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## Capanna, M.D. v. Orth, 134 Nev. Adv. Op. 108 (Dec. 27, 2018) (en banc)

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## CIVIL LAW: MEDICAL MALPRACTICE

### **Summary**

The Court determined that Orth's counsel violated the golden rule arguments, but opposing party's substantial rights were not violated. Moreover, the district court's ruling regarding plaintiff expert's potential biases did not impose severe limitations on Capanna's ability to fully cross-examine plaintiff's expert. Further, the district court did not abuse its discretion when it allowed Orth to supplement expert witness list and the award of attorney fees and costs was within the discretion of the district court. Lastly, Orth lacks standing in challenging the district court's decision.

### **Background**

Orth was a student at the University of Nevada, Las Vegas (UNLV) on a football scholarship. Due to injuries he sustained during the course of his college career, Orth felt back pain and sought a consultation with Dr. Capanna to discuss his symptoms. After examination, it was discovered that Orth had a bulging disc between his fifth lumbar and first sacral vertebrae. Dr. Capanna anticipated that should Orth have surgery to treat the bulging disc, Orth would be able to return to football practice within weeks of surgery.

In September 2010, Dr. Capanna performed the operation. However, Orth's pain level drastically increased after the surgery to the point where he could not even walk. Orth went to a second doctor, Dr. Cash, for another opinion to discover why his pain level increased. After an examination of the post-surgery MRI, it is revealed that Dr. Capanna actually performed the surgery on the disc between fourth and fifth lumbar and that Orth was ninety-four percent disabled.

Orth filed a complaint against Dr. Capanna. After an eleven-day trial, jury awarded Orth \$136,300.49 in past medical expenses, \$350,000 in future medical expenses, \$1,800,000 in past pain and sufferings and loss of enjoyment of life, and \$2,000,000 in future pain and sufferings and loss of enjoyment of life. Further, after district court concluded that Dr. Capanna maintained his liability defense without reasonable ground, district court awarded Orth partial attorney's fees and expenses. This appeal followed.

### **Discussion**

#### *Attorney Misconduct*

Dr. Capanna contends that during the closing argument, Orth's counsel violated the golden rule argument and advocated for jury nullification. Under the golden rule argument, counsel asks the jury assume the perspective of the defendant, rather than a hypothetical individual in similar position as the defendant. Here, Dr. Capanna contends that during Orth's closing argument, his counsel used the term "you" to address the jury in conjunction with a hypothetical story so similar to defendant's that it is almost identical. The Court found that Orth's counsel violated the golden rule, but it did not affect any substantial right that belongs to Dr. Capanna.

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<sup>1</sup> By Pengxiang Tian.

Jury nullification is the process in which a party is attempting to persuade the jury to disregard evidence admitted during trial for purpose of deliberating the best outcome. The Court found Dr. Capanna's claim false and held that Orth's counsel actually encouraged jury to deliberate based on evidence.

#### *Restriction on Cross Examination*

Before Dr. Capanna's counsel was allowed to cross-examine Dr. Cash, the district court limited the scope of Dr. Capanna's questioning as to allow information regarding the existence of a relationship between Dr. Cash and Orth's counsel, but not so broad as to allowed inquiries into the frequency of such a relationship. Dr. Capanna's counsel contends that this affects Dr. Capanna's right to fully develop his argument, but the Court disagreed, as Dr. Capanna is allowed to explore the existence of a relationship between Orth's counsel and Dr. Cash in front of the jury.

#### *Future Medical Care and Expenses*

During the later period of the discovery process, Orth's counsel supplemented new information and opinion regarding Orth's future medical expenses from both Dr. Cash and Dr. Kevin Yoo. Dr. Capanna contends that the district court erred in allowing Orth's counsel to supplement the information because it was untimely. The Court, however, held that although Orth's counsel supplemented this information late in the discovery process, it was not untimely. The Court noted that due to the nature of plaintiff's injury, more accurate diagnoses can only be obtained with the passage of time.

#### *Attorney Fees and Cost*

Dr. Capanna further challenges the award of attorney's fees and expenses. However, the the Court held that absent an abuse of discretion challenge, the Court would defer to the district court regarding matters involving the court's use of its discretionary power. Further, the Court determined that the district court did divide the attorney's fees to only those incurred as a result of Dr. Capanna's attempt to establish an unreasonable defense regarding his liabilities.

#### *Cross Appeal Regarding NRS 42.021*

In the present case, Orth cross appeals the district court's denial under NRS 42.021, which allows a defendant in a medical malpractice case to introduce evidence of collateral payment to plaintiff from third parties. Orth contends that the denial to rule NRS 42.021 violates the Equal Protection clause and is unconstitutionally vague. The Court held that since Orth obtained all the damages he sought during trial, Orth lacked the standing required to challenge the statute.

#### **Conclusion**

The Court determined that Orth's counsel did not advocate for jury nullification during the closing argument because they did implore the jury to deliberate based on evidence presented. However, the Court did find that Orth's counsel violated the golden rule argument, but the

violation was not severe enough to affect the substantial right of Dr. Capanna. Moreover, the Court held that all evidence and motions regarding the award of fees and damages were proper because all procedures followed the rules set by the court. Thus, Orth was entitled to a partial award of attorney's fees because Dr. Capanna's liability defense has no merit. Lastly, the Court determined that Orth's cross appeal regarding NRS 42.021 lacked standing because he was not injured by the statute.