

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. 8 PART 2

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1 forward.

2 But to someone who has chronic pain, sometimes pain stands still. It
3 moves at a much slower pace. Because you're limited and the days Beau has a bad
4 day, it doesn't move. The time, you know, doesn't fly by like it would for everybody
5 else. The time will stand still. And although we're hoping for the best for Beau, the
6 reality is he has lots of risk and challenges that face him in the future.

7 And 50 years ago we have -- John F. Kennedy was President.
8 Unfortunately he was assassinated in Dallas and Lyndon B. Johnson took over as
9 President. Nelson Mandela, he was a -- you know, fought apartheid in South
10 America (sic), he was imprisoned. Bobby Kennedy ran for President. Martin Luther
11 King was assassinated. Bobby Kennedy was assassinated. The Vietnam War
12 started. President Richard Nixon was President during the Vietnam War. The man
13 -- someone walked on the moon in the last 50 years for the first time. Think about
14 how long ago that is.

15 President Nixon, he resigns over Watergate in 1974. Gerald Ford took
16 over, who was the Vice President. And the Vietnam War ends.

17 And we celebrated the United State's bicentennial in 1976. Jimmy
18 Carter was President. Saturday Night Fever, 1978. The initial, you know, Iran --
19 you know, the hostage crisis we had.

20 Miracle on Ice, 1980 Olympic U.S. hockey team wins the gold medal.
21 President Ronald Reagan is President. Berlin wall fell during Ronald Regan's
22 presidency.

23 We had the Tiananmen Square, a little Chinese boy as part of the civil
24 rights movement stop by himself those tanks from coming into a group of citizens
25 who were protesting the Chinese government. Judge H.W. -- George H.W. Bush

1 was President. The original Kuwait War, you know, the Gulf War while George H. --
2 the dad was President.

3 Nelson Mandel was freed from prison. Bill Clinton was President and
4 served two terms.

5 We have the white Bronco chase involving O.J. Simpson. And George
6 W. Bush was President. We had -- September 2001, 9/11, terrorist attacks on the
7 Twin Towers and we invaded Iraq and George W. Bush declared the mission
8 accomplished in defeating Iraq and Saddam Hussein.

9 We had the hurricane -- Hurricane Katrina. Because I love the Boston
10 Red Sox, one of my best friends played for the Boston Red Sox, so they won -- after
11 almost a hundred years they won the World Series. We had the first African
12 American President, Barack Obama. We had Captain Sully remember he landed
13 that aircraft on the Hudson River just outside of New York City just outside of
14 Manhattan. The final shuttle launch. Will and Kate get married. We took down --
15 what the hell's -- what's this guy's name?

16 THE COURT: Osama Bin Laden.

17 MR. PRINCE: Osama Bin Laden. I'm thinking -- I was thinking of Hussein so
18 -- Osama Bin -- thanks.

19 And Barack Obama sworn in for a second term. We had Hurricane
20 Sandy hit the east coast. And we had the first Pope in history resign of the Catholic
21 Church. And the Boston Red Sox won again. World Series again.

22 And Will and Kate have now had a baby who's going to be the -- one of
23 the heir to the throne of England. And Nelson Mandela died (indiscernible) after --
24 when he was released from prison after 37 years and he died. And that's a long
25 time. That's a lot of life.

1 And the concern is for Beau as somebody who suffers from chronic
2 pain, it doesn't move the same way it does for somebody who doesn't have those
3 medical issues or physical problems. It moves at a much slower pace. And he
4 won't have the opportunity to participate in the way he would want to.

5 But what is 50 -- what does 50 years mean kind of going forward? A
6 baby's going to be born. He's going to grow -- go to elementary school. Going to go
7 to middle school and high school. Going to graduate from college. Going to get
8 married. Going to have a baby. That child's going to grow up and go to high school.
9 That child's going to graduate from high school, graduate from college. That child's
10 now going to get married. That child's going to -- they're going to -- that's going to --
11 they're going to have a baby. And that child's going to be -- go to elementary
12 school.

13 That's 50 years. That's three generations of life. And that's what -- we
14 have to think about that timeframe for Beau when trying to figure out how much
15 should we fair to Beau to award him for his future.

16 And he's got a long road ahead of him. We're not sure what the
17 outcome of it all will be. We're hoping for the best. And unfortunately Beau can't
18 come back and ask for any -- reopen this case. So we -- anything we do here we
19 have to plan for it right now because Beau -- you get one opportunity to come to
20 court.

21 And so we're going to have to ask you to fill in an amount for this verdict
22 that makes sense for everything that Beau's had to not only go through but what he
23 has to go through over the next 50 years. And that's not even including -- that's not
24 even assuming there's no complication nothing -- nothing serious happens, that it all
25 goes as planned, but we know not everything always goes as planned. So what we

1 think would be the fair thing for Beau for the future, given all of his losses, pain,
2 suffering and loss of enjoyment of life, would be \$4 million for 52 years of pain and
3 limitation and losing out on the prime of his life.

4 And ladies and gentlemen, on behalf of Beau Orth, I want to thank you
5 for your service. I want to thank you for your attention to this case. I know it's a --
6 you have a serious responsibility in this case and I totally understand that. If I said
7 or did anything that offended you or that you felt was wrong, I apologize for that.
8 And just, you know, the -- obviously people are passionate about this case and I'm
9 passionate about my representation of Beau. I do thank you for your time away
10 from your families and your businesses. I look forward to your verdict. And
11 remember Dr. Capanna, he needs to hear from you. He's not going to -- he's not
12 going to accept any responsibility. You're the only one who has the authority and
13 the power to hold him accountable for what he did to Beau. Thank you.

14 THE COURT: Thank you, Mr. Prince.

15 All right, ladies and gentlemen, at this time we're going to go ahead and
16 take our lunch recess. Our lunch is here. Whatever you guys talked about with Joel
17 yesterday we ordered and it's here. So he's going to take you back in the back
18 hallway instead of out the front so we'll take you down to one of the deliberation
19 rooms where you can sit down and eat your lunch.

20 You're still under the same admonition even though you're not out there
21 which means you can't talk about the case. Even though you're part way through
22 closing arguments, you still just have to maintain that open mind and listen to the
23 rest of the arguments before you start your deliberations, so during the recess you're
24 not admonished not to talk or converse among yourselves or with anyone else on
25 any subject connected with the trial; or read, watch or listen to any report of or

1 commentary on the trial by any medium of information, including without limitation to
2 newspapers, television, the internet or radio; and you cannot form or express any
3 opinion on any subjected connected with the case until it's finally submitted to you.
4 I'll see you back in about an hour. So go ahead and head on out to your left, please.
5 Thank you.

6 [Jury out at 12:45 p.m.]

7 THE COURT: Guys have anything outside the presence?

8 MR. LAURIA: Yeah, Your Honor, I just want to put on the record my
9 objections, number one, to when the counsel put up the what would a reasonable
10 person accept to endure pain and suffering, I consider that to be a Golden Rule
11 argument --

12 THE COURT: You're --

13 MR. LAURIA: -- although he didn't specifically mention --

14 THE COURT: -- talk (sic) about the slide that said who would volunteer to --

15 MR. LAURIA: And he --

16 THE COURT: Okay.

17 MR. LAURIA: -- talked about it for a few minutes, who would volunteer to
18 have pain and suffering, et cetera, et cetera and give up their -- I consider that to be
19 a Golden Rule argument which I believe is inappropriate and improper closing
20 argument.

21 THE COURT: Okay.

22 MR. LAURIA: So I just want to make record of that.

23 THE COURT: Mr. Prince?

24 MR. PRINCE: I thought we made a record -- we made a record at the bench
25 but --

1 THE COURT: Well, you know, we do. I mean it's -- how -- I'm always
2 concerned since I've only become a recording department this year exactly, you
3 know, how it filters --

4 MR. PRINCE: Sure.

5 THE COURT: -- through the white noise but -- so I don't mind making records
6 thereafter.

7 MR. PRINCE: Yeah, sure, and I'll go ahead -- I mean, I was only asking in the
8 third person context. I was not asking for the jury what would you accept for that. I
9 was talking about what would a reasonable person accept who -- and who would
10 volunteer -- what reasonable person would volunteer for this and, you know, sort of
11 how do you quantify pain and suffering. I mean there has to be some way -- that's
12 my way of describing and an analogy to at least lay the foundation for what I'm going
13 to be asking this jury to do. Because -- my statements aren't evidence. Obviously
14 I'm giving a suggestion what I think would be fair and appropriate in the case, but I
15 don't think that that any way crossed the line. Certainly it's not a *Lioce* violation of --

16 THE COURT: You guys can sit down.

17 MR. PRINCE: -- any kind.

18 THE COURT: I'm talking about everybody behind you, or you all as well. But
19 any event, go ahead.

20 MR. PRINCE: So anyway, I had nothing other than that and I have nothing to
21 add.

22 THE COURT: Okay. Mr. Lauria?

23 MR. LAURIA: The only other thing I would raise, Your Honor, and I raised it
24 early on and again it was at the bench so -- I raised the issue of I believe it was
25 inappropriate for the argument of sending a message to Dr. Capanna which was

1 insinuated through here and that Dr. Capanna was misleading or not telling the truth
2 and you need to send him a message. I believe that that is essentially a social
3 argument. That's the reason -- I anticipated that and that's why I asked for an
4 instruction telling this jury that they're not to consider that in determining damages
5 and requested a punitive damage instruction so -- again, I objected to that -- that in
6 closing argument. Just again want it to be on the record, Your Honor.

7 THE COURT: Okay.

8 MR. PRINCE: All right -- well, since you brought that up, I can see where this
9 is going. He's going to get up here and say hey there's no punitive damage even
10 being alleged here. That would be completely inappropriate for him to even raise a
11 punitive aspect component because you've given them no instruction -- they've
12 never even heard the concept of punitive damage in this case. I can see where
13 exactly where he's going to try to go that, you know, you -- you're not being asked to
14 award punitive damage, you're not here, you know, to punish him. I mean that's a
15 punitive concept.

16 THE COURT: Well but I don't think there's anything inappropriate about him
17 making the argument to the jury that you have instructions that tell you what your
18 damages --

19 MR. PRINCE: Oh right.

20 THE COURT: -- can constitute and there's no -- the -- this isn't a place to say
21 I'm going to award money to punish somebody. That's not what this is about. That's
22 not what the damages are about. I didn't want to introduce the concept of, quote
23 unquote, punitive damages in a written instruction because it's not a case about
24 punitive damages. And as we talked about yesterday, I always hesitate greatly to
25 instruct the jury on things that aren't involved in the case and then --

1 MR. PRINCE: Right.

2 THE COURT: -- get them thinking about those things, but look, the first part
3 that he brings up in terms of the responsibility issue with Dr. Capanna, I always tell
4 attorneys that I think it's inappropriate in an opening to say we're only here because
5 somebody won't accept responsibility. Everybody has the right to go to trial. I mean
6 that's a fundamental --

7 MR. PRINCE: Right.

8 THE COURT: -- part of the justice system.

9 Once you get to closing arguments however, look, I mean you're talking
10 to them about how they need to make somebody accountable or responsible based
11 upon evidence in the case, so that argument is perfectly fine at that point in time.
12 And based upon some of the things that took place during the trial with testimony, I
13 didn't think Mr. Prince's argument was inappropriate in that regard in the way that it
14 was formed.

15 Nor do I think the slide and the argument that he was making about
16 who would volunteer to take pain in exchange for money is a Golden Rule-type
17 argument. I mean I know that there are situations in which somebody could make
18 an argument that impliedly invokes the Golden Rule, but more importantly, it's really
19 about expressly asking a jury in particular to put themselves in the shoes of the
20 plaintiff and think about, you know, what it would feel like for A, B, C, D and E, and I
21 don't think that's what was done, so that's why I overruled --

22 MR. PRINCE: Okay.

23 THE COURT: -- that as well.

24 MR. LAURIA: So if I make a decision to instruct the jury or tell them you --
25 here are the damages that you are permitted --

1 THE COURT: Right.

2 MR. LAURIA: -- to do, you will see in there that it's not -- nothing to make an
3 example or to send a message, it's to --

4 THE COURT: No, you --

5 MR. LAURIA: -- reimburse --

6 THE COURT: -- you can do that. You can -- look, you know, just because I
7 don't give a written instruction doesn't mean there aren't lots of arguments that you
8 all can make about things --

9 MR. LAURIA: Sure.

10 THE COURT: -- and that's certainly an appropriate --

11 MR. PRINCE: Okay.

12 THE COURT: -- argument as well.

13 MR. PRINCE: One other issue is like we've heard it before and I think it's
14 going to come up and I think we need -- it was part of a stipulation regarding a
15 motion in limine about kind of like litigation driven like, you know, damages and, you
16 know, build up, because Mr. Lauria has kind of gone around, you know, suggesting
17 well, that I've asked for a letter from the doctors, but I mean you -- as you know,
18 Judge, I have to get a cost estimate for the doctors. That's nothing inappropriate on
19 my part.

20 THE COURT: Right.

21 MR. PRINCE: What I think I want -- I'm asking you to instruct him not to be
22 able to argue well the only reason where we have these damage because Dr. -- you
23 know, Mr. Prince asked for letter from Dr. Cash, it's only requested by the lawyers
24 and the -- you know, this all came out and no more argument on the facet issue
25 because that's a dead issue. Right, I -- no one's asking for any facet-related money.

1 And so for him to argue things that are no -- not a claim, so therefore would not be
2 relevant, that would not be a fair inference from any aspect of the evidence so, you
3 know, I guess instruct him in advance -- admonish him not go into this, you know,
4 lawyer driven type of argument that he's tried to been espousing throughout the
5 course of the evidence.

6 THE COURT: Mr. Lauria?

7 MR. LAURIA: Dr. Yoo -- I reread his testimony, it's in the record, last night --
8 specifically talked about his report said this facet and need for these instructions.
9 He testified about getting this report from Dr. Ruggeroli as part of his evaluation and
10 review of the case. So I mean, while they're not claiming it now, it's certainly out
11 there. It's been in front of the jury in the testimony of Dr. Ruggeroli.

12 I'm not going to make a big deal about it, Judge, but to now say that I
13 can't point out the fact that the first time that we heard from Dr. Cash that two
14 fusions was needed was a letter to plaintiff's counsel in May of 2015 --

15 MR. PRINCE: See --

16 MR. LAURIA: -- that's the evidence in the case. We've --

17 MR. PRINCE: See --

18 MR. LAURIA: -- put that up there routinely, so I'm certainly able --

19 MR. PRINCE: No.

20 MR. LAURIA: -- to say that.

21 Now, I -- you know, can the jury infer from that what they wish? Of
22 course they can. So I don't understand what his complaint is, is that that is a fact in
23 the case that the doctor presented a letter and noted for the first time, not in his
24 record but in a letter to counsel for which he was paid \$3,500 -- we have the records
25 showing that too -- that now two fusions were needed. Those are the facts of the

1 case. Why am I not entitled to point that out to the jury?

2 MR. PRINCE: No, he -- by continually referencing me and the way he does it,
3 it's to suggest that I've engaged in some inappropriate conduct, and as you know,
4 that's the only mechanism I have to ask a doctor do anything. If they charge, they
5 charge. Whatever he's charged he's charged. But to suggest that oh in a letter to --
6 you know, Mr. Prince and Mr. Prince got a letter from this doctor and he got a letter
7 from this doctor suggests that I'm out there doing something that's advocating a
8 doctor take a position or do something that's otherwise inappropriate. That's the
9 inference he's creating and that's how he's been trying to play it the whole time and
10 that's you -- you said -- and you previously told him the facet issue's dead.

11 THE COURT: Well no, what I told him was that at the time of argument if he
12 wanted to remind the jury that look this is no longer a part of the case -- because it
13 was mentioned in opening, that amount Dr. Ruggeroli charges --

14 MR. PRINCE: No, no, I -- oh I -- no, I didn't. I did not mention that in opening.
15 I certainly did not.

16 THE COURT: No, I thought it was brought up in opening.

17 MR. PRINCE: Absolutely not. No. No. We -- I made decision not to pursue
18 that claim because he didn't get any relief. Mr. Lauria --

19 THE COURT: Well okay.

20 MR. PRINCE: -- brought that up in opening.

21 THE COURT: Let's assume for the --

22 MR. PRINCE: I didn't do that.

23 THE COURT: Okay, okay, I apologize. Let's assume for the moment that
24 you're correct. To the extent, you know, we have had doctors relying on Dr.
25 Ruggeroli for a variety of things in terms of his medical reporting and their argument

1 is that Dr. Ruggeroli isn't credible because he was recommending something that
2 the patient had said wasn't even giving him any relief. I mean they're entitled to
3 make reference to that. I would say yeah, if Mr. Lauria's up here for 30 minutes
4 talking about Dr. Ruggeroli and the -- I can't remember the acronym for it now --

5 MR. LAURIA: RFA.

6 THE COURT: RFA, excuse me. Thank you. Then, you know, maybe that
7 becomes an issue, but making discussion about it in the argument, look, we're
8 talking about arguing about things -- including things in argument that have been
9 mentioned during the course of the trial admittedly to the jury. That's not
10 inappropriate. I don't think it's inappropriate either to make mention of when these
11 things came about because the argument was well the doctors weren't treating for a
12 long time and then they provided these letters saying there were certain things that
13 were needed. There was questioning about that exploration of it at the time of trial.
14 They can make whatever argument they --

15 MR. PRINCE: Well how would --

16 THE COURT: -- want to make about that.

17 MR. PRINCE: The facet issue is a non-relevant claim. It's a claim not being
18 pursued in the case --

19 THE COURT: But I would agree with you if you -- if you abandoned it before
20 trial and never mentioned it in any fashion, okay, I agree with that, but it's still that
21 doctors are talking about Dr. Ruggeroli's treatment, Dr. Ruggeroli's records, Dr.
22 Ruggeroli's diagnostic findings, his treatment findings. They're entitled to bring
23 things out about what Dr. Ruggeroli's recommendations are as to the extent that it,
24 you know, affects his credibility or anything. I -- look, I'll be honest with you I think
25 it's a very minimal issue, but I don't think it's inappropriate for them to make some

1 mention of it during their argument.

2 MR. PRINCE: Okay. Okay.

3 THE COURT: Okay.

4 MR. LAURIA: Thank you, Your Honor.

5 MR. PRINCE: We have -- we do have one stipulation that's -- we sent to your
6 -- we're waiting for a signature and I want to read it to you because I -- this kind of
7 goes to my argument about --

8 MR. LAURIA: I haven't --

9 MR. PRINCE: -- lawyer driven. No, we --

10 MR. LAURIA: I haven't --

11 MR. PRINCE: -- we signed it.

12 THE COURT: Okay.

13 MR. PRINCE: Any argument that this case is attorney driven or there is
14 medical buildup case including not limited to Beau's attorneys directing his care
15 and/or that any his physicians performed unnecessary medical procedures. That's
16 the argument I'm talking about --

17 THE COURT: I know.

18 MR. PRINCE: -- continually using this letter --

19 THE COURT: I know.

20 MR. PRINCE: -- to Mr. Prince and I did --

21 THE COURT: But --

22 MR. PRINCE: -- all this --

23 THE COURT: -- you --

24 MR. PRINCE: That's part of a lawyer driven argument.

25 THE COURT: Let me interrupt you for a moment, I apologize, but what Mr.

1 Lauria said was that he wants to say that the doctors didn't provide -- weren't
2 involved, weren't treating, weren't doing anything until they provided a letter in May
3 saying they now need future surgery. It wasn't that he wants to make argument to
4 the jury that you solicited this letter from the doctors and dah dah dah dah --

5 MR. PRINCE: But I did though.

6 THE COURT: But I -- what's that?

7 MR. PRINCE: But I had to though.

8 THE COURT: I know, but that's not even the argument he wants to make.

9 MR. PRINCE: Yes, it is. He's saying that I got the letter from the doctors, it's
10 not in any treatment record, it's only a letter to the lawyer --

11 THE COURT: Right.

12 MR. PRINCE: -- suggesting therefore absence from the records means there
13 wasn't discussed part of a treatment plan with the patient. I mean that's what he's
14 suggesting, therefore there's lawyer involvement and it's lawyer driven.

15 THE COURT: See you wore him down. Now he's sitting back down.

16 MR. PRINCE: No. And so nevertheless, that's the issue.

17 MS. TARMU: Impossible.

18 THE COURT: I won't make the --

19 MS. TARMU: Impossible.

20 THE COURT: -- the old married couple analogy again.

21 MR. PRINCE: Yeah, I don't want --

22 MR. LAURIA: Thank you, Your Honor.

23 THE COURT: Okay.

24 MR. PRINCE: Please don't do that again.

25 MR. LAURIA: We got divorced last night. Can do it quick here --

1 THE COURT: Mr. Lauria.

2 MR. LAURIA: I -- yeah, Your Honor, I don't know what he's panicking about.
3 The testimony and the evidence before this jury is that -- I got it from Dr. Cash and I
4 got it from everybody else that there's no mention in his records of a need for fusion
5 or the future treatment. The first time it's mentioned --

6 MR. PRINCE: No.

7 MR. LAURIA: -- is in a letter in May --

8 MR. PRINCE: Not true.

9 MR. LAURIA: -- of 2015 --

10 MR. PRINCE: For the fiftieth time not true.

11 MR. LAURIA: -- to the attorney. I mean that's the evidence in front of the
12 jury. They can make a reasonable inference from that as to what if any significance
13 that has. I'm not going to spend -- again, I'm not spend -- going to spend, you know,
14 half an hour talking about any of that stuff, but that is the evidence in the case --

15 THE COURT: Understood.

16 MR. LAURIA: -- and they're entitled to consider that.

17 THE COURT: Look, as I said, you can make argument based on things that
18 we have admitted --

19 MR. PRINCE: Okay.

20 THE COURT: -- to the jury. Depending upon how it's phrased and argued, if
21 you want to make an objection to it, then I kind of got to hear that. Just like they're,
22 you know, worried about the Golden Rule argument and then their prospective worry
23 about a per diem argument, until it actually comes out, I mean I trust that you're
24 going to do things in a professional and ethical way. You were worried that they
25 were going to make an argument that I don't think they ever even made on the per

1 diem thing but I understood your concern was that it was coming, but as I said at the
2 bench, I got to hear what Dennis says before I can --

3 MR. LAURIA: Sure.

4 THE COURT: -- decide whether there's even something to object to so --

5 MR. PRINCE: Okay.

6 MR. LAURIA: All right.

7 THE COURT: Okay.

8 MR. LAURIA: What time do you want us back?

9 THE COURT: I --

10 MR. LAURIA: I don't remember at this point.

11 THE COURT: Well we released them about 10 minutes ago so I would say
12 about 1:45.

13 MR. LAURIA: Thank you, Your Honor.

14 THE COURT: Okay?

15 MR. PRINCE: Okay.

16 [Off the record at 12:58 p.m.]

17 [Proceedings resumed at 1:49 p.m.]

18 [Outside the presence of the jury]

19 MR. LAURIA: Judge, the only thing that we noted was one thing that we
20 thought -- and again we -- I thought we had a stipulation admit the bills with the
21 write-offs on them. Because we have Exhibit SSSSSS (sic) which is the most
22 recent Dr. Cash bill we got that has the write-offs on --

23 MR. PRINCE: From when? I guess I -- I guess I was agreeing to whatever
24 was produced in discovery but -- I mean, the bills are the bills. I'm not making
25 objection to it so whatever.

1 THE COURT: All right, quadruple S --
2 MR. LAURIA: Correct, the very last --
3 MR. CARDINALE: Quintruple (sic).
4 THE CLERK: Okay.
5 MR. LAURIA: Quintruple S.
6 MR. CARDINALE: Quintruple.
7 THE COURT: Quintruple. Excuse me.
8 MR. LAURIA: It's like five.
9 THE CLERK: Okay. Got it.
10 THE COURT: I don't even know how to pronounce that word. Quintruple S.
11 MR. LAURIA: Quintruple. Just be glad you don't have quintruplets or
12 whatever -- however you pronounce --
13 MR. CARDINALE: Do you need a new copy?
14 THE CLERK: No, it should be in the book.
15 MR. CARDINALE: Oh it is in the book.
16 THE CLERK: Yeah, I just -- it wasn't marked as --
17 MR. LAURIA: It just wasn't admitted.
18 THE CLERK: Yeah.
19 MR. LAURIA: So I think we have a stipulation --
20 THE CLERK: Yes.
21 MR. LAURIA: -- it's admitted now.
22 THE COURT: Yeah, that's fine.
23 MR. LAURIA: All right.
24 [Defendant's Exhibit SSSSS admitted]
25 [Colloquy between counsel and courtroom staff]

1 THE COURT: Other than that, Tony, you're good?
2 MR. LAURIA: We're ready to go.
3 THE COURT: Are you guys replacing exhibits?
4 THE CLERK: Yeah, I mean --
5 THE COURT: Okay.
6 THE CLERK: -- it's also at the top as well but --
7 THE COURT: All right. We'll wait a second.
8 THE CLERK: I'm so sorry, almost done.
9 [Colloquy between counsel and courtroom staff]
10 THE COURT RECORDER: I'm going to go make a copy for her, but it's
11 recording if you want to start.
12 THE COURT: Oh. No, that's all right, we'll wait.
13 [Courtroom at ease]
14 THE COURT: Okay. You guys done with the exhibit?
15 THE CLERK: Well, I -- there's Social Security numbers in this still.
16 THE COURT: Oh. Well we need to redact --
17 THE CLERK: Yeah.
18 THE COURT: -- those as well.
19 MR. PRINCE: We just need to figure out the --
20 MS. TARMU: I'll just flag it for now and then --
21 THE COURT: Yeah, you don't have to get them all done right now. I thought
22 maybe you were doing something that was going to pertain to Tony's arguments and
23 you guys --
24 MS. TARMU: Oh, no.
25 THE COURT: -- needed to get them done or no?

Yeah, just before we conclude -- I mean even when it goes back to the jury for right now, I'm not concerned. It's just before we start putting it all into the vault, we don't want Social Security numbers in there anywhere since they become public.

Okay. Joel, if you would please. Thank you.

[Pause]

THE COURT: Is your -- is it showing up okay on that screen?

MS. TARMU: Yeah.

MR. LAURIA: I think so. I don't think we're showing anything, are we?

MR. PRINCE: Oh.

MR. LAURIA: Oh, is it -- is it off a little bit?

THE COURT: Well, my -- yeah, looking at my monitor, the color whatever looks kind of screwy and sometimes it's the plug in the floor, so I didn't know if it was doing that over there --

MR. PRINCE: Yeah, it's not adequate on the screen.

THE COURT: Okay.

MR. PRINCE: Something's wrong with it.

THE COURT: I'll have Joel jiggle it. That's a technical term.

MR. LAURIA: Jiggle?

THE COURT: Jiggle it.

MR. LAURIA: You got as -- about as much computer savvy as I do --

THE COURT: Well, you know, they have them in the floor over there and that's just a really bad place to have it because they get kicked all the time --

MR. LAURIA: As we've learned.

THE COURT: -- and the prongs --

1 MR. LAURIA: As we've learned.

2 THE COURT: -- the prongs break and it's almost impossible to replace that

3 over there because it's built into the floor.

4 THE COURT RECORDER: Sorry. It was off.

5 MR. LAURIA: Okay.

6 MR. CARDINALE: Go ahead and --

7 MR. LAURIA: You can -- you can turn it down for now.

8 MR. CARDINALE: Yeah, you can turn it off --

9 MR. LAURIA: Thank you.

10 MR. CARDINALE: -- for now, thanks.

11 THE COURT: Can you put something back up there just so I can -- for when

12 he jiggles it?

13 [Jury in at 1:58 p.m.]

14 THE COURT: Hey Joel, I might need you to jiggle the cord there on the floor

15 because -- see how the screen's got that -- doesn't look right?

16 MR. CARDINALE: Funky tint.

17 THE COURT: Yeah.

18 THE MARSHAL: You got to jiggle so --

19 THE COURT: It's a little -- just a little jiggling.

20 MR. PRINCE: I think that's the computer.

21 Sit down -- we're good, sit down.

22 THE COURT: You know what? Yeah.

23 THE MARSHAL: Did anything change?

24 THE COURT: No.

25 THE MARSHAL: No?

1 THE COURT: No. Maybe it's not that cord then. Maybe the cords at the
2 table or something aren't connected.

3 MR. LAURIA: That's all right, Judge. If it becomes a problem, we'll --

4 THE COURT: Okay.

5 MR. LAURIA: -- we'll deal with it.

6 THE COURT: All right. Thank you.

7 Okay, we will be back on the record. Our jurors are all present.

8 Ladies and gentlemen, we are going to continue on with our closing
9 arguments on behalf of the defense now, Mr. Lauria.

10 MR. LAURIA: Thank you.

11 CLOSING ARGUMENT BY THE DEFENDANT

12 BY MR. LAURIA:

13 Good afternoon, ladies and gentlemen. This is my last chance to talk to
14 you and I want to thank you also for being here, for listening to the case, for putting
15 in this time. I know it's taken longer than either of us estimated, but you have paid
16 attention and you have listened to the evidence and we both appreciate your time
17 very much.

18 We agree that this is a -- trial is about determining the truth and to
19 determine the truth, we believe you have to look at both sides, the complete story,
20 and we believe you have to look at the evidence in a critical and an accurate light to
21 make sure that what is being represented to you is the full picture.

22 Told you in the opening what I believe the evidence would show and
23 that included some of the things that I'm going to talk about with you now. I'm not
24 going to go through all the evidence. You're smart people. You've heard what it is.
25 You've made notes about things that were said and occurred here, but there's some

1 points that I think are important that I want to highlight for you.

2 And, you know, one of the things that I think is important for you to
3 consider is that -- something that Mr. Prince actually brought up in his closing
4 argument. And one of the things that Mr. Prince said is what should have happened
5 in this case is what should have happened is Dr. Capanna should have sat down
6 with Mr. Orth and he should have gone through this scan with him and they should
7 have talked about it and Dr. Capanna should have said here's what this scan shows
8 and here's what I think we need to do to try and get you better.

9 We agree a hundred percent that's what should have happened. One
10 of the problems as we've showed in the case is Dr. Capanna never got a chance to
11 do that because Mr. Orth never came back see him after that scan was done. He
12 never got a chance to sit down with Mr. Orth and say look, here's what this scan
13 shows, here's why you're seeing findings at L4-5, this is the reason that those are
14 there, this is what I did during the surgery, let me tell you, here's what this shows
15 now as small as this fragment is on this one film and here's how I propose we treat
16 it, why don't we treat it conservatively, if it becomes unbearable or that doesn't
17 relieve your pain, we can go back in and we can relieve that.

18 That's what should have happened, but Dr. Capanna never got the
19 chance to do that and that's -- wasn't Dr. Capanna's choice to do that. Mr. Orth
20 never came back and saw him for treatment within -- the scan is on October 6th.
21 Within -- by October 12th he's at another doctor's office and you'll see the records
22 and you'll have all the records there to look at. If you have any questions about
23 what I'm saying being accurate, you'll have the records to look at.

24 There was a quick phone call on the evening of the 7th, or on the 7th
25 with Mr. Orth about the film, but he never got the chance to sit down and explain it

1 and maybe that's one reason why we are here. Another reason why we may be
2 here may be just what Mr. Prince showed you in the very end of his closing
3 argument and what the amounts that he believes are reasonable in this case may
4 be a reason why we're here.

5 I want to point out some things that I think are important and -- and
6 again I think some of the rest of the story and -- and one of the things that's
7 happened in -- throughout this case and through the closing argument is kind of an
8 assertion or attack on Dr. Capanna that he didn't tell Mr. Orth what he found, that he
9 should have told him what he found, again without pointing out that Mr. Orth never
10 came back to him, trying to kind of incite some anger in you I think towards Dr.
11 Capanna. And I don't know if you're going to ever get to that damages part of this
12 case. You might, you might not. One of the instructions you get says -- I'm giving
13 you all of the instructions. Whether they apply or not you decide, so they may not all
14 apply.

15 So you may not get there. You may get there. But if you do, look at all
16 the damages instructions because one of the things that you're going to see is that
17 there's no instruction that Mr. Orth is entitled to any money if you become angry at
18 Dr. Capanna. In fact you're not entitled to do that.

19 One of the instructions -- the instructions tell you he's entitled to
20 reasonable compensation for his pain, suffering and for his reasonable medical
21 expenses past and future. But the law specifically prohibits you from awarding him
22 damages if you believe Mr. Prince or become angry at Dr. Capanna or think he said
23 something he shouldn't have said. That is not a proper element of damages here.

24 So when you go back there if you're considering what's reasonable in
25 this case, the law requires you not to include that in your consideration. All right.

1 Read those damages instructions and I'll put some up for you and explain it to you.

2 One of the other things that I think has not been talked about and I
3 didn't hear Mr. Prince mention it at all really in his closing argument is the reason
4 why Mr. Orth went to Dr. Capanna in the first place. He went there because he's got
5 a herniated disc at L5-S1. He went there because he had this problem for two years
6 and it wasn't getting relieved with conservative methods. He tried therapy, he tried
7 injections, they'd helped in the past, they didn't help now. He went there because
8 he had a herniated disc that needed surgery. Everybody agrees with that.

9 And the reality is, and every surgeon agrees also, that Mr. Orth required
10 surgery for that disc. Once that disc had presented to Dr. Capanna, it was already
11 undergoing degenerative changes. You've heard every spine surgeon tell you that
12 yes, that disc was already going through the degenerative process, that's part of this
13 herniation. And once you have surgery on that disc, which everyone agrees was
14 indicated, that disc is going to continue to degenerate.

15 So the entire focus of the closing here I think has been on L4-5, but I
16 think L5-1 has been ignored. So in considering all of the factors in this case, I think
17 you need to consider why was Mr. Orth having surgery in the first place. This --
18 there was a reason for that. And the reason for that was because he --
19 unfortunately as a 20-year-old man, he had a herniated disc in his back that was
20 causing him enough pain that he was going to undergo surgery.

21 And I've gone through -- I went through in my opening statement
22 outlining kind of the dates of treatment and complaints and those things. I'm not
23 going to do that all again with you. But another thing that everyone agrees is you
24 know what, once Mr. Orth needed surgery for that L5-S1 disc, he wasn't playing
25 football that year. That wasn't going to happen. Even in the best case scenario, his

1 junior year of playing football at UNLV that year was done because everyone agrees
2 it takes months to get back to a high level contact sport like that.

3 Now, there has been again the assertion in closing argument that at the
4 time he presented to Dr. Ruggeroli, that the only complaint was sciatica, L5-S1 is no
5 -- there's no back pain component to it and it's all just this L5-S1 nerve root. But I
6 think if we actually look at the records that's -- that's not accurate.

7 [Colloquy between counsel]

8 MR. LAURIA: And we've shown these to you -- again you have them. This is
9 from August 26th, 2010. Dr. Ruggeroli's not a party here. He doesn't have any
10 interest in this case. He didn't know at the time he wrote this that there's going to be
11 a lawsuit or some claim for injury or damages. Dr. Ruggeroli notes that there are
12 complaints of stiffness, back pain and numbness, tingling in the leg.

13 So to suggest that there were no problems in the back at that time I
14 think is not accurate in the records and the other thing that is important is to look at
15 Dr. Ruggeroli's treatment note for the injection he performed in August.

16 [Colloquy between counsel]

17 MR. LAURIA: We've identified that Dr. Ruggeroli did the same procedure in
18 February of 2010, in August of 2010 and then again in 2014. And the assertion has
19 been made again that the only pain source in Mr. Orth was the L5-S1 nerve root and
20 the S1 nerve root was injected.

21 And counsel went through the reduction in pain that -- when the first
22 one was done in February of 2010, that the pain was reduced from -- I think it was
23 six to zero, and then after this one, August 13th, 2010, that it went from a seven
24 pretreatment to a four to five out of 10 posttreatment.

25 Logic tells you that if the only source of pain was at L5-S1 and -- and if

1 you could rely on this procedure specifically as the test to determine where the pain
2 comes from, if those two things were true, then back in 2010 there must have been
3 another source of significant pain for Mr. Orth because he didn't get full relief. He's
4 still at four to five out of 10 pain after getting that injection.

5 There are only two reasonable interpretations for that. One is as Dr.
6 Rimoldi said, that's just one piece of information. That doesn't tell you specifically
7 where the pain's coming from. Or if you believe the explanation that's put up by
8 plaintiffs and this is an absolutely reliable test to determine if the pain is from L5-S1
9 because they're arguing because the 2014 test didn't reduce the pain, then logic
10 tells you that back in 2010 Mr. Orth must have had a pain generator coming from
11 somewhere other than L5-S1. Otherwise, we would have seen this at zero out of 10
12 as it was in February.

13 So again, I want to go back to what Mr. Orth's condition was the first
14 time he presented to Dr. Capanna. We know from Dr. Ruggeroli that he had
15 complaints of back pain and leg pain and numbness. We know that they'd been
16 going on for two years. We know that three MRIs had shown this disc herniation at
17 L5-S1. We know it was sufficient or significant enough to Mr. Orth that he wanted to
18 proceed with surgery which would prevent him from playing football that year. And
19 everyone -- all of the surgeons agree that surgery was indicated in this case.

20 Now, you know, Dr. Capanna is a board certified neurosurgeon. He's
21 done additional training in microsurgery. He's on the clinical faculty for the
22 University of Nevada School of Medicine. He -- although it's been portrayed that he
23 has no idea what he's doing, he's been practicing neurosurgery in this town for over
24 30 years. He's published papers on microdiscectomy and also served as a team
25 physician for UNLV. That's a volunteer job. He's not getting paid for that. UNLV

1 has no obligation or responsibility.

2 But he does it because he likes to help people like Mr. Orth when he
3 can. That's his job. That's what he likes to do. He does it because he enjoys being
4 around student athletes and helping them as he can.

5 Dr. Capanna sees Mr. Orth on September 1st, 2010.

6 And do you have that note handy, Paul?

7 I'm not going to go through the whole note again, but just as -- you have
8 all of these in evidence and you can review them. He's got a focal disc. Dr.
9 Capanna examines him. I think we went through the records and he spent an hour
10 and 11 minutes to be exact I think with him on that visit that day with Mr. Orth and
11 his dad talking about what the problem is here, going through with him what your
12 options are, what we can do to possibly treat this.

13 Dr. Capanna didn't make a decision to rush him to surgery that day.
14 Didn't say okay, we need to get you in the operating room. He in fact said I want to
15 get some other tests done so we can determine what the best approach to this is,
16 let's go get an EMG and see if there in fact is a nerve problem at L5-S1, let's get a
17 flexion extension MRI so we can see whether we can try a different procedure that
18 may help you.

19 But the records show that during an hour and 10 minutes during this
20 discussion with the patient this occurred. And again we've heard that Mr. Orth
21 wasn't having really much of a problem. They don't want to focus or they don't want
22 you to think about why was he in having surgery in the first place. But Dr. Capanna
23 explained why he asked patients that, because you ask, you know, what kind of
24 physical things are you doing or not doing that are affecting your everyday life and
25 the patient's complaints were such that he wasn't carrying a backpack to school at

1 that time.

2 Now, there's been evidence some different points and I'm going to put
3 up the other note in a second, but there's been different evidence on what Dr.
4 Capanna told Mr. Orth about his recovery time for the surgery. Under the theory
5 that Mr. Prince has proposed, Dr. Capanna told Mr. Orth that within two, three or
6 four weeks you're going to be back on the field playing football. Dr. Capanna again
7 has told you he's been a team physician at UNLV for 15 years or so. He knows, as
8 Kyle Wilson said, as every doctor has said, nobody's going to be back playing
9 football in two, three or four weeks after you have a microdiscectomy even under the
10 best circumstances.

11 If you believe the scenario set forth by Mr. Prince, Dr. Capanna was
12 setting himself up to have an unhappy patient from the minute he walked through
13 the door. I'm going to tell you something that I know is not going to happen because
14 I've been doing this 30 years and I've treated other patients and nobody's ever been
15 back that fast, but for some reason he was going to tell Beau Orth that you're going
16 to be back playing in two, three and four weeks.

17 The other explanation, I suggest, is that as Dr. Capanna said, when I
18 referred to back two, three or four weeks, I'm talking about back to light exercises,
19 back to working out, which all the other doctors say yeah, that's reasonable. That's
20 about the timeframe we'd start doing that.

21 I want to talk about the second visit after these tests were done with Dr.
22 Capanna. Dr. Capanna -- again I think we have the actual time or -- that he was
23 there. This was another half hour or so not with the patient in the waiting room, with
24 the patient back with the doctor talking about these things. Mr. Orth's dad didn't
25 recall being there twice, but the notes show that he was.

1 And microdiscectomy -- he discusses possible procedures, right? He
2 discusses he may continue playing if he can tolerate the pain. He says you could
3 have an arthroscopic discectomy but doesn't -- that's not likely going to work. Will
4 not come back -- likely that disc fragment will not come back into space. And the
5 microdiscectomy most likely could be beneficial and cure problem.

6 You folks you decide what this evidence means. Does that mean that
7 Dr. Capanna was guaranteeing Mr. Orth that he was going to cure his problem, that
8 (indiscernible) a hundred percent sure that he was going to be fine, because all of
9 the surgeons that we've asked, Dr. Yoo, the expert they hired, agreed that two to
10 three out of every 10 people that have this continue to have back pain and
11 problems.

12 You decide what that means. Does that mean that he was
13 guaranteeing a cure or does that mean most likely if you're going to have one of
14 these procedures, this is the one that's going to benefit you?

15 The other important thing about this note is the issue of talking about
16 red shirting that he recorded at the time, and that discussion was had and it was
17 noted suggesting there wasn't a guarantee or representation you're going to be back
18 playing two, three or four weeks. A red shirt means you're missing the year, right?
19 You're not going to be playing all year.

20 Dr. Capanna documented at that time -- again, there's no litigation,
21 there's no interest in writing something down for a lawsuit, just documenting what
22 occurred at that visit.

23 Other important fact about that is you heard from Kyle Wilson from
24 UNLV who's the head athletic trainer who said I had a discussion with Mr. Orth, I
25 talked to him before he had this surgery, we have a program set up at UNLV to

1 rehab these guys, I talked to him face to face and told him hey, it's going to be a
2 matter of months before you get back. You heard Mr. Wilson, again who's got no
3 interest in this lawsuit, come in and tell you under oath under penalty of perjury that
4 he recalls having that conversation with Mr. Orth.

5 We've shown you the consent to surgery, and it's part of the record in
6 this case, that Mr. Orth and his dad agree that there's no guarantee of a cure,
7 there's no guarantee that everything's going to be fine, there's no guarantee you're
8 going to be playing football in two to four weeks (sic). In fact, I realize I may be
9 worse. Nobody wants anyone to be worse. Everybody -- every surgeon -- every
10 doctor wants their patients to get better, but they can't always control that. They
11 can't always predict what the outcome is going to be.

12 The consent -- we also have testimony from the other surgeons who
13 agree. In the course of the operation, unforeseen circumstances might arise making
14 it necessary to extend the operation beyond the originally planned operation.

15 Think you heard from Dr. Cash -- he even agreed that that consent
16 gives Dr. Capanna the ability to use his reasonable judgment to treat the problem
17 that he encounters. All right. What that says is as your surgeon, I'm going to use
18 my judgment, my training and my best ability to do what I think I can do to help you
19 best.

20 In this case, Dr. Capanna said I used that judgment and I went first to
21 remove a little bit of the lamina at the L4-5 area and see if I could approach the disc
22 that way. You know, Dr. Capanna has never in this case denied that he was at the
23 L4-5 area. He is -- he's denied that he did a microdiscectomy at L4-5; that he
24 intentionally went in there and removed a portion that disc. But he's never denied
25 that he was at the L4-5 area.

1 What he has said is I was at the L4-5 area and I did it to specifically see
2 if I could approach this particular fragment that way. I removed a little bit of bone at
3 the L5 lamina and during the course of doing that, I probably inadvertently entered
4 the L4-5 disc.

5 So he hasn't denied being there, he hasn't denied that he has entered
6 the L4-5 disc, he hasn't denied that that's why it herniated, you know, few weeks
7 later before -- when he comes back for the X-ray. So there's been no denial of what
8 occurred here. There's been a difference as to what occurred. Of course there's
9 evidence of surgery at L4-5. Dr. Capanna's explained why. He said he went there.

10 Now, I put up notes and maybe some of you remember my discussion
11 with Dr. Cash and counsel has said that I want to cherry pick Dr. Cash's testimony. I
12 don't want to cherry pick Dr. Cash's testimony at all. I want to tell you what Dr. Cash
13 said -- remind you what he said and you evaluate -- if you believe that Dr. Cash is
14 accurate and his evaluation of the patient's condition is accurate, then give Dr. Cash
15 all of the credence that Mr. Orth gives Dr. Cash. Believe him a hundred percent.
16 Believe what he testified to in this case. If you find Dr. Cash credible, then find him
17 credible throughout.

18 And what Dr. Cash told us is from the minute Mr. Orth was going to
19 have surgery at L5-S1, he was going to require a fusion. You recall that testimony --
20 we can again replay it or put it up -- in the same timeframe that he now says he's
21 going to require a fusion. It's a little bit different because you're doing two levels
22 now. There's no question about that. And nobody's denying that the L4-5 disc got
23 injured in this case.

24 But even with a perfect L5-S1 discectomy, the testimony of Dr. Cash is
25 that he was going to need a fusion between 20 and 25. His testimony now is he

1 needs a fusion in 2025 and he was going to need further fusion surgery in 17 years
2 in both scenarios, in both cases.

3 So according to their primary expert, the treating physician, the doctor
4 who's known Beau, the doctor who came here and explained the procedure and
5 said exactly what a fusion is and how to hammer the disc space in there with the
6 spine in front of you, has said even if everything was done perfectly, even if Beau
7 Orth had come to me in September of 2010, unfortunately, because of his L5-S1
8 nerve root disc, something that Dr. Capanna didn't create -- unfortunately because
9 of that, he was going to require two fusion surgeries in the future. If you believe Dr.
10 Cash's testimony in the other aspects of this case, I suggest you have to believe Dr.
11 Cash's testimony in that aspect of this case.

12 Now, that is important because we do have a jury instruction on
13 preexisting condition that was discussed a little bit with you by Mr. Prince. A person
14 -- this is what the law instructs you as a jury. A person who has a condition or
15 disability is not entitled to recover damages therefor. No dispute Mr. Orth had a
16 condition or disability at the time that Dr. Capanna first saw him and according to his
17 treating doctor, Dr. Cash, that disability or injury was going to lead to him requiring a
18 fusion surgery in 2025 and another fusion surgery in 2042.

19 Second part of this also the law instructs is important. Where a
20 preexisting condition or disability is so aggravated, the damages as to such
21 condition or disability are limited to the additional injury caused by the aggravation.
22 What does that mean, what does that tell you, what is the law instructing you have
23 to do? You have to do because you've all agreed to follow the law in this case and
24 the instructions of the Court.

25 What that is telling you is that if you find or if you believe that there was

1 an aggravation to L5-S1 because of what occurred at L4-5, Mr. Orth is not entitled to
2 recover for everything related to L5-S1 after that. He's only entitled to recover
3 damages for any additional injury caused by the aggravation.

4 Again, according to Dr. Cash's testimony, he was going to need surgery
5 in the same timeframe anyway. And folks, this is not the defense expert, this is the
6 treating doctor, the main witness that the plaintiffs have called in this case. The
7 difference is because he's going to do two levels now instead of one. And the
8 difference in cost is \$8,000 according to Dr. Cash, their expert.

9 The -- this instruction is also important as you're considering down the
10 road this idea of degeneration of the disc and -- and again, Mr. Prince hasn't wanted
11 to talk to -- talk about the L5-S1 disc, but everybody agrees that was going to
12 degenerate. And I will show you in a minute Dr. Yoo was asked I think a question
13 by the jury about, you know, can you say that what occurred at L4-5 has aggravated
14 or increased the degeneration of L5-S1, and I think Dr. Yoo said it's theoretical, but
15 no, I can't say that to a reasonable medical probability.

16 Now, Dr. Capanna has indicated that -- has testified and told you what
17 he did at surgery, why he believes he did surgery at the appropriate level --

18 Do you have his op report handy?

19 -- and you have his op report in evidence in this case. On September
20 17th, 2010, he took Mr. Orth to surgery. There are a lot of description of things that
21 occurred. But a lot of the testimony in this case as it related to Dr. Cash was what
22 did you see under the microscope when you were doing this procedure.

23 Dr. Capanna describes in doing the procedure observing the nerve tight
24 in the preforaminal area and indented by the disc. Everybody agrees that the only
25 place in his spine what he's described as pristine at every other level -- the only

1 place that a disc was indenting the nerve was at L5-S1. Everybody agrees with that.
2 This is dictated again long before there's any dispute in this case. This is dictated
3 the day of the surgery where Dr. Capanna's describing what he did and what he
4 saw.

5 He also describes -- noting that the nerve can now be moved minimally
6 medially, there's a disc fragment under the root and against the vertebral body,
7 multiple fragment are removed and the disc space then entered and did -- and then
8 did a discectomy.

9 What's significant about that? We had this talk about herniated disc
10 and whether it's contained within the annulus or not contained within the annulus
11 and the testimony's been that no that -- this disc was not necessarily contained
12 within the annulus. There were no free fragments floating around.

13 But Dr. Capanna's describes doing a discectomy after removing disc
14 fragments. So the disc fragments had to be there before he entered the disc to do
15 the discectomy or there would be no fragment to remove. Multiple fragments were
16 removed and then the disc space entered and then a discectomy is done.

17 You don't have to rely on Dr. Capanna's report dictated the same day.
18 There's other evidence in the records. Mr. Orth had the surgery on September 17th.
19 He's -- everybody agrees he's doing well until the night of October 5th when he calls
20 Dr. Capanna at 11:30. So for two and a half weeks Mr. Orth is better. The only
21 explanation for why his numbness, tingling has gone away is that there was some
22 improvement at the L5-S1 level. Dr. Kuo, who interpreted the subsequent MRI on
23 October 6th, does not describe the same protruding disc on the nerve root at L5-S1
24 that's described by all the radiologists pre-op.

25 I want to -- and what happens when this MRI comes back or there's a

1 complaint of pain by Mr. Orth? Mr. Orth calls Dr. Capanna at 11:30 at night on
2 October 5th. Dr. Capanna says I'll make arrangements, come see me. Sees him
3 that day, although it's not normal office hours. Immediately arranges to get an MRI
4 done on Mr. Orth.

5 When -- as soon as he gets the results and goes through the films, he
6 calls Mr. Orth and tells him what he believes the MRI shows. And never gets a
7 chance to have that face-to-face conversation, never gets the chance to sit down
8 and talk with Mr. Orth about what he believes is going on here, what the treatment
9 options were, what he would recommend to do to take care of this continuing
10 problem. He never got that chance. Maybe that's one of the reasons why we're
11 here. Dr. Capanna certainly didn't ignore Mr. Orth's condition. He certainly didn't
12 shove him off or say I don't care, I'm not going to treat you.

13 One of the other things that's found is that the deep tendon reflexes that
14 were abnormal preoperatively have returned. Again, that's noted in Dr. Capanna's
15 records.

16 So, ladies and gentlemen, I agree there's a difference of opinion among
17 the people who have testified, the experts in this case as what -- as to what
18 occurred. Dr. Rimoldi, who's someone hired by counsel for Dr. Capanna before me,
19 says yeah, I think surgery was at L4-5. Okay. Dr. Belzberg says if the surgery was
20 done as Dr. Capanna described it being done, didn't say that was impossible to do
21 this, didn't say you can't get to the fragment that way, said if you did this, this is how
22 it could happen and that would be within the standard of care. He said as I look at
23 the MRI, I don't see clear indications of a surgical track. Okay.

24 Couple things are important about that. One is what does that tell you
25 about Dr. Rimoldi's credibility as you're listening to the rest of his testimony? If Dr.

1 Rimoldi's hired -- stress he's hired by the defendant to do an evaluation here -- and
2 yet he writes something that's in some ways damning to Dr. Capanna's case, does
3 that give you any indication that well this man must have some credibility if he's
4 willing to write something in here that's adverse to the people that -- that he -- that
5 retained him.

6 Dr. Belzberg I think you only got to see him for a little bit unfortunately,
7 but I think his credibility is without question. I think what he said is absolutely
8 accurate and he told you the truth as he saw it.

9 MR. PRINCE: Objection, move to strike. Mr. Lauria's vouching for Dr.
10 Belzberg on saying he told you the truth.

11 MR. LAURIA: I will withdraw it, Judge.

12 THE COURT: All right, thank you.

13 MR. LAURIA: Thank you.

14 You folks -- it doesn't matter what I think. You folks decide whether you
15 believe that he was telling you the truth or not.

16 Dr. Belzberg and Dr. Rimoldi and Dr. Kaye will -- Dr. Belzberg and Dr.
17 Rimoldi said look I didn't see evidence of a surgical track at L5-S1. But they also
18 agreed that you won't always see a surgical track there, because it's got the least
19 amount of tissue, the least amount of fat, you don't necessarily have to remove bone
20 to get there, so it's not always going to be present. Dr. Kaye says the same thing,
21 says in this case he believes there is indication of surgery there.

22 Folks, you put all those things together and you decide did Dr. Capanna
23 inadvertently injure L4-5, which we've admitted to from the start, or did L4-5 get
24 injured because he only did a discectomy at the wrong level. You have to put
25 together all that evidence and make your decision.

1 Whatever way you decide, whatever way you find, that's not the end of
2 your role in this case. You -- the -- your job is still to determine, okay, if that
3 happened, was that negligence. And if it was, what are the injuries or damages that
4 we're talking about in this case. Again, not forgetting the reason why Mr. Orth was
5 there in the first place.

6 Counsel has made a big deal about Dr. Cash describing a box cut in
7 surgery, but let's read what Dr. Belzberg said -- testified to about the ability -- the
8 ability this many weeks after surgery when everybody agrees that scar tissue's
9 forming, the area's healing, it's all changes, the ability to determine whether that's a
10 box cut or something else.

11 Do you have that handy?

12 MR. CARDINALE: I do. Switching --

13 MR. LAURIA: Do you believe, Doctor, five weeks after surgical procedure
14 such as was performed here and in an area with a significant amount of scarring
15 around the area of the disc that you'd be able to identify the difference between a
16 rent or a perforation or an entry into the disc from a probe versus some kind of cut or
17 a circle?

18 Dr. Belzberg again is a professor at Johns Hopkins University in
19 neurosurgery. When Dr. Cash talked about Dr. Watkins who he trained under, Dr.
20 Belzberg is one of the Dr. Watkins of neurosurgery.

21 He goes on to say well, one might expect that there -- and what Dr.
22 Cash described is scar tissue. This would be scarred and at approximately four
23 weeks you would have a fairly dense scar present. It would be very, very difficult, if
24 not impossible, to look at that and say, you know, this was done with a knife versus
25 a probe and to say it's cut as a square or a box versus cut as a cruciate or so on.

1 You'd probably be able to tell that if you got within a week or less. There wouldn't
2 be sufficient scarring, but past a week the area's going to be scarred. You wouldn't
3 know. You would certainly know there's been a rent. You can tell that the disc in
4 the area either would still have a little bit of a hole in it or when you palpate it would
5 be soft. But I don't believe -- and certainly in my experience in his 30 something
6 years of practicing neurosurgery, I would not be able at a month going back on an
7 operation tell you exactly how that hole was made or what instrument was used and
8 whether it was done as a cruciate single cut and so on.

9 And so in 25 years as a professor of neurosurgery wouldn't be able to
10 tell whether that was a palpation by a probe -- I think that should be penetration by a
11 probe inadvertently or is cut surgically at five weeks post-op? No. I would not be
12 able to tell and certainly not to a reasonable degree of medical probability.

13 You can accept Dr. Belzberg or you can reject Dr. Belzberg, but let's
14 also ask Dr. Yoo, the neurosurgeon they hire, about whether he'd be able to make
15 that distinction or tell whether this was a inadvertent perforation or whether this was
16 specifically cut with a box.

17 We should be at 101, 3 to 13.

18 Have you ever tried to identify in a surgery the specific mechanism of
19 what had occurred at a prior surgery four to five weeks after it's done in a scarred
20 field?

21 Answer: So you're assuming I wasn't the primary surgeon?

22 Answer: Correct. Or Question: Correct.

23 Well you're there, you obviously will see what happened in the prior
24 surgical procedure, if you're able to.

25 All right. If you're able to because a lot of times the scar tissue and

1 everything will have surrounded and bound down so it's sometimes difficult to tell
2 exactly what happened. Do you agree?

3 Yes. The scarring makes it difficult to see everything, yes, absolutely.

4 All right. Thanks.

5 Again, you -- they've -- there's a lot of reliance on the fact that Dr. Cash
6 says he saw a box cut in a patient in a scarred disc four to five weeks after prior
7 surgery. Whether it was a box cut or perforation doesn't matter, ladies and
8 gentlemen. We agree that the disc at L4-5 got entered. Nobody's ever denied that.
9 We're not denying that. We're not denying that a subsequent surgery was indicated.
10 We're not denying that Dr. Cash or if the patient returned to Dr. Capanna, Dr.
11 Capanna needed to go in there and fix that. There's no dispute about that. The
12 dispute is whether -- whether he did only surgery at L4-5 or was also at L5-S1.

13 Now, you are getting a -- an instruction on preexisting conditions and
14 we've put that up for you, and you also are getting an instruction on --

15 MR. CARDINALE: Burden of proof?

16 MR. LAURIA: Well yeah, first I'm going to show you the burden of proof.

17 One of the instructions you have is that the plaintiff has the burden to
18 prove by a preponderance of the evidence the accepted standard of medical care or
19 practice, that a doctor's conduct departed from the standard, that the doctor's
20 conduct was the legal cause of injury, and the nature and extent of their damages.
21 Again, the nature and extent of the damages that were caused not by something
22 that Mr. Orth had previously, not that was going to worsen over time on its own
23 whether or not this happened, but the damages that specifically relate to what
24 they're claiming the doctor did wrong. That's their burden.

25 You -- there is an instruction that is given regarding rebuttable

1 presumption. Under that instruction, ladies and gentlemen, if you believe -- if you
2 believe the evidence shows after conferring that Dr. Capanna did only perform
3 surgery on the wrong level, that's not the end of the case. That doesn't mean that
4 all of a sudden the burden shifts to the defendant to disprove everything that plaintiff
5 says.

6 What that means is that -- it affects the burden of some of those
7 elements we've looked at before. If you find that he did it at the wrong level in this
8 case, then the burden to prove these things, the accepted standard of care, the
9 conduct departed from the standard and that it caused some form of injury is
10 accepted. What they still need to prove would be what that injury was specifically
11 and what the nature and extent of their damages are. So even if you find that that is
12 applicable in this case, that does not mean that defendant has the burden of proving
13 all these issues. What it means is they still have to prove to you exactly what the
14 injury was and what the damages flowing from that injury were.

15 Now I want to talk a little bit about the injury in this case for just a
16 minute and go through the patient's postoperative course, because again, I think it
17 gets glossed over, but I think it needs to be discussed and it's an important
18 consideration.

19 MR. CARDINALE: Summer?

20 MR. LAURIA: Yes, please.

21 MR. CARDINALE: Okay.

22 MR. LAURIA: First sees Dr. Cash on 10/12/10. First visit to the office. Good
23 relief for a week and then recurrent left leg pain. According to the records from Dr.
24 Capanna, it was actually the phone call was two and a half weeks after surgery.
25 Disc fragment L4-5. So let's go forward.

1 And his opinion at the time initially seeing him was that he was going to
2 do well. So let's go to the first post-op visit and down.

3 First post-op visit. Within nine days of seeing -- having the second
4 surgery done, Dr. Cash, the patient's treating physician, notes his pain is extremely
5 mild, one out of 10, he's not requiring any pain medications and he's doing well.

6 Second post-op visit --

7 Go ahead, Paul, you could scroll down a little farther.

8 -- 12/11/10, about a month later, leg pain relief, start some physical
9 therapy, he can return to light duty. Again, he's not on any -- requiring any type of
10 pain medication. He's not in any significant or severe pain during this timeframe.

11 First -- third post-op visit. Post-laminectomy syndrome meaning he's
12 still having some pain or complaints but they're mild after this procedure. And he's
13 still got some of this numbness and tingling down his leg.

14 Fourth post-op visit, April 19th, 2011. His pain level is at three -- two to
15 three out of 10. Again, very mild and he tells Mr. Orth to come back in three
16 months.

17 Mr. Orth doesn't feel the need to come back for 16 months. Why is that
18 relevant? Well, folks, maybe -- you will make the determination of whether or not
19 this is any indication that the severity of the pain level during that timeframe from the
20 time of surgery up to the present for which I think the plaintiffs have said they're
21 asking for two and a half million dollars during that timeframe. You'll make the
22 determination whether or not the fact that the patient doesn't need treatment for 16
23 months is an indication of what he's experience -- experiencing or what his pain
24 level is. Doesn't require medication, doesn't need to see a doctor.

25 Let's go back to -- keep going down if we can, Paul.

1 So after almost a year and a half without having to see a doctor, without
2 having to take any pain medication, comes back on August 28th, 2012 and again his
3 pain is at one to two out of 10, not severe, not excruciating.

4 Folks, nobody's disputing that Mr. Orth has any pain. Nobody's
5 attacking Mr. Orth in this case at all. Nobody's suggesting that this has not been a
6 horrible experience for him. But the records show what the records show and I think
7 it's important that you see what the records show as you're evaluating the case and
8 making your decision.

9 So 16 months before the last visit, pain one to two out of 10, a low
10 grade back ache and some numbness down the last (sic) leg. And then we get to
11 the MRI of 8/31/2012 and here's what Dr. Cash notes about that MRI, the MRI in
12 August of 2012. And let me represent to you that that is the same MRI that Dr.
13 Cash showed you on the screen and said shows this severe disc collapse, this loss
14 to 80, 90 percent of disc height, that it's almost bone on bone, there's nothing -- no
15 cushion left. The thing that he notes in his record -- and you have that office note.
16 You'll have it back there. I ask you to look at it. Look and see whether he said back
17 in 2012 that boy, there's severe loss of disc height here, it's bone on bone, it's loss
18 of 80, 90 percent because the records don't show that.

19 After this visit, his advice is follow up when you need to. Go do what
20 you can. I understand fortunately your -- you pain level's low, you're not requiring
21 any medications, so I don't need to see you to prescribe narcotics, come back and
22 see me when you need to.

23 From September 4th of 2012 --

24 Go ahead, Paul.

25 -- until 18 months later in March of 2014, again during this same

1 timeframe that we're leading up to trial now, no medical treatment at all during 2013.
2 Eighteen months later he comes to see Dr. Cash and now he's got complaints of six
3 out of 10 and he says -- again you'll have that record, look at it -- the pain started
4 three days ago. This hasn't been something that had been going on for months and
5 getting worse and worse, at least not according to what Dr. Cash recorded. It
6 started three days ago, low back pain with pain and numbness and tingling in the left
7 heel and bilateral -- bilateral lateral three toes. Because remember we read that
8 with Dr. Yoo and I said words are important, Dr. Yoo, and if you leave out the word
9 lateral, meaning the outside of the toes, it could be L5, but if you add the word
10 bilateral lateral three toes, the outside, that's classic S1.

11 So he gives him some steroid treatment, orders an MRI, and here's
12 what the MRI shows for that visit: L4-5 reduction of scar and/or disc herniation
13 resulting in improved patency of the central spinal canal and lateral recess without
14 neural impingement, minimal disc bulge present, disc protrusion with annular tear at
15 L4-5 contacting left S1 nerve root. There is no suggestion -- no mention in that note,
16 in that chart, in that office record on either of those visits or on the MRI itself that the
17 pain generator is L4-5. Absolutely none and that's not suggested other than while
18 we've been here in court.

19 That's the last time that Dr. Cash sees Mr. Orth until again just a couple
20 weeks before trial to do an evaluation. Doesn't provide any treatment at that time.
21 Sees him to evaluate before his testimony.

22 The next things that happens is -- go back. Yeah.

23 Next things that happen -- 14 months later we get a report from Dr.
24 Cash for the first time now saying that Mr. Orth is going to require the two fusion
25 surgeries which he said he was going to require in any event.

1 Now, one of the questions that was asked --

2 Can you put up Dr. Yoo's testimony?

3 -- again about the L4-5 area being a pain generator or how that may
4 play into this. So we asked Dr. Yoo a little bit about the pain in the patient's back.
5 Part of this would you agree can be the 20 to 30 of patients who have back pain
6 after surgery? That's under a one-level microdiscectomy or a multilevel
7 microdiscectomy. Dr. Yoo says I agree. I agree with that number. That sounds
8 reasonable, yes.

9 So he's got pain in his back. Is it fair to say, Doctor, to a reasonable
10 medical probability -- and we keep using that term because that's a legal term that's
11 required. Doctors can't just come in and guess or speculate or say well it could be
12 or it might be or, you know, I think it might be. The law requires that they give their
13 opinions to a reasonable medical probability for it to be sufficient for you to consider.

14 Is it fair to say, Doctor, to a reasonable medical probability as a
15 neurosurgeon that you can't say with any certainty whether it's L5 -- should say L4-5
16 -- L5-L4 or L5-S1 or some combination of the two?

17 Answer (sic): Is that fair?

18 Answer: Not only is it fair, it really doesn't matter to me.

19 Now that's not somebody -- again, that's not somebody I hired to come
20 in and give an opinion as to why Mr. Orth is having complaints of pain or why he'd
21 had the one to two level of back pain that we saw from 2011 up till 2015. That's the
22 neurosurgeon that they hired to come in and render opinions in this case, and his
23 opinions are he can't say whether it's L4-5, whether it's L5-S1 or some combination
24 of the two.

25 Significant because as we read in the jury instruction about preexisting

1 condition, and if you evaluate damages in this case, the law requires that if his pain
2 generator is L5-S1 or that's at least part of it, he's not entitled to compensation for
3 that. He had a preexisting condition and injury there. That's not something that the
4 law lets you or permits you to award him. You have to be able to segregate that out
5 and say okay, what is it specifically that's related to or caused by the injury.

6 Do you have that instruction again, Paul, or that --

7 MR. CARDINALE: Preexisting? Preexisting?

8 MR. LAURIA: Yes, please. And then I want to go to -- can you switch this
9 over?

10 THE COURT RECORDER: Yeah.

11 MR. LAURIA: Thank you.

12 Person who has condition or disability at the time of an injury is not
13 entitled to recover damages therefor. Entitled to recover for an aggravation. Where
14 a preexisting condition or disability is aggravated, the damage as to such condition
15 or disability are limited to the additional injury caused by the aggravation. I mean
16 that's what the law instructs that you have to decide and distinguish here. And in
17 fact I think I asked Dr. Yoo specifically whether or not he could say that what
18 happened at L4-5 made L5-S1 worse as a pain generator.

19 Can you switch us back?

20 I think it's 131, 24? It's at the very end in response to the question,
21 Paul. Is that where you are? Can you get to the very end of the deposition? I think
22 it was the question by -- from a juror in court.

23 MR. CARDINALE: Okay.

24 MR. LAURIA: You can stop right there. Right there's good.

25 As you recall one of the jurors sent a question that was asked of Dr.

1 Yoo and said if you ask me -- question was did L4-5 and what happened at L4-5
2 cause or contribute to L5-S1 being a pain generator in him. And Dr. Yoo's answer
3 was (as read): I think if you ask me why did L5-S1 become a pain generator, I
4 would say that the problems at L4-5 is probably a minor contribution. He's always
5 had problems at L5-S1 even before Dr. Capanna operated on him, so that's
6 probably his main source of pain at L5-S1, more so than the adjacent L4-5 problem.
7 But I don't disagree with you if you made an argument and said the L4-5 problem
8 must contribute to it becoming a problem as well, it makes sense. It makes sense.
9 Do I have way to prove that? Do I have literature to back me up? No, I do not.

10 And go down.

11 So I asked him in other words you can't say that to a reasonable
12 medical probability, and he said that's true. The significant thing is Dr. --

13 Go back to the beginning -- Mr. Prince is shaking his head, but I want to
14 make sure the jury sees the answer to the question. If you ask me why did L5-S1
15 become a pain generator, I would say that the problems at L4-5 is probably a minor
16 contribution. He's always had problems at L5-S1 even before Dr. Capanna
17 operated on him, so that's probably his main source of pain at L5-S1.

18 Again, that's not somebody I hired or paid or brought in here to say that.
19 That's the expert that they retained, the neurosurgeon, to talk about this case.

20 Dr. Belzberg was also asked whether or not L4-5 or having to have
21 surgery at L4-5 has made things worse at L5-S1.

22 Page 66, lines 1 through 15 (as read):

23 All right. Based on the patient's complaints, his evaluation, you believe
24 the primary source of his complaints was related to the L5-S1 space in the S1 nerve
25 root?

1 Talking about 2014.

2 2012 to 2014.

3 Again I would say I can't say for sure after his second operation
4 whether his complaints are due to L4 or L5-S1, without a clear cut sensory change
5 that follows one root or the other. I don't believe I could say which level's causing
6 the pain.

7 Do you believe anybody -- any neurosurgeon, any spine surgeon could
8 be able to say his problems are because of L4-5 versus L5-S1? Do you think that's
9 possible?

10 Answer: I don't think that you'd be able to tell. Back pain especially
11 even more so than leg pain. You would not be able to tell whether the back pain is
12 coming from one level, both levels or which one.

13 The plaintiffs would have you believe or have you attribute all of Mr.
14 Orth's problems to L4-5, but I think the evidence is clear unfortunately he had an
15 underlying degenerative disc at L5-S1 that was also going to follow this course and
16 cause problems.

17 Now, I just want to go through a few things with you because I -- some
18 of the things that were said or that were done or that were shown here did not make
19 sense to me.

20 Dr. Cash again testified -- I think we talked about it a little bit yesterday
21 and it's up here. Dr. Cash talking about this disc says this has lost all of its shock
22 absorption. Let's say a great majority of it, 80 to 90 percent. This is flat. This is not
23 a shock absorber anymore. And it's less mobile. Something that used to go through
24 this motion segment has got to be transmitted and shared by the other level.
25 Usually it affects the one above.

1 You saw we put up the -- we put up the pictures. We put them side by
2 side. We can do it again I think.

3 MR. CARDINALE: You want --

4 MR. LAURIA: We can --

5 MR. CARDINALE: What do you want, Tony?

6 MR. LAURIA: Yeah, that --

7 This is the MRI study that Dr. Cash was referring to when he told you it
8 was the loss of 80 percent, that it was bone on bone, that it was flat as a pancake,
9 that there was no shock absorption, and this is the most recent MRI. If you look and
10 if you want to compare whether they are comparable images or -- you can look at
11 the disc heights. The actual boney portions are essentially the same because the
12 disc may change or by angle, but you can tell that they're essentially the same,
13 unlike one of the images that was put up yesterday where on one view they were
14 kind of square, on another they were very elongated.

15 Do any of you remember seeing those images yesterday? This case
16 you can see the outline of the bone at those levels is the same. And as you look at
17 the discs, L2, L3, L4-5, L5-S1 going down, sure, has there been some desiccation or
18 has there been some loss of the disc height at L4-5? Yeah. And at L5-S1 if we go
19 back to the preoperative films.

20 But is it a loss of 80 percent or 90 percent? Is it bone on bone? Is it flat
21 as a pancake? Well, Dr. Kaye certainly doesn't think so. Dr. Belzberg certainly
22 doesn't think so. Dr. Rimoldi certain doesn't -- certainly doesn't think so. The only
23 person who testified to that was Dr. Cash. And I would suggest to you that you can
24 look at the images yourself and decide whether that's accurate.

25 But if you don't believe the people who testified that way, let's look at

1 the radiology report of Dr. Chen from March of 2014. Okay.

2 Thanks. Can you switch us back?

3 THE COURT RECORDER: Yep.

4 MR. LAURIA: Again, this is someone who's got no interest in this case, is
5 reviewing an MRI, is reading a study, is looking for significant changes as a
6 radiologist to report to a surgeon as to what he's seen. Some disc desiccation --
7 we've learned about that, right, loss of some water content in the disc. Mild facet
8 arthropathy, post-surgical changes, reduction of scar and/or disc herniation resulting
9 in improved patency of the central spinal canal and lateral recess without neural
10 impingement, minimal disc bulge present. No description of severe degenerative
11 changes in that disc, no mention that it's lost 80 to 90 percent of its disc height.
12 There's nothing like that.

13 In fact, when we get down to the impression section, the thing that the
14 radiologist brings up is look for S1 radiculopathy. Is there something going on at the
15 L5-S1 level that's causing this man's problems? That's what the radiologist
16 suggests when he reviews these films that he's telling Dr. Cash you should focus
17 your attention there because that's where I see the abnormal pathology that I may --
18 that I believe may be causing any pain or problems here.

19 Can you switch us back and leave that PowerPoint up?

20 MR. CARDINALE: You want the PowerPoint?

21 MR. LAURIA: The one you just had up, the image you just had up?

22 Ladies and gentlemen, you have instructions about you're to evaluate
23 witnesses' testimony and give it the weight to which you're entitled, considering all of
24 the basis for it, what it -- their training, education, skill. You evaluate what you
25 believe is accurate or not accurate. I know it's hard. You've got four different spine

1 surgeons sometimes saying different things. But that's part of your job as jurors.

2 Why -- of all the people who testified here, why is Dr. Cash saying that
3 that has lost 80, 90 percent of its height? Why is Dr. Cash saying that that's almost
4 or getting close to bone on bone or flat as a pancake? Those are questions I
5 suggest when you get back in the jury room and deliberate you ask yourself.

6 Want to talk about something else that didn't make sense to me in this
7 case as I looked at it and went through it. There was -- and that's why did it appear
8 that sometimes we were having images that were not comparable put in front of
9 you? As we've shown here, you can tell those are comparable -- you can look at the
10 boney outline and you can see basically they're the same size.

11 You may not recall but when Dr. Cash came on and was first witness
12 testifying in this case, I'm sitting over here, Dr. Belzberg was sitting in the audience
13 and during Dr. Cash's testimony when they had two images up on the screen, he
14 came up to the table and said those aren't the same cuts, those aren't the same
15 type of images. I wouldn't have known. I'm a lawyer. I'm not a neurosurgeon or
16 radiologist. I saw two images and like oh, they're comparing.

17 Something Dr. Belzberg pointed out to me, so from that point forward I
18 know you probably got sick of hearing it, but since I couldn't get the actual images
19 they put up, those weren't provided to me, I had to ask --

20 MR. PRINCE: Objection to -- move to strike, Your Honor. He has the images
21 (indiscernible) weren't provide --

22 THE COURT: I'll sustain the objection. This isn't the time talk about
23 discovery issues.

24 MR. LAURIA: Sure.

25 I had to ask for what specific number and what image are you showing

1 so I could go back and go wait a minute, is this a fair comparison? Is it fair to put a
2 slice from here and a slice from there up and say they're equivalent?

3 Paul, do you have that other image?

4 MR. CARDINALE: Fifteen. That one?

5 MR. LAURIA: Yeah.

6 So that's one of the things that I asked Dr. Kaye to do, because you
7 can't -- these programs -- doing the MRIs -- although I screwed up trying to do it
8 yesterday because I'm not very computer good, but I'll try better today -- shows you
9 -- when you're looking at an axial image, it shows you exactly where you are in the
10 spine. You -- it's not something you play with and manipulate or change. The
11 program does that, it tells you this is where you're looking.

12 And it does that for a purpose because if you're a radiologist or a spine
13 surgeon, you want to look at the slice that's at right about there on this film to
14 compare has the anatomy changed because if you don't look at as close as you can
15 get to where the slice is, you have nothing to compare it to. You need to be in the
16 same area in order to make that comparison.

17 Dr. Kaye put these together -- this is what I was told when I asked what
18 images are these two that you've got side by side. They didn't have this up here.
19 They just had this one next to this one. So I said what are the numbers, what are
20 the images and what are the films so we can see are they in the same location.

21 Dr. Kaye put them together and they're clearly not. It's not a fair
22 comparison if you're not looking at the same level or the same image.

23 Now, what did Dr. Belzberg say about showing those images?

24 Can you put that up, Paul?

25 MR. CARDINALE: Uh-huh.

1 MR. LAURIA: In your mind, Doctor, as someone who trains fellows and
2 residents and sits on the board, what was the problem with comparing side by side
3 the two images that Dr. Cash put up there?

4 Answer: So one wants to be as accurate as possible and provide
5 objective testimony. If you look at an MRI, an MRI consists of hundreds of slices
6 often, so hundreds of different images will make up this entire picture.

7 So when you say a slice, can you explain how that works and --

8 Go -- you can go down.

9 And he goes on to explain obviously what slices are. You've heard that
10 now. That was I think the first time that that was explained to you.

11 But he says if you only see one slice, that obviously doesn't tell you
12 what's doing just beside it. And if you compare pre-op to post-op and you're looking
13 at two slices, you would expect those slices to be the same anatomy taken at the
14 same place. If I move a bit to my left on one and a bit to my right on the other and
15 they're not the same place in the body, then it's really not appropriate to compare
16 and say well this is the pre-op exactly how it looked and this is post-op exactly how it
17 looked.

18 So you go down a little farther.

19 When I saw the two images that were put up and somebody says -- and
20 Dr. Cash says yes, this is the pre-op/post-op same image and here's the difference,
21 in fact they're not the same image. They're clearly not the same anatomy. And it's
22 very obvious to me because this is what's called the spinal cord on one of the films,
23 and you see it very clearly here this structure. And in one of the images you saw the
24 spinal cord and in the other image you didn't. You were off the midline so you
25 couldn't see it so they were clearly two different images.

1 Keep going.

2 Now when I say that it's very important if somebody starts by saying I'm
3 going to compare these, I'm saying these are the same image pre and post-op and
4 now I'm going to show you the differences, you're already starting by -- you know, by
5 that's just not true. They're not the same image. They're taken in a different place
6 in the body. Either you say that up front and put a series of images so you can
7 compare or I believe that's misleading.

8 When I look at this particular image and we talk about the discs, I would
9 agree that this disc, which is the L4-5 disc, is probably a little bit compressed or a
10 little shrunk. But I heard it stated that it's bone on bone. This is not bone on bone.
11 That's not even close to bone on bone. If all of this disc had completely collapsed
12 and this bone was literally touching that bone, sure we'd call that bone on bone
13 which is very severe. That's severe degeneration. That's simply not what's here. I
14 think a lot of verbiage used is simply inaccurate and misleading.

15 Don't take Dr. Belzberg's word for it if you want because he was hired
16 by the defense. Let's show Dr. Yoo's testimony if we can.

17 You can go up a little bit.

18 I asked Dr. Yoo the same question, I said Dr. Yoo, isn't it important if
19 you're going to put up images to compare and show the jury changes before and
20 after that you use the same image or the same slice or as close as you can be?

21 To the best of my abilities, yes, because they're not perfect, you're
22 never going to be perfect. Slices are between four and five millimeters apart
23 depending on which MRI machine you're using, so you may be a millimeter or so off.
24 But to the best of your abilities, they're not perfect, but you're going to try to get them
25 at the same level, not as we showed Dr. Kaye.

1 To make sure you're looking at the center of the L4-5 disc in 2009 and
2 make sure you're also looking at the center of the L4-5 disc in 2012.

3 Answer (sic): Right?

4 Answer: Yes. You try to do that best you can, yes.

5 And if you don't do that and if you put center of the 2009 disc here and
6 you put top or above the disc here, meaning side by side, that's not going to
7 represent a comparison, is it?

8 This is Dr. Yoo, their expert's answer to that question: If you did that
9 intentionally, yes, I would agree that I was trying to mislead you.

10 Ladies and gentlemen, you -- something you can talk about when you
11 get back in the jury room, why would there be slides that are at different levels, why
12 would they be represented as being at the same level, why would you be told that
13 there's bone on bone when there's not, why would you be told that you can compare
14 images that are not comparable? That's for you to consider and you to decide as
15 you go back and deliberate this case.

16 I also want to go to the trial testimony of Dr. Yoo and I ask that you --
17 page 32, 6 to 20. This is when Mr. Prince was questioning Dr. Yoo and again,
18 putting up one of those things on the blue -- their slides. Goes to the next slide and
19 let's talk about this for a second. We're going on to talk about some other slides for
20 a minute. October 6, 2010 film, series five, axial view, seven of 28.

21 May want to make note of that because I'm going to show you where
22 that is in the spine in just a minute. October 6, 2010 film, series five, axial view,
23 seven of 28.

24 Dr. Yoo goes on to say so this is the axial view of the L5-S1 disc space
25 again. And then he goes on to talk about the abnormalities at the L5-S1 disc space

1 and this is supersensitive so you -- you would see surgery there at this L5-S1 disc
2 space on image seven of 28 of series five of the axial views. Now if you give me a
3 second, want to show you exactly what that image -- where that image is.

4 This is the marker and I apologize for the brightness. For some reason
5 it doesn't work out well on my computer. You can tell -- we've seen these films
6 enough you guys can probably read them as well as I can. Here's L5-S1. Here's
7 L4-L5. Here's L3-L4. This is a marker that comes in the computer. Series five,
8 image seven of 28, October 6, 2010.

9 Now I'll show you how that marker moves if I move the images. Can
10 you see how that's going down? Let me get it down to where the L5-S1 level
11 actually is. That's probably the top of it. Do you agree?

12 We're now at image 21 of 28 to get to the L5-S1 level and that's
13 probably very top of it. Probably go to 22 would probably show a little more, 23
14 would show a little more.

15 Ladies and gentlemen, as you're deliberating this case, why would they
16 show -- and that's his testimony. You read it from the court transcript of what he
17 showed. Why would they show image seven of 28 which is up here and tell you and
18 have him testify that this is what the L5 disc space shows and you could see there's
19 no surgery here -- why would they do that? I suggest when you go back and
20 deliberate you may want to ask yourself that question, because clearly -- we'll go
21 back to seven of 28. Clearly it's not in the L5-S1 disc space.

22 Why do that? One of the questions you may want to discuss is why
23 would you do that? Look, ladies and gentlemen, we're not disputing that Beau Orth
24 had injury to L4-5 as result of this procedure. Nobody disputes that. We've never
25 disputed that.

1 We're not disputing that he's a good kid. We're not disputing that he
2 played college football. I think that's amazing and that's -- you know, I wish I could.
3 I'm five six and weighed about 130 pounds in high school so that was not -- that was
4 not going to happen for me. But what a great experience that must have been.

5 But why do you need to do that? What's the reason why you would do
6 something like that and show an image and say this is what it shows when it's not
7 what it shows at all? That's something for you folks to decide.

8 Again, not picking on Mr. Orth at all. I mean, I think it's great that he
9 played football. Dr. Cash comes in and says yes, Mr. Orth was a starter, was a
10 starter. Mr. Prince in his opening statement says he started more than half the
11 games is sophomore year, but we know from Mr. Wilson the official stat so he
12 started one. Not a big deal. Not a big deal. I mean, again, I think it's awesome that
13 he started one if it was one.

14 But why do you need to make it five or why do you need to say it's more
15 than half? Why do you need to go there? Why not just say what the stats show it
16 was one? That's a question you can ask yourself when you get back in the jury
17 room.

18 The question of whether or not Dr. Cash put in his records the need for
19 fusion from October 2010 up to 2015, remember the evidence shows that the first
20 time that we became aware of it was when he wrote a letter to Mr. Prince indicating
21 now he needs two fusions in his spine that we talked about here and that was in
22 May of 2015 just before trial, nothing in the four plus years before that. Mr. Prince
23 has suggested --

24 Can you switch for me? Thank you

25 You've seen this before and it's been in front of you before but -- the

1 only mention of a surgery has an important word in it. Just like the lateral bilateral
2 toes, the only mention of the need for a fusion has an important word in it that I
3 suggest has been admitted throughout most of these discussions. Patient also
4 recognizes if this is a second recurrent disc herniation at L4-5 and he has another
5 injury at this level, then he most likely will require fusion surgery.

6 Dr. Cash is clearly saying look, if he has another injury at this level in
7 the future, right? If he has another injury at this level in the future, then he'll
8 probably need a fusion. Very different than saying I've seen him now, he's had a
9 microdiscectomy, in my opinion more probably than not he's going to need not one
10 but two fusions. Very different. And again, language and words have some
11 meaning.

12 During the questioning of Dr. Yoo by Mr. Prince, he asked Dr. Yoo
13 about this particular portion.

14 Can you put up that testimony, Paul?

15 You need to switch us again. Thank you.

16 MR. CARDINALE: I'm not sure of the right area, Tony, just so you know.

17 MR. LAURIA: Seven -- 176, 2 I think. Is that right?

18 MR. CARDINALE: May not be right.

19 MR. LAURIA: Was that not the right --

20 MR. CARDINALE: See if I could find it.

21 MR. LAURIA: Can you find the part where he asked Dr. Yoo about that
22 specific surgery? There we go. That's it. You were there.

23 MR. CARDINALE: There?

24 MR. LAURIA: Oh that's my questioning of him, I think.

25 MR. CARDINALE: Okay.

1 MR. LAURIA: All right. That's all right.

2 MR. CARDINALE: Come back to it, yeah.

3 MR. LAURIA: We'll -- maybe we'll come back to it.

4 So ladies and gentlemen, just ask yourself some questions. Again, we
5 want to tell the rest of the story, we want to be accurate, we want you to have the
6 information here. Ask yourself why some of those things are presented that way. Is
7 -- what's the reason for that? Is it potentially to make things more severe or appear
8 more severe than they actually are? I don't know.

9 Dr. Rimoldi, Dr. Belzberg -- again, Dr. Rimoldi wrote something in his
10 report didn't help Dr. Capanna. So they both believe it is unlikely that Mr. Orth is
11 going to require a fusion. They don't think that's likely based on what they see in the
12 films.

13 Dr. Cash, as we've gone through, has testified that in his opinion to a
14 reasonable medical probability that he believes he's going to need a fusion. It's
15 going to be a two-level fusion, he'll need it by 2025 and it's going to cost \$350,000.
16 And then by 2042 he's going to need a second fusion that's going to cost \$342,000.
17 That's his testimony. You were here when I wrote it down and you saw me doing it,
18 probably going why is that guy writing on paper again?

19 But he also told you that in his opinion, 20 to 25 he was going to need a
20 fusion at L5-S1. So what's happening now is now he needs L5-S1 and L4-5. It's
21 going to cost \$8,000 more and he was going to need that even with a perfect
22 surgery. And Dr. Cash then said and if you fuse only L5-S1 and this timeframe,
23 2025, that he was going to still need another fusion surgery, same timeframe, 2042,
24 same cost as what he's needing now. I bring up those questions about why do that
25 so you can talk about some of those things.

1 Talk about instruction number 38. Again, this is what the law tells you
2 about how to apply your findings of fact in making your determination in this case.
3 And one of the things I said to you earlier because I -- there have been a lot of
4 comments about what Dr. Capanna said or he didn't say or what did he tell Mr. Orth
5 or didn't tell him or did he not explain to him what was on this MRI, regardless the
6 fact he didn't get a chance to see him face to face and sit down with him.

7 You'll look that none of these things talk about you can give any kind of
8 money because you're mad at Dr. Capanna or you think you should have said
9 something different to Beau or he should have made some other statement. That's
10 not permitted. What you are allowed to do is award reasonable medical expenses
11 plaintiff has necessarily incurred as a result of the negligence. That means to date
12 what is -- what are his medical expenses.

13 We'll put up and I will show you in a minute that Mr. Orth has paid
14 virtually none of -- for none of the medical care he's received thus far. Fortunately
15 he's covered by health insurance and as you know, when you go and you have
16 insurance, they write off the difference, so he may have been out of pocket for some
17 amount, five or \$6,000, but the hundred and thirty-something thousand dollars that
18 was put up by Mr. Prince, Mr. Orth hasn't paid that or -- and if he gets an award of
19 \$136,000, he doesn't have to pay any of that back. He doesn't have to give that
20 back to anybody or pay the hospital.

21 You decide what the reasonable medical expenses are that he incurred,
22 and we provided you actually the medical bills in the exhibits and ours are -- have
23 letters in them to show you exactly who paid these things and how much.

24 So second part is why I got on this the first place, the reasonable
25 medical expenses you believe the plaintiff is reasonably certain to incur in the future.

1 Not that that might be, not that Mr. Prince wants to say there's some risk about.
2 That's not how the law works. That may be what he wants you to apply here or think
3 about here.

4 What the law says is that you as a juror sworn to follow the Judge's
5 instructions, may only award those reasonable medical expenses you believe the
6 plaintiff is reasonably certain to incur in the future as result of the medical
7 malpractice.

8 If you believe Dr. Cash and if you believe his testimony throughout the
9 trial, that amount is \$8,000. Because the rest he was going to incur anyway, right?

10 If you believe Dr. Rimoldi and Dr. Belzberg that surgery is unlikely not
11 reasonably certain to incur in the future, then that amount is zero because they
12 haven't put on any evidence of anything -- any other medical care he needs other
13 than these fusions 15 and 17 years down the road, 2025 and 2042. There's been
14 no other evidence that they presented to you about any other reasonable medical
15 expenses for care for Mr. Orth other than Dr. Cash putting up these two numbers.
16 And you -- we have that testimony. You were sitting right here as I wrote those
17 numbers down and that's exactly the numbers that Mr. Prince just asked you to
18 award.

19 Folks, you -- again, you decide have they proven it's reasonably certain
20 to occur in the future? If they have, then they're entitled to what you believe under
21 that instruction is different from what he was going to require anyway. If you don't
22 believe that they're reasonably certain to incur, if you believe that well there's a
23 potential or there's a risk or there might be, the law says that's not enough. That's
24 not sufficient.

25 Regardless of whether you find that there is a rebuttable presumption

1 as to negligence, that's still something they have to prove. That's their burden of
2 proof, regardless of how you find.

3 Want to talk about instruction number 40 also, if we can.

4 MR. CARDINALE: Do you want the chart from the hospital?

5 MR. LAURIA: Huh?

6 MR. CARDINALE: Chart of the --

7 MR. LAURIA: Oh yeah. Can you put that up? Sorry. We're going to make
8 you switch -- or do you -- is it on your computer?

9 MR. CARDINALE: Yeah. It's up.

10 MR. LAURIA: I told you we would show how this works. You've probably all
11 received billings and statements from your insurer as to what they write off, what's
12 actually paid, what's not paid. These show University Medical Center; total paid by
13 insurance, hundred dollars; patient balance, eighteen hundred twenty-six; written off
14 for adjustment, meaning nobody has to pay that, \$13,159.

15 Now what's interesting in -- in Mr. Prince, they're -- they agree and they
16 admit that Mr. Orth required at least one of these surgeries, right? From the minute
17 he walked in Dr. Capanna's door, he was going to need one surgery. Yet they're
18 asking for damages to Mr. Orth for money that he hasn't actually paid out of his
19 pocket for two surgeries. They want you to award him damages -- past medical
20 damages for both surgeries, although they agree that one of them was necessary
21 and unrelated to what Dr. Capanna did.

22 You can see all these amounts. Dr. Cash charges \$40,000 for his
23 surgery and medical care. This is what Dr. Cash accepts as payment for the
24 surgery and the treatment he provides. That's what he's paid and he accepts. If he
25 didn't want to accept it, if he didn't think it was reasonable, he didn't have to do the

1 surgery. He wouldn't have to do those procedures.

2 He writes off or adjust \$37,977, meaning that goes away, that
3 disappears. Nobody's obligated to pay that. If you decided you want to give Mr.
4 Orth this \$40,000, he doesn't have to pay that to Dr. Cash, he doesn't do anything
5 with it. It goes just directly to him under the law in Nevada.

6 MR. PRINCE: No, that's not true. That is absolutely not true, Judge.

7 THE COURT: Hold on. Approach the bench, please.

8 MR. PRINCE: Yeah.

9 [Bench conference begins at 3:31 p.m.]

10 MR. PRINCE: That is not under the law --

11 MR. LAURIA: Yeah, it is.

12 THE COURT: Shh, shh, shh --

13 MR. LAURIA: That's what this code section says.

14 THE COURT: Hey, hey, hey, hey, hey --

15 MR. PRINCE: It does not say that.

16 MR. LAURIA: He's the one standing up --

17 THE COURT: Hey --

18 MR. LAURIA: -- making speaking objections.

19 MR. PRINCE: It doesn't say that, Judge. He can't --

20 THE COURT: Okay. Keep -- try to keep your voices down. Go ahead.

21 MR. PRINCE: He can't misstate the law. He's saying the law -- like the jury
22 instruction you just gave, that's the law Nevada just write off because you don't have
23 to pay it. That is not how the jury instruction reads at all --

24 THE COURT: Mr. Lauria?

25 MR. PRINCE: -- and he's saying that's the law Nevada.

1 MR. LAURIA: The law in Nevada, as we've established with this Court, under
2 the statute, is there's no subrogation right. There's no obligation to repay --

3 MR. PRINCE: (Indiscernible) --

4 MR. LAURIA: -- so nobody can take --

5 THE COURT: Shh, shh, shh, shh, shh --

6 MR. LAURIA: -- there's no obligation for him to repay anybody that money.
7 That's the law. There's no --

8 THE COURT: No.

9 MR. LAURIA: -- right of subrogation --

10 THE COURT: But the --

11 MR. PRINCE: You didn't give the 42 (indiscernible) instruction.

12 THE COURT: Oh, we did -- you're right we didn't give them that instruction,
13 but everything that was in -- it's in the statute is about what may be done; that you
14 may introduce that evidence. There's nothing that tells them what can and cannot
15 be paid by --

16 MR. LAURIA: No, it -- the statute specifically says none of these people
17 who've paid have any right of subrogation --

18 THE COURT: I know but we're --

19 MR. LAURIA: -- meaning he doesn't have to pay anybody back.

20 THE COURT: That's not the relevant inquiry here though. It's not going
21 about who else may or may not have subrogation here.

22 MR. PRINCE: Correct.

23 THE COURT: It's just argue the case on the evidence and the --

24 MR. LAURIA: Okay.

25 THE COURT: -- jury's going to give what award --

1 MR. PRINCE: Yeah.

2 THE COURT: -- they're going to give, okay?

3 MR. PRINCE: No, he can't be talking about that's the law Nevada. He's

4 trying to argue like it's other than instruction you gave.

5 THE COURT: (Indiscernible) law is what's in our instructions for them.

6 MR. PRINCE: Yeah.

7 THE COURT: That's what they need to base --

8 MR. PRINCE: Exactly.

9 THE COURT: -- a decision on. Okay?

10 MR. LAURIA: Okay.

11 THE COURT: All right.

12 MR. PRINCE: And so I want you to sustain my -- move to strike --

13 THE COURT: All right.

14 MR. PRINCE: -- his comments regarding what the law --

15 THE COURT: Okay.

16 MR. PRINCE: -- is Nevada because it's not --

17 [Bench conference ends at 3:32 p.m.]

18 THE COURT: I'm going to -- look, I'm going to sustain the objection. That

19 last statement will be stricken.

20 Ladies and gentlemen, the law that you'll use to decide the case is

21 what's in the jury instructions, okay? Thank you.

22 MR. LAURIA: Just going through these, again, bill \$33,000 paid by insurance

23 for Southern Hills Hospital for the surgery, \$13,000 written off, nobody collect, it's

24 gone, it's out the window, \$20,000, patient responsibility zero.

25 When you look at the past medical expenses, it talks about the

1 reasonable medical expenses incurred by the patient for the treatment provided. If
2 you add up all the amounts that have been paid by insurance, all the amounts that
3 have been written off, the total amount that Mr. Orth has been responsible for not
4 just one but both surgeries, both the one that everybody agrees he needed and the
5 second surgery is \$3,217.22.

6 Now, I do want to put up jury instruction number 40, so -- I'm sorry, I'm
7 going to make you switch again.

8 THE COURT RECORDER: That's fine.

9 MR. LAURIA: This instruction tells you a couple things that I think are really
10 important to consider as you go back there and you got a lot to consider and a lot to
11 look at. Says there's no standard method to calculate -- and that was something
12 was brought up in voir dire is, you know, how do we figure out what's a reasonable
13 award for pain and suffering, how do we do that, maybe a Judge should do it.
14 Remember some jurors were uncomfortable with that.

15 Says, you know, there's no standard or method. Nor is a witness
16 required. Furthermore, the argument of counsel as to the amount of damages is not
17 evidence of reasonable compensation. What this instruction is telling you is that
18 what Mr. Prince suggests as a number of two and a half million during the years
19 from 2011 to the present, 2015 -- we went through the amount of treatment, we went
20 through the pain levels, the doctors he saw, the pain medication. What he says or
21 what I say for that matter is not evidence of reasonable compensation. It's just
22 lawyers talking.

23 You make an award -- you exercise your authority in several ways,
24 calm and reasonable judgment. And the damages, if you find damages are
25 indicated, shall be reasonable in light of the evidence.

1 Calm and reasonable judgment. That's what you're asked to provide
2 here. There's another instruction that goes along with that.

3 Instruction 41. Thank you.

4 In making a determination if you get to the area of damages in this
5 case, you've got to decide one, have they been proven. We talked about the future
6 damages, are they reasonably certain to occur? Have they proven that to you?

7 Neither sympathy or speculation is a proper basis for determining
8 damages, so you can't speculate that Mr. Orth may need some other treatment or
9 he may have some other problem or he may have a complication. And nor are you
10 to use sympathy, passion or prejudice in making a determination in this case. You
11 need to use reasonable and calm judgment, looking at the evidence as to what you
12 folks would decide was reasonable.

13 Go back to the burden of proof.

14 Again as we talked about, the burden of proving the injury that was
15 caused and the damages that flow from that injury, even if you find that Dr. Capanna
16 operated at the wrong level, that burden still is on the plaintiff to establish that to
17 you. And I'm going to explain how that -- what that burden means. I saw -- I know
18 you saw some scales from Mr. Prince earlier, but I think I can explain it in a way that
19 makes some pretty clear sense.

20 I'm going to show you the verdict form also.

21 Do you have that, Paul?

22 MR. CARDINALE: Uh-huh.

23 MR. LAURIA: Thank you.

24 MR. CARDINALE: Two pages --

25 MR. LAURIA: Yep.

1 First question is do you find by preponderance of the evidence that
2 defendant was negligent in the care and treatment of plaintiff. If you consider that
3 and you find that Dr. Capanna was not negligent, you check no and you're done. All
4 right.

5 Second question: Do you find preponderance of the evidence
6 defendant's negligence was legal cause of injury. Only if you answered yes, do you
7 go on to number two. If you find no, there you check and you've reached a verdict.
8 Only if you find both of those things do you get to the line that he put up.

9 For past -- it's interesting, folks, and while it's been said that I'm going to
10 try and cherry pick here, I'm going to do what I think is consistent with what make
11 sense. What plaintiff is asking you to do or Mr. Prince is asking you to do for past
12 medical expenses is take the testimony of Dr. Cash as gospel, as authoritative, as
13 that's what you should base it on and give an award of a hundred and thirty-six
14 thousand or something dollars.

15 Well if you're going to rely on Dr. Cash also for past medical expenses,
16 then it only makes sense that you also rely on Dr. Cash for future medical expenses.
17 And if you do that, unfortunately for Mr. Prince, that leads you right back to Dr.
18 Cash's testimony as to what these future medical expenses are going to be and
19 what's related to the negligence versus what's related to the fact that unfortunately
20 Mr. Orth had an L5-S1 disc and needed a discectomy.

21 If you believe Dr. Cash on past medical expenses, then I think his
22 testimony wasn't the hundred and thirty-six, I think he was around a hundred and
23 twenty or something. I think something got added in there. But even if you go a
24 hundred and thirty-six.

25 But if you believe Dr. Cash on future medical expenses, you're at

1 \$8,000 because that's the difference that Dr. Cash has testified between Mr. Orth's
2 need for future surgery now as it was on September 17th, 2010. According to Dr.
3 Cash, that's the difference in the cost of doing the one level versus the two level
4 procedure that he was going to need anyway.

5 If you're going to believe Dr. Cash for one, I think you need to believe
6 Dr. Cash for the other. My experts don't believe he's going to need fusions to a
7 reasonable medical probability anyway. But if you believe that he is based on what
8 Dr. Cash has said, that's your award for future medical expenses.

9 Ladies and gentlemen, I'm not going to suggest -- I'm not going to write
10 in a number for these things. I will suggest to you again that what Mr. Prince says or
11 believes is a -- an appropriate number should you get to this part of the verdict form
12 should be disregarded. The jury instruction tells you it's not evidence of what's
13 reasonable. What's reasonable is what the eight people sitting in the jury room
14 decide is reasonable. What's reasonable for the period of time of approximately five
15 years from the time of the Dr. Capanna surgery till now given what we know about
16 the medical treatment he received, what his pain complaints were when he saw the
17 doctors, you decide what those figures are.

18 Same in regard to future suffering, disability, loss of enjoyment. And I
19 would suggest to you that whatever you believe that reasonable figure is in your
20 mind, that you need to then reduce it by what factor is that related to L5-S1 which
21 was going to be there anyway. What portion of that is related to this underlying disc
22 that needed surgical treatment, because, you know, it's not fair and the law tells you
23 that they're only entitled to recover what they show are damages relating from what
24 the doctor did wrong, not damages that would flow from the L5-S1 disc that needed
25 surgery anyway.

1 So whatever -- whatever you folks thinks (sic) is reasonable, believe
2 you need to reduce it -- if you can't tell whether it's L5 or L4-5 or it's a combination of
3 the both, you need to find out what that number is and then you need to reduce it by
4 half to attribute what's preexisting, what was going on anyway versus what is
5 actually cause or what is related to what Dr. Capanna has done.

6 Ladies and gentlemen, I want to thank you. You've taken this very
7 seriously. You've been attentive. I know it's been dull. I know as I tend to and we
8 all do, lawyers sometimes beat you guys over the head with stuff. You've seen it six
9 times and we don't think six is enough and we do it 12 times. I apologize for that.
10 But I want to thank you for your time and attention.

11 If I've done anything that has offended you or annoyed you or put you
12 off in any way, please take that out on me and not on Dr. Capanna. Okay, I
13 certainly haven't intended to do that, but if I have, it wouldn't be fair to the doctor if
14 you took that out on him.

15 This is kind of the hardest part of the case for me because I got to sit
16 down now and I don't get to stand up and say anything else, so -- you guys are
17 probably all happy, but it makes it hard for me because Mr. Prince gets to get up
18 and talk to you again because he's got the burden of proof. So he gets to go last
19 and talk to you. I got to sit there and be quiet.

20 So I think it's only fair and I'll ask that when Mr. Prince says something
21 to you or makes a representation to you or makes an argument to you, since I don't
22 get to counter it, I don't get to get up and say anything, ask yourself well what would
23 the response to that be? Wait a minute, you're saying X. What's the other side of
24 the coin?

25 MR. PRINCE: Objection, move to strike, inviting speculation, Judge.

1 THE COURT: Well overruled.

2 MR. LAURIA: Thank you.

3 Just ask yourself what would Mr. Lauria respond to that, how would he
4 respond.

5 Ladies and gentlemen, I -- again, I appreciate your time and I thank
6 you. I believe that you will do what is reasonable and fair in this case. Thank you
7 very much.

8 THE COURT: Thank you, Mr. Lauria.

9 All right. Ladies and gentlemen, we'll take like five or 10 minutes let you
10 stretch, use the restroom, and then we'll get you back in here to finish up with our
11 rebuttal argument.

12 Joel, you can just take them back in the back and use the restrooms
13 down by the deliberation room if you would, please.

14 [Jury out at 3:46 p.m.]

15 THE COURT: All right, we'll be at ease guys --

16 MR. LAURIA: We free, Judge, for a few?

17 THE COURT: Pardon?

18 MR. LAURIA: We free for a few?

19 THE COURT: Yeah. Yeah. Absolutely.

20 [Off the record at 3:46 p.m.]

21 [Proceedings resumed at 4:00 p.m.]

22 [Outside the presence of the jury]

23 THE COURT: You guys ready?

24 MR. PRINCE: Ready.

25 THE COURT: Okay. Go ahead, Joel.

1 Trying to figure out whether I think Mr. Rietz is going to be happy that
2 he's an alternate or not that he had to sit here for two weeks.

3 MR. PRINCE: Oh I know. I know, I -- I think both of them are going to have a
4 gasket over that. I really do. I think they're going to be real upset.

5 [Colloquy between counsel]

6 MR. LAURIA: You want to know how I feel about that, Judge?

7 THE COURT: (No audible response.)

8 [Colloquy between counsel]

9 THE MARSHAL: Is everyone ready?

10 MR. PRINCE: Yep.

11 THE COURT: Yep.

12 [Jury in at 4:02 p.m.]

13 THE MARSHAL: Jury's present, Your Honor.

14 THE COURT: Thank you. You all can be seated.

15 [Rebuttal closing argument by the plaintiff at 4:02 p.m. - previously transcribed]

16 [Bench conference begins at 4:39 p.m.]

17 MR. LAURIA: He's -- he just told the jury that I'm suggesting they not follow a
18 jury instruction --

19 THE COURT: Yeah, I don't think that's what his argument was.

20 MR. LAURIA: -- and --

21 THE COURT: His argument is about what would be a reasonable amount
22 and your argument's about what would be a reasonable amount, but I don't think he
23 was telling them don't follow the law.

24 MR. LAURIA: Yeah, I didn't (indiscernible) --

25 MR. PRINCE: Yeah, that --

1 THE COURT: Okay.

2 MR. PRINCE: -- well that -- that's what my reading is, is that he -- that's what
3 he's urging them to do.

4 MR. LAURIA: No.

5 THE COURT: Well, I disagree. So you can reword what you're trying to
6 convey. All right.

7 MR. LAURIA: Thank you.

8 THE COURT: All right.

9 MR. LAURIA: Is the objection sustained, Your Honor?

10 [Bench conference ends at 4:39 p.m.]

11 [Rebuttal closing argument by the plaintiff concludes at 4:41 p.m.]

12 THE COURT: Thank you, Mr. Prince.

13 All right. We're going to swear the officers to take charge of our jurors.

14 MR. TAYLOR: Do we take our stuff with us, our pad --

15 THE COURT: Yeah. Hold on one second.

16 [The Clerk swore in the officers to take charge of the jury during deliberations]

17 THE COURT: All right, folks, yes, gather up all your belongings. You're going
18 to take them back.

19 Based upon how we selected our jury, Mr. Rietz, you and Mr. Taylor
20 were the alternates. So when you guys go into the back hallway, you're going to
21 kind of peel off with Steve and he's going to give you some instructions. You're
22 under the same admonition not to talk about the case with anybody until such time
23 as we notify you to let you know the jury's finished their service.

24 The rest of you are going to go with Joel back to the deliberation room.
25 I realize it's getting late in the evening and I have no intention of keeping you here

1 late, but what I would like you to at least do as a group is get a foreperson elected,
2 have some conversation about starting your deliberations and then kind of let us
3 know, obviously if need be, when you want to come back tomorrow and then we'll
4 move forward from there, okay?

5 But you can all take all your belongings, go ahead and head back there.

6 MR. PRINCE: Judge, are they not going to deliberate at all tonight?

7 THE COURT: I feel your pain, Calvin, I feel your pain.

8 MR. LAURIA: No, he said they were -- he said they were going to go back at
9 least do some and then let him know --

10 MR. PRINCE: Okay. Good, I didn't quite catch that.

11 [The jury retired to deliberate at 4:43 p.m.]

12 THE COURT: Anything outside the presence?

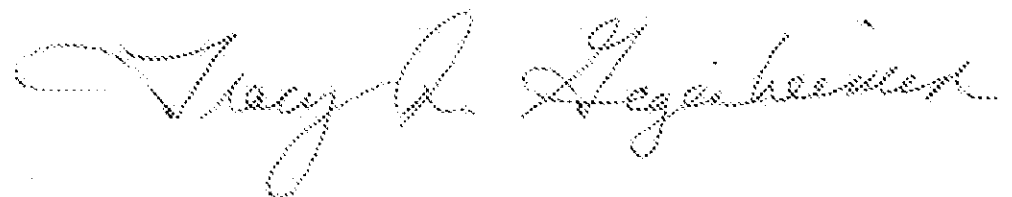
13 THE COURT: I would say --

14 MR. LAURIA: Is Capriotti's open?

15 THE COURT: I would say from a body language standpoint, Mr. Taylor was
16 the more upset of the two. Just leave us some contact --

17 [Proceedings concluded at 4:43 p.m.]

18 ATTEST: I hereby certify that I have truly and correctly transcribed the audio/visual
19 proceedings in the above-entitled case to the best of my ability.

20
21 

22
23 Tracy A. Gegenheimer, CER-282, CET-282
24 Court Recorder/Transcriber
25

DISTRICT COURT

SEP 02 2015 12:29 PM

CLARK COUNTY, NEVADA BY Deborah Miller

DEBORAH MILLER, DEPUTY

BEAU R. ORTH,

Plaintiff,

vs.

ALBERT H. CAPANNA, M.D.

Defendants.

CASE NO. : A-11-648041-C

DEPT. NO.: III

JURY VERDICT

We, the jury duly impaneled in the above entitled action, answer the Special Interrogatories as follows:

INTERROGATORY NO. 1:

Do you find by a preponderance of the evidence that Defendant was negligent in the care and treatment of Plaintiff?

Yes X

No _____

If you answered yes to Interrogatory Number 1, please proceed to Interrogatory Number 2. If you answered no to Interrogatory Number 1, please stop and have your foreperson sign and date this form.

INTERROGATORY NO. 2:

Do you find by a preponderance of the evidence that Defendant's negligence was the legal cause of Plaintiff's injuries?

Yes X

No _____

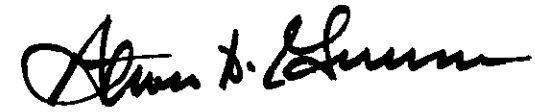
1
2
3 If you answered yes to Interrogatory Number 2, please proceed to Interrogatory Number 3. If
4 you answered no to Interrogatory Number 2, please stop and have your foreperson sign and date this
5 form.
6
7

8 **INTERROGATORY NO. 3:**

- 9 1. Past medical expenses \$ 136,300.49
10 2. Future medical expenses \$ 350,000.00
11 3. Past pain, suffering, disability and loss
12 of enjoyment of life \$ 1,800,000.00
13 4. Future pain, suffering, disability and loss
14 of enjoyment of life \$ 2,000,000.00
15
16

17 DATED this 2nd day of Sept, 2015.
18
19

20 
21 FOREPERSON
22
23
24
25
26
27
28



CLERK OF THE COURT

ROPP
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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 REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO RETAX AND
SETTLE THE COSTS

I.

INTRODUCTION

Pursuant to EDCR 2.20(e) and NRCP 6(a), Plaintiff's Opposition to Defendant's Motion to Retax and Settle the Costs in this matter was initially due on October 23, 2015. On October 22, 2015 Defendant graciously granted Plaintiff a 3-day extension to file his Opposition until October 26, 2015, even though this would shorten Defendant's time to file his Reply Brief. In spite of this extension, Plaintiff filed his Opposition on October 27, 2015. Plaintiff would undoubtedly argue that his Opposition was filed only one day after the stipulated deadline and therefore the delay should be overlooked by the Court. However, it would be patently unfair to

1 allow Plaintiff this additional time (a total of 21 days) to prepare and file his Opposition without
2 consequences, particularly since Defendant was statutorily permitted only 3 days to file his
3 initial Motion. Plaintiff clearly violated the rule regarding the deadline for his Opposition and
4 took advantage of the extension permitted by Defendant. Therefore, Defendant requests that
5 this Court disregard Plaintiff's overdue Opposition and grant Defendant's Motion to Retax and
6 Settle the Costs in its entirety, settling the costs at \$18,743.68.

7 In addition, Plaintiff's Opposition falls well short of demonstrating that the disputed
8 costs were "reasonable and necessary" expenses, particularly when applying the strict scrutiny
9 in determining allowable costs. In other words, Plaintiff is still unable to establish that many of
10 his costs are permitted by statute. Therefore, if this Court is not inclined to disregard Plaintiff's
11 Opposition, Defendant requests that this Court substantially reduce Plaintiff's claim for costs as
12 set forth in Defendant's Motion and the instant Reply.

13 II.

14 ARGUMENT

15 A. THIS COURT SHOULD DISREGARD PLAINTIFF'S OVERDUE OPPOSITION.

16 On October 1, 2015, Plaintiff filed and served his Memorandum of Costs, which included
17 approximately 160 pages of exhibits. Pursuant to NRS 18.110(4), Defendant had only 3 days
18 following receipt of Plaintiff's Memorandum to file a Motion to Retax and Settle the Costs. In
19 fact, had Defendant failed to file his Motion within that time period, he likely would have waived
20 appellate review of the issue. (See e.g. *Sheehan & Sheehan v. Nelson Malley & Co.*, 121 Nev. 481,
21 493 (2005).) Therefore, on October 6, 2015, Defendant filed and served his timely 14-page
22 Motion detailing all the costs set forth in Plaintiff's Memorandum of Costs that were statutorily
23 impermissible.

24 Pursuant to EDCR 2.20(e) and NRCP 6(a), Plaintiff's Opposition to Defendant's Motion to
25 Retax and Settle the Costs was due on October 23, 2015. On the evening of October 22, 2015
26 Plaintiff's counsel sent Defendant's counsel an email requesting an extension to oppose the
27 Motion until Monday, October 26, 2015. (See Exhibit A.) In spite of the \$125,000 that was at
28 stake with this Motion, Defendant's counsel responded to Plaintiff's counsel's email

1 approximately an hour later granting the extension. (See Exhibit B.) Nevertheless, Plaintiff did
2 not file his Opposition Brief until October 27, 2015, violating the extension agreement and
3 giving Defendant one less day (4 court days total) to prepare his Reply to Plaintiff's 18-page
4 Opposition. Plaintiff has provided no reason for his overdue Opposition to the Court or
5 Defendant. He did not contact Defendant to either request another extension or give Defendant
6 the courtesy of offering more time to file his Reply Brief.

7 The purpose of the briefing schedule and deadlines as set forth in NRCP and the local
8 District Court Rules is to prohibit a party from gaining an advantage by having additional time
9 to prepare and file their documents and at the same time imposing a shortened deadline on the
10 responding party. Plaintiff's advantage is particularly glaring in this circumstance because he
11 not only had 4 additional days to file his Opposition but also had ample time to prepare and
12 compile his Memorandum of Costs which was filed a month after the jury verdict on September
13 2, 2015. As noted above, Defendant only had 3 days to review and analyze Plaintiff's
14 Memorandum of Costs and prepare and file his Motion to Retax in response. Plaintiff took
15 advantage of Defendant's stipulated extension and ignored the agreed-upon deadline. If
16 Plaintiff is permitted to do so without consequences, the deadlines will be deemed meaningless
17 and parties could simply file their Briefs when it is convenient for them rather than when it is
18 required by statute.

19 As such, Defendant requests that this Court disregard Plaintiff's overdue Opposition to
20 Defendant's Motion to Retax the Costs and settle the costs in this matter at \$18,743.68 as
21 requested by Defendant.

22 **B. PLAINTIFF HAS FAILED TO ESTABLISH THAT THE COSTS DISPUTED BY**
23 **DEFENDANT ARE STATUTORILY PERMISSIBLE.**

24 Plaintiff's arguments in his Opposition attempting to support the disputed costs offer
25 him no assistance. Plaintiff seems to claim that because the case did not resolve prior to a jury
26 verdict, that he should be able to recover any and all claimed costs at any amount no matter
27 how unreasonable, unnecessary and even if they are statutorily impermissible. As noted in
28 Defendant's initial Motion, cost claims are to be strictly construed by the Court. The costs

1 disputed by Defendant are not permitted by Nevada law and should be deducted from Plaintiff's
2 cost award.

3 Reporter's Fees for EDCR 2.67 Conference

4 Plaintiff provides no authority to support his contention that the cost of the court
5 reporter for the EDCR 2.67 conference is a permissible cost—because there is no such
6 authority. NRS 18.005(2) is clear. It allows reimbursement for the cost of “reporters’ fees for
7 depositions, including a reporter’s fee for one copy of each deposition.” It does not permit
8 reporters’ fees for any other proceedings. Certainly if the legislature wanted to provide a
9 broader scope for this item of damages, it could have done so. Plaintiff unilaterally decided to
10 retain a court reporter for the EDCR 2.67 conference without Defendant’s knowledge or
11 consent. It was certainly permissible for Plaintiff to do so if he wished; he just cannot claim it as
12 part of his cost award.

13 TrialSmith, Inc. Charge

14 As noted in Defendant’s initial Motion, claimed costs must be necessarily incurred as a
15 matter of course in litigation, not merely helpful or advantageous in the particular case.
16 (*Bergmann v. Boyce*, (1993) 109 Nev. 670, 681-682.) Plaintiff’s expense to obtain deposition
17 transcripts unrelated to the instant case can hardly be seen as a necessary cost. In fact,
18 Defendant does not recall a single instance either in deposition or trial in which Plaintiff
19 impeached an expert witness with deposition testimony from another matter. Defendant
20 should not have to shoulder the burden for this discretionary cost and it should be excluded
21 from Plaintiff’s award.

22 Expert Fees

23 Defendant has already fully briefed the reasons why Plaintiff is entitled only to the
24 statutory limit of \$1,500.00 for two experts and why Plaintiff should receive nothing for Dr.
25 Ruggeroli’s unused future treatment letter. Defendant will not reiterate those points here.
26 However, Defendant must address a few of Plaintiff’s arguments.

27 Defendant certainly was not attempting to “re-argue” Dr. Cash’s status as a treating
28 physician in this matter as Plaintiff suggests. To the contrary, Defendant was demonstrating

1 that a treating physician like Dr. Cash is already familiar with a plaintiff's medical history, prior
2 treatment and potential future medical needs by virtue of the physician's treatment of the
3 plaintiff. A retained expert has no such knowledge and must review the case "from scratch." As
4 a result, most treating physicians spend little to no time for additional review or trial
5 preparation. Dr. Cash, on the other hand, spent nearly 30 hours for review of documents and
6 trial preparation at a cost of \$30,000+. This does not include the \$12,000 per day cost for time
7 spent in trial. It is the duty of this Court to scrutinize Plaintiff's claimed costs. (*Farmer v.*
8 *Arabian American Oil Co.* (1964) 379 U.S. 227, 236.) Even if this Court is inclined to award
9 Plaintiff more than the statutory maximum of \$1,500 for each expert, it should look very
10 suspiciously at the charges for Dr. Cash. If there ever was an instance to reduce a cost item, Dr.
11 Cash's \$47,250.00 in expert fees should be it.

12 In addition, Plaintiff is still unable to provide any evidence as to the additional \$1,250
13 that the Keating Law Group allegedly paid Dr. Rimoldi. Apparently Plaintiff's counsel contacted
14 Keating Law Group about this cost and is still unable to produce documentation supporting this
15 expense. As a result this claim should be excluded from Plaintiff's cost award.

16 Fees For Licensed Process Server

17 Defendant has reviewed the \$420.00 in subpoena fees again and will no longer dispute
18 this charge.

19 Compensation for the Official Reporter

20 Plaintiff fails to divulge to this Court that the burden is on him to demonstrate that the
21 trial transcripts were a necessary expense rather than a mere convenience for counsel. (*Bucalo*
22 *v. East Hampton Union Free School District* 238 F.R.D. 126 (E.D.N.Y. 2006)) It has been well-
23 established in case law that the cost of a trial transcript does not ultimately become a necessary
24 and taxable expense simply because a party orders a transcript and uses it during trial. In fact,
25 some of the cases that Plaintiff cites support Defendant's position in that regard. (*e.g. Picket v.*
26 *Tyson Fresh Meats, Inc.* 2004 WL 3712721, at *4 (M.D. Ala. Aug. 3, 2004)--"[C]ounsel's
27 reference to the transcripts during the trial does not testify to the need for them. [citation]
28 Considering the lengthy nature of the trial, counsel likely used the daily transcripts to refresh