

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU : TRIAL TERM PART 25

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CLAUDETTE B. CAPLIN,

Plaintiff,

-against-

Index No.  
10150/91

MIHAI DIMANCESCU,

Defendant.

- - - - -X

Nassau County Supreme Court  
Mineola, New York 11501  
Wednesday, May 24, 1995

B E F O R E: HON. BRUCE D. ALPERT, .  
Justice & a Jury

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Official Supreme Court Reporter

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Wednesday, May 24, 1995.

THE COURT: Good morning.

MR. GINSBERG: Good morning, your Honor.

MR. HYMAN: Good morning, your Honor.

THE COURT: Mr. Hyman.

MR. HYMAN: I believe Dr. DiGiacinto was  
on the stand, your Honor.

THE COURT: Yes. Doctor, would you come  
up, please?

G E O R G E   V I N C E N T   D i G I A C I N T O ,  
a witness having been previously sworn and  
admonished by the Court Clerk that he is still  
testifying under oath, continued to testify as  
follows:

THE COURT: You may continue.

MR. HYMAN: Thank you, your Honor.

EXAMINATION BY MR. HYMAN: (Continued)

Q. Good morning, Dr. DiGiacinto.

A. Good morning.

Q. Yesterday we had finished before we broke  
with you telling the jury about your credentials and  
training and experience. That being done, let me  
now ask you if you were sent certain materials by my  
office to review with regard to the method, care and

1 Dr. G.V. Giacinto - Direct  
2 treatment that Mrs. Caplin received pertinent to  
3 this case?

4 A. Yes, sir, I was.

5 Q. Do you recall what materials were sent to  
6 you?

7 A. I'll try to recount as best I can.

8 I was sent a number of x-rays spanning  
9 from the time of the injury through the time of Dr.  
10 Patterson's surgery. I can't remember the most  
11 recent one, whether it was after the surgery  
12 sometime. I reviewed x-rays of Dr. Patterson and  
13 New York Hospital working backwards. I reviewed an  
14 E.R. visit, I think, to South Nassau Community  
15 Hospital. Is that correct?

16 Hospital records from Franklin General  
17 Hospital, and I believe office records from Dr.  
18 Dimancescu. Also, depositions of Dr. Dimancescu and  
19 plaintiff and her husband.

20 That's all I can remember right now. If I  
21 left anything out, I apologize.

22 Q. Now, this is not the first time that  
23 you've reviewed cases for my office, is it?

24 A. No, it's not.

25 Q. Can you estimate in the past five years

Dr. G.V. Giacinto - Direct

how many cases you reviewed for my office?

A. From your office? Probably three or four. I'm not really sure.

Q. I assume that you review materials in other cases for other firms that are representing people in lawsuits?

A. Yes, I do, sir.

Q. You've been practicing for how long, 17 years,?

A. Yes, sir.

Q. Maybe in a short range of reference, in the past five or six or seven years, can you estimate about how many times you reviewed cases?

A. I would guess around 50 or 60 times.

Q. I assume that you are generally compensated for the time that you spend reviewing records?

A. Yes, sir.

Q. In this case are you being compensated for the time you spent reviewing medical records?

A. Yes, sir.

Q. You've also had conversations with me about those records, haven't you?

A. Yes, I have.

Dr. G.V. Giacinto - Direct

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Q. I assume you are being compensated for the time you spent discussing the matter with me?

A. Yes.

Q. Do you know offhand what the compensation amount rate is for your review and discussion with me?

A. I will be asking for 250 dollars an hour for the reviewing.

Q. You are also receiving compensation for the time you spent away from your practice and being here today, isn't that true?

A. Yes.

Q. Can you tell me what your rate of compensation per day in court is?

A. Two thousand, five hundred dollars.

Q. Doctor, you have also, before today, testified in court as an expert?

A. Yes, I have.

Q. Can you estimate for me again in the past five or six or seven years how many times you testified as an expert?

A. Nine or ten times, something like that. On that order of magnitude.

Q. Doctor, can you tell me whether or not

1 Dr. G.V. Giacinto - Direct

2 there is a standard of care with respect to how  
3 often x-rays necessarily should be taken of  
4 patients?

5 THE COURT: Will you try that again?

6 MR. HYMAN: Yes, your Honor.

7 Q. Dr. DiGiacinto, can you tell me whether or  
8 not there is a standard of care with respect to how  
9 often it's necessary to take x-rays of a patient who  
10 has a C4/C5 cervical spine dislocation such as Mrs.  
11 Caplin while that patient is wearing a halo brace?

12 A. I don't know if there is a standard.  
13 There is some key times to take x-rays. The term  
14 "standard of care", there is nothing written down  
15 in hard and fast rules about doing that.

16 Q. Can you tell me then what your opinion is  
17 about or what your understanding is of the times at  
18 which it is necessary to take x-ray films of  
19 patients who are in a halo brace?

20 MR. GINSBERG: I will object. He just  
21 said there is no standard of care. His opinion  
22 is irrelevant. He's only here to testify as to  
23 what the standard of care was in the community  
24 back in 1981 and '82. If he said there was  
25 none, that's it.

1 Dr. G.V. Giacinto - Direct

2 MR. HYMAN: Judge, that is not, I think,  
3 what the doctor said, your Honor.

4 MR. GINSBERG: I think it is.

5 THE COURT: Let me here the question.

6 (Whereupon, the record was read as requested.)

7 THE COURT: We are referring back to the  
8 time in question?

9 MR. HYMAN: Yes, your Honor. It's what is  
10 necessary.

11 THE COURT: I'm just asking a question,  
12 Mr. Hyman.

13 Can you answer that question?

14 THE WITNESS: Yes, sir.

15 THE COURT: I'll allow the question.

16 A. Assuming, which we obviously do, we have  
17 x-rays indicating what the abnormality is or what  
18 the injury is, x-rays are appropriately taken when  
19 the patient is first placed in the halo; most  
20 commonly a day or two after that; prior to discharge  
21 from the hospital, and at any point when there is a  
22 major change in the patient's neurological status  
23 while wearing the halo and at the time that the halo  
24 is to be removed and immediately after removing the  
25 halo.

Dr. G.V. Giacinto - Direct

Q. I want to you assume, Dr. DiGiacinto, that in this case Mrs. Caplin suffered an automobile accident on December 1st, 1981 and that she was taken from the accident scene to Franklin General Hospital where she was diagnosed as having a C4/C5 dislocation subluxation injury. That she was realigned in a halo brace. I'm sorry she was realigned in traction, in 20 pounds of traction which was reduced to ten pounds of traction. That on December 10th, 1981 she was shown to be in good alignment on x-rays taken on that date and that there were also films taken.

Let me backtrack.

THE COURT: Are you going to withdraw if question?

MR. HYMAN: Yes, your Honor.

Q. Dr. DiGiacinto, let me ask you to assume that Mrs. Caplin was in an automobile accident on December 1st, 1981; and that she was taken to Franklin General Hospital and diagnosed with a dislocation subluxation injury at C4/C5 and she was put into traction on that day with 20 pounds of weight, and that she was seen on films thereafter to be realigned and in good position.



1 Dr. G.V. Giacinto - Direct

2 I want you to further assume that she was  
3 put into a halo brace on December 10th and films  
4 were taken of her in the halo brace on December 10th  
5 and then films were taken of her in the halo brace  
6 on December 11, and the x-rays show good alignment.

7 I want you to further assume that she was  
8 discharged from Franklin General Hospital on  
9 December 13th and that at that time Dr. Dimancescu  
10 established a plan of care for her that included her  
11 returning to his office for a follow-up visit in one  
12 month's time, and that she should have follow-up  
13 x-rays taken of her spine prior to the time that she  
14 returned to the office.

15 Let me also ask you to assume that his  
16 plan for her post hospital care also included  
17 provisions for unscheduled office visits with him if  
18 she suffered an injury in the interim period, if  
19 there was any excessive head or neck movement in the  
20 halo brace or if there were any complaints of new  
21 onset of pain, signs of spinal cord impairment or  
22 new neurological signs including reflex changes,  
23 muscle weakness or sensory loss.

24 And let me also ask you to assume that the  
25 plan included a plan for unscheduled x-rays of Mrs.

Dr. G.V. Giacinto - Direct

Caplin's cervical spine to evaluate any condition or complaints that would have led him to believe that there was any threat to spinal cord integrity.

Assuming all of that, do you have an opinion to a reasonable degree of medical certainty about whether that was an appropriate plan within the accepted standards of care for the management of this patient after a discharge from the hospital?

A. I do have an opinion.

Q. Could you please tell the jury what that opinion is?

A. That it was an appropriate plan for her care.

Q. Do you believe this plan to schedule for an x-ray four weeks after the discharge was appropriate timing for an x-ray from the time that she was discharged from the hospital?

A. I think that I already stated that the main criteria would be any change in neurological status and the development of neurological weakness. It would not be inappropriate to take an x-ray in four weeks.

Q. Let me also ask you to assume further that Mrs. Caplin called Dr. Dimancescu on the 28th of

Dr. G.V. Giacinto - Direct

December with complaints of soreness in her neck and glandular swelling and she actually came to the office on December 29th for an office visit at which time Dr. Dimancescu examined her and found that she had nuchal adenopathy on the right side to a greater extent than on the left and she had swelling of the scalp; and

Let me further ask you to assume that there was testimony that it was a departure from accepted standards of care for Dr. Dimancescu not to take an x-ray of the patient on that date based on those clinical symptoms.

Given that assumption, doctor, do you have an opinion to a reasonable degree of medical certainty about whether or not there were necessary indications for an x-ray to be taken on that date based on that assumption?

A. I do have an opinion.

Q. Could you please tell the jury what that opinion is?

A. Based on the information and the hypothetical statements that you just made, there was no indication that there is any change in neurological status and therefore no indication to

Dr. G.V. Giacinto - Direct

take an x-ray.

Q. Could you tell the jury what nuchal adenopathy is?

A. Swollen glands is how I would most easily describe it.

Q. Those swollen glands in the neck in your opinion was not a clinical reason that necessitates the taking of an x-ray of the cervical spine of a patient in a halo brace?

A. No, sir.

Q. I would like you to assume further that there was testimony in this case by an expert on behalf of the plaintiff that it was a departure in accepted standards of care for Dr. Dimancescu not to take an x-ray film of Mrs. Caplin after her discharge from the hospital within two to three weeks following discharge; and,

Further, that there was testimony that it was a departure not to take a film on the 29th when she appeared in his office with these symptoms.

Do you have an opinion to a reasonable degree of medical certainty, doctor, about whether or not you agree that that was a departure?

A. I do have an opinion.

Dr. G.V. Giacinto - Direct

Q. Could you tell the jury, please, what your opinion is?

A. I don't agree that that was a departure.

Q. Doctor, let me also ask you to assume still further, that when Mrs. Caplin was in the office on December 29th with the complaints that I already mentioned to you, and that Dr. Dimancescu on that occasion checked the halo brace and found everything to be in place, and at that time Dr. Dimancescu was also of the opinion that this patient could be relied upon to advise of new complaints or problems that she had while she was in the halo brace; and let me ask you to further assume that on that basis he also had in his plan of care for her directing that she return in five weeks time to his office for a scheduled office visit, and that she was told that she should have follow-up x-rays prior to coming to the office for that visit five weeks later.

Let me also ask you to assume that the plan of care as to unscheduled visits to the office, unscheduled x-ray visits, for the reasons that I mentioned to you in previous questions, was not changed.

1 Dr. G.V. Giacinto - Direct

2 Do you have an opinion to a reasonable  
3 degree of medical certainty about whether or not  
4 that was an appropriate plan of care at that time  
5 for this patient?

6 A. I do have an opinion.

7 Q. Could you please tell the jury what that  
8 is?

9 A. I feel it was an appropriate plan of  
10 care.

11 Q. You do not feel, doctor, that there was  
12 any departure from accepted standards of care in  
13 that plan by Dr. Dimancescu?

14 A. No, I do not feel there was any departure  
15 from standards of care.

16 Q. I want you to assume still further,  
17 doctor, that on January 21st, 1982, Mrs. Caplin  
18 called Dr. Dimancescu complaining that she heard a  
19 snapping noise in the halo and that she had a  
20 headache thereafter, and that Dr. Dimancescu saw her  
21 in the office and examined her in the halo and that  
22 he found on that occasion that she had a normal  
23 neurological and that there was slight swelling in  
24 the area of the right parietal pin of the halo and  
25 that he checked the halo and found that all bolts

Dr. G.V. Giacinto - Direct

and hardware on the halo were verified and found to be tight and the halo was in the proper position, and further, that Dr. Dimancescu adjusted the tension on the screws at that time.

Do you have an opinion to a reasonable degree of medical certainty about whether there were any clinical indications on that date that would require the taking of a cervical spine x-ray?

A. I do.

Q. Could you again tell the jury what your opinion is in that regard?

A. Based on the clinical information just made available I do not feel it was an indication to take an x-ray on that date.

Q. Is the snapping noise in the halo brace something that is not uncommon in the use of halo braces?

A. That is correct. It's a very common complaint.

Q. Can you tell the jury what the snapping often is attributable to and why it is not significant?

A. Well, I think part of that answer has to be that you have to examine the halo. If there is

Dr. G.V. Giacinto - Direct

an obviously loose bolt or rod, the possibility of it being related to that has to be considered. When you examine the halo after such a complaint and all of the fittings are tightly secured down, the pins are tightly secured and there is no evidence that they moved, then I say to patients, we hear that kind of complaint very often and as long as the halo is in one piece, we don't have to worry about it.

I don't think I answered what causes that noise except it's something to do with the halo, but the important thing in answering the question is to say that as long as the halo has not changed, the position and everything is tight, then you are not worried about it.

Q. Let me continue to ask you a few additional facts.

I want you to assume further that on January 27, 1982, Mrs. Caplin made a complaint that she felt the halo was moving and that she had headaches.

Let me ask you to further assume that she was told at that time to go to an x-ray facility to have a cervical spine x-ray taken and that she did so at the Glen Cove Hospital.



1 Dr. G.V. Giacinto - Direct

2 And let me also ask you to assume that Dr.  
3 Dimancescu later saw her.

4 And let me ask you to assume that the Glen  
5 Cove Hospital film evidenced some re-subluxation or  
6 change of position from the way the spine was when  
7 she left the hospital, Franklin General, at  
8 discharge.

9 Let me ask you to further assume that Dr.  
10 Dimancescu saw her that same day at the Franklin  
11 General Hospital, that he readjusted her in the halo  
12 and then took a second film to evaluate whether or  
13 not the change in position of the cervical spine  
14 that was seen on the Glen Cove Hospital film was an  
15 acute change of recent origin or whether or not it  
16 was a change that was in stable position, and that  
17 he compared the film prior to the adjustment to the  
18 film and after the adjustment and that he found that  
19 there was no movement in the position of the C4  
20 vertebra as compared to the C5 vertebrae.

21 Do you have an opinion to a reasonable  
22 degree of medical certainty as to whether it was  
23 appropriate for Dr. Dimancescu under those  
24 circumstances to direct Mrs. Caplin to have an  
25 x-ray?

Dr. G.V. Giacinto - Direct

A. Well, I thought you had already said he had the x-ray.

Q. Okay. Under the circumstances that Mrs. Caplin called Dr. Dimancescu because she thought the halo was moving and that she had headaches, was it appropriate for Dr. Dimancescu at that time to direct that she have an x-ray?

A. I understand the question. I'm sorry.

Yes, it was.

Q. Let me ask you to assume further that there had been testimony in this case, and you have seen previously the Franklin General Hospital films from January 27th, haven't you?

A. I'm sure I have with all of the others, yes.

Q. If it's helpful to you to put it up, you are welcome to do that to explain any answer that you want.

Let me continue with this testimony first.

I want you to assume further that there was testimony from plaintiff's expert, Dr. Pulliam, that the re-subluxation or something close to it that was seen on the Franklin General Hospital film of January 27th likely had occurred prior to two to

Dr. G.V. Giacinto - Direct

three weeks after Mrs. Caplin was discharged from Franklin General Hospital and that if Dr. Dimancescu had taken an x-ray film of Mrs. Caplin's cervical spine two or three weeks after her discharge from the hospital that this re-subluxation would have been identified at that time and that she could have been realigned in the halo or could have been taken out of the halo and put back in traction and then put back in the halo, and that by either of those mechanisms she would have gone on to heal in perfect or close to perfect anatomical alignment and that she could have been prevented from having a re-subluxation of the cervical spine that was seen on the film on January 27th.

I'd like to ask you if you have an opinion to a reasonable degree of medical certainty as to whether or not that is reasonable and whether or not in your opinion this injury could have been maintained in a perfect anatomical alignment by any physician in the halo brace?

A. I do have an opinion.

Q. Please tell the jury what your opinion is?

A. It's a long question so I'll try to see if I can hit the things you wanted.

1 Dr. G.V. Giacinto - Direct

2 Now, I'm assuming that I've seen the  
3 x-rays and have seen the records in answering the  
4 question.

5 THE COURT: The January 27th film, would  
6 that be of any help to you, doctor?

7 THE WITNESS: Well, it will be along the  
8 way perhaps.

9 THE COURT: All right.

10 A. The specific question I think is whether  
11 or not this could have been treated in a halo and  
12 ended up aligned better than it ended up aligned,  
13 and if I'm getting off the question please correct  
14 me.

15 Q. No.

16 A. It was a long question.

17 The x-rays that we had available from the  
18 initial injury show that there was an unstable  
19 dislocation and was on the basis primarily of  
20 ligamentous injury. Placing a patient in a halo  
21 will attempt to correct alignment. A patient like  
22 this with a very unstable fracture, I'm sorry, not  
23 fracture, but ligamentous injury as this was, will  
24 settle into a position that she is or he is going to  
25 end up in, and that position may be temporarily

Dr. G.V. Giacinto - Direct

correctable in a halo but the patient is going to continue to settle back into that position. That is the position that the patient will heal in and the likelihood of being able to take x-rays on a daily, weekly, whatever basis, readjust the halo and keep the patient in that position in a halo is with a high degree of medical certainty impossible. This was going to heal in this position. That is what it was going to settle into. I'm not sure if there is more to the question.

Q. Let me ask you this, doctor.

If a patient was in a halo and if attempts were made to continually check it with x-rays and continually readjust the halo to realign the cervical spine by increasingly extending the cervical spine back to a position that it didn't want to settle in, do you have an opinion to a reasonable degree of medical certainty whether or not that plan of care would permit healing of the injury?

A. If you were to adjust the halo in such a fashion that it continued to lift the head up, No. 1, it would be very uncomfortable for the patient and not tolerated. No. 2, if you achieve the

Dr. G.V. Giacinto - Direct

alignment, you would very probably have the degree of distraction, meaning pulling the bones apart.

You have to pull that hard if it were even possible and I can stop answering the question by saying I doubt that, if it were possible. If it were possible I think that amount of distraction to try to keep it straight would actually slow down or prevent healing of the injury. It would create a bigger gap across with fibrous healing and scarring would have to occur. It would slow it down or possibly prevent it, if you could get it in that position, which I doubt in this first place.

Q. Doctor, I will ask you some questions, about the position in which this cervical spine did settle in. I'm wondering if it would be helpful for you to discuss it from the films?

A. Certainly.

MR. HYMAN: Is it possible to put it closer to the jury?

THE COURT: Sure.

Q. Doctor, can you demonstrate or show things on the view box and perhaps the Court would let you come forward?

A. Yes.

1 Dr. G.V. Giacinto - Direct

2 THE COURT: You can go forward.

3 THE WITNESS: Thank you.

4 Q. I'm going to put up, doctor.

5 First of all, Exhibit 2C, which is the  
6 Franklin General Hospital film from December 1st,  
7 which shows the initial injury that Mrs. Caplin  
8 sustained. Have you seen this film previously to  
9 today?

10 A. Yes, I have sir.

11 Q. Perhaps we can show the jury the injury  
12 that Mrs. Caplin suffered and give us an idea of the  
13 extent of the injury which she suffered?

14 A. This is an x-ray taken looking from the  
15 side of the patient. I'm guessing you've seen this  
16 already. For your orientation, this is the base of  
17 the skull, the jaw is up here, the nose and the eyes  
18 are here. This is looking at the side of the neck.

19 The abnormality, the major abnormality on  
20 the film is noted between the fourth and the fifth  
21 cervical vertebrae, where the body of the fourth  
22 cervical vertebra is sitting forward relative to the  
23 body of the fifth cervical vertebra, approximately  
24 one-half of the width of the fifth cervical  
25 vertebra. This is a forward subluxation and

Dr. G.V. Giacinto - Direct

dislocation or whichever terminology you may use.  
This is the injury of which the patient sustained.

Q. Is that a considerable dislocation?

A. Yes, sir.

Q. This film, doctor, is Exhibit 2H which is  
the film of December 2nd, 1981 from Franklin  
General Hospital which shows Mrs. Caplin in  
traction.

Doctor, could you explain what that film  
shows to jury, what it shows, and if it helps you,  
to characterize the nature of the injury she had?

A. This is, again, a side view of the  
cervical spine. The same orientation. We can see  
now between the fourth and the fifth cervical  
vertebrae, the alignment is good. If we draw a  
straight line or use my pen to draw a straight line,  
the forward displacement of No. 4 versus No. 5 has  
been corrected.

We also see a greater than normal distance  
between the bottom of four and the top of five. It  
looks likes it's distracted a little bit. The main  
change on the x-ray is that it's well aligned. It's  
straightened out.

Q. Could you tell the jury what distraction



Dr. G.V. Giacinto - Direct.

means, doctor?

A. It means that the weight on the patient's head is actually pulling apart, perhaps a little bit more than normal, the space between the two bones. I can't think of another word other than distraction.

Q. Is this the kind of distraction that you mentioned to the jury that could prohibit healing of this jury if she was in a similar position in a halo?

A. Yes.

Q. The neck film I will show you, doctor, is marked 2L, which is the Franklin General Hospital film of December 10th, 1981 which shows Mrs. Caplin in the halo brace.

Could you just describe that film to the jury, please, doctor?

A. This is again the same orientation. We see this time, what I will call the hardware of the halo. And again, we see between the fourth and the fifth cervical vertebra there is relatively good alignment and there is actually seemingly a little less distance between the fourth and the fifth vertebrae than there was on the previous film.

1 Dr. G.V. Giacinto - Direct

2 Q. This next film, doctor, is 2N which is a  
3 film in the halo brace taken the next day, December  
4 11, 1981.

5 You told us earlier, doctor, that it would  
6 be appropriate to take an x-ray of the cervical  
7 spine in the halo the day it is done and the day  
8 later?

9 A. Usually before the patient goes home,  
10 yes.

11 Q. Can you tell the jury what that film  
12 shows?

13 A. It is again, a view in the halo. We can  
14 see the hardware. We are then looking at the  
15 spine. You can see between the fourth and the  
16 fifth. The body of the fifth cervical vertebra is  
17 secured by part of the halo but the area we need to  
18 see between the fourth and the fifth is again  
19 visualized and appears to be well aligned.

20 Q. Doctor, we mentioned that on January 27th,  
21 Mrs. Caplin had films taken at Franklin General  
22 Hospital, that eight films taken and that it showed  
23 some amount of re-subluxation?

24 THE COURT: What is that exhibit number?

25 MR. HYMAN: I'm sorry, your Honor, Exhibit

1 Dr. G.V. Giacinto - Direct

2 2-O.

3 THE COURT: Thank you.

4 Q. Doctor, could you tell the jury what that  
5 film shows about the nature of the cervical spine,  
6 the condition of the cervical spine on that date?

7 A. Again, we're seeing the halo hardware,  
8 we're looking from the side. It's a little harder  
9 to see because it's very dark.

10 What we are seeing now is there is some  
11 degree of change in the angle between the spine  
12 above the four cervical vertebrae and the spine  
13 below. There is some small degree of angulation and  
14 there is also a small degree of subluxation or  
15 sliding forward of the fourth cervical vertebra  
16 relative to the fifth.

17 Q. Now, there was another film taken on that  
18 date, doctor, from Glen Cove Hospital and I just  
19 want to see if you would compare these films and  
20 tell me whether or not you see that degree of  
21 subluxation and angulation seen in the films is the  
22 same?

23 THE COURT: What is the exhibit?

24 MR. HYMAN: I'm sorry, your Honor,  
25 Plaintiff's Exhibit 5.

1 Dr. G.V. Giacinto - Direct

2 THE COURT: Thank you.

3 A. Again, in comparing the two films, they're  
4 basically the same view. This one we can see a  
5 little better, and the position in my viewing is  
6 essentially the same, unchanged.

7 Q. Now, when you say "unchanged", doctor, you  
8 mean the position of C4 and C5 is not changed from  
9 one film to the other?

10 A. That is what I was referencing to, yes,  
11 sir.

12 Q. There is some movement of the other  
13 vertebrae between the two films?

14 MR. GINSBERG: I couldn't hear the  
15 question.

16 Q. There is some small amount of movement  
17 between the other vertebrae as compared between  
18 those two films?

19 MR. GINSBERG: I object to the leading.

20 THE COURT: Overruled.

21 A. I can't see a whole lot of movement.  
22 There may be a little difference but it's not  
23 substantial.

24 Q. If I ask you to assume, doctor, that the  
25 film on the right, the Glen Cove film, was the first

Dr. G.V. Giacinto - Direct

1 film taken and that there has been testimony that  
2 Mrs. Caplin was readjusted in the halo brace and  
3 there was some attempt of realignment at Franklin  
4 General Hospital and the Franklin General Hospital  
5 film was taken thereafter; based on that assumption  
6 and review of the films, can you tell the jury  
7 whether or not there is any indication on that basis  
8 and on your review of the films for the proposition  
9 that there is some stability at C4/C5?  
10

11 A. I think the fact that it couldn't be moved  
12 by readjusting the halo says that the two are stuck  
13 together, so the answer is yes, there is indication  
14 that there is a degree of stability at that point.

15 Q. Let me then ask you if you would to put up  
16 again 2C which is the film of the original injury  
17 and if in comparing this film, doctor, to either of  
18 the Glen Cove film, that if you would compare the  
19 film of her position on 1/27 which is the film that  
20 shows the position of C4/C5 after the original  
21 injury, and compare for the jury the difference in  
22 the alignment as she was after the accident and as  
23 she was on January 27th, during the course of Dr.  
24 Dimancescu's care and treatment of her?

25 A. There are two differences. No. 1, there

Dr. G.V. Giacinto - Direct

is a little higher degree of angulation seen on the second film, I forget the date, versus the first and there is a significantly less degree of subluxation seen on the second film versus the first. So that the subluxation is much less significant and there is a little bit more angulation of the cervical spine. Is that the question?

Q. Yes.

Let me ask you this, doctor.

Given the greater degree of angulation as seen in the cervical spine on the film of 1/27 on the left in the halo, can you tell me whether or not that has any effect in the way or the degree to which the subluxation is seen on an x-ray film?

A. Well, I think, I'll try to answer the question.

Again, we measured the subluxation --

Q. Let me just move this.

THE COURT: Do you have a problem keeping those in the box?

THE WITNESS: Yes. That might work.

Q. What I meant is --

A. The question is --

Q. If you can give some indication to the

Dr. G.V. Giacinto - Direct

jury on the 1/27 film, whether or not you think that film shows an acceptable position and explain to them why that is?

A. The two things that make it an acceptable position is, No. 1, the patient's clinical status which is by far the most important thing to monitor and lack of development of any new signs of further compression or damage to the spinal cord clinically reassure that it's acceptable. The important consideration on the film is the diameter of the spinal canal. It's difficult to measure precisely but it's minimally, if at all, lower from normal if this were completely straight. The reason being that the actual degree of subluxation is maybe a couple of millimeters and that the angulation does not affect the diameter of the canal. In fact in some ways it opens it up a little bit by spreading it behind from a above and blow. So that the important consideration in answering the question, yes, this is an adequate position. That is the space where the spinal cord runs which is not significantly compromised by this position because the subluxation is minimal and the angulation is not really a contributor to the change in the diameter

1 Dr. G.V. Giacinto - Direct  
2 of the spinal canal.

3 Q. As long as you are here, again, doctor,  
4 let me put up a couple of more films.

5 I'm going to put up Exhibit 4A and Exhibit  
6 4B, which are flexion and extension films that were  
7 taken on February 8th, 1982.

8 A. All right.

9 Q. Doctor, could you briefly tell the jury  
10 what the purpose of taking films of the cervical  
11 spine in flexion and extension is?

12 A. Our concern here is whether there is any  
13 motion between the fourth and the fifth cervical  
14 vertebrae. By having the patient extend the neck  
15 backwards and bend the neck forward, it would show  
16 or amplify any degree of movement. That is why you  
17 do flexion and extension views.

18 Q. Doctor, did it appear to you on those  
19 films, the flexion and extension--

20 THE COURT: Excuse me?

21 MR. HYMAN: I'll start again.

22 Q. In your review of those films doctor,  
23 between flexion and extension, do you see any  
24 movement between the fourth and fifth cervical  
25 vertebrae in flexion and extension?



Dr. G.V. Giacinto - Direct

A. No, I do not see any movement.

Q. It is the position of C4 over C5 on these films, that is the same position with minimal subluxation and some angulation that you saw on the film you just looked at from January 27th?

A. Yes, sir. Essentially the same.

Q. In the review of those films, doctor, do they tell you anything about the extent of healing and the degree of stability that now exists at C4 and C5?

A. It again tells us that the bones are stuck together and they're stuck in a fixed position. I don't think I can answer beyond that.

Q. Based on these films, can you tell me what it is holding those, or based on your knowledge, obviously of the treatment of cervical spine injury, what is holding C4 and C5 in position?

A. The patient is developing a fibrous union. The things that are holding C4 and C5 together are things that can't be seen on x-ray. They're the normal ligaments of the patient that may have been partially torn or stretched which are either healing back together or are shrinking back down into their normal length.

1 Dr. G.V. Giacinto - Direct

2 In addition to fibrous tissue, scar tissue  
3 is forming between the bones, between the bones and  
4 you can't see as well behind in the region of the  
5 so-called joints. So there is fibrous tissue  
6 reestablishment. Ligamentous integrity at that  
7 level are the things that are holding it together.

8 Q. This fibrous union, is that essentially in  
9 lay terms scar tissue formation or is it something  
10 different?

11 A. I think we're talking about scar tissue  
12 plus the normal ligaments in the neck shrinking back  
13 down to normal size, so scar tissue plus or scar  
14 tissue forming within the ligaments and the  
15 ligaments themselves would be a better answer or  
16 more complete. Ligaments contracting back down  
17 would be a better answer. It is more complete.

18 MR. HYMAN: I think that is all of the  
19 films we need, doctor. Could you return to the  
20 stand?

21 THE WITNESS: Yes.

22 Q. I want you to assume, Dr. DiGiacinto, that  
23 there has been testimony previously in this case by  
24 plaintiff's expert, Dr. Pulliam, that the position  
25 of the cervical spine at C4 and C5 on January 27th

Dr. G.V. Giacinto - Direct

was improved to a slight degree; and that there was also testimony in this case by plaintiff's expert, Dr. DeLuca, that the position on 1/27 was a mite, M-I-T-E, better than the position in the halo after she was aligned. I'm sorry, a mite better than her position after the original accident, the original injury, and that Dr. DeLuca testified that to him a mite better meant one millimeter or 1.2 millimeters.

Do you have an opinion to a reasonable degree of medical certainty whether or not those are accurate assessments of the degree to which improvement in alignment was seen on the films that you just looked at?

MR. GINSBERG: I object to the form of the question. I have to objection to his opinion. But I object to the form.

THE COURT: Am I missing something? This is not what he's being asked to do?

MR. GINSBERG: He's being asked to criticize other people.

MR. HYMAN: I asked whether or not it's a slight degree better or a mite degree better.

THE COURT: I don't think Mr. Ginsberg has

1 Dr. G.V. Giacinto - Direct  
2 a problem with that question.

3 MR. GINSBERG: That one I have no problem  
4 with.

5 MR. HYMAN: All right. Fine.

6 Q. I want you to assume, doctor, that  
7 plaintiff's expert, Dr. Pulliam, testified that the  
8 re-sublux position that was seen in the film of  
9 January 27th as compared to the original subluxation  
10 injury was a slight degree better.

11 Do you have an opinion as to the extent to  
12 which the position on 1/27 was improved as compared  
13 to the original film?

14 MR. GINSBERG: I have no objection to the  
15 second half of the question. I object to the  
16 preempt.

17 THE COURT: I have no problem with the  
18 question. I'll allow it.

19 A. I do have an opinion.

20 Q. Could you tell me what your opinion in  
21 that regard is?

22 A. I think that the position shown on January  
23 27th, if that is the film we're looking at, is much  
24 improved, versus the film of December 1st. Again  
25 I'm guessing the numbers.

Dr. G.V. Giacinto - Direct

Q. Then I want to ask you, secondly, assuming that there was testimony from Dr. DeLuca, that the 1/27 film shows a mite bit of improvement, which, as I told you, we can describe as one millimeter to 1.2 millimeters of improvement as compared to the original injury, can you tell us whether or not you think that is a reasonable description of the amount of improvement seen as we just looked at?

MR. GINSBERG: Again, I object to the form.

THE COURT: I don't have a problem with the form. I will allow it.

A. I do have an opinion.

Q. Could you tell the jury please what your opinion is?

A. I think it significantly underestimates the degree of improvement seen between the two films.

Q. Now, Dr. DiGiacinto, you have previously reviewed Dr. Patterson's operative note for his surgery?

A. Yes, I have.

Q. You noted in that operative report certain descriptions of the cervical spine that was viewed

1 Dr. G.V. Giacinto - Direct  
2 by Dr. Patterson, is that correct?

3 A. Yes, sir.

4 Q. There was also some description of  
5 treatment in traction to try to move the position of  
6 the cervical spine?

7 A. I'm aware of that, yes.

8 Q. I'd like to ask you, doctor, if, based  
9 upon your review of the two films, one from Glen  
10 Cove and one from Franklin General Hospital that  
11 were taken on January 27th, and based upon your  
12 review of the films of the flexion and extension  
13 taken on February 8th at South Nassau Community  
14 Hospital; and based upon your reading of the  
15 hospital operative report dictated by Dr. Patterson,  
16 and the hospital records describing the patient in  
17 traction from two days prior to that surgery and  
18 again in traction during the surgery, if you have an  
19 opinion to a reasonable degree of medical certainty  
20 about the quality of healing and the stability of  
21 the cervical spine prior to the time that Mrs.  
22 Caplin had surgery by Dr. Patterson?

23 A. I do have an opinion.

24 Q. Could you please tell the jury what that  
25 opinion is?

Dr. G.V. Giacinto - Direct

A. The spine was stable at the time of Dr. Patterson's operation. I'm not sure what quality of healing means. I'll try to answer it by saying that given that the film in traction did not show any significant change, given, most importantly, at the time of surgery, while the patient was under anesthesia, Dr. Patterson described being unable to change the position of the C4 spinous process versus the C5 spinous process, that is the strongest evidence that this is solidly healed in a fixed position.

Q. Doctor, based upon that opinion, and that analysis of films and records, based upon your review of the films and the records, doctor, can you tell me whether or not you have an opinion to a reasonable degree of medical certainty about whether Mrs. Caplin in the position she was in had she gone on to full healing without surgery, and subluxed slightly in an angulated position that she was in, would be at any greater risk for cervical spinal cord injury in the course of her daily life than she would be had she healed in perfectly or close to perfectly normal straight alignment?

A. I do have an opinion.

Dr. G.V. Giacinto - Direct

Q. Could you please tell us what that opinion is?

A. It's my opinion that she is not at any greater risk in the position she healed in versus straight alignment.

Q. Could you tell me why you have that opinion?

A. I think I tried to demonstrate and describe it while looking at the x-rays, that the diameter of the spinal canal was very close to the diameter of the spinal canal and the rest of her spine.

Moreover, I feel that the patient was in the process of and would heal solidly without any risk for re-injury anymore than any other part of the neck at the C4/5 level by the fibrous union that we were describing and we did describe, so I feel that it's stable with adequate space for the nerve root and adequate space for the spinal cord and no particular propensity in being injured than anything else.

Q. The vertebrae C4 and C5 in the sublux position slightly angulated in which they healed, do you think that position inherently makes a cervical



Dr. G.V. Giacinto - Direct

spine of C4, C5 weaker than if she healed in straight alignment?

A. No, sir.

Q. I want you to assume, Dr. DiGiacinto, that there was testimony in this case by Dr. Pulliam that in his opinion the facets of C4 vertebra were two to three to four million millimeters from the edge of the C5 facet underneath it and that in such a position in Mrs. Caplin's case with angulation, that the C4 facet was in danger of toppling over the underlying C5 facet if she suffered any trauma to the neck, and that that was a significantly greater risk for her than if she healed in the perfect straight alignment.

Do you have an opinion to a reasonable degree of medical certainty about whether that is a reasonable or true statement?

A. I do have an opinion.

Q. Please tell the jury what that is?

A. I don't feel that it's a true statement.

Q. Dr. DiGiacinto, let me ask you this question further.

Separate and apart from activities of normal daily living, do you have an opinion to a

Dr. G.V. Giacinto - Direct

reasonable degree of medical certainly whether or not Mrs. Caplin in a subluxed angulated position had gone on to full healing without surgery, whether she would be at any increased risk or damage to the her spinal cord in her neck in the event that she slipped or fell on ice or was rear-ended in an automobile accident or suffered any trauma to her neck?

A. I do have an opinion.

Q. Can you please tell us what that opinion is?

A. I don't feel she's at any increased risk at all.

Q. I want you to assume also, doctor, that there was testimony in this case by Dr. Pulliam, the expert for the plaintiff, that had she gone on to heal fully in the subluxed angulated position that she's in, that she would have been in a precarious situation and that she would be in greater increased jeopardy to having injury to her cervical spinal cord if she was in an accidental or slip or fell.

Can you tell me whether or not you believe that is a true statement?

A. I don't believe that is a true statement.

1 Dr. G.V. Giacinto - Direct

2 Q. Now, I know you told us already that you  
3 don't believe that Mrs. Caplin was at any increased  
4 risk based on the way her neck was healing and would  
5 have gone on to heal without surgery.

6 MR. GINSBERG: I'm sorry. I really don't  
7 think it's appropriate for him to repeat the  
8 answer.

9 THE COURT: Counsel's remark is stricken.  
10 The jury is instructed to disregard the  
11 statement.

12 Q. Notwithstanding the opinions that you've  
13 given as to whether or not Mrs. Caplin was at  
14 increased risk if she healed in this position that  
15 she healed in, and had gone on to full healing, do  
16 you believe that there was any necessity for  
17 surgical fusion in order to make her as safe as if  
18 she had healed in normal alignment?

19 A. No, I do not believe that there was.

20 Q. Doctor, let me ask you whether or not you  
21 have an opinion to a reasonable degree of medical  
22 certainty about whether in the subluxed angulated  
23 position in which Mrs. Caplin healed, or had she  
24 gone on to full healing, whether she would have been  
25 in that position more prone to pain than she would

Dr. G.V. Giacinto - Direct

have been if she healed in straight alignment?

A. I do have an opinion.

Q. Could you please tell us that opinion?

A. That she would not have been more subject to pain.

Q. Also, I would like to ask you if Mrs. Caplin had gone on to full healing in this subluxed angulated position that we saw her in, whether or not she would be more prone to stiffness or limited range of motion of the cervical spine in that position than she would be if she healed in a straight alignment?

A. There is no reason that she should be, no.

Q. Do you have an opinion, doctor, as to whether or not a patient such as Mrs. Caplin who had a C4/C5 sublux injury of the kind that Mrs. Caplin had, would necessarily have some degree of stiffness and decreased range of motion if she healed naturally without any surgery?

A. I do have an opinion.

Q. Could you please tell the jury what your opinion is, please, in that regard?

A. That she would have a degree of stiffness

1 Dr. G.V. Giacinto - Direct  
2 and limitation in range of motion, yes.

3 Q. Doctor, let me ask you to assume that Mrs.  
4 Caplin made complaints of having pain in her neck  
5 two to three days a week, that often involves her  
6 neck on the left side of her neck, the left  
7 shoulder, and that she has testified that it's  
8 relieved by lying down and sometimes she needs to  
9 take an Advil maybe two or three times a month; and  
10 that she also gets discomfort in the neck from  
11 reading.

12 Let me then ask you, based on that  
13 assumption, whether or not you think that symptoms  
14 or complaints are proximately related to the fact  
15 that Mrs. Caplin is now healed and fixed in a  
16 position that is somewhat subluxed and angulated?

17 A. I don't think that the position has  
18 anything to do with it. I think it's the injury to  
19 the neck that is the primary cause of any current  
20 complaint that she has. I'm not sure if I missed  
21 the question.

22 Q. No, you got it. Thank you for not making  
23 me repeat it.

24 Let me ask you one final question.

25 Do you have an opinion to a reasonable

Dr. G.V. Giacinto - Direct

degree of medical certainty as to whether Dr. Dimancescu's care and treatment of this patient was in accord with accepted standards of medical care in this state in 1981 and 28?

A. I do have an opinion.

Q. Can you tell me what that is?

A. They were fully in accord with standard medical care at that time.

Q. Let me ask you a few more questions, doctor.

Given the complaints that Mrs. Caplin has made which I just related to you, do you have an opinion to a reasonable degree of medical certainty about whether or not rehabilitation therapy or physical therapy would possibly have or would have any benefit for her in terms of her complaints of limited range of motion or pain?

A. I think they potentially would, yes.

Q. Let me also ask you, doctor, whether you think it's more likely than not that she would stand to have some improvement or at least be given full range of motion, that she is capable of physical therapy or rehabilitation therapy?

MR. GINSBERG: Those are two questions in

Dr. G.V. Giacinto - Direct

one.

A. I missed that.

THE COURT: All right.

Q. Doctor, do you have an opinion as to whether rehabilitation therapy or physical therapy would more likely than not give Mrs. Caplin full extent of range of motion in the cervical spine that she is capable of having?

A. I think any potential for improvement would be maximized by physiotherapy.

Q. Let me ask you, Mrs. Caplin's complaints of pain, more likely than not, could be alleviated or improved, or even with the assistance of medical care?

A. I think the answer would be the same. Any potential for improvement would be maximized by such treatment.

MR. HYMAN: Thank you very much, doctor.

I have nothing further.

THE COURT: Why don't we take ten minutes at this time.

(Whereupon, this matter was recessed.)

1 Dr. G.V. Giacinto - Cross

2 THE COURT: All right. Mr. Ginsberg.

3 MR. GINSBERG: Thank you, your Honor.

4 CROSS-EXAMINATION BY MR. GINSBERG:

5 THE CLERK: Doctor, you are reminded that  
6 you are still under oath. Please acknowledge  
7 that for the record.

8 THE WITNESS: Yes, I understand.

9 Q. Dr. DiGiacinto, first of all, good morning  
10 to you sir.

11 A. Good morning.

12 Q. We unofficially told each other our names  
13 yesterday. I'm Mr. Ginsberg. I obviously know your  
14 name.

15 Doctor, I guess first a bookkeeping  
16 question. The 25 hundred dollars a day, is that 25  
17 hundred dollars for yesterday plus 25 hundred  
18 dollars for today?

19 A. I will send a bill for yesterday. I hope  
20 they pay it.

21 Q. I assure you Mr. Hyman is a complete  
22 gentleman.

23 You will send a bill for five thousand  
24 dollars?

25 A. Yes.



Dr. G.V. Giacinto - Cross

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Q. Doctor, do you have a written report?

A. No, sir.

Q. Based on your experience of reviewing, I apologize, 50 or 60 records that you reviewed, have you become aware of the fact that if you don't prepare a written report it makes it somewhat difficult for poor lawyers like myself to cross-examine you?

MR. HYMAN: Objection, your Honor.

THE COURT: Objection sustained.

Q. Let me put it another way.

Doctor, is the reason that you did not prepare a written report was because you were worried that it could be used against you in cross-examination?

A. No, sir.

Q. Do you have any written notes?

A. No, sir.

Q. You have no notes?

A. No, sir.

Q. Well, when you reviewed the hospital record, the x-rays, et cetera, let me start from the beginning, when is it that you received the material that you indicated you did from Mr. Hyman's office?

Dr. G.V. Giacinto - Cross

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A. Within the last few weeks I think.

Q. Very recently?

A. Yes, sir.

Q. Did he indicate to you one way or the other whether he had sent the records to be reviewed by anyone prior to yourself?

A. Yes, he did, sir.

Q. What did he say?

A. He said he sent them to another person, presumably a neurosurgeon and that that person would not be available to testify at the time that the trial was going to trial, would I be willing to review the records for him.

Q. Did you have the benefit of a written report from that person?

A. No, sir.

Q. Did you have any discussion with that person as to what he or she found?

A. No, sir.

Q. Without telling us, do you know the name of the other person?

A. No, sir.

Q. Did you inquire at all of Mr. Hyman what the other person had found?

Dr. G.V. Giacinto - Cross

A. No, sir.

Q. Now, these records that you reviewed, were these delivered to your office near Roosevelt Hospital or mailed? How did it work?

A. I don't recall.

Q. What happened to all these records and x-rays that you reviewed a few weeks ago?

A. They're sitting in a pile in my home.

Q. When you reviewed them, did you make any notes?

A. No, sir.

Q. Do you find it at all difficult having reviewed 50 or 60 records, x-rays I assume in many of the cases, do you find it at all difficult to keep all this material in your head?

MR. HYMAN: Objection, your Honor. He's not testifying about 50 or 60 other cases.

THE COURT: I will allow it.

A. I don't find it difficult, no.

Q. In addition, of course, to reviewing records for lawsuits, I think you indicated that as chief of neurosurgery you also review the cases of all the other neurosurgeons who are under you at Roosevelt-St. Luke's?

Dr. G.V. Giacinto - Cross

A. I'm not sure what you mean by review. I don't go through the charts. I'm just aware of what cases are going on and how they do.

Q. Well, you discuss the cases?

A. When necessary, yes.

Q. I'm sorry?

A. Only when necessary. I don't have a conference with them every day about every case.

Q. What does "being aware of" mean?

MR. HYMAN: Objection. Could I have clarification, your Honor?

THE COURT: As to what?

MR. HYMAN: Are we talking about medical patients, cases of patients in the hospital?

MR. GINSBERG: Yes.

Q. The medical cases in the hospital, you are aware of the cases?

A. Yes, sir.

Q. I mean somebody told you something about the cases?

A. I reviewed the O.R. schedule every day. I make rounds with the residents every day and see all of the patients and I'm aware of their postoperative course.

Dr. G.V. Giacinto - Cross

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Q. Over the last few weeks, the last few months, you've seen scores of patients in the way that you just described, and when you make rounds you actually see the patients?

A. Yes.

Q. You sort of stand in the back while the physician, the neurosurgeon in charge does the interview, does the examination or whatever.

A. That's not a good representation, no.

Q. Well, whatever. But in any event, you know something about all of these cases that you see on a daily basis?

A. Yes.

Q. In spite of all that and in spite of whatever number of records you reviewed for suits, you have no trouble, you have no trouble keeping this case in your head?

A. I keep reviewing the chart to keep it in my head.

Q. In any event?

A. I'm not sure how else to answer your question.

Q. Fine. In any event, I don't recall from yesterday, to show you how bad my memory is, had you

Dr. G.V. Giacinto - Cross

testified about meeting with Mr. Hyman and did you meet with Mr. Hyman at some point prior to yesterday?

A. No.

Q. Did you have a telephone conversation with Mr. Hyman prior to yesterday in which you discussed not your scheduling but the substance of your testimony?

A. Yes, sir.

Q. When was that telephone conversation?

A. There were several over the last week or two. As recently as the day before yesterday.

Q. When do you think the first one was?

A. A couple of weeks ago probably.

Q. The telephone conversations, I think you answered, discussed the substance of the case?

A. Yes, sir.

Q. By the way, the fact that you didn't take any written notes, was that by any chance to prevent those notes from being used in cross-examination?

MR. HYMAN: Objection, your Honor.

THE COURT: Sustained.

Q. Was your purpose in not taking any notes to make sure that they could not be used in

Dr. G.V. Giacinto - Cross

cross-examination?

MR. HYMAN: Objection, your Honor.

THE COURT: Sustained.

Q. Tell me, doctor, when you were at Harvard Medical School, and you went to class, did you take notes?

A. As a matter of fact, no.

Q. No?

A. No.

Q. You got through anyway?

A. We had a service that made notes for us automatically.

Q. You caught me on that one but I assume you didn't have such a service when you reviewed Mrs. Caplin's records?

A. No, sir.

Q. In any event, sir, you were asked by my colleague about the snapping noise as in when Mrs. Caplin reported that her halo snapped or she heard a snapping sound in the halo, and I think you indicated that the first thing would be to examine the halo to see if there was anything broken, and if you didn't find anything broken then you really didn't know what caused the noise?

Dr. G.V. Giacinto - Cross

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A. I think I said looking for movements, I don't think I used the word broken.

Q. If you didn't find anything that moved, then you really wouldn't have known what made the noise?

A. Then you'd know that movement of something out of position hadn't made the noise. Yes.

Q. You also said you wouldn't really know what the cause was?

A. I think that is appropriate, yes.

Q. Would it surprise you to know that Dr. Dimancescu not only knew what the cause was, but he actually took the halo brace and demonstrated that there are a couple of grooves that the rod fits into and that is very common when the rod moves to make a snapping noise, are you aware of that?

A. I'm not sure what the question is. I'm sorry.

Q. Were you aware that Dr. Dimancescu had testified to that?

A. I can't specifically remember. I'm sorry.

Q. By the way, in the conversation that Mr. Hyman had with you, I think you said one or two



Dr. G.V. Giacinto - Cross

days ago, did he summarize the various testimony that had been given in court?

A. I was sent the testimony of Dr. Dimancescu and Dr. Pulliam to read.

Q. Had you ever met, I'm sorry. Are you a member of, I apologize, it's something like the New York Society of Neurological Surgeons?

A. I'm a member of one that sounds close to that, yes.

Q. Is that the one that Dr. Dimancescu was the president of a few years ago?

A. I don't know, sir.

Q. I'm sorry?

A. I don't know.

Q. So you've never seen Dr. Dimancescu, never met him, never heard of him, and let me leave out the heard of; you never met him or seen him prior to your meeting him yesterday in court?

A. I would be surprised if I had never seen him before since we all attend meetings, very commonly. I don't believe I've ever been introduced to him to this point in time.

Q. Were you in that society in 1988?

A. I think so. I think so.

Dr. G.V. Giacinto - Cross

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Q. It's customary, isn't it, for the president of the society to get up and give just a few welcoming remarks to the other neurosurgeons?

A. I'll answer by saying I don't think I went to any of their meetings.

Q. No insult intended to Dr. Dimancescu?

A. No, sir.

Q. Doctor, in any event, I think in part of your testimony you indicated that basically the only indication for taking x-rays when somebody is in the halo brace would be if there were neurological signs or symptoms, is that a fair statement?

A. I think that was the main indication that I mentioned.

Q. Well, you put on a halo brace. You expect it to come off in eight or 12 weeks give or take?

A. Closer to 12 probably, yes.

Q. With this kind of an injury I'm talking about?

A. Yes.

Q. You are supposed to take an x-ray I think you said when you take it off?

A. Before you take it off.

Q. Before. I mean immediately before, not a

Dr. G.V. Giacinto - Cross

month before?

A. Yes.

Q. So you take an x-ray after it's put on, is that correct?

A. Yes.

Q. And then according to good practice, unless there are neurological symptoms or signs, you don't have to take an x-ray, according to your testimony, for approximately 12 weeks?

A. Assuming that there has been no change in the halo because I think the other thing we mentioned was if the halo had obviously slipped or moved that would be an indication.

Q. Fair enough. If there is no slippage or movement of the halo nor any neurological signs, then for this approximate 12 week period, it's your position that good and acceptable standards does not require any x-ray to be taken?

A. That's correct, sir.

Q. You would agree, would you not, sir, that the bones, meaning the vertebrae, could slip without any neurological signs or symptoms?

A. Yes, sir.

Q. Now, doctor, if I could impose upon you to

Dr. G.V. Giacinto - Cross

step down to the shadow box for a moment. Maybe let me do something else first before that.

Doctor, do we agree that the best and almost only method, other than doing CAT scans, of determining whether in a subluxation such as this, the vertebrae have re-subluxed or re-dislocated, that lateral cervical x-rays are the diagnostic tool of choice?

A. Yes, sir.

Q. Doctor, in the hospital record, and I apologize, do you have the Franklin General record in front of you?

A. No, sir.

Q. Here you are.

A. Thank you.

Q. Could you, doctor, just turn to the x-rays or radiological reports, I guess is the more correct term.

A. Do you know where they are, sir? The front or middle or back? I found them, I'm sorry.

Q. In any event, doctor, there was an x-ray, and I'm not interested in other parts of the body, but there was an x-ray, was there not, of the cervical spine that was taken on December 1st?

Dr. G.V. Giacinto - Cross

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A. Yes.

Q. That's the one you showed to the jury which showed the original subluxation?

A. Yes, sir.

Q. Then there was an x-ray taken on December 2nd, is that correct?

A. I believe so. I think that was the date. I don't remember.

Q. That is why I gave you the record.

A. I'm sorry.

Q. I know you can't keep everything in your head.

A. There is, yes, one dated December 2nd, a report.

Q. By the way, doctor, could you explain how you couldn't remember from a half hour ago that there was an x-ray on December 2nd, but you were able to keep this whole case in your head over this several week period?

A. The details of an exact date you can show me. There is no reason for me to remember those things. I have the x-rays and that is the best way I can answer it.

Q. In any event, doctor, on that, could you

Dr. G.V. Giacinto - Cross

read the findings, all of these are very brief, on December 2nd?

A. December 2nd. Cervical spine reexamination in lateral projections with portable techniques reveals the previously reported dislocation of C4 on C5 is corrected. There are --

Q. You can continue to read.

A. There are osteoarthritic changes of the lower cervical spine.

Q. Now, doctor, you also indicated that there was a small amount of distraction, meaning a slight additional separation of C4, C5. Just so I don't confuse you, Dr. Pulliam also said that that existed. Was that the x-ray where this existed?

A. I have to look. There were several x-rays taken in the hospital. One of them showed distraction and one of them showed a little less distraction.

Q. In any event, that x-ray was taken on December 2nd and for the purpose of my question, it showed that the C4 and C5 were in good alignment, is that correct?

A. Yes.

Q. Now, the next x-ray that was taken was

Dr. G.V. Giacinto - Cross

December the third, the very next day, of the lateral view of the cervical spine, is that correct?

A. Yes.

Q. The reading there says what?

A. Repeat lateral view of the cervical spine: With portable technique, reveals no significant changes since the previous examination on 12/2/81.

Q. And no significant change would be synonymous with saying that the vertebrae are still in proper alignment?

A. Yes, sir.

Q. Now, there is another x-ray of the cervical spine taken six days later on the ninth, is that correct?

A. Yes.

Q. Well, I guess I can read it. Cervical spine, single lateral view with portable technique shows no significant change from the prior examination of 12/3, after reduction or correction of the subluxation of between C4/C5 with satisfactory alignment of the vertebral bodies comprising the cervical spine.

So this radiologist is a little more

Dr. G.V. Giacinto - Cross

1  
2 expressive but says the same thing, is that correct?

3 A. Yes, sir.

4 Q. Now, doctor, I'm sorry, then the next day  
5 apparently before the halo brace is put on, which is  
6 now the 10th, it says cervical spine, reexamination  
7 of the cervical spine in lateral projection with  
8 portable technique reveals no significant change  
9 since previous examination on 12/9/ 81.

10 Is that correct? I mean I read it  
11 correctly?

12 A. Yes, you have.

13 Q. That means that before the halo was on and  
14 it's now eight days since the x-ray of the 2nd,  
15 traction has held the cervical vertebrae in proper  
16 alignment, is that correct?

17 A. Yes, sir.

18 Q. Doctor, by any chance, do you feel or do  
19 you have an opinion that the reason that these  
20 x-rays were taken, four of them in an eight day  
21 period, were because the treating neurosurgeon  
22 wanted to see if the vertebrae were still in proper  
23 alignment?

24 A. I can't answer that question. I don't  
25 know what the indication was to take them.



Dr. G.V. Giacinto - Cross

Q. Well, doctor, leaving aside this case, and looking at the record, wouldn't it be your opinion that the reason that x-rays of this type and frequency were ordered was to see if the cervical spine was still in proper alignment?

A. Yes, sir.

Q. Doctor, there is nothing wrong with that, that's didn't deviate from acceptable practice, did it?

A. No, sir.

Q. And there was no risk to the patient? There was some suggestion early in the trial that if you took too many cervical x-rays you might put the patient at some sort of radiation risk?

MR. HYMAN: Objection, your Honor.

THE COURT: Well, it's not a question.

Q. Well, doctor,--

THE COURT: Counsel, one second.

Counsel's remark is stricken.

Q. Doctor, was there any radiation risk to this patient from the number of x-rays taken these first eight days?

A. No, sir.

Q. Now, doctor, since we can assume that

Dr. G.V. Giacinto - Cross

people don't do things and doctors don't do things for no particular reason, can we assume that if the x-rays, any of these four that we just went through, had shown that the vertebrae had slipped out of proper alignment, that the traction would have been adjusted to put them back into proper alignment?

A. That's probably a safe assumption, yes.

Q. Doctor, if that is a safe assumption, doesn't that mean that this concept of the vertebrae deciding where they want to end up is not a medical concept, but is a legal concept invented for this case?

A. No, sir.

Q. Well, let me ask you, sir, if we just agreed that had the vertebrae slipped out of position when they were in traction, a neurosurgeon would have realigned them, the neurosurgeon wouldn't have said, aha, these two vertebrae have decided to go into a different position, and I'm not going to interfere with the decision that these two vertebrae have made so I'm just going to leave them. No neurosurgeon would have said that, would he?

A. (No response.)

Q. That is a confusing question.

Dr. G.V. Giacinto - Cross

A. Yes, I'll agree.

MR. GINSBERG: I'll withdraw that.

Q. Doctor, one other thing. I apologize before I get to another subject.

It is your testimony, sir, that without ever examining Claudette Caplin you have told this jury under oath that it is your opinion that she will benefit 13 years later from physical therapy?

A. I think my answer was that she could maximize her improvement or something like that with physiotherapy. The only way to know if it would benefit her would be to have her go through it.

Q. So now you are telling us that you don't know that it will improve her, if I understand you, but that if she went through it, then we would know whether or not it improved it?

A. That is a version of my answer, yes.

Q. Doctor, would it be fair to say, sir, that you have never, ever, ever, in your entire medical career, prescribed physical therapy to a human being whom you didn't examine?

MR. HYMAN: Objection.

THE COURT: I'll allow the question.

A. I probably have to disagree with that.

Dr. G.V. Giacinto - Cross

Q. But it took you a long time to think about it?

A. No, I was thinking of a category of patients rather than one patient.

Q. In any event, doctor, were you aware of the fact that my colleague has brought a little model of the cervical spine here to court?

A. He said there was something else, whether it was picture or a model, I don't know.

Q. Well, doctor, let me indicate for the record that from the coat rack I have obtained something.

Doctor, does this model represent in a fair and general way the cervical spine of an adult human being?

A. Yes, sir.

Q. I guess --

THE COURT: Do you want to mark it?

MR. GINSBERG: Can I put a mark on the base?

MR. HYMAN: I have no objection to marking it.

MR. GINSBERG: I would introduce this. I offering it in evidence. It doesn't matter. I

1 Dr. G.V. Giacinto - Cross

2 withdraw that.

3 MR. HYMAN: You can't keep it. You can  
4 use it.

5 THE COURT: Mark it for identification.

6 (Whereupon the abovementioned model was  
7 marked as Plaintiff's Exhibit No. 8 for  
8 identification.)

9 MR. GINSBERG: Could you step down for a  
10 moment, doctor. I won't spent much time on  
11 this.

12 THE WITNESS: All right.

13 Q. Doctor, the only real question I have,  
14 doctor, is, is the configuration of the human  
15 anatomy such that the vertebrae sort of fit into  
16 each other one on top of the next?

17 A. Yes.

18 Q. That's it.

19 Doctor, in the normal spine and again, the  
20 normal cervical spine that has not been injured and  
21 does not have a tumor, is it fair to say that there  
22 are two things which provide stability, No. 1, being  
23 the natural fit of the spine as demonstrated in  
24 Plaintiff's Exhibit 8 for identification; and No. 2,  
25 being the ligamentous structure that holds them

Dr. G.V. Giacinto - Cross

together?

A. No, I can't really agree with that statement.

Q. Which part don't you agree with?

A. The first part.

Q. So you don't think that the natural fit of these vertebrae, one on top of each other, has anything to do with adding stability to the spine or do you?

A. Alone, no.

Q. Maybe then it's my error.

I'll put it another way.

Is it correct that alone neither the ligaments nor the fit provide the one hundred percent stability, but that together the combination of the fact that the bones fit one into the other and the ligaments binding them together are what gives you the one hundred percent stability in a non-injured spine?

A. I can't answer that question yes because, I can't agree with the question.

Q. Fair enough. Let me ask it in another way.

Does the natural fit of the vertebrae of

Dr. G.V. Giacinto - Cross

the cervical spine, one into each other, add to the stability of the cervical spine?

A. I can't answer that without adding the ligamentous part of it. In other words, the natural fit offers no stability whatsoever unless there is ligamentous attachment stabilizing the spine.

Q. Where there is ligamentous attachment, does the natural fit add stability?

A. Add stability? No.

Q. Does it help provide stability?

Did I pick the wrong word?

A. It can be stable with a natural fit and it can be stable without a natural fit. That is why I can't agree with the statement.

Q. What you are saying is the natural fit is irrelevant?

A. No, the natural fit is the natural fit. The question you are asking me is whether that natural fit adds stability and my answer is no, it can be very stable in the natural fit and it can be very stable out of the natural fit.

Q. Doctor, is it then your testimony that the natural fit is irrelevant to stability?

MR. HYMAN: Objection, your Honor.

1 Dr. G.V. Giacinto - Cross

2 THE COURT: We keep going over this. I  
3 will ask the doctor to respond.

4 A. I have to answer by saying the spine can  
5 be absolutely stable without the natural fit.

6 Q. Does that make the natural fit irrelevant  
7 in terms of stability?

8 A. Yes.

9 Q. Doctor, does Plaintiff's Exhibit 8 for  
10 identification depict fairly the natural fit between  
11 the vertebrae?

12 A. Yes, it appears to, yes.

13 MR. GINSBERG: At this point I would offer  
14 it into evidence, your Honor.

15 MR. HYMAN: I do have an objection to  
16 that. I would be happy to approach to discuss  
17 it.

18 THE COURT: Surely.

19 (Whereupon, an off the record discussion was  
20 held at the bench between the attorneys and the  
21 Court.)

22 MR. GINSBERG: For the record, I will  
23 withdraw my offer of the exhibit.

24 THE COURT: Thank you.

25 Q. Doctor, did I understand you, sir, to say



Dr. G.V. Giacinto - Cross

that when there is a subluxation, the ligaments can get torn or stretched and that when the healing process takes place, part of the healing process will be for the ligaments to tighten and part of the healing process will be for fibrous or scar tissue to be formed?

A. Both of those things can occur, yes.

Q. Doctor, let's go over, just for a moment, Dr. Patterson's surgery.

In your medical opinion that was unnecessary surgery?

A. That is correct.

Q. You do realize the statute of limitations has run, do you not, based on your reviewing all these records over the years?

MR. HYMAN: Objection, your Honor.

THE COURT: Sustained.

MR. HYMAN: Thank you.

Can we approach, your Honor?

THE COURT: Yes.

(Whereupon, an off the record discussion was held at the bench between the attorneys and the Court.)

THE COURT: All right. You may continue.

1 Dr. G.V. Giacinto - Cross

2 MR. GINSBERG: Thank you, your Honor.

3 Q. Doctor, let's return to Dr. Patterson.  
4 Dr. Patterson put Mrs. Caplin in traction for two  
5 days prior to the surgery in an attempt to  
6 straighten out or properly align the vertebrae, is  
7 that correct?

8 A. I understand he put her in traction for  
9 two days. I can't presume what his purpose was.

10 Q. Well, let me ask you to assume that that  
11 is what he said the purpose was.

12 Doctor, would you agree that that was also  
13 unnecessary because, based on the your testimony,  
14 she's in as good shape with misaligned vertebrae as  
15 she would have been with a properly aligned  
16 vertebrae?

17 A. No, I don't agree that that was  
18 unnecessary.

19 Q. Well, if I understand the bottom line of  
20 your testimony is that she's no worse off having her  
21 spine healed or would have been no worse off having  
22 her spine healed mal-aligned as opposed to being  
23 properly aligned?

24 A. She's no worse off having her spine heal  
25 as it has healed as being properly aligned, that is

Dr. G.V. Giacinto - Cross.

correct.

Q. But she healed with a spinal stabilization, is that what you meant? Mr. Hyman's questions were if she continued in the condition that she was in without having spinal fusion, so that the end result to her spine was the kind of alignment that shows up on the January 27th and February 8th x-rays, that she would be no worse off than if she had healed with a perfectly aligned cervical vertebrae?

A. That is correct.

Q. That is your position?

A. Yes.

Q. But it is also your position that it was not a waste of Dr. Patterson's time to use traction to try to properly align the vertebrae?

A. To see if there would be any change in the alignment. That is why I think it was appropriate.

Q. I didn't hear you?

A. It was appropriate for him to put her in traction to see if there would be any change in the alignment.

Q. Now, doctor, I think you testified that what was even more significant to you than the

Dr. G.V. Giacinto - Cross

traction was that in surgery Dr. Patterson tried to move or manipulate the vertebrae and was unable to do so?

A. That is correct.

Q. And that indicated to you that this was solid, I think that was your word, wasn't it?

A. Yes, sir.

Q. Doctor, and just as solid as she was going to be after surgery?

A. Yes, sir.

Q. Do you think that Dr. Patterson did something wrong at that point when instead of just making a note in the chart, saying this woman is just as solid as she'll be with surgery, I therefore am not going to take some acrylic mesh and tie it on with wires to this woman's spine because it's not necessary, so I'm going to stop the operation, re-close the incision, reduce my bill a little bit, and send Mrs. Caplin home in exactly the same shape that she would be in without the acrylic and the wires?

MR. HYMAN: Objection, your Honor.

Q. Did Dr. Patterson doing something wrong in not stopping the surgery at that point?

1 Dr. G.V. Giacinto - Cross

2 MR. HYMAN: Objection, your Honor.

3 THE COURT: As to form. If you can  
4 rephrase it.

5 MR. GINSBERG: Surely.

6 Q. Doctor--

7 THE COURT: Sustained.

8 Q. Doctor, you heard of Dr. Russell  
9 Patterson, have you not?

10 A. Yes, sir.

11 Q. He's world reknown as a neurosurgeon, is  
12 he not?

13 A. I guess so, yes.

14 Q. I apologize. I forgot whether he was  
15 associated with the Neurological Institute, but  
16 anyway, a surgeon of his caliber, would you agree,  
17 would never, ever, ever, have taken an acrylic and  
18 wire and mesh and attached them to the woman's spine  
19 if there was no reason to do so?

20 MR. HYMAN: Objection, your Honor.

21 THE COURT: The basis?

22 MR. HYMAN: Dr. Patterson explained his  
23 thinking to the jury yesterday about why he did  
24 this. It's not part of this case.

25 THE COURT: Well, within the framework, I

Dr. G.V. Giacinto - Cross

will allow the question.

MR. HYMAN: Whether Dr. Patterson did anything right or wrong is not part of this case.

THE COURT: I will allow the question.

A. You have to give to it me again. I'm sorry.

THE COURT: Do you want it read back?

MR. GINSBERG: Yes.

THE COURT: All right.

(Whereupon, the record was read as requested.)

A. I have no way of commenting on why Dr. Patterson did that. I don't know how else to answer the question.

Q. Doctor, are there different degrees of force, as a general proposition?

A. Yes.

Q. Have you, as a neurosurgeon, ever attempted to manipulate the human spine when a person was open and under anesthesia?

A. Yes.

Q. There is a maximum amount of force that you are willing to use to accomplish that, is that correct?

Dr. G.V. Giacinto - Cross

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A. I don't know --

Q. I'm not going to ask you what it is but there is a maximum amount of force. You are not going to take a sledge hammer because obviously you are going to paralyze the person?

A. Yes, I can agree that I wouldn't go quite that far.

Q. Doctor, I'm not saying you measure the foot pounds or however these things are measured of force, but in using a descriptive word, how much force would you say you used, I mean about, as much as is necessary to do what?

A. I would say I pulled as hard as I could and I don't know how many, you know, I don't know what that means.

Q. So you used as much strength as you possibly could?

A. Yes, sir.

Q. Doctor, how does that force, if you know, compare to the kind of force that is placed on the neck that is in an automobile that is rammed from the rear and a whiplash effect occurs?

A. In one way I will say it's not as much force, and in another way, which I will explain if I

Dr. G.V. Giacinto - Cross

can, I will say that it probably comes close to that. The one way it's not that much force is that an acceleration or deceleration of whiplash injury can impart a lot of force to a neck in a way that a patient, that the muscles are working.

The reason I'm qualifying this so much is when you are operating on a patient and he's under anesthesia, who, of necessity, is paralyzed and all of the stability of the muscle in the neck is completely eliminated and the only thing that is holding the bones that are not fused together with bone are the ligaments, and the normal sign or in our particular situation, the fibrous union which is formed between, so that you can impart a good deal of force, and I'm not going to even come close to saying I could quantify or compare it to an auto accident, but a good deal of force in a neck of an anesthetized paralyzed patient. That is the best I can do.

Q. Doctor, would you agree with me that there are certainly some auto accidents where the speed of the impact is great enough that the force, even in the way you described it, would be substantially greater than what a physician such as yourself could



Dr. G.V. Giacinto - Cross

impart in an operating room?

A. Well, I know that an auto accident can cause the tearing of the ligaments and I know that in the operating room under any circumstances I can't tear the ligaments.

Q. Fair enough, doctor.

I guess just one last question.

Doctor, when you, on those occasions when you pulled as hard as you could, did you have any fear at all of interfering with the spinal canal?

A. You're pulling is gauged by whether there is motion. If there is nothing moving then you can't hurt the spinal canal.

Q. Doctor, one last area and we're done.

Could you step down? I apologize.

A. Sure.

Q. Doctor, I'm handing you Plaintiff's Exhibit 2C and either 4A or 4B, I forget which. 4B. The 2C being the December 12 film from the Franklin General Hospital, and 4B being the flexion film from South Nassau Communities Hospital.

Now, doctor, for each of these films there is, would you agree with me, that the film from Glen Cove and Franklin General on the 27th were a little

Dr. G.V. Giacinto - Cross

bit dark so that seeing them was not perfect?

Doctor, would you agree with me that the two films that we have up, namely 2C and 4B are pretty good in terms of imaging the fourth and fifth cervical vertebrae?

A. Yes, sir.

Q. Doctor, could you reach out if you would, first of all for the record, as the jury is looking at the shadowbox, the December 1st x-ray is to the right and the February 8th x-ray is to the left, is that correct?

A. Yes, sir.

Q. Could you point out to the jury the fifth and fourth cervical vertebrae as depicted on the December 1st, film?

A. Fifth and fourth.

Q. Could you point out to the jury the fourth and fifth as depicted on the February 8th film?

A. Fourth and fifth.

Q. Now, doctor, you've given certain testimony and a number of physicians have, about how much the vertebrae has subluxed back. When you made your evaluation, did you do anything other than use your eyes? In other words, did you have any sort of

Dr. G.V. Giacinto - Cross

calibrating machine or anything like that or was this all based on an eye ball looking at these two x-rays?

A. An eye ball looking at the two x-rays.

Q. Would it be fair to say that subject to who has better glasses or not, the jury's eyes and your eyes are just as good?

A. Yes.

Q. So that whatever dispute there is between how much this one is, the fifth vertebrae is off from the fourth, versus how much the fifth is off from the fourth on the other x-ray, the jury can look at that and they don't need any magical powers to estimate that distance?

MR. HYMAN: Objection.

MR. GINSBERG: I'll withdraw that.

Q. One last question.

If you recall, I'm not going to put all the x-rays on the box, but if you recall, there were two x-rays on January 27th. Then there was the flexion and extension on February 8th. But I indicated, and not even counting the ones taken later at New York Hospital, but just the ones I mentioned, would you agree that looking at one

Dr. G.V. Giacinto - Cross

versus the other might change an estimate by a millimeter or so as to the position of the vertebrae?

A. I did not feel looking at any of those pictures that there was a difference in position so I'm not sure I would feel they were in the same position, so I would feel that my estimate would be the same. I wouldn't try to give it a number. I would say they were in the same position.

Q. You have not quantified it, you thought you had, by millimeters?

A. No, I hadn't.

MR. GINSBERG: Fair enough. Then I won't pursue it.

Thank you very much.

THE COURT: Thank you Mr. Ginsberg.

Is there any redirect?

MR. HYMAN: Yes, your Honor.

REDIRECT EXAMINATION BY MR. HYMAN:

Q. Doctor, the management of a patient in a hospital in bed in traction when nursing care and other services are being provided --

THE WITNESS: I'm sorry. I'm hearing that. I can't pay attention.

1 Dr. G.V. Giacinto - Redirect

2 THE COURT: Try it again.

3 MR. HYMAN: I'll repeat it.

4 Q. Dr. DiGiacinto, is there a difference  
5 between management of a patient who is in traction  
6 in a hospital bed who is receiving nursing services  
7 and other care and being moved in a hospital bed  
8 different than a management of a patient who is  
9 fixed and has a brace?

10 A. Yes, sir.

11 Q. Let me ask you, Dr. DiGiacinto,  
12 Mr. Ginsberg asked you whether or not great force  
13 would be applied to the cervical spine in the course  
14 of an automobile accident and whether that was  
15 similar or different than the force that would be  
16 applied to the cervical spine in the operating  
17 room.

18 Assuming that great force or even greater  
19 force that can be applied in an operating room is  
20 applied say in an automobile accident, is there any  
21 difference in your opinion of the ability of the  
22 cervical spine in Mrs. Caplin's case to withstand  
23 that force in the position she was in had she healed  
24 naturally than if she healed in a straight position?

25 A. No, there is no difference.

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MR. HYMAN: Thank you very much.

THE COURT: Mr. Ginsberg?

MR. GINSBERG: No, your Honor. No questions.

THE COURT: Doctor, thank you very much.

THE WITNESS: Thank you

(Whereupon the witness was excused. )

THE COURT: Mr. Hyman.

MR. HYMAN: Yes, your Honor.

THE COURT: Are there any other witnesses?

MR. HYMAN: No, your Honor.

The defendant rests.

THE COURT: Members of the jury, we will adjourn for the luncheon recess.

Remember my admonition to you.

See everybody back at two o'clock.

( Whereupon the jury was excused from the courtroom. )

THE FOLLOWING TOOK PLACE OUTSIDE THE PRESENCE OF THE JURY:

THE COURT: For the record, do you have any rebuttal testimony?

MR. GINSBERG: Yes.

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THE COURT: Off the record  
(Whereupon, an off the record discussion was  
held .)

THE COURT: Can I have an offer of proof?

MR. GINSBERG: She will contradict what  
Dr. Patterson said he to her.

MR. HYMAN: I think the case law is  
eminently clear, your Honor, that rebuttal is  
not for the purpose of contradiction and  
therefore if that is the offer of proof --

THE COURT: Can you be more specific? I  
won't hold you to every word and every  
question, Mr. Ginsberg. I mean rather than a  
blanket statement, if you will.

MR. GINSBERG: Well, in general, his  
position is that he told her that --

THE COURT: Are you talking about in  
regards to statements that she's alleged to  
have made to him?

MR. GINSBERG: And that he made to her.  
It's his claim here in court that he told her  
basically that this is elective surgery that I  
don't think is necessary. As you may recall,  
in my main case, I tried to have her testify as

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2 to what Dr. Patterson told her and the  
3 objection was sustained. Now, however, she  
4 will say that he recommended surgery. He  
5 didn't equivocate.

6 THE COURT: Just so I understand the  
7 nature of or the sum and substance of rebuttal  
8 testimony will be statements that she made to  
9 Dr. Patterson or statements made by him to her  
10 on the subject of, as to whether the surgery  
11 that he in fact performed, and I use the word  
12 loosely, was elective?

13 MR. GINSBERG: A hundred percent correct.

14 THE COURT: That is what you will be  
15 limited to?

16 MR. GINSBERG: Yes.

17 THE COURT: Do you want to be heard?

18 MR. HYMAN: Yes. That is absolutely  
19 inappropriate and improper reasons for  
20 rebuttal. The case law is absolutely clear  
21 that rebuttal is not for the purpose of either  
22 supporting testimony that has been said before  
23 or to contradict testimony. The only purpose  
24 for rebuttal is to meet an issue newly raised  
25 for the first time on the defense's case and



1  
2 clearly an issue of whether or not this is  
3 necessary surgery and was the exact basis for  
4 the claims in this case and the issue was  
5 introduced by Dr. Pulliam on direct. If  
6 Mr. Ginsberg was concerned about having Dr.  
7 Patterson differing on the case and putting  
8 statements on the record, he could have  
9 subpoenaed him and put him on the witness  
10 stand. At this point, he obviously did want to  
11 hear what Dr. Patterson said. There is no  
12 purpose in putting Mrs. Caplin in rebuttal to  
13 say he told me something different.

14 THE COURT: All right. I'll reserve with  
15 regard to your application. I will have an  
16 answer for you prior to when we resume.

17 All right.

18 (Whereupon, this matter was recessed for the  
19 luncheon recess.)  
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2 **AFTERNOON SESSION:**

3 THE FOLLOWING TOOK PLACE OUTSIDE THE PRESENCE OF THE  
4 JURY.

5 THE COURT: Good afternoon.

6 MR. GINSBERG: Good afternoon, your Honor.

7 MR. HYMAN: Good afternoon, your Honor.

8 THE COURT: Plaintiffs application to  
9 allow rebuttal testimony by Mrs. Caplin, the  
10 plaintiff is denied.

11 Thousand Dr. Patterson characterized the  
12 subject surgery as elective, he indicated  
13 during cross-examination that he believed that  
14 it would be of some benefit to the plaintiff.  
15 The scope of rebuttal is limited to the  
16 adducing of evidence which tends to impeach the  
17 credibility of a witness called by an  
18 adversary, or which tends to controvert some  
19 affirmative fact adduced during an adversary's  
20 case in chief. See Fisch on New York Evidence  
21 Section 326.

22 The offer of proof made by the plaintiff  
23 with respect to the necessity to undergo the  
24 surgical procedure performed by Dr. Patterson  
25 falls beyond the pale of permissible rebuttal.

1  
2 MR. GINSBERG: Your Honor, in addition to  
3 a strenuous exception, and I know it doesn't  
4 make it anymore strenuous than other  
5 exceptions, but I do feel that this is an  
6 unfortunate and very important ruling and I  
7 would like to be heard and I would appreciate  
8 the opportunity.

9 THE COURT: Sure.

10 MR. GINSBERG: I'm not sure how much the  
11 record reveals because some of this was back  
12 off the record, but, for the record, we had  
13 during the course of plaintiff's case, I had  
14 indicated that I wished to elicit questions  
15 from Mrs. Caplin as to what she was told, both  
16 as to surgery and also as to physical therapy,  
17 and in both cases the Court did not permit me  
18 to elicit such testimony. In this limiting of  
19 it, I don't believe that I really took  
20 exception and I think in most instances it was  
21 off the record. However, in this instance, it  
22 is not off the record and in this instance Dr.  
23 Patterson specifically said that he said  
24 certain things to plaintiff. Now, what he said  
25 to the plaintiff is not in some peripheral

1  
2 area, like whether it was raining out, but what  
3 he said to plaintiff according to him--

4 THE COURT: The Court read Dr. Patterson's  
5 direct and cross.

6 MR. GINSBERG: I'm just making my record.

7 What he said to the plaintiff, according  
8 to him, is that in essence, and obviously since  
9 the testimony is transcribed, over simplifying  
10 it, but that this was elective surgery and  
11 really as I look at it, he said it was  
12 basically unnecessary surgery.

13 The plaintiff had said in her deposition  
14 under oath that what Dr. Patterson said to her  
15 is quite different from what he said and it is  
16 her testimony in deposition and it will be if  
17 I'm permitted to call her, that Dr. Patterson  
18 specifically said that the surgery was  
19 recommended and that it was necessary.

20 This is not, as I say, some minor issue.  
21 This is a contradiction. I can't think of  
22 anything that is more attuned to rebuttal than  
23 having a witness in a key area in this case, a  
24 witness saying I said such and such and the  
25 plaintiff being permitted to bring in a

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2        rebuttal witness saying that witness did not  
3        say such and such or said something different.  
4        I mean this is the classic rebuttal.

5                I just fail, I mean, I certainly respect  
6        Fisch on Evidence, but I don't see where the  
7        application is of what your Honor read.

8                In addition, Dr. Patterson hemmed and  
9        hedged and hawed about March 8th, saying that  
10       maybe there was a telephone call on a weekend  
11       or maybe, I don't remember what else he said.  
12       Maybe I was in the operating room; and it's  
13       going to be plaintiff's testimony that the  
14       statement made by Dr. Patterson, which is not  
15       in his office record, was made in his office by  
16       him on the 8th of March and that immediately  
17       afterwards, Dr. Patterson had made arrangements  
18       to have her admitted to the New York Hospital  
19       the next day.

20               This is just completely contradictory to  
21       what Dr. Patterson said. It unbelievably  
22       affects his credibility, and what is more than  
23       that, it is not testimony, No. 1, based on the  
24       Court's ruling, assuming the Court's ruling was  
25       correct, it was not testimony that I could have

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or was permitted to bring in in my direct case.

THE COURT: In the first place, your allusion to the March 8th incident was beyond the application that you made when I asked you for an offer of proof.

MR. GINSBERG: Well, I think that is true.

THE COURT: An offer of proof is an offer of proof. That is why I asked you for it. I can't make what I believe to be a reasonably intelligent ruling unless I know what the sum and substance of your offer of proof is. There was no allusion to the March 8th set of facts and circumstances.

MR. GINSBERG: Then I apologize to the Court, your Honor.

THE COURT: I just wanted to know what I had before me.

MR. GINSBERG: I was not specific enough. I made a very brief and general offer of proof and I take blame and I apologize for not going into as much detail then as I am doing now. What I can do is apologize to the Court and then ask the Court to perhaps reconsider its ruling in light of what I've just said.

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THE COURT: As to the March 8th incident?

MR. GINSBERG: Yes. I mean let me break my application into two then.

In other words, there are two visits of Mrs. Caplin to his office. One on February 18th, and one on March 8th.

My original intention was to have her testify as to the conversation for both visits. However, I can separate my requested rebuttal and break them down into either doing both visits or if the Court feels it's appropriate, to leave out the February 18th visit and limit my questions to the March 8th visit, both as to what was said and also equally importantly as to where it took place.

THE COURT: What is the offer of proof with regard to the March 8th visit?

MR. GINSBERG: On March 8th Dr. Patterson said surgery was necessary in his office and made arrangements to have her admitted to New York Hospital.

As your Honor may recall, there is an entry for every other visit for Dr. Patterson's office in his notes that are in evidence.

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Missing is anything about March 8th. Your Honor may recall my cross-examination, and he said maybe it was on a weekend.

THE COURT: Yes, there was an issue as to whether it was a weekend.

MR. GINSBERG: Then he said maybe he was in the operating room. So it will nail the coffin.

THE COURT: You represent to the Court that the March 8 visit, if it in fact took place, that it was not a weekend, is that right?

MR. GINSBERG: That is correct, your Honor.

THE COURT: What was the day?

MR. GINSBERG: It was a Monday. Actually we looked that up during the recess. But beyond that he then later said I was maybe in the operating room and we did it by telephone.

I represent that the testimony will be that he was not in the operating room, that it was a face-to-face meeting in his office. I think that goes a long way to affecting his credibility since there is no entry from that



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date in the office records.

THE COURT: All right. Mr. Hyman.

MR. HYMAN: If I could be heard, your Honor?

The March 8th visit was, I believe, something that Mrs. Caplin said she went to Dr. Patterson's office on the 8th. Dr. Patterson was cross-examined quite extensively by Mr. Ginsberg on whether or not this visit occurred on the 8th or not. Dr. Patterson said that it's entirely possible it occurred in my office. I can't explain why, I don't have the note in my file.

He was trying to help explain it. One of the possibilities was that it was not a weekend, or one other possibility was that I could be called in the operating room, or another possibility is I don't know what happened to the note. That all has been told to this jury. They all know of the visit. They all know Dr. Patterson doesn't have documentation of that visit.

THE COURT: I don't think he conceded that there was a visit. Am I mischaracterizing his

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testimony?

MR. HYMAN: I didn't hear that.

THE COURT: If I were to say that it's his position that there was in fact, that he wasn't sure whether there was a visit on March 8th.

MR. HYMAN: He said I must have had contact with her somehow whether in the office or on the phone.

THE COURT: Her testimony is clear that she in fact was there.

MR. HYMAN: Yes. I don't think it's pertinent. It's not an issue. First of all, if it is an issue at all, obviously someone else decided other than me. Clearly the parameters of that issue were discussed on the direct of Mrs. Caplin and the cross-examination of Dr. Patterson. Her coming and saying it happened on the 8th, which I think she already testified to, is not probative of anything and not a reason to put her on the stand for rebuttal. There is nothing to rebut. Dr. Patterson never said the visit did not occur. I'm sure he said he's not sure whether the visit occurred at all. That is not new

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2 affirmative proof of some issue that was not  
3 open on direct-examination that it was  
4 commented on.

5 THE COURT: That may be.

6 MR. GINSBERG: Your Honor, I don't believe  
7 that because it was not an issue at that point  
8 that I elicited from Mrs. Caplin that it was a  
9 face-to-face visit in the office. Indeed she  
10 said she came to his office and she talked to  
11 him but she did not eliminate the possibility,  
12 which my colleague correctly points out, that  
13 Dr. Patterson threw in that maybe he was in the  
14 operating room and there was some telephone  
15 communication. I never asked her that. I  
16 didn't know it was coming up. To that extent  
17 it certainly would be rebuttal.

18 MR. HYMAN: My motion is that all of these  
19 issues are out on the record. Mr. Ginsberg can  
20 talk about them in his closing arguments if he  
21 wants. Mrs. Caplin said she was there in the  
22 office. He said he has no idea. That issue is  
23 in front of the jury. To take the extreme step  
24 of offering rebuttal of something clearly on  
25 the record and the doctor is cross-examined

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about --

THE COURT: Well, the fact that he was cross-examined doesn't preclude rebuttal.

MR. HYMAN: I believe that is certainly a factor. That much should affect whether or not it's necessary to give the extreme remedy or privilege or whatever of Mr. Ginsberg to open up a rebuttal case. The main thing his expert said, affirmatively said, that surgery was necessary. His expert said surgery was necessary. Dr. Patterson said I did not think she had to have it.

THE COURT: Anything else?

MR. HYMAN: Also it's a question about, your Honor, recommended or not, he said obviously it was a discussion.

THE COURT: We don't need to regurgitate his testimony. We read the direct and cross and redirect and re-cross. We read it.

MR. HYMAN: I understand, your Honor. Let me just say in conclusion that this is a clear case of testimony that on rebuttal is being offered for the mere purpose of contradiction and that is not a proper reason for rebuttal.

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THE COURT: Is there anything else?

MR. GINSBERG: No, your Honor.

THE COURT: All right. Give me a couple of minutes. I want to look at this further.

Are you sure there is nothing else?

MR. GINSBERG: No, nothing else, your Honor.

THE COURT: All right.

(Whereupon, this matter was recessed.)

THE COURT: Off the record.

( Whereupon, a discussion was had off the record.)

1  
2 THE COURT: With regard to the plaintiff's  
3 offer of proof concerning the testimony of  
4 March 8th, the Court has again reviewed Dr.  
5 Patterson's testimony in its entirety with  
6 regard to that particular date and the Court  
7 finds that the testimony sought to be proffered  
8 by the plaintiff by way of rebuttal on this  
9 issue again falls beyond the pale of  
10 permissible rebuttal.

11 You may have an exception to that.

12 MR. GINSBERG: Thank you, your Honor.

13 THE COURT: All right. Bring the jury in.

14 MR. HYMAN: What will we proceed to do at  
15 this point?

16 THE COURT: I will ask if he has anything  
17 further.

18 MR. HYMAN: I want to remind the Court  
19 that I do have an application to make. We  
20 deferred my application after the close of the  
21 plaintiff's case.

22 THE COURT: Yes.

23 MR. HYMAN: I would like to do that.

24 THE COURT: We will do that at four.  
25 Counsel had the luxury of a break. We were

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working on the rebuttal. We had to read the testimony.

MR. HYMAN: Absolutely.

THE COURT: We'll schedule that for four o'clock.

Off the record.

(Whereupon, an off the record discussion was held .)

(Whereupon the jury entered the courtroom. )

THE FOLLOWING TOOK PLACE IN THE PRESENCE OF THE JURY:

THE COURT: Sorry for the delay, members of the jury.

Mr. Ginsberg, do you have anything else?

MR. GINSBERG: Other than what I had said, and the Court's ruling, no.

THE COURT: All right. Are you resting?

MR. GINSBERG: Yes.

THE COURT: Members of the jury, both sides having rested, the matter will be adjourned until two o'clock tomorrow afternoon at which time we will have summations and I will charge you with regard to the law. Depending on the hour at which summations and

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2 my instructions or charge to you on the law is  
3 concluded, I will make a determination at that  
4 point based on the lateness or based upon the  
5 hour, based upon the time at which that process  
6 is concluded, I will make a determination as to  
7 whether you will formally retire for your  
8 deliberations at that point tomorrow or return  
9 on Friday morning in order to formally retire  
10 to your deliberations on Friday morning. So  
11 again, depending on the hour, tomorrow when we  
12 conclude with the lawyers and when I conclude  
13 what I need to do, I will make a determination  
14 at that point whether again you will formally  
15 retire for deliberations late tomorrow or you  
16 will come back Friday morning in order to  
17 commence your deliberations.

18 So at this point we're going to adjourn  
19 until tomorrow at 2. We will make every  
20 attempt to start promptly at 2, and the process  
21 will continue tomorrow and possibly into  
22 Friday.

23 ALTERNATE JUROR: I'm involved in all this  
24 as an alternate?

25 THE COURT: Yes, sure. At this point you



1  
2 are. Yes. As I indicated to you initially,  
3 alternate jurors until they are in fact  
4 formally discharged, if that happens, need to  
5 be present at all times.

6 ALTERNATE JUROR: Thank you.

7 THE COURT: Okay. You need to be back at  
8 two and you need to be part of the jury until  
9 such time as you are in fact, if you are in  
10 fact, formally discharged. Okay?

11 Sorry for the delay. We'll see everybody  
12 at 2.

13 Remember my admonitions. Again, don't  
14 discuss the case amongst yourselves or with  
15 anyone else. If anybody tries to talk to you  
16 about the case, report that facts to the Court,  
17 not counsel or the witnesses or the parties to  
18 the case.

19 The evidentiary portion of the case is  
20 over. We'll see everybody tomorrow afternoon  
21 at 2. I don't anticipate any problems as far  
22 as parking then. We'll see everybody at two  
23 and we'll get going then.

24 Thank you very much.

25 (Whereupon the jury was excused from the

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courtroom. )

THE FOLLOWING TOOK PLACE OUTSIDE THE PRESENCE OF THE  
JURY:

THE COURT: All right.

MR. GINSBERG: One very brief item, your  
Honor.

THE COURT: Yes.

MR. GINSBERG: In light of your Honor's  
ruling concerning my rebuttal case, I certainly  
request that the Court direct Mr. Hyman not to  
make any mention in his summation of the fact  
that the plaintiff didn't come back on the  
stand to deny what Dr. Patterson had said.

MR. HYMAN: I certainly would not do that.

THE COURT: Certainly. That is  
understood.

MR. GINSBERG: Your Honor, may I go off  
the record?

THE COURT: Off the record.

(Whereupon, an off the record discussion was  
held .)

(Whereupon, this matter was recessed.)

THE COURT: Do you have a motion,  
Mr. Hyman?

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MR. HYMAN: Yes, I do your Honor.

THE COURT: All right.

MR. HYMAN: At this time the defendant moves for a dismissal of plaintiff's case on grounds that there was a failure to make out a prima facie case. The application is made on general grounds as well as the specific grounds that the testimony offered by plaintiff's expert in support of the claims made do not arise to a level of medical opinion to a reasonable degree of medical certainty.

In particular, it is the contention of plaintiff, through plaintiff's expert, that had Dr. Dimancescu taken an x-ray of Mrs. Caplin's cervical spine two to three weeks after her discharge from Franklin General Hospital on December 13, 1982, that a subluxation or re-subluxation of her cervical spine would have been detected and that that injury could have been, the position of the spine at that time could have been straightened and that her cervical spine would have remained in a straight position.

However, plaintiff's expert also testified

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2 that in two out of ten cases, at two to three  
3 weeks after discharge when there is a  
4 re-subluxation, that re-subluxation will be  
5 fixed in position and that surgery will be  
6 required as of that time.

7 That being the case, I don't believe that  
8 testimony can be said to rise to the level of  
9 reasonable medical certainty if it's  
10 acknowledged that in one out of five cases  
11 surgery would have been necessary at that  
12 time. If surgery would have been necessary at  
13 that time then the failure to take a film at  
14 that time can not be a proximate cause of the  
15 need for surgery.

16 My contention is that the testimony,  
17 whether the doctor says to a reasonable degree  
18 of medical certainty or not, does not measure  
19 up to what would amount to a legal standard of  
20 reasonable medical certainty based on the fact  
21 that he could say that only four out of five  
22 patients would have been in a situation that  
23 would have permitted correction of the cervical  
24 spine, of the re-subluxation at that time.

25 In addition, I made a prior application to

1  
2 preclude Mrs. Caplin from testifying about her  
3 injuries on the direct case because I did not  
4 feel that the expert who testified for  
5 plaintiff at that time or prior to that time  
6 testified in the manner and with adequate  
7 knowledge of her injuries to state again to a  
8 legally sufficient level that Mrs. Caplin's  
9 pain in particular was a proximate result of  
10 the alleged departure in this case.

11 So at this time I simply will renew the  
12 essence of that application with a request that  
13 the claims as to pain be dismissed for failure  
14 to make out a prima facie case that the pain  
15 that Mrs. Caplin complains of was proximately  
16 related to the departure claimed in this case.  
17 The lack of foundation is premised on the  
18 expert's acknowledgment on the witness stand  
19 this he had no knowledge of the kind of pain  
20 she had, that he had no knowledge of the nature  
21 of the pain she had, that he had no knowledge  
22 of how much pain she had or when she had that  
23 pain. My feeling is that if, and my position  
24 on this is that if the expert doesn't know what  
25 the pain is, there is no way he can say that

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2 it's proximately related to any particular  
3 cause. That deficiency in my opinion  
4 necessitates a dismissal of complaints of pain  
5 that Mrs. Caplin suffered as a result of Dr.  
6 Dimancescu's departure. That is the  
7 application.

8 THE COURT: Thank you.

9 MR. GINSBERG: To move backwards, if I  
10 may, your Honor, the question of whether pain  
11 is a permissible item of damage, it was  
12 exhaustively discussed before your Honor and a  
13 record has been made. I would just obviously  
14 repeat whatever I said on that occasion without  
15 putting in the record and physically repeating  
16 it.

17 To return to the question of whether the  
18 prima facie case is made out, it seems as  
19 though my colleague is focusing on the  
20 cross-examination question that he posed to Dr.  
21 Pulliam in which the doctor said that in 20  
22 percent of the cases they would not be  
23 successful in realigning the cervical spine. I  
24 think my colleague is confused between what is  
25 reasonable medical certainty on the one hand

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2 versus what is the plaintiff's burden of proof  
3 in determining the question of damages as a  
4 result of malpractice.

5 The leading case, interestingly, which is  
6 Kellenberg versus Beth Israel Hospital. I do  
7 not have the citation. I apologize to the  
8 Court. In that case, the jury was allowed to  
9 award damages where the doctors said there was  
10 only a 20 percent possibility that had the  
11 proper treatment been given, and I think this  
12 was a death case, that the woman would have  
13 recovered. In our case basically he's saying  
14 it's 80 percent. There have been many  
15 decisions following Kellenberg. The basic  
16 holding of the Appellate Court is that all the  
17 plaintiff has to show is that there is a  
18 substantial chance that had the right treatment  
19 been given, the damages would have been  
20 obviated and certainly 80 percent is a  
21 substantial chance. The interesting debate  
22 that has gone on over the years is whether it  
23 has to be 50 percent or more. Kellenberg said  
24 no. Some of the other cases seem to imply that  
25 the answer is yes. But there is no case that

1  
2 you have to do more than 50 percent in  
3 probability. So 80 percent is clearly well  
4 over 50 percent.

5 For that reason the motion should be  
6 denied as to specifics, and as to its  
7 generality I don't have to go into it. Dr.  
8 Pulliam said that this was a departure, that  
9 had the x-rays been taken, again, he said had  
10 the x-rays been taken the vertebrae would have  
11 been realigned. Had they been realigned she  
12 would have healed with no or minimal symptoms.  
13 Interestingly, Dr. Patterson confirmed that  
14 someone could heal from this injury without  
15 symptomatology if the vertebrae had ended up in  
16 normal anatomical alignment.

17 For all of those reasons the motion should  
18 be denied.

19 THE COURT: I will reserve with regard to  
20 Mr. Hyman's application.

21 Do you have an application?

22 MR. GINSBERG: Yes, your Honor, two  
23 applications.

24 I respectfully move, if they are still in  
25 the case, which I'm not sure about, to dismiss



1  
2 any claim of comparative negligence. Maybe I  
3 will do them one at a time. As to comparative  
4 negligence there has been absolutely no proof  
5 or statement by anyone, including by Mr. Hyman  
6 in his opening, that Mrs. Caplin did anything  
7 to contribute to what we claim is an alleged  
8 departure or what we claim is a departure. The  
9 only thing I guess she could be accused of is  
10 picking Dr. Dimancescu. Certainly Mr. Hyman  
11 won't argue that that is comparative  
12 negligence. Short of that, she followed every  
13 piece of advice given to her. Dr. Dimancescu  
14 said she was the kind of person who followed  
15 his instructions to call his office upon  
16 complaints. She showed up for appointments.  
17 She went to the hospital when she was supposed  
18 to, et cetera. There is nothing that she did  
19 that in any way warrants submission of the  
20 issue of comparative negligence to the jury.

21 Secondly, is that we respectfully move to  
22 dismiss the claim for mitigation of damages  
23 which is apparently based on the failure to  
24 undergo physical therapy for a number of  
25 different reasons.

1  
2 First of all, there is no evidence that  
3 anybody for the first 12 years recommended that  
4 plaintiff have physical therapy. The first  
5 notation of it and, of course, your Honor did  
6 not-- well, your Honor did permit me to put, to  
7 have plaintiff testify that nobody recommended,  
8 or I forgot the other word; referred, referred  
9 or recommended physical therapy during the time  
10 of treatment. Therefore, for the first 12  
11 years, no matter what, there is no evidence of  
12 any recommendation of physical therapy. The  
13 only two threads of evidence on physical  
14 therapy are the statement by Dr. DeLanerolle  
15 which. If my recollection is correct, I'm  
16 sorry, I should have said ten instead of 12. I  
17 believe Dr. DeLanerolle examined her in 1992  
18 which would be ten years after the fact and did  
19 say that she recommended physical therapy, and  
20 the other witness who said anything was today,  
21 Dr. Dr. DiGiacinto, who also said something  
22 about physical therapy. However, in both of  
23 those cases there is an essential element  
24 missing and that is that Dr. DiGiacinto  
25 emphatically stated that he did not know

1  
2 whether physical therapy would be helpful or  
3 not and he could not tell until after the  
4 physical therapy to see if it would do any  
5 good. Dr. DeLanerolle didn't say anything  
6 except that it was advisable but she never at  
7 any time said in her opinion physical therapy  
8 would improve plaintiff's condition or  
9 alleviate her symptoms or cure her. Without  
10 that key element, because the defendant has the  
11 burden of proof on mitigation of damages, it is  
12 our position that there is a failure of proof  
13 and therefore this affirmative defense,  
14 mitigation of damages, is, as I understand it,  
15 an affirmative defense and that that  
16 affirmative defense should be dismissed.

17 THE COURT: Thank you.

18 Do you want to respond to that?

19 MR. HYMAN: Notwithstanding counsel's  
20 penchant for commentary as evidenced by his  
21 comment about Dr. Dimancescu a moment ago, it's  
22 my position that the culpable conduct  
23 affirmative defense is essentially a claim for  
24 mitigation of damages issue and that there is  
25 testimony from Dr. DeLanerolle that after

1  
2 examining the patient and running her through a  
3 full range of motion to determine her  
4 limitations and to assess the limitations, that  
5 he recommendation to the patient was that she  
6 should have physical therapy. She testified  
7 that that recommendation was because she  
8 thought physical therapy would be helpful.

9 It certainly is sort of difficult to say  
10 that anything will necessarily be helpful  
11 before it's done. I mean certainly any  
12 recommended procedure has a chance of not being  
13 successful, even though there is anticipation  
14 that that is appropriate in circumstances and  
15 an indication that it is probably helpful.

16 Certainly, that is based on direct contact  
17 with this plaintiff. Certainly Dr. DiGiacinto  
18 said that this would be potentially helpful to  
19 the patient. Again, I don't know how anyone is  
20 supposed to know ahead of time whether or not  
21 some act will be successful and to what  
22 degree.

23 However, it's my position that this  
24 plaintiff has an affirmative duty to seek out  
25 treatment that is reasonable in terms of

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mitigating damages and for the plaintiff to say

I'm not going to talk to a doctor, I'm not going to talk to a rehab person and I will sit and suffer with my injury is a basis for a mitigation of damages charge.

THE COURT: All right. I will reserve with regard to Mr. Ginsberg's applications. I will give you an extra couple of minutes.

MR. GINSBERG: I have one bookkeeping matter which maybe we can do now to save time tomorrow. That is if your Honor may recall the letter that Mrs. Caplin wrote which was marked as Defendant's Exhibit B. The original of that letter is contained within the office notes of Dr. Patterson and I think Mr. Hyman and I have agreed that we could substitute the letter, leave it in the office file but mark that letter as Defendant's Exhibit B.

MR. HYMAN: That would be fine with me.

THE COURT: All right. Mark it please. (Whereupon, the abovementioned original letter was marked as Defendant's Exhibit No. B in evidence.)

MR. GINSBERG: I will say for the record

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also, Mr. Hyman has been courteous enough, because I don't have a legible copy, to say that I could physically take the old Exhibit B so that I could use it to prepare for my summation.

THE COURT: You are keeping Defendant's Exhibit B in his folder which encompasses the record?

MR. HYMAN: Yes, your Honor.

THE COURT: All right.

Off the record.

(Whereupon, an off the record discussion was held .)

(Whereupon, this matter was recessed.)

MR. HYMAN: Can I make an additional statement as far as my application?

THE COURT: Yes.

MR. HYMAN: I had mentioned earlier so the Court is aware of my position on this, in regards to my application made to keep Mrs. Caplin's testimony about injuries in the case, I also mentioned to the Court that the testimony from the expert about the injuries was simply that re-subluxation of the spine

1  
2 tends to cause pain or commonly causes pain and  
3 that I don't believe also rises to the level of  
4 the necessary quality of testimony that  
5 supports the claim and I would ask that the  
6 claim for pain be dismissed.

7 THE COURT: All right.

8 MR. HYMAN: Thank you.

9 THE COURT: Thank you.

10 All right. At the outset the plaintiff's  
11 motion to strike the defendant's affirmative  
12 defenses of culpable conduct and failure to  
13 mitigate is granted. The review of the  
14 defendant's answer indicates a presence of a  
15 single affirmative defense to wit: Culpable  
16 conduct. Excepting the arguments of the  
17 defendant's counsel on point, that the subject  
18 defense embraces the concept of mitigation, the  
19 Court finds insufficient evidence in the record  
20 to support the defendant's contention. One PJI  
21 2:325 indicates that it is the defendant's  
22 burden to prove that plaintiff failed to avail  
23 herself of a reasonably safe modality of  
24 treatment which would have either completely  
25 cured or greatly alleviated her injury or

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2 condition. There is no evidence in the record  
3 which speaks to the reasonable safety of any  
4 specific modality of physical therapy.

5 Moreover, there is no evidence in the  
6 record that had the plaintiff undergone a  
7 regimen of physical therapy that her injury or  
8 condition would have either been cured or  
9 greatly alleviated. At best there is some  
10 evidence which suggests that her symptoms could  
11 be thereby improved, but the extent of the  
12 anticipated improvement remains unquantified as  
13 well as speculative.

14 In addition, the defendant's motion for  
15 dismissal is denied.

16 All right. 10:30, gentlemen.

17 MR. GINSBERG: Thank you, your Honor.

18 MR. HYMAN: Note my exception, your Honor,  
19 for the record.

20 THE COURT: All right.

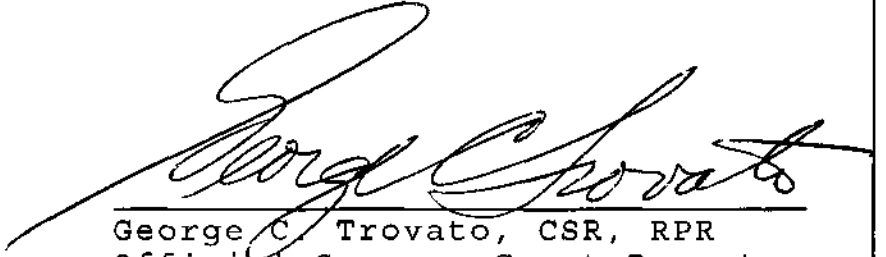
21  
22 (Whereupon, this matter was adjourned to  
23 Thursday, May 25, 1995. )  
24

25 oOo



C E R T I F I C A T I O N :

I, George C. Trovato, CSR, RPR, Official  
Supreme Court Reporter, hereby certify that the  
above transcript is a true and accurate copy of  
the minutes taken by myself stenographically in  
the within matter.



George C. Trovato, CSR, RPR  
Official Supreme Court Reporter

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU : TRIAL TERM PART 25

- - - - -X

CLAUDETTE B. CAPLIN,

Plaintiff,

-against-

Index No.  
10150/91

MIHAI DIMANCESCU,

Defendant.

- - - - -X

Nassau County Supreme Court  
Mineola, New York 11501  
Friday, May 26, 1995

**B E F O R E:** HON. BRUCE D. ALPERT,  
Justice & a Jury

**A P P E A R A N C E S:**

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George C. Trovato, CSR, RPR  
Official Supreme Court Reporter

1  
2 Friday, May 26, 1995.

3 THE FOLLOWING TOOK PLACE OUTSIDE THE PRESENCE OF THE  
4 JURY:

5 THE COURT: Good morning.

6 MR. GINSBERG: Good morning, your Honor.

7 MR. HYMAN: Good morning, your Honor.

8 THE COURT: For the record, Mr. Hyman.

9 MR. HYMAN: Yes, your Honor. For the  
10 record, I am making an application for a  
11 mistrial based on the what I consider to be  
12 statements in Mr. Ginsberg's closing argument  
13 which went beyond the bounds of proper  
14 advocacy. I thought that Mr. Ginsberg  
15 essentially offered new testimony to the jury  
16 in the comments of a medical nature making an  
17 improper analogy to tea cups and saucers which  
18 was not an analogy made by any medical witness  
19 in this case and I think it is not proper.

20 I thought there was comment on matters not  
21 part of the evidence. I thought there was  
22 improper comment about matters that were  
23 evidence and I thought that there was some  
24 misstatements and inuendo made during the  
25 closing argument which went beyond the bounds

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of proper advocacy and also with prejudice to the defendant.

THE COURT: Mr. Ginsberg.

MR. GINSBERG: No. 1, it's axiomatic that motions for mistrials have to be made at the time the supposed offense occurs. The reason for that, of course, is that the Court may correct whatever impropriety supposedly occurred by curative instruction.

There were, as I recall, two or three examples that Mr. Hyman is referring to. I remember the cup and saucer one.

No. 1, the motion should be denied because it was not made at the time and it's axiomatic. That is almost enough.

However, since by innuendo I'm being accused of doing something improper, I didn't. The using of an analogy of a cup and saucer is something, and I know the Court sustained the objection. I immediately stopped the analogy. It certainly is not something that rises to the level of impropriety.

One or two other objections, I don't even frankly recall them anymore. I started to say

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2 solid like the rail of this court, or the jury  
3 box, and your Honor sustained the objection to  
4 that. I immediately desisted had. Again, this  
5 is scarcely a prejudicial kind of comment.

6 In terms of the other things that I think  
7 my colleague is referring to, these were items,  
8 I mean there is no question that I attacked  
9 particularly the credibility of Dr. Patterson  
10 in a number of different ways but each one of  
11 them was based on the what I had gone into in  
12 cross-examination. We spent a long time on the  
13 fact that there was no records for the 8th of  
14 March. We spent time on the situation whereby  
15 he got had a typed note which contained all the  
16 damaging information and none of the other  
17 visits had any typed note at all. The other  
18 thing was the fact that he admitted on  
19 cross-examination that his wonderful physical  
20 examination of Mrs. Caplin occurred after he  
21 knew there was a lawsuit.

22 So for all of the above reasons, and in  
23 terms of Dr. DeLanerolle, the fact that she had  
24 to be subpoenaed and has never testified in a  
25 malpractice case was brought up by my colleague

1  
2 in cross-examination. I don't see why I  
3 shouldn't have been permitted to comment on  
4 that.

5 The last one, I think the only other  
6 impunity thing was Dr. Dimancescu, in which I  
7 mentioned, as I did when he was on the stand,  
8 that this particular note in which his office  
9 staff wrote down about the subsequent x-rays  
10 four weeks later, I went through that with him  
11 when he was on the stand that it's in red,  
12 underlined, et cetera. The only thing I did  
13 was to point it out to the jury and it's in  
14 evidence that the date of that entry is the  
15 14th whereas the discharge was the 13th which  
16 contradicts what Dr. Dimancescu said that  
17 somebody called in from the hospital on the day  
18 of discharge.

19 All of this is totally and completely  
20 proper comment and I don't even think any of  
21 that was objected to.

22 THE COURT: The defendant's application is  
23 denied. Off the record.

24 (Whereupon, an off the record discussion was  
25 held .)

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(Whereupon, this matter was recessed.)

THE FOLLOWING TOOK PLACE IN THE PRESENCE OF THE  
JURY:

THE COURT: Good morning.

MR. GINSBERG: Good morning, your Honor.

MR. HYMAN: Good morning, your Honor.

THE COURT: Let me see counsel.

(Whereupon, an off the record discussion was  
held at the bench between the attorneys and the  
Court.)

THE COURT: All right. Members of the  
jury, as per my instructions of yesterday, you  
will now formally retire for your deliberations  
and the you will take the jury verdict sheet  
with you.

Thank you very much.

The alternate will remain in the  
courtroom.

( Whereupon the six jurors were excused from  
the courtroom. )

THE COURT: Mrs. Brown, thank you very  
much. As I indicated to you at the outset, we  
didn't know whether we would need you for  
deliberations or not. Obviously the time of

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deliberation has come. We have the jury intact and your services are no longer needed.

THE ALTERNATE JUROR: Can I leave?

THE COURT: On behalf of counsel and the Court, I wish to thank you very much for your patience. It's been a rather long trial. We understand the inconvenience that you've gone through.

If I may presume to speak for counsel, we thank you very much. You are more than welcome, if you wish, to wait around. You have no obligation to do so. If you want to wait around you can.

THE ALTERNATE JUROR: Can I stay here?

THE COURT: You can stay in the courtroom, if you wish.

MR. GINSBERG: You can leave.

THE COURT: You can do whatever you want.

THE ALTERNATE JUROR: I think I will leave. I want to tell you, it was an education for me. It was a learning experience.

MR. GINSBERG: Thank you.

MR. HYMAN: Thank you very much. We appreciate your attention.



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THE ALTERNATE JUROR: You're welcome.

THE COURT: The Clerk will give you the number of the courtroom.

THE ALTERNATE JUROR: I would love to know the outcome.

THE COURT: You can call us later in the day or on Tuesday.

THE ALTERNATE JUROR: Thank you very much.

THE COURT: You're welcome,  
(Whereupon the alternate was excused from the courtroom. )

THE FOLLOWING TOOK PLACE OUTSIDE THE PRESENCE OF THE JURY.

THE COURT: I have a note from Mrs. Hirschel, dated today's date addressed to the Court which I've shared both with Mr. Ginsberg and Mr. Hyman. I would ask either side if they wish to comment on same?

MR. GINSBERG: No, your Honor.

MR. HYMAN: No, your Honor.

THE COURT: All right. Thank you, gentlemen.

We will mark it as a Court Exhibit.

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(Whereupon, the abovementioned note was marked  
as Court Exhibit No. V.)

THE COURT: All right.

(Whereupon, this matter was recessed.)

THE COURT: All right, Mr. Ginsberg,  
regarding the records.

MR. GINSBERG: For the record, Mr. Hyman  
is taking possession of Defendant's Exhibit 1  
which are Dr. Dimancescu's records. I'm sorry,  
Defendant's A and Defendant's C which is Dr.  
Dimanscucus' and Dr. Patterson's records  
respectively with the understanding that he can  
return the original to the physicians after he  
makes a photocopy and he will retain the  
photocopy, and in the event there is an appeal  
he will stipulate that the photocopy of the  
exhibits can be used in replacement of the  
original upon the record pending on appeal.

MR. HYMAN: Yes. Agreed.

THE COURT: All right. Thank you.

MR. GINSBERG: Thank you, your Honor.

MR. HYMAN: Thank you, your Honor.

THE COURT: All right.

(Whereupon, this matter was recessed.)

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2 THE COURT: Gentlemen, I have a note from  
3 Mrs. Hirschel, the foreperson, dated 5/25.  
4 That is incorrect. We'll ask her to make the  
5 correction. The time is 10:45. Wherein she  
6 states, please send the testimony of Dr.  
7 Fontanetta to the jury.

8 Okay? So, I would propose, the testimony  
9 wasn't lengthy and she hasn't specified which  
10 part or anything specific. In a case like that  
11 we just propose to read it. Okay?

12 MR. GINSBERG: I would only suggest, while  
13 it's not likely but it will take a good hour or  
14 so to read it, I would suggest that we send  
15 back a note and ask her if there is any  
16 particular part that they want.

17 THE COURT: In view of the fact that the  
18 testimony is not all that lengthy, I'm just  
19 wondering whether an inquiry by the Court might  
20 create more problems than might be solved.

21 MR. HYMAN: That seems reasonable. I  
22 don't know obviously why they want a particular  
23 read back. It is not that long.

24 MR. GINSBERG: I think the note means that  
25 the jury thinks, since they said send, that

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means that they think you will just send them a transcript.

THE COURT: All right. I will explain it.

Bring them up.

Mark the note please.

(Whereupon, the abovementioned note was marked as Court Exhibit No. VI.)

THE COURT: Bring the jury in, please.

THE CLERK: Yes, your Honor. (

Whereupon the jury entered the courtroom. )

THE FOLLOWING TOOK PLACE IN THE PRESENCE OF THE JURY:

THE COURT: Mrs. Hirschel, I have a note from you with yesterday date on it. You said please send the testimony of Dr. Fontanetta to the jury, is that correct?

THE FOREPERSON: Yes.

THE COURT: I will instruct the Court Reporter to read Dr. Fontanetta's testimony in it's entirety.

(Whereupon, the record was read as requested.)

THE COURT: All right. Members of the jury, that concludes the entire testimony of

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Dr. Fontanetta. The jury will now retire and continue their deliberations. Thank you.

(Whereupon the jury was excused from the courtroom and the matter was recessed. )

THE FOLLOWING TOOK PLACE IN THE PRESENCE OF THE JURY:

THE COURT: Madam foreperson, I have a note from you with today's date at 1:18, wherein you state that you reached a verdict, is that correct.

THE FOREPERSON: Yes, your Honor.

THE COURT: All right.

Mark the note as a Court Exhibit.

(Whereupon, the abovementioned note was marked as Court Exhibit No. VII.)

THE CLERK: It will foreperson please rise?

THE FOREPERSON: Yes.

THE CLERK: In the matter of Claudette B. Caplin versus Mihai D. Dimancescu, as to question number 1.

Did the defendant deviate from the prevailing good and accepted standards of neurosurgical care by not having follow-up

1  
2 x-rays taken of the plaintiff's cervical spine  
3 within two to three weeks subsequent to her  
4 placement within a halo brace?  
5 Yes or no?  
6 THE FOREPERSON: No.  
7 THE CLERK: Was that unanimous?  
8 THE FOREPERSON: Yes.  
9 THE CLERK: Question No. 2.  
10 Did the defendant deviate from the  
11 prevailing good and accepted standards of  
12 neurosurgical care by not having an x-ray taken  
13 of plaintiff's cervical spine at the time of  
14 her office visit on December 29th, 1981?  
15 Yes or no?  
16 THE FOREPERSON: No.  
17 THE CLERK: Was that unanimous?  
18 THE FOREPERSON: No.  
19 THE CLERK: The verdict is recorded, your  
20 Honor.  
21 MR. GINSBERG: I would like to have the  
22 jury polled, your Honor.  
23 THE COURT: All right.  
24 THE CLERK: You may be seated. Listen to  
25 your verdict as it stands recorded by the

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Court.

As to question No. 1.

Did the defendant deviate from the prevailing good and accepted standards of neurosurgical care by not having follow-up x-rays taken of the plaintiff's cervical spine within two to three weeks subsequent to her placement within a halo brace?

Your answer was no.

Juror No. 1. was that your verdict?

THE FOREPERSON: Yes.

THE CLERK: Juror No. 2, was that your verdict?

JUROR NO. 2: Yes.

THE CLERK: Juror No. 3, was that your verdict?

JUROR NO. 3: Yes.

THE CLERK: Juror No. 4, was that your verdict?

JUROR NO. 4: Yes.

THE CLERK: Juror No. 5, was that your verdict?

JUROR NO. 5: Yes.

THE CLERK: Juror No. 6, was that your

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verdict?

JUROR NO. 6: Yes.

THE CLERK: As to question No. 2.

Did the defendant deviate from the prevailing good and accepted standards of neurosurgical care by not having an x-ray taken of the plaintiff's cervical spine at the time of her office visit on December 29th, 1981?

Your answer was no.

Juror No. 1, was that your verdict?

THE FOREPERSON: Yes.

THE CLERK: Juror No. 2, was that your verdict?

JUROR NO. 2: Yes.

THE CLERK: Juror No. 3, was that your verdict?

JUROR NO. 3: Yes.

THE CLERK: Juror No. 4, was that your verdict?

JUROR NO.4: No.

THE CLERK: Juror No. 5, was that your verdict?

JUROR NO. 5: Yes.

THE CLERK: Juror No. 6, was that your



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verdict?

JUROR NO. 6: Yes.

THE CLERK: The jury has been polled, your Honor.

THE COURT: Does counsel have anything before I discharge the jury?

MR. GINSBERG: No, your Honor.

MR. HYMAN: No, your Honor.

THE COURT: All right. The jury is discharged with the thanks of the Court. I will see the jury in chambers.

(Whereupon the jury was excused from the courtroom. )

THE FOLLOWING TOOK PLACE OUTSIDE THE PRESENCE OF THE JURY:

THE COURT: The jury verdict form will be marked as a Court Exhibit.

(Whereupon, the abovementioned verdict sheet was marked as Court Exhibit No. VIII. )

THE COURT: Is there any application, Mr. Ginsburg?

MR. GINSBERG: I think my only application, your Honor, would be to set the verdict aside on the grounds that the charge

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2 given to the jury concerning, the not being  
3 responsible for an error of judgment was  
4 erroneous and could easily have been involved  
5 in the jury's verdict, No. 1; and No. 2, the  
6 inability of myself to put Mrs. Caplin on the  
7 stand to refute what Dr. Patterson had said  
8 that he told to her, was also an error that  
9 could easily have influenced the outcome of the  
10 case, and on those grounds, I will leave it at  
11 that.

12 THE COURT: All right. Do you wish to be  
13 heard Mr. Hyman?

14 MR. HYMAN: Other than to say that I felt  
15 that error of judgment was properly charged and  
16 it was my opinion the rulings against  
17 Mr. Ginsburg were proper.

18 I have to other statement to make.

19 THE COURT: The application by the  
20 plaintiff herein is denied.

21 The application by the defendant for a  
22 judgment as a matter of law at the end of the  
23 plaintiff's case is denied as being moot.

24 The last part of the ruling wherein I  
25 denied the defendant's application, that

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application was previously denied, the motion for judgment as a matter of law at the end of the plaintiff's cases, just so the record is clear, that is what I was alluding to.

MR. HYMAN: I didn't realize that.

THE COURT: Just so the record is clear, again, plaintiff's application is denied.

The previous motion made by the defendant at the end of the plaintiff's case to dismiss pursuant to 4401 alleging that the plaintiff has failed to prove a prima facie case was denied at the time of the application.

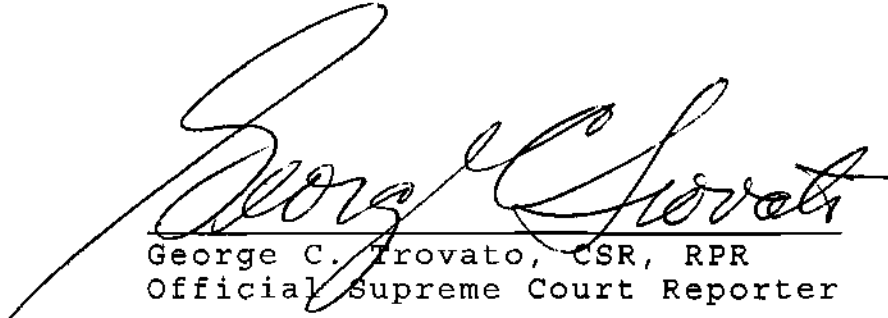
All right gentlemen.

(Whereupon, this matter was concluded.)

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C E R T I F I C A T I O N :

I, George C. Trovato, CSR, RPR, Official  
Supreme Court Reporter, hereby certify that the  
above transcript is a true and accurate copy of  
the minutes taken by myself stenographically in  
the within matter.



George C. Trovato, CSR, RPR  
Official Supreme Court Reporter