

## IN THE SUPREME COURT OF THE STATE OF NEVADA

### INDICATE FULL CAPTION:

ALBERT H. CAPANNA, M.D.,  
Appellant/Cross-Respondent,  
vs.  
BEAU R. ORTH,  
Respondent/ Cross-Appellant.

No. 69935

DOCKETING STATEMENT  
CIVIL APPEALS

Electronically Filed  
May 24, 2016 09:37 a.m.  
Tracie K. Lindeman  
Clerk of Supreme Court

### GENERAL INFORMATION

Appellants must complete this docketing statement in compliance with NRAP 14(a). The purpose of the docketing statement is to assist the Supreme Court in screening jurisdiction, identifying issues on appeal, assessing presumptive assignment to the Court of Appeals under NRAP 17, scheduling cases for oral argument and settlement conferences, classifying cases for expedited treatment and assignment to the Court of Appeals, and compiling statistical information.

### WARNING

This statement must be completed fully, accurately and on time. NRAP 14(c). The Supreme Court may impose sanctions on counsel or appellant if it appears that the information provided is incomplete or inaccurate. *Id.* Failure to fill out the statement completely or to file it in a timely manner constitutes grounds for the imposition of sanctions, including a fine and/or dismissal of the appeal.

A complete list of the documents that must be attached appears as Question 27 on this docketing statement. Failure to attach all required documents will result in the delay of your appeal and may result in the imposition of sanctions.

This court has noted that when attorneys do not take seriously their obligations under NRAP 14 to complete the docketing statement properly and conscientiously, they waste the valuable judicial resources of this court, making the imposition of sanctions appropriate. See KDI Sylvan Pools v. Workman, 107 Nev. 340, 344, 810 P.2d 1217, 1220 (1991). Please use tab dividers to separate any attached documents.

Revised December 2015

1. Judicial District Eighth Judicial Department III  
County Clark Judge Honorable Douglas W. Herndon  
District Ct. Case No. A-11-648041-C

**2. Attorney filing this docketing statement:**

Attorney Dennis M. Prince, Esq. Telephone 702-450-5400  
Firm Eglet Prince  
Address 400 South Seventh Street, Suite 400  
Las Vegas, Nevada 89101

Client(s) Respondent/Cross-Appellant, Beau R. Orth

If this is a joint statement by multiple appellants, add the names and addresses of other counsel and the names of their clients on an additional sheet accompanied by a certification that they concur in the filing of this statement.

**3. Attorney(s) representing respondents(s):**

Attorney Robert L. Eisenberg, Esq. Telephone 775-786-6868  
Firm Lemons, Grundy, & Eisenberg  
Address 6005 Plumas Street, Third Floor  
Reno, Nevada 89519

Client(s) Appellant/Cross-Respondent, Albert H. Capanna, M.D.

Attorney Anthony D. Lauria, Esq. Telephone 702-387-8633  
Firm Lauria Tokunaga Gates & Linn, LLP  
Address 601 South Seventh Street, 2nd Floor  
Las Vegas, Nevada 89101

Client(s) Appellant/Cross-Respondent, Albert H. Capanna, M.D.

(List additional counsel on separate sheet if necessary)

**4. Nature of disposition below (check all that apply):**

- |   |   |
|---|---|
| <input type="checkbox"/> Judgment after bench trial         | <input type="checkbox"/> Dismissal:   |
| <input type="checkbox"/> Judgment after jury verdict        | <input type="checkbox"/> Lack of jurisdiction   |
| <input type="checkbox"/> Summary judgment                   | <input type="checkbox"/> Failure to state a claim   |
| <input type="checkbox"/> Default judgment                   | <input type="checkbox"/> Failure to prosecute   |
| <input type="checkbox"/> Grant/Denial of NRCP 60(b) relief  | <input type="checkbox"/> Other (specify): _____   |
| <input type="checkbox"/> Grant/Denial of injunction         | <input type="checkbox"/> Divorce Decree:  |
| <input type="checkbox"/> Grant/Denial of declaratory relief | <input type="checkbox"/> Original <input type="checkbox"/> Modification                   |
| <input type="checkbox"/> Review of agency determination     | <input checked="" type="checkbox"/> Other disposition (specify): <u>collateral source</u> |

**5. Does this appeal raise issues concerning any of the following?**

- ☐ Child Custody  
☐ Venue  
☐ Termination of parental rights

**6. Pending and prior proceedings in this court.** List the case name and docket number of all appeals or original proceedings presently or previously pending before this court which are related to this appeal:

Albert H. Capanna, M.D., Appellant, vs. Beau R. Orth, Respondent, Case No. 702227

**7. Pending and prior proceedings in other courts.** List the case name, number and court of all pending and prior proceedings in other courts which are related to this appeal (e.g., bankruptcy, consolidated or bifurcated proceedings) and their dates of disposition:  
None.

**8. Nature of the action.** Briefly describe the nature of the action and the result below:

Medical malpractice action wherein Defendant physician was found by a jury to be below the standard of care by performing surgery on the wrong level of Plaintiff's spine. This resulted in money judgment against Defendant.

**9. Issues on appeal.** State concisely the principal issue(s) in this appeal (attach separate sheets as necessary):

Respondent/Cross-Appellant is appealing the admission of Plaintiff's collateral source information and the constitutionality of NRS 42.021, as permitted in the following orders: (1) Order Regarding Defendant's Motion for New Trial, or in the Alternative, for Amendment of Judgment, limited to the briefing regarding NRS 42.021 and any admission of Plaintiff's insurance information; (2) Order Regarding Defendant's Motion for Application of NRS 41A.035 and NRS 42.021, regarding NRS 42.021 only; (3) Order Regarding Plaintiff's Motion to Declare NRS 42.021 and NRS 41A.035 Unconstitutional, regarding NRS 42.021 only; and (4) Order Regarding Plaintiff's Omnibus Motion in Limine, Section 7, regarding Collateral Sources of Payment.

**10. Pending proceedings in this court raising the same or similar issues.** If you are aware of any proceedings presently pending before this court which raises the same or similar issues raised in this appeal, list the case name and docket numbers and identify the same or similar issue raised:

None known.

**11. Constitutional issues.** If this appeal challenges the constitutionality of a statute, and the state, any state agency, or any officer or employee thereof is not a party to this appeal, have you notified the clerk of this court and the attorney general in accordance with NRAP 44 and NRS 30.130?

☐ N/A

☒ Yes

☐ No

If not, explain:

**12. Other issues.** Does this appeal involve any of the following issues?

☐ Reversal of well-settled Nevada precedent (identify the case(s))

☒ An issue arising under the United States and/or Nevada Constitutions

☒ A substantial issue of first impression

☐ An issue of public policy

☒ An issue where en banc consideration is necessary to maintain uniformity of this court's decisions

☐ A ballot question

If so, explain: Appellant is appealing the admission of Plaintiff's collateral source information and the constitutionality of NRS 42.021, as permitted in the orders listed above in number 9.

**13. Assignment to the Court of Appeals or retention in the Supreme Court.** Briefly set forth whether the matter is presumptively retained by the Supreme Court or assigned to the Court of Appeals under NRAP 17, and cite the subparagraph(s) of the Rule under which the matter falls. If appellant believes that the Supreme Court should retain the case despite its presumptive assignment to the Court of Appeals, identify the specific issue(s) or circumstance(s) that warrant retaining the case, and include an explanation of their importance or significance:

This matter is presumptively retained by the Supreme Court, which has original jurisdiction under NRAP 17(a)(1), because this cross-appeal arises from an appeal from a judgment in excess of \$1,000,000 in a tort case.

**14. Trial.** If this action proceeded to trial, how many days did the trial last? 8

Was it a bench or jury trial? Jury Trial

**15. Judicial Disqualification.** Do you intend to file a motion to disqualify or have a justice recuse him/herself from participation in this appeal? If so, which Justice?  
None.

## TIMELINESS OF NOTICE OF APPEAL

**16. Date of entry of written judgment or order appealed from** 2/10/16;8/22/16;12/1/15

If no written judgment or order was filed in the district court, explain the basis for seeking appellate review:

**17. Date written notice of entry of judgment or order was served** 2/11/16;5/11/16;12/3/15

Was service by:

☐ Delivery

☒ Mail/electronic/fax

**18. If the time for filing the notice of appeal was tolled by a post-judgment motion (NRCP 50(b), 52(b), or 59)**

(a) Specify the type of motion, the date and method of service of the motion, and the date of filing.

☐ NRCP 50(b)      Date of filing \_\_\_\_\_

☐ NRCP 52(b)      Date of filing \_\_\_\_\_

☒ NRCP 59      Date of filing Motion New Trial, e-served 11/9/15

**NOTE: Motions made pursuant to NRCP 60 or motions for rehearing or reconsideration may toll the time for filing a notice of appeal. See AA Primo Builders v. Washington, 126 Nev. \_\_\_, 245 P.3d 1190 (2010).**

(b) Date of entry of written order resolving tolling motion Feb 10, 2016

(c) Date written notice of entry of order resolving tolling motion was served Feb 11, 2016

Was service by:

☐ Delivery

☒ Mail

**19. Date notice of appeal filed** Notice of Cross-Appeal filed on 3/21/16

If more than one party has appealed from the judgment or order, list the date each notice of appeal was filed and identify by name the party filing the notice of appeal:

Appellant/Cross-Respondent filed a Notice of Appeal on March 7, 2016.

Appellant/Cross-Respondent filed a Supplemental Notice of Appeal on April 18, 2016.

**20. Specify statute or rule governing the time limit for filing the notice of appeal, e.g., NRAP 4(a) or other**

NRAP 4(a)(1)

**SUBSTANTIVE APPEALABILITY**

**21. Specify the statute or other authority granting this court jurisdiction to review the judgment or order appealed from:**

(a)

- |   |                                       |
|---|---------------------------------------|
| <input checked="" type="checkbox"/> NRAP 3A(b)(1)                       | <input type="checkbox"/> NRS 38.205   |
| <input type="checkbox"/> NRAP 3A(b)(2)                                  | <input type="checkbox"/> NRS 233B.150 |
| <input checked="" type="checkbox"/> NRAP 3A(b)(3)                       | <input type="checkbox"/> NRS 703.376  |
| <input checked="" type="checkbox"/> Other (specify) <u>NRAP 4(a)(2)</u> |                                       |

(b) Explain how each authority provides a basis for appeal from the judgment or order: NRAP 3A(b)(1) and (2) confers jurisdiction over the appeal because Appellant/Cross-Respondent Albert H. Capanna, M.D. appeals a final judgment after jury verdict and appeals an order denying another trial. Respondent/Cross-Appellant Beau R. Orth filed this cross-appeal pursuant to NRAP 4(a)(2).



**22. List all parties involved in the action or consolidated actions in the district court:**

(a) Parties:

Plaintiff, Beau R. Orth

Defendant, Albert H. Capanna, M.D.

(b) If all parties in the district court are not parties to this appeal, explain in detail why those parties are not involved in this appeal, *e.g.*, formally dismissed, not served, or other:

All parties in the district court are parties to this appeal

**23. Give a brief description (3 to 5 words) of each party's separate claims, counterclaims, cross-claims, or third-party claims and the date of formal disposition of each claim.**

Plaintiff claims medical malpractice and negligence. The complaint was filed on 9/8/11.

**24. Did the judgment or order appealed from adjudicate ALL the claims alleged below and the rights and liabilities of ALL the parties to the action or consolidated actions below?**

☒ Yes

☐ No

**25. If you answered "No" to question 24, complete the following:**

(a) Specify the claims remaining pending below:

(b) Specify the parties remaining below:  
Not applicable

(c) Did the district court certify the judgment or order appealed from as a final judgment pursuant to NRCP 54(b)?

☐ Yes

☒ No

(d) Did the district court make an express determination, pursuant to NRCP 54(b), that there is no just reason for delay and an express direction for the entry of judgment?

☐ Yes

☒ No

**26. If you answered "No" to any part of question 25, explain the basis for seeking appellate review (e.g., order is independently appealable under NRAP 3A(b)):**

Orders being appealed are independently applicable under NRAP 3(A(b)).

**27. Attach file-stamped copies of the following documents:**

- The latest-filed complaint, counterclaims, cross-claims, and third-party claims
- Any tolling motion(s) and order(s) resolving tolling motion(s)
- Orders of NRCP 41(a) dismissals formally resolving each claim, counterclaims, cross-claims and/or third-party claims asserted in the action or consolidated action below, even if not at issue on appeal
- Any other order challenged on appeal
- Notices of entry for each attached order

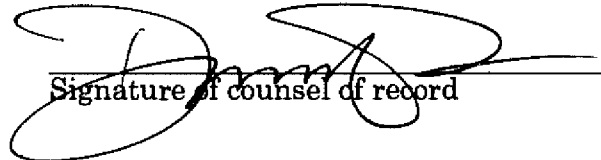
## VERIFICATION

I declare under penalty of perjury that I have read this docketing statement, that the information provided in this docketing statement is true and complete to the best of my knowledge, information and belief, and that I have attached all required documents to this docketing statement.

Beau R. Orth  
Name of appellant

Dennis M. Prince  
Name of counsel of record

May 12, 2016  
Date

  
Signature of counsel of record

Clark County, Nevada  
State and county where signed

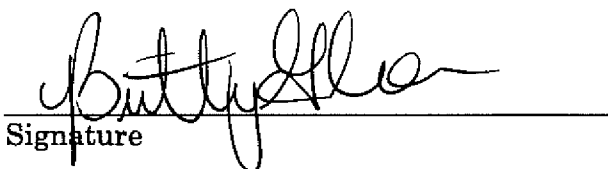
## CERTIFICATE OF SERVICE

I certify that on the 12th day of May, 2016, I served a copy of this completed docketing statement upon all counsel of record:

- ☐ By personally serving it upon him/her; or
- ☐ By mailing it by first class mail with sufficient postage prepaid to the following address(es): (NOTE: If all names and addresses cannot fit below, please list names below and attach a separate sheet with the addresses.)

SEE ATTACHED

Dated this 12th day of May, 2016

  
Signature

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this DOCKETING STATEMENT was filed electronically with the Nevada Supreme Court on the 12th day of May, 2016. Electronic service of the foregoing shall be made in accordance with the Master Service List as follows:

Anthony D. Lauria, Esq.  
LAURIA, TOKUNAGA GATES & LINN, LLP  
601 South Seventh Street, 2<sup>nd</sup> Floor  
Las Vegas, Nevada 89101  
[Alauria@ltglaw.net](mailto:Alauria@ltglaw.net)

Robert L. Eisenberg, Esq.  
LEMONS, GRUNDY & EISENBERG  
6005 Plumas Street, Suite 300  
Reno Nevada 89519  
[rle@lge.net](mailto:rle@lge.net)

Stephen Haberfeld (Settlement Judge)  
8224 Blackburn Avenue, #100  
Los Angeles, CA 90048

/s/ Brittney Glover  
An Employee of Eglet Prince

**ATTACHMENT'S TO  
NUMBER 27**

## CIVIL COVER SHEET

A-11-648041-C

Clark County, Nevada

Case No. \_\_\_\_\_

(Assigned by Clerk's Office)

XXVII

**I. Party Information**

Plaintiff(s) (name/address/phone): BEAU R. ORTH

Defendant(s) (name/address/phone): ALBERT H. CAPANNA, MD

Attorney (name/address/phone):

Dennis M. Prince, Prince & Keating, 3230 S. Buffalo Drive,  
Suite 108, Las Vegas, Nevada 89117 (702) 228-6800

Attorney (name/address/phone):

**II. Nature of Controversy** (Please check applicable bold category and applicable subcategory, if appropriate)☐ **Arbitration Requested****Civil Cases**

Real Property	Torts	
<input type="checkbox"/> <b>Landlord/Tenant</b> <input type="checkbox"/> Unlawful Detainer <input type="checkbox"/> <b>Title to Property</b> <input type="checkbox"/> Foreclosure <input type="checkbox"/> Liens <input type="checkbox"/> Quiet Title <input type="checkbox"/> Specific Performance <input type="checkbox"/> <b>Condemnation/Eminent Domain</b> <input type="checkbox"/> <b>Other Real Property</b> <input type="checkbox"/> Partition <input type="checkbox"/> Planning/Zoning	<input type="checkbox"/> <b>Negligence</b> <input type="checkbox"/> Negligence – Auto <input checked="" type="checkbox"/> Negligence – Medical/Dental <input type="checkbox"/> Negligence – Premises Liability (Slip/Fall) <input type="checkbox"/> Negligence – Other	<input type="checkbox"/> <b>Product Liability</b> <input type="checkbox"/> Product Liability/Motor Vehicle <input type="checkbox"/> Other Torts/Product Liability <input type="checkbox"/> <b>Intentional Misconduct</b> <input type="checkbox"/> Torts/Defamation (Libel/Slander) <input type="checkbox"/> Interfere with Contract Rights <input type="checkbox"/> <b>Employment Torts</b> (Wrongful termination) <input type="checkbox"/> <b>Other Torts</b> <input type="checkbox"/> Anti-trust <input type="checkbox"/> Fraud/Misrepresentation <input type="checkbox"/> Insurance <input type="checkbox"/> Legal Tort <input type="checkbox"/> Unfair Competition
Probate	Other Civil Filing Types	
<input type="checkbox"/> <b>Summary Administration</b> <input type="checkbox"/> <b>General Administration</b> <input type="checkbox"/> <b>Special Administration</b> <input type="checkbox"/> <b>Set Aside Estates</b> <input type="checkbox"/> <b>Trust/Conservatorships</b> <input type="checkbox"/> Individual Trustee <input type="checkbox"/> Corporate Trustee <input type="checkbox"/> <b>Other Probate</b>	<input type="checkbox"/> <b>Construction Defect</b> <input type="checkbox"/> Chapter 40 <input type="checkbox"/> General <input type="checkbox"/> <b>Breach of Contract</b> <input type="checkbox"/> Building & Construction <input type="checkbox"/> Insurance Carrier <input type="checkbox"/> Commercial Instrument <input type="checkbox"/> Other Contracts/Acct/Judgment <input type="checkbox"/> Collection of Actions <input type="checkbox"/> Employment Contract <input type="checkbox"/> Guarantee <input type="checkbox"/> Sale Contract <input type="checkbox"/> Uniform Commercial Code <input type="checkbox"/> <b>Civil Petition for Judicial Review</b> <input type="checkbox"/> Other Administrative Law <input type="checkbox"/> Department of Motor Vehicles <input type="checkbox"/> Worker's Compensation Appeal	<input type="checkbox"/> <b>Appeal from Lower Court</b> (also check applicable civil case box) <input type="checkbox"/> Transfer from Justice Court <input type="checkbox"/> Justice Court Civil Appeal <input type="checkbox"/> <b>Civil Writ</b> <input type="checkbox"/> Other Special Proceeding <input type="checkbox"/> <b>Other Civil Filing</b> <input type="checkbox"/> Compromise of Minor's Claim <input type="checkbox"/> Conversion of Property <input type="checkbox"/> Damage to Property <input type="checkbox"/> Employment Security <input type="checkbox"/> Enforcement of Judgment <input type="checkbox"/> Foreign Judgment – Civil <input type="checkbox"/> Other Personal Property <input type="checkbox"/> Recovery of Property <input type="checkbox"/> Stockholder Suit <input type="checkbox"/> Other Civil Matters

**III. Business Court Requested** (Please check applicable category; for Clark or Washoe Counties only.)

- |   |  |   |
|---|--|---|
| <input type="checkbox"/> NRS Chapters 78-88   | <input type="checkbox"/> Investments (NRS 104 Art. 8)        | <input type="checkbox"/> Enhanced Case Mgmt/Business  |
| <input type="checkbox"/> Commodities (NRS 90) | <input type="checkbox"/> Deceptive Trade Practices (NRS 598) | <input type="checkbox"/> Other Business Court Matters |
| <input type="checkbox"/> Securities (NRS 90)  | <input type="checkbox"/> Trademarks (NRS 600A)               |   |

09/8/11

Date

Signature of initiating party or representative

  
CLERK OF THE COURT

**COMP**

DENNIS M. PRINCE  
Nevada Bar No. 5092  
JOHN T. KEATING  
Nevada Bar No. 6373  
3230 S. Buffalo Drive  
Suite 108  
Las Vegas, Nevada 89117  
*DPrince@PrinceKeating.com*  
*JKeating@PrinceKeating.com*  
(702) 228-6800  
(702) 228-0443 facsimile  
*Attorneys for Plaintiff*  
*Beau R. Orth*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

BEAU R. ORTH,

Plaintiff,

vs.

ALBERT H. CAPANNA, M.D.;  
DOES I through X; ROE BUSINESS  
ENTITIES I through X, inclusive,

Defendants.

CASE NO. : A-11-648041-C  
DEPT. NO. : XXVII

**COMPLAINT**

Arbitration Exemption:  
Medical Malpractice

Plaintiff Beau R. Orth, by and through his attorneys, Prince & Keating, and for his  
Complaint against Defendants, states, asserts, and alleges as follows:

**GENERAL ALLEGATIONS**

1. At all times relevant herein, Plaintiff Beau R. Orth ("Orth") is and was a  
resident of the State of Nevada, County of Clark.

2. Upon information and belief, Albert H. Capanna, M.D. ("Dr. Capanna"), is a  
physician licensed pursuant to NRS Chapter 630 and maintains an office in Las Vegas, Clark  
County, Nevada.

1           3.     The true names, identities, and capacities, whether individual, corporate,  
2     associate, or otherwise, of DOES I through X, inclusive, and ROE BUSINESS ENTITIES I  
3     through X, inclusive, are unknown to Plaintiff, who therefore sues said Defendant by such  
4     fictitious names. Plaintiff is informed and believes and upon that basis alleges that each of the  
5     Defendants designated herein as a DOE and ROE BUSINESS ENTITY Defendant are  
6     responsible in some manner for events and happenings herein referred to and caused damages  
7     proximately thereby to Plaintiff as herein alleged. Plaintiff further alleges that he will ask leave  
8     of this Court to amend this Complaint to insert the true names, identities, and capacities of said  
9     DOES I through X, inclusive, and ROE BUSINESS ENTITIES I through X, inclusive, when the  
10    same have been ascertained by Plaintiff together with appropriate charging allegations.

### 13                               FACTS

14           4.     At all times mentioned herein, Orth was a 21 year old young man who sought  
15    care from Dr. Capanna for a low back injury he sustained while playing collegiate football.  
16    Dr. Capanna ordered an MRI of Orth's lumbar spine which revealed a left lumbar L5-S1 disc  
17    injury. As a result of these findings, Dr. Capanna recommended Orth undergo surgery to  
18    repair his L5-S1 disc.

19  
20           5.     On September 17, 2010, Orth underwent surgery for what was supposed to be  
21    a lumbar discectomy at L5-S1 by Dr. Capanna at University Medical Center.

22           6.     On September 29, 2010, Orth returned to Dr. Capanna for a post-surgical  
23    office visit. Orth reported he was in extreme pain. Dr. Capanna ordered a lumbar MRI of  
24    Orth, which revealed post-surgical changes from a left L4 laminectomy and microdiscectomy.

25  
26           7.     On October 7, 2010, Dr. Capanna called Orth and advised that the MRI  
27    showed significant edema. At no time did Dr. Capanna note that the MRI showed post-



1 surgical changes at L4, when the surgery scheduled by Dr. Capanna was to be performed at  
2 L5-S1.

3  
4 **FIRST CLAIM FOR RELIEF**

5 *(Medical Malpractice and Negligence)*

6 Plaintiff repeats and realleges the allegations contained in Paragraphs 1 through 7 as  
7 though fully set forth herein.

8 8. Dr. Capanna owed a duty and obligation to Plaintiff to have that degree of  
9 learning and skill ordinarily possessed by reputable physicians and surgeons, practicing in the  
10 same or similar locality and under similar circumstances. Dr. Capanna also owed a duty to  
11 use the care and skill ordinarily exercised in like cases by reputable members of the  
12 profession, practicing in the same or a similar locality under similar circumstances, and to use  
13 reasonable diligence and best judgment in the exercise of skill and the application of learning  
14 in an effort to accomplish the purpose for which they are employed.

15  
16 9. Dr. Capanna breached the foregoing duty to Orth by performing the surgery at  
17 the wrong lumbar level, thereby causing injury to Orth, as evidenced by the expert affidavit of  
18 Kevin Yoo, M.D. attached as Exhibit "1".

19  
20 10. As a proximate result of Dr. Capanna's negligence, Plaintiff has been damaged  
21 in an amount in excess of Ten Thousand Dollars (\$10,000.00).

22 11. As a proximate result of Dr. Capanna's negligence, Plaintiff has been required  
23 to retain the services of an attorney to bring this claim and is, therefore, entitled to an award  
24 of attorney's fees.

25 ...

26 ...


27 ...

1  
2  
3 WHEREFORE, Plaintiff prays this Court to enter judgment against Defendants for the  
4 following relief:

- 5 a. Compensatory and special damages in excess of \$10,000;  
6 b. Costs of suit, including reasonable attorney's fees;  
7 c. Legal interest; and  
8 d. Such other relief as this Court deems just and proper.  
9

10 Dated this 8 day of September, 2011.

11 **PRINCE & KEATING**

12  10341 for

13 DENNIS M. PRINCE

14 Nevada Bar No. 5092

15 JOHN T. KEATING

16 Nevada Bar No. 6373

17 3230 S. Buffalo Drive

18 Suite 108

19 Las Vegas, Nevada 89117

20 *Attorney for Plaintiff*

21 *Beau Orth*  
22  
23  
24  
25  
26  
27  
28

# EXHIBIT 1

# EXHIBIT 1

**AFFIDAVIT OF KEVIN YOO, M.D. IN SUPPORT OF  
COMPLAINT FOR PROFESSIONAL NEGLIGENCE**

STATE OF CALIFORNIA            )  
  ) ss:  
COUNTY OF SAN DIEGO        )

Kevin Yoo, M.D., being first duly sworn, deposes and says:

1. I have personal knowledge of the facts and matters stated herein except those matters stated upon information and belief and as to those matters I believe them to be true.

2. I am a licensed physician specializing in Neurosurgery, and board certified by the American Board of Neurological Surgery. Attached to this Affidavit as Exhibit 1 is a true and correct copy of my Curriculum Vitae outlining my education, professional experience and my professional affiliations.

3. In connection with this case, I have reviewed the following medical records and diagnostic studies pertaining to Beau Orth:

- a) Desert Radiologists, MRI reports of February 3, 2009 and February 18, 2010;
- b) International Neuroscience Consultants (Albert Capanna, MD), medical records;
- c) Axiom Medical Imaging, MRI report of September 2, 2010;
- d) University Medical Center, medical records;
- e) Steinberg Diagnostic Medical Imaging, MRI report of October 6, 2010;
- f) Desert Institute of Spine Care (Andrew Cash, MD), medical records;
- g) Southern Hills Hospital, pertinent medical records (without nursing notes);
- h) CD of MRIs of February 18, 2010; September 2, 2010; and October 6, 2010.

4. The opinions expressed herein are to a reasonable degree of medical probability based upon my qualifications, including my education, training and experience and the medical records and documents I have reviewed in this matter to date.

...  
...  
...  
...

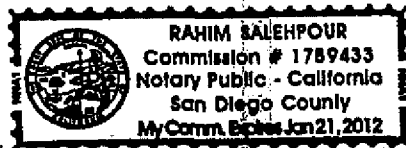
5. It is my opinion to a reasonable degree of medical probability that Albert Capanna, M.D. fell below the standard of care in his treatment of Beau Orth on September 16, 2011, by performing a surgical procedure at L4-5 rather than L5-S1, as identified in the operative report, thereby causing injury to Beau Orth requiring additional medical treatment.

FURTHER YOUR AFFLANT SAYETH NAUGHT.

Kevin Yoo, M.D.

SUBSCRIBED and SWORN to before  
me this 7 day of September, 2011.

NOTARY PUBLIC in and for said  
County and State





Kevin Yoo, M.D.

15706 Pomerado Road, Suite 206  
Poway, CA 92064  
Phone (858) 485-8022  
Fax (858) 815-6820

9834 Genesee Ave., Suite 411  
HM Poole Building  
Scripps Memorial Hospital, La Jolla Campus  
La Jolla, CA 92037 (858) 677-1755  
Phone: 858-677-1755  
Fax: 858-677-1771

[www.palomar-neurosurgery.com](http://www.palomar-neurosurgery.com)

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## CURRICULUM VITAE

### Current Position

- DIRECTOR OF PALOMAR NEUROSURGERY CENTER
- SOLO/PRIVATE PRACTICE: June 2004 – Current

### Medical Facility Affiliations

- SCRIPPS MEMORIAL HOSPITAL, LA JOLLA
  - TRAUMA OFFICE
    - 9888 Genesee Avenue, LJ 601, La Jolla, CA 92037
    - (O) 858-626-6682 (F) 858-626-6354
- POMERADO HOSPITAL
- FOUNTAIN VALLEY REGIONAL HOSPITAL AND MEDICAL CENTER
- PALOMAR MEDICAL CENTER
- OUTPATIENT SURGERY OF DEL MAR
- INLAND VALLEY MEDICAL CENTER
- KINDRED HOSPITAL
- OUTPATIENT SURGERY CENTER OF LA JOLLA

### Approved Provider Status

- TRICARE
- MEDICARE
- PPO
- WORK COMP
- PERSONAL INJURY

### Education:

High School: The Westminster Schools (Atlanta, Georgia)  
Graduated Summa Cum Laude June 1984

College: University of North Carolina at Chapel Hill  
Dual Degree: Bachelor of Arts in English and Chemistry

Medical School: August 1984 - June 1988  
Emory University School of Medicine  
Degree: Doctor of Medicine  
August 1988 - June 1990, August 1991 - June 1993  
Graduate School: Emory University Graduate School  
Division of Biological and Biomedical Sciences  
July 1990 - July 1991  
Graduate School: University of Arkansas for Medical Sciences  
Department of Anatomy  
Passed Candidacy Oral and Written Exams  
July 1994 - December 1996

### **Post Doctoral Training**

July 1993 – June 1994: Surgical Internship  
Emory University School of Medicine, Department of Surgery and Affiliated Hospitals,  
Atlanta, Georgia (404-727-0093)  
July 1994 – December 1996: Neurosurgical Research Associate  
University of Arkansas for Medical Sciences, Department of Neurosurgery, Little Rock,  
Arkansas (501-296-1463)  
January 1997 – July 2002: Neurosurgical Residency  
Loyola University Medical Center, Department of Neurosurgery, Maywood, Illinois  
(708-216-3208)  
July 2002 – June 2004: Chief Resident, Neurosurgical Residency  
University of California at San Diego, Division of Neurosurgery, San Diego, California  
(619-543-5545)

### **Continuing Medical Education**

- Minimally Invasive Surgery of the Spine, University of California at San Diego, Nov 2005.
- Minimally Invasive Surgery of the Spine, University of California at San Diego, Nov 2006.

### **License/Certification**

- The American Board of Neurological Surgery Certified exp 12/31/2019
- California License G86513  
Issue date: January, 2004  
Expiration date: January 31, 2012

### **Awards and Honors**

- High School: The Westminster Schools (1980 -1984): graduated *summa cum laude* and with distinctions.
- College: University of North Carolina (1984 -1988): *John Motley Morehead Scholar*; Dean's Honor List; Member of the UNC Honors Program and the North Carolina Fellows Program.
- Medical School: Emory University School of Medicine (1988 -1990, 1991 - 1993): Awarded Medical Student Summer Research Fellowship 1989.

## Memberships

- AMERICAN ASSOCIATION OF NEUROLOGICAL SURGEONS  
Since 2004
- CONGRESS OF NEUROLOGICAL SURGEONS  
Since 2004
- NORTH AMERICAN SPINE SOCIETY  
Since 2006

## Teaching Experience

- Faculty Member for Synthes Spine Lateral Lumbar Interbody Fusion Surgeon Courses 2008 – 2009
  1. Oracle Spacer System Training Forum, San Diego, CA, August 8, 2009.
  2. Synthes Spine Introduction to the Lateral Lumbar Approach Forum, Dallas, TX, August 1, 2009.

## Consulting Experience

- Lumbar Degenerative Spine Executive Surgeon Panel for Alphatec Spine 2008
- Minimally Invasive Spine Executive Surgeon Panel for Alphatec Spine 2009

## Publications and Papers

### Poster Presentations:

1. Tominaga, GT, Dandan IS, Coufal F, **Yoo K**, Schaffer K, Simon, Jr, FJ, Eastman, AB "Decompressive Craniectomy for Severe Brain Injury: Lessons Learned." Annual American Association for the Surgery of Trauma, Sept. 2008, Maui, HI.
2. Ozgur BM, Aryan HE, **Yoo K**, Taylor WR. "Adult Degenerative Scoliosis Repair via an Extreme Lateral Interbody Fusion Technique (XLIF)." American Association of Neurological Surgeons, 2005.
3. **Yoo K**, Shownkeen H, Oritano T.C. "Pediatric Congenital Vertebral Artery Fistula treated successfully with Endovascular Techniques." 12<sup>th</sup> Annual Meeting of North American Skull Base Society, Mar. 2001, Orlando, FL.
4. **Yoo K**, Shownkeen H, Oritano T.C. "Successful treatment of Carotid Artery Stenosis with Shape-Memory-Alloy-Recoverable-Technology Stents." Cardiovascular Section, 2001, Hawaii.
5. **Yoo K**, Shownkeen H, Oritano T.C. "Carotid-Cavernous Fistula: Multiple Routes in Endovascular Treatment." Congress of Neurological Surgeons, 2000, San Antonio, TX and Cardiovascular Section, 2001, Hawaii.
6. **Yoo K**, Shownkeen H, Oritano T.C. "Endovascular Treatment of Transverse-Sigmoid Sinus Dural AVMs presenting as Pulsatile Tinnitus." Congress of Neurological Surgeons, 2000, San Antonio, TX and Cardiovascular Section, 2001, Hawaii.
7. Nockels R, **Yoo K**, Leppla D, Rauzzino M. "Rigid Stabilization of the Cervicothoracic Region with Combined Lateral Mass and Hook Rod Implants." Congress of Neurological Surgeons, 2000, San Antonio, TX.



8. Shownkeen H, **Yoo K**, Oritano T.C. Three topics presented on Balloon, Embolization, and Coil Treatment. Interventional Neuroradiology Peer Review Conference, 2000, Jackson Hole, WY.
9. **Yoo K**, Jellish WS, Murdoch J, Leonetti J, Fluder E, Corsino A, "Peripheral Nerve Injury associated with Skull Base Surgery." American Association of Neurological Surgeons, 2000, San Francisco, CA.
10. **Yoo K**, Jellish WS, Brody M, Shea J, Slogoff M, Oritano TC. "The Effect Epidural Clonidine and/or SQ Bupivacaine have on Postoperative Outcomes after Lower Back Surgery using Spinal Anesthesia." American Association of Neurological Surgeons, 2000, San Francisco, CA.
11. **Yoo K**, Jellish WS, Leonetti J, Fluder E, Corsino A, Oritano TC. "Perioperative Comparisons of the Lateral vs. Classic Approach to the Skull Base." American Association of Neurological Surgeons, 2000, San Francisco, CA.
12. Krisht AF, **Yoo K**, Arnautovic KI, Al-Mefty O. "Canine Cavernous Sinus Tumor Model." American Association of Neurological Surgeons, 1996, Minneapolis, MN.
13. **Yoo K**, Krisht AF, Wallace B, Arnautovic KI, Al-Mefty O. "The Use of Somatostatin Receptor Scintigraphy with [111Indium-labeled DTPA-D-Phe1]-Octreotide for Preoperative Diagnosis of Brain Tumors." Student Research Day, 1995, University of Arkansas for Medical Sciences College of Medicine, Little Rock, AR.
14. **Yoo K**, Krisht AF, Wallace B, Arnautovic KI, Al-Mefty O. "The Use of Somatostatin Receptor Scintigraphy with [111Indium-labeled DTPA-D-Phe1]-Octreotide for Postoperative follow-up of Meningiomas." Congress of Neurological Surgeons, 1995, San Francisco, CA.
15. **Yoo K**, Krisht AF, Wallace B, Arnautovic KI, Al-Mefty O. "The Use of Somatostatin Receptor Scintigraphy with [111Indium-labeled DTPA-D-Phe1]-Octreotide for Preoperative Diagnosis of Brain Tumors." Congress of Neurological Surgeons, 1995, San Francisco, CA.
16. Arnautovic KI, Borba L, Pait TG, Al-Mefty O, Krisht AF, **Yoo K**. "The Vertebral Artery; Microsurgical Anatomy of Occipito-C1/C2 Segment." 4th International Workshop on Cerebrovascular Surgery, 1995.
17. Krisht AF, Bulent C, Arnautovic KI, **Yoo K**, Al-Mefty O. "Giant Invasive Pituitary Adenomas." American Association of Neurological Surgeons, 1995.
18. Krisht AF, Barrow D, Al-Mefty O, **Yoo K**. "The Microanatomic Features of the Clinoidal Cone." American Association of Neurological Surgeons, 1995.
19. Krisht AF, Barrow D, Al-Mefty O, Shengalaia G, **Yoo K**. "The Microsurgical Anatomy of a Basilar Artery Perforator Free Zone." American Association of Neurological Surgeons, 1995.

#### Oral Presentations:

1. **Yoo K**: "Stand-Alone Single Level Trans-Psoas Lumbar Interbody Fusion." 1<sup>st</sup> Triennial World Congress of Minimally Invasive Spine Surgery and Techniques, June 2008, Honolulu, HW.
2. **Yoo K**, Coufal F, Leary S: "Cervical Disc Arthroplasty In Conjunction With Cervical Fusion." 1<sup>st</sup> Triennial World Congress of Minimally Invasive Spine Surgery and Techniques, June 2008, Honolulu, HW.
3. **Yoo K**, Shownkeen H, Chenelle AG, Oritano TC: "Stenting of Carotid Artery Stenosis using Shape-Memory-Alloy-Recoverable-Technology Stents." 12<sup>th</sup> Annual Meeting of North American Skull Base Society, Mar. 2001, Orlando, FL.

4. Shownkeen H, **Yoo K**, Hopkins LN, Anderson D, Origiano TC: "Stenting of Parent Vessels and in Failed Balloon Assisted (Remodeling) Technique in Patients with Aneurysm Regrowth." 12<sup>th</sup> Annual Meeting of North American Skull Base Society, Mar. 2001, Orlando, FL.
5. **Yoo K**, Davies DL, Krisht AF, Al-Mefty O: "Inhibition of Proliferation of Meningiomas with a Somatostatin Analog." 3rd International Skull Base Congress, Mar. 1997, Little Rock, AR.
6. **Yoo K**, Davies DL, Krisht AF, Al-Mefty O: "Successful Subcutaneous Nude Mice Implantation of Cultured Meningioma Cells." 3rd International Skull Base Congress, Mar. 1997, Little Rock, AR.
7. Krisht AF, **Yoo K**, Al-Mefty O, Davies DL: "Use of OctreoScan for Pre- and Postoperative Detection of Skull Base Meningiomas." 3rd International Skull Base Congress, Mar. 1997, Little Rock, AR.
8. **Yoo K**, Davies DL, Krisht AF, Al-Mefty O: "Inhibition of Proliferation of Meningiomas with a Somatostatin Analog." 2nd International Skull Base Congress, Jun. 1996, San Diego, CA.
9. **Yoo K**, Davies DL, Krisht AF, Al-Mefty O: "Successful Subcutaneous Nude Mice Implantation of Cultured Meningioma Cells." 2nd International Skull Base Congress, Jun. 1996, San Diego, CA.
10. **Yoo K**, Krisht AF, Al-Mefty O, Davies DL: "Use of OctreoScan for Pre- and Postoperative Detection of Skull Base Meningiomas." 2nd International Skull Base Congress, Jun. 1996, San Diego, CA.
11. Krisht AF, **Yoo K**, Arnautovic KI, Al-Mefty O: "Canine Cavernous Sinus Tumor Model." 2nd International Skull Base Congress, Jun. 1996, San Diego, CA.
12. **Yoo K**, Krisht AF, Wallace B, Arnautovic KI, Al-Mefty O: "Somatostatin receptor scintigraphy with [<sup>111</sup>Indium-labeled DTPA-D-Phe<sup>1</sup>]-octreotide: diagnosing, localizing, and determining the extent of resection of meningiomas." Southern Neurosurgical Meeting, Mar. 1996, Miami, FL.

#### Publications:

1. Huang M, Theilmann RJ, Robb A, Angeles A, Nichols S, Drake A, D'Andrea J, Levy M, Holland M, Tao S, Ge S, Hwang E, **Yoo K**, Cui L, Baker DG, Trauner D, Coimbra R, Lee RR. Integrated imaging approach with MEG and DTI to Detect Mild Traumatic Brain Injury in Military and Civilian Patients *Journal of Neurotrauma*. 26:1213-1226, 2009 Aug.
2. Ozgur BM, **Yoo K**, Rodriguez G, Taylor WR. Minimally Invasive Technique in Transforaminal Lumbar Interbody Fusion (TLIF) *European Spine J*. 2005 Sept.
3. Levy ML, Meltzer HS, Hughes S, Aryan HE, **Yoo K**, Amar AP. Hydrocephalus in Children with Middle Fossa Arachnoid Cysts, Submitted to *Journal of Neurosurgery* 2004 Feb.
4. Levy ML, Wang M, Aryan HE, **Yoo K**, Meltzer HS. Microsurgical Keyhole Approach for Middle Fossa Arachnoid Cyst Fenestration. *Neurosurgery*. 53(5): 1138-45, 2003 Nov.
5. Shownkeen H, **Yoo K**, Leonetti J, Origiano TC. Endovascular Treatment of Transverse-Sigmoid Sinus Dural Arteriovenous Malformations Presenting as Pulsatile Tinnitus. *Skull Base Journal*. 2001.
6. **Yoo K**, Origiano TC. Familial cervical spondylosis. Case report. *Journal of Neurosurgery*. 89(1): 139-41, 1998 Jul.

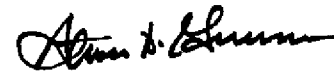
7. Alleyne CH Jr, Krisht A, Yoo K, Silverstein A, Colohan AR. Bilateral persistent trigeminal arteries associated with cerebral aneurysms and aortic arch vessel anomaly. *Southern Medical Journal*. 90(4): 434-8, 1997 Apr.
8. Krisht AF, Yoo K: Neurosurgery - The Year in Review (1995) Contemporary Neurosurgery Vol. 17, No. 27, 1995.

#### Book Chapters:

1. Krisht AF, Yoo K. "Etiology and Classification of Cavernous-Carotid Fistulas." The Cavernous Sinus. Lippincott Williams & Wilkins, 1999.

#### Research Experience

- The RESCUEicp Study: Randomized Evaluation of Surgery with Craniectomy for Uncontrollable Elevation of Intra-Cranial Pressure
  - Principal Investigator at the Scripps Memorial Hospital in La Jolla site for an International Study based in Oxford, England
  - Currently undergoing and enrolling patients till end of 2009
  - Sub-Investigators: Frank Coufal, M.D., Gail Tominaga, M.D., Fred Simon, M.D.
- THE USE OF OCTREOSCAN AS A DIAGNOSTIC TOOL FOR INTRACRANIAL NEOPLASMS
  - ◆ Co-Principal Investigator in evaluating the role of OctreoScan, a nuclear scan based on a somatostatin analog, in preoperative diagnosis and localization and postoperative follow-up of patients with meningiomas and other intracranial neoplasms.
  - ◆ Location: Department of Neurosurgery; University of Arkansas for Medical Sciences Hospital, John L. McClellan Veterans Administration Hospital, Arkansas Children's Hospital
  - ◆ Other Investigators: Ali Krisht, M.D. (P.I.), Ossama Al-Mefty, M.D., F.A.C.S., W. Bruce Cherny, M.D.
- HORMONAL AND RADIOTHERAPEUTIC TREATMENT OF MENINGIOMAS
  - ◆ Co-Principal Investigator in growing meningioma cell cultures, establishing nude mouse meningioma animal model, and determining therapeutic potential of radiolabeled somatostatin analogs for meningiomas.
  - ◆ Location: Laboratory of Skull Base Center, Department of Neurosurgery, University of Arkansas for Medical Sciences.
  - ◆ Other Investigators: Ali Krisht, M.D. (P.I.), David L. Davies, Ph.D. (Department of Anatomy), Ossama Al-Mefty, M.D., F.A.C.S., Mingzhong Zheng, M.D.
- A SKULL BASE TUMOR MODEL IN THE CANINE
  - ◆ Co-Principal Investigator in establishing a skull base brain tumor model in dogs by implanting tumor cells in the roof of the cavernous sinus and to study the effect of immunosuppression on the rate of tumor growth.
  - ◆ Location: Laboratory of cerebrovascular and neurosurgery studies, Department of Neurosurgery, Emory University School of Medicine and Division Laboratory and Animal Medicine & Laboratory of Skull Base Center, Department of Neurosurgery, University of Arkansas for Medical Sciences
  - ◆ Other Investigators: Ali F. Krisht, M.D. (P.I.), Kenan Arnautovic, M.D., OSSAMA Al-Mefty, M.D., F.A.C.S.



CLERK OF THE COURT

MNTR

Anthony D. Lauria  
Nevada Bar No. 4114

Paul A. Cardinale  
Nevada Bar No. 8394

LAURIA TOKUNAGA GATES & LINN, LLP  
601 South Seventh Street, 2<sup>nd</sup> Floor

Las Vegas, NV 89101

Tel: (702) 387-8633

Fax: (702) 387-8635

Attorneys for Defendant,  
ALBERT H. CAPANNA, M.D.

**DISTRICT COURT**  
**CLARK COUNTY, NEVADA**

BEAU R. ORTH,

Plaintiff,

vs.

ALBERT H. CAPANNA, M.D., DOES I  
through X and ROE BUSINESS ENTITIES I  
through X, inclusive,

Defendants.

) CASE NO. A-11-648041-C  
) DEPT. NO. III

) **DEFENDANT'S MOTION FOR NEW  
TRIAL, OR IN THE ALTERNATIVE,  
FOR AMENDMENT OF JUDGMENT**

) DATE OF HEARING:  
) TIME OF HEARING:

**TO: ALL PARTIES ABOVE NAMED AND THEIR ATTORNEYS OF RECORD:**

**COMES NOW** Defendant Albert H. Capanna, M.D., by and through his attorneys of record,  
Anthony D. Lauria, Esq. of the law firm Lauria Tokunaga Gates and Linn, LLP, and moves this Court  
for a new trial or, in the alternative, to amend the Judgment in this case to conform with the evidence  
and with Nevada law, pursuant to NRCP 59. The Motion is made upon the pleadings and papers filed

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**DEFENDANT'S MOTION FOR NEW TRIAL, OR IN THE ALTERNATIVE,  
FOR AMENDMENT OF JUDGMENT**

1 herein, the Points and Authorities set forth below, the proceedings before and during the trial of this  
2 matter, and such other argument and/or evidence which may be presented at the hearing of this  
3 Motion.

4 DATED: November 9, 2015

LAURIA TOKUNAGA GATES & LINN, LLP

5 By: /S/ ANTHONY D. LAURIA  
6 Anthony D. Lauria  
7 Nevada Bar No. 4114  
8 601 South Seventh Street, 2nd Floor  
9 Las Vegas, Nevada 89101  
10 (702) 387-8633  
11 Attorneys for Defendant  
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1 **NOTICE OF MOTION**

2 PLEASE TAKE NOTICE that Defendant ALBERT H. CAPANNA, M.D. will bring the  
3 foregoing **DEFENDANT'S MOTION FOR NEW TRIAL, OR IN THE ALTERNATIVE, FOR**  
4 **AMENDMENT OF JUDGMENT** on for hearing in Department 3 of the above-entitled Court on the  
5 16 day of December, 2015, at 9:00AM a.m., or as soon thereafter as  
6 they may be heard.

7 DATED: November 9, 2015

LAURIA TOKUNAGA GATES & LINN, LLP

8  
9 By: /S/ ANTHONY D. LAURIA

Anthony D. Lauria

10 Nevada Bar No.: 4114

601 South Seventh Street, 2nd Floor

11 Las Vegas, Nevada 89101

12 (702) 387-8633

13 Attorneys for Defendant  
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I

**FACTUAL AND PROCEDURAL BACKGROUND**

This matter was tried before a jury from August 19 to September 2, 2015, with testimony from numerous health care providers and experts. Prior to the trial in this action, Defendant sought to exclude the untimely and improperly disclosed claims for future damages which were first made only two weeks before the scheduled close of discovery in this action. In addition, Defendant sought to have the Court enforce its Gatekeeper role to limit the testimony of Plaintiff's expert on future damages to opinions which were scientific in nature and had a reliable basis. These requests were denied.

During the trial in this action, as more fully set forth below, Defendant submits there were numerous irregularities in the proceedings which prevented a fair trial, misconduct of the Plaintiff's counsel, manifest disregard by the jury of the instructions of the court, and errors at law which were objected to.

In addition, prior to trial, the Court denied Plaintiff's Motion to declare the provisions of NRS 41A.035 and NRS 42.021 unconstitutional. Immediately following the reading of the verdict in this case, Defendant requested, orally and in writing, that the Court apply these provisions to reduce noneconomic damages to a total of \$350,000 and order future damages to be paid by periodic payments. Both of these statutory provisions are mandatory. In spite of Defendant's written and oral request, Defendant's Motion to Stay Entry of Judgment until these provisions had been applied, Plaintiff submitted to the Court, without service on Defendant or an opportunity for Defendant to provide input, a Judgment which is in violation of these provisions and contrary to Nevada law. Plaintiff has now also served Notice of Entry of this improper Judgment. This improper Judgment must be amended and corrected to comply with the mandatory provisions of NRS 41A.035 and 42.021.

II

**LEGAL STANDARD**

NRCP 59 provides the appropriate grounds for a new trial, several of which are applicable to this action.

1 a) **Grounds.** A new trial may be granted to all or any of the parties and on all or part of the  
2 issues for any of the following causes or grounds materially affecting the substantial rights of  
3 an aggrieved party: (1) Irregularity in the proceedings of the court, jury, master, or adverse  
4 party, or any order of the court, or master, or abuse of discretion by which either party was  
5 prevented from having a fair trial; (2) Misconduct of the jury or prevailing party; (3) Accident  
6 or surprise which ordinary prudence could not have guarded against; (4) Newly discovered  
7 evidence material for the party making the motion which the party could not, with reasonable  
8 diligence, have discovered and produced at the trial; (5) Manifest disregard by the jury of the  
9 instructions of the court; (6) Excessive damages appearing to have been given under the  
10 influence of passion or prejudice; or, (7) Error in law occurring at the trial and objected to by  
11 the party making the motion. . . .

12 NRCP 59(e) provides authority for a motion to alter or amend a judgment. Such a motion  
13 requests a substantive alteration of the judgment, not merely correction of a clerical error, or relief  
14 wholly collateral to the judgment. AA Primo Builders v. Washington, 126 Nev. 578, 245 P.3d 1190,  
15 1192-93 (2010). One of the "basic grounds" for such a motion is correcting a manifest error of law in  
16 a judgment. *Id.*

17 NRS 41A.035 provides, in pertinent part:

18 "In an action for injury or death against a provider of health care based upon professional  
19 negligence, the injured plaintiff may recover noneconomic damages, but the amount of  
20 noneconomic damages awarded in such an action must not exceed \$350,000." (See (Stephen  
21 Tam, M.D. v Eighth Judicial District Court (131 Nev. Adv. Op. 80); NRS 41A.035)

22 NRS 42.021 provides, in pertinent part:

23 "3. In an action for injury or death against a provider of health care based upon professional  
24 negligence, a district court shall, at the request of either party, enter a judgment ordering that  
25 money damages or its equivalent for future damages of the judgment creditor be paid in whole  
26 or in part by periodic payments rather than by a lump-sum payment if the award equals or  
27 exceeds \$50,000 in future damages.

28 4. In entering a judgment ordering the payment of future damages by periodic payments  
pursuant to subsection 3, the court shall make a specific finding as to the dollar amount of  
periodic payments that will compensate the judgment creditor for such future damages. "

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1 **III**

2 **ARGUMENT**

3 **A. ERRONEOUS PRE-TRIAL RULINGS AND THEIR IMPACT UPON TRIAL**

4 Erroneous pre-trial rulings included improperly permitting a “supplemental report” by Dr.  
5 Ruggeroli as to future damages on May 8, 2015, an untimely “Computation of Damages” which for  
6 the first time identified \$342,000 in future damages, (less than the \$692,000 Plaintiff sought at trial  
7 and less than the \$350,000 which was awarded), and permitting the “supplemental report” of  
8 Plaintiff’s retained expert Dr. Yoo dated May 26, 2015, who for the first time expressed an opinion  
9 on future treatment and damages which was not based upon any information which was not available  
10 at the time of his disclosure in November of 2014. At the time of the hearing on the pre-trial motions  
11 to exclude this testimony, the Court permitted the untimely “supplemental opinions” of Dr. Yoo,  
12 permitted the untimely disclosure of a claim for future damages (and permitted Plaintiff to request  
13 and the jury to award future damages at trial in an amount in excess of every computation of damages  
14 submitted in this case), and permitted Dr. Cash to testify to matters which were beyond his scope as a  
15 “treating physician” without Defendant having the benefit of an expert report of Dr. Cash.

16 Further, the Court refused to require Drs. Yoo and Cash to provide a scientific basis for their  
17 testimony on the need for future treatment although both doctors admitted they were aware of no  
18 scientific studies or peer reviewed literature to support their opinions. In addition, the Court refused  
19 several requests at the hearing on these pre-trial motions to continue the trial to permit additional  
20 necessary discovery related to these untimely disclosures of new expert opinions and claims for  
21 damages. Further, the Court did not inquire or address prejudice to Defendant in permitting the  
22 above late and improper disclosures although Counsel for Defendant repeatedly established prejudice.

23 **B. ERRONEOUS RULINGS AT TRIAL**

24 **(i) Insurance**

25 The Court granted Defendant’s Motion in Limine to exclude any mention of malpractice  
26 insurance. Yet, in jury selection in this case, Counsel for Plaintiff repeatedly violated the order in  
27 limine and asked a number of jurors specifically about insurance. Counsel for Defendant requested a  
28 mistrial and that a new panel be selected. This request was denied. Insurance was again injected into

1 the case at the conclusion of the trial, when Counsel for Defendant objected to the presentation of the  
2 jury instruction that jurors were not to consider whether Defendant had malpractice insurance, an  
3 instruction Plaintiff requested. The Court noted it did not normally give this instruction if the party it  
4 was designed to protect did not want it given but in this case gave it over Defendant's objection. As  
5 predicted, Counsel for Plaintiff used this instruction in his closing argument to simply again place the  
6 issue of insurance directly before the jury.

7 **(ii) Past Medical Expenses**

8 It is axiomatic that a party is only entitled to recover for medical costs which were caused by  
9 the negligence of the defendant. In the pre-trial motions, Defendant pointed out to the Court that the  
10 past damages claimed included charges for University Medical Center for the surgery by Dr.  
11 Capanna, yet no expert had indicated the surgery was not necessary. Although not included at any  
12 time in the pre-trial disclosure, at trial plaintiff's request for past damages also included the charges  
13 by Dr. Capanna for treatment. All experts in this case testified that Mr. Orth required spine surgery  
14 before he even went to see Dr. Capanna. Yet in this case, Plaintiff sought the charges for both  
15 surgeries performed without any expert testimony as to the additional charges related to the alleged  
16 negligence of Dr. Capanna. This issue was never addressed by Dr. Cash or any other expert. There  
17 was no testimony, nor could there have been, that ALL of the past medical expenses were caused by  
18 the alleged negligence of Dr. Capanna as all of the experts agreed that a microdiscectomy was  
19 required. Thus, Plaintiff was permitted over the objection of the Defendant to present past medical  
20 expenses which all experts agreed were not incurred as a result of the negligence of Dr. Capanna and  
21 which were without supporting expert testimony. Essentially this permitted Plaintiff to "double dip"  
22 and recover for medical expenses which were not causally related to acts of alleged negligence and  
23 added approximately \$28,000 in damages which are not recoverable.

24 Further, Counsel for Plaintiff intentionally and continually misstated the law related to NRS  
25 42.021 and the past medical expenses. This Court ruled that the payment of these past medical  
26 expenses were admissible under that provision. Yet Counsel for Plaintiff asserted that the jury was  
27 obligated under the law and instruction to award the reasonable value of the past medical care, which  
28 was the full amount billed. This Court pointed out on several occasions outside the presence of the

1 jury that the reasonable value of the medical expenses and the fact that they had been paid by a  
2 collateral source were entirely different concepts but Counsel for Plaintiff persisted in confusing these  
3 issues for the jury, even after objection by Counsel for Defendant.

4 In fact, at one point Counsel for Plaintiff asserted that Counsel for Defendant was asking them  
5 to violate the law by considering the collateral source payments. (Plaintiff's Rebuttal Closing  
6 Argument, Partial Transcript of Proceedings of Trial by Jury Day 10, at page 18:15-22) Even after  
7 that particular improper argument was stricken, Counsel for Plaintiff continued to assert that to  
8 "follow the rules" they had to award the amount submitted as the reasonable value, impliedly  
9 suggesting the jury could not consider NRS 42.021. (Id. at page 18:6-14) When Counsel for  
10 Defendant informed the jury that Mr. Orth was not obligated to repay any of the amounts that had  
11 been paid on his behalf, which is precisely what is set forth in NRS 42.021, the Court instructed the  
12 jury to disregard this information and it appeared that Counsel for Defendant was being reprimanded  
13 for accurately stating the law.

14 Additionally, to avoid just such confusion, Counsel for Defendant submitted a proposed jury  
15 instruction on the provisions of NRS 42.021 which the Court initially indicated it planned to give  
16 with some modification. The Court then changed its ruling and refused to give any instruction to the  
17 jury that they were permitted to consider the fact that past medical expenses had been paid in making  
18 their determination. The lack of instruction, in conjunction with an instruction that they could not  
19 consider insurance for future medical expenses or whether the doctor had insurance, in conjunction  
20 with the reasonable value assertions of Plaintiff's Counsel led to hopeless confusion on this issue to  
21 the jury. Defendant submits it was error to refuse a clarifying instruction.

22 **(iii) Refusal to Permit Cross-Examination on Images Shown to Jury**

23 Throughout this trial, Counsel for Plaintiff used images from multiple MRI's which were  
24 shown to the jury via electronic images. The vast majority of these images had no writing or  
25 commentary but were either single MRI images upon which their experts commented or multiple  
26 MRI images from differing dates which were used for comparison. There was no "work product" on  
27 these images and presenting an image to a jury electronically rather than in a photograph does not  
28 make it work product.

1 Counsel for Defendant made repeated requests that he be permitted to cross-examine these  
2 expert witnesses on the precise images that they had just been shown and testified about during their  
3 examination by Plaintiff's Counsel. These repeated requests were refused and the Court would not  
4 permit counsel to have the jury view the same images during cross-examination they had been shown  
5 and testified to on direct examination. This severely prejudiced the ability to cross-examine these  
6 expert witnesses in a timely and effective manner and there is no valid legal basis for not permitting  
7 such cross-examination.

8 While Defendant did have copies of the same numerous MRI's from which the images shown  
9 to the jury were taken, each MRI contained almost a hundred or more images and the potential  
10 combination when images were placed side by side by Plaintiff would number into the millions.  
11 Thus, it would not have been possible to anticipate the combinations of comparisons. The Court  
12 would not permit Counsel for Defendant access to the images even when it was testified to by Dr.  
13 Belzberg that the images shown side by side and testified to by Dr. Cash were not comparable or  
14 taken from the same locations.

15 On another occasion, during the examination of Dr. Kaye, Defendant's expert Radiologist, he  
16 was asked to comment on images which Dr. Yoo had testified about in his examination by Plaintiff.  
17 Counsel for Plaintiff objected that Dr. Yoo had not discussed those images and this objection was  
18 sustained although the subsequently available transcript of Dr. Yoo's trial testimony shows that he  
19 clearly did testify as to these images and his opinions as to what they showed. An element of the  
20 Defendant's case as it related both to liability and damages was that the images shown to the jury and  
21 testified to by Plaintiff's experts Dr. Cash and Dr. Yoo did not correspond to the locations of the  
22 images and the findings on those images were misrepresented. The Court and Plaintiff's Counsel  
23 prevented this from occurring.

24 Refusing to permit cross-examination of those precise MRI images, only minutes after they  
25 were shown to the jury, severely hampered this defense. These items could not be said to be "work  
26 product", which protects "an attorney's mental impressions, conclusions, or legal theories"  
27 (Wardleigh v. Second Judicial Dist. Court In & For Cnty. of Washoe, 111 Nev. 345, 357, 891 P.2d  
28 1180, 1188 (1995)) from discovery (NRCF Rule 26(b)) when they had already been shown to the

DEFENDANT'S MOTION FOR NEW TRIAL, OR IN THE ALTERNATIVE.  
FOR AMENDMENT OF JUDGMENT

1 jury and testified to by witnesses on the stand. Counsel for Defendant repeatedly requested the ability  
2 to cross-examine on these same images, or to have them duplicated so they could be used, or at least  
3 to be marked as a Court exhibit so this issue could be addressed. This was refused. Counsel for  
4 Defendant believes that the Court also indicated, as is only proper, that these items specifically  
5 presented to the jury and testified to by witnesses, should be marked. It does not appear that this ever  
6 occurred. Defendant respectfully submits that the ability to defend this case and to cross-examine  
7 witnesses on the MRI images that Plaintiff specifically placed before the jury and had witnesses  
8 testify about was improper, prejudicial, and an error of law.

9 **(iv) Misrepresentation and Potential Perjury**

10 One of the images shown to the jury during direct examination which Counsel for Defendant  
11 was not permitted to utilize in cross-examination of Dr. Yoo was Axial T2 Series 5 image number 7  
12 of 28 of the MRI of October 6, 2010 ordered by Dr. Capanna, which was initially interpreted by Dr.  
13 Kuo. Dr. Yoo and Counsel for Plaintiff used this image during his examination and represented to  
14 the jury that this image was taken at the L5-S1 level and did not show indications of surgery at that  
15 level. In the trial testimony of Dr. Yoo from August 25, 2015, beginning at Page 32, this image is  
16 identified specifically. (Yoo Trial Testimony at 32:7-33:2) Dr. Yoo testifies under oath that this  
17 image was of the L5-S1 disc level. That is an untrue statement of fact.

18 Counsel for Plaintiff reiterated and emphasized the testimony of Dr. Yoo as to the October 6,  
19 2010 Axial T2 image number 7 of 28 representing that it showed the L5-S1 disc level and the lack of  
20 surgery at that level with the disc protrusion still abutting the nerve. (Plaintiff's Rebuttal Closing  
21 Argument at page 4:1-18)

22 The fact is that that Image number 7 of 28 is NOT at the L5-S1 disc level or even close to it  
23 and is at the level of L3-4. This is clearly shown on the MRI itself when the locator tools are utilized.  
24 The location of the slice of the study is a FACT, not an opinion and can be viewed by the Court  
25 directly. Dr. Kuo, the Radiologist who interpreted this study, can clearly testify that the location of  
26 this image is NOT at the L5-S1 level as could any independent radiology expert the court wished to  
27 have review this image. Dr. Yoo testified about his qualifications to interpret MRI studies and yet  
28 provided testimony under oath that an image was at a level of the spine where it is not. What the

1 *findings* on the image are may be a matter of opinion but the *location* of the image is not opinion, it  
2 is fact and it is scientifically set forth on the MRI study itself. This misrepresentation and fraudulent  
3 testimony, in addition to the inability of Counsel for Defendant to use the precise electronic MRI  
4 images in examination, warrants the granting of a new trial.

5 (iv) **Future Medical Expenses**

6 As a result of the Court's pre-trial decisions, both Dr. Yoo and Dr. Cash were permitted to  
7 testify as to future treatment for Mr. Orth which was not part of their opinions or any disclosure until  
8 weeks before trial. The trial testimony of both Mr. Orth and of Dr. Cash both clearly established that  
9 they were aware of the likely need for future fusion surgery back in 2010, yet this was never  
10 identified in response to discovery requests or multiple 16.1 disclosures, or a computation of damages  
11 and was first disclosed in May of 2015, almost 5 years after Plaintiff and his doctor (and almost  
12 assuredly his counsel) knew it would be part of this claim.

13 As noted above, the amount claimed at trial and the amount awarded at trial were NEVER set  
14 forth in any Computation of Damages by Plaintiff, even one submitted during trial.

15 Dr. Cash testified that Mr. Orth would have needed two future fusion surgeries regardless of  
16 any negligence by Dr. Capanna and that the difference was in the level and a slight increase in cost  
17 for the first procedure. Defendant moved to limit the claim for future damages to the difference in  
18 costs between what Dr. Cash testified would have been required even without any alleged negligence  
19 and what he claimed was required now, an amount of approximately \$8,000. This motion was denied  
20 on the grounds that Dr. Yoo was also providing testimony about future medical needs.

21 Curiously, Counsel for Plaintiff represented at the pre-trial hearings in this case that it would  
22 be Dr. Cash and Dr. Ruggeroli, not Dr. Yoo, who would provide testimony as to the need for future  
23 treatment. The direct quote from Counsel for Plaintiff is:

24 "Well, not so much Yoo, he isn't giving an opinion on future care, but it's really Cash and  
25 Ruggeroli." (Transcript of Hearing on All Pending Motions, August 14, 2015, at page 120:5-  
26 6) (emphasis added)

27 Yet, over objection at trial, Dr. Yoo was permitted to give testimony on future care in direct  
28 contradiction to the statement of counsel. This is extremely significant because it was only because

1 Dr. Yoo was permitted to offer testimony regarding future care that Defendant even addressed the  
2 issue. If Dr. Yoo did not offer such testimony, as Plaintiff's Counsel represented he would not, or if  
3 Dr. Yoo's testimony on future care had not been permitted for an improper "supplementation" not  
4 based upon new information, the only testimony on future care would have been that of Dr. Cash  
5 who, as noted above, testified that future fusion surgeries would have been needed regardless of  
6 negligence and the costs would have been virtually identical. The total future medical specials which  
7 would not have been incurred by Mr. Orth in the absence of negligence would have been  
8 approximately \$8,000 and the future damages award of \$350,000 could not have occurred as a matter  
9 of law.

10 Further, as noted during the trial in this case, given the untimely disclosure of the claims for  
11 future medical special damages, Defendant was effectively precluded from offering economic  
12 testimony of the net present value of such future damages. The net present value of \$350,000 which  
13 would be needed 10 years into the future is markedly different than that amount today. In fact, even  
14 at a 2% rate of simple interest, \$291,666.66 today is the net present value of \$350,000 ten years from  
15 now. As a result of the late disclosure of these damages claims only weeks before the close of  
16 discovery and trial, Defendant was prevented from providing evidence of the net present value of  
17 these claimed future damages.

18 **(v) Exclusion of Prior Testimony of Dr. Cash for Plaintiff's Counsel**

19 Dr. Cash testified in deposition that he had testified dozens of times in cases for Plaintiff's  
20 Counsel. Counsel for Defendant was precluded from introducing this fact to the jury, exploring the  
21 similarity of his testimony in those cases (i.e. testimony of the need for future fusion surgery in those  
22 cases), or any other aspect of the relationship. The potential for bias involving an expert who has  
23 testified dozens of time for a particular attorney, and who therefore has a direct financial interest in  
24 giving testimony favorable to the attorney, is readily apparent and obvious. Yet, the jury was  
25 prevented from having this critical information in evaluating Dr. Cash's testimony and Defendant  
26 was prohibited by the Court from pursuing Dr. Cash's potential bias by the Court. This was error.

27 Similarly, the Court precluded Defendant from introducing evidence that Counsel for  
28 Plaintiffs had paid Dr. Cash \$15,000 prior to trial to review records which were not part of his

1 treatment of the patient and were solely for the purposes of expert testimony. In addition, Defendant  
2 was prohibited from introducing evidence that Dr. Ruggeroli was similarly paid thousands of dollars  
3 just prior to trial to produce a report that several hundred thousand dollars in future treatment were  
4 needed for this patient. Refusal to allow examination and evidence of the role of counsel in procuring  
5 these future damages claims, the timing of doing so, and the payment for them, in addition to the  
6 extensive testimonial relationship precluded Counsel for Defendant from fully exploring the bias of  
7 Dr. Cash whose testimony was the most critical in the case.

8 Based upon the entire record in this matter, Defendant respectfully submits that there were  
9 "irregularities" which prevented a fair trial, was "misconduct" of the prevailing party, excessive  
10 damages in the award of past medical expenses NOT caused by any alleged negligence, and errors in  
11 law. For the reasons set forth above, Defendant submits that a new trial of this action is warranted.

#### 12 C. AMENDMENT OF IMPROPER JUDGMENT

13 In the event that this Court refuses to grant a new trial in this matter, the Judgment must be  
14 amended to conform with Nevada law and the evidence presented at trial.

##### 15 (i) NRS 41A.035 and prejudgment interest

16 The provisions of NRS 41A.035 are mandatory according to the plain language of the statute.  
17 The damages awarded "must not" exceed the statutory cap. In this case, the verdict for non-economic  
18 damages exceeded the amount permitted under Nevada law in actions for professional negligence  
19 against a health care provider. As such, the non-economic damages must be reduced to \$350,000  
20 pursuant to NRS 41A.035.

21 The Nevada Supreme Court has recently upheld the provisions of NRS 41A.035 against  
22 constitutional challenge in the matter of Stephen Tam, M.D. v Eighth Judicial District Court (131  
23 Nev.Adv.Op. 80 (October 1, 2015). Thus, Defendant requests that the Court apply the mandatory  
24 provisions of NRS 41A.031 and accordingly reduce the award of noneconomic damages, for both  
25 past and future noneconomic damages, to \$350,000. Upon this reduction, the court must then allocate  
26 what portion of that amount goes to past and what amount goes to future, and prejudgment interest  
27 may only be awarded to the amount of the \$350,000 which is attributed to "past noneconomic  
28



1 damages". The rational basis for allocation appears to be the allocation percentages for past and  
2 future utilized by the jury.

3 In conjunction with the mandatory reduction in the noneconomic damages, the Court must  
4 reduce the amount of Pre-Judgment interest set forth in the Judgment on Verdict in this case. NRS  
5 17.130 provides that pre-judgment interest is permitted on the Judgment and, when the Judgment is  
6 properly Amended to reflect the requirements of NRS 41A.035, the amount of pre-judgment interest  
7 must also be amended. First, the prejudgment interest is only awardable on the amount of  
8 noneconomic damages allocated to "past" damages.

9 Second, the amount of interest on past medical specials must be determined only after this  
10 court has properly reduced the amount of past medical specials to those established by the evidence  
11 as caused by the alleged negligence of Dr. Capanna, and not for both spine surgeries since it is  
12 undisputed that one of them was necessary regardless of negligence. All experts agreed that a  
13 microdiscectomy was necessary for Mr. Orth regardless of negligence. He is not entitled as a matter  
14 of law to recover damages which were not caused by negligence.

15 Further, the Plaintiff is not entitled to recover any prejudgment interest on any costs in the  
16 case where it he has not established the costs were reasonable and necessary and the date on which  
17 they were incurred. Only costs which have been determined to be reasonable and necessary are  
18 recoverable and interest may only be awarded from the date each cost was incurred. (Gibellini v.  
19 Klindt, 110 Nev. 1201, 1209, 885 P.2d 540, 545 (1994)) The Judgment on Jury Verdict in this case  
20 ignores all of the above requirements.

21 **(ii) Periodic Payment of Future Damages in Mandatory per NRS 42.021**

22 The judgment must also be amended to provide for periodic payments. The provisions of  
23 NRS 42.021 are also mandatory as evidence by the statute's use of the term "shall" in the application  
24 of the provision. Defendant is not aware of a case from Nevada which has addressed the application  
25 of the periodic payment provisions although numerous cases in California have addressed these issues  
26 in the application of Code of Civil Procedure §667.7, upon which the Nevada statute is based.

27 It has been stated that:

1 "In structuring a periodic-payment schedule under section 667.7, a trial court is "guided by  
2 the evidence of future damages" introduced at trial. (*citations.*) The fundamental goal in this  
3 respect is to attempt to match losses with compensation "to ensure that money paid to an  
4 injured plaintiff will in fact be available when the plaintiff incurs the anticipated expenses or  
5 losses in the future." (*citations.*) The target is "a fair correlation between the sustaining of  
6 losses and the payment of damages." (*Citation omitted*) (Hrimnak v. Watkins, 38 Cal. App.  
7 4th 964, 975, 45 Cal. Rptr. 2d 514, 520 (1995))

8 Thus, the goal is to equate the timing of the payment of the future damages with the timing of the  
9 future economic loss. As stated by the California Supreme Court:

10 "The fundamental goal in this respect is to attempt to match losses with compensation 'to  
11 ensure that money paid to an injured plaintiff will in fact be available when the plaintiff  
12 incurs the anticipated expenses or losses in the future.' (*citation omitted*)" (Salgado v.  
13 Cnty. of Los Angeles, 19 Cal. 4th 629, 639, 967 P.2d 585, 590 (1998), as modified (Feb. 17,  
14 1999))

15 In this action, the testimony of Dr. Andrew Cash regarding the costs of future surgeries  
16 indicated that Mr. Orth, in his opinion, would require a future fusion surgery in 10 years (2025) and  
17 another fusion surgery 17 years after that. (2042) In making the determination as to the amount and  
18 timing of periodic payments of the futures economic damages in this case, this Court must consider  
19 that testimony as to the timing of the "anticipated expenses or losses in the future." Thus, the  
20 appropriate timing of the periodic payment of damages in this case is in 2025 and 2042, the time  
21 when Plaintiff's expert and treating physician testified such damages would be incurred. It is an  
22 abuse of discretion to order a periodic payment schedule which "does not fairly correlate these future  
23 economic needs with the evidence of when they will arise." (Hrimnak, supra, 38 Cal. App. 4th at  
24 976, 45 Cal. Rptr. 2d at 521.)

25 In addition, in this action the amount of future economic losses was provided as a gross value  
26 and was not reduced to a net present value. There was no economic evidence or testimony of present  
27 value and no present value jury instruction was given. As set forth above, the net present value of  
28 \$350,000 which would be needed 10 years into the future is markedly different than that amount  
today. In fact, even at a 2% rate of simple interest, \$291,666.66 today is the net present value of  
\$350,000 ten years from now. It would be manifestly unfair to award interest on these damages to be

1 paid periodically when, in effect, interest has already be factored in since there is no present value  
2 reduction. In that circumstance, it is improper to award interest on these future economic damages.

3 "The purpose of section 667.7 payments is to provide compensation for losses that are to  
4 occur in the future. (citation.) A plaintiff suffers no detriment if the future damages portion of  
5 the award is not paid when judgment is entered because the injury for which the payment is  
6 intended to compensate has not yet occurred. By definition, therefore, a periodic payment due  
7 on some future date is not unpaid until that date. 'Interest is only awardable to compensate for  
8 a delay in payment and compensation for future needs involves no such delay.' (citation.)  
Accordingly, interest on periodic payments for *future* losses which have not been reduced to  
present cash value is improper. (*Schiernbeck v. Haight*, 7 Cal. App. 4th 869, 874, 9 Cal. Rptr.  
2d 716, 720 (1992)(emphasis in original)

9 Thus, prior to the entry of an amended Judgment in this matter, this Court must make a  
10 determination as to the timing and amount of periodic payments pursuant to this section. These  
11 payments must reflect the time in which the expenses will be incurred (2025 and 2042) and do not  
12 bear interest since they were not reduced to a net present value. Defendant hereby requests that the  
13 Court issue an order applying the mandatory periodic payment provisions of NRS 42.021 in accord  
14 with these principles.

### 15 III

### 16 CONCLUSION

17 For the reasons set forth above, Defendant respectfully requests that the Court grant a new  
18 trial in this matter. In the alternative, Defendant respectfully requests that the Court Amend the  
19 Judgment on Jury Verdict to conform with mandatory Nevada law, reduce the non-economic  
20 damages to \$350,000, and order the payment of future medical special damages to be made  
21 periodically in accord with the evidence presented at trial and without further interest as the damages  
22 were not reduced to a net present value.

23 DATED: November 9, 2015

LAURIA TOKUNAGA GATES & LINN

24 By: /S/ ANTHONY D. LAURIA

25 Anthony D. Lauria  
26 State Bar No. 4114  
27 601 South Seventh Street, 2<sup>nd</sup> Floor  
28 Las Vegas, NV 89101  
Tel: (702)387-8633  
Attorneys for Defendant

DEFENDANT'S MOTION FOR NEW TRIAL, OR IN THE ALTERNATIVE,  
FOR AMENDMENT OF JUDGMENT

**CERTIFICATE OF SERVICE**

Pursuant to N.R.C.P. 5(b), I certify that I am an employee of Lauria Tokunaga Gates & Linn, and that on this 9<sup>th</sup> day of November, 2015, I served a true and correct copy of the foregoing DEFENDANT'S MOTION FOR NEW TRIAL, OR IN THE ALTERNATIVE, FOR AMENDMENT OF JUDGMENT:

☐ By placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepared in Las Vegas, Nevada; and/or

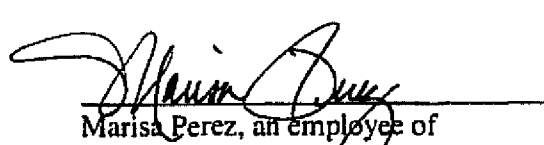
X By mandatory electronic service (e-service), proof of e-service attached to nay copy filed with the Court; and/or

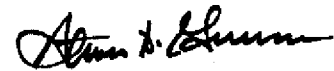
☐ By facsimile, pursuant to EDCR 7.26 (as amended); and/or

☐ By personal service via Receipt of Copy to the interested parties

as follows:

Dennis M. Prince, Esq.  
EGLET PRINCE  
400 South 7<sup>th</sup> Street, Box 1, Suite 400  
Las Vegas, NV 89101

  
Marisa Perez, an employee of  
Lauria Tokunaga Gates & Linn



CLERK OF THE COURT

NEOU  
Anthony D. Lauria  
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Kimberly L. Johnson  
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(702) 387-8633; Fax: (702) 387-8635  
Attorneys for *Defendant* ALBERT H. CAPANNA,  
M.D.

DISTRICT COURT  
CLARK COUNTY NEVADA

BEAU R. ORTH,

Plaintiff,

v.

ALBERT H. CAPANNA, M.D.; DOES  
I THROUGH X; ROE BUSINESS  
ENTITIES I THROUGH X,

Defendants.

CASE NO. : A-11-648041-C  
DEPT. NO. : 3

NOTICE OF ENTRY OF ORDER

NOTICE IS HEREBY GIVEN that the above-entitled court entered its Order  
on February 4, 2016, a copy of which is attached.

Dated: February 11, 2016.

LAURIA TOKUNAGA GATES & LINN, LLP

By: /s/ ANTHONY D. LAURIA  
Anthony D. Lauria  
Nevada Bar No.: 4114  
601 South Seventh Street  
Las Vegas, Nevada 89101  
Attorneys for Defendant

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# ORIGINAL

1 ORDER

2 ROBERT L. EISENBERG (Nevada Bar No. 950)

3 Lemons, Grundy & Eisenberg

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4 Reno, Nevada 89509

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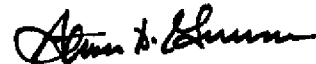
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11 ATTORNEYS FOR DEFENDANT

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CLERK OF THE COURT

12  
13 IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
14 IN AND FOR THE COUNTY OF CLARK

15 BEAU R. ORTH,

Plaintiff,

Case No. A-11-648041

Dept. No. III

16  
17 vs.

18 ALBERT H. CAPANNA, M.D.

Defendant.

**ORDER REGARDING  
DEFENDANT'S MOTION  
FOR NEW TRIAL, OR IN  
THE ALTERNATIVE, FOR  
AMENDMENT OF  
JUDGMENT**

19  
20  
21  
22 This matter was heard by the Court on December 16, 2015. Dennis M. Prince, of  
23 Eglet Prince, appeared on behalf of Plaintiff Orth. Anthony D. Lauria, of Lauria  
24 Tokunaga Gates & Linn, LLP, and Robert L. Eisenberg, of Lemons, Grundy &  
25 Eisenberg, appeared on behalf of Defendant Capanna. Having considered the motion  
26 papers and the oral arguments by counsel, the Court hereby rules as follows:

27 ///

28

**Motion for New Trial**

The Court finds that Defendant has not established grounds for a new trial, pursuant to NRCP 59. The Court affirms its pretrial rulings dealing with discovery and evidence relating to expert witnesses. The Court finds no basis to grant a new trial, pursuant to NRCP 59, regarding discussions about insurance in *voir dire*, jury instructions or arguments by plaintiff's counsel.

The Court also finds no basis for a new trial regarding MRI presentations at trial. And the Court finds no basis for a new trial on other issues raised in Defendant's Motion for New Trial.

Accordingly, the Motion for New Trial is denied.

**Motion for Amendment of Judgment**

This motion seeks an amendment of the judgment, to comply with NRS 41A.035, which imposes a cap on noneconomic damages. Having considered the motion papers and the arguments of counsel, the Court hereby grants the Motion for Amendment of the Judgment. The noneconomic damages will be reduced to \$350,000. This amount will apply entirely to the past noneconomic damages.

It is so ORDERED.

DATED: February 4, 2016

  
DISTRICT COURT JUDGE

Order initially prepared by:

 4114  
ROBERT L. EISENBERG

(Nv. Bar No. 0950)

Lemons, Grundy & Eisenberg

6005 Plumas Street, Third Floor

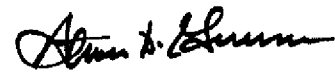
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Attorneys for Defendant





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Attorneys for Defendant,  
ALBERT H. CAPANNA, M.D.

**DISTRICT COURT**  
**CLARK COUNTY, NEVADA**

BEAU R. ORTH,	)	CASE NO. A-11-648041-C
	)	DEPT. NO. III
Plaintiff,	)	
	)	
vs.	)	<b>MOTION FOR APPLICATION OF N.R.S.</b>
	)	<b>41A.035, N.R.S. 42.021</b>
	)	
ALBERT H. CAPANNA, M.D., DOES I	)	
through X and ROE BUSINESS ENTITIES I	)	
through X, inclusive,	)	
	)	
Defendants.	)	

Comes now, Defendant ALBERT H. CAPANNA, M.D., by and through his counsel of record, LAURIA TOKUNAGA GATES & LINN, LLP and brings this Motion for Application of N.R.S. 41A.035 and N.R.S. 42.021.

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**MOTION FOR APPLICATION OF N.R.S. 41A.035, N.R.S. 42.021**

1 The Motion is made upon the pleadings and papers filed herein, the Points and Authorities set  
2 forth below, and such other argument and/or evidence which may be presented at the hearing of this  
3 Motion.

4 Dated: October 22, 2015

LAURIA TOKUNAGA GATES & LINN

5 By: /s/ ANTHONY D. LAURIA

6 Anthony D. Lauria

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8 Paul A. Cardinale

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12 (702) 387-8633

13 Attorneys for Defendant

14 ALBERT H. CAPANNA

[illegible]

DATED: October 22, 2015 LAURIA TOKUNAGA GATES & LINN, LLP

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601 South Seventh Street, 2nd Floor  
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(702) 387-8633  
Attorneys for Defendant

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I.

3 STATEMENT OF FACTS

4 On September 2, 2015, the jury returned a verdict in this matter in favor of Plaintiff  
5 BEAU ORTH and against Defendant ALBERT CAPANNA. The Verdict indicated an award of Past  
6 Non-Economic Damages of \$1,800,000 and Future Economic Damages in the amount of  
7 \$2,000,000. In addition, the Verdict awarded \$350,000 in future medical special damages to  
8 Plaintiff premised upon the testimony of Dr. Andrew Cash that in 10 years and 27 years, Mr.  
9 Orth would require lumbar fusion surgeries. There was no evidence presented regarding  
10 "present value" of future damages and the jury was not instructed to make a present a value  
11 determination of future damages.

12 Immediately following the Verdict, Defendant filed in open court a written request that  
13 this Court apply the provisions of NRS 41A.035 and NRS 42.021 to the Verdict in this action.  
14 The Court has already determined that the provisions of these sections are Constitutional and  
15 are applicable in this action and has indicated that these sections would be applied. Defendant  
16 requests and moves the Court to apply these statutes to the Verdict in regard to the limitation  
17 on Non-Economic Damages and the determination of Periodic Payment for Future Damages as  
18 the amount of future damages awarded are in excess of \$50,000.

19 II.

20 LEGAL ARGUMENTS

21  
22 1. NRS 41A.035 Limitation on amount of award for noneconomic damages.

23 "In an action for injury or death against a provider of health care based upon  
24 professional negligence, the injured plaintiff may recover noneconomic damages, but the  
25 amount of noneconomic damages awarded in such an action must not exceed \$350,000."

26 The provisions of NRS 41A.035 are mandatory according to the plain language of the  
27 statute. The damages awarded "must not" exceed the statutory cap. In this case, the Verdict for  
28 Non-Economic damages exceeded the amount permitted under Nevada law in actions for

1 professional negligence against a health care provider. As such, the non-economic damages  
2 must be reduced pursuant to NRS 41A.035.

3 The Nevada Supreme Court has recently upheld the provisions of NRS 41A.035 against  
4 constitutional challenge in the matter of Stephen Tam, M.D. v Eighth Judicial District Court (131  
5 Nev.Adv.Op. 80 (October 1, 2015)).

6 Thus, Defendant requests that the Court apply the mandatory provisions of NRS 41A.031  
7 and accordingly reduce the noneconomic damages awarded to the amount of \$350,000.

8  
9 2. NRS 42.021 Actions based on professional negligence of providers of health care:  
10 Introduction of certain evidence relating to collateral benefits; restrictions on source of  
collateral benefits; payment of future damages by periodic payments.

11 NRS 42.021 provides, in pertinent part:

12  
13 " 3. In an action for injury or death against a provider of health care based upon  
14 professional negligence, a district court shall, at the request of either party, enter a  
15 judgment ordering that money damages or its equivalent for future damages of the  
16 judgment creditor be paid in whole or in part by periodic payments rather than by a  
lump-sum payment if the award equals or exceeds \$50,000 in future damages.

17 4. In entering a judgment ordering the payment of future damages by periodic  
18 payments pursuant to subsection 3, the court shall make a specific finding as to the  
dollar amount of periodic payments that will compensate the judgment creditor for such  
future damages. . . .

19 5. A judgment ordering the payment of future damages by periodic payments entered  
20 pursuant to subsection 3 must specify the recipient or recipients of the payments, the  
dollar amount of the payments, the interval between payments, and the number of  
21 payments or the period of time over which payments will be made. . . ."

22 The provisions of NRS 42.021 are also mandatory as evidence by the statute's use of the term  
23 "shall" in the application of the provision. Defendant is not aware of a case from Nevada which  
24 has addressed the application of the periodic payment provisions although numerous cases in  
25 California have addressed these issues in the application of Code of Civil Procedure §667.7,  
26 upon which the Nevada statute is based.

27 ///

28 ///

1 It has been stated that:

2  
3 "In structuring a periodic-payment schedule under section 667.7, a trial court is "guided  
4 by the evidence of future damages" introduced at trial. (*citations*.) The fundamental goal  
5 in this respect is to attempt to match losses with compensation "to ensure that money  
6 paid to an injured plaintiff will in fact be available when the plaintiff incurs the  
7 anticipated expenses or losses in the future." (*citations*.) The target is "a fair correlation  
8 between the sustaining of losses and the payment of damages." (*Citation omitted*)  
9 (*Hrimnak v. Watkins*, 38 Cal. App. 4th 964, 975, 45 Cal. Rptr. 2d 514, 520 (1995))

10 Thus, the goal is to equate the timing of the payment of the future damages with the timing of  
11 the future economic loss. As stated by the California Supreme Court:

12 "The fundamental goal in this respect is to attempt to match losses with compensation  
13 'to ensure that money paid to an injured plaintiff will in fact be available when the  
14 plaintiff incurs the anticipated expenses or losses in the future.' (*citation omitted*)"  
15 (*Salgado v. Cnty. of Los Angeles*, 19 Cal. 4th 629, 639, 967 P.2d 585, 590 (1998), as  
16 modified (Feb. 17, 1999))

17 In this action, the testimony of Dr. Andrew Cash regarding the costs of future surgeries  
18 indicated that Mr. Orth, in his opinion, would require a future fusion surgery in 10 years (2025)  
19 and another fusion surgery 17 years after that. (2042) In making the determination as to the  
20 amount and timing of periodic payments of the futures economic damages in this case, this  
21 Court must consider that testimony as to the timing of the "anticipated expenses or losses in the  
22 future." Thus, the appropriate timing of the periodic payment of damages in this case is in  
23 2025 and 2042, the time when Plaintiff's expert and treating physician testified such damages  
24 would be incurred. It is an abuse of discretion to order a periodic payment schedule which  
25 "does not fairly correlate these future economic needs with the evidence of when they will  
26 arise." (*Hrimnak, supra*, 38 Cal. App. 4th at 976, 45 Cal. Rptr. 2d at 521.)

27 In addition, in this action the amount of future economic losses was provided as a gross  
28 value and was not reduced to a net present value. There was no economic evidence or  
testimony of present value and no present value jury instruction was given. In that  
circumstance, it is improper to award interest on these future economic damages.

1  
2 "The purpose of section 667.7 payments is to provide compensation for losses that are to  
3 occur in the future. (citation.) A plaintiff suffers no detriment if the future damages  
4 portion of the award is not paid when judgment is entered because the injury for which  
5 the payment is intended to compensate has not yet occurred. By definition, therefore, a  
6 periodic payment due on some future date is not unpaid until that date. 'Interest is only  
7 awardable to compensate for a delay in payment and compensation for future needs  
8 involves no such delay.' (citation.) Accordingly, interest on periodic payments for future  
9 losses which have not been reduced to present cash value is improper. (Schiernbeck v.  
10 Haight, 7 Cal. App. 4th 869, 874, 9 Cal. Rptr. 2d 716, 720 (1992)(emphasis in original)

11 Thus, prior to the Entry of Judgment in this matter, this Court must make a determination as to  
12 the timing and amount of periodic payments pursuant to this section. These payments must  
13 reflect the time in which the expenses will be incurred (2025 and 2042) and do not bear  
14 interest as a matter of law. Defendant hereby requests that the Court issue an Order applying  
15 the periodic payment provisions of NRS 42.021 in accord with these principles.

### 16 III.

### 17 CONCLUSION

18 The provisions of NRS 41A.035 and NRS 42.021 are mandatory and must be applied by  
19 the Court prior to the Entry of Judgment in this case. For the foregoing reasons, Defendant  
20 hereby requests that the Court issue an Order for application of these provisions and reduce the  
21 award of noneconomic damages to \$350,00 and for periodic payment of future damages,  
22 without interest, reflecting the timing that Plaintiff's expert and treating physician had testified  
23 such future expenses would be incurred.

24 DATED: October 22, 2015

LAURIA TOKUNAGA GATES & LINN, LLP

25 By 

Anthony D. Lauria

Nevada Bar No.: 4114

601 South Seventh Street, 2nd Floor

Las Vegas, Nevada 89101

(702) 387-8633

Attorneys for Defendant

28 MOTION FOR APPLICATION OF N.R.S. 41A.035, N.R.S. 42.021

1 **CERTIFICATE OF SERVICE**

2 Pursuant to N.R.C.P. 5(b), I certify that I am an employee of Lauria Tokunaga Gates & Linn,  
3 and that on the 23<sup>rd</sup> day of October, 2015, I served a true and correct copy of the foregoing

4 **MOTION FOR APPLICATION OF N.R.S. 41A.035 and N.R.S. 42.021:**

5  
6 ☐ By placing same to be deposited for mailing in the United States Mail, in a sealed  
envelope upon which first class postage was prepared in Las Vegas, Nevada; and/or

7 ☒ Via electronic mail; and/or

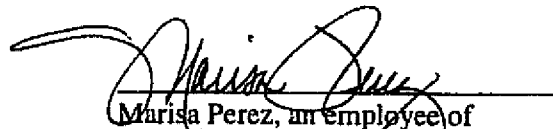
8 ☐ Via facsimile; and/or

9 ☐ Via Receipt of Copy to the interested parties

10 as follows:

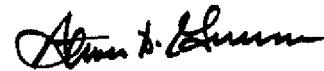
11  
12 Dennis M. Prince, Esq  
EGLET PRINCE  
13 400 South 7<sup>th</sup> Street, Box 1, Suite 400  
Las Vegas, NV 89101  
14 Tel. 702.450.5400

15 John T. Keating, Esq.  
KEATING LAW GROUP  
16 9130 West Russell Road, Suite 200  
Las Vegas, NV 89148  
17 Tel. 702.228.6800

18  
19  
20  
21  
22   
23 Marisa Perez, an employee of  
24 Lauria Tokunaga Gates & Linn  
25  
26  
27  
28

MOTION FOR APPLICATION OF N.R.S. 41A.035, N.R.S. 42.021





CLERK OF THE COURT

1 **NEOJ**  
2 Anthony D. Lauria  
3 Nevada Bar No.: 4114  
4 Kimberly L. Johnson  
5 Nevada Bar No.: 10554  
6 **LAURIA TOKUNAGA GATES & LINN, LLP**  
7 601 South Seventh Street, 2<sup>nd</sup> Floor  
8 Las Vegas, Nevada 89101  
9 (702) 387-8633; Fax: (702) 387-8635  
10 Attorneys for **Defendant ALBERT H. CAPANNA,**  
11 **M.D.**

7 **DISTRICT COURT**  
8 **CLARK COUNTY NEVADA**

9 **BEAU R. ORTH,**

10 Plaintiff,

11 v.

12 **ALBERT H. CAPANNA, M.D.; DOES**  
13 **I THROUGH X; ROE BUSINESS**  
14 **ENTITIES I THROUGH X,**

15 Defendants.

CASE NO. : A-11-648041-C  
DEPT. NO. : 3

**NOTICE OF ENTRY OF ORDER**

16 **NOTICE IS HEREBY GIVEN** that the above-entitled court entered its Order  
17 on February 4, 2016, a copy of which is attached.

18 Dated: February 11, 2016.

19 **LAURIA TOKUNAGA GATES & LINN, LLP**

20  
21 By: **/s/ ANTHONY D. LAURIA**  
22 Anthony D. Lauria  
23 Nevada Bar No.: 4114  
24 601 South Seventh Street  
25 Las Vegas, Nevada 89101  
26 Attorneys for Defendant  
27  
28  
29  
30

1 **CERTIFICATE OF SERVICE**

2 Pursuant to N.R.C.P. 5(b), I certify that I am an employee of Lauria Tokunaga  
3 Gates & Linn, and that on the 11<sup>th</sup> day of February 2016, I served a true and correct  
4 copy of the foregoing **NOTICE OF ENTRY OF ORDER**:  
5

- 6 ☐ By placing same to be deposited for mailing in the United States  
7 Mail, in a sealed envelope upon which first class postage was  
8 prepared in Las Vegas, Nevada; and/or  
9 ☒ Via electronic mail; and/or  
10 ☐ Via facsimile; and/or  
11 ☐ Via Receipt of Copy to the interested parties

12 as follows:

13 Dennis M. Prince, Esq.  
14 Eglet Prince  
15 400 S. 7<sup>th</sup> Street, Box 1, Suite 400  
16 Las Vegas, Nevada 89101  
17 Attorneys for Plaintiff  
18 BEAU R. ORTH

19 /s/ **CARRIE C. TAYLOR**  
20 Carrie C. Taylor, an employee of  
21 Lauria Tokunaga Gates & Linn  
22  
23  
24  
25  
26  
27  
28  
29  
30

ORIGINAL

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02/10/2016 11:53:07 AM

1 ORDR

2 ROBERT L. EISENBERG (Nevada Bar No. 950)

3 Lemons, Grundy & Eisenberg

6005 Plumas Street, Third Floor

4 Reno, Nevada 89509

775-786-6868

5 775-786-9756

Email: [rlc@lge.net](mailto:rlc@lge.net)

6 Anthony D. Lauria

7 Nevada Bar No. 4114

8 LAURIA TOKUNAGA GATES & LINN, LLP

601 South Seventh Street, 2nd Floor

9 Las Vegas, NV 89101

10 Tel: (702) 387-8633

Fax: (702) 387-8635

11 ATTORNEYS FOR DEFENDANT

12  
13 IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
14 IN AND FOR THE COUNTY OF CLARK

15 BEAU R. ORTH,

Plaintiff,

Case No. A-11-648041

Dept. No. III

16  
17 vs.

18 ALBERT H. CAPANNA, M.D.

Defendant.

**ORDER REGARDING  
DEFENDANT'S MOTION  
FOR APPLICATION OF  
NRS 41A.035 and 42.021**

19  
20  
21  
22 This matter was heard by the Court on December 16, 2015. Dennis M. Prince, of  
23 Eglet Prince, appeared on behalf of Plaintiff Orth. Anthony D. Lauria, of Lauria  
24 Tokunaga Gates & Linn, LLP, and Robert L. Eisenberg, of Lemons, Grundy &  
25 Eisenberg, appeared on behalf of Defendant Capanna. Having considered the motion  
26 papers and the oral arguments by counsel, the Court hereby rules as follows:

27 ///

28

NRS 41A.035

This statute imposes a cap of \$350,000 on noneconomic damages.<sup>1</sup> The Court finds that statute is applicable and that Plaintiff's noneconomic damages must not exceed \$350,000. Nevertheless, the Court denies Defendant's request to apportion noneconomic damages between past and future damages. The Court finds that the entire \$350,000 amount of noneconomic damages should be attributed to past damages.

NRS 42.021

Subsections (3) through (8) of this statute deal with periodic payments for future damages. The Court finds that the statutory provisions for periodic payments apply to the amount awarded by the jury for future medical expenses, i.e., \$350,000. The Court finds that this portion of the judgment shall be paid in three periodic payments. The first payment will be the amount of \$175,000, which consists of one-half of the future medical expenses awarded by the jury. This amount will be paid within six months after entry of the amended judgment. The second periodic payment will be the amount of \$88,000, which will be paid within one year after entry of the amended judgment. The final periodic payment will be the amount of \$87,000, which will be paid within 18 months after entry of the amended judgment.

The Court also finds that the \$350,000 amount of future medical expenses awarded by the jury shall draw post-judgment interest, pursuant to NRS 17.130(2), from the time of entry of the judgment until satisfied, with post-judgment interest to be adjusted as each periodic payment is made.

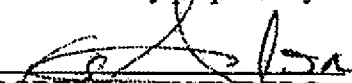
It is so ORDERED.

DATED: February 4, 2012

  
DISTRICT COURT JUDGE

<sup>1</sup> The Court has also dealt with application of this statute in the Order Regarding Defendant's Motion for Amendment of the Judgment.

1 Order initially prepared by:

2  
3  4114  
4 ROBERT L. EISENBERG

5 (Nv. Bar No. 0950)

6 Lemons, Grundy & Eisenberg

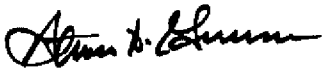
7 6005 Plumas Street, Third Floor

8 Reno, Nevada 89519

9 775-786-6868

10 Email: [rlc@lge.net](mailto:rlc@lge.net)

11 *Attorneys for Defendant*  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
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26  
27  
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CLERK OF THE COURT

1 **NEOJ**  
2 **DENNIS M. PRINCE, ESQ.**  
3 Nevada Bar No. 5092  
4 **TRACY A. EGLET, ESQ.**  
5 Nevada Bar No. 6419  
6 **DANIELLE TARMU, ESQ.**  
7 Nevada Bar No. 11727  
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12 (702) 450-5400 phone  
13 (702) 450-5451 facsimile

14 Attorneys for Plaintiff  
15 *Beau R. Orth*

16 **DISTRICT COURT**  
17 **CLARK COUNTY, NEVADA**

18 **BEAU R. ORTH,**  
19 Plaintiff,

20 vs.

21 **ALBERT H. CAPANNA, M.D.;**  
22 **DOES I through X; ROE BUSINESS**  
23 **ENTITIES I through X, inclusive,**  
24 Defendants.

CASE NO. : A-11-648041-C  
DEPT. NO. : III

**NOTICE OF ENTRY OF ORDER**

EGLET PRINCE

1 PLEASE TAKE NOTICE that an Order Regarding Plaintiff's Motion to Declare NRS  
2 42.021 and NRS 41A.035 Unconstitutional was signed on August 20, 2015 and entered in the  
3 above-entitled action on August 22, 2015, a copy of which is attached hereto as Exhibit "1."

4  
5 Respectfully submitted this 11th day of May, 2016.

6 EGLET PRINCE

7  
8 /s/ Danielle Tarmu  
9 DENNIS M. PRINCE, ESQ.  
10 Nevada Bar No.: 5092  
11 TRACY A. EGLET, ESQ.  
12 Nevada Bar No.: 6419  
13 DANIELLE TARMU, ESQ.  
14 Nevada Bar No.: 11727  
15 *Attorneys for Plaintiff*  
16  
17  
18  
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28

**CERTIFICATE OF SERVICE**

Pursuant to NRCP 5(b), I certify that I am an employee of EGLET PRINCE, and that on May 11th, 2016, I caused the foregoing document entitled **NOTICE OF ENTRY OF ORDER** to be served upon those persons designated by the parties in the E-Service Master List for the above-referenced matter in the Eighth Judicial District Court eFiling System in accordance with the mandatory electronic service requirements of Administrative Order 14-2 and the Nevada Electronic Filing and Conversion Rules.

Anthony D. Lauria, Esq.  
LAURIA, TOKUNAGA GATES & LINN, LLP  
601 South Seventh Street, 2<sup>nd</sup> Floor  
Las Vegas, Nevada 89101  
[Alauria@ltglaw.net](mailto:Alauria@ltglaw.net)

Robert L. Eisenberg, Esq.  
LEMONS, GRUNDY & EISENBERG  
6005 Plumas Street, Suite 300  
Reno Nevada 89519  
[rlc@lge.net](mailto:rlc@lge.net)  
Attorneys for Defendant  
*Albert H. Capanna, M.D.*

/s/ Brittney Glover  
an Employee of EGLET PRINCE



# **EXHIBIT “1”**

  
CLERK OF THE COURT

1 **ORDER**  
2 **DENNIS M. PRINCE, ESQ.**  
3 Nevada Bar No.: 5092  
4 **TRACY A. EGLET, ESQ.**  
5 Nevada Bar No.: 6419  
6 **DANIELLE TARMU, ESQ.**  
7 Nevada Bar No.: 11727  
8 **EGLET PRINCE**  
9 400 South Seventh Street, #400  
10 Las Vegas, Nevada 89101  
11 [dprince@egletlaw.com](mailto:dprince@egletlaw.com)  
12 [teglet@egletlaw.com](mailto:teglet@egletlaw.com)  
13 [dtarmu@egletlaw.com](mailto:dtarmu@egletlaw.com)  
14 (702) 450-5400 phone  
15 (702) 450-5451 facsimile  
16 Attorneys for Plaintiff  
17 Beau R. Orth.

12 **DISTRICT COURT**  
13  
14 **CLARK COUNTY, NEVADA**

15 **BEAU R. ORTH,**

16 Plaintiff,

17 vs.

18 **ALBERT H. CAPANNA, M.D.;**  
19 **DOES I through X; ROE BUSINESS**  
20 **ENTITIES I through X, inclusive,**

21 Defendants.

CASE NO. : A-11-648041-C  
DEPT. NO. : III

**ORDER REGARDING PLAINTIFF'S**  
**MOTION TO DECLARE NRS 42.021**  
**AND NRS 41A.035**  
**UNCONSTITUTIONAL**

22  
23 This matter having come on for hearing on the 14th day of August, 2015; Dennis M.  
24 Prince, Esq., and Danielle Tarmu, Esq. of Eglet Prince appearing on behalf of Plaintiff, Beau  
25 Orth; and Anthony D. Lauria, Esq. and Paul A. Cardinale, Esq. of Laura Tokunaga Gates &  
26 Linn, LLP, appearing on behalf of Defendant Albert H. Capanna, M.D. The Court, having read  
27 the moving papers and heard oral argument by counsel, and hereby **DENIES** Plaintiff's  
28

1 Motion to Declare NRS 42.021 and NRS 41A.035 Unconstitutional. The statutes pass  
2 constitutional scrutiny under rational basis test.

3 Dated this 20 day of August, 2015.

6   
DISTRICT COURT JUDGE

7 DATED this 22<sup>nd</sup> day of August, 2015.


8 DATED this \_\_\_\_ day of August, 2015.

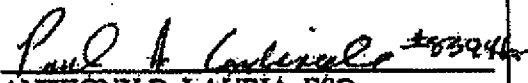
9 Respectfully Submitted By:

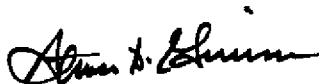
Approved as to Form and Content:

10 EGLET PRINCE

LAURIA TOKUNAGA GATES & LINN

11   
12 \_\_\_\_\_  
13 DENNIS M. PRINCE, ESQ.  
14 Nevada Bar No. 5092  
15 TRACY A. EGLET, ESQ.  
16 Nevada Bar No. 6419  
17 DANIELLE TARMU, ESQ.  
18 Nevada Bar No.: 11727  
19 400 South Seventh Street, Suite 400  
20 Las Vegas, Nevada 89101  
21 Attorneys for Plaintiff

22   
23 \_\_\_\_\_  
24 ANTHONY D. LAURIA, ESQ.  
25 Nevada Bar No. 4114  
26 KIMBERLY L. JOHNSON, ESQ.  
27 Nevada Bar No.: 10554  
28 601 South Seventh Street, 2<sup>nd</sup> Floor  
Las Vegas, Nevada 89101  
Attorneys for Defendant

  
CLERK OF THE COURT

1 **NEOJ**  
2 **DENNIS M. PRINCE, ESQ.**  
3 Nevada Bar No. 5092  
4 **TRACY A. EGLET, ESQ.**  
5 Nevada Bar No. 6419  
6 **DANIELLE TARMU, ESQ.**  
7 Nevada Bar No. 11727  
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13 (702) 450-5451 facsimile

14 Attorneys for Plaintiff  
15 *Beau R. Orth*

11  
12 **DISTRICT COURT**  
13 **CLARK COUNTY, NEVADA**

14 **BEAU R. ORTH,**  
15  
16 Plaintiff,

17 vs.

18 **ALBERT H. CAPANNA, M.D.;**  
19 **DOES I through X; ROE BUSINESS**  
20 **ENTITIES I through X, inclusive,**

21 Defendants.

CASE NO. : A-11-648041-C  
DEPT. NO. : III

**NOTICE OF ENTRY OF ORDER**

EGLET PRINCE  


1 PLEASE TAKE NOTICE that an Order Regarding Plaintiff's Motions in Limine was  
2 signed on September 1, 2015 and entered in the above-entitled action on December 1, 2015, a  
3 copy of which is attached hereto as Exhibit "1."

4  
5 Respectfully submitted this 3rd day of December, 2015.

6 EGLET PRINCE

7  
8 /s/ Danielle Tarmu  
9 DENNIS M. PRINCE, ESQ.  
10 Nevada Bar No.: 5092  
11 TRACY A. EGLET, ESQ.  
12 Nevada Bar No.: 6419  
13 DANIELLE TARMU, ESQ.  
14 Nevada Bar No.: 11727  
15  
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**CERTIFICATE OF SERVICE**

Pursuant to NRCF 5(b), I certify that I am an employee of EGLET PRINCE, and that on December 3rd, 2015, I caused the foregoing document entitled **NOTICE OF ENTRY OF ORDER** to be served upon those persons designated by the parties in the E-Service Master List for the above-referenced matter in the Eighth Judicial District Court eFiling System in accordance with the mandatory electronic service requirements of Administrative Order 14-2 and the Nevada Electronic Filing and Conversion Rules.

Anthony D. Lauria, Esq.  
 Kimberly L. Johnson, Esq.  
 LAURIA, TOKUNAGA GATES &  
 LINN, LLP  
 601 South Seventh Street  
 2<sup>nd</sup> Floor  
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 Fax: (702) 387-8635  
[Alauria@ltglaw.net](mailto:Alauria@ltglaw.net)  
[Kjohnson@ltglaw.net](mailto:Kjohnson@ltglaw.net)  
 Attorneys for Defendant  
 Albert H. Capanna, M.D.

/s/ Brittney Glover  
 an Employee of EGLET PRINCE

# **EXHIBIT “1”**

  
CLERK OF THE COURT

EGLET PRINCE

1 **ORDR**  
2 **DENNIS M. PRINCE, ESQ.**  
3 Nevada Bar No.: 5092  
4 **TRACY A. EGLET, ESQ.**  
5 Nevada Bar No.: 6419  
6 **DANIELLE TARMU, ESQ.**  
7 Nevada Bar No.: 11727  
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14 (702) 450-5400 phone  
15 (702) 450-5451 facsimile  
16 Attorneys for Plaintiff  
17 *Beau R. Orth*

12 **DISTRICT COURT**  
13  
14 **CLARK COUNTY, NEVADA**

15 **BEAU R. ORTH,**

16 **Plaintiff,**

17 **vs.**

18 **ALBERT H. CAPANNA, M.D.;**  
19 **DOES I through X; ROE BUSINESS**  
20 **ENTITIES I through X, inclusive,**

21 **Defendants.**

**CASE NO. : A-11-648041-C**  
**DEPT. NO. : III**

**ORDER REGARDING PLAINTIFF'S**  
**MOTIONS IN LIMINE**

22  
23 This matter having come on for hearing on the 14th day of August, 2015; Dennis M.  
24 Prince, Esq., and Danielle Tarmu, Esq. of Eglet Prince appearing on behalf of Plaintiff, Beau  
25 Orth; and Anthony D. Lauria, Esq. and Paul A. Cardinale, Esq. of Laura Tokunaga Gates &  
26 Linn, LLP, appearing on behalf of Defendant Albert H. Capanna, M.D. The Court, having read  
27 the moving papers and heard oral argument by counsel, and hereby rules as follows:  
28



1 **IT IS HEREBY ORDERED** that Plaintiff's Omnibus Motion in Limine No. 1 is ruled  
2 upon as follows:

3 1) **Hypothetical Medical Condition.** This Motion is **GRANTED**. Questions  
4 must be related to evidence in the record or evidence they reasonably anticipate will be  
5 presented at trial.

6 2) **Reference to Plaintiff Being a Malingerer, Magnifying Symptoms or**  
7 **Manifesting Secondary Gain Motives Should be Excluded.** This Motion is **GRANTED** as  
8 unopposed. Defendant will not make this argument at all unless new evidence regarding these  
9 issues is disclosed at trial, in which case counsel must approach the bench before making any  
10 reference to the jury.

11 3) **References to Defense Medical Examiners as "Independent."** This Motion is  
12 **GRANTED** as unopposed.

13 4) **Closing Argument.** This Motion is **GRANTED** as unopposed. Defendant  
14 will not argue that Plaintiff's counsel is asking for a higher verdict because he thinks the jury  
15 will award less. This order does not prevent Defendant from arguing that the amount requested  
16 by Plaintiff is not supported by the evidence.

17 5) **Taxation.** This Motion is **GRANTED** as unopposed. The parties will not  
18 reference taxation of any amount of damages.

19 6) **Precluding Reference as to Plaintiff's Counsel Working with Plaintiff's**  
20 **Treating Physicians on Unrelated Cases.** This Motion is **GRANTED IN PART** and  
21 **DENIED IN PART.** Defendant can ask questions about the nature of physicians' practice,  
22 such as the amount of work for defense versus plaintiffs, and attorneys. However, Defendant  
23

1 cannot ask specific questions about working with Plaintiff's counsel in the past, such as the  
2  
3 number of times the doctor treated Plaintiff's counsel's clients.

4 7) Exclude Collateral Sources of Payment. This Motion is DENIED without  
5  
6 prejudice.

7 IT IS HEREBY ORDERED that Plaintiff's Motion in Limine No. 2 to Exclude  
8 Irrelevant and/or Unduly Prejudicial Information is GRANTED. Any reference to Plaintiff's  
9 parents' alleged spinal treatment or Plaintiff having a congenital spinal condition is excluded  
10 from trial.

11 IT IS HEREBY ORDERED that Plaintiff's Motion in Limine No. 3 to Exclude Prior  
12 Unrelated Medical Conditions is GRANTED. Any reference to Plaintiff's previous injuries  
13 sustained while playing football and sports, including but not limited to, his ankle injury in his  
14 sophomore year of college, his torn ligament in his hand/thumb area approximately in 2009 or  
15 early 2010, and his March 2010 concussion, are excluded from trial. If Defendant believes that  
16 something at trial opens the door to allow questioning in this area, then the parties must  
17 approach the bench before asking questions or referencing it before the jury.

18 IT IS HEREBY ORDERED that Plaintiff's Motion in Limine No. 4 to Permit  
19 Treating Physicians to Testify as to Causation, Diagnosis, Prognosis, Future Treatment, and  
20 Extent of Disability Without a Formal Expert Report is GRANTED. Dr. Cash can testify  
21 about billing, causation, prognosis, future treatment, and extent of disability without a formal  
22 expert report. He is a treating physician, not a retained expert. Asking a treating physician to  
23 do a future cost letter or certain other tasks does not automatically convert him/her to a retained  
24 expert.  
25  
26  
27  
28

1 IT IS HEREBY ORDERED that Plaintiff's Motion in Limine No. 5 to Allow Parties  
2 to Present a Jury Questionnaire Prior to Voir Dire is MOOT as it is too late.

3 IT IS HEREBY ORDERED that Plaintiff's Motion in Limine No. 6 to Limit  
4 Defendant's Experts' Testimony to the Opinions and Bases Set Forth in Their Expert Reports  
5 is GRANTED. Retained expert opinions must comply with NRCP 16.1(a)(2)(B) and be in a  
6 16.1 disclosure, report, or deposition.  
7

8 Dated this 1 day of <sup>Sept</sup> August, 2015.

9  
10  
11   
DISTRICT COURT JUDGE

12 DATED this 1 day of <sup>Dec.</sup> August, 2015.

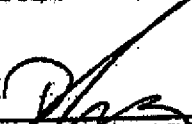
13 Respectfully Submitted By:

14 EGLET PRINCE

15 DATED this \_\_\_\_ day of August, 2015.

16 Approved as to Form and Content:

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