IN THE SUPREME COURT OF THE STATE OF NEVADA

ALBERT H. CAPANNA, M.D., Appellant/Cross-Respondent, vs. BEAU R. ORTH, Respondent/Cross-Appellant.	Case No. 69935 District Court Case No. A648041
ALBERT H. CAPANNA, M.D., Appellant, vs. BEAU R. ORTH, Respondent.	Case No. 70227

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

DENNIS M. PRINCE, ESQ.
Nevada Bar No. 5092
KEVIN T. STRONG, ESQ.
Nevada Bar No. 12107
EGLET PRINCE
400 South 7th Street, 4th Floor
Las Vegas, NV 89101
Tel.: 702-450-5400
Email: eservice@egletlaw.com
Attorneys For Respondent/Cross-Appellant, Beau Orth

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OPP
DENNIS M. PRINCE, ESQ.
Nevada Bar No.: 5092
TRACY A. EGLET, ESQ.
Nevada Bar No.: 6419
DANIELLE TARMU, ESQ.
Nevada Bar No.: 11727
EGLET PRINCE
400 South Seventh Street, 4th Floor
Las Vegas, NV 89101
(702) 450-5400
Attorneys for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

BEAU R. ORTH, Plaintiff, vs. ALBERT H. CAPANNA, M.D.; DOES I through X; ROE BUSINESS ENTITIES I through X, inclusive, Defendants.	CASE NO.: A-11-648041-C DEPT. NO.: III Hearing Date: July 29, 2015 Hearing Time: 9:00 a.m.

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTIONS IN LIMINE

COMES NOW, Plaintiff, BEAU R. ORTH, by and through his attorneys of record, DENNIS M. PRINCE, ESQ., TRACY A. EGLET, ESQ., and DANIELLE TARMU, ESQ. of the law firm of EGLET PRINCE; and hereby files his *Opposition to Defendant's Motions in Limine.*

MEMORANDUM OF POINTS AND AUTHORITIES

I.

FACTUAL BACKGROUND/PROCEDURAL HISTORY

Beau Orth ("Orth") was a student athlete at the University of Nevada, Las Vegas. At the time, Orth attended UNLV on a full football scholarship, where he played the position of wide receiver. On February 3, 2009, Orth was diagnosed with a very small (5mm) left paracentral disc protrusion at L5-S1, causing a very mild lateral displacement of the left S1 nerve root, following a football injury. The protrusion worsened over time and caused Orth pain and numbness into his lower left extremity. On February 18, 2010, Orth underwent a comparison MRI study of his lumbar spine. The comparison study revealed relatively no change. Orth underwent conservative care for many months, including physical therapy and epidural injection therapy to alleviate his pain. However, the conservative care failed to alleviate his pain and numbness.

On September 1, 2010, Orth was referred to Dr. Capanna, a neurosurgeon, by the UNLV Athletic Department for consultation. Dr. Capanna performed an examination of Orth and reviewed the lumbar MRI films from December 3, 2009 and February 18, 2010. Based on his review and examination, Dr. Capanna diagnosed Orth with focal left lumbar L5-S1 disc injury. Dr. Capanna ordered an EMG study and an upright MRI of Orth's lumbar spine, and instructed him to return once the studies were complete.

On September 17, 2010, Orth returned to Dr. Capanna for follow-up care. Dr. Capanna reviewed the MRI findings. Based on the findings, Dr. Capanna recommended Orth undergo a lumber discectomy at L5-S1. Accordingly, on September 17, 2010, Orth underwent a left microlumbar L5-S1 laminectomy and left L5-S1 microdisectomy by Albert Capanna, M.D. at University Medical Center.

On September 29, 2010, Orth returned to Dr. Capanna for a post-surgery office visit. Orth reported he was in extreme pain. Dr. Capanna noted on examination that Orth's body was angled to the left. Dr. Capanna ordered a MRI with and without contrast, and prescribed a Medrol Dosepak for Orth.

On October 6, 2010, Orth underwent follow-up MRIs at Steinberg Diagnostic Medical Imaging. On October 7, 2010, Dr. Capanna called Orth and advised that the MRI showed significant edema. Orth was prescribed antibiotics for inflammation due to any infection that may have been present. At no time did Dr. Capanna note that the MRI showed postsurgical changes at L4-5, when the surgery scheduled by Dr. Capanna was supposed to be performed at L5-S1. According to Dr. Capanna's expert report, "the surgical procedure was done at the wrong level, one level cephalad, that is the L4-5 level." *See* Reynold L. Rimoldi, M.D.'s IME Report, at pg. 5 (attached hereto as **"Exhibit 1"**). On October 19, 2010, Orth presented to Andrew Cash, M.D. for a second opinion. Dr. Cash examined Orth and reviewed the MRI of October 6, 2010. Dr. Cash noted Orth had a painful stance, was unable to walk very well and was basically in a crippled state. Dr. Cash advised Orth that the MRI showed he was status post left laminectomy at L4-5 with a 4mm non-enhancing fragment surrounded by enhancing scar tissue. Dr. Cash recommended surgical intervention at L4-5 to repair the herniation caused by the surgery performed by Dr. Capanna, and also repair of the disc bulge at L5-S1, which Dr. Capanna failed to address.

On October 22, 2010, Orth underwent revision by Dr. Cash at Southern Hills Hospital. Beau filed his Complaint on September 8, 2011. This matter is set for trial on August 17, 2015.

II.

LEGAL ARGUMENT

1. Plaintiff does not oppose Defendant's Subsection 1

Plaintiff does not oppose Defendant's subsection 1 regarding malpractice insurance coverage.

2. Evidence Relating to Other Claims and Lawsuits Involving Defendant is Relevant to Rebut Defendant's Qualifications as an Expert Witness and Medical Provider

In reliance upon N.R.S. 48.045(2), Defendant argues that evidence relating to other claims and lawsuits involving Defendant is inadmissible to prove conformity with the past conduct in the present case. N.R.S. 48.045(2) provides as follows:

> Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Prior misconduct is admissible only if it is relevant for some purpose other than to show that the accused probably committed the crime because he is of a criminal character. *See McMichael v. State,* 94 Nev. 184, 577 P.2d 398 (Nev. 1978). The purpose of evidence relating to other claims and lawsuits will be used to rebut the qualifications of Defendant as a medical provider, which are squarely at issue in this case. In addition, as Defendant himself intends to present expert testimony regarding standard of care, his qualifications as an expert witness are at issue. *See* Albert H. Capanna, M.D.'s Designation of Expert Witness (attached hereto as **"Exhibit 2"**).

3/4. The Nevada State Board Medical Examiner's Investigation is Relevant and Should Not Be Excluded Because The Licensure Status of Defendant as a Physician is at Issue

Without any legal authority, Defendant argues that this court should preclude evidence of the Nevada State Board Medical Examiner's complaint filed by Plaintiff. As stated, Defendant intends to present expert testimony regarding standard of care. The licensure status of a

physician who gives an expert opinion is admissible to impeach the doctor's opinion. *See Linton v. Davis,* 887 N.E.2d 960, 969 (Ind. Ct. App. 2008); *Sneed v. Stovall,* 156 S.W.3d 1 (Tenn. Ct. App. 2004). In addition, if Defendant holds himself to be highly respected and reputable in the medical community, his qualifications as physician are at issue. Based on NSBME's investigation into Plaintiff's complaint, Defendant's licensure status as a physician is at issue. Accordingly, Plaintiff should not be precluded from offering evidence, including testimony of his expert witnesses, regarding NSBME's investigation.

5. Defendant's Argument Regarding Demonstrative Evidence is Unclear

Plaintiff cannot adequately address Defendant's argument regarding the disclosure of the demonstrative evidence Plaintiff intends on using during his opening statement because it is unclear to Plaintiff what Defendant is requesting. In Plaintiff's NRCP 16.1(a)(3) pre-trial disclosure, Plaintiff identified the demonstrative exhibits he may offer at trial. Despite this, Defendant's motion failed to specifically identify any of the demonstrative exhibits that he has an issue with. Plaintiff is agreeable to providing Defendant with any demonstrative evidence he intends to use 24 hours prior to opening statement, except for the actual PowerPoint presentation used.

6. Plaintiff does not oppose Defendant's Subsection 6

Plaintiff does not oppose Defendant's subsection 6 regarding evidence of and claims for lost wages.

7. Nevada Law Does Not Prohibit Lay Witnesses From Offering Testimony as to Causation

Defendant argues that Plaintiff and/or his other lay witnesses should be precluded from offering testimony about "medical matters." *Defendant's Motions in Limine,* at 8:24-25. More specifically, Defendant argues that Plaintiff and other lay witnesses should be prevented from

presenting testimony regarding standard of care, the deviation therefrom, and causation. *Id.* at 8:21-22. Both parties agree that Plaintiff and other lay witnesses may present testimony regarding Plaintiff's damages. Plaintiff, however, should be permitted to present testimony regarding causation.

According to the Nevada Supreme Court, "[a]s a general rule, a plaintiff must use expert testimony to establish medical malpractice." *Jain v. McFarland,* 109 Nev. 465, 474 (1993). Through testimony from Plaintiff's expert witnesses, this is exactly what Plaintiff intends to do at trial. However, Nevada does not prohibit Plaintiff, in addition to his expert witnesses, from presenting lay testimony regarding causation, which includes testimony from the Plaintiff. *See Prabhu v. Levine,* 112 Nev. 1538, 1544 (1996)(stating that "[c]ausation in a medical malpractice case may also be proved with expert medical testimony."). According to N.R.S. 50.265, so long as lay witness testimony is "[r]ationally based on the perception of the witness; and . . . [h]elpful to a clear understanding of the testimony of the witness or the determination of a fact in issue[,]" it should be permitted at trial. This court should not preclude lay witness testimony so long as it meets the standard set forth in N.R.S. 50.265. It is for the jury to decide what testimony it accepts as credible.

8. <u>Plaintiff does not oppose Defendant's Subsection 8</u>

Plaintiff does not oppose Defendant's subsection 8 regarding the residence of defense counsel.

9. <u>Plaintiff Should Not Be Precluded From Presenting to the Jury Every Instance in Which Defendant's Conduct Failed to Meet the Standard of Care</u>

Defendant's argument that his acts of negligence that are not the legal and proximate cause of harm to Plaintiff should be precluded is nothing more than an attempt to prevent Plaintiff from presenting the totality of the circumstances to the jury. Plaintiff should not be

precluded from presenting to the jury every instance Defendant's conduct failed to meet the standard of care. For instance, Plaintiff should not be precluded from presenting evidence to the jury that Defendant incorrectly identified the location of Plaintiff's L5-S1 level; that Defendant failed to obtain Plaintiff's informed consent to perform surgery at L4-5; and that Defendant failed to correctly note the level he actually performed Plaintiff's surgery. Finally, all of Defendant's acts of negligence are relevant to his credibility.

10. <u>Evidence Regarding Defendant's Personal Choices Are Relevant to Determine Whether Defendant's Personal Choices Differ From the Standard of Care as Asserted by the Defendant</u>

Evidence of personal practices of an expert witness do not by itself establish standard of care, although they can be used to assess the credibility of experts. *See Condra v. Atlanta Orthopaedic Group, P.C.* 285 Ga. 667, 672 (Ga. 2009); *Bergman v. Kelsey*, 873 N.E.2d 486, 507 (stating that a "medical expert's personal practices may well be relevant to that expert's credibility, particularly when those practices do not entirely confirm to the expert's opinion as to the standard of care."). Defendant's attempt to exclude evidence of personal practices would prevent Plaintiff's counsel from questioning Defendant as to his own personal practices. Consequently, if Plaintiff were prevented from questioning Defendant as to his own personal practices, Plaintiff would wrongfully be prevented from establishing that Defendant's personal practices differ from the standard of care as asserted by the Defendant.

Defendant also claims that evidence regarding the personal choices of Plaintiff's expert witnesses would mislead the jury. *Defendant's Motions in Limine,* at 12:1. Any potential confusion created by the admission of such evidence may be remedied through the use of jury instructions. Such instructions, for example, clearly define the legal meaning of standard of care; enunciate the principal that a mere difference in the views between physicians does not itself prove malpractice; and clarify concepts such as burden of proof and credibility of

witnesses. Accordingly, this court should not preclude Plaintiff's expert witnesses from presenting testimony as to their personal choices.

11. Defendant Failed to Provide this Court with Any Legal Authority in Support of his Position that Plaintiff's Expert Witnesses Should Be Limited to the Opinions Provided at the Time of Deposition

Defendant's request for a court order limiting expert witnesses testimony to that from his/her deposition will provide Defendant the opportunity to argue to the jury that Plaintiff's expert witnesses violated a court order. Not surprisingly, Defendant failed to provide this court with any legal authority to support his position. Assuming that an expert's testimony changed at trial, even without good cause, the appropriate method is to impeach the witness with his/her deposition and/or expert report, not to argue to the jury that the witness violated a court order. Conversely, assuming that Plaintiff's expert did in fact change his/her opinion, with good cause, Defendant's counsel argument to the jury that Plaintiff's expert violated this court's order would unduly prejudice Plaintiff as it would poison the jury.

12. Plaintiff Will Not Forego His Right to the Exception to the 90 Day Cutoff Rule for Expert Witness Disclosures Provided by NRCP 16.1(a)(2)(C)(i)

NRCP 16.1(a)(2)(C)(i) provides that in the "absence of extraordinary circumstances," expert disclosures shall be made at least 90 days before the discovery cut-off date. While Plaintiff does not intend to present testimony from an untimely identified expert witness, for the simple reason that there is an exception to the 90 day cutoff rule, albeit an extremely high standard to meet, Plaintiff will not forego his right to this exception if the circumstances were presented.

EGLET PRINCE

13. Sequence of Testifying Witnesses

As to subsection 13 regarding the sequence of testifying witness, Plaintiff's counsel proposes that we will inform Defendant's counsel the witnesses we intend to call the night before we call them.

14. Plaintiff does not oppose Defendant's Subsection 14

Plaintiff does not oppose Defendant's subsection 14 barring non-party witnesses from the courtroom, except expert witnesses may remain.

15. Barring Cumulative Testimony

As to subsection 15 barring any cumulative testimony regarding the standard of care and causation, Plaintiff's counsel proposes that we will inform Defendant's counsel the witnesses we intend to call the night before we call them, which will allow Defendant's counsel to make an objection before trial begins the following day, outside the presence of the jury, regarding any concerns of cumulative testimony. This court can entertain argument and rule at that time.

16. Plaintiff Should Not Be Precluded From Arguing Negative Inferences That Are Supported by the Record

Both parties should be precluded from commenting on a party's failure to call a witness at trial if the parties agree, or if this court determines, that the witness' testimony would be cumulative. However, absent this situation, Plaintiff objects to being prevented from arguing negative inferences that are supported by the record, which includes failure to call certain witnesses. *See Glover v. Eighth Judicial District Court of Nev.*, 125 Nev. 691, 705 (2009).

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III.

CONCLUSION

Based upon the foregoing law and analysis, Plaintiff respectfully requests that this Honorable Court Deny Defendant's Motions in Limine: 2, 3, 4, 5, 7, 9, 10, 11, 12, 13, 15, and 16.

DATED this 9th day of July, 2015.

EGLET PRINCE

DENNIS M. PRINCE, ESQ.
Nevada Bar No.: 5092
TRACY A. EGLET, ESQ.
Nevada Bar No.: 6419
DANIELLE TARMU, ESQ.
Nevada Bar No.: 11727

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of EGLET PRINCE, and that on this 9th day of July, 2015, I did cause a true copy of **PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTIONS IN LIMINE** to be e-filed and e-served through the Eighth Judicial District EFP system pursuant to the Electronic Filing and Service Order entered on the Court's Docket in the above referenced matter.

Anthony D. Lauria, Esq.
Kimberly L. Johnson, Esq.
LAURIA TOKUNGA GATES & LINN, LLP
601 South Seventh Street, 2nd Floor
Las Vegas, Nevada 89101
Attorneys for Defendant Albert H. Capanna

An employee of EGLET PRINCE

EGLET PRINCE

EXHIBIT "1"

NEVADA Orthopedic & Spine Center

2650 N. Tenaya Way, Ste 301
Las Vegas, NV 89128

1505 Wigwam Pkwy., Ste 330
Henderson, NV 89074

Patient Name: Beau Orth
Patient ID: 496711
Date of Birth: 11/02/1989
Date of Examination/Report: 07/17/2013

INDEPENDENT MEDICAL EVALUATION

Beau Orth was seen for an Independent Medical Evaluation in my office at Nevada Orthopedic & Spine Center at 2650 N. Tenaya, Suite 301, Las Vegas, Nevada 89128 on 7/17/13 for the purposes of my rendering opinions in the way of an Independent Medical Evaluation. Prior to performing the Independent Medical Evaluation, I explained to him that I would not be entering in to a formal physician/patient relationship and that I was seeing him on a one-time basis to perform an evaluation of alleged complaints that he states arose out of a 9/17/10 surgical procedure that was performed by Dr. Albert Capanna. Once Mr. Orth understood that I would not be entering in to a formal physician/patient relationship, I proceeded with the Independent Medical Evaluation which consisted of taking a history from Mr. Orth which included a history of the chief complaint as well as a past medical history, reviewing medical records, performing a physical exam, reviewing diagnostic imaging, and formulating opinions in this matter.

HISTORY OF PRESENT ILLNESS: Mr. Orth is a 23-year-old gentleman. He is employed as a store manager. He indicates that while participating in athletic activities, namely football, at the University of Nevada Las Vegas, he sustained a lower back injury. He complained of back pain and left-sided lower extremity pain. After receiving conservative treatment, he presented to Dr. Capanna on 9/1/10. Dr. Capanna had reviewed an MRI scan which noted an L5-S1 disc protrusion. Dr. Capanna ordered nerve conductions and EMGs which suggested a left-sided S1 radiculopathy. Based on the patient's clinical impression and the diagnostic studies, Dr. Capanna elected to proceed with a left-sided decompression at L5-S1. On 9/17/10, Dr. Capanna performed, what was dictated as, a left L5-S1 microdiscectomy. Apparently the patient had persistent pain and a follow up MRI with gadolinium showed postoperative scar tissue at L4-5. It appears that no surgery was performed at L5-S1. The patient went on to have a second surgery in October of 2010 by Dr. Andrew Cash in which a two-level decompression was performed, that being at L4-5 and L5-S1. The patient continues to have back and left leg pain. For further details regarding the treatment the patient received for his lumbar spine and left lower extremity pain, please see the medical record review listed below.

PAST SURGICAL HISTORY: Remarkable for the two lumbar spine surgeries that I have mentioned, one in September of 2010 and the other in October of 2010.

PAST MEDICAL HISTORY: Unremarkable.

MEDICATIONS: Multivitamins only.

ALLERGIES: Penicillin.

REVIEW OF SYSTEMS: Noncontributory.

FAMILY HISTORY: Unremarkable.

SOCIAL HISTORY: He denies tobacco use. He drinks ethanol on rare occasions. The patient is employed as a store manager having received a degree in Marketing from the University of Nevada Las Vegas.

MEDICAL RECORD REVIEW:

8/25/08 through 10/22/10 – Handwritten notes from the UNLV athletic training facility as well as the general medical assessment team at University of Nevada Las Vegas. This Claimant is seen on multiple occasions for various conditions between 8/25/08 and 10/22/10. Approximately 130 visits are noted between these two dates. The patient is seen for multiple issues. He is an UNLV football player and is seen for upper extremity symptoms, ankle sprains, injuries to his left great toe, as well as general medical issues such as upper respiratory tract infections; however, the majority of these visits are for issues pertaining to his lumbar spine. It appears from looking at other notes that this patient sustained, as a result of his football activities, issues with his lumbar spine and left lower extremity. These handwritten notes over the approximate two-year period noted from August of 2008 through October of 2010 concern athletic trainer and evaluations as well as referrals to various healthcare specialists for treatment regarding his lower back and his left leg.

2/3/09 – MRI scan of the lumbar spine from 2/3/09 and it shows a very small left L5-S1 disc protrusion.

2/19/10 – MRI of the lumbar spine is comparable to the 2009 scan, that is a small left-sided L5-S1 disc protrusion.

2/23/10 – Ruggeroli, M.D., pain specialist – The patient is seen and diagnosed with a left L5-S1 disc hernia versus protrusion and recommends a left-sided L5-S1 epidural steroid injection.

2/24/10 – Ruggeroli, M.D. – Performs left-sided L5-S1 transforaminal epidural steroid injection.

3/9/10 – Ruggeroli, M.D. – The patient is seen status post the injection. The injection has helped him with regards to his back and left leg pain. The patient will follow up on an as-needed basis.

8/11/10 – Ruggeroli, M.D. – The patient is seen and the diagnosis is left-sided L5-S1 disc herniation. He recommends additional injections into the lumbar spine.

8/13/10 – Ruggeroli, M.D. – Performs a left-sided L5-S1 transforaminal epidural steroid injection.

8/26/10 – Ruggeroli, M.D. – The patient is seen with the L5-S1 disc herniation. There was no relief with the epidural steroid injection. No further injections are recommended.

9/1/10 – Capanna, M.D. – The patient is seen and Dr. Capanna notes in his history that he is complaining of back and left leg pain. It seems to be related when he switched from a wideout to a linebacker. Discussions regarding L5-S1 microdiscectomy were made. Dr. Capanna recommends EMGs and flexion/extension MRI prior to making final decisions regarding surgery.

9/2/10 – MRI scan of the lumbar spine with flexion/extension views shows an L5-S1 disc protrusion, only mild stenosis.

9/8/10 – Germin, M.D. – Performs nerve conductions and EMGs left lower extremity, suggest left-sided S1 radiculopathy.

9/17/10 – Capanna, M.D. – Performs a left-sided L5-S1 microdiscectomy. This is done after the patient undergoes a preoperative evaluation. Apparently, the patient does not do well. There are multiple phones call into Dr. Capanna's office indicating that the patient has persistent pain.

10/6/10 – MRI with gadolinium shows postoperative scar tissue and a recurrent L4-5, which is the first time that the L4-5 level is mentioned having an issue. All the previous MRIs suggested L5-S1 as the problematic level. This states L4-5 was operated on on the left side and there is a recurrent disc herniation there.

10/12/10 – Cash, M.D. – The patient is seen status post surgery by Dr. Capanna. The patient had one week of relief, but now has persistent left leg pain. He recommends surgery for a recurrent disc herniation.

10/19/10 – Cash, M.D. – Performs a preoperative evaluation.

10/22/10 – Cash, M.D. – Performs revision left-sided L4-5 discectomy. There is epidural fibrosis noted at L4-5. There is a disc herniation at L4-5 and a bulge at L5-S1. Dr. Cash decompresses both levels, L4-5 and L5-S1 on the left.

Dr. Cash sees the patient in postoperative visit two weeks postop and approximate six-week postop on 11/3/10 and 12/1/10 respectively. On 12/1/10, he recommends physical therapy and utilizing a brace when out of bed.

12/9/10 – The patient is seen for physical therapy modalities by physical therapist Keith Kleven.

4/19/11 – Cash, M.D. – The patient is seen and the diagnoses are postlaminectomy syndrome and lumbar radiculopathy. The patient is indicated as doing well and will follow up in three months.

8/28/12 – Cash, M.D. – The patient is seen and the diagnoses are postlaminectomy syndrome and left lower lumbar radiculopathy. MRI scan of the lumbar spine with and without contrast is recommended.

8/31/12 – MRI of the lumbar spine with and without gadolinium contrast shows a small left-sided L5-S1 disc protrusion and a bulge at L4-5 as well as postoperative changes.

9/4/12 – Cash, M.D. – The patient is seen and Dr. Cash notes the MRI findings. He notes that there is disc dehydration at L4-5 and L5-S1. The patient is diagnosed with a postlaminectomy syndrome and lumbar radiculopathy. Recommendations are to follow up on an as-needed basis.

CURRENT COMPLAINTS: The patient's current complaints are of a lumbar spine pain eccentrically placed to the left of the midline with a pins and needles, stabbing, and numbness in his left leg. He indicates that currently his pain is a 2 out of 10 on a visual analog scale with 0 being no pain and 10 being the worst pain that he can imagine. At its worst, it is a 10 out of 10. He indicates that 70% of his pain is in his back and 30% is in his left leg. He indicates that he can sit for 30 minutes, stand for 30 minutes, ride in a car for one hour, and walk two to three blocks. He indicates that exercise, sitting too long, and activities such as washing a car make his pain worse. He indicates doing nothing makes it better.

PHYSICAL EXAMINATION: On physical examination, the patient is observed to be ambulating without use of lateral support. He is not using any type of lumbar spine a brace. On inspection, his lumbar spine shows a well-healed midline incision consistent with the two previous decompressions. He has diffuse tenderness that is difficult to localize throughout his lumbar spine. He has 10% limitation of lumbar spine range of motion based on my estimate. Sensory and motor evaluations in key dermatomes and myotomes tested from L3 through S1 are intact. Reflexes are 2/4 and symmetric at the patella and Achilles. Straight leg raising is negative for radicular findings.

I have reviewed previous studies:

The diagnostic imaging that I have reviewed in chronological order presented to me on DVD disc are as follows.

9/2/10 – MRI scan of the lumbar spine shows a small left-sided L5-S1 disc protrusion.

10/6/10 – MRI scan of the lumbar spine shows a left L4-5 laminotomy that was done. There is no laminotomy at L5-S1.

10/12/10 – X-rays of the lumbar spine show changes consistent with an L4-5 laminotomy.

11/3/10 – Radiographs of the lumbar spine that show two-level decompression, left-sided, by Dr. Cash.

12/1/10 – X-rays of the lumbar spine show changes consistent with left-sided L4-5 and L5-S1 laminotomy.

2/8/11 – X-rays of the lumbar spine show disc height diminution L4-5 and L5-S1 and postoperative changes.

8/28/12 – X-rays of the lumbar spine with flexion/extension views of the lumbar spine that show no instability, disc height diminution L4-5 and L5-S1.

DIAGNOSIS: Left-sided L5-S1 disc herniation with a postlaminectomy syndrome.

DISCUSSION/OPINIONS: As is noted based on my evaluation, this patient had an L5-S1 disc protrusion on 9/2/10. He had surgery to his lumbar spine. It was stated it was done at L5-S1. However, postoperative scans show that the surgical procedure was performed at L4-5. Apparently the patient did not improve and the patient had a second decompression at L4-5 and L5-S1. Follow up radiographs show postoperative changes. The patient is now here for evaluation and it is clear that he has ongoing symptoms subjectively and the objective findings on his scans show postlaminectomy changes.

This patient did have an L5-S1 disc protrusion. It was appropriate for Dr. Capanna to make the recommendation for surgery. However, the surgical procedure was done at the wrong level, one level cephalad, that is the L4-5 level. Certainly the patient required a second surgery. In my opinion, the patient's condition postoperatively is satisfactory indicating that the patient has normal neurologic function and can perform all activities of daily living; although, he complains of subjective pain. Certainly the patient required a second surgical procedure by Dr. Andrew Cash after the first surgical procedure was done at the wrong level. Certainly, to a reasonable degree of medical probability, this patient would have had ongoing symptoms to some degree even if the surgical procedure was done at the correct level the first time. Certainly the patient was subjected to a second anesthetic and had a longer time to reach maximum medical improvement secondary to the need for a second decompressive surgery. The patient is quite functional and performing activities as a manager that he is able to perform without restriction.

He is on no medications at this time and, in my opinion, has had a satisfactory result status post the two previous lumbar spine procedures, albeit the first one being performed at the incorrect level, that being one level cephalad to what was meant to be.

If could be of any further assistance, please feel free to contact me.

REYNOLD L. RIMOLDI, M.D.

RLR/rp

EXHIBIT "2"

DOW
JOHN H. COTTON, ESQ.
Nevada Bar No. 005268
E-mail: JhCotton@cdwnvlaw.com
JOHN J. SAVAGE, ESQ.
Nevada Bar No. 011455
E-mail: JSavage@cdwnvlaw.com
COTTON, DRIGGS, WALCH,
HOLLEY, WOLOSON & THOMPSON
400 South Fourth Street, Third Floor
Las Vegas, Nevada 89101
Telephone: 702/791-0308
Facsimile: 702/791-1912

Attorneys for Defendant
Albert H. Capanna, M.D.

DISTRICT COURT

CLARK COUNTY, NEVADA

BEAU R. ORTH,

Plaintiff,

v.

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

Defendants.

Case No.: A-11-648041-C
Dept. No.: XXVI

ALBERT H. CAPANNA, M.D.'S DESIGNATION OF EXPERT WITNESSES

Defendant ALBERT H. CAPANNA, M.D., by and through his attorneys of record, John H. Cotton, Esq. and John J. Savage, Esq., of the law firm COTTON, DRIGGS, WALCH, HOLLEY, WOLOSON & THOMPSON, hereby designate the following expert witnesses, to be called in his defense as necessary to refute the allegations against him in this matter:

1. **Albert H. Capanna, M.D.**
c/o Cotton, Driggs, Walch, Holley, Woloson & Thompson
400 S. Fourth St., 3rd Floor
Las Vegas, Nevada 89101

Dr. Capanna is expected to testify that no act or omission on his part deviated from the standard of care with respect to the care and treatment he provided to Beau Orth.

2. **Allan Joel Belzberg, B.Sc., M.D., FRCSC**
8419 Greenspring Avenue
Baltimore, MD, 21208

Dr. Belzberg is expected to testify as to his opinions and findings regarding the care provided to Beau Orth, as alleged in Plaintiff's Complaint. Dr. Belzberg's opinions and findings are based on his review of the medical records disclosed in this matter and the pleadings on file in this matter. Dr. Belzberg's opinions and findings are further based on his education, experience and training. Dr. Belzberg has reserved the right to comment on other opinions or materials that he has not yet seen, or any additional discovery that is completed in this case.

Dr. Belzberg is expected to testify that no act or omission on the part of Dr. Capanna deviated from the standard of care with respect to the care and treatment Dr. Capanna provided to Beau Orth. Dr. Belzberg is further expected to provide expert testimony to rebut the testimony of Plaintiff's expert witnesses. Dr. Belzberg's Expert Report is attached hereto as *Exhibit A*. A copy of Dr. Belzberg's Curriculum Vitae is attached hereto as *Exhibit B*. A copy of Dr. Belzberg's Fee Schedule, which sets forth his rate of compensation as an expert witness, is attached hereto as *Exhibit C*. There is no record of Dr. Belzberg's testimony history.

3. **Marc D. Kaye, M.D.**
Collier Radiology Consultants
2805 East Oakland Park Blvd., Suite 452
Ft. Lauderdale, FL 33306

Dr. Kaye is expected to testify as to his opinions and findings regarding the care provided to Beau Orth, as alleged in Plaintiffs' Complaint. Dr. Kaye's opinions and findings are based on his review of the medical records disclosed in this matter and the pleadings on file in this matter. Dr. Kaye's opinions and findings are further based on his education, experience and training. Dr. Kaye has reserved the right to comment on other opinions or materials that he has not yet seen, or any additional discovery that is completed in this case.

Dr. Kaye is expected to testify that Mr. Orth's MRI from October 6, 2010 shows that Dr.

Capanna did operate at L5-S1 and did remove the small disc fragment seen on the pre-operative MRI exams. Dr. Kaye is further expected to provide expert testimony to rebut the testimony of Plaintiff's expert witnesses. Dr. Kaye's Expert Report is attached hereto as *Exhibit D*. A copy of Dr. Kaye's Curriculum Vitae is attached hereto as *Exhibit E*. A copy of Dr. Kaye's Fee Schedule, which sets forth his rate of compensation as an expert witness, is attached hereto as *Exhibit F*. There is no record of Dr. Kaye's testimony history.

4. **Reynold L. Rimoldi, M.D.**
2650 North Tenaya Way, Suite 301
Las Vegas, NV 89128

Dr. Rimoldi is expected to provide testimony concerning the facts and circumstances surrounding this matter, including, but not limited to, the medical examination of Plaintiff Beau Orth that he performed on July 17, 2013 and the injuries alleged in Plaintiff's Complaint. Dr. Rimoldi's opinions and findings are based on his examination of Plaintiff, his review of the medical records disclosed in this matter, and the pleadings on file in this matter. Dr. Rimoldi's opinions and findings are further based on his education, experience, and training. Dr. Rimoldi has reserved the right to comment on other opinions or materials that he has not yet seen, or any additional discovery that is completed in this case.

Dr. Rimoldi is expected to testify consistent with his IME report. Dr. Rimoldi's IME report is attached hereto as *Exhibit G*. A copy of Dr. Rimoldi's Curriculum Vitae is attached hereto as *Exhibit H*. A copy of Dr. Rimoldi's Fee Schedule, which sets forth his rate of compensation as an expert witness, is attached hereto as *Exhibit I*. Finally, a copy of Dr. Rimoldi's four year testimonial history, for trials and depositions, is attached hereto as *Exhibit J*.

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5. Any Expert designated by any other party

Defendant reserves the right to elicit expert testimony from any other expert witness designated by any other party to this action.

Dated this 8th day of August 2013.

COTTON, DRIGGS, WALCH, HOLLEY, WOLOSON & THOMPSON

JOHN H. COTTON, ESQ.
Nevada Bar No. 005268
JOHN J. SAVAGE, ESQ.
Nevada Bar No. 011455
400 South Fourth Street, Third Floor
Las Vegas, Nevada 89101
Attorneys for Defendant
Albert H. Capanna, M.D.

CERTIFICATE OF MAILING

I hereby certify that on this 9th day of August 2013, I sent a true and correct copy of the foregoing **ALBERT H. CAPANNA, M.D.'S DESIGNATION OF EXPERT WITNESSES** by U.S. Mail, postage prepaid, addressed to the following:

Dennis M. Prince, Esq.
John T. Keating, Esq.
PRINCE & KEATING
3230 S. Buffalo Drive, Suite 108
Las Vegas, NV 89117
Attorney for Plaintiff

An employee of Cotton, Driggs, Walch, Holley, Woloson, & Thompson