IN THE SUPREME COURT
OF THE STATE OF ARIZONA

RONNIE ANTHONY MCDANIEL, et al., Plaintiffs/Appellants/Cross-Appellees/Respondents, v. PAYSON HEALTHCARE MANAGEMENT, INC., et al., Defendants/Appellees/Cross-Appellants/Petitioners.	Arizona Supreme Court Case No. CV-20-0333-PR Court of Appeals Division Two Case No. 2 CA-CV 19-0150 Gila County Superior Court Case No.: CV 2013-00157

AMICI CURIAE BRIEF OF THE ARIZONA MEDICAL ASSOCIATION AND THE AMERICAN MEDICAL ASSOCIATION IN SUPPORT OF PETITIONERS

Barry D. Halpern (#005441)
Ian R. Joyce (#035806)
SNELL & WILMER L.L.P.
One Arizona Center
400 E. Van Buren, Suite 1900
Phoenix, Arizona 85004-2202
Telephone: 602.382.6000
E-Mail: bhalpern@swlaw.com
ijoyce@swlaw.com

Attorneys for Amici Curiae Arizona Medical Association and American Medical Association

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INTRODUCTION

Although it was primarily designed to promote judicial economy by reducing cumulative evidence, the "one-expert-per-side rule" in Rule 26(b)(4)(F)(i), Ariz. R. Civ. P., has in practice prejudiced physicians by limiting their ability to defend themselves against malpractice claims. The Court of Appeals' decision in *McDaniel v. Payson Healthcare Mgmt, Inc.*, 250 Ariz. 199 (App. 2020) (hereinafter "Decision") exacerbates this prejudice, by holding that a *treating physician* can be the "one retained or specially employed expert" allowed under Rule 26(b)(4)(F)(i) if the physician, at any point during his or her testimony, makes a stray comment that crosses the line from a "factual" observation into an "expert" opinion.

This Court should reject the Court of Appeals' holding, and instead adopt a simpler approach: a treating physician is not a "retained or specially employed expert" under the one-expert-per-side rule.

This outcome is supported by the text and purpose of the one-expert-per-side rule, which only prohibits parties from *retaining* multiple *independent* experts. *See Duquette v. Superior Court*, 161 Ariz. 269, 271 n.2 (App. 1989) (treating physicians are not experts within the meaning of Rule 26(b)(4) because they do not develop opinions specifically for trial); *Felipe v. Theme Tech Corp.*, 235 Ariz. 520, 526 ¶ 19 (App. 2014) (fact witnesses that give expert testimony do not qualify as independently retained experts under the one-expert-per-side rule). Moreover, a

bright line rule that treating physicians are not "retained or specially employed expert[s]" has several policy advantages over the testimony-based approach employed by the Court of Appeals. *See Drew v. Lee*, 250 P.3d 48, 53-56 ¶¶ 19-30 (Utah 2011) (adopting a bright line rule that treating physicians need not file written expert reports). A bright-line rule ensures that treating physicians can fully defend themselves against malpractice claims; will provide much needed consistency to an unpredictable area of law; will promote judicial economy by reducing ancillary litigation; and is consistent with Arizona case-law.

In contrast, Respondents' argument that allowing multiple treating physicians to testify during trial somehow improperly prejudices medical malpractice plaintiffs is unavailing: it ignores the text of the one-expert-per-side rule, ignores the fact-finding mission of the jury, and ignores that the trial court always has discretion to reject prejudicially cumulative evidence.

This Court should vacate the Court of Appeal's decision because Drs. David Friedman, Timothy Schaub, John Burge, and John Cory are not "experts" under the one-expert-per-side rule.

INTERESTS OF AMICI CURIAE

The Arizona Medical Association ("ArMA") is a voluntary membership organization for Arizona physicians. It currently represents 4,000 members, including physicians, physician assistants, resident physicians, and medical students

from all specialties and practice settings. ArMA's vision is to make Arizona the best place to practice medicine and receive care. It has become the foremost advocate and resource in the state for economically sustainable medical practices, the freedom to deliver care in the best interests of patients, and health for all Arizonans. ArMA has frequently represented its membership at the state capitol on issues affecting physicians and patients, and has provided amicus support in appellate matters regarding the same.

The American Medical Association ("AMA") is the largest professional association of physicians, residents, and medical students in the United States. Through state and specialty medical societies and other physician groups seated in its House of Delegates, substantially all United States physicians, residents, and medical students are represented in the AMA's policymaking process. The AMA, founded in 1847, promotes the science and art of medicine and the betterment of public health, and these remain its core purposes. AMA members practice in every state, including Arizona, and every medical specialty.

The AMA and ArMA both appear as separate entities speaking for their members and the AMA Litigation Center. The Litigation Center is a coalition among the AMA and medical societies of every state. The Litigation Center is the voice of America's medical profession in legal proceedings across the country. The mission of the Litigation Center is to represent the interests of the medical profession in the

courts. It brings lawsuits, files amicus briefs, and otherwise provides support or becomes actively involved in litigation of general importance to physicians.

Both ArMA and AMA have an interest in ensuring that treating physicians are not viewed as expert witnesses under Rule 26(b)(4)(F)(i), Ariz. R. Civ. P. As a fundamental issue of fairness and due process, treating physicians should be permitted to present a fulsome defense of their care when it is challenged in court. The Court of Appeal's decision in this case harms these fundamental rights, by improperly expanding the one-expert-per-side rule well beyond its text and original purpose.

ARGUMENT

The "one-expert-per-side rule" is found in Rule 26(b)(4)(F)(i), Ariz. R. Civ. P., which provides in relevant part that: "Unless the parties agree or the court orders otherwise for good cause, each side is presumptively entitled to call only one retained or specially employed expert to testify on an issue." This Court should use this opportunity to clarify that treating physicians are not "retained or specially employed expert[s]" as understood in the one-expert-per-side rule. This approach aligns with the text and purpose of the one-expert-per-side rule, is far more protective of treating physician's due process rights than the testimony-based approach used by the Court of Appeals, is highly efficient, and is consistent with prior Arizona case law.

I. The Court of Appeals' Decision Increases the One-Expert-Per-Side Rule's Inherent Prejudice Against Physicians.

As a preliminary matter, the one-expert-per-side rule has prejudiced physicians since its inception. By requiring that each side may only use one expert on an issue, the rule presumptively places both sides of a medical malpractice dispute on equal footing, even when there is overwhelming medical consensus supporting the physician's care. The one-expert-per-side rule also improperly assumes that there is a universally agreed upon way to treat every illness or injury, which is simply not the case.

This prejudice will be exacerbated if the Court of Appeal's decision is upheld here. In direct contravention of the one-expert-per-side rule's text and purpose, the Court of Appeals significantly expanded the scope of the rule by holding that a treating physician can somehow be an "expert" based solely on the treating physician's testimony. The Decision thus potentially limits medical provider's ability to retain or specially employ third-party experts and may chill treating physician testimony. This not only hinders a physician's ability to defend their care, but also will ultimately discourage treating physicians from testifying at trial, at all.

II. Both the Text and Purpose of the One-Expert-Per-Side Rule Confirm It Does Not Apply to Treating Physicians.

Treating physician witnesses generally fall into two categories: (1) treating physicians who are named defendants, and (2) non-defendant treating physicians

called to provide supplemental factual testimony (collectively referred to as "treating physicians"). The one-expert-per side rule's text and purpose confirms that it was never intended to apply to either group—both of which are primarily called to give factual testimony. Nor was the one-expert-per-side rule intended to be used as a weapon to transform treating physicians into "expert" witnesses based on a line-by-line *de novo* appellate review of the trial record.

A. The One-Expert-Per-Side Rule Only Applies to Experts "Retained or Specially Employed" For the Purpose of Giving Expert Testimony; a Treating Physician is Not Retained for This Purpose.

By its own terms, the one-expert-per-side rule only prevents a party from calling multiple "retained or specially employed" experts on a single issue. Ariz. R. Civ. P. 26(b)(4)(F)(i). A retained or specially employed expert is a "person who is retained for the *purpose of* offering expert opinion testimony." *Felipe*, 235 at 526 ¶ 19 (emphasis added). This is confirmed in the 1991 Advisory Committee's note, which explains that the purpose of the one-expert-per-side rule is to prevent parties from retaining or disclosing "multiple *independent* expert witnesses." Ariz. R. Civ. P. 26 advisory committee's note to 1991 amendment (emphasis added). "There is no intent to preclude witnesses who in addition to their opinion testimony are factual witnesses." *Id.*

This concept is illustrated in *Felipe v. Theme Tech. Corp*. 235 Ariz. 520 (App. 2014). There, the plaintiffs sued defendants for damages arising from an automobile

accident. *Felipe*, 235 Ariz. at 522 ¶ 1. During trial, the plaintiffs called a police officer who had witnessed the accident to describe the scene. *Id.* at 522 ¶ 5. During the officer's testimony, the officer performed an accident reconstruction. *Id.* Notwithstanding that the Court of Appeals determined that the accident reconstruction was "expert" testimony, the court *did not* preclude the plaintiffs' third party accident reconstruction expert's testimony. *See id.* at 526 ¶ 19. "Because [the officer] was not retained by Plaintiffs, he was not Plaintiffs' independent, retained expert" under the one-expert-per-side rule. *Id.*

Like the officer in *Felipe*, treating physicians are not "retained for the purpose of offering expert opinion testimony." *See id.* Instead, treating physicians are brought into the litigation to provide "relevant, material, and probative" factual testimony concerning the treatment rendered on a particular patient. *See State ex rel. Montgomery v. Whitten*, 228 Ariz. 17, 22 ¶ 21 (App. 2011) (quotation omitted). Thus, the Court of Appeals explained in *Duquette v. Superior Court*, 161 Ariz. 269 (App. 1989), a "plaintiff's treating physician is not an 'expert witness' within the meaning of Rule 26(b)(4), Arizona Rules of Civil Procedure, because facts known and opinions held by a treating physician are not 'acquired or developed in

anticipation of litigation or for trial.'"[1] 161 Ariz. at 271 n.2. This analysis is especially true where a treating physician is a named defendant.

B. The Purpose of the One-Expert-Per-Side Rule is to Reduce Cumulative Evidence at Trial and Lower Litigation Costs, Not Disqualify Treating Physician Testimony.

The stated purpose of the one-expert-per-side rule is to avoid "unnecessary costs inherent in the retention of multiple independent expert witnesses" and "the discovery costs associated with listing multiple cumulative independent experts as witnesses." Ariz. R. Civ. P. 26 advisory committee's note to 1991 amendments. In this sense, the one-expert-per-side rule is essentially duplicative of, and was designed to reinforce, "Rule 403 of the Arizona Rules of Evidence which gives the court discretion to exclude relevant evidence which represents … 'needless presentation of cumulative evidence.'" *Id.* (ellipsis in original).

In short, the one-expert-per-side rule was designed to give trial courts an additional *discretionary* tool to manage trial and promote judicial economy.[2] *Felipe*, 235 Ariz. at 524, 526 ¶¶ 10, 21 (trial courts have "broad discretion" in precluding or admitting expert witnesses and cumulative evidence). Indeed, "discretion is

[1] The *Duquette* ruling was issued before Rule 26 was amended to include the one-expert-per-side rule in 1991. The case instead concerned whether it is appropriate for attorneys to contact treating physicians *ex parte*. *Duquette*, 161 Ariz. at 271.

[2] Because trial courts have discretion to preclude or admit witness testimony under the one-expert-per-side rule, *amici* join Petitioners' argument that the Court of Appeals should have applied an abuse of discretion standard.

recognized both by the Committee Comment and Arizona case law as a distinct purpose of [the one-expert-per-side rule].” *Felipe*, 235 Ariz. at 526 ¶ 21 *see also* Ariz. R. Civ. P. 26 advisory committee’s note to 1991 amendment (warning that “[w]here an issue cuts across several professional disciplines, the court should be liberal in allowing expansion of the limitation upon experts established in the rule.”)

When used correctly, a trial court could therefore cite the one-expert-per-side rule as justification for limiting a treating physician’s testimony on the ground that the issue had already been covered by an expert witness. For example, in this case the trial court had discretion to instruct Drs. Friedman and Schaub not to discuss the importance of “C-Reactive Protein” (“CRP”) tests in diagnosing necrotizing fasciitis, if the trial court had felt the testimony would be unduly cumulative (it was not). Trial courts are well suited to make these types of discretionary decisions.

The one-expert-per-side rule was never intended to be used, as the Court of Appeals used it in this case, by an appellate court as a weapon to disqualify treating physician testimony (or the testimony of a retained expert) based on an exhaustive, line-by-line, review of trial testimony. Indeed, if treating physicians were aware that they could somehow be transformed into “experts” based on a stray comment at trial, they would naturally restrict their own testimony. This reality would be contrary to the Advisory Committee’s warning that the one-expert-per-side rule is not intended “to preclude witnesses who in addition to their opinion testimony are factual

witnesses." Ariz. R. Civ. P. 26 advisory committee's note to 1991 amendments.

III. Policy Considerations Support a Ruling that Treating Physicians Are Not "Experts" Under the One-Expert-Per-Side Rule.

As stated, a treating physician is not a "retained or specially employed expert" under the one-expert-per-side rule. The Court should vacate the Decision for that reason alone. But there are also several policy considerations that support a bright-line rule that treating physicians are not "experts" under the one-expert-per-side rule. This is illustrated by comparing the two methods followed by courts around the country that have considered the question of whether a treating physician is an "expert" or "fact" witness: the "substance-based" approach and the "role-based" approach. *See Drew*, 250 P.3d at 53-54 ¶¶ 20-23 (collecting cases).

The Court of Appeals below employed the "substance-based" method, which evaluates the content of a physician's testimony to determine whether that testimony has crossed over from "fact" to "expert" based on various enumerated factors.[3] *Id.* at 53 ¶ 20; *see also* Decision at 128-130 ¶¶ 9-16.

In contrast, the role-based method simply looks at the "status of the individual" physician. *Drew*, 250 P.3d at 54 ¶ 23. Thus, the role-based approach

[3] For example, under the substance-based approach a treating physician is a "fact" witness if he or she testifies as to the "'who, what, when, where, and why' regarding his own patient and medical records" or answers questions "calling for information the physician has derived from one of the five senses…." *Whitten*, 228 Ariz. 242 at ¶ 15. In contrast, a treating physician is an "expert" witness where he or she "review[s] records or testimony of another health care provider" or "opine[s] regarding the standard of care or treatment given by another provider…." *Id.* at ¶ 16.

segregates testifying physicians into two categories: (1) "physicians the party visited for purposes of medical treatment" (*i.e.*, treating physicians) and (2) other physicians who are specifically retained or employed for purposes of litigation. *Id.* Under the role-based approach, treating physicians are never considered expert witnesses. *Id.*

Not only is the role-based method more consistent with the text and purpose the one-expert-per-side rule, it also better protects the fundamental due process rights of physicians, better promotes judicial economy, and conforms with established Arizona precedent.

A. The Role-Based Approach Promotes Fairness and the Due Process Rights of Treating Physicians.

Every treating physician has a right to defend and explain his or her care when it has been challenged in a court of law. *See Webb v. State ex rel. Ariz. Bd. of Med. Exam'rs*, 202 Ariz. 555, 558 ¶ 9 (App. 2002) (holding that due process requires fair notice of the charges and a meaningful opportunity to defend against them). Treating physicians should be able to fully defend their care, without having to worry their testimony will somehow cross the line into "expert" territory and disqualify retained expert opinions or invalidate a jury verdict in their favor. *See Whitten*, 228 Ariz. at 22 ¶ 21 (App. 2011) ("Fairness is jeopardized when courts unnecessarily prevent the introduction of highly probative evidence from being heard by jurors" (quotation omitted)).

These interests are obviously most acute when the treating physician is a named defendant. Rule 26(b)(4)(F)(ii), Ariz. R. Civ. P., acknowledges as much by providing that "defendant[s] in a medical malpractice action may—in addition to that defendant's standard-of-care expert witness—testify on the issue of that defendant's standard of care."

But there are also significant fairness and due process concerns when *any* treating physician pre-emptively limits his or her testimony for fear of violating the one-expert-per-side rule. Non-defendant treating physicians will often provide factual testimony tending to show that the defendant in a medical malpractice case was not negligent—as is what happened in this case. *See* Decision at 129-130 ¶¶ 11-12. And even where a treating physician is not a named defendant or has been dismissed from the case, a medical malpractice action may nevertheless implicate that physician's care, requiring a factual response.

The substance-based method is particularly prejudicial because physicians, given that they are not attorneys, are not likely to recognize when their testimony is straying into "expert" territory. In fact, the substance-based approach seemingly permits the *opposing party* to intentionally solicit "expert" testimony from treating physicians, thereby disqualifying third party standard of care experts or providing an avenue to overturn a jury finding on appeal. *See Sanchez v. Gama*, 233 Ariz. 125, 131 ¶ 19 (App. 2013) (acknowledging that the determination of whether a physician

is an expert or fact witness often "will depend on the questions being presented to the treating physician").

The due process concerns raised by the substance-based approach are on display in this case. For instance, Respondents Anthony McDaniel, Roy Haught, and Marie Haught (the "Haughts") originally named Dr. Cory a defendant and claimed that his treatment of Dallas Haught was negligent. *See* Decision at 128 ¶ 5. Although the claims against Dr. Cory were dismissed before trial, the quality of Dr. Cory's care was still at issue and accordingly, Dr. Cory defended his own care during a deposition. The Court of Appeals focused on this testimony and inappropriately concluded that Dr. Cory was an "expert" (and overturned the jury's finding that the care rendered on Dallas was not negligent) because Dr. Cory's deposition testimony included "a hypothetical regrading standard of care." *Id.* at 130 ¶ 12 (significantly, the hypothetical question related to *Dr. Cory's* care).

Further, the crux of the Haughts' negligence claims is that Petitioners failed to timely diagnose Dallas Haught's necrotizing fasciitis. Resp. to Sharma and PHM Pet. for Review at 2. According to the Haughts, "a key piece of evidence supporting this claim was his c-reactive protein ("CRP") test result, which was extremely elevated." Appellants' Opening Brief at 1, *McDaniel v. Payson Healthcare Mgmt Inc.*, 250 Ariz. 199 (App. 2020). Thus, the Haughts' standard-of-care expert "opined that the defendants' failure to act on the 'grossly abnormal labs,' including 'one with

a CRP of 138.7 48 hours after the initial trauma' amounted to medical negligence and caused Haught's" injuries. Decision at 129 ¶ 11 n. 3; *see also* Resp. to Sharma and PHM Pet. for Review at 3.

Both Dr. Friedman and Dr. Schaub treated Dallas, but neither reviewed the CRP test result before doing so. *See* Decision at 127-129, ¶¶ 3-4, 11. At trial, the Haught's explicitly elicited testimony from Dr. Friedman about the importance of CRP test results in diagnosing necrotizing fasciitis. *See* Appellee Payson Healthcare Mgmt, Inc.'s Answering Brief at *9, *McDaniel v. Payson Healthcare Mgmt, Inc.*, 250 Ariz. 199 (App. 2020) (citing May 11, 2018 Trial Tr. at 181-82). To respond to the Haughts' suggestions that their care had been negligent, Dr. Schaub and Friedman both testified that the CRP test results would not have impacted their care. Decision at 129 ¶¶ 11-12. Like with Dr. Cory, the Court of Appeals ruled that Dr. Schaub and Dr. Friedman's testimony had somehow converted those doctors from treating physicians into "experts"—simply because they were responding to "hypotheticals" when they explained the importance (or lack thereof) of CRP test results. *See id.* at 130 ¶ 16; *see also id.* at 129-30 ¶ 12 (citing Dr. Friedman's *rebuttal* testimony).

These concerns would be alleviated with a role-based approach.

B. The Role-Based Approach Produces Consistent Results and Further Promotes Judicial Economy.

The role-based method is "easy to [apply] and uncontroversial" because it only requires a court to answer a straightforward question: did a testifying physician render treatment to the plaintiff? *See Drew*, 250 P.3d at 54 ¶ 23. The role-based method thus promotes the purposes of the one-expert-per-side rule by dissuading ancillary litigation concerning whether a treating physician has somehow rendered an "expert" opinion in his or her testimony. *See* Ariz. R. Civ. P. 26 advisory committee's note to 1991 amendments (stating that a goal of the one-expert-per-side rule is to reduce litigation costs); *see also Whitten*, 228 Ariz. at 20 ¶ 10 (expressing a preference for "simple[] procedure[s]" in evaluating whether a physician is an expert or fact witness).

In sharp contrast, the substance-based approach's "practical application is often inconsistent, unpredictable, costly, and time consuming."[4] *Drew*, 250 P.3d at 54 ¶ 22. Arizona courts have recognized that it is "not possible" to consistently determine when a treating physician's testimony "crosses the line from fact witness to expert witness." *See Whitten*, 228 Ariz. at 21 ¶ 12. Perhaps unsurprisingly, there is a "vast disagreement" among courts that follow the substance-based approach

[4] That the substance-based approach invites excessive litigation is evidenced in this case, where the testimony at issue has been subject to pre-trial discussions, a motion in limine, trial objections, and two appeals. *See* Decision at 130 ¶ 15.

regarding what testimony is properly considered "expert" versus "fact." *See Drew*, 250 P.3d at 54 ¶ 21.

For instance, in *Fielden v CSX Transp., Inc.*, 482 F.3d 866 (6th Cir. 2007) the Sixth Circuit ruled that a treating physician was not required to file a written expert report under Rule 26, Fed. R. Civ. P., even where the physician testified about causation. 482 F.3d at 869-70 (acknowledging the "obvious fact that doctors may need to determine the cause of an injury in order to treat it"). In *Widhelm v. Wal-Mart Stores, Inc.*, 162 F.R.D. 591 (D. Neb. 1995), on the other hand, the District of Nebraska prohibited treating physicians from testifying about causation, based on the theory that Rule 26, Fed. R. Civ. P., only permits treating physicians (who have not been disclosed as experts) to testify regarding "their treatment of plaintiff and the fairness and reasonableness of their bills." 162 F.R.D. at 594. Arizona courts that have attempted a substance-based approach have seemingly taken the middle ground: a treating physician's testimony on causation is considered expert testimony "unless the physician[] drew such conclusions in treating" the patient. *Whitten*, 228 Ariz. at 22 ¶ 20.

In short, the substance-based approach is inconsistent and inefficient. Adopting a role-based approach would reduce these issues.

C. The Role-Based Approach is Consistent with Arizona Precedent.

The role-based method is also consistent with Arizona caselaw. As mentioned, the Court of Appeals in *Duquette v. Superior Court*, 161 Ariz. 269 (App. 1989) observed that "[a] plaintiff's treating physician is not an 'expert witness' within the meaning of Rule 26(b)(4), Arizona Rules of Civil Procedure, because the facts known and opinions held by a treating physician are not 'acquired or developed in anticipation of litigation or for trial.'" 161 Ariz. at 271 n.2. And in *Felipe*, the Court of Appeals held that a factual witness who gave some expert testimony did not qualify as an independently retained expert under the one-expert-per-side rule. *Felipe*, 235 Ariz. at 526 ¶ 19.

Although some Arizona cases have claimed that "[w]hether a treating physician is a fact or expert witness depends on the content of the physician's testimony," *Sanchez*, 233 Ariz. at 132 ¶ 19, these cases concerned expert compensation. *Id.* at 127, 131 ¶¶ 6, 20; *Whitten*, 228 Ariz. 240 ¶ 1. It makes sense to compensate a testifying physician (who may also be a retained expert) at different rates for "factual" versus "expert" testimony because "expert" witnesses normally perform preparatory work to review records and formulate opinions, whereas "factual" witnesses generally testify based on their own recollections. *See Whitten*, 228 Ariz. at 242 ¶¶ 14-17. This rationale does not extend to the one-expert-per-side rule, which simply seeks to prevent cumulative evidence and reduce litigant costs.

Moreover, cases concerning physician compensation only tangentially (at best) involve the type of due process concerns raised in this action.

Adopting a role-based approach to the one-expert-per-side rule would thus not affect a sea change in Arizona laws.

D. Medical Malpractice Plaintiffs Are Not Unfairly Prejudiced by a Role-Based Approach.

One of the Haughts' main arguments in support of the Court of Appeal's substance-based approach is that permitting multiple treating physicians to testify, while at the same time restricting plaintiffs to a single "retained or specially employed expert," somehow unfairly tilts the playing field against medical malpractice plaintiffs. *See* Plfs/Appellants' Supp. Br. at 11-12. This argument is deficient for several reasons.

First, as stated, treating physicians are not "specially retained or employed" for the purposes of giving expert testimony. *See* Ariz. R. Civ. P. 26(b)(4)(F)(i). In claiming that the Petitioners' called multiple "expert" witnesses at trial, the Haughts' misleadingly conflate treating physicians—who are either defendants to an action, or called to provide supplementary factual information, or both—with independent experts subject to the one-expert-per-side rule.

Second, this argument improperly presumes that the jury is incapable of appropriately weighting witness testimony. *See State v. Cid*, 181 Ariz. 496, 500

(App. 1995) ("The finder-of-fact, not the appellate court, weighs the evidence and determines the credibility of witnesses."). In any given case, a jury may find the testimony of a single independent expert more credible than the combined testimony of several treating physicians. The jury, as the finder-of-fact, is "in the best position to evaluate credibility and accuracy, as well as draw inferences, weigh, and balance" treating physician testimony—not appellate courts. *See State v. Bible*, 175 Ariz. 549, 609 (1993).

Third, the Haughts' position ignores the trial court's discretion and obligation to limit cumulative or unfairly prejudicial testimony. *See e.g.*, Ariz. R. Evid. 403. Indeed, in this case the trial court considered, and rejected, the Haught's objections that Drs. Friedman, Schaub, Burge, and Cory provided unfairly prejudicial cumulative expert testimony. Decision at 130 ¶ 15. There is no compelling reason to treat this discretionary determination as a legal issue subject to *de novo* review.

Fourth, and finally, a slightly skewed treating physician to independent expert witness ratio does not somehow *unfairly* prejudice a medical malpractice plaintiff. Medical malpractice actions often involve highly complex facts with multiple treating physicians. Allowing a medical malpractice defendant to call each treating physician as a witness in order to establish a fulsome evidentiary record will not cause the jury to reach a decision based on improper grounds such as "emotion, sympathy, or horror." *See State v. Schurz*, 176 Ariz. 46, 52 (1993) (quoting Fed. R.

Evid. 403 advisory committee's note). It is not even true that treating physician testimony will always be adverse to a medical malpractice plaintiff: treating physicians may testify to facts that tend to support the plaintiff's claims.

In short, the net effect of the analytical framework advanced by the Haughts ignores the role of the jury and the trial court and encourages the type of collateral litigation the one-expert-per-side rule was designed to prevent. The role-based method avoids these concerns.

CONCLUSION

For the foregoing reasons, the Court should hold that treating physicians are not "retained or specially employed experts" under the one-expert-per-side rule. This ruling would ensure that treating physicians will not risk being transformed into "expert" witnesses based solely on their testimony, follows the text and purpose of the one-expert-per-side rule, is consistent with due process and fairness, better promotes judicial economy, and follows relevant precedent.

RESPECTFULLY SUBMITTED this 8th day of June, 2021.

SNELL & WILMER L.L.P.

By */s/ Barry D. Halpern*
Barry D. Halpern
Ian R. Joyce
One Arizona Center
400 E. Van Buren Suite 1900
Phoenix, Arizona 85004

Attorneys for Amici Curiae Arizona Medical Association