

IN THE SUPREME COURT OF THE STATE OF NEVADA

ALBERT H. CAPANNA, M.D.,
Appellant/Cross-Respondent,

vs.

BEAU R. ORTH,
Respondent/Cross-Appellant.

ALBERT H. CAPANNA, M.D.,
Appellant,

vs.

BEAU R. ORTH,
Respondent.

Case No. 69935

District Court Case No. A648041

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**APPENDIX TO RESPONDENT/CROSS-APPELLANT'S
COMBINED OPENING AND ANSWERING BRIEF**

VOL. 6 PART 3

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1 THE WITNESS: Excellent, thanks. This disc looks just like this disc now,
2 which has had, you know, seven, eight years of degeneration plus a discectomy, but
3 it looks even worse. It used to look like the other disc, and now it looks like the bad
4 disc, and even worse.

5 BY MR. PRINCE:

6 Q And --

7 A That would not have happened -- but for the initial violation of L4-5, it
8 would look like the other disc and not like the L5-S1.

9 Q Okay.

10 MR. PRINCE: Could we clear it if possibly? Thank you, Judge.

11 THE WITNESS: Thank you.

12 BY MR. PRINCE:

13 Q Dr. Cash, in your opinion, had a correct procedure and proper
14 procedure been done at L5-S1 and -- by Dr. Capanna would -- by March of 2014
15 would Beau Orth's L4-5 disc look anything like that?

16 A Not whatsoever.

17 Q Okay. Do you have an opinion whether it would still maintain a normal
18 appearance based upon everything you know?

19 A Yes.

20 Q Okay. Is that your opinion to a reasonable degree of medical
21 probability?

22 A Yes.

23 Q Okay. Thank you.

24 MR. PRINCE: No additional questions.

25 THE COURT: Mr. Lauria.

1 MR. LAURIA: Thank you.

2 RECROSS EXAMINATION

3 BY MR. LAURIA:

4 Q Doctor, I just want to clarify, because I think in the very beginning when
5 counsel got up to redirect he asked you some questions that, I think, to try and
6 confuse some of the things that we've gone through, but I want to make sure the
7 testimony's absolutely clear and not muddled up here. The time that Mr. Orth would
8 need a first fusion surgery didn't change, in your opinion, as a result of what
9 occurred at the surgery by Dr. Capanna; do you agree?

10 A The timing, correct.

11 Q All right. So let me put this up and let me see -- let's go through them
12 and make sure they're correct.

13 MR. LAURIA: Thank you. Can you put him on?

14 THE WITNESS: It's coming.

15 MR. LAURIA: Okay. Thank you. I'm just trying to do this kind of quickly.

16 BY MR. LAURIA:

17 Q So this is your opinions, as you've stated, to a reasonable medical
18 probability. On September 17th, 2010 it was your opinion that he would require a
19 fusion in 10 to 15 years, that would be 2020 to 2025, right?

20 A That's correct, at L5-S1.

21 Q And your opinion just given a couple months ago, and you wrote it
22 down, we've got the exhibit, you read it before, it was Mr. Orth will require a fusion
23 within 10 years, which would have put us about the same timeframe, right, 2025?

24 A Two-level fusion, yes.

25 Q Okay. And we talked about the additional cost of doing a two-level, and

1 according to your report you've estimated the one at 342,000 and the second at
2 350,000, right?

3 A That's correct.

4 Q So in your opinion, once Mr. Orth required a discectomy, that was going
5 to occur, he was going to incur that cost and have a fusion, agree?

6 A Yes.

7 Q All right. And how old was he when he had the surgery that you
8 performed on him?

9 A Around 20.

10 Q All right. So he was 20 years old, so in 10 to 15 years he was going to
11 require a fusion at 30 to 35, right?

12 A That's correct.

13 Q And how old is Mr. Orth now?

14 A Twenty-five.

15 Q All right. And he's going to require a fusion in 10 years, so you're now
16 saying at 35 years old, true?

17 A Well, I said --

18 Q Approximately? Something less -- somewhere between now and 35 is
19 your guess, right?

20 A Yeah, as of May -- but, you know, more recently -- he's a candidate
21 now, but I think he's going to give into it within the next 10 years for sure.

22 Q I mean, I'm going by the opinion that you wrote out and provided to us
23 in May of this year, right?

24 A Right.

25 Q You've told us that the rehabilitation between the two is essentially the

1 same, maybe a little more because it's two-level, true?

2 A That's right.

3 Q You do them both at the same time so the costs are very similar
4 otherwise, right?

5 A That's right.

6 Q And then it's your opinion, to a reasonable medical probability, that 17
7 years after that, so in either case, around 52 years old, in your opinion, he was
8 going to need a fusion, true?

9 A That's right. A second fusion, one --

10 Q A second fusion?

11 A -- one at a second level, one at a third level.

12 Q Okay. So in your opinion, again, without going through -- now he was
13 going to 42 and then he was going to be 30, you would agree with me that the timing
14 of the requirement of fusions in Mr. Orth's condition hasn't been significantly altered,
15 at least according to these opinions, by having a second level, agreed?

16 A According to those predictions at that time.

17 Q Okay. And then according to those predictions at that time, 17 years
18 down the road from whenever he has the first fusion, whether it was going to be a
19 one-level or whether it's now going to be two-level, he'd require an adjacent level
20 fusion at the same cost; is that fair?

21 A That's right.

22 Q All right. That's all I have. Thank you.

23 A Thank you.

24 THE COURT: Mr. Prince?

25 FURTHER REDIRECT EXAMINATION

1 BY MR. PRINCE:

2 Q Under just a strict, you know, using the 5-S1, was three or four ever
3 going to be contemplated had everything gone perfectly at L5-S1?

4 A No, it -- no, it wasn't. And what we haven't focused on is -- I mean,
5 we're looking at absolute cost of a technical fusion in a hospital and the postop
6 rehab, you're not looking at the effect it has on life. You ask me if I want a one-level
7 fusion now or two-level fusion now, the choice is obvious, take the one. And if I
8 wanted two later and a third later, I'll take the two.

9 Q Thanks -- thank you, Dr. Bennett -- or Dr. Cash.

10 MR. PRINCE: No further questions.

11 THE COURT: Anything from our jurors? Yes? Okay.

12 [Bench conference begins at 4:42 p.m.]

13 MR. LAURIA: Getting like a maze up here.

14 THE COURT: I have no idea. I can't figure out what their question is.

15 MR. PRINCE: I don't understand --

16 MR. LAURIA: Yeah, I don't understand. I don't think we can ask it.

17 [Bench conference ends at 4:43 p.m.]

18 THE COURT: Mr. Ostrow, none of us can figure out what the question is.

19 MR. OSTROW: I don't know either.

20 THE COURT: Let me give this back to you and see if there's -- I mean, I
21 understand some of the things that you're saying, but there has to be a question I --

22 MR. OSTROW: Yes (indiscernible) okay.

23 THE COURT: -- can formulate for the witness.

24 [Pause]

25 MR. OSTROW: Does that do it?

1 THE MARSHAL: I don't know if it's going to change much.
2 [Bench conference begins at 4:44 p.m.]
3 THE MARSHAL: (Indiscernible) question.
4 THE COURT: Okay.
5 MR. PRINCE: Yeah. Oh.
6 MR. LAURIA: No, I don't think that can be given, Judge.
7 MR. PRINCE: No (inaudible) surgeries you need because of malpractice --
8 THE COURT: (Indiscernible) let me look at this again.
9 MR. PRINCE: Yeah.
10 MR. LAURIA: Let me see it one more time.
11 THE COURT: Does it matter one year or hundred years?
12 MR. CARDINALE: I think I --
13 MR. LAURIA: I think I know what he's asking.
14 MR. CARDINALE: Prior to the surgeries (indiscernible) because of the
15 malpractice which is --
16 MR. LAURIA: Which is not -- right.
17 MR. CARDINALE: -- exactly (indiscernible) --
18 MR. LAURIA: Right.
19 MR. PRINCE: -- exactly what you've been emphasizing.
20 MR. PRINCE: No --
21 THE COURT: I --
22 MR. LAURIA: I think the --
23 MR. PRINCE: -- you can't (indiscernible) --
24 THE COURT: I still don't know.
25 MR. PRINCE: -- just leave --

1 MR. LAURIA: I think --

2 THE COURT: Go ahead.

3 MR. LAURIA: -- the question is clearly --

4 MR. PRINCE: It's not (indiscernible) --

5 MR. LAURIA: -- are the surgeries due to malpractice or would surgery be

6 needed anyway. I think that's --

7 MR. PRINCE: That's not what he --

8 MR. LAURIA: -- the question.

9 MR. PRINCE: That's not what he said.

10 THE COURT: All right.

11 MR. PRINCE: (Indiscernible) --

12 MR. LAURIA: Because he says are surgeries due to malpractice --

13 [Bench conference ends at 4:45 p.m.]

14 THE COURT: I still can't -- there is a number of kind of statements in here

15 about years, about costs, about surgery, and then you -- all you did at the end was

16 write now yes or no. I mean I can't formulate a question out of that. So there has to

17 be something that you're asking that I can formulate a question that the doctor could

18 answer.

19 MR. OSTROW: Well he answered 90 percent of everything I needed to

20 know --

21 MR. PRINCE: Okay.

22 THE COURT: Okay.

23 MR. OSTROW: -- but I was just --

24 THE COURT: Well then no, I want to -- I want you to figure this out because I

25 want to answer your question. I just still can't figure out exactly how to formulate a

1 question that he could answer. I can't just read off a number of statements that
2 you've made and ask him yes or no. And sometimes I know it's kind of difficult.
3 Jurors will ask me questions in trials all the time where they're really kind of making
4 a statement about what they think about certain things, which is more kind of for you
5 discuss in deliberation. But if there is a question that you need clarification from
6 something he's testified about, that's kind of what I want to try and figure out.

7 MR. OSTROW: Well, nine out of 10 questions were -- that were directly
8 asked him I got my answers.

9 THE COURT: Okay.

10 MR. OSTROW: Maybe the rest will come through the jurors.

11 THE COURT: Okay.

12 MR. PRINCE: Okay. You sure?

13 THE COURT: You sure?

14 MR. OSTROW: Yeah.

15 MR. PRINCE: You sure?

16 THE COURT: Okay.

17 MR. PRINCE: Okay. Okay, thank you.

18 THE COURT: All right. Okay, Dr. Cash --

19 MR. PRINCE: Looks like --

20 THE COURT: -- thank you very much for your --

21 MR. PRINCE: Yeah, looks like we have one more. I think we --

22 THE COURT: Oh. I'm sorry.

23 MR. PRINCE: -- we have another taker.

24 THE WITNESS: Good.

25 MR. LAURIA: (Indiscernible) do them now.

1 THE MARSHAL: Can you write your juror number (indiscernible) --
2 [Bench conference begins at 4:46 p.m.]
3 THE COURT: I think I get this one now actually.
4 MR. LAURIA: I do too.
5 MR. PRINCE: No.
6 MR. LAURIA: I do too.
7 THE COURT: I think he's saying does it matter whether it's one year or a
8 hundred years or free or \$10 million, the surgery or surgeries are needed because
9 of malpractice --
10 MR. LAURIA: Because of malpractice.
11 THE COURT: -- dah dah dah dah dah dah.
12 MR. LAURIA: Yeah, that's the question. Right. So --
13 THE COURT: Does that make sense?
14 MR. LAURIA: Yes. That's what he's trying to ask.
15 THE COURT: I think Danielle agrees.
16 MR. PRINCE: (Indiscernible) --
17 THE COURT: Okay.
18 MR. PRINCE: We'll try it -- maybe we'll try it.
19 [Pause]
20 THE COURT: You guys look at that one.
21 I think I get your question now, Mr. Orth (sic). I've been enlightened.
22 MR. OSTROW: (Indiscernible) --
23 THE COURT: I'm going to -- as soon as they get done looking at this other
24 one, I'm going to ask your question.
25 [Colloquy between counsel]

1 MR. LAURIA: It's fine.

2 THE COURT: What's that? You guys get that one?

3 MR. LAURIA: Yeah.

4 THE COURT: I'm not sure -- I think it's some of the words that were used that
5 were confusing to me -- since Dr. Cash said three discectomies in a short period
6 isn't good -- I think what she's saying is why didn't he wait until later?

7 MR. PRINCE: No.

8 MR. LAURIA: Yeah, he's saying why did he rush --

9 THE COURT: I thought she said why --

10 MR. LAURIA: -- before looking for alternatives.

11 THE COURT: -- didn't he wait --

12 MR. PRINCE: No, that means --

13 THE COURT: -- until a later time and see what other alternatives --

14 MR. LAURIA: That's what she's asking.

15 THE COURT: -- can help the patient.

16 MR. LAURIA: All right. That's --

17 MR. PRINCE: Oh. Oh. Okay, yeah --

18 THE COURT: See?

19 MR. PRINCE: -- yeah, yeah, yeah --

20 THE COURT: Okay.

21 MR. PRINCE: -- yeah, good.

22 THE COURT: All right.

23 [Bench conference ends at 4:48 p.m.]

24 THE COURT: Okay.

25 MR. PRINCE: Okay.

1 THE COURT: Okay, first off, Mr. Ostrow, let me make sure that I understand
2 what I now think I understand. Are you -- does your -- is your question asking Dr.
3 Cash, quote, does it matter whether it's one year or a hundred years whether the
4 cost would be free or they be \$10 million -- regardless of that, in your expert opinion,
5 are the surgery or surgeries needed because of malpractice due to wrong level
6 surgery to L4-L5? Yes. You're shaking your head yes.

7 Okay, you understand that, Dr. Cash?

8 THE WITNESS: Let me rephrase it myself before I --

9 THE COURT: Okay. And but there's a part at the end also and -- and it also
10 needed corrective second surgery to L4-L5. Okay.

11 THE WITNESS: Okay, so the second part first. The corrective surgery at L4-
12 5 was absolutely 100 percent related to the wrong level surgery. The surgery I
13 performed was related to the wrong level (indiscernible) performed.

14 L4-5 surgery that's upcoming for the fusion which will also include 5-1
15 now because of 4-5 is related to the wrong level surgery, but had it not been
16 performed, 27 years from now L4-5 would have been fused. But (indiscernible)
17 rapid advance of when that surgery was needed and that's the next surgery's
18 needed at 4-5, not 5-1. 5-1 would have been needed and then later on, much later
19 4-5, but now 4-5 is needed and because of consequence of 4-5, 5-1 will be included.

20 THE COURT: And so that's your opinion regardless of whether it's one year
21 or a hundred years, free cost or it cost \$10 million?

22 THE WITNESS: These are medical facts. Yes, not -- regardless of cost and
23 years.

24 THE COURT: Okay. Then the second question is since you said that the
25 three discectomies in a short period of time wasn't good, why didn't you wait until

1 later in time and see what other alternatives could help the patient before rushing to
2 operate on Mr. Orth?

3 THE WITNESS: Okay. That's an excellent question. So if you look at the
4 histories leading up to each one of those surgeries, there's a stark difference. One
5 gave the opportunity to play football even on a disc herniation. He played football
6 for two years. There's no rush to surgery there because there's no permanent --
7 there was no neurologic deficit, particularly weakness ever associated. He could
8 play football and why rush to surgery, but in attempt to reduce the pain he was
9 complaining of the mild, you know, moderate intermittent pain for those couple
10 years, surgery was performed electively.

11 When I saw the patient, he had a whopping disc fragment that escaped
12 through a hole and was engulfed in scar tissue taking up half the canal wrapping up
13 the nerve. He had a loss of muscle strength in not one muscle nerve root but in two,
14 and he had 94 percent disability out of a hundred and he's crippled and he's
15 hobbling in there. He can't even walk. Before the first surgery he's playing -- or,
16 collegiate competitive football so you can wait on that surgery. That's elective. But
17 this one was urgent. He had a 94 percent disability index, his pain was up to 10
18 over 10, he was hobbling in, the scar tissue was rushing in on that disc fragment
19 encapsulating the nerve and he had significant weakness that could have been
20 permanent. I had to get him into surgery.

21 Now, if he had had a disc herniation crushing the nerve so bad he lost
22 bladder and bowel control, I would have gone directly to surgery; do not pass go, go
23 over the hospital, I follow you over there, we operate within the hour or day if
24 possible.

25 So there's three stages. The first one is outlined nicely in the

1 preoperative notes. It was elective. He's trying to get improvement in his pain. The
2 second time was urgent. I had to take that disc material and the encapsulating scar
3 tissue off as soon as possible within a permanent foot drop and disability. In the last
4 case which luckily didn't happen, if he had lost bladder and bowel control, that's
5 immediate surgery. So that's why.

6 THE COURT: Mr. Prince.

7 MR. PRINCE: I think the juror has another -- do you have another question?

8 THE COURT: Yes?

9 MS. TAM: Could I talk instead of write just --

10 THE COURT: Okay. Got to write it down.

11 MS. TAM: Got to wait for me.

12 [Pause]

13 THE MARSHAL: Juror number.

14 MS. TAM: Thank you.

15 THE MARSHAL: Put your juror number.

16 THE COURT: You guys can approach.

17 [Bench conference begins at 4:54 p.m.]

18 [Colloquy between counsel]

19 THE COURT: I think she's assuming that the surgery, you know,
20 reinvigorates the disc with fluid.

21 MR. PRINCE: Huh?

22 THE COURT: I think she's assuming that surgery reinvigorates the disc with
23 fluid in some fashion.

24 MR. PRINCE: (Inaudible) --

25 MR. LAURIA: I don't know that we --

1 MR. PRINCE: -- showed dark on (indiscernible) why or -- why showed dark
2 (indiscernible) showed the white color. Oh, at one point it had the white color.

3 THE COURT: Yeah.

4 MR. PRINCE: I mean, yeah, it was --

5 THE COURT: But I think she's thinking it should have come white again --

6 MS. TARMU: Right.

7 THE COURT: -- because you --

8 MR. PRINCE: No, no, I don't think she's thinking that.

9 MS. TARMU: Yeah, she --

10 THE COURT: Yeah, she is.

11 MR. PRINCE: No, I don't --

12 MS. TARMU: Yeah, she is.

13 THE COURT: Yeah, she is.

14 MS. TARMU: She is. Because she's not grasping that --

15 THE COURT: She's thinking gee, you had -- did surgery. Why didn't it get all
16 good again.

17 MS. TARMU: (Indiscernible) --

18 MR. PRINCE: No. I don't -- I think it's something different. I think because
19 there was other white -- there's some white in it still. There was white that it does --
20 like 4-5 has no white. If you look at the --

21 THE COURT: Right.

22 MR. PRINCE: -- '12 MRI, 5 still have some hydration in it, as opposed to 4-5.

23 THE COURT: Well, I ask -- I mean --

24 MR. PRINCE: So anyway.

25 MR. LAURIA: So then --

1 MR. PRINCE: I don't know.

2 MR. LAURIA: -- once he answers then we get to ask the --

3 THE COURT: Yeah.

4 MR. LAURIA: -- doctor to clarify.

5 THE COURT: Yeah. Yeah.

6 MR. LAURIA: I don't think that -- I don't know that -- I mean you can ask that

7 one --

8 THE COURT: I'll ask --

9 MR. LAURIA: -- I guess if you want.

10 THE COURT: Okay, would you put this MRI up?

11 MR. PRINCE: Which one?

12 MR. LAURIA: Well --

13 THE COURT: Put that back up --

14 MR. LAURIA: -- I --

15 THE COURT: -- March 14, 2014?

16 MR. LAURIA: And I'm not sure about -- did he damage the what? I don't

17 know what that question means.

18 THE COURT: It says did he damage the L5-S1, too.

19 MR. LAURIA: Yeah, so I don't think that's a really good question.

20 THE COURT: Well no, I mean he can answer it.

21 [Bench conference ends at 4:56 p.m.]

22 THE COURT: Okay. Mr. Prince, if you'll put up that March 14, 2014 --

23 MR. PRINCE: I will.

24 THE COURT: -- MRI film that had been shown.

25 MR. PRINCE: That's demonstrative 4.

1 THE COURT: Okay. Ms. Tam, is this the one you were talking about?

2 MS. TAM: Yes.

3 THE COURT: Okay. So, Doctor, here's my question: Why on this film,
4 March 14th, 2014, the MRI shows dark on L4-5 and L5-S1 -- since L5-S1 has been
5 operated on, should that be white color? That's the first part, but I'll let you answer
6 that.

7 THE WITNESS: I was waiting for somebody to ask that --

8 THE COURT: Well actually, you what what, I'll --

9 THE WITNESS: -- during this whole trial.

10 THE COURT: -- I'll ask this part as well and you can just answer it altogether.

11 THE WITNESS: Yeah.

12 THE COURT: The second question says did he damage the L5-S1, too?

13 THE WITNESS: Did he damage the L5-S1 --

14 THE COURT: Who do you mean by he? Did Dr. Cash damage L5-S1?

15 MS. TAM: Right, when he operated (indiscernible) --

16 THE COURT: Okay. All right, Dr. Cash.

17 THE WITNESS: Okay. So the first part is why is this colored in. Well, you'll
18 see that the whole vantage because the scar tissue has formed, you have to get --
19 has to be -- it has to be hyperemic, meaning it has to have blood flow actively going
20 in to light up. Okay? So I can't tell if this particular -- I've seen so many images, if
21 this one actually has contrast with. Now I know that says with and without. That just
22 means the study. But I don't know particularly if this one is the without or this one is
23 the with. So if it's without, it's going to appear dark. It always would. Okay? So
24 that's one reason.

25 The other reason is if it's with, then most likely there's not a lot of

1 hyperemic new blood flow coming in. Okay? You can see that L4-5 didn't just
2 vanish so whatever -- the same phenomena that's going on where there's scar
3 tissue has just remodeled and taken a step back or it's not been exposed to contrast
4 in this slice, they look the same. 4-5 and 5-1 have both been operated on and they
5 look the same. So that's why it doesn't show a gaping hole at 5-1.

6 Now the other thing is the L5-S1 is by definition injured because it's
7 been degenerating and it needed surgery. I have to make an incision in the L5-S1,
8 so I technically traumatize (sic) it, but I'm not doing damage to it. I'm removing the
9 disc fragment. It's already a crumbly disc. It's been herniated. It's been herniated
10 for couple years, and I have to make an incision. So I improved it. There's no such
11 thing as a repair for it. It's just a discectomy.

12 THE COURT: Okay. Mr. Prince.

13 MR. PRINCE: Yeah. Take maybe Mr. Ostrow's question first.

14 FURTHER REDIRECT EXAMINATION

15 BY MR. PRINCE:

16 Q What were -- what was the risk, Dr. Cash, when Beau came to you
17 originally on October the 12th of not taking to surgery, you know, pretty soon after
18 you saw him? What were the risks of not doing anything?

19 A Well, the absolute risk is to be debilitated with -- with a mechanical
20 compression on the nerve and not being able to do anything more and more disc
21 material escaping. The other risk include -- he already had a weakness in not just
22 one nerve root but a second one, it was significant, he was in a lot of pain, and
23 weakness in the ankle in both directions. So if I didn't take the pressure off the
24 nerve, the neurologic deficient could progress to a point where he had a foot drop,
25 inability to move his foot. He wouldn't be paralyzed from waist down, but essentially

1 his ankle would be paralyzed. If that were permanent, he's going require a boot,
2 never -- and it never returns and trips on carpet and he just has this big
3 cumbersome orthotic there. He loses function of his ankle.

4 Q Okay. And with regard to the -- maybe the last question, when you -- I
5 guess any time a surgeon goes into a disc to remove fragment, I mean once you
6 open it up and it -- that's I guess some -- it's some type of an injury, right?

7 A Well it's a trauma, so -- it's a trauma so you're accelerating the
8 degenerative process. It was a pimple before. Now it's popped, it has to be, but it
9 just accelerates degenerative condition.

10 Q Is there any other way to remove the disc fragment from -- and remove
11 the compression other than going in the disc and getting it out so it like calms down
12 and stops pressing on the nerve?

13 A Well there are some other ways. You can put an -- you can put
14 essentially a hot wire in there and there's different ways to do a nucleoplasty
15 whether it's thermal or laser. Those don't work that well. I mean there are options.
16 They're not as tried and proven as discectomy like Dr. Capanna recommended like I
17 performed. I think that's the gold standard actually.

18 Q Right. I mean, Dr. Capanna's recommendation was the correct
19 recommendation?

20 A I agree.

21 Q His description, had he been at the correct level, would have been the
22 correct description for the surgery?

23 A That's correct.

24 Q Okay.

25 [Colloquy between counsel]

1 BY MR. PRINCE:

2 Q What's the -- I think we understand it, but it's to make sure we're all
3 clear. What was the purpose of decompressing the nerve at L5-S1?

4 A The nerve was herniated. It was pressing into the canal where the
5 nerves live. So the purpose of decompressing it is take that pressure away and
6 make the disc essentially smaller as it relates to the surrounding nerves.

7 Q For the leg pain?

8 A Yeah, I'm sorry. For the leg pain, yeah. It's not a back pain procedure.
9 We covered that earlier. It's not a back pain procedure. It's a back surgery but for a
10 leg pain caused at the lumbar area.

11 Q Okay. Thank you.

12 THE COURT: Mr. Lauria.

13 MR. LAURIA: Thank you.

14 FURTHER RECROSS EXAMINATION

15 BY MR. LAURIA:

16 Q Dr. Cash, if Mr. Orth had never had any surgery at L4-5 but had only
17 had the surgery at L5-S1 -- so nobody -- there's no wrong level, there's nobody
18 touching anything, there's nobody above the level of L5-S1. If that was the only
19 level that was touched, it's your opinion that between age 30 and 35 to a reasonable
20 medical probability Mr. Orth was going to require fusion surgery at L5-S1, true?

21 A Yes.

22 Q All right. So Mr. Orth was going to require fusion surgery at L5-S1 even
23 without any wrong level or going to a level above, true?

24 A That's my opinion.

25 Q All right. And the reason that you estimated he would require -- it's your

1 opinion that he would need a fusion between age 30 and 35, even if only L5-S1
2 were done, there was nothing in L4-5 and no second surgery, is because he would
3 develop mechanical back pain leading up to that time that would ultimately require a
4 fusion. That's your opinion to a reasonable medical probability, correct?

5 A Yes, sir.

6 Q All right. So your opinion is even just with an L5-S1 surgery and
7 nothing else touched --

8 MR. PRINCE: Objection; asked and answered, Judge.

9 MR. LAURIA: Just trying to clarify.

10 THE COURT: It has been asked and answered.

11 MR. LAURIA: Just trying to clarify.

12 MR. PRINCE: What's that?

13 MR. LAURIA: Put it together.

14 THE COURT: It's been asked and answered at this point.

15 BY MR. LAURIA:

16 Q By age 30 or 35 in your opinion to a reasonable medical probability, his
17 back pain would have been so significant or severe from the original injury, the disc
18 herniation that required the discectomy and undergoing the discectomy, that he
19 would have needed a fusion, true?

20 MR. PRINCE: Objection; asked and answered, Judge.

21 THE COURT: It is and that's beyond the questions --

22 MR. PRINCE: Right.

23 THE COURT: -- of the jurors. That's all this is supposed to be about.

24 MR. LAURIA: All right.

25 THE COURT: Okay. All right. Dr. Cash, thank you very much for your time,

1 sir --

2 THE WITNESS: My pleasure, Your Honor.

3 THE COURT: -- over the two days you've been here --

4 MR. PRINCE: Leave them lemons, Doctor. Or the one.

5 THE WITNESS: Okay.

6 THE COURT: And you are excused, sir.

7 Okay. Ladies and gentlemen, we're going to take our evening recess.
8 During the recess, you're admonished not to talk or converse among -- well actually,
9 before I tell you what time, why don't you guys approach the bench, please.

10 [Bench conference begins at 5:03 p.m.]

11 THE COURT: So what do we -- keeping your fruit?

12 MR. PRINCE: The box cut.

13 THE COURT: Okay. What's our plan for tomorrow? What do we got?

14 MR. PRINCE: Nine. And we've got to put Dr. Capanna back on the stand.

15 THE COURT: Okay. And then after him, what else do you have?

16 MR. PRINCE: I have Beau.

17 THE COURT: Okay. And --

18 MR. PRINCE: Because, you know, you started crossing him -- Tony says that
19 he's going to put him on in his case. I'm like well, I then -- he's already started a
20 cross-exam --

21 THE COURT: No, I know.

22 MR. PRINCE: -- and then if you're going just stop questioning him, I'm going
23 to start -- go into start questioning him right now --

24 THE COURT: Okay.

25 MR. PRINCE: -- I mean based on what you already did.

1 THE COURT: Okay.
2 MR. LAURIA: Okay.
3 MR. PRINCE: So whatever --
4 THE COURT: All right.
5 MR. PRINCE: -- you know, whatever --
6 THE COURT: So in any event --
7 MR. PRINCE: -- so let know.
8 THE COURT: -- you got to finish --
9 MR. LAURIA: And then I've got --
10 THE COURT: -- you got to finish --
11 MR. LAURIA: -- I've got a witness coming --
12 THE COURT: Hold on. You got to finish --
13 MR. PRINCE: Who?
14 THE COURT: -- Dr. Capanna and you've got Beau?
15 MR. PRINCE: Yeah.
16 THE COURT: And anybody else?
17 MR. PRINCE: No.
18 THE COURT: And then you're going to rest.
19 MR. PRINCE: What witness --
20 MR. LAURIA: Kyle Wilson.
21 THE COURT: And then who else?
22 MR. PRINCE: What's his relevance to anything?
23 THE COURT: Well --
24 MR. LAURIA: He's the athletic trainer at UNLV, so --
25 MR. PRINCE: What's it going to -- what's he going to do?

1 MR. LAURIA: He's going to testify.
2 MR. PRINCE: To what?
3 MR. LAURIA: To things within his scope of knowledge.
4 THE COURT: I'm just trying to figure -- look, if they're disclosed witness, they
5 can call the witness.
6 MR. PRINCE: I don't know.
7 THE COURT: What about any video --
8 MR. PRINCE: I guess we'll decide what's --
9 THE COURT: -- linkups? Do I need to hook that up at all, or no?
10 MR. LAURIA: He's telling me he doesn't -- I don't --
11 MR. PRINCE: I don't need Belzberg back.
12 THE COURT: Okay.
13 MR. LAURIA: He's saying he doesn't need Belzberg back --
14 THE COURT: All right, so Belzberg is done. And then Dr. Rimoldi?
15 MR. LAURIA: I -- if I need to hook that up, I will let the JEA know first thing.
16 I'm not sure that we're going to be able to do that given he's trying to get his kid
17 moved in, so --
18 THE COURT: Okay.
19 MR. LAURIA: -- having some difficulty.
20 THE COURT: Okay.
21 MR. PRINCE: So what happens Monday?
22 MR. LAURIA: Monday I said first thing in the morning I've got --
23 MR. PRINCE: Kaye?
24 MR. LAURIA: -- Dr. Kaye here.
25 MR. PRINCE: Okay.

1 THE COURT: Okay. Is he here or is he video?
2 MR. LAURIA: No, he's going to fly back in. He went --
3 THE COURT: Okay. All right.
4 MR. LAURIA: -- back to Florida, Judge --
5 THE COURT: Okay. All right.
6 MR. LAURIA: -- and then he's flying back in.
7 THE COURT: Okay. And so I'm sorry, yes, you're continuing on with
8 Capanna tomorrow or you're stopping and calling him in your case?
9 MR. LAURIA: I'm probably going to continue, but --
10 THE COURT: Okay. All right.
11 MR. LAURIA: -- I may stop just so we can get his case closed so I can put
12 mine on, so I haven't decided yet.
13 THE COURT: Okay. So we'll start at nine.
14 MR. PRINCE: Yeah. Fair enough.
15 THE COURT: Yeah? Okay.
16 MR. LAURIA: And you expect we're going to pretty much all day?
17 THE COURT: Yeah. Well, I mean --
18 MR. PRINCE: Yeah.
19 THE COURT: -- we got to go and then we got to get the jury instructions --
20 MR. LAURIA: I know.
21 THE COURT: -- settled, unless you guys agree on all the jury instructions.
22 MR. LAURIA: That's not --
23 THE COURT: Because I --
24 MR. PRINCE: What's that?
25 MR. LAURIA: I said we'll probably agree on most of them --

1 MR. PRINCE: I mean, the vast majority --
2 MR. LAURIA: -- but we're not going to agree on all of them.
3 MR. PRINCE: -- are stock instructions.
4 THE COURT: All right. Well, you're going to need to do that tonight because
5 we got to get them settled --
6 MR. LAURIA: I understand.
7 THE COURT: -- so that we're not sitting here trying to settle them on Monday
8 while they all sit around.
9 MR. PRINCE: Yeah, we'll just go over my office tonight right after this.
10 THE COURT: Okay.
11 MR. PRINCE: Meet over my office.
12 MR. LAURIA: Let's give it some time because I'd like to get a bite to eat. I
13 haven't had any food, so --
14 THE COURT: You can have dinner first.
15 MR. PRINCE: Right. Oh, yeah, we --
16 THE COURT: Okay.
17 MR. PRINCE: I mean whatever, yeah.
18 THE COURT: All right.
19 MR. PRINCE: I mean, let's come over to my office when you're done.
20 THE COURT: All right. There you go. Thank you.
21 MR. PRINCE: We can meet.
22 [Bench conference ends at 5:06 p.m.]
23 THE COURT: Folks, 9:00 tomorrow. Thank you very much. I appreciate it.
24 Have a good evening.
25 UNIDENTIFIED SPEAKER: 7:30?

1 MR. TAYLOR: So 9:45?
2 THE COURT: Yeah --
3 MR. TAYLOR: We'll start at nine --
4 THE COURT: Exactly.
5 MR. TAYLOR: Start at nine --
6 THE COURT: Right on.
7 MR. TAYLOR: -- if you say 7:30.
8 THE COURT: Trust me, I've had trials where I tell you a different time than I
9 tell the attorneys.
10 MR. TAYLOR: I got a lawyer calculator now. I know how --
11 THE COURT: I know.
12 MR. TAYLOR: -- this stuff works.
13 THE COURT: You're spot on my friend.
14 MR. TAYLOR: We'll start at nine if you say 7:30.
15 [Jury out at 5:06 p.m.]
16 THE COURT: Okay. And yes, pursuant to our conference at the bench, I am
17 going to ask that you guys get together tonight, go have dinner first, and go through
18 the instructions to get settled what you can. And then tomorrow, as soon as we
19 finish up with whatever testimony we have, we're going to have to go through them.
20 So I would anticipate obviously that that's going to -- you know, finish up the
21 testimony before the end of the day because we need to go through the instructions.
22 All right, guys. I will see you tomorrow morning.
23 ...
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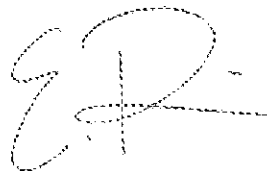
MR. LAURIA: Thank you. How long do you think --

[Proceeding concluded at 5:07 p.m.]

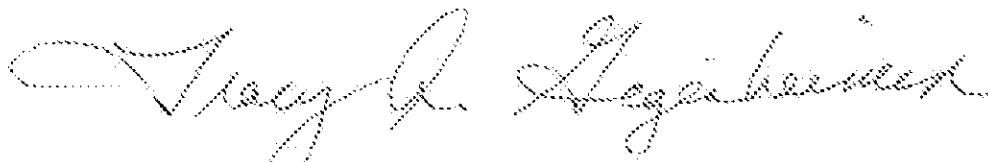
ATTEST: We hereby certify that we have truly and correctly transcribed the audio/visual proceedings in the above-entitled case to the best of our ability.



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