IN THE SUPREME COURT FOR THE STATE OF ALASKA

THOMAS J. KNOLMAYER, M.D. and ALASKA TRAUMA AND ACUTE SURGERY, LLC,

Petitioners,

vs.

CHARINA MCCOLLUM and JASON MCCOLLUM,

Respondents.

Superior Court Case No. 3AN-16-04601 CI
Supreme Court No. S-17792

PETITION FOR REVIEW FROM THE SUPERIOR COURT FOR THE STATE OF ALASKA,THIRD JUDICIAL DISTRICT AT ANCHORAGE
THE HONORABLE HERMAN G. WALKER, PRESIDING

Amicus Brief of the Alaska Association for Justice

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I. INTRODUCTION

This Court is faced with an issue it has not yet considered. Whether the statutory modification of the common law collateral source rule places the plaintiff injured by medical negligence between Scylla and Charybdis. In this case, Charina McCollum is threatened by two evils with little choice between them. Her plight is not unique. ERISA plans provide the largest segment of America with health insurance, with local governments and churches being the only exceptions.[1] While the subrogation and reimbursement terms in Charina's ERISA Plan are typical to both ERISA and private insurance plans, most insureds have no idea that the health care benefits they receive are conditional and must be repaid if a lawsuit is filed.

The Alaska Association for Justice ("AAJ") submits this brief to address some of this Court's questions in its Order and to urge an interpretation of AS 09.55.548(b) that ensures injured Alaskans are not penalized through an unfair reduction in their recovery of non-collateral source damages caused by medical negligence.

II. ARGUMENT

1. AS 09.55.548(B) Should be Narrowly Construed to Ensure that Injured Alaskans with Health Insurance are not Required to Shoulder the Burden of Medical Expenses Caused by Negligent Health Care Providers

[1] "Nationally, about 136 million people are covered by an ERISA-regulated health plan, making ERISA health insurance the largest segment of the U.S. health insurance market." https://www.associationhealthplans.com/group-health/what-is-erisa-healthinsurance/#:~:text=Nationally%2C%20about%20136%20million%20people,the%20U.S.%20health%20insurance%20market.

Prior to statutory modification, Alaska's common law collateral source rule allowed tort victims, including medical malpractice victims, to recover from the tortfeasor the full reasonable value of their damages without regard to whether some or all of those damages had also been compensated by a collateral source:

> The rule is based on the principle that a tort-feasor is not entitled to have his liability reduced merely because plaintiff was fortunate to have received compensation for his injuries or expenses from a collateral source, and on the assumption that knowledge of that fact will more likely than not influence the jury against the plaintiff on the issue of liability and damages.[2]

In the mid-1970's the Alaska legislature became concerned that medical malpractice litigation would increase in Alaska, resulting in cost-prohibitive medical malpractice insurance. The parties agree that the goal of AS 09.55.548(b) was to modify the collateral source rule so that a medical malpractice plaintiff could not obtain a "windfall" or "double recovery" by recovering collateral source benefits that were not subject to subrogation as one way to help control costs.

Things were different in the mid-1970's than they are now. There were far fewer doctors in Alaska, no such thing as telemedicine, less hospitals (including the addition of massive facilities under the umbrella of Alaska Native Medical Center and the Veteran's Administration), there were no physician's assistants and nurse practitioners filling the

[2] *Tolan v. ERA Helicopters, Inc.*, 699 P.2d 1265, 1267 (1985) quoting from *Ridgeway v. North Star Terminal and Stevedoring, Inc.,* 378 P.2d 647, 650 (Alaska 1963). The statutory modifications of the collateral source rule are designed to "limit[] the circumstances in which a victim can receive double recovery, while enhancing the chances that a tortfeasor may not be held fully accountable." *Weston v. AKHappytime, LLC,* 445 P.3d 1015, 1021–22 (Alaska 2019).

roles of doctors, there were no Zoom doctor's appointments, and no one had ERISA health insurance plans with the force of federal law. In the 1970s, the law of subrogation was confined to the context of automobile insurance coverage.[3] Efforts by health insurers to seek subrogation on personal injury claims began in the 1980s.[4] A health insurer seeking subrogation on a personal injury claim was first reported in the 1982 decision of *Frost v. Porter Leasing Corp.*[5] While the threat of a double recovery by a plaintiff may have seemed real, the reality of a contractual right of recovery with the force of federal law and without the protections of common law equities was unknowable at the time AS 09.55.548(b) was contemplated.

Now a system with the power of federal law exists to protect the reimbursement interests of health insurers. This is coupled with a lingering belief that the medical malpractice insurance market has not changed in the 45 years since AS 09.55.548(b) was passed (or the 23 years since the second round of non-medical malpractice tort reform was passed). Undeniably, Alaska's legislature has adopted numerous statutes designed to protect and limit the liability of health care providers whose conduct is found to have fallen below the applicable standard of care. The result is that injured patients have limited recourse in obtaining compensation for injuries caused by negligent health care providers.

Charina McCollum's dilemma in having to decide whether to forfeit the right to compensation or to seek redress in the face of significant financial risk is faced by many

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[3] Roger M. Baron & Anthony P. Lamb, The Revictimization of Personal Injury Victims by ERISA Subrogation Claims, 45 Creighton L. Rev. 325, 330 (2012)
[4] Id.
[5] Id.; 436 N.E.2d 387 (Mass. 1982).

Alaskans. One of the effects of the restrictions faced in recovering for the consequences of medical malpractice is that there are few lawyers who practice medical malpractice litigation, and that number is shrinking. The AAJ members who do still practice this complex and expensive type of litigation cannot take cases of even glaring liability where an ERISA plan or other contractual subrogation threatens to consume the entire medical malpractice policy carried by the medical provider. Injured patients, their family or loved ones are generally shocked to learn that the law as argued by the negligent medical provider is that victims of medical malpractice are not entitled to collect the money for the medical bills generated by the provider's negligence, even when the victim is legally obligated to pay those bills back.

Charina's case is representative of a group of people who nearly die, but are able to recover through the provision of extensive medical care. What is unusual about her case is not that she nearly died and recovered, but that she was able to find a lawyer willing to take her case. The first dollar right of recovery without any right to attorney's fees and costs, common fund doctrine, make whole doctrine or any other common law equitable relief that has always existed to protect the injured insured make an ERISA plan case a bet without any real possibility of a meaningful recovery. This system has obvious consequences on society has a whole. The medical malpractice and health insurers are secure, and the costs of the injured people is passed on to us all. But, most deeply affected, are the injured people and their families.

There is no meaningful dispute that the purpose of AS 09.55.548(b) was to modify that aspect of the common law collateral source rule that permitted a tortiously injured

malpractice victim from recovering from the tortfeasor damages paid by a collateral source that the victim did not have to repay e.g. preventing the victim from obtaining a "double recovery." Dr. Knolmayer also concedes that AS 09.55.548(b) was not intended to bar a collateral source from recovering its subrogated interest. Rather, Dr. Knolmayer contends that AS 09.55.548(b) should be interpreted in a manner that limits the ***manner*** by which a subrogated collateral source can recover its subrogated interest. According to Dr. Knolmayer, while permitting recovery of a collateral source's subrogated interest, AS 09.55.548(b) restricts the manner in which a collateral source can recover contractually subrogated interest to a lawsuit filed by the subrogated collateral source directly against the tortfeasor. Thus, according to Dr. Knolmayer, AS 09.55.548(b) overrides all provisions in the insurance contract authorizing recovery of its subrogated interest in any manner other than a direct action brought by the insurer against the tortfeasor.

In the present action, the insurance plan, like virtually all insurance plans, includes a provision that allows the insurer to authorize its insured to include the insurer's subrogated interest in the insured's claim against the tortfeasor, subject to reimbursement. The insurer's reimbursement right is a "first dollar" right that prioritizes the subrogated interest above all other amounts recovered from the tortfeasor. The plan contains enforcement provisions which impose penalties on the insured until the insurer's subrogated interest is fully reimbursed, such as withholding future coverage and/or reducing future medical expense payments until the subrogated interest is fully reimbursed.

Here, there is no dispute that the Lowe's plan covering Charina exercised its contractual right to have Charina include its subrogated interest in her claim against Dr.

Knolmayer, subject to reimbursement. [Exc. 143]. Dr. Knolmayer contends that, since AS 09.55.548(b) should be interpreted to limit the manner by which the plan may enforce its subrogated interest to a direct claim against the tortfeasor, the plan's decision to allow Ms. McCollum to include its subrogation claim in her action against Dr. Knolmayer precludes recovery of its subrogated interest against Dr. Knolmayer.

As explained in Respondent's and Amicus Blue Premera Blue Cross and Blue Shield's briefing, there is no dispute that a state statute whose effect interferes with an ERISA plan's subrogation and reimbursement rights is preempted. In order to avoid preemption, Dr. Knolmayer argues that, although AS 09.55.548(b) should be interpreted to prevent Ms. McCollum from being able to recover the plan's subrogated interest in her action against Dr. Knolmayer, the plan's right to reimbursement and subrogation is not impaired because it is not prevented from asserting its reimbursement right with respect to any non-collateral source damages recovered by Ms. McCollum e.g., deducting the subrogated amount from her recovery for non-economic damages, such as pain and suffering damages. According to Dr. Knolmayer, because the insurer's reimbursement right against its insured is not impaired by AS 09.55.548(b), ERISA preemption is not triggered. However, as explained in Respondent's and Premera's briefing submitted before this court, this argument is without merit since the contemplated procedure of authorizing the Plan to recover its subrogated interest through assignment/ratification and reimbursement is compromised by Dr. Knolmayer's proposed interpretation. In addition, there is the practical consequence that there is little likelihood the insurer will recover its subrogated interest against an insured who is prevented from recovering the insurer's

subrogated interest from the tortfeasor. This is because a medical malpractice victim faced with having to reimburse their insurer for hundreds of thousands of dollars in past medical expenses without the commensurate ability to recover those funds from the tortfeasor has no incentive to seek redress for medical negligence.

A number of factors make it virtually impossible for a medical malpractice victim whose tortiously caused injuries have resulted in extensive past medical expenses paid by an insurance plan to pursue a claim against a negligent medical provider. First, medical malpractice actions are generally complex and extremely expensive to litigate due, *inter alia*, to the cost of retaining medical and other experts required to meet the statutory burden of proving medical negligence and causation.[6]

Second, Alaska limits the recovery of non-economic damages in medical malpractice actions to $250,000.00 or, if the injuries are permanent and more than 70% disabling, $400,000.00. Most serious injuries resulting from medical malpractice will frequently result in several or many hundreds of thousands of dollars in medical expenses.[7]

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[6] See e.g. AS 09.55.540

[7] As most people who have received significant medical treatment in the last 5-10 years are aware, even a relatively simple surgery involving a short hospital stay in Alaska is likely to cost in excess of $50,000.00. When surgery is more complex and/or requires a longer hospital stay, medical costs are likely to increase exponentially. In a 2017 study, "it was found that payments to doctors and hospitals in Alaska are 76 percent higher than nationwide averages using a national Medicare benchmark." In the same study, "comparisons of medical procedure codes showed the cost of an MRI or CT scan in Seattle averages about $500, where in Anchorage, the average cost is just over $2000 and hospital payment levels in Alaska are 56 percent higher than the national average and increased at a rate 6 percent higher than other states in the study comparison areas. See, https://www.premera.com/Premera-Voices/All-Posts/Alaska-medical-costs-are-more-

Even if a medical malpractice victim was able to recover the maximum amount under these caps, their recovery would be wiped out in situations where the insured's subrogated interest matched or exceeded these caps. Dr. Knolmayer's proposed interpretation results in an even more draconian outcome to those more seriously injured because the greater the medical treatment/costs, the greater the victim's reimbursement obligation.

Others who need medical care for their on-going problems associated with medical negligence (or their families) cannot take the risk that an ERISA plan could cut-off their current and future benefits since they are obligated to reimburse the insurer in full from any recovery they obtain. Equally troubling are the catastrophically injured people who can no longer work, but whose initial treatment was covered by an employer health plan. When the medical malpractice policy is limited, and the past medical bills are significant (as they often are in these cases), AAJ members have to explain that filing the lawsuit will only allow them to obtain enough money to repay the ERISA plan. While such cases may have the possibility for depletion or exhaustion recoupment under AS 0955.548(b), that permissive post-verdict possibility is only available post-trial. It does not drive settlement and is not considered in settlement offers.

In short, if Dr. Knolmayer's interpretation is accepted, attorneys considering representing medical malpractice victims with significant subrogated medical expenses subject to reimbursement would be ethically obligated to explain to such victims that a

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than-double-the-national-average/, see also the Millman report at: https://www.premera.com/documents/044006.pdf.

claim against the tortfeasor would be unlikely to result in any meaningful recovery. When such information is delivered to a potential medical malpractice client, along with notice that the potential client could be subject to a significant adverse cost and attorney's fee award if they do not prevail (or recover less than offered under an ARCP 68 offer of judgment), it is hard to imagine the circumstance in which an injured victim could reasonably consider pursuing a medical malpractice action in Alaska that involved significant past subrogated medical expenses, irrespective of the claim's merits.

While some private insurers and ERISA fiduciaries are willing to work with counsel for their insured to find an avenue for recovery within Alaska law and the dictates of the Plan, it is far more common that there is no cooperation or insufficient cooperation to justify pursuit of the claim. The litigation in Charina's case demonstrates how relentlessly and astutely the defense bar uses this power to their advantage. Busy trial court judges have little time to wade through the complicated nature of ERISA, preemption, and legislative intent. Even when a lawyer takes a chance on a case like this one, litigating the issues will consume an inordinate amount of time in the already complex field of medical malpractice litigation. These are the practical realities faced by Dr. Knolmayer's proposed interpretation of AS 09.55.548(b) in light of the other damage limitations such as the significant non-economic caps in medical malpractice cases. It is far less risky, and the more common course, for attorneys to simply decline to accept cases involving medical malpractice.

The bottom line is that interpreting AS 09.55.548(b) to allow recovery of subrogated benefits, whether by a direct claim by the insurer or by inclusion of the subrogated claim

in the malpractice victim's action against the tortfeasor (subject to reimbursement), serves the legislative goals of preventing a double recovery while protecting a medical malpractice victim's ability to seek redress for economic and non-economic harms caused by negligent medical treatment. Any other construction results in a "double deduction," which has the practical consequence of serving as a bar to the courts and, even for those brave enough to take the risk and who prevail, are still left with the likelihood of little to no recovery.

Since the legislature could not reasonably have intended AS 09.55.548(b) to result in such an "absurd" outcome, this court should find that, irrespective of whether the ERISA plan covering Ms. McCollum is a "federal program" under AS 09.55.548(b) or is preempted, the statute should be interpreted to permit recovery of subrogated collateral source benefits against the tortfeasor, whether through inclusion of the claim in the insured's action against the tortfeasor or through a direct claim filed by the insurer.

2. Contractual Assignment of a Subrogated Claim Should not be Barred by AS 09.55.548(B).

Dr. Knolmayer's argument that AS 09.55.545 limits ERISA plans to only pursuing subrogation through a direct action within the statute of limitations for the medical malpractice tort illustrates why ERISA insurers will always pursue reimbursement over subrogation. But, the right to subrogation in the Plan, and the automatic ratification provisions and obligations imposed on Charina McCollum, establish the right to pursue the Plan's subrogation claim within her lawsuit. "The idea of an assignment is essentially that

of a transfer by one existing party to another existing party of some species of property or valuable interest."[8]

As noted by the trial court and conceded by Dr. Knolmayer, Alaska law authorizes an insurer to pursue a direct claim against a tortfeasor for recovery of its subrogated claim:

> When an insurer pays expenses on behalf of a party it insures, the insurer is "subrogated" to the insured's claim. This means the claim belongs to the insurer; thus, the insurer "may pursue a direct action against the tortfeasor, discount and settle its claim, ... determine that the claim should not be pursued", or "[i]f the insurer does not object, the insured may include the subrogated claim in its claim against a third-party tortfeasor. If the insured does include the subrogated claim in its claim against a third party tortfeasor, "[a]ny proceeds recovered must be paid to the insurer . . . [Exc. 311-312] [9].

The Plan contract provides in relevant part as follows:

> The Plan may, at its discretion, in its own name or in the name of the Covered Person, commence a proceeding or pursue a claim against any party or coverage for the recovery of all damages to the full extent of the value of any such benefits or conditional payments advanced by the Plan. [Exc. 88-89] (bold italics added).

ARCP 17(a) provides that:

> Every action shall be prosecuted in the name of the real party in interest. . . . [A] party with whom or in whose name a contract has been made for the benefit of another . . . may sue in that person's own name without joining the party for whose benefit the action is brought.

Since the Plan is the owner of the subrogation claim, it has the discretion to either bring a direct claim against the tortfeasor for its subrogated interest or to authorize its insured, Charina, to assert its subrogation claim on its behalf.

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[8]https://dictionary.thelaw.com/assignment/#:~:text=Legal%20definition%20for%20ASSIGNMENT%3A%20This%20refers%20to%20the,%3C%3C%3C%20H.%20C.%20Black%20%3E%3E%3E%20In%20contracts.%201

[9] *Ruggles v. Grow*, 984 P.2d 509, 512 (Alaska 1999)

Here, the Plan authorized Charina to assert on its behalf its subrogation claim. [Exc. 143]. By authorizing Charina to pursue its subrogation claim, the Plan effectively "ratified" the right of Charina to pursue the subrogation claim on its behalf and, as a result of this ratification, was not required to join the action against Dr. Knolmayer or to bring an independent action against Dr. Knolmayer. [Exc. 314-315]. By ratifying Charina's prosecution of the Plan's subrogation claim, the Plan effectively "assigned" its interest in its subrogation claim against Dr. Knolmayer to Charina. There is no articulable or rational basis to distinguish the right of the Plan to assert its subrogation claim directly against Dr. Knolmayer rather than through ratification of Charina's inclusion of its subrogation interest in her claim against Dr. Knolmayer. Accordingly, the court should reject Dr. Knolmayer's contention that AS 09.55.548(b) precludes Charina from pursuing the Plan's subrogation interest on its behalf.

3. The Court Should Consider the Constitutionality of AS 09.55.548(B) and AS 09.55.010 as Applied in this Case.

It is not settled law in Alaska that medical malpractice tort reform is constitutional. The plurality opinion in *Evans ex rel. Kutch v. State* suffered from the difficult facial challenge standards that applied.[10] While some aspects of the law have been challenged as applied, some of the more draconian aspects have not. This case provides a perfect example. Many states since *Evans* have revisited the constitutionality of tort reform caps and reversed prior decisions.[11]

[10] 56 P.3d 1046 (Alaska 2002).
[11] *Estate of McCall v. United States*, 134 So. 3d 894, 897 (Fla. 2014); *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt,* 691 S.E.2d 218, 220 (Ga. 2010); *Hilburn v.*

This Court's Order inquired about the impact AS 09.55.548(b) has on the substantive due process guaranteed by article I, section 7,[12] and equal protection found in article I, section 1 of the Alaska Constitution.[13] The Court's Order recognized the limitation of the decision in *Reid v. Williams*, acknowledging that "contractual subrogation was not raised in that case."[14] There are other important considerations in considering the weight of the *Reid* decision on the constitutional issues being addressed in the present context. The court in *Reid* considered the constitutional issues despite a strong waiver argument and a candid acknowledgement that the issue had not been briefed below other in a footnote of the trial brief.[15] At least one equal protection argument was considered waived and not addressed.[16] There is no evidence in the opinion that *Reid* offered any "factual justification for the statute," other than conceding it was in response to a "perceived medical malpractice crisis."[17] This is not an appropriate record to assess the constitutionality of AS 09.55.548(b).

It is also important that the general statements of purpose relied upon by the Court do not appear to be supported by the evolution the specific part of the legislation that led

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Enerpipe Ltd., 442 P.3d 509, 511 (Kan. 2019); *Lebron v. Gottlieb Mem'l Hosp.,* 930 N.E.2d 895, 899 (Ill. 2010); *Beason v. I. E. Miller Servs., Inc.*, 441 P.3d 1107, 1109 (Ok. 2019).

[12] Providing in relevant part: "[n]o person shall be deprived of life, liberty or property without due process of law."

[13] Providing in relevant part, "[t]hat "all persons are equal and entitled to equal rights, opportunities, and protection under the law."

[14] 964 P.2d 453, 457 (Alaska 1998).

[15] Id. at 456.

[16] Id. at 460.

[17] Id. at 457.

to AS 09.55.548(b). The comprehensive legislation that included the addition of AS 09.55.548(b) was extensive. There were specific reasons for each part.

In assessing whether AS 09.55.548(b) "bears no reasonable relationship to a legitimate government purpose,"[18] as required in substantive due process analysis, the Court should consider the specific legislative history relevant to this section of the statute. The scope of AS 09.55.548(b) as proposed by Dr. Knolmayer reaches past a double recovery as the parties agree was its limited intent. In *Reid,* the Court only considered the due process and equal protection question based upon a case where a double recovery had occurred.

A classification only survives equal protection scrutiny if it is reasonable, not arbitrary, and it must have a fair and substantial relation to a legitimate governmental objective.[19] The equal protection question also deserves fresh analysis in the context of contractual subrogation unburdened by the holding in *Reid*. The equal protection argument in *Keyes v. Humana Hosp. Alaska, Inc.*, relied upon by the court in *Reid*, challenged a specific classification of medical malpractice plaintiffs versus other tort litigants.[20] Thus, *Reid* only addressed the difference in similarly situated individuals: medical malpractice plaintiff and defendants versus other tort litigants.[21] AS 09.55.548(b) creates different classes of similarly situation plaintiffs that have not previously been considered.

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[18] Id. at 456.
[19] *Wilson v. Municipality of Anchorage*, 669 P.2d 569, 572 (Alaska 1983).
[20] 750 P.2d 343, 357 (Alaska).
[21] Id. at 458.

There are many classifications created by AS 09.55.548(b) that deserve scrutiny and are facially arbitrary based on the legislative purpose of preventing double recovery. There is a category of insured plaintiffs who have no binding contractual subrogation or reimbursement versus those who do. And, another category within any contractual subrogation and reimbursement plan where the insurer purses reimbursement, but not subrogation. These are all similarly situated plaintiffs who will suffer extremely different outcomes depending on the classification created by AS 09.55.548(b). AAJ urges the Court to carefully consider the Alaska Constitutional due process and equal protection arguments raised by Respondent and Amicus Premera Blue Cross Blue Shield in considering these disparate effects on persons whose status does not provide a rational basis for differing treatment.

4. If AS 09.55.548(B) is Interpreted in the Manner Advocated by Dr. Knolmayer, It is Preempted.

To avoid redundancy, Amicus AAJ relies on and refers this court to the briefing addressing ERISA preemption filed by Respondent and Amicus Premera Blue Cross Blue Shield. Those arguments and authorities establish that, to the extent AS 09.55.548(b) is interpreted to preclude or restrict the Plan's ability to assert its subrogation and reimbursement rights, it is preempted under 29 U.S.C. §1144 (a).

III. CONCLUSION

For the reasons set forth herein and in the briefing filed by Respondent and Amicus Premera Blue Cross Blue Shield, this court should hold that an ERISA plan falls within the scope of a "federal program" under AS 09.55.548(b), that AS 09.55.548(b) does not bar an

insured from recovering from the tortfeasor contractually mandated subrogated collateral source benefits on behalf of the collateral source and that any other construction violates the due process and equal protection provisions of the Alaska Constitution. Lastly, to the extent AS 09.55.548(b) is interpreted to prevent or otherwise limit the subrogation and reimbursement provisions of the Lowe's self-funded ERISA plan, it is preempted under 29 U.S.C. §1144 (a).