COLORADO TITLE SETTING BOARD

IN THE MATTER OF THE TITLE, BALLOT TITLE, AND SUBMISSION CLAUSE FOR INITIATIVE 2023-2024 #277

MOTION FOR REHEARING ON INITIATIVE 2023-2024 #277

Alethia Morgan ("Movant"), a registered elector of the City and County of Denver, Colorado, through counsel, Ireland Stapleton Pryor & Pascoe, PC, hereby files this Motion for Rehearing on Initiative 2023-2024 #277 ("Initiative #277").

On April 18, 2024, the Title Board set the Title for Initiative #277 as follows:

> A change to the Colorado Revised Statutes allowing a person to recover the total amount of monetary damages awarded by a judge or jury in a lawsuit involving a catastrophic injury or wrongful death unless the lawsuit is against a ski area operator, a seller or server of alcoholic beverages, or a governmental entity or employee, and, in connection therewith, eliminating statutory limitations on economic, non-economic, and punitive monetary damages for catastrophic injury or wrongful death.

I. Summary

Initiative #277 is identical to Initiative #150, except that it removes the section providing for a preponderance burden of proof to establish a "catastrophic injury." Nevertheless, like Initiative #150 (which is on appeal to the Colorado Supreme Court) Initiative #277 packs multiple distinct and incongruous purposes under the guise of a measure that purports to create a vague new private right for a subset of Coloradans. Consequently, it is critical that the Board unpack and understand everything Initiative #277 does, because doing so reveals multiple subjects coiled in the folds of a deceptive measure. *In re Title & Ballot Title & Submission Clause for 2005-2006 #55*, 138 P.3d 273, 278–79 (Colo. 2006), *as modified on denial of reh'g* (June 26, 2006) ("[T]his court has repeatedly stated it will, when necessary, characterize a proposal sufficiently to enable review of the Board's actions.") (citing authorities).

Because of how Initiative #277 is constructed, it would be difficult for even a savvy personal injury attorney to identify and understand all the surprises baked within its provisions. For instance, in addition to eliminating all caps on damages across various separate and unidentified laws, Initiative #277: (1) removes the judiciary's oversight over jury awards; (2) overrides the Provision of Uniform Contribution Among Tortfeasors Act, thereby allowing plaintiffs to double dip on damages; (3) nullifies the Collateral Source Statute, further expanding double-dipping opportunities; and (4) eliminates the doctrine of comparative negligence by precluding the judiciary from reducing damages awards according to proportional fault as set forth in statute.

Accordingly, Initiative #277 is an example of sophisticated logrolling aimed at unwinding several different laws that have no single-subject correlation. As Proponents' counsel indicated at the initial hearing on Initiative #150, the only thing holding the measure together is the extremely broad theme of "catastrophic injury or death", which is impermissibly broad when considering everything the measure does under this guise.[1]

Because of the various defects with the measure, it would be impossible to set a clear and accurate title that puts voters on notice of what #277 does. But instead of trying to accomplish this, the Title set by the Board unwittingly condones surreptitious omnibus measures by telling voters almost nothing of import. Voters looking at either the language of Initiative #277 or the Title would not have any clue of the extent to which the measure would dramatically shift Colorado to one of the most, if not the most, unconstrained tort jurisdictions in the country. If the Board moves forward with setting a title, it needs to put voters on notice of what the measure actually does so voters can make an informed decision.

II. Initiative #277 Has Multiple Separate Subjects.

A. Initiative #277 Effectively Repeals Multiple Different Damage-Cap Laws that Were Separately Enacted for Different Policy Reasons.

An understanding of Initiative #277's broad sweep of other laws begins with the language of the measure itself:

> ***Notwithstanding any*** contrary limitation on ***any*** type of damages ***found in law***, an injured person or their family has the ***right to recover, without limitation***, the total amount of damages awarded by a jury or judge in a claim involving catastrophic injury, including wrongful death.

Proposed C.R.S § 13-21-102.7(1) (emphasis added).

Under the broad heading of creating a "right to recover" all damages awarded, Initiative #277 does away with damages caps in the case of catastrophic injury, including wrongful death, regardless of the nature of the cap, the source of the law, or the rationale for the cap. Proponents' counsel was very clear on this point at the initial hearing on Initiative #150. March 6 Hearing Audio at 3:28:10 (not identifying which damages laws are being changed, except for stating, "all of them"). Thus, Proponents concede that, despite framing the measure as an affirmative right, the measure repeals damages caps in every instance except for the few enumerated exceptions in the measure. Proposed C.R.S. § 13-21-102.7(4).

The question then becomes, which damages caps are repealed? The measure does not identify them, and it is doubtful whether Proponents could identify all of them, given that when asked where Initiative #150 would apply, Proponents counsel answered, "It applies everywhere." March 6 Hearing Audio at 3:29:20. That answer is not helpful to either this Board or to voters in understanding what these initiatives do.

[1] March 6 Hearing Audio at 3:27:45.

Through independent research, which voters are not likely to undertake, Objector's counsel was able to identify the following non-exhaustive list of the damages-cap laws repealed, or at least potentially repealed, by Initiative #277 in any case involving catastrophic injury, including death:

- **General limitation on noneconomic damages**, C.R.S. § 13-21-102.5. This law limits non-economic damages in any civil action (except for medical malpractice) to $250,000, which, adjusted for inflation as required, is $729,790 for claims accruing after January 1, 2024.[2] Note, the jury cannot be instructed on these limits and therefore can award any amount of damages beyond this limit. *Id.* at 102.5(4).

- **The Health Care Availability Act**, C.R.S. § 13-64-302(1)(b). This law limits damages in tort actions against healthcare professionals to $1,000,000 total, and $300,000 for non-economic damages.

- **Construction Defect Action Reform Act**, C.R.S. § 13-20-806(4)(a). This law limits non-economic and derivative non-economic damages to $250,000 in actions for bodily injury as a result of a construction defect.

- **Wrongful Death Act,** C.R.S. § 13-21-203. This law limits noneconomic loss in wrongful death cases (except for medical malpractice cases, which are governed by C.R.S. § 13-64-302) to $250,000, which, adjusted for inflation as required, is $679,990 for claims accruing after January 1, 2024.[3] The jury cannot be instructed on these limits and therefore can award any amount of damages beyond this limit. C.R.S. §13-64-302(1)(b).

- **Bad Faith Breach of Insurance Contract**, C.R.S. § 10-3-1116. This statute limits first-party bad faith claims to "two times the covered benefit". The Board might wonder why insurance contract claims are in play for a measure that purports to be about "catastrophic injury, including wrongful death." The proponents have surreptitiously used the word "***involving***" in the phrase, "involving catastrophic injury, including wrongful death". Proposed C.R.S. § 13-21-102.7(1). By phrasing the measure this way, neither the claim nor the damages would need to be ***caused by*** catastrophic injury in order to be eligible for unlimited damages.

- **Recreational Use Statute**, C.R.S. § 33-41-101. This law limits the liability of landowners who allow the public to use their land for recreational use, depending on the context the land is being used. For instance, where a landowner leases land to a public entity, damages against the landowner are limited to $350,000 for an injury to one person for one occurrence or $990,000 for an injury to two or more persons for one occurrence.

- **Punitive Damages in Non-Medical Tort Cases**, C.R.S. § 13-21-102. This law caps the amount of punitive damages a jury can award no more than the amount of

[2] *See* Certification of Adjusted Limitations on Damages, *available at:* https://www.sos.state.co.us/pubs/info_center/files/damages_new.pdf.

[3] *See* Certification of Adjusted Limitations on Damages, *available at:* https://www.sos.state.co.us/pubs/info_center/files/damages_new.pdf.

actual damages awarded. Under the Colorado Jury Instructions, juries are not instructed on this cap in awarding punitive damages, meaning that the cap will be gutted.[4]

- **Punitive Damages Against Healthcare Professionals**, C.R.S. §13-64-302.5. This law limits punitive damages under the Health Care Availability Act in the same manner as in C.R.S. § 13-21-102.

These damages caps laws were put into effect based on separate and distinct policy grounds. For instance, the legislative declaration for the general economic damages cap at C.R.S. § 13-21-102.5 provides:

> The general assembly finds, determines, and declares that awards in civil actions for noneconomic losses or injuries often unduly burden the economic, commercial, and personal welfare of persons in this state; therefore, for the protection of the public peace, health, and welfare, the general assembly enacts this section placing monetary limitations on such damages for noneconomic losses or injuries.

§ 13-21-102.5, C.R.S.

Notably, this law does not cap economic damages, but only non-economic damages for pain and suffering and mental damages. The General Assembly passed these caps to strike a balance between, on the one hand, the availability of this category of damages, and, on the hand, the economic, commercial, and personal welfare of citizens and businesses in Colorado that pay for home, auto, umbrella, and liability insurance in this state.

Separately, the medical malpractice limits were put in place squarely to address the cost and availability of healthcare:

> The general assembly determines and declares that it is in the best interests of the citizens of this state to assure the continued availability of adequate health-care services to the people of this state ***by containing the significantly increasing costs of malpractice insurance for medical care institutions and licensed medical care professionals, and that such is rationally related to a legitimate state interest***. To attain this goal and in recognition of the exodus of professionals from health-care practice or from certain portions or specialties thereof, ***the general assembly finds it necessary to enact this article limited to the area of medical malpractice to preserve the public peace, health, and welfare***.

C.R.S. § 13-64-102(1) (emphasis added).

Distinct from both of these statutes, the policy behind the Recreational Use Statute is to

[4] *See* CJI:Civ 5.4, *available at:* *https://www.courts.state.co.us/userfiles/file/Court_Probation/Supreme_Court/Committees/Civil_Jury_Instructions_Committee/2018/Chapter%205.pdf.*

"encourage owners of land to make land and water areas available for recreational purposes by limiting their liability toward persons entering thereon for such purposes." C.R.S. § 33-41-101.

Most disparately of any of these policies is the cap on punitive damages. This form of damages is based on a completely different policy rationale than compensatory damages. The purpose of compensatory damages is to compensate a plaintiff for economic and/or non-economic harm. In contrast, punitive damages, whether in the context of general torts or torts against healthcare professionals, exist as a form of punishment and deterrence. C.R.S. § 13-64-302.5. Juries are instructed as much in awarding punitive damages. CJI:Civ 5:4 ("Punitive damages, if awarded, are to punish the defendant and to serve as an example to others.")

Because punitive damages are a punishment, caps are in place to ensure that punishment is wielded fairly and within certain bounds, whether by a judge or jury. *See Sky Fun 1 v. Schuttloffel*, 27 P.3d 361, 370 (Colo. 2001) ("There is no doubt that the purpose of [the punitive damages cap legislation] was to limit excessive punitive damages awards.")

Here, Proponents cannot use a vague measure about "expanding rights to damages" to repeal a swath of unidentified, separate laws that were passed for different reasons. There is no logical connection between, for example, eliminating guardrails on the level of punishment a jury can issue in the form of punitive damages, while at the same time eliminating liability limits under the Recreational Use Statute, thereby removing a critical incentive for putting private lands to public use.

This measure is a form of sophisticated and surreptitious logrolling built on an "expansion-of-rights" concept, when in fact it secretly pushes through dozens of critical policy changes that voters would never understand. For instance, a voter might understand and favor the repeal damages caps in medical malpractice cases based on the voter's own personal history. But that same voter might cherish private lands being put to public recreational use, and therefore be dismayed to find out that she voted for a measure that eliminates a policy promoting public use of private lands. Another voter might be strongly against compensatory damages caps on the theory that there should be no limit on actual damages suffered, regardless of the collective economic ramification. That same voter might be strongly in favor of limiting punitive damages because they are a form of punishment, yet have no idea the measure eliminates punitive damages caps.

These examples could go on and on—the point is, the single-subject requirement does not allow Proponents to brush these various policy changes under the rug of a vague, broad theme. *See, e.g., In re Title, Ballot Title & Submission Clause, for 2007-2008, #17*, 172 P.3d 871, 873 (Colo. 2007), *as modified on denial of reh'g* (Dec. 17, 2007) (analyzing measure creating environmental conservation department to determine that the measure also created a "public trust standard", which was a second subject); *In re Title, Ballot Title, Submission Clause for 2009-2010 No. 91*, 235 P.3d 1071, 1080 (Colo. 2010) (analyzing measure with the broad stated purpose "to protect and preserve the waters of this state" to determine the measure had distinct purposes embedded within it).

B. Initiative #277 Nullifies a Host of Non-Cap Laws that Have Separate and Distinct Purposes.

By creating a "right" to all damages awarded, Initiative #277 cleverly nullifies a host of other laws in cases of so-called "catastrophic injury". Most of these laws have no relationship to damages caps and were enacted based on separate and distinct policy grounds. Consequently, the only thing tying them together is that they are unhelpful for plaintiffs in personal injury cases. The biggest problem is that these major policy changes are made without anyone (except sophisticated personal injury lawyers) knowing it.

First, because Initiative #277 provides a "right" to all damages awarded by a jury, the measure eliminates the judiciary's oversight over damages awards. For instance, the measure nullifies the trial court's authority to reduce or disallow punitive damages awards. C.R.S. § 13-21-102(2) (empowering judges to reduce or disallow punitive damages in certain circumstances where the punishment issued is not justified). The purpose of this statute is to "provide for the trial court's supervisory role over a jury's exemplary damages award." *Sky Fun 1 v. Schuttloffel,* 27 P.3d 361, 370 (Colo. 2001).

Further, the measure eliminates a trial court's ability to order a new trial in the event the court finds the jury verdict is tainted by bias, prejudice, and passion, or juror misconduct. *See Marks v. District Court,* 643 P.2d 741, 744-45 (Colo. 1982). It likewise removes a court's ability to reduce an excessive verdict through remittitur. *See Burns v. McGraw-Hill,* 659 P.2d 1351, 1356 (Colo. 1983); *Ochoa v. Vered*, 212 P.2d 963, 972-73 (Colo. App. 2009).

In reading the measure (or the title), voters would have no idea that Initiative #277 infringes on the power of the judiciary to oversee jury awards, the ramifications of which are amplified several-fold by the elimination of all damage caps. Initiative #277's sneak-attack on all checks and balances on damage awards has no connection to ensuring that plaintiffs are adequately compensated for their losses. Instead, it is squarely aimed at opening the door to runaway jury verdicts in favor of a few and at the expense of all Coloradans.

Second, Initiative #277 overrides the Provision of Uniform Contribution Among Tortfeasors Act, thereby permitting plaintiffs to double dip on their damages in wrongful death cases. Pursuant to this Act, "a trial verdict shall be reduced by an amount equal to the cumulative percentage of fault attributed to settling nonparties." *Smith v. Zufelt*, 880 P.2d 1178, 1188 (Colo. 1994) (citing C.R.S. § 13-50.5-105).

Because this reduction is by the court post-verdict (purportedly not allowed by Initiative #277), the measure nullifies this statute and will permit a plaintiff to double-dip by recovering the full jury award while also having already collected a portion of her damages from settling parties that were also determined to be at fault. Guarding against double recovery has nothing to do with ensuring fair compensation to plaintiffs and again is aimed at maximizing jury verdicts even when nonsensical to do so. Voters would be very surprised to learn that Initiative #277 sanctions double recovery of damages.

Third, Initiative #277 nullifies the Collateral Source Statue, which provides, in pertinent part:

> In any action by any person or his legal representative to recover damages for a tort ***resulting in death or injury to person***. . . , the court, ***after the finder of fact has returned its verdict stating the amount of damages to be awarded***, shall reduce the amount of the verdict by the amount by which such person, his estate, or his personal representative has been or will be wholly or partially indemnified or compensated for his loss by any other person, corporation, insurance company, or fund in relation to the injury, damage, or death sustained.

C.R.S. § 13-21-111.6.

While the Collateral Source Statute makes an exception where a plaintiff paid for a contract that provides the collateral source payment, Initiative #277 would override any other application of the rule because the required reduction comes after damages are awarded by the jury. This is another example of Initiative #277 sanctioning double-dipping.

Fourth, Initiative #277 nullifies the Comparative Negligence Statute at C.R.S. § 13-21-111. This statute requires courts to reduce the amount of damages awarded by a jury in proportion to the plaintiff's own negligence. C.R.S. § 13-21-111 ("[T]he court shall reduce the amount of the verdict in proportion to the amount of negligence attributable to the person for whose injury, damage, or death recovery is made . . . ."); *Alhilo v. Kliem*, 2016 COA 142, ¶ 70 ("[C]omparative negligence ***reduces*** the amount of damages found by the trier of fact, to determine the amount recoverable by a plaintiff.") (emphasis added). As constructed, Initiative #277 could be interpreted as barring a court from reducing a jury's damages award because plaintiffs have a "right" to the amount awarded by the jury.

Each of these laws exists for separate policy reasons, none of which are intended to prevent damages to which a plaintiff is entitled. Voters, including those that are lawyers, would be surprised to learn that Initiative #277—which is couched as a plaintiff's "rights" measure—actually unwinds a host of laws aimed at ensuring plaintiffs are not ***unfairly*** compensated in personal injury and wrongful death cases.

III. The Title Is Unfair, Inaccurate, and Incomplete.

Ballot titles must clearly express a measure's single subject. Colo. Const. art. V, § 1; C.R.S. § 1-40-106.5. Titles must also:

> allow voters, whether or not they are familiar with the subject matter of a particular proposal, to determine intelligently whether to support or oppose the proposal. Thus, in setting a title, the title board shall consider the public confusion that might be caused by misleading titles and shall, whenever practicable, avoid titles for which the general understanding of the effect of a 'yes/for' or 'no/against' vote will be unclear.

The Title set by the Board here highlights and exacerbates the problem with setting a ballot title for a measure that has multiple, distinct purposes hidden with its folds. The title reads:

> A change to the Colorado Revised Statutes allowing a person to recover the total amount of monetary damages awarded by a judge or jury in a lawsuit involving a catastrophic injury or wrongful death unless the lawsuit is against a ski area operator, a seller or server of alcoholic beverages, or a governmental entity or employee, and, in connection therewith, eliminating statutory limitations on economic, non-economic, and punitive monetary damages for catastrophic injury or wrongful death.

While the Board is required to identify the laws affected by the measure, it is impossible to do so because Initiative #277 changes dozens of laws without ever identifying them. Even if the Board or Proponents could identify them, the Title would read like a novel. The solution to this problem cannot be to give the voters a misleading title that tells them nothing. That result would condone these surreptitious omnibus measures. In fact, setting a title that simply mirrors the vague new "right" being created would unwittingly give proponents of such measures a huge and unfair lift at the ballot box.

If the Board moves forward with setting a title, it should, at a minimum:

- Identify the damage caps being removed;
- Identify all the changes to non-cap laws, including eliminating the judiciary's oversight over jury awards; and
- Remove the catchphrase, "catastrophic injury" because its definition does not align with what a voter would understand the phrase to mean.

Consequently, in addition to containing multiple subjects, Initiative #277's title fails to comport with Colorado's clear-title requirements.

WHEREFORE, Movant respectfully requests that the Title Board reverse the title setting for Initiative #277 because it violates the single subject requirement, or, alternatively, correct the deficiencies with the Title.

Dated: April 25, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby affirm that a true and accurate copy of the foregoing **MOTION FOR REHEARING ON INITIATIVE 2023-2024 #277** was sent this 25th day of April, 2024, via first class U.S. mail, postage pre-paid or email to:

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