Name of Health Care Provider)

the provisions of the Nebraska Hospital-Medical Liability Act ~~(L.B. 434, 84th Nebraska Legislature~~ (Neb.Rev.Stat. §§44-

2801 through 44-2855). Patients will be subject to the terms and provisions of that act unless they file a refusal to be bound by the act with the Director of Insurance of the State of Nebraska and notify the above health care provider of the election as soon as is reasonable under the circumstances that such patient has so elected.

[1] Heading must be 90 point boldface type.

[2] Text must be 32 point boldface type.

NOTICE

Physicians Clinic, Inc., has qualified under the provisions of the Nebraska Hospital-Medical Liability Act (Neb. Rev. Stat. §§44-2801 through 44-2855). Patients will be subject to the terms and provisions of that act unless they file a refusal to be bound by the act with the Director of Insurance of the State of Nebraska and notify the above health care provider of the election as soon as is reasonable under the circumstances that such patient has so elected.

EXHIBIT I

NOTICE

The Nebraska Methodist Hospital has qualified under the provisions of the Nebraska Hospital-Medical Liability Act (Neb. Rev. Stat. §§44-2801 through 44-2855). Patients will be subject to the terms and provisions of that act unless they file a refusal to be bound by the act with the Director of Insurance of the State of Nebraska and notify the above health care provider of the election as soon as is reasonable under the circumstances that such patient has so elected.

EXHIBIT J

NOTICE

Susan D. Westcott, M.D., has qualified under the provisions of the Nebraska Hospital-Medical Liability Act (Neb. Rev. Stat. §§44-2801 through 44-2855). Patients will be subject to the terms and provisions of that act unless they file a refusal to be bound by the act with the Director of Insurance of the State of Nebraska and notify the above health care provider of the election as soon as is reasonable under the circumstances that such patient has so elected.

EXHIBIT K

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

JACKSON CUENCA, a minor, by and through his parents and next friends, John H. Cuenca and Emily A. Cuenca; **EMILY A. CUENCA**, individually; and **JOHN H. CUENCA**, individually, Plaintiffs, v. **PHYSICIANS CLINIC, INC.**; and **THE NEBRASKA METHODIST HOSPITAL**, Defendants.	CASE NO. CI12-5413 **AFFIDAVIT OF JOSEPH P. CULLAN**

COMES NOW, Joseph P. Cullan, of lawful age, who being first duly sworn, on this oath deposes and states:

1. I am lead counsel for the Plaintiffs in the above-captioned matter.

2. This Affidavit is based on my personal knowledge.

3. Exhibits attached to Plaintiffs' Brief in Opposition to Motion to Reduce the Aggregate Jury Verdict, are true and correct copies of the original, according to my best information and belief.

Further, affiant sayeth not.

Joseph P. Cullan, M.D., J.D.

Subscribed and sworn to before me, a notary public, this 21 day of December, 2016.

Notary Public

My commission expires:

GENERAL NOTARY - State of Nebraska
ROSALYN CRATE
My Comm. Exp. January 13, 2020

PLAINTIFF'S EXHIBIT
L

Cullan
&Cullan, LLC

Patrick J. Cullan MD, JD · Joseph P. Cullan MD, JD
Doctors of Medicine / Attorneys at Law

September 9, 2013

Thomas Shomaker
Sodoro, Daly & Sodoro, P.C.
200 Century Professional Plaza
7000 Spring Street
Omaha, NE 68106

Re: Cuenca v. Physicians Clinic et al

Dear Counsel:

The Plaintiffs do hereby make a formal written offer to resolve all claims in accordance and in compliance of Revised Statutes of Nebraska §45-103.02 for $1,400,000.00 (One million four hundred thousand and 00/100 dollars).

Sincerely,

Joseph Cullan, M.D.

Old Market Cullan Court · 1113 Harney Street · Omaha, NE 68102 · (402) 397-7600 · Fax (402) 397-3816

EXHIBIT B

IN THE D 000908205D01 JNTY, NEBRASKA

JACKSON CUENCA, a minor, by and through his Parents and Next Friends, John and Emily Cuenca, **EMILY CUENCA**, Individually, and **JOHN CUENCA**, Individually,	CASE NO. CI 12-5413
Plaintiffs, vs.	PROOF OF SERVICE BY AFFIDAVIT
PHYSICIANS CLINIC, INC.; **SUSAN A. WESTCOTT, M.D.**; **CECELIA S. NORTON, C.N.M.**; and **THE NEBRASKA METHODIST HOSPITAL**,	
Defendants.	

#23 FILED
IN DISTRICT COURT
DOUGLAS COUNTY NEBRASKA
SEP 18 2013
JOHN M. FRIEND
CLERK DISTRICT COURT

STATE OF NEBRASKA)
) ss.
COUNTY OF DOUGLAS)

A copy of the attached letter (Exhibit A) was mailed by certified mail, return receipt requested, to Thomas Shomaker, Sodoro, Daly Sodoro, 200 Century Professional Plaza, 7000 Spring Street,

Omaha, NE 68106, attorney for Defendants, on the 9th day of September 2013.

The return receipt was signed on the 10th day of September 2013 (Exhibit B).

FURTHER AFFIANT SAYETH NOT.

Joseph Cullan, Attorney for Plaintiffs

Subscribed and sworn to before me this 13th day of September, 2013.

Notary Public

Postage: $6.11

GENERAL NOTARY - State of Nebraska
ANGELO GONZALES
My Comm. Exp. Oct. 15, 2013

EXHIBIT C

Cullan
&Cullan, LLC

Patrick J. Cullan MD, JD · Joseph P. Cullan MD, JD
Doctors of Medicine / Attorneys at Law

September 9, 2013

Thomas Shomaker
Sodoro, Daly & Sodoro, P.C.
200 Century Professional Plaza
7000 Spring Street
Omaha, NE 68106

Re: Cuenca v. Physicians Clinic et al

Dear Counsel:

The Plaintiffs do hereby make a formal written offer to resolve all claims in accordance and in compliance of Revised Statutes of Nebraska §45-103.02 for $1,400,000.00 (One million four hundred thousand and 00/100 dollars).

Sincerely,

Joseph Cullan, M.D.

Old Market Cullan Court · 1113 Harney Street · Omaha, NE 68102 · (402) 397-7600 · Fax (402) 397-3816

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Th[redacted] Shomaker
Sodaro Daly Sodaro
200 Century Professional Plaza
7000 Spring St.
Omaha, NE 68106

COMPLETE THIS SECTION ON DELIVERY

A. Signature
X Sherry Lost ☐ Agent ☐ Addressee

B. Received by (Printed Name) Sherry Lost
C. Date of Delivery 9-10-13

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

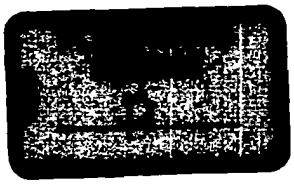
3. Service Type
☒ Certified Mail ☐ Express Mail
☐ Registered ☐ Return Receipt for Merchandise
☐ Insured Mail ☐ C.O.D.

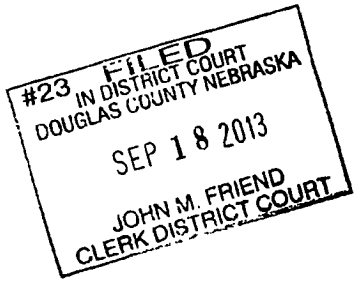
4. Restricted Delivery? (Extra Fee) ☐ Yes

2. Article N
(Transfer 7009 1680 0001 7060 0045

PS Form 3811, February 2004 Domestic Return Receipt

[redacted]-02-M-1540




#23 FILED
IN DISTRICT COURT
DOUGLAS COUNTY NEBRASKA
SEP 18 2013
JOHN M. FRIEND
CLERK DISTRICT COURT

JUDGMENT INTEREST EFFECTIVE SINCE 01/01/1987
CHILD SUPPORT INTEREST EFFECTIVE SINCE 09/06/1991
TABLE PROVIDED PURSUANT TO 45-103
Two percentage points above the bond investment yield of the 26 week U.S. Treasury bill
Effective date, 2 weeks after the auction price is published in each annual quarter
(26 week bill effective 07/20/2002, 52 week bill and one point for all prior dates)
Interest rate shown contains 2 point increase of 45-103

Effective Date	Interest Rate
1/1/1987	6.770
1/6/1987	6.930
1/29/1987	6.750
2/26/1987	7.090
3/26/1987	7.040
4/23/1987	7.300
5/26/1987	8.020
6/18/1987	8.000
7/16/1987	7.640
8/18/1987	7.980
9/15/1987	8.220
10/14/1987	8.880
11/5/1987	7.900
12/3/1987	7.930
12/31/1987	8.220
1/28/1988	8.140
2/25/1988	7.590
3/24/1988	7.710
4/21/1988	8.010
5/19/1988	8.200
6/16/1988	8.590
7/14/1988	8.540
8/11/1988	8.950
9/8/1988	9.320
10/6/1988	9.040
11/3/1988	9.150
12/1/1988	9.550
12/29/1988	10.200
1/26/1989	10.160
2/28/1989	10.320
3/23/1989	10.430
4/20/1989	10.510
5/18/1989	10.150
6/15/1989	9.850
7/13/1989	9.160
8/10/1989	8.750
9/7/1989	9.270
10/5/1989	9.190

Effective Date	Interest Rate
11/2/1989	8.900
11/30/1989	8.690
12/28/1989	8.660
1/25/1990	8.740
2/27/1990	8.970
3/22/1990	9.360
4/19/1990	9.320
5/18/1990	9.700
6/14/1990	9.240
7/12/1990	9.090
8/9/1990	8.880
9/6/1990	8.950
10/4/1990	8.780
11/9/1990	8.510
11/29/1990	8.280
12/27/1990	8.020
1/24/1991	7.620
2/26/1991	7.210
3/21/1991	7.460
4/18/1991	7.260
5/16/1991	7.070
6/13/1991	7.090
7/11/1991	7.390
8/8/1991	7.260
9/5/1991	6.680
10/3/1991	6.570
10/31/1991	6.420
11/28/1991	5.980
12/26/1991	5.410
1/23/1992	5.020
2/20/1992	5.210
3/19/1992	5.580
4/16/1992	5.550
5/14/1992	5.400
6/11/1992	5.260
7/9/1992	5.110
8/6/1992	4.510
9/3/1992	4.410

Effective Date	Interest Rate
10/1/1992	4.130
10/29/1992	4.240
12/1/1992	4.760
12/24/1992	4.720
1/21/1993	4.670
2/18/1993	4.450
3/18/1993	4.210
4/20/1993	4.370
5/13/1993	4.250
6/10/1993	4.540
7/8/1993	4.540
8/5/1993	4.540
9/2/1993	4.430
9/30/1993	4.400
10/28/1993	4.380
11/30/1993	4.570
12/23/1993	4.610
1/20/1994	4.670
2/17/1994	4.740
3/17/1994	5.220
4/14/1994	5.510
5/12/1994	6.020
6/9/1994	6.280
7/7/1994	6.310
8/4/1994	6.490
9/1/1994	6.670
9/29/1994	6.6900
10/27/1994	7.060
11/24/1994	7.480
12/22/1994	8.220
1/19/1995	8.340
2/16/1995	8.020
3/16/1995	7.570
4/13/1995	7.410
5/11/1995	7.280
6/8/1995	6.880
7/6/1995	6.530
8/3/1995	6.530

EXHIBIT D

JUDGMENT INTEREST EFFECTIVE SINCE 01/01/1987
CHILD SUPPORT INTEREST EFFECTIVE SINCE 09/06/1991
TABLE PROVIDED PURSUANT TO 45-103
Two percentage points above the bond investment yield of the 26 week U.S. Treasury bill
Effective date, 2 weeks after the auction price is published in each annual quarter
(26 week bill effective 07/20/2002, 52 week bill and one point for all prior dates)
Interest rate shown contains 2 point increase of 45-103

Effective Date	Interest Rate
8/31/1995	6.890
9/28/1995	6.520
10/26/1995	6.620
11/29/1995	6.450
12/21/1995	6.350
1/18/1996	6.160
2/15/1996	5.890
3/14/1996	6.250
4/16/1996	6.460
5/9/1996	6.660
6/6/1996	6.620
7/4/1996	6.890
8/1/1996	6.810
8/29/1996	6.670
9/26/1996	6.900
10/24/1996	6.640
11/21/1996	6.490
12/19/1996	6.450
1/16/1997	6.610
2/13/1997	6.640
3/14/1997	6.670
4/9/1997	7.000
5/8/1997	7.060
6/5/1997	6.880
7/3/1997	6.650
7/31/1997	6.560
8/28/1997	6.580
9/25/1997	6.600
10/23/1997	6.490
11/20/1997	6.420
12/18/1997	6.468
1/20/1998	6.341
2/12/1998	6.232
3/12/1998	6.407
4/9/1998	6.391
5/7/1998	6.407
6/4/1998	6.434
7/2/1998	6.413

Effective Date	Interest Rate
7/30/1998	6.375
9/1/1998	6.271
9/29/1998	7.730
10/27/1998	5.242
11/23/1998	5.616
12/22/1998	5.513
1/19/1999	5.545
2/16/1999	5.584
3/16/1999	5.918
4/13/1999	5.732
5/11/1999	5.727
6/8/1999	5.879
7/6/1999	6.163
8/3/1999	5.966
8/31/1999	6.224
9/28/1999	6.285
10/27/1999	6.411
11/23/1999	6.471
12/21/1999	6.670
1/18/2000	6.997
2/15/2000	7.287
3/14/2000	7.197
6/14/2000	7.375
9/12/2000	7.241
12/12/2000	7.052
3/13/2001	5.442
(26 week standard)	
7/20/2002	3.770
10/17/2002	3.507
1/14/2003	3.245
4/17/2003	3.114
7/17/2003	2.971
10/16/2003	3.027
1/16/2004	3.016
4/15/2004	3.008
7/15/2004	3.764
10/21/2004	4.038
1/20/2005	4.630

Effective Date	Interest Rate
4/21/2005	5.125
7/21/2005	5.429
10/20/2005	6.002
1/19/2006	6.420
4/20/2006	6.849
7/20/2006	7.297
10/19/2006	7.014
1/18/2007	7.094
4/19/2007	7.076
7/19/2007	7.012
10/18/2007	6.151
1/17/2008	5.507
4/17/2008	3.532
7/17/2008	4.188
10/16/2008	3.574
1/16/2009	2.254
4/16/2009	2.427
7/16/2009	2.355
10/15/2009	2.193
1/21/2010	2.183
4/15/2010	2.244
7/15/2010	2.218
10/21/2010	2.188
1/20/2011	2.193
4/21/2011	2.132
7/21/2011	2.081
10/20/2011	2.061
1/19/2012	2.056
4/19/2012	2.142
7/19/2012	2.152
10/18/2012	2.137
01/17/2013	2.122
04/18/2013	2.107
07/19/2013	2.086
10/17/2013	2.041
01/16/2014	2.091
04/17/2014	2.066
07/17/2014	2.066

JUDGMENT INTEREST EFFECTIVE SINCE 01/01/1987
CHILD SUPPORT INTEREST EFFECTIVE SINCE 09/06/1991
TABLE PROVIDED PURSUANT TO 45-103
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Interest rate shown contains 2 point increase of 45-103

Effective Date	Interest Rate
10/16/2014	2.041
01/16/2015	2.132
04/16/2015	2.137
07/16/2015	2.112
10/15/2015	2.107
01/21/2016	2.510
04/21/2016	2.391
07/21/2016	2.345
10/20/2016	2.498
01/19/2017	2.641
04/20/2017	2.927

Effective Date Interest Rate Effective Date Interest Rate