IN THE SUPREME COURT

STATE OF ARIZONA

NICHOLAS BASTIAMPILLAI, D.O., Defendant/Petitioner, vs. HONORABLE D. DOUGLAS METCALF, Judge of the Superior Court of Arizona, Pima County, Respondent Judge, SHIRLEY HEAPHY, Personal Representative of the Estate of Charles Heaphy, deceased. Real Party in Interest	No. CV 20-0197-PR Arizona Court of Appeals Division Two No. 2 CA-SA 2020-001 Pima County Superior Court No. C20191130

AMICI CURIAE BRIEF OF THE AMERICAN MEDICAL ASSOCIATION AND ARIZONA MEDICAL ASSOCIATION IN SUPPORT OF PETITION FOR REVIEW

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STATEMENT OF INTEREST OF *AMICI CURIAE*

The proper application of the patient-physician privilege is of utmost importance to the American Medical Association (AMA), Arizona Medical Association (ArMA), and their members. Physicians recognize the need to protect patient confidences, but also appreciate that when patients put their health before the court that limited disclosure of the patients' medical records may be needed to achieve fair and accurate litigation outcomes. The physician community is concerned that the Court of Appeals ruling to deny access to such information here could lead to excessive liability for future noneconomic damages and allow the patient-physician privilege to be improperly manipulated for litigation gains.

The 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 art and science 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.

ArMA is a professional membership organization for all 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.

The AMA and ArMA appear on their own behalves and as representatives of 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. No other person or entity provided financial resources for the preparation of the brief.

ISSUE FOR REVIEW ADDRESSED BY THIS *AMICI* BRIEF

Did the Court of Appeals err in holding that Plaintiffs' claims for future damages does not allow Defendants to examine the survivors' recent medical records to learn whether they have significant medical conditions that will likely shorten their life expectancies, and thus, reduce the value of future noneconomic damages to which Plaintiffs claim an entitlement.

STATEMENT OF THE FACTS AND CASE

The Petition arises out of medical negligence claims by Ms. Heaphy and her adult children. They each brought wrongful death claims over the death of Ms. Heaphy's husband, Charles, against Defendant Willow Canyon's rehabilitation center and Dr. Bastiampillai. As detailed in the Court of Appeals' ruling, Ms. Heaphy and her children are pursuing noneconomic damages for future loss of love, affection, companionship, care, protection, and guidance from Mr. Heaphy, as well as their own pain, grief, sorrow, shock, and mental suffering for the rest of their lives. To determine the likely duration for these future damages, Defendants subpoenaed Plaintiffs' medical records to determine the likely life expectancy of each Plaintiff. Defendants explained that because each Plaintiff was seeking damages for the remainder of his or her life, Defendants should be able to see if a Plaintiff has been diagnosed with any medical conditions that would severely affect his or her life expectancy. Plaintiffs refused to provide the records, asserting the records were protected under Arizona's statutory patient-physician privilege.

The trial court ruled that Plaintiffs impliedly waived their patient-physician privilege over these records by choosing to seek future damages for life, thereby putting their life expectancy before the court. It required Plaintiffs to produce the records, but limited discovery to the past five years and issued strict confidentiality orders. The Court of Appeals reversed, finding Plaintiffs had not

impliedly waived the privilege. It held the privilege is impliedly waived only when a plaintiff affirmatively puts a specific medical condition before a court, and life expectancy is a general, not a specific medical condition.

ARGUMENT

The Arizona Legislature enacted the patient-physician privilege to protect the sanctity of patient care, while recognizing that, like other evidentiary privileges, it cannot be absolute. *See* A.R.S. §§ 12-2235, 12-2236. When a patient files a lawsuit and "voluntarily" seeks damages invoking his or her health, as future damages for life does with respect to one's life expectancy, he or she has implicitly waived the privilege to the extent needed for the court to arrive at a fair and accurate resolution. A.R.S. § 12-2236; *see also Bain v. Super. Ct.*, 148 Ariz. 331, 334 (1986). Here, the trial court adhered to the law and ordered limited discovery of information pertinent to Plaintiffs' life expectancy with strict confidentiality orders to ensure the medical records could be used only for this litigation and would not become part of the public record that others could see.

In overturning this ruling, the Court of Appeals raised significant questions about the patient-physician privilege. First, the court oddly sidestepped the key substantive issues in this case, stating in footnotes that it "express[es] no opinion whether the beneficiaries' life expectancies are relevant" to their claims for future damages, or "whether the statutory beneficiaries would place a medical condition

at issue in presenting evidence relevant to their respective life expectancies." *Heaphy v. Metcalf*, 2020 WL 3286822, at *2, ¶ 5 n. 2, — P.3d — (App. June 18, 2020) [*hereinafter* "*Heaphy*."]. These issues are central for how the patient-physician privilege should apply here. Indeed, the court felt compelled to acknowledge that a claim for future damages is "inconsistent with observance of the physician-patient privilege as to the medical evidence relevant to a person's life expectancy." *Heaphy*. n. 3. Yet, it still blocked discovery of this information. The Court should grant the Petition to clarify how the privilege applies when a plaintiff seeks future damages for life.

Second, the Court of Appeals parses this Court's ruling in *Bain* that the privilege is waived only when the patient places "a particular medical condition at issue," and life expectancy is a general, not a "particular medical condition." *See Heaphy*, at *3, ¶ 10 (quoting *Bain*, 148 Ariz. at 334). This narrow ruling could have wide-ranging implications. It suggests that plaintiffs can choose to waive the privilege to put a particular medical condition before the court when it benefits their claims, but invoke the privilege when seeking to hide a medical condition that may harm their claims. Further, it is unclear whether the Court of Appeals has limited this ruling to the life expectancy or third-party beneficiary claims at issue here. The Court should grant the Petition so there are clear ground rules for the patient-physician privilege and to prevent it from being improperly leveraged. In

addition, the Court should provide guidance for how any required disclosures must be handled, including potentially in-camera review, to respect patient privacy.

For these reasons and those below, *amici* respectfully urge the Court to grant the Petition. As the Court of Appeals explained in accepting special action jurisdiction, this case presents an important issue that is "a purely legal one of first impression that may arise again in the future." *Heaphy*, at *2-3. Arizona patients and physicians must be able to rely on the State's courts to follow sound law and produce just outcomes, and the ruling below jeopardizes this essential function.

I. The Court Should Grant Review to Establish Clear Boundaries for the Patient-Physician Privilege so that Courts Can Avoid Unjust Outcomes

Courts in Arizona and around the country are relied on to doggedly pursue the truth in an effort to drive fair and accurate outcomes. For this reason, each person, whether a witness or party in the case, has a "duty to give what testimony one is capable of giving." *Jaffee v. Redmond*, 518 U.S. 1, 9 (1996). Evidentiary privileges, including the patient-physician privilege at issue here, deny plaintiffs and defendants access to such truthful testimony. They apply only where the need for privacy outweighs truth-seeking. *See id*. at 8. Because evidentiary privileges derogate the search for truth, legislatures and courts have long recognized that they must be rare and, when allowed, narrowly tailored to their specific purposes. *U.S. v. Nixon*, 418 U.S. 683, 710 (1974) ("[E]xceptions to the demand for every

man's evidence are not lightly created nor expansively construed.").

Amici are ardent supporters of the patient-physician privilege, including in Arizona, when needed to protect unwarranted disclosure of someone's private medical records to third parties. As the AMA's Code of Medical Ethics states, patients should be able to confide in physicians and "trust that physicians will protect information shared in confidence." AMA, Code of Medical Ethics § 3.2.1; *see also* Code of Medical Ethics § 3.1.1 ("Protecting information gathered in association with the care of the patient is a core value in health care."). *Amici* also recognize the patient-physician privilege, like others, is not absolute. *See Herbert v. Lando*, 441 U.S. 153, 175 (1979) (Even privileges rooted in the Constitution "must give way in proper circumstances."). In several, narrow sets of circumstances, physicians have been required to disclose information otherwise covered by the patient-physician privilege.

For example, physicians must disclose a patient's medical information to protect readily identifiable third parties from imminent physical harm. *See Hamman v. County of Maricopa*, 161 Ariz. 58 (1989) (requiring a "specific threat to a specific victim"). The patient-physician privilege can be pierced in the investigation of health care fraud. *See State v. Zeitner*, 246 Ariz. 161 (2019) (finding the need to investigate suspected fraud requires this exception). The privilege also may not apply in "criminal cases, personal injury cases, workers'

compensation proceedings, will contests, child abuse proceedings, or when on balance the court finds that the need for the information outweighs the value of confidentiality." Daniel W. Shuman, *The Origins of the Physician-Patient Privilege and Professional Secret*, 39 SW L.J. 661, 678 (1985).

Relevant here, the Legislature carved out an exception to the privilege when a patient "offers himself as a witness and voluntarily testifies with reference to the communications." A.R.S. § 12-2236. The Court has applied this exception whenever a patient puts a medical condition before a court. *See Bain*, 148 Ariz. at 334; Leonard William Copple, *Physician-Patient Privilege: A Need to Revise the Arizona Law*, 6 Ariz. L. Rev. 292 (1965) ("[I]t cannot be said that carrying of that privilege into the courtroom, where the patient has voluntarily chosen to bare his injuries to the court and jury, is indispensable to or even justified by the fostering of freedom between patient and physician."). Here, the Court of Appeals blindly iterated the Court's words that the Plaintiff must have put a specific, not general medical condition before the Court and never engaged in the balancing needed to determine whether privacy interests outweighed the search for truth in this situation. There was no indication Plaintiffs avoided treatment or withheld information needed for effective treatment of a life-threatening medical condition to expand damages in this case. Rather, when it comes to treatment implicating life expectancy, a patient would likely prioritize their own treatment over the potential

of seeking speculative future damages in third-party beneficiary litigation.

In addition to providing needed guidance on this question, the Court should grant the Petition to clarify the steps trial courts should take when requiring the production of such information. Under the AMA Code of Ethics, physicians must "[r]estrict disclosure[s] to the minimum necessary information" to achieve a legitimate countervailing goal. AMA Code of Ethics, *supra* at § 3.2.1. Lower courts should know when to enforce such discovery requests, when confidentiality orders are needed, and when they should require in-camera review.

II. The Court of Appeals Ruling Runs Counter to the Long-Standing Trend in Arizona to Assure Fair and Accurate Litigation Outcomes

The Court should also grant the Petition because the Court of Appeals ruling would force the trial court to rely solely on generalized mortality tables, which may be highly inaccurate and irrelevant to the specific plaintiffs in a given case. *See Begay v. City of Tucson*, 148 Ariz. 505, 508 (1986) (stating a plaintiff can pursue only his or her individual losses "suffered by reason of the wrongful death"). Here, Plaintiffs have chosen to pursue various damages, including pain, grief, sorrow, shock and mental suffering for the rest of their lives. A key element for determining the amount of damages, therefore, is estimating how long they may live, *i.e.*, each Plaintiff's life expectancy. If a plaintiff has medical condition that would significantly affect his or her life expectancy, it may be highly relevant

to the court's determinations. The triers-of-fact must not be misled based on averages when personalized information is available.

This forced reliance on general, not available case-specific information is inconsistent with the decades-long movement in Arizona and other states toward greater consistency, predictability, and accuracy in litigation damages, particularly over allegations of medical negligence. For example, in the 1980s, the Arizona Legislature adopted a pure comparative fault regime so that defendants would not be subject to liability for harms they did not cause. *See* A.R.S. §§ 12-2501 to 12-2509; *Watts v. Medicis Pharm. Corp.*, 239 Ariz. 19, 26 (2016) (explaining "Arizona's pure comparative fault scheme protects defendants from bearing more than their fair share of liability"). The Legislature's goal was to assure damage findings would be "fair to both plaintiffs and defendants." *Jimenez v. Sears, Roebuck and Co.*, 183 Ariz. 399, 405 (1995).

Soon thereafter, it became clear that additional reforms were needed to achieve this goal and the Legislature abolished joint and several liability entirely in most circumstances. *See* A.R.S. § 12-2506; *State Farm Ins. Cos. v. Premier Manufactured Sys., Inc.*, 217 Ariz. 222, 225 (2007). This "evolution of Arizona law" to more fair and accurate damage awards has been extended to successive injury cases and cases where total damage results from multiple causes. *See Piner v. Super. Ct. In and For County of Maricopa*, 192 Ariz. 182, 186 (1998). The goal,

as here, is to assure that defendants are not required to pay damages that plaintiffs' have not sustained.

With respect to medical negligence claims, the Legislature has recognized the additional need to ensure fair and accurate awards. In the 1970s, it abolished the collateral source rule for claims against health care providers so they could present evidence as to the expenses plaintiffs actually, not theoretically incurred. *See* A.R.S. § 12-565 (permitting only medical malpractice defendants to introduce evidence of collateral source payments). The premise of this reform was to ensure that plaintiffs do not receive a windfall for harms they did not or will not suffer. *See Eastin v. Broomfield*, 116 Ariz. 576, 583 (1977) (explaining the impropriety of allowing "plaintiffs to effectuate double and even triple recovery as a result of injuries received by them").

The same principles apply here. The Court should grant the Petition so that medical providers are not liable for future noneconomic damages that plaintiffs are unlikely to sustain. The Legislature's efforts to ensure accuracy in economic damages, as with collateral source rule reform, could be undone if plaintiffs could just inflate their noneconomic damages by refusing to disclose key evidence.

III. Maintaining Rational Boundaries on Noneconomic Damage Awards Has Been a Longstanding Priority in Medical Liability Cases

For decades, this Court and the Legislature have prioritized ensuring that

damage awards in medical liability cases do not exceed the actual harm caused to a plaintiff, particularly for noneconomic damages. Part of the challenge has always been that noneconomic damages, including those sought here for life-long pain, grief, and mental suffering, are highly subjective and unpredictable. As this Court has appreciated, juries have "extraordinarily wide discretion in determining the amount of compensation for a wrongful death." *Walsh v. Advanced Cardiac Specialists Chtd.*, 229 Ariz. 193, 195 (2012) (internal citation omitted). "[T]here is almost no standard for measuring pain and suffering damages, or even a conception of those damages or what they represent." Dan B. Dobbs, *Law of Remedies* § 8.1(4), at 383 (2d ed. 1993).[1] "[J]uries are left with nothing but their consciences to guide them." Stanley Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*, 73 Cal. L. Rev. 772, 778 (1985).

Historically, these problems did not raise the serious concerns they do today because noneconomic damages awards were largely modest. *See* Philip L. Merkel, *Pain and Suffering Damages at Mid-Twentieth Century: A Retrospective View of the Problem and the Legal Academy's First Reponses*, 34 Cap. U. L. Rev. 545, 560 (2006). Noneconomic damages took their first leap after World War II as

[1] *See also* Restatement (Second) of Torts § 903 cmt. a (1965) ("There is no scale by which . . . suffering can be measured and hence there can only be only a very rough correspondence between the amount awarded as damages and the extent of the suffering.").

plaintiffs' lawyers began leveraging them for higher awards. *See* Melvin M. Belli, *The Adequate Award*, 39 Cal. L. Rev. 1 (1951). In inflation-adjusted terms, the average pain and suffering award grew from $38,000 in the 1940s and 1950s to $48,000 in the 1960s. *See* David W. Leebron, *Final Moments: Damages for Pain and Suffering Prior to Death*, 64 N.Y.U. L. Rev. 256, 301 (1989). By 1971, pain and suffering constituted "the largest single item of recovery," exceeding medical expenses and lost wages. *Nelson v. Keefer*, 451 F.2d 289, 294 (3d Cir. 1971).

This development led directly to the medical liability and insurance crises in Arizona and other states in the 1970s and 1980s. *See generally* Frank P. Grad, *Medical Malpractice and the Crisis of Insurance Availability: The Waning Options*, 36 Case W. Res. L. Rev. 1058 (1986). It was in response to this crisis that the Legislature enacted the Medical Malpractice Act in 1976 that included the collateral source reforms above so that physicians would not be subject to damages for harms the plaintiff did not sustain. *See Eastin*, 116 Ariz. at 583-84.

Concerns with excessive liability in medical negligence cases reared its head again in the beginning of this century. *See* Perry J. Argires, *There Is an Attack on Medical Profession*, Sunday News (Lancaster, Pa.), May 16, 2004, at 1, *available at* 2004 WLNR 11275958 (citing Jury Verdict Research data). Average jury awards in medical liability cases, driven by large noneconomic damages, increased from just over $1 million in 1994 to almost $5 million in 2002. *See*

Robert P. Hartwig, *Medical Malpractice Insurance & The Insurance Cycle: Medical Professional Liability & the P/C Insurance Industry*, at 57-58 (Ins. Info. Inst. May 15, 2008), *available at* http://www.iii.org/assets/docs/pdf/Medmal_preso1.pdf; *see also* Kim Brimer, *Has "Pain and Suffering" Priced Itself Out of the Market?*, Ins. J., Sept. 8, 2003, *available at* http://www.insurancejournal.com/magazines/southcentral/2003/09/08/partingshots/32172.htm.

The U.S. Department of Health & Human Services reported that this systemic rise in noneconomic damages caused sharp medical liability insurance increases and an exodus of physicians from the states including Arizona, early retirement of physicians, and the curtailment of certain high-risk procedures. *See* U.S. Dep't Of Health & Human Servs. (HHS), *Confronting The New Health Care Crisis: Improving Health Care Quality And Lowering Costs By Fixing Our Medical Liability System* at 14 (July 2002). Indeed, the AMA found that Arizona was one of the "states showing problem signs." AMA, America's Medical Liability Crisis: A National View (July 2003). This effort to ensure a properly functioning medical liability system remains an important, ongoing challenge.

Allowing plaintiffs to inflate future pain and suffering awards, or worse, purposefully hide information that would properly constrain those awards raises several issues this Court should consider, from due process concerns for defendants, "horizontal equity" problems for plaintiffs, and the ability to settle

cases. Oscar G. Chase, *Helping Jurors Determine Pain and Suffering Awards*, 23 Hofstra L. Rev. 763, 769 (1995) (observing "variability . . . undermines the legal system's claim that like cases will be treated alike"). The Court should grant the Petition to ensure that future damages are appropriate to a plaintiff's actual harm.

CONCLUSION

For these reasons, *amici* respectfully request the Court to grant review, reverse the Court of Appeals, and reinstate the trial court's discovery order.

Respectfully submitted,

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