

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

vs.

BEAU R. ORTH,
Respondent/Cross-Appellant.

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

vs.

BEAU R. ORTH,
Respondent.

Case No. 69935

District Court Case No. A648041

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Case No. 70227

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

VOL. 5

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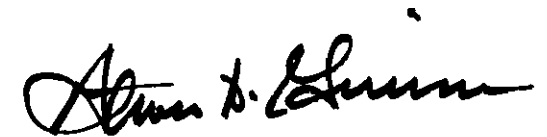
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CLERK OF THE COURT

TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA

BEAU ORTH,

Plaintiff,

VS.

ALBERT CAPANNA, MD,

Defendant.

CASE NO. A-11-648041-C

DEPT. III

BEFORE THE HONORABLE DOUGLAS W. HERNDON,
DISTRICT COURT JUDGE

WEDNESDAY, AUGUST 26, 2015

TRANSCRIPT OF PROCEEDINGS
JURY TRIAL - DAY 6

APPEARANCES:

For the Plaintiff:

DENNIS M. PRINCE, ESQ.
DANIELLE A. TARMU, ESQ.

For the Defendant:

ANTHONY D. LAURIA, ESQ.
PAUL A. CARDINALE, ESQ.

RECORDED BY: SARA RICHARDSON, COURT RECORDER

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FOR THE PLAINTIFF:

(None)

FOR THE DEFENDANT:

(None)

1 Wednesday, August 26, 2015 at 10:49 a.m.

2
3 [Outside the presence of the jury]

4 MR. LAURIA: Your Honor, I do have one request.

5 THE COURT: Okay. What do you got?

6 MR. LAURIA: I would request that counsel provide you -- or provide the Court
7 that CD of the demonstrative images now so we have it on -- you have it on record.

8 THE COURT: I asked that by the close of trial --

9 MR. PRINCE: Right.

10 THE COURT: -- that everybody gives me copies of PowerPoints,
11 demonstrative exhibits, all that kind of stuff --

12 MR. LAURIA: Okay.

13 THE COURT: -- so we have hard copies.

14 MR. LAURIA: Okay.

15 THE COURT: Okay.

16 MR. LAURIA: So at -- only at the end of trial?

17 THE COURT: Pardon?

18 MR. LAURIA: Only after evidence has closed?

19 MR. PRINCE: Yes, sir.

20 THE COURT: That's my only request. And just so we're clear, the reason
21 that I denied your request to use their PowerPoint slide with the MRI films is a
22 couple of things. Number one, that would have required the gentleman that they
23 hired to display their exhibits to work for you. And if there is no agreement, then I
24 don't do that. Secondarily, that was items of actual evidence, the MRI films. So I'm
25 of the mind set that they're asking their expert about those. You can pull them up as

1 well. You can pull them up digitally and put them side by side.

2 You can put them side by side on the overhead, whatever you wanted
3 to do. And so when the issue came yesterday when you said can I use this
4 demonstrative exhibit, obviously that was in front of the jury so I understand, you
5 know, Mr. Prince didn't want to make a stink about it, but I would have allowed that
6 anyway. Those are different than items of evidence. So if you're questioning one of
7 your experts on some animated demonstrative exhibit, I think they're entitled to
8 utilize that and ask questions about it in cross-examination as well. That's different
9 than an actual item of evidence and using their audio video technician to help you in
10 that regard.

11 MR. LAURIA: And I -- again, so I understand the Court's position, my thought
12 being then that I ought to be able to have hard copies, at least, of what they've done.
13 Not have their guy pull it up, but have a hard copy so I can identify it. Otherwise I
14 have to, you know, it's -- there are hundreds of images on each of these scans.

15 THE COURT: I know. But the reality, Mr. Lauria, is they're using the same
16 five images. I know you want to make a record of it every time, but it's the same
17 image every time.

18 MR. LAURIA: It's not -- it's -- I mean, sometimes it is and sometimes it's not,
19 Judge. So --

20 MR. PRINCE: It's the same, Judge, every single time.

21 THE COURT: Well, no, I'm not saying every -- it's -- I'm not saying it's one
22 image displayed over and over again, I'm just saying it's the same February, 2009
23 image. It's the same --

24 MR. LAURIA: Yeah, but there's --

25 THE COURT: -- October 6, 2010 --

1 MR. LAURIA: -- two hundred images on the February, 2009 image --
2 THE COURT: I know.
3 MR. LAURIA: -- and that's the problem.
4 THE COURT: But they're using the same one.
5 MR. PRINCE: It's not a problem. But we keep --
6 THE COURT: Every time they bring it up --
7 MR. PRINCE: Right.
8 THE COURT: -- it's the same slide and the same image. But we'll continue to
9 make the record of --
10 MR. LAURIA: Thank you.
11 THE COURT: -- the series and the view and the number, that's fine.
12 Okay, Joel, you can go ahead.
13 Who is your first witness, by the way?
14 MR. PRINCE: Mr. Orth --
15 THE COURT: Okay.
16 MR. PRINCE: -- Robert Orth. Okay, you can go get Robert.
17 [Colloquy between counsel]
18 THE MARSHAL: Okay, we're ready?
19 THE COURT: Yeah.
20 MR. LAURIA: Thank you.
21 THE MARSHAL: Come on in.
22 [Jury in at 10:52 a.m.]
23 THE MARSHAL: The jury's present, Your Honor.
24 THE COURT: Thank you. You guys can be seated.
25 MR. LAURIA: Thank you, Your Honor.

1 THE COURT: All right. We will be back on the record. We're going to
2 continue on, ladies and gentlemen, with plaintiff's case in chief.

3 Mr. Prince, you all may call your next witness.

4 MR. PRINCE: Your Honor, thank you. I call Robert Orth, who is Beau's
5 father.

6 THE COURT: Okay.

7 MR. PRINCE: I think his mom went to go get him.

8 THE COURT RECORDER: Mr. Prince, would you mind moving that podium a
9 little closer to your little podium --

10 MR. PRINCE: I will.

11 THE COURT RECORDER: Thank you.

12 MR. PRINCE: Thank you. Can you hear me okay? I'll move (indiscernible) a
13 little over too.

14 THE COURT RECORDER: Perfect. Thank you.

15 THE COURT: If you just remain standing and raise your right hand for me --
16 need a trash can?

17 MR. ORTH: Yes, sir, I do. I apologize.

18 THE COURT: Just give it to me. That's okay.

19 MR. ORTH: It's nothing but water.

20 THE COURT: No worries.

21 MR. ORTH: Okay.

22 ROBERT ORTH

23 [having been called as a witness and being first duly sworn, testified as follows:]

24 THE CLERK: Thank you. You may be seated.

25 THE WITNESS: Thank you.

1 THE CLERK: Will you please state and spell your name for the record?

2 THE WITNESS: Robert, R-o-b-e-r-t, E, Orth, O-r-t-h.

3 THE COURT: Thank you. Mr. Prince.

4 DIRECT EXAMINATION OF ROBERT ORTH

5 BY MR. PRINCE:

6 Q And good morning, Mr. Orth.

7 A Good morning.

8 Q Are you nervous?

9 A A little bit.

10 Q All right. You're just going to relax. We're just going to ask you a few
11 questions about your son.

12 A Okay.

13 Q And do you go by Rob?

14 A Yes.

15 Q And just for our record, I -- we -- everybody knows, but what's your
16 relationship to Beau Orth?

17 A He's my son.

18 Q Okay. And are you married?

19 A Yes.

20 Q And what's your wife's name?

21 A Peggy.

22 Q And how long have you and Peggy been married?

23 A Will be 40 years this February.

24 Q Congratulations. How long have you been together?

25 A Forty-three.

1 Q Okay. When did you first -- how many children do you have other than
2 Beau?

3 A Well, we have three other children.

4 Q Okay. And what are their names?

5 A Kristen (phonetic), Dustin, Nicholas.

6 Q Okay. And is Kristen still with us?

7 A No, she's not. She passed when she was young.

8 Q Okay. And when did you move to Las Vegas?

9 A After I came out of the Navy in '72. We had been here prior. My mom
10 came here from Ohio. My grandparents came here from Ohio. My grandfather had
11 a little TV repair shop down on Las Vegas Boulevard. My grandmother worked at
12 The Mint. My mom worked at the Las Vegas Club.

13 Q My grandmother worked at The Mint ironically enough.

14 A Yeah, okay.

15 Q Interesting. I didn't even know that about you. What kind of work do
16 you do, Rob?

17 A Landscaping.

18 Q Okay.

19 A Self-employed.

20 Q Okay. How long have you had your own landscaping business?

21 A Thirty years.

22 Q Okay. Where does Peggy work?

23 A Peppermill.

24 Q And the Peppermill, the restaurant on Las Vegas Boulevard?

25 A Correct.

1 Q And what is her position there?

2 A She's a general manager. She's been there for 40 years, 42 years.

3 Q Forty years.

4 A Yeah, a long time.

5 Q So just a short time.

6 A A short time.

7 Q All right. And so where does Beau fit in in terms of the age of all of your

8 kids?

9 A It's hard to talk about Beau without basically going back to when my

10 wife and I were first trying to have children. We had some problems. I had to go to

11 a urologist. I had to take some medication. It caused problems with Kristen. She

12 had a heart disease and she passed when she was six months old.

13 Q Okay. I'm sure that was hard. And then you have your other two boys,

14 Dustin and Nicolas.

15 A And then we adopted Dustin, believe it or not a month later, and then

16 my wife found out that she was pregnant with Nicholas a couple of months after we

17 had -- after we signed papers for Dustin.

18 Q Okay. And so -- and Dustin, how old is Dustin?

19 A Thirty-four. He's going to turn 34 this Friday.

20 Q Okay. And where does he work?

21 A He's a metro police officer.

22 Q Okay. I think he's been in court here a few days this week.

23 A I think so. Yes, he has.

24 Q All right. And it sounds like, you know, after -- shortly after you adopted

25 Dustin you learned that -- Peggy learned that she was pregnant?

1 A Right.

2 Q And that's your older son, Nicholas?

3 A It's middle son, Nicholas.

4 Q Middle son, Nicholas -- middle --

5 A He's a chef, yes.

6 Q He's a -- where is he a chef?

7 A At the Peppermill.

8 Q All right. And what's the age difference between Nicholas and Beau?

9 A Eight and nine. Nick was eight and Dustin was nine when Beau was

10 born.

11 Q And tell us about, you know, when you -- when Peggy became

12 pregnant with Beau. Were you planning on having any more kids?

13 A No, actually, I was supposedly sterile --

14 Q Okay.

15 A -- and couldn't have kids without medication of some sort. I took

16 Clomid, which was prescribed to me through the urologist for Kristen, and so I -- we

17 just never really -- this was it. We pretty much -- we had our Dustin and we had our

18 Nick, and we were pretty much good to go. We had a normal life. We camped.

19 The boys played baseball, pretty low key. It was just an average family, you know,

20 doing our thing.

21 Q Right. And how old were you when you learned that Peggy was

22 pregnant with Beau?

23 A Thirty. I was -- I think I just turned 38, 39, something like that.

24 Q Yeah. And it sounds like life was going along just fine?

25 A Yeah.

1 Q Yeah. And what was your reaction when you learned that Peggy was
2 pregnant with Beau?

3 MR. LAURIA: Judge, I just think I need --

4 THE WITNESS: Well, we were amazed --

5 MR. LAURIA: Excuse me. I'm sorry. I just think I need to object. I'm not
6 sure what the relevance of this is to the -- what the reaction was. I mean, there's not
7 a claim by the parents here.

8 THE COURT: Well, I'll give you some leeway. You can continue.

9 MR. PRINCE: Okay, yeah, it's short. I mean --

10 BY MR. PRINCE:

11 Q Yeah, what was your reaction, and we're getting to a point. What was
12 your reaction at that point?

13 A Well, all of our family and friends knew the situation. They just wanted
14 to know who the mailman was, actually.

15 Q Okay. And so --

16 A We were pretty happy. We were extremely happy, but worried too.

17 Q Yeah. And so when was Beau born?

18 A November 2nd, '89 -- 1989.

19 Q Okay. So he's about to be 26 years old here in a couple months.

20 A Yes, he is.

21 Q And tell us about Beau, I mean tell us how he hits the scene.

22 A Well, we were extremely nervous. We had -- the three children that we
23 had before Beau, Dustin had heart problems, Nick had visual problems, Kristen had
24 heart problems and we were really I think more nervous about him in the beginning
25 than -- we were cautiously happy. You know, we're wondering if everything is going

1 to be okay. We had -- we were kind of like this doesn't -- we were afraid. You know,
2 we thought there might be something with Beau. I mean we were going to have him
3 anyway. It doesn't matter what the problems were, but you know. And then when
4 he was born and we found out he was perfect, we were like this (indicating).

5 Q And tell me about Beau as a baby. Tell about kind of -- what kind of
6 impact did he have right from the start?

7 A Our family and friends like -- from the beginning it was kind of a crazy
8 thing. When he was two, 107.5 had a baby games thing at the Meadows Mall -- or
9 at the Boulevard Mall, I'm sorry. And my wife goes let's enter him because he was
10 very energetic. I mean you could never stop him. He was always into everything. I
11 mean it wasn't like a -- he would lose his focus on anything, he just -- whatever he
12 was doing he would do it fast, he would do it hard, he would do it now and he
13 wanted to compete with somebody when he was just a little kid. So we got him into
14 these baby games and he won.

15 Q As a two year old?

16 A As a two year old. And we've got the plaque and the picture and the
17 stuff and all that -- anyway. So we're like wow this kid is -- he's pretty amazing kid.
18 And he watched basketball. He watched the Rebels, you know, when they went to
19 the championships there in the -- the Nationals in '90 and '91. He wanted to play
20 baseball all the time, wanted to sword fight. He wanted his brothers -- he drove his
21 brothers crazy. And drove his mom crazy too. He was always -- we had planters by
22 our shower in our master bedroom. He would dig in them and you'd -- she's got -- I
23 mean he just was adventurous. He was -- he never stopped. He wanted to
24 compete.

25 Q Okay. Was that -- has that always been his spirit?

1 A Always. Always has been. Even when he played T-ball, he -- we
2 played one year of T-ball and he said dad, this isn't baseball. They don't even keep
3 score. I want to play baseball.

4 Q And tell us about -- when did Beau get -- first get started in athletics?

5 A He was almost six. Actually, he was five. No, he had just turned six,
6 into baseball.

7 Q Oh, how did he do in baseball?

8 A He did fantastic. Through his career he was a home run hitter. He was
9 a catcher, a pitcher, first base, third base, outfield. Pitched a perfect game when he
10 was 10. All-star when he was in majors and -- major one and major two, he's a all-
11 star both years he was there. He played in the all-star games in Las Vegas through
12 Mountain Ridge.

13 Q Okay. And did he play basketball?

14 A Played basketball.

15 Q Was he -- how was he as a basketball player?

16 A He was -- he played basketball from the time he started playing NYFL
17 football. Bob Barrera said let's all get these boys hooked up in this league, and they
18 played base -- they played basketball. And he was the MVP.

19 Q How was he as a basketball player?

20 A He was -- well, defensively he was a killer. He was great defense.
21 He'd block you out, take the ball. He liked to shoot the three pointer. He was pretty
22 good at that.

23 Q All right.

24 A In his freshman year at Bishop Gorman, they went to the Cowboy
25 Classic. He was MVP playing basketball.

1 Q Did you know early on that he had special talents and gifts as an
2 athlete?

3 A Absolutely. Oh, yeah. And I -- when he was like five years old he had
4 this Raider helmet and this Raider jersey and he would always pose -- doing the
5 Heisman pose. It was pretty cute.

6 Q Yeah. And tell us about football. What was his real passion?

7 A Football.

8 Q Always?

9 A Always. He asked me when he was five years old. Dad, I want to play
10 football. Now, he could have played Mighty Mites, but at -- I think it's six -- you had
11 to be -- he had to be six. And the problem was was he would turn six in November,
12 everybody else turned six and he didn't meet the criteria. So we had to make -- wait
13 one more year, and -- which is good because he played for a friend of ours, Bob
14 Barrera who played football at UNLV. He played for the San Diego Chargers.
15 Played some Canadian football. It was his coach.

16 Q What was the name of his team?

17 A 49ers -- NYFL 49ers.

18 Q How long was Beau on the 49ers?

19 A Oh, I'd say from the time he was seven until he went into high school for
20 the most part. He was --

21 Q Mostly with the same group of boys?

22 A Absolutely. Yeah.

23 Q All right. Tell me about that team. How was that team? Are they --
24 were they competitive?

25 A In the -- they were the New England Patriots of the NYFL. They were a

1 great team. The -- four years undefeated, five championships. He was in the Pro
2 Bowl every year, played a tailback. He played defensive end. He played
3 linebacker, safety, kicked field goals. He was a punter. He even threw a touchdown
4 to his best friend, Dillon Barrera, against the Rams in a championship game. So
5 yeah, he was quite an athlete.

6 Q And now, you know, let's kind of advance our self. Now he's, you know,
7 14, 15 years old, getting ready to go to high school. How big is Beau by that point?

8 A He's a pretty good kid. He struggled with his weight during the NYFL
9 only because he was growing so fast and there was a weight limit to carry the
10 football. You couldn't carry it if -- I can't remember what the weight. Each division
11 had a different weight that they could have the ball carry. You didn't want to have
12 like a 150-pound ball carrier and you have like a -- you know, an eight year old who
13 weighs 57 pounds, you know, tackling at a free safety position. So you can't have
14 that. And he would always right down to the beginning of the season, he would eat
15 his tuna, he would ride his bike. He was -- a protein diet, and he'd maintain that
16 weight to carry that football. We blew it one year, but yeah, it was a passion. He
17 was determined to play football, without a doubt.

18 Q And where do you live in town, Rob?

19 A In Northwest.

20 Q And where was Beau originally zoned to go to high school?

21 A Centennial.

22 Q Okay. And were a number of his, you know, his teammates from the
23 49ers, do they also live in your area?

24 A Yes. That's the way it's set up. Each team has a specific area so
25 practices aren't hard to get to, things of that nature, because there's a lot of practice,

1 three nights a week, game on Saturday.

2 Q Now, how was it? I mean, where -- in terms of your family, I mean,
3 where did -- was the spotlight on Beau from the time, you know, he hit the ground
4 running, you know, as a -- playing sports, all the way through, you know, high school
5 and college for that matter?

6 A Yeah, absolutely. When he --

7 MR. LAURIA: Judge, can we approach, quickly?

8 THE COURT: Yeah.

9 MR. LAURIA: Thank you.

10 [Bench conference begins at 11:07 a.m.]

11 MR. LAURIA: I understand that there's some leeway, but I think that, you
12 know, how is this affecting the family and how -- what do the family respond to,
13 there's no claim by the family here, so if he wants to talk about Beau as an athlete, I
14 get that that's -- but we've heard -- you know, we're hearing a lot of things that I think
15 are well beyond that. I'm just asking that we -- while I understand some leeway, that
16 we have some limits on --

17 MR. PRINCE: I don't know what I've done wrong --

18 THE COURT: Well my comment on the leeway question was as it pertained
19 really to their beginnings of their family and pregnancy issues and things like that.
20 This I think is all fine. I don't think this is problematic at all.

21 MR. PRINCE: Okay.

22 THE COURT: Okay?

23 MR. PRINCE: Thank you, Judge.

24 [Bench conference ends at 11:07 a.m.]

25 THE COURT: You can go ahead, Mr. Prince.

1 BY MR. PRINCE:

2 Q Kind of talking about, you know, kind of Beau growing up and kind of
3 going through little league, NYFL, getting, you know, through college. I mean, was
4 he like the shining star of your family?

5 A My wife said, I don't think Beau has ever had a bad day. Everybody
6 wanted to be Beau. Beau never had a bad day. He was gifted. Everything he did,
7 he did well.

8 Q How was he as a student?

9 A And it didn't come natural, the athletics -- I mean the academic part. He
10 worked real hard in school. You know, not that it was hard, but you know, he wasn't
11 like gifted that way. He wasn't like a, you know, like Dillon. Dillon was like -- you
12 know, he was a six-year-old, you know, mathematician. But Beau, he had to work
13 hard at it, you know.

14 Q Did he?

15 A And his -- yes, he did. And his brothers -- he had a 3.2 average when
16 he left college, and I think he had a 3.5 when left Bishop Gorman. And that's a
17 preparatory school. That's not a -- you know, I don't mean to --

18 Q Yeah.

19 A -- down play, but it's a preparatory school. You have to work pretty
20 hard.

21 Q And let's talk about, you know, going to Bishop Gorman and kind of pick
22 up our story there. I mean, what kind of discussion did you have with Beau about,
23 you know, going to Bishop Gorman? How did that come about, Rob?

24 A We were -- we were all zoned for Centennial. And there was a coach
25 there that Bob knew -- Bob Barrera. He was the -- his head coach in the NYFL.

1 And we were all going to take this 49er team and we were going to take it to
2 Centennial. They were a relatively new school at the time. And we were going to --
3 you know, wanted to carry on our success at the next level. We thought we could
4 win a state championship. And for some reason during the year or two that this was
5 being talked about, this coach, his contract evidentially was up and he moved to
6 Henderson. So everybody that was zoned there went there, and others went to
7 Bishop Gorman. Beau asked me if he could go, and I told him I said, son, the only
8 way I can do that is I'll pay for your high school, but you're going to have to get a
9 scholarship if you want to go to college. And he did.

10 Q And what did Beau say in response to that?

11 A I'll do it.

12 Q Did you have any doubt that he would?

13 A No.

14 Q So we enter Bishop Gorman. What sports does he play as a
15 freshman?

16 A He plays basketball. He plays football. He wrestles, and that's about it.

17 Q And let's talk about his foot -- his first year playing football at Gorman.

18 A Okay.

19 Q Does he make it up to the varsity team?

20 A He goes to the playoffs. The freshman team goes 8 and 0. The first
21 time I think in a extremely long time that Bishop Gorman's freshman team goes
22 undefeated. They went 8 and 0. And during the playoffs the players -- the better
23 players, or the star players, go up into -- and they play in the playoff games. They
24 play in the zone championships and stuff like that, and helps the varsity team,
25 because Bishop Gorman -- I mean, their teams at that time were pretty small. You

1 know, they had a real small student body which was like, you know, 700, you know,
2 opposed to like a division double -- or a four A school -- or one A school. That's like
3 three, 4,000 kids. So they were at a disadvantage.

4 Q So what -- and in his first year, you know, at Gorman, does he make it
5 up to the varsity team at some point? I think you said that.

6 A Yes, he does.

7 Q When does he make it up to the varsity team?

8 A After the season is over. David White would not play -- they didn't play
9 freshman during the year, but the deal was that if you did well, you go and you play
10 in the varsity during the playoffs.

11 Q And did Beau get playing time during the play --

12 A Yes, he did.

13 Q At what position, Rob?

14 A He was a safety, wide receiver. He played wide receiver up until his
15 junior year.

16 Q At Gorman?

17 A At Bishop Gorman.

18 Q Did he play both defense and offense?

19 A He played both ways.

20 Q Did he play both ways as a freshman?

21 A Yes, he did.

22 Q Did he ever come off the field?

23 A No. He was a punter. He played every down. Special teams -- he was
24 a gunner on special teams.

25 Q What's a gunner mean?

1 A A gunner at the -- on both sides of the field on a -- during a kick off or
2 even on a punt return, you have two guys at the end. They're called gunners and
3 they're the ones -- their job is to basically pinch -- when they get down there, they
4 got to bring that -- keep the guy from going from side to side and create some sort of
5 havoc so everybody else can get to the football.

6 Q Okay. And so as a freshman Beau never came off the field.

7 A No.

8 Q Did he play virtually every down?

9 A Pretty much every down, yes, he played --

10 Q Would you -- would he -- was he considered a dominant player?

11 A I think so. Yes.

12 Q And so now we're, you know, at the -- his freshman year, at the end of
13 the season, Gorman's in the playoffs. He gets to play. Does he get -- does Gorman
14 make it to the state championship?

15 A No.

16 Q No, not that year. All right. And now let's kind of talk about the
17 sophomore year of high school for Beau and let's kind of -- what sports does he play
18 that year, his sophomore year?

19 A They do this -- pretty much the same thing except he doesn't play
20 basketball.

21 Q Okay. And so --

22 A He only played basketball his freshman year. Then after that he was
23 pretty much football, working out, getting ready for the season.

24 Q Okay.

25 A They would play pick-up games and stuff like that. Him and his friends

1 would go down to the Y and --

2 Q You know, how about track and field, was he -- starting as a
3 sophomore, was he involved in track and field?

4 A A little bit.

5 Q Okay. And so tell us how his sophomore football season goes. Tell us
6 what happens for Beau then?

7 A He does exactly the same thing as he did before, he plays offense,
8 plays defense. They dominate Southern Nevada football in the Sunset Division and
9 they go to the playoffs.

10 Q And was it this group of kids from the --

11 A Same group of kids now --

12 Q -- 49ers?

13 A -- they've kind of infiltrated -- you know, they've -- you know, they're
14 allowed now to go and play football --

15 Q Yeah.

16 A -- for --

17 Q And what sort of honors does Beau -- or acknowledge (sic) does Beau
18 get even as a sophomore at Bishop Gorman?

19 A He -- I don't --

20 Q Was he all-conference or --

21 A Well he -- yeah, they do all of that. They make -- yeah, all-conference
22 stuff and --

23 Q Was Beau all-conference? Was he named to an all-conference team?

24 A Sure. Second team, uh-huh.

25 Q As a sophomore?

1 A I think so, yes.

2 Q All right. Let's take it to his junior year. Tell me about Beau as a
3 football player that year and how, you know -- and how he's doing, is he progressing
4 and improving. Tell us about him.

5 A Well there's -- he's doing just as well. He played well all the way
6 through, the same thing. We had coaching changes. David White went off and did
7 some other stuff and Altshuler came in and started coaching the team. Now he's
8 playing fullback. Now he's playing -- it's a little tight end. Now he's punting. Now
9 he's playing safety, he's playing linebacker, he's kick off return. He was, you know,
10 he, again, never came off the team.

11 Q Off the --

12 A I mean off the field.

13 Q And how did the team do that year, Beau's junior year?

14 A Well, we really didn't do as well I think as we wanted to. No, that was
15 his -- what year did we beat Palo? I forget that year.

16 THE COURT: I don't think you've lost to Palo in a long time at this point.

17 THE WITNESS: I mean -- I'm sorry, Cimarron-Memorial.

18 MR. PRINCE: Yeah.

19 THE WITNESS: We beat them when Mikey Levine kicked that field goal.
20 Was that your sophomore or junior year?

21 BY MR. PRINCE:

22 Q Yeah, you have to talk to me. I know --

23 A Oh, I'm sorry.

24 Q -- Beau's right here, but I mean yeah, you got to talk to me.

25 A Okay.

1 Q All right.

2 A I apologize.

3 Q So anyway, so now we're -- the -- his -- Beau's junior year. I mean,

4 that's -- is that a year that colleges start to reach out to kids that they're -- that they

5 see interest in?

6 A Yeah, you start getting letters of interest. He got ASU. He got Boise,

7 Utah, Air Force, Montana, a couple of other smaller colleges.

8 Q What about University of Nebraska?

9 A Yeah, they had -- actually Nebraska came to Bishop Gorman and

10 talked to Beau.

11 Q How about Oregon State University?

12 A Yes.

13 Q How about Louisiana or LSU, Louisiana State?

14 A Yes, LSU also.

15 Q Okay. And was that a -- an exciting time for Beau?

16 A Yes, it was.

17 Q In what way? Tell me about that. I mean, you know --

18 A He was fulfilling a dream. Every kid --

19 Q What was his dream?

20 A Every kid wants to play football. They want to go and get a scholarship

21 and go on to the NFL. I mean, most kids that are serious about the sport, that love

22 the sport, that have the passion for the sport, that's what they want.

23 Q What was Beau's goal when, you know, he's -- starting in his junior

24 year, what's he telling you? What's he talking about, his hopes and his dreams, and

25 his goals?

1 A Same thing as he talked about since he was six years old.

2 Q And what's that?

3 A He wanted to play professional football.

4 Q And let's talk about Beau in terms of like his size and strength and

5 speed. What can you share with us? I want you to just, you know, tell the jury

6 about how strong he was, how fast he was as an athlete.

7 A Well -- and during the combines and stuff he was pretty impressive.

8 When he was at -- he'd bench press over 300 pounds.

9 Q As a high school student?

10 A Yes. Absolutely.

11 Q How much could he squat?

12 A Oh, I don't know, probably same, 400 pounds. They were -- their

13 weight rooms was really bad. Yeah, they did. They worked hard. He worked very

14 hard.

15 Q When you say combine, did Beau get invited to, you know, select what

16 they call it where other high school athletes come to, you know, showcase their

17 skills for colleges and universities around --

18 A Yeah, we went down to San Antonio for the Under Armour game. He

19 was invited down there for the combine.

20 Q Okay.

21 A Three or four kids from Bishop Gorman and Coach White, they all went

22 down.

23 Q What other combines was he invited to to showcase his skills?

24 A Oakland. We were at Stanford.

25 Q Okay. And is this -- can any kid go or do you have to be invited?

1 A You -- it's up to your head coach. He gets letters, and they're -- they
2 get invited and he wants -- and they invite their -- they want their star athletes, yes.

3 Q Okay.

4 A It's pretty much like that.

5 Q And when Beau's getting, you know, letters from various colleges and
6 universities around the country, what's his excitement? What's his reaction to that?
7 Is he excited?

8 A Well, yeah, of course. Yeah, he was elated. He's like get another
9 letter, he'd run to the mailbox, get another letter.

10 Q Right, that's what --

11 A You know, that's a process. That -- you know, any kid that wants to --
12 even for young women too, it's swimmers, divers, anything I mean that you're
13 excelling. Golfers, you know, they want that scholarship to that school --

14 Q Right.

15 A -- you know, and to -- you want to go to the -- a premiere. Like if you're
16 baseball, you want to go to a premier baseball college or you know, football, same
17 thing.

18 Q And was Beau -- kind of in his junior year when these letters are coming
19 in, would he ask you hey dad, did you get any mail today, get any letters today, did
20 -- you know, would he go to the mailbox himself and check?

21 A Sure. I would go.

22 Q That's a very exciting time.

23 A Absolutely.

24 Q And it was exciting for you too --

25 A Yeah.

1 Q -- as a family, wasn't it?

2 A A very proud dad, you bet.

3 Q And so did UNLV show interest?

4 A Yes.

5 Q Okay. How about Harvard?

6 A Yes, they did.

7 Q Did you -- do you remember getting that letter from Harvard?

8 A Yes. Yes.

9 Q What did you laugh?

10 A Harvard, come on, it has that stigma, you know. My kid's at Harvard.

11 Everybody would have laughed at me. I wouldn't --

12 Q Yeah.

13 A He was a smart boy. I didn't know if he was that smart.

14 Q Were you in -- heavily involved with Beau and guiding him through this

15 process, you know, games, practices, you know, every -- all of his --

16 A I coached him in the NYFL through his whole football. I was an

17 assistant coach.

18 Q Were you hands on even during high school very -- in terms of with

19 Beau?

20 A Not so much. Not so much. We did a lot of things to help the school,

21 boosters, things of that nature, organized trips, games. There was a transition

22 between the old school and the new school where the kids, they were -- basically

23 there's no place for them to practice. So we had to go to the city and get parks, and

24 there were waters and dummies and things that we all had to just -- it was more of a

25 -- that type of thing that we helped in high school.

1 Q Sure.

2 A Not so much the coaching.

3 Q Did -- what sort of honors or recognitions did Beau get during his junior

4 -- after his junior year?

5 A He was, you know, again, all-conference. And the regular awards that

6 just come along with, you know, through team awards and things of that nature.

7 Q Okay. And did he have a good junior year?

8 A I think he had a pretty good junior year. They didn't do as well on the --

9 as I think they wanted to do, but the team was still growing.

10 Q Okay. Now, let's go to our senior year. How's Beau physically going

11 into his senior year?

12 A He's actually hurt.

13 Q Okay.

14 A He had a trip to California and hurt himself body surfing.

15 Q Okay.

16 A And he hurt his shoulder.

17 Q Okay.

18 A So he played the whole year with shoulder pain.

19 Q Okay. And did he have that corrected? Did he have a surgery?

20 A After his senior year, yes, he did.

21 Q Okay. So he played his -- so how did he do his senior year? Tell me

22 about his season?

23 A He had a fantastic season. He ran for almost a thousand yards at

24 tailback, interceptions, all-conference, all-state. He won all the awards, first team,

25 he won everything -- everything that you could win.

1 Q With a broken shoulder?

2 A With a broken shoulder.

3 Q All right. And how'd the team do that year?

4 A They won state for the first time since '55.

5 Q That was a very proud year, obviously?

6 A Yes.

7 Q And so talk to me now, Rob, about -- now we're -- you said the colleges

8 are, you know, showed interest in Beau early?

9 A Uh-huh.

10 Q Is -- are the same school interested in him, you know, during his senior

11 year?

12 A Yes.

13 MR. LAURIA: Objection; compound, Your Honor.

14 THE COURT: Well, I'll sustain the objection.

15 BY MR. PRINCE:

16 Q What schools are interested in Beau during his senior year, Rob?

17 A Montana, Oregon, UNLV, those were the serious ones.

18 Q Okay. And --

19 A We actually had people come to our house, setting up visits, things of

20 that nature.

21 Q Okay. So now coaches are actually coming to the house?

22 A Coaches are coming to the house, yes, sir.

23 Q All right. And did Beau -- and you're kind of like talking through this

24 process, working through his junior year and his senior year, is he telling you where

25 he'd like to play?

1 A Yes and no. I mean, we have dreams. I'm from Ohio. You know, I
2 wouldn't mind having him go to Ohio State, but I mean, that's me.

3 Q Right.

4 A But he had -- he loved UNLV. He liked his hometown. He really -- I
5 think what -- it just depended on -- he was really kind of a homebody. He was a --
6 you know, he liked family. He didn't really want to go too far. I think that was his
7 biggest thing because a lot of his friends that had gone before him ended up coming
8 home because they didn't -- their freshman year, they didn't want to be away from
9 home. And that's a big transition for a kid that's 17, 18 years old. It's a big deal. A
10 lot of, you know, kids are like, I want to get out of this town, you know. And then
11 they get out and they get home sick.

12 Q Right.

13 A And he was afraid that might happen too.

14 Q So where does Beau ultimately decide to go to college?

15 A UNLV.

16 Q Did he get a scholarship?

17 A Yes, he did.

18 Q And what type of scholarship?

19 A A full ride.

20 Q A full ride. And who was the coach at the time?

21 A Coach Sanford.

22 Q Did you like Coach Sanford?

23 A I loved him.

24 Q And what was a -- you know, are you familiar, you know, just because
25 your involvement with youth sports and high school sports and athletics, I mean,

1 how many kids really get to go on to a Division I football program?

2 MR. LAURIA: Objection; lacks foundation.

3 THE WITNESS: The numbers --

4 THE COURT: Well, hold on just second.

5 THE WITNESS: I'm sorry, sir.

6 THE COURT: I'll sustain the objection. If you can establish some more
7 foundation --

8 BY MR. PRINCE:

9 Q Are you familiar with, you know, based upon your involvement with
10 youth sports, you know, high school sports and going through the college
11 recruitment process with Beau, how many, you know, high school football players
12 get to go on and play Division I college football?

13 MR. LAURIA: Objection; lacks foundation.

14 THE COURT: Well, the first question was just are you familiar? Do you have
15 some understanding of --

16 THE WITNESS: Yes, sir, I do.

17 THE COURT: -- the percentages?

18 THE WITNESS: Yes, sir, I do.

19 THE COURT: Okay. You can go ahead.

20 MR. PRINCE: Okay.

21 BY MR. PRINCE:

22 Q And what's your understanding?

23 MR. LAURIA: Same objection, Your Honor.

24 A My --

25 THE COURT: I'll let him answer the question.

1 THE WITNESS: My understanding, one percent of one percent play Division I
2 football.

3 BY MR. PRINCE:

4 Q Okay. And so Beau now is being, you know -- you have discussions
5 with the coach about, you know, whether Beau should, you know, play his freshman
6 year, take a red shirt year. Do you have that discussion?

7 A Yes.

8 Q But I want you to tell us --

9 A Yes.

10 Q -- what is a red shirt year?

11 A Okay. A red shirt year is like -- the school usually uses that as an extra
12 year of --

13 THE COURT: Eligibility.

14 THE WITNESS: Thank you. Eligibility. And what they do is, they're allowed
15 to -- I don't think they go through team practices and stuff like that, but they're able
16 to work out, get bigger, get their studies down. If they need their grades raised up,
17 raise the grades up, just in preparation of the rest of the four year scholarship. At
18 UNLV they had a gray shirt which you would actually go to school. I would pay for
19 that year. He could work out, not with the team, but they would -- he would sign his
20 letter of intent. He would stay at UNLV, and then he would still have a red shirt and
21 four years of eligibility left over after that. And that was the original discussion.

22 BY MR. PRINCE:

23 Q Okay. Does it also -- the red shirt year, does it also give an -- you
24 know, an 18-year-old young man an opportunity to grow and get -- and even get
25 stronger?

1 A Oh, absolutely, yeah, in preparation, you bet, they do. They are able --

2 Q That's one of the reasons, right?

3 A One of the reasons, right.

4 Q And for a gray shirt year?

5 A Yes, same thing with a gray shirt.

6 Q When you were, you know, looking at these other schools, you know,
7 raw with Beau, were you also looking not only for the right fit for just him as a
8 person, but also as a player, how many people played strong safety or whatever
9 position that he was being recruited for --

10 MR. LAURIA: Judge, I'm sorry.

11 Q -- and would he have a chance to --

12 MR. LAURIA: Objection; leading.

13 THE COURT: I'll sustain the objection.

14 BY MR. PRINCE:

15 Q What steps did you take in terms of, you know, comparing UNLV to
16 other schools in terms of would Beau be a, you know -- when -- how soon could he
17 get in the lineup and those types of things?

18 A Right. A lot of times when you sign up to go to a school, it takes you a
19 few years to get into the rotation. It's a slow, slow process and you don't always
20 play as a freshman. You don't always play sometimes as a sophomore. Sometimes
21 you don't get to play until you're a junior. So a lot of that, not only being that it was a
22 hometown team that he liked, he was going to get playing time as a freshman.
23 Unfortunately, UNLV Rebels aren't that good so I -- they're going to take anybody
24 that's a step above the next person in front of them. And I don't mean to have that
25 sound bad, but that was part of the process -- of the understanding of where he was

1 going to go to school.

2 Q Was that attractive to Beau in terms of his decision making and yours
3 with giving him guidance as his father about you're going to have the chance at
4 UNLV. It's a Division I team, Mountain West Conference and you're going to have
5 ability to, you know, get stats immediately?

6 A Well, it really -- part of the process, Beau says, well maybe I can just
7 help make this team better. That was his mind set.

8 Q As a freshman?

9 A As a freshman.

10 Q And did you talk with Coach Sanford about, you know, whether Beau
11 should red shirt, gray shirt or come in and play?

12 A Not with Coach Sanford. I -- with Coach Cinkovich. I sat down with
13 him. He came to our house, we had dinner, we were talking about Beau. He was
14 explaining the gray shirt, red shirt process, why they wanted Beau on the team and
15 so on.

16 Q Okay. Now, coming out of high school now, I mean, tell us a little bit
17 about Beau, his stature, his strength, his speed -- you know, now get -- we're now at
18 UNLV his freshman year and, you know, what's he look like?

19 A Well, he -- after he had his surgery after his senior year in high school,
20 he was right back on track to do everything. He was bench pressing -- I mean, he
21 was going in -- I've got a board at home that has all of the individuals and their
22 strength and how much they had leg pressed and bench pressed and he was tied
23 for number three. I mean, this is of everybody on the team. This goes from --

24 Q At UNLV?

25 A -- goes from linebacker, to safety, to quarterback, to O line, D line,

1 everybody on the team, yes.

2 Q At UNLV?

3 A At UNLV. And he was -- he broke records that have been established
4 since 2001.

5 Q And how was his speed?

6 A He's had pretty good speed, 4/5, 4/5/6. Yeah.

7 Q In a 40 yard, right?

8 A In a 40 yard.

9 Q Yeah. And so we're in our freshman year at UNLV -- well, and before I
10 do that. Beau ever give you any trouble, any kind, while in high school, any trouble
11 before going to college?

12 A No, no, no, he wouldn't play if he did.

13 Q And -- why, because you wouldn't let him?

14 A Exactly.

15 Q And so now, tell us about Beau at UNLV his freshman year. Does he
16 get playing time?

17 A He gets a lot. I don't know that much. All I do is get to go to the games.
18 When you turn your child over to a school, and he is -- almost like the military, they
19 become his property. You're allowed -- they send you your tickets, your parking
20 pass. They say I'll see you Friday night or Saturday night and that's pretty much it.
21 We talk to him and stuff. I mean, it wasn't a gestapo of any kind, but it's tough. It's a
22 little tougher in college than it is the rest of the sports. But he did fantastic. He
23 played special teams --

24 Q When you say special teams, tell us what you mean by that.

25 A He was -- one of the kick offs, punt returns, kick offs, receiving, that

1 type of stuff.

2 Q What position did he play on the field during the regular downs?

3 A He -- in his freshman year he -- and his sophomore year, he played
4 kind of a linebacker, safety position. It was kind of a -- I don't know. They could put
5 him anywhere depending on the defense they were running at the time.

6 Q Okay.

7 A Kind of a hybrid safety/linebacker or whatever.

8 Q And did Beau have any special moments during that year, you know, in
9 any big games?

10 A Yeah, he had quite a few. He caused a fumble in Air Force. He
11 intercepted a pass in Arizona.

12 Q The Arizona State --

13 A Arizona State game, right.

14 Q Was that when Arizona state was ranked -- number --

15 A Saw that.

16 Q -- number 15.

17 A Yeah. He did really well.

18 Q So he had an impact even --

19 A Oh, he had a true impact on that game. I think he changed the whole
20 outcome of that game. Even though they had another half to play, that team got
21 fired up, yeah.

22 Q Did Beau have a good following -- a big following at the games?

23 A Yes, he did. Little kids love him. Nothing like seeing your son -- yeah,
24 sign an autograph for a little kid. It's awesome.

25 Q Were you encouraged after seeing Beau, how he did his freshman

1 year, his first year, you know, in college?

2 A Yeah. He -- yeah. We teased him a lot. He got blew up one time.
3 Yeah, first game he's to do special teams and you know, he's a little green, didn't
4 have his head on a swivel and some guy plowed -- and I got texts and texts and
5 texts for like the first half. Welcome to Division I football young man. But yeah, all
6 of his friends, they harassed him. But yeah, he did wonderful.

7 Q And what conference was UNLV in at the time?

8 A Mountain West.

9 Q Okay. Did Beau earn any all-conference awards?

10 A Academic. Academic all-conference. Coach Sanford had -- the way it
11 was set up there was a representative from each class. Beau was the freshman
12 representative. They had like a little kind of in-house thing that they took care of
13 problems and they felt good enough that Beau that he was a good enough person to
14 sit on that as a freshman and he sat on that committee that took care of in-house
15 problems. Sanford treated them as men and they were expected to act like men.

16 Q Did Beau was -- when you say took care of in-house problems, was that
17 like a tutor?

18 A Well, he did that also because they were required after -- or every night
19 that they had to -- after practice and things of that nature, he had to -- or the
20 freshman team especially had to come in there -- and they had juniors and they had
21 other classmen in there, but Beau would tutor them, help them keep their grades up
22 so they could be eligible to play football.

23 Q Okay. And what's the football season, Rob?

24 A It runs from September to November --

25 Q Okay.

1 A -- for the most part unless you get into bowl games and things of that
2 nature.

3 Q Okay. And so Beau had a, by all accounts, a very good freshman
4 year?

5 A Yes, he did.

6 Q And kind of move -- and that was -- when did the freshman season
7 end?

8 A In November.

9 Q Of what year?

10 A Oh, God.

11 Q Was it 2008?

12 A It had -- yeah, it had to be 2008. It's -- I haven't thought about it for
13 awhile. Yeah, 2008.

14 Q I'm going to kind of move you somewhere else for a second. You know,
15 the records in this case show that Beau had an MRI on his back in February of
16 2009, after his freshman season.

17 A Right.

18 Q Okay. Tell us how that came about.

19 A He had some pains in his back. And one time he came home and they
20 were practicing and he took a shot in the back, he intercepted a ball, and took a shot
21 in the back --

22 Q Okay.

23 A -- during practice. And that was the first time I -- you know, he
24 complained. That's the first time that he ever really actually complained about his
25 back. Then he just went ahead and played. He didn't really say too much. He just

1 went along and played with pain.

2 Q Okay. Did he have -- I mean -- so now the February of 2009 MRI, are
3 you aware of what the results of that were?

4 A I am now. I wasn't -- I really wasn't then.

5 Q Okay. And did Beau continue to practice in the spring and summer of
6 2009?

7 A Yeah, he practiced all the way through his sophomore season.

8 Q Okay.

9 A And --

10 Q So look --

11 A -- we noticed it in his play too. He would -- you wrap up different when
12 you're trying to avoid pain. In fact, he had actually talked to Coach Cink about
13 changing to offense, going back to wide receiver the next year. His junior year he
14 wanted to go back to his original position.

15 Q What -- so let's go to his sophomore year. And with regard to -- I mean
16 -- does Beau have a good sophomore year? That's -- that would be the fall of --

17 A Yeah, he has a pretty good year for -- yeah, he's playing. He's still the
18 same thing.

19 Q Is he starting games?

20 A Starting a few games, yeah. Backing up star, yeah, absolutely.

21 Q How many downs does he play on a -- typically during --

22 A He plays a lot more than I thought he was going to play, not as many as
23 I wanted him to play. But you know, you just --

24 Q Is he coming along as a --

25 A He's coming along fine. Absolutely. Coming along real good. But you

1 can tell by the way he's tackling that he's uncomfortable.

2 Q Okay. And at the end does he have any awards or accolades from the
3 Mountain West Conference for his sophomore year?

4 A Same thing as he had in his freshman year.

5 Q What is that?

6 A The academics.

7 Q And how do you get to become an academic all-conference player for
8 the Mountain West Conference?

9 A You have to carry a 3.0 average, and be a part of the team, and
10 participate, and do all of that, yes.

11 Q Okay. And does, you know, that year -- I mean, you know, does Beau
12 -- what position does he continue to play?

13 A Same position.

14 Q What's position is that for our record?

15 A The hybrid safety, linebacker, special teams.

16 Q Okay. What about -- now does he -- how about say special teams that
17 kick off, punt return?

18 A Right. That happens every time either before -- well, it happens to start
19 the game, and after every touch down, and after every field goal, things of that
20 nature, special teams goes on the field. Whether it's receiving or kicking off.

21 Q How was he as a special teams player?

22 A He was pretty good. He was really good.

23 Q And kind of let's -- can I -- we finish the sophomore year, kind of now
24 we're in the beginning of you know, 2010, and kind of in the summer of --

25 A His junior year.

1 Q -- junior year. Getting ready to go into his junior year.

2 A Right.

3 Q We're kind of -- that -- that's where I'm --

4 A Right.

5 Q -- talking about now. I mean, is Beau working out a lot?

6 A Yep.

7 Q How's he -- how does he look physically and his strength?

8 A Looks fantastic.

9 Q What -- you know, what do you remember from what he could do in

10 terms of his, you know --

11 A He could leg press a thousand pounds, bench press over 400. He

12 stopped squatting because his back was hurting. But he stopped squatting, that's

13 why he'd leg press. His speed was good. He looked pretty good.

14 Q So were you still encouraged for his future now that --

15 A Absolutely, I sure was.

16 Q I mean, even though you -- he had -- you know, had some of these

17 back issues, did you think that that was going to somehow limit him in some way in

18 terms of you know, pursuing his dreams?

19 A I really didn't think about it that much. Like I said, I really wasn't familiar

20 with what was going on. I just knew he had some back pain. I knew the MRI said

21 he was having some problems with his back, and he continued to play. I felt if there

22 was -- and I mean, like I said, when -- unless you actually go in and start asking

23 questions, no one really offers you anything. You're just the parent of this

24 scholarship athlete. You don't really have a lot of input. So I would walk around,

25 and we -- I'd go to practices, ask him how he was doing. Coach Sanford would

1 come by, hey Beau looks great, love him, can't wait for next season. He'd drive
2 around in his little cart and his little hat and everybody -- you know, so everybody
3 was -- it was just, you know, and that was it.

4 Q Did you -- did the future look bright for Beau going into his junior year?

5 A Yes.

6 Q Did you think he was going to be -- getting to be playing even more
7 than he was as a freshman?

8 A Oh, absolutely, yeah, until things starting happening with the new coach
9 and things of that nature. They changed coach after that.

10 Q Okay. And now --

11 A Coaches.

12 Q And let's kind of go to now the summer of 2010 and starting with going
13 to Dr. Capanna, okay?

14 A Okay.

15 Q And -- just to make sure I catch my notes (indiscernible) --
16 First off, how did he end up being seen by Dr. Capanna? Who referred
17 him there?

18 A The university.

19 Q Okay. And had you ever even heard of Dr. Capanna before?

20 A He was in the media guide --

21 Q Okay.

22 A -- as their surgeon.

23 Q Okay. And when Beau first went to Dr. Capanna the records show
24 September 1st, 2010, did you go to that appointment with him?

25 A Yes, sir, I did.

1 Q And what was the -- the records show that Beau is mostly complaining
2 of leg pain, like symptoms in his leg?

3 A Right.

4 Q Okay.

5 A Right.

6 Q And what was your understanding of what you know, how Beau was
7 doing or what his complaints were as you're kind of going --

8 A Well, I knew it has -- it seemed to me like it was his sciatic nerve or
9 something. He was having problems getting lift, getting -- going through his tackles.
10 He would hesitate. Because I knew when the impact came he could feel the pain. I
11 just -- you could just see it. So we went there, and he went to Ely after Coach
12 Sanford was fired and Coach Hauck came in. I should probably start at the
13 beginning --

14 Q No, it's okay. Let me just stop -- pause you there just for a --

15 THE COURT: Ely being preseason practice.

16 THE WITNESS: Preseason camp, yes, it's a --

17 MR. PRINCE: Preseason camp.

18 THE WITNESS: -- it's like -- yeah, it's their camp.

19 BY MR. PRINCE:

20 Q Okay. Okay, and so was going to see Dr. Capanna before or after the
21 Ely camp?

22 A After.

23 Q Yeah because September 1st.

24 A Correct.

25 Q Okay.

1 A Yeah.

2 Q And so you're going to the -- Dr. Capanna, you're at his office visit.

3 A Uh-huh.

4 Q And you're there getting -- Beau's having some kind of sciatica type
5 complaints.

6 A Uh-huh.

7 Q And what do you recall about that appointment and the discussion with
8 Dr. Capanna, the -- you know, the collective discussion about Beau's condition?

9 A Well, we --

10 MR. LAURIA: Objection, Your Honor.

11 A -- had --

12 MR. LAURIA: Objection; it's hearsay.

13 MR. PRINCE: Statements related to a medical condition, diagnosis and
14 treatment are not hearsay.

15 THE COURT: Talking about the conversations of the defendant.

16 MR. PRINCE: Yes.

17 MR. LAURIA: So I understand that.

18 THE COURT: Okay.

19 MR. LAURIA: So can we approach?

20 MR. PRINCE: He's a --

21 THE COURT: Yeah.

22 MR. PRINCE: -- party and it's by definition non-hearsay.

23 MR. LAURIA: Well --

24 [Bench conference begins at 11:40 a.m.]

25 MR. LAURIA: We gave you trial brief that statements made by a patient to his

1 physician for the purposes of treatment are not hearsay.

2 THE COURT: Correct.

3 MR. LAURIA: He's going to talk about what my doctor supposedly said or
4 what he's --

5 THE COURT: Well he's the defendant. That's not hearsay.

6 MR. LAURIA: Well --

7 MR. PRINCE: That's not hearsay. It's not hearsay.

8 MR. LAURIA: Well no, if you're a defendant doesn't make everything
9 non-hearsay --

10 MR. PRINCE: Yes, it does.

11 MR. LAURIA: -- only if it's an admission against interest.

12 MR. PRINCE: No.

13 THE COURT: No.

14 MR. PRINCE: Not true.

15 MR. LAURIA: You're saying that anybody can come in and say a defendant
16 said anything at any time?

17 THE COURT: Yep.

18 MR. PRINCE: Yep.

19 MR. LAURIA: Under --

20 MR. PRINCE: Non-hearsay by definition.

21 MR. LAURIA: Under what rule of evidence is that?

22 THE COURT: Because he's a party opponent, his statements are admissible.
23 They're non-hearsay.

24 MR. LAURIA: Is there a particular rule of evidence I'm not aware of that says
25 that?

1 THE COURT: By definition. We can have a discussion when we take a break
2 and we can --

3 MR. LAURIA: Yeah, so --

4 THE COURT: -- make a record of it, but yeah.

5 MR. PRINCE: Let's do it.

6 MR. LAURIA: Okay, so but -- so then what does he get to talk about what
7 Beau said or what he said? How's that not hearsay?

8 THE COURT: Well, if things that Beau said are during the course of the
9 appointment for treatment purposes, then they're non-hearsay.

10 MR. LAURIA: Statements made --

11 THE COURT: Okay, they're statements for a medical diagnosis. Comments
12 that your client makes are the defendant so they're non-hearsay. If Beau's just
13 talking to him about -- you know, wants to ask him a conversation and Beau talks
14 about his academic awards or something, I would say that's hearsay because it has
15 nothing to do with his medical diagnoses. But I can't, until the question's asked,
16 figure out exactly what it's seeking to elicit from the Beau standpoint of it.

17 MR. LAURIA: Okay.

18 THE COURT: If it's confined to what the doctor said, that's not hearsay.

19 MR. LAURIA: Okay. So then my objection is it's overbroad as phrased
20 because the question was tell me about all those conversations, so --

21 THE COURT: All right, well I'll -- just be more -- go ahead and specifically --

22 MR. LAURIA: Thank you.

23 THE COURT: -- talk about those.

24 [Bench conference ends at 11:42 a.m.]

25 THE COURT: All right. Mr. Prince.

1 MR. PRINCE: Thank you, Your Honor.

2 BY MR. PRINCE:

3 Q Now, we were talking about the initial visit with Dr. Capanna. Hold --
4 one second while I get my records. Sorry, Your Honor. Now, before I ask you any
5 questions, do you have a clear recollection of that appointment?

6 A Yes, sir, I do.

7 Q Okay. And do you recall being there with Beau talking with Dr.
8 Capanna?

9 A Yes.

10 Q Do you remember Dr. Capanna talking to you and Beau --

11 A Oh, yes.

12 Q -- about what his options were --

13 A Yes.

14 Q -- and what's going on?

15 A Yes.

16 Q And you know, tell us what Dr. Capanna told you that day -- told you
17 and Beau?

18 A Well, we went into his -- in the --

19 MR. LAURIA: Objection, Your Honor.

20 THE COURT: Understood; overruled. You can answer the question.

21 THE WITNESS: We went into his office and he had the MRI that we had --
22 Beau had taken. Put them up on the screen. Explained what the process was, you
23 know, that surgery was needed on the L5. Beau was interested in if he could have
24 this surgery done and get back on the field in minimal amount of time. I talked to Dr.
25 Capanna. I mentioned that I wanted him to red shirt. I thought it was best that he

1 red shirt. I figured with the coaching change that -- Beau and I just had totally
2 different ideas on the process. I wanted him to wait a year. He wanted to get on the
3 field now because he was afraid that he would lose his opportunity with Coach
4 Hauck because Coach Hauck was so -- he wasn't very nice, Coach Hauck --

5 MR. PRINCE: Okay.

6 THE WITNESS: -- okay, to any of the Sanford kids. Those players, really, he
7 let them know in minimal terms that they weren't his guys --

8 MR. PRINCE: Okay.

9 THE WITNESS: -- and he was going to work their tails off and who was ever
10 left standing was going to play, and Beau wanted to play, and Beau wanted on the
11 field.

12 BY MR. PRINCE:

13 Q Yeah. Well, Beau had been recruited by Coach Hauck at the University
14 of Montana, right?

15 A That is correct.

16 Q Okay. So let's now talk about, you know, with Dr. Capanna, and he
17 said -- what did he say, you know, in light of what Beau said, hey, I'd like to come
18 back. Can I play this season? I'd like to get back as soon as I can.

19 A Right.

20 Q And did Dr. Capanna say if that -- tell you if that was even an option?

21 A Yes, he did. He said he could do that operation. It was easy. He'd be
22 done in an hour and Beau would probably be back on the field in three -- a few
23 weeks is what he said.

24 Q A few weeks?

25 A Told him to get up after the surgery -- he did have the surgery. Told

1 him to get up, move around, go back to the team Monday and do your physical
2 therapy, you'd be ready to rock. That was pretty much what he said to us.

3 Q Okay. And in terms of describing the surgery, how did he describe it,
4 Rob?

5 A He said that he was part of an -- he was one of the innovators of this
6 particular procedure, and that it was an hour and a half, and he would be good to
7 go.

8 Q Did he tell you it was easy?

9 A Yeah.

10 Q Did he tell you it was simple?

11 A Simple. Absolutely.

12 Q And based upon what Dr. Capanna told you, did you and Beau make a
13 decision right then about whether he should pursue it?

14 A Pretty much. He made me -- well, I made some reference to that he
15 looked like Newt Gingrich. We were talking, having a casual conversation through
16 all of this, and then after the -- after we --

17 MR. LAURIA: Objection, Your Honor.

18 A -- had our little --

19 MR. LAURIA: Hearsay.

20 THE COURT: Well, you're talking about a casual conversation?

21 THE WITNESS: Casual conversation, yes, sir.

22 THE COURT: Just you and Beau or with the doctor?

23 THE WITNESS: With the doctor.

24 THE COURT: Okay.

25 THE WITNESS: Beau was standing in the room. All three of us were there.

1 THE COURT: Okay. You can go ahead.

2 THE WITNESS: And as we were making our decision on what he wanted to
3 do, he wanted to get back on the field, we just had casual conversation about the
4 university, about you know, his practice, you know, how great it was to work with the
5 boys, you know, something that -- and I mentioned he looked like Newt Gingrich.
6 Well he said, well, come on, I want to show you. Went into his office. He had
7 pictures of Newt. Had the whole deal. I mean, it was during the -- you know,
8 Gingrich was running for president. It was a nice -- I felt very comfortable with Dr.
9 Capanna to tell you the truth.

10 BY MR. PRINCE:

11 Q So he earned your trust?

12 A He earned my trust, absolutely.

13 Q Did he earn Beau's trust --

14 A He must --

15 Q -- most importantly?

16 A Yes, he did.

17 Q And you know, according to his records, he said that, you know, with
18 the microdissectomy that it's, you know --

19 MR. LAURIA: Objection.

20 Q -- said he could --

21 MR. LAURIA: Leading, Your Honor.

22 MR. PRINCE: Excuse me. I haven't even finished the question yet.

23 MR. LAURIA: It's already leading.

24 THE COURT: Go ahead --

25 MR. PRINCE: It hasn't even --

1 THE COURT: -- you can finish the question.

2 MR. PRINCE: Well, it's not leading yet, I haven't even asked the question.

3 BY MR. PRINCE:

4 Q In Dr. Capanna's records, he states that most microdiscectomy most
5 likely to be beneficial and to cure the problem.

6 MR. LAURIA: Objection; leading, Your Honor.

7 MR. PRINCE: And so anyway, I'm going to ask --

8 THE COURT: Okay. Finish the question please.

9 BY MR. PRINCE:

10 Q Did Dr. Capanna tell you and Beau that he would cure the problem,
11 consistent with his records?

12 MR. LAURIA: Objection; leading.

13 THE COURT: I'll let him answer the question.

14 BY MR. PRINCE:

15 Q Yeah, go ahead.

16 A Yes.

17 Q And -- so then what did Beau do after that? According to the records
18 Dr. Capanna ordered a few more tests. Do you remember that?

19 A It -- to some degree, yeah. Like I said, most of the stuff that they were
20 doing -- he would have assistants from the school go with Beau. We didn't -- I only
21 went to one injection that he had later on, but they would send staff with them.
22 Parents wouldn't go for whatever tests. So I'm not familiar with all of the tests that
23 he had. The school should have records of that.

24 Q Okay. And the surgery, according to the records, happened on
25 September the 17th, 2010. And were you still -- it looks there was maybe one more

1 preoperative meeting with you and Beau and Dr. Capanna. Do you recall that?

2 A Not so much. No, I don't.

3 Q Okay.

4 A I don't remember that so much.

5 Q And -- well let me -- let's put it up. And that's -- I want to ask you a
6 question specifically about it.

7 A You have to refresh my memory --

8 Q I will.

9 A -- there on that.

10 MR. PRINCE: If we could have part of Exhibit Number 1, Bate number 11.

11 THE COURT: It should be on your screen. It's up --

12 BY MR. PRINCE:

13 Q This is pre-op, right?

14 A Yes, sir.

15 Q Oh, yes, okay, I'm sorry.

16 THE COURT: Mr. Orth, is it on this monitor here?

17 THE WITNESS: Oh, it might be, sir. But I'm blind as a bat and my wife has
18 my glasses.

19 THE COURT: Oh, okay, that's all right.

20 THE WITNESS: I apologize. Can I step down here or should I --

21 BY MR. PRINCE:

22 Q No, it's -- you can look -- I'm going to read it to you.

23 A Oh, okay.

24 Q Maybe you --

25 MR. PRINCE: Peter, if you can zoom in on the office visit, 9/15/10.

1 Q Says, you know, patient in with father for follow up. Explain, you know,
2 some results of some tests --

3 MR. PRINCE: Peter, take that down.

4 THE WITNESS: Whoa.

5 MR. PRINCE: And -- need to do one thing with --

6 THE COURT: Hold on, he changed his mind.

7 MR. PRINCE: One second. (Indiscernible) technical problem.

8 [Colloquy between counsel]

9 BY MR. PRINCE:

10 Q And so anyway, let me just read it to you, maybe it be faster.

11 A No, I can see it now.

12 Q Okay. And so anyway, it talks about -- there's a question at the bottom
13 talks about red shirt issue. Did you bring that up or did Dr. Capanna bring that up?

14 MR. LAURIA: It's been asked and answered, Your Honor.

15 THE COURT: This is a different meeting. I'll allow --

16 MR. PRINCE: Different meeting.

17 THE COURT: I'll allow the question.

18 THE WITNESS: Yes, I did.

19 BY MR. PRINCE:

20 Q Okay. Did Dr. Capanna, while you're having the discussion with Beau,
21 did he suggest to you or suggest to Beau or recommend to Beau, I think you need to
22 take this year off and use your red shirt?

23 A No. No, he did not.

24 Q Because that was something you were specifically concerned about?

25 A That was my concern, yes. He said he was the surgeon that could

1 make him, and cure his back problem, and get him playing in a few weeks. I asked
2 about a red shirt, would that be a -- could this take care of the problem or would we
3 have to red shirt, because I didn't want him to play with an injury. I didn't want him
4 to have this surgery and then go and play and make something even worse. And
5 no, he said that -- he confirmed Beau's wishes that he could get him back on the
6 field.

7 Q Okay. And did -- was -- did Beau agree to undergo the surgery based
8 upon what Dr. Capanna said?

9 A Yes.

10 Q And how many games -- you know, between yours and Beau's
11 calculations were -- did he expect to miss if he had the surgery?

12 A Well, there was a game coming up and then there was a bye week and
13 another game. So he was figuring possibly three at the least, maybe one more, but
14 he kind of figured he could get back on the field.

15 Q How many games are there in a typical college season, Rob?

16 A Anywhere from -- depending on the agreements they have, it could be
17 as much as 13. Most of the big time Division, you know, I, it's 12.

18 Q Okay. So if he missed --

19 A And then playoffs if there's --

20 Q Even if he missed four games, I guess that leaves about at least eight.

21 A Eight games, right. And then if they could make it to a bowl game, then
22 you have to showcase your, you know --

23 Q Right.

24 A So you could possibly -- I think that season was like 13 -- 12 or 13,
25 yeah.

1 Q Okay. And so kind of fast forwarding now, or moving to the day of the
2 surgery. Do you remember the day of the surgery?

3 A Yes.

4 Q Did you accompany Beau to the University Medical Center for the
5 surgery?

6 A Yes, Victoria, uh-huh.

7 Q And --

8 A Ladun (phonetic), his girlfriend and I took him.

9 Q And when she -- when -- hang on a second. What time did you get
10 there that day?

11 A It was early. I -- seven, 8:00 the surgery I think was. We were there
12 early. The sun hadn't even come up yet.

13 Q And before that -- let me just pause one second. I think -- got a little
14 ahead of myself. Did Dr. Capanna discuss the risks of the surgery in your presence
15 with Beau?

16 A I don't remember that. I don't. I mean, there's risks to every surgery. I
17 mean, we talked about, you know, had to be careful after the surgery. We never
18 really talked about anything that would happen during the surgery.

19 Q So is there anything --

20 A I mean, everybody signs releases, things of that nature, you know, but
21 you don't -- you know, it's not like --

22 MR. PRINCE: If you can go to, Peter, Bate number 93 of Exhibit Number 1.

23 BY MR. PRINCE:

24 Q This is the consent for surgery.

25 A Right.

1 MR. PRINCE: And Peter, I need the bottom part of that, please, the
2 signatures.

3 BY MR. PRINCE:

4 Q And is your signature on that document?

5 A Uh-huh.

6 Q Is that a yes?

7 A Yes, sir. I'm sorry.

8 Q And it says father there, that would be obviously --

9 A Right.

10 Q -- you?

11 A Correct.

12 Q Do you remember anything memorable or significant about what Dr.
13 Capanna explained, you know -- and to Beau in your presence?

14 A No, he didn't. We signed that at the window when we did our
15 paperwork to have him okay the surgery.

16 Q Okay. Did you sign that in the presence of Dr. Capanna?

17 A No that I remember, no.

18 Q Did Dr. Capanna in your presence with Beau sit down and go through
19 all of those items on the -- on that form?

20 A No, it was just -- it was part of the packet of paperwork that you sign to
21 get him -- for pre-op. You know everybody signs those, you know.

22 Q And do you recall Dr. Capanna ever explaining in your presence that
23 there was a risk of operating on a body part other than his L5-S1 disc level space?

24 A No.

25 Q Did Dr. Capanna ever discuss in your presence that the surgery might

1 have to include another level of Beau's spine other than L5-S1?

2 A No.

3 Q Did Dr. Capanna ever explain in your presence, you know, before you
4 sign that, you know, document, that the risk could also affect other levels of the
5 spine other than the L5-S1?

6 A No.

7 Q Did Beau, based upon your knowledge, consent to anything other than
8 an L5-S1 microdiscectomy?

9 A No. And I told you that the office visit was great. He said there would
10 be no problem at all, none.

11 Q Now, day of the surgery, you get there early. Did you see Dr. Capanna
12 before the surgery?

13 A No.

14 Q Okay. And while Beau's in the operating room, where are you?

15 A We're out front.

16 Q Okay. In the waiting area -- patient waiting area?

17 A In the waiting area, right.

18 Q And at some point does Dr. Capanna come out and find you?

19 A At the -- when he's finished with the surgery, yes.

20 Q Okay. Tell us what he told you.

21 A He told us it went great. Not to worry, Beau's fine, everything's good.
22 Tori, she was crying she was so happy.

23 Q Was relief for you also?

24 A Absolutely. Yeah, to -- yeah.

25 Q Did he tell you anything unusual about the surgery?

1 A Not really.

2 Q Did he tell you there was any complications?

3 A No complications.

4 Q Okay. Did he tell you he had to go to another level to try to get to the

5 disc because it was hard to get to or anything along those lines?

6 A No. He said it went great. Our conversation was maybe five minutes.

7 That was it.

8 Q And now -- so Beau -- was it an outpatient surgery?

9 A Yes. We went --

10 Q And at some point, you know, after Beau's discharged, where do you

11 go?

12 A We go -- well, his discharge or you mean after --

13 Q After the -- after --

14 A -- they let us go back in and see him --

15 Q Yeah.

16 A -- after he wakes in pre -- post-op --

17 Q Yeah.

18 A -- you said --

19 Q I mean, how -- did that go fine, all the post-op at the hospital?

20 A Other than the fact that he was all crazy bloated from anesthesia. I've

21 never seen that before, but I thought they'd give you more anesthesia than I thought

22 they should. But other than that, he was pretty groggy. The nurses were great.

23 Q Okay.

24 A They treated him with care, yeah.

25 Q Okay. And then so -- well, do you take him home after that?

1 A Yes, sir, we do.

2 Q And talk -- walk us through the next couple of days. You know, what's
3 Beau, you know --

4 A Well, Dr. Capanna told us not to have him lay around. Get him up the
5 next day, walk around. He didn't put him in a back brace of any kind. He -- nothing
6 like that. I thought for sure they would at least wrap him or something. He just
7 covered his incision. Have him get up. He was -- we were told prior to the operation
8 to go and get him into physical therapy. He was suppose to report to school
9 Monday morning to the athletic department and that would be that. So that's pretty
10 much it. Got him up, moved him around, got him to school Monday.

11 Q Okay. And how did he do over the next few days, initially?

12 A He seemed to be okay. Seemed to be.

13 Q Realizing he's just recovering from a pretty significant surgery.

14 A Just recovering. I mean, it was normal stuff. He was sore, you know.
15 He was kind of groggy still. He was kind of loopy. But he was, you know, he was a
16 little mobile, a little slow.

17 Q Okay. And you know, there was a -- I want to go to a note in the -- in
18 Dr. Capanna's records, and look at Bate number 11 of Exhibit 1.

19 MR. PRINCE: And Peter, I'm going to focus down where it says TC9 --
20 there's two entries at 9/22.

21 BY MR. PRINCE:

22 Q And I'm going read the first -- the one to you, Rob, and then I'm going to
23 ask you a question about it, okay?

24 A All right.

25 Q It says Beau -- this is Beau calling in to Dr. Capanna's office. Beau

1 called to ask about recovery time. His coach stated it would take four months but
2 was just wondering what Dr. Capanna thought about it -- thought it would be. Do
3 you recall Beau having a -- you know, a concern after he went back to school
4 following the surgery that hey, the recovery time is not going to be a few weeks, you
5 know, it might be a few months. Do you remember him raising that concern to you?

6 A I do.

7 Q Okay. And the next entry, it looks like it's about an hour and a half later
8 at 2:30 p.m. on the same day. Are you concerned enough that you actually call Dr.
9 Capanna?

10 A Yes, sir.

11 Q It says -- you know, or I guess you receive a phone call rather --

12 A Receive a phone call, yeah.

13 Q -- you received a phone call. And it says -- are you speaking to Dr.
14 Capanna or are you speaking to his assistant? Do you recall who made the phone
15 call to you?

16 A His assistant. We -- after that, pretty much, I didn't have any
17 conversation with Dr. Capanna.

18 Q Okay. Then it says here, Dr. C stated that the recovery time is hard to
19 give an exact amount of time. It changes from person to person, but typically takes
20 a few weeks. We talked about how he knew Beau wanted to get out there and play,
21 but he didn't want him to get out there too early or be released too soon. Do you
22 recall that conversation --

23 A Yes.

24 Q -- with Dr. Capanna's assistant?

25 A Yes.

1 Q And what it looks like is she's relaying to you statements from Dr.
2 Capanna.

3 MR. LAURIA: Objection. Is that leading, Your Honor?

4 THE COURT: Well, I'll sustain that objection.

5 BY MR. PRINCE:

6 Q What is she relaying to you?

7 A Information from the doctor.

8 Q Okay. And when says, you know, it typically takes -- do you recall her
9 telling you that, you know, from Dr. Capanna that it takes a few weeks for the
10 recovery?

11 A Yes, I -- yes --

12 Q Okay.

13 A -- that is true.

14 Q Was that consistent with what Dr. Capanna had said --

15 A In the office?

16 Q -- originally?

17 A Yes.

18 Q All right. Now, fast forward a few more days. You know, at some point
19 did Beau's condition dramatically change?

20 A Yes.

21 Q Tell us what you saw, Rob, and what you observed?

22 A Well, it just -- it got worse. It got to the point to where he couldn't get
23 out of bed. He couldn't walk.

24 THE COURT: Can I clarify something? Is he living with you at this time?

25 THE WITNESS: Yes, sir.

1 THE COURT: Okay. Thank you.

2 THE WITNESS: He's -- he can live anywhere now. He's not a freshman
3 anymore. So as a sophomore, junior, he was staying with us at home, yes, sir.

4 THE COURT: Okay. Thank you.

5 THE WITNESS: Yes, he was living at the house.

6 MR. PRINCE: Okay.

7 THE WITNESS: You know, they can live anywhere after they --

8 BY MR. PRINCE:

9 Q And so you had a chance to see him?

10 A Correct.

11 Q You and your wife. And so --

12 A Correct.

13 Q Now, you said that he could -- go ahead and tell us what you observed
14 and --

15 A Well it just slowly progressed to the point to where he couldn't get out of
16 bed.

17 Q Was he complaining of severe pain --

18 A He tried to go to class a couple of times. He couldn't do it. He tried to
19 be somewhat normal, but he got to the point to where it took him an hour and a half
20 just to get out of bed. You couldn't help him and touch him. It --

21 Q Was that a big change from before he went into the surgery?

22 A I'm sorry?

23 Q Was that a big change from the day he walked into the surgery center?

24 A Absolutely. To hear your boy is -- he was in agony. I mean he couldn't
25 -- just to have him go to the bathroom. Have him -- and he wouldn't eat up in his

1 room. He had to come downstairs. And he -- you couldn't touch him. You couldn't
2 help him because he had to like get to wherever it was where he would -- you know,
3 you pick somebody up and you'd kind of -- they'd move weird and they'd hurt. So he
4 had to kind of do his own thing. And he would -- we'd go okay, we're going to have
5 dinner at 6:30. And at 5:00 he'd start his way down. And then he would anticipate
6 having to go to the restroom. So he would go to the restroom, wait till he had to go
7 to the bathroom, and then go to the bathroom and then -- I'm sorry.

8 THE COURT: We'll let's take a minute. We're okay.

9 THE WITNESS: You can't watch your son or a child do that kind of stuff. And
10 you know, being self-employed and my wife and his girlfriend, we all three kind of
11 did these shift things, and had got him to a doctor, and trying to get new MRIs that
12 Dr. Capanna asked for. And they went and saw him again and --

13 BY MR. PRINCE:

14 Q And had you ever seen Beau in that type of pain or agony?

15 A Excuse me?

16 Q Had you ever seen Beau in that kind of pain or agony or condition?

17 A No. I've never seen anybody --

18 Q And --

19 A -- in that kind of pain or agony.

20 Q And do you recall at some point Dr. Capanna did order another MRI?

21 A Yes, him and Tori went and got another MRI.

22 Q And what did you learn about what Dr. Capanna said was on the MRI?

23 A He didn't -- he said it was perfect. It was swollen. Gave him a steroid
24 pack and some pain pills and said, take these, it'll, you know -- come back and see
25 me in a couple of weeks.

1 Q And after you got that -- was there any discussion that you recall from
2 Dr. Capanna to Beau or your family that there had been, you know, a complication,
3 the surgery, you know, the MRI showed that there was surgery at the wrong level?

4 A Not at that point, no. He said --

5 Q Did Dr. --

6 A Dr. Capanna said it was good. After --- he called back in a couple of
7 weeks. Beau talked to him. I don't recall the day or the time. I just know that he
8 talked to Beau and he said Beau --

9 MR. LAURIA: Objection, Your Honor; it hearsay -- on hearsay.

10 A -- this is normal. Everything looks good.

11 MR. LAURIA: Excuse me.

12 THE COURT: Hold on. Mr. Prince?

13 BY MR. PRINCE:

14 Q What was your understanding of what Dr. Capanna told Beau?

15 MR. LAURIA: Irrelevant. It's phrased and hearsay.

16 MR. PRINCE: That's not hearsay because it's from --

17 THE COURT: I think that's better to come from Mr. -- the plaintiff than it is
18 from the father if he wasn't part of that conversation.

19 BY MR. PRINCE:

20 Q Anyway, after Beau had the MRI --

21 A Yes.

22 Q -- based upon what -- you know, your knowledge and interaction with
23 Beau, was there any knowledge or idea that you had at that point that there had
24 been a wrong level surgery?

25 A We thought something was wrong but we --

1 Q I meant from -- coming from Dr. Capanna?

2 A Oh, no, not at all, no, no.

3 Q Did you -- after, you know, Beau spoke with Dr. Capanna, did you and

4 your wife think, there's something more to this?

5 A My wife did for sure.

6 Q Okay.

7 A She said something's wrong here, and I happened to agree with her.

8 Q Did she take matters into her hands at that --

9 A Yes, she's -- yes, she did.

10 Q She said you boys are done messing around?

11 A You guys are done. Yeah, I'm going to take care of this.

12 Q Okay. And how does she get -- how does Beau get to Dr. Cash? Does

13 your wife set the --

14 A My wife.

15 Q She sets that up?

16 A My wife. She fell --

17 Q Okay. But does your wife refer --

18 A Yes.

19 Q -- get Beau to Dr. Cash?

20 A Yes.

21 Q Okay. And now the records show that, you know -- did you go to the

22 appointments with Dr. Cash?

23 A I've went to a couple of them.

24 Q Okay. And after Beau's appointments with -- you know, initially during

25 -- with Dr. Cash, but the first one is October the 12th, 2010, just about three weeks

1 after the initial surgery, what did you learn following Beau's -- after Beau's
2 appointment with Dr. Cash?

3 MR. LAURIA: Objection; it's hearsay, Your Honor, I think.

4 MR. PRINCE: Asking what did he learn, I'm asking what anybody said.

5 MR. LAURIA: Well --

6 THE COURT: Well --

7 MR. LAURIA: -- he wasn't at the appointment as I understand it.

8 THE COURT: -- just what was your --

9 THE WITNESS: I was at --

10 THE COURT: -- what was your understanding of what the plan of treatment
11 was going to be after his visit with Dr. Cash?

12 THE WITNESS: I -- we really didn't know other than the pain meds and stuff
13 that we got a -- Dr. Cash looked at the MRIs and he never really stated what he
14 thought. He never said it. He never said I think that the surgery was the wrong
15 level. He stated something that the old could have ruptured, something else was
16 going on in there. He did not want to say anything --

17 MR. PRINCE: Okay.

18 THE WITNESS: -- about the previous -- the Dr. Capanna surgery.

19 MR. LAURIA: Objection, move to strike --

20 MR. PRINCE: And --

21 MR. LAURIA: -- calls for speculation, Your Honor.

22 THE COURT: I will strike that very last statement about what he perceived
23 Dr. Cash did not want to do.

24 MR. PRINCE: And --

25 MR. LAURIA: Please -- and please advise the jury if --

1 THE COURT: Well I just ordered that it be stricken as I told them before the
2 trial how they handle that. Go ahead.

3 THE WITNESS: I'm sorry.

4 BY MR. PRINCE:

5 Q That's okay. And so after Beau met -- saw Dr. Cash -- met with Dr.
6 Cash, Dr. Cash looked at the MRI. Do you -- are you aware of whether Dr. Cash
7 made a recommendation for surgery?

8 A Yeah.

9 Q And --

10 A We had -- this was a process, you know, between Beau and Peg and
11 us going back and forth to the doctor, and then the decision was made to have
12 another surgery.

13 Q How was Beau doing -- so you know, kind of, you know, when he sees
14 Dr. Cash --

15 A Prior to Dr. Cash?

16 Q Yeah, and going -- and when he saw Dr. Cash, how was he?

17 A He was crippled. He couldn't walk. He couldn't sit. He couldn't do
18 anything. He just laid there. He was afraid to eat. He was afraid to move. He was
19 afraid to go to the bathroom. He was afraid to get dressed.

20 Q And so now we're going to have the surgery with Dr. Cash. He does it
21 on October 22nd, 2010, according to the records. What hospital was that at?

22 A Oh, my God. Southern Hills.

23 Q Southern Hills?

24 A Southern Hills, yes.

25 Q Like at Russell -- like at Sunset and --

1 A Right.

2 Q -- 215?

3 A That's his hospital, yes.

4 Q Southwest. Okay. And after you -- Beau had the surgery by Dr. Cash,

5 did -- you know, did Dr. -- did you learn about what Dr. Cash found during the

6 surgery?

7 A Yes.

8 Q What did you learn?

9 A That there was damage done to the L4, and that the L5 had not been

10 corrected. And he repaired L4 and L5 and Beau would do better.

11 Q Okay. Was that surprising for you and -- you know, for Beau and your

12 family to learn that there had been a surgery at the wrong level?

13 A Yeah.

14 Q And you know, kind of -- how did Beau do shortly after that surgery?

15 A He did pretty good.

16 Q Did it help him?

17 A Oh, absolutely. Are you kidding me? Yeah. It was not instantaneous,

18 but it was within a couple of days. He was doing much better. He was still in pain.

19 Mom threw away the pain drugs. That wasn't going to happen anymore. He had a

20 body cage on which kept him from moving, gave him a little time to heal, which I

21 thought was kind of strange that Dr. Capanna, after his surgery, wouldn't put him in

22 something like that to keep him, at least, immobile for a day or two. But --

23 Q And kind of advancing forward a few weeks after Dr. Cash's surgery.

24 Was Beau able to return to the team?

25 A No.

1 Q No. Do you recall a, you know -- or did you participate in any meetings
2 with Dr. Cash about whether it was advisable for Beau to continue playing football?

3 A Dr. Cash said it wasn't going to be possible.

4 Q And when Dr. Cash told Beau that, what was Beau's reaction?

5 A He was pretty upset. We were all pretty upset.

6 Q What did he tell you -- was he tearful?

7 A A little bit. He told us that yes, he was upset. He's known my family for
8 awhile.

9 Q Yeah, but what about Beau? What about -- how did it affect Beau?
10 What was Beau's reaction to that news?

11 MR. LAURIA: I'm sorry, can we get --

12 THE WITNESS: Beau was crushed.

13 MR. LAURIA: Could we --

14 THE COURT: Pardon?

15 MR. LAURIA: Can we find out when this conversation was?

16 THE COURT: Sure. Why don't you --

17 BY MR. PRINCE:

18 Q When did Dr. Cash tell Beau that, you know, it was his recommendation
19 that he shouldn't go back to playing football?

20 A He told us after the surgery that Dr. Capanna operated on the wrong
21 level, and that Beau would probably not play football again -- or should not play
22 football again. Beau was under anesthesia. He was kind of out. So we just kind of
23 -- we had a follow up, and then I let Dr. Cash tell us. And he was pretty crushed.
24 He was devastated. That was his life's dream.

25 MR. LAURIA: I'm sorry, Your Honor, I still don't --

1 MR. PRINCE: What's the problem now?

2 MR. LAURIA: I don't think Beau was part of that conversation.

3 MR. PRINCE: Yes, he was.

4 MR. LAURIA: The question was --

5 THE COURT: He just said they were at --

6 THE WITNESS: Beau was --

7 THE COURT: Excuse -- he just said they were at the follow-up visit. The

8 first --

9 MR. PRINCE: The follow-up visit.

10 MR. LAURIA: But I don't know which one. There were --

11 THE COURT: Well, the first postoperative follow-up visit. He said he talked

12 to them while Beau was still under anesthesia after surgery and then at their next

13 follow-up visit he said --

14 MR. LAURIA: Oh, okay. Maybe I missed it. I'm sorry.

15 THE COURT: That's okay.

16 BY MR. PRINCE:

17 Q And do you remember that day?

18 A Yeah, I do.

19 Q And what was Beau's reaction? This is the first time hearing that from

20 the doctor.

21 A We cried.

22 Q What did Beau share with you, you know, in the days and weeks and

23 months after that?

24 A Well, he really didn't. You could just watch it. We never really talked

25 much. He was really quiet. My wife and I thought he was suicidal for awhile. It was

1 difficult, but you know, Tori got his school stuff going, and he's got them going, and
2 he didn't lose any credits due to the surgery. He -- after the surgery he was, boom,
3 he went right back to school. Got all of his stuff done. Didn't do as well as he
4 probably would have, but it lowered his GPA a little and he got on with life.

5 Q Yeah, and I think it was his -- I think that probably would have been his
6 21st birthday shortly after that surgery?

7 A Yeah.

8 Q Was he able to --

9 A No.

10 Q -- celebrate his 21st --

11 A Not really, we waited awhile.

12 Q -- the way you --

13 A We waited.

14 Q -- would have wanted to celebrate a 21st birthday?

15 A Yeah, we waited to -- yeah. I -- yeah. Yeah.

16 Q And you know, at some point, I know Beau's competitive. Did he pick
17 himself up?

18 A Absolutely.

19 Q Dust himself off?

20 A Absolutely. Yeah.

21 Q Did he finish college?

22 A Yeah, he did it in three and a half years instead of four, four and a half.
23 He did. He graduated.

24 Q Did he -- did the university, you know, continue with the scholarship --

25 A Oh yes, they did. They honored their agreement with Beau. They

1 absolutely did.

2 Q Okay.

3 A I'll commend them --

4 Q And --

5 A -- give live and good debt.

6 Q Was Beau upset that he didn't learn directly from Dr. Capanna that
7 there had been a surgery at the wrong level?

8 MR. LAURIA: Objection; calls for speculation. Leading, Your Honor.

9 MR. PRINCE: I'm asking did he -- does he know from observation of
10 speaking to him.

11 THE WITNESS: My whole family was.

12 BY MR. PRINCE:

13 Q Was Beau upset?

14 A Yeah. Yeah. Yeah. And you try to get -- I'm sorry.

15 Q Go ahead.

16 A No you -- the university was like that too. We tried to contact the
17 university. We tried to contact Dr. Capanna. We got -- nobody ever called us back.
18 Nobody ever called us back from the athletic department, to the front office where
19 Dr. -- I mean, I think he was a doctor, Livengood, the head of the athletic department
20 or Dr. Capanna.

21 Q And have you seen changes in Beau, just physically, since he's had,
22 you know, these surgeries and what -- you know, what he can do, what he can't do,
23 is he limited, does he --

24 A Well, he tries to do as much as a 25 year old would want to do. He tries
25 to golf. He tries to do other things that I did when I was 25.

1 Q Does he still talk about what could have and should have been?

2 A We do. In our own little private way we do. We just -- up until last year
3 he couldn't even watch football -- college football. He wouldn't watch it with me.
4 And I never really got into the professional thing anyway. But he lost interest in that
5 kind of thing and we used to do that -- that was a -- that was all -- that was our whole
6 life for a long time. And we figured it would be a part of his life for a lot longer.

7 Q And does Beau -- and we've heard a lot of testimony. You weren't here
8 for some of it. Has Beau shared with you his thoughts and fears about the future
9 concerning his back and need for future surgeries and limitations?

10 A Yeah, we've talked about --

11 MR. LAURIA: Objection; hearsay, Your Honor.

12 THE COURT: I'll sustain the objection.

13 MR. PRINCE: Bob, thank you. I have no additional questions.

14 THE COURT: Okay. We'll go ahead and take a lunch break at this time,
15 ladies and gentlemen. During the recess you're admonished not to talk or converse
16 among yourselves or with anyone else on any subject connected the trial; or read,
17 watch or listen to any report of or commentary on the trial by any medium of
18 information, including without limitation newspapers, television, internet and radio; or
19 form or express any opinion on any subject connected with the case until it's finally
20 submitted to you. We'll start back at 1:15. Thank you.

21 [Jury out at 12:18 p.m.]

22 THE COURT: Mr. Orth --

23 THE WITNESS: Yes, sir.

24 THE COURT: -- you can step down. You can stay there for right now if you
25 wish, but you can step down whenever you're ready.

1 THE WITNESS: Okay.

2 THE COURT: You guys have anything outside the presence?

3 MR. PRINCE: No.

4 MR. LAURIA: I don't think so, Your Honor. Oh --

5 THE COURT: Does Mr. Rietz just have an unlimited supply of Arizona State
6 shirts to wear to court?

7 MR. PRINCE: I know.

8 MR. LAURIA: Apparently.

9 THE COURT: My gosh. Okay.

10 MR. PRINCE: I'm glad he's an alternate.

11 THE WITNESS: Well if you're a fan, you're a fan, sir.

12 THE COURT: You're -- yeah. Yeah. I think he --

13 THE WITNESS: I just --

14 THE COURT: -- he has a big --

15 THE WITNESS: He has probably had underwear like that too.

16 THE COURT: -- has a big online account, I guess.

17 Yeah. Somebody started to stay something, I'm sorry.

18 MR. LAURIA: I think we're okay.

19 THE COURT: Okay. All right. I'll see you back in an hour guys. Thank you.

20 [Off the record at 12:18 p.m.]

21 [Proceedings resumed at 1:19 p.m.]

22 [Outside the presence of the jury]

23 THE COURT: Do you guys have anything else out of the presence?

24 MR. LAURIA: I don't think so, Your Honor.

25 MR. PRINCE: I'm going to ask Mr. Orth a couple more questions before I turn

1 him over.

2 THE COURT: Okay. All right, Joel, you can go ahead.

3 Yeah, Mr. Orth, you can come on back up. Thank you.

4 THE WITNESS: Thank you, sir.

5 [Pause]

6 THE MARSHAL: Are you all ready?

7 THE COURT: Yes, thank you.

8 THE MARSHAL: Come on in.

9 [Jury in at 1:21 p.m.]

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

11 Okay. We will be back on the record. We're going to continue on in
12 plaintiff's case in chief with the testimony of Mr. Orth.

13 Mr. Orth, I'll remind you that you're still under oath, okay?

14 THE WITNESS: Yes, Your Honor.

15 THE COURT: Thank you. Mr. Prince.

16 MR. PRINCE: I'm sorry, our famous last words were there were no additional
17 questions, but I thought of a couple that I just wanted to touch --

18 THE COURT: I actually think famous last words is I'll be brief.

19 MR. PRINCE: Yeah. That's probably true.

20 THE COURT: You can add that too.

21 BY MR. PRINCE:

22 Q And I want to just kind of go back for a second to -- you know, about
23 UNLV football for a minute. I mean, you obviously followed UNLV football, at least
24 when Beau was there and even probably before, right?

25 A Correct.

1 Q And, again, based upon your knowledge and understanding and being
2 involved with a collegiate athlete, did UNLV have players that went on to play in the
3 NFL?

4 A Several, yes, sir.

5 Q Okay. On a regular basis?

6 A Yes, on a regular basis.

7 Q And now I know you're his father, but I really want you to be as
8 objective as you can and tell us, did Beau have a -- even a legitimate opportunity to
9 become a professional football player?

10 MR. LAURIA: Objection; calls for speculation, lacks foundation.

11 THE COURT: Well, I'll sustain the objection.

12 BY MR. PRINCE:

13 Q Do you believe, based upon, you know, your knowledge of Beau's play,
14 where he was, speaking with coaches, speaking with other people, that he had a
15 potential opportunity to play in the NFL?

16 A Yes.

17 MR. LAURIA: Objection; lacks foundation, calls for speculation.

18 THE COURT: I'll sustain the objection.

19 MR. PRINCE: What's the --

20 THE COURT: A, I think it's really difficult to be unbiased as a parent in that
21 regard. I mean all of us with our kids.

22 MR. PRINCE: Of course.

23 THE COURT: But I think there would have to be a lot more foundation for
24 involvement, not just at the collegiate level but at the professional level, to be able to
25 speak to that.

1 MR. PRINCE: All right.

2 BY MR. PRINCE:

3 Q Do you believe based upon your -- you know, speaking with coaches,
4 Beau's play, his abilities --

5 THE COURT: Well, actually, let me interrupt you and go back. By
6 opportunity are you just saying --

7 MR. PRINCE: Yeah, what --

8 THE COURT: -- to have an opportunity to go walk into a training camp and
9 try out for a team?

10 MR. PRINCE: Right. Well, yeah, right. Or potential for draft, any --

11 THE COURT: Or make it -- make a 53-man roster?

12 MR. PRINCE: Not making it, just why did he think he had the potential to be a
13 professional --

14 THE COURT: Right.

15 MR. PRINCE: -- football -- the potential.

16 THE COURT: You can go ahead an answer that then.

17 THE WITNESS: Okay. If you're going to go by numbers, and which we're in
18 this computer age where everything from body fat to size of their feet are measured,
19 yes, I do believe he could have -- in my opinion, he could have played, and --

20 BY MR. PRINCE:

21 Q What do you base that on?

22 A Every coach that I've ever talked to coaching my son, watching my son,
23 people that have been in high school sports, coaching, academia, college coaches
24 that I talked to, even when he was recruited -- not only do they go after young men
25 and women that have the numbers, the bench presses, the 40 speeds, there's no

1 way to measure the heart. And that's what my son had. He had the X factor, that if
2 you needed it down, he was going to get it. You needed the ball back, he was going
3 to get it. Just in that Arizona game, the three plays that he played in that game,
4 other than special teams, he picked off the quarterback, he was involved in a sack,
5 and defended a pass. Just the three plays, and they needed that. And that
6 propelled that team to beat Arizona State University. And he's done that constantly
7 through his life. Constantly. Whenever -- Coach Cinkovich from UNLV, when we
8 were going through the recruiting process, he says, we went to see DeMarco --

9 MR. LAURIA: Objection, Your Honor.

10 THE COURT: Well, it's kind of a narrative at this point, but you can follow-up
11 with another question.

12 MR. PRINCE: Right.

13 BY MR. PRINCE:

14 Q When you -- during the recruiting process, you had said you would go
15 with a Coach Cinkovich. Who is Coach Cinkovich?

16 A He's the offensive coordinator for UNLV.

17 Q And did he express --

18 THE COURT: Under Coach Sanford?

19 THE WITNESS: Under Coach Sanford, yes, sir.

20 BY MR. PRINCE:

21 Q And his impression from -- of watching Beau, did he have the additional
22 X factor, the it factor?

23 A He believed he did.

24 Q Why?

25 A He told me face-to-face, they went to watch DeMarco when DeMarco

1 was playing at Bishop Gorman, and Beau was playing in the game that they went to
2 see. And Coach Cink was sitting across the table. We were having -- it was one of
3 his visits that he had, and he said --

4 MR. LAURIA: Objection; hearsay, Your Honor.

5 THE COURT: I'll sustain the objection.

6 MR. PRINCE: Well, I think it's just offered up for the --

7 BY MR. PRINCE:

8 Q Okay. Did he see the it factor in Beau?

9 A Yes.

10 Q And when you say DeMarco, who are you talking about?

11 A DeMarco Murray of the now Philadelphia Eagles.

12 Q And was he with the Cowboys last year?

13 A Yes, sir, he was.

14 Q And did he play also at Bishop Gorman High School?

15 A Yes, he did.

16 Q Okay. Are you aware of people from the NFL reaching out to Beau and
17 offering him at least the opportunity to come and try out for an NFL football team?

18 A Yes.

19 Q Who?

20 A The strength and conditioning coach at UNLV, when Sanford was
21 replaced by Coach Hauck, he went to the Oakland Raiders and he had been in
22 contact with Beau trying to figure out what Beau was doing with his back, things of
23 that nature. If he ever was healthy, if he -- whatever, he had an opportunity there to
24 come, try out, become a street-free agent, or if there was a draft that was going to
25 be involved, or whatever the case may be, that he would put a good word in for

1 Beau. And that's done all the time.

2 Q And did Beau have the ability at that point in time when that -- when
3 that strength and conditioning coach reached out to Beau, did he go?

4 A No.

5 Q Why?

6 A He was hurt. Couldn't play.

7 Q Was it after these surgeries?

8 A Yes, sir.

9 Q Thank you.

10 MR. PRINCE: No additional questions.

11 THE COURT: All right. Mr. Lauria.

12 MR. LAURIA: Thank you.

13 CROSS-EXAMINATION

14 BY MR. LAURIA:

15 Q Mr. Orth, you are a proud dad, aren't you?

16 A Yes, sir.

17 Q And you should be. I mean, you sure got a great kid. And you're not
18 any less proud of your son because he's not playing football?

19 A Right.

20 Q Just -- I just want to clarify a couple things because actually, I mean,
21 during the time that your son was playing college football, he couldn't have tried out
22 for a team, or he couldn't have done a workout for a professional team, or had an
23 agent, or even had any contact with anybody in the NFL under the rules of the
24 NCAA. He would have lost his eligibility, wouldn't he?

25 A After his junior -- before his junior year, you are correct, sir, yes.

1 Q Okay.

2 A And he cannot talk to anyone.

3 Q All right. So let's -- let me go back and clear -- clear up a couple of

4 questions that I have, if I can. I think we've kind of gone through a couple things that

5 were not clear, but back in -- let me understand that -- because you talked a little bit

6 about gray shirting. So when did Beau graduate from high school?

7 A In the '07.

8 Q Spring of -- or summer of '07, basically?

9 A Yes.

10 Q All right. So he didn't gray shirt; he actually went right to school?

11 A Yes, sir.

12 Q All right. And when did he graduate from UNLV?

13 A Three and a half years later, '11, '12.

14 Q Okay. And talking about a little bit -- wrong pad, sorry. When a high

15 school athlete gets recruited by colleges I saw with my partner's kid, initially there'll

16 be some that come to games or come to those camps and they may be -- there may

17 be a football camp where there's coaches from 20 different schools and they're

18 looking at 300 different kids trying out, right?

19 A That's correct.

20 Q Is that true?

21 A Yes, sir.

22 Q So any kids can pretty much go to the camp if they want to try and get

23 recruited and hope that a coach picks them up or shows some interest, right?

24 A Well not necessarily. Under Armour camp is an invitation only.

25 Q Okay. But the other ones like the Nike camp and some of those were

1 you can go if you want --

2 A Samford camp, yes, sir.

3 Q Okay. And so as I understand the process then, then what happens is
4 you may have a bunch of schools showing interest and -- and then it's a progress
5 (sic), it doesn't happen right then, nobody signs you right then, said we want you,
6 this can take months.

7 A This could actually take years.

8 Q All right. So what happens is, you know, maybe they start showing
9 interest in some kids when they're freshman in a high school and --

10 A Correct.

11 Q -- you know, now they're -- unfortunately, they're looking at kids that are
12 13, 14 years old and trying to get them but -- so it's a process so initially some
13 schools will show some interest, right?

14 A Yes, sir.

15 Q All right. And those are -- that's what you put up -- you were here for
16 the opening by Mr. Prince, right?

17 A Yes, sir.

18 Q When he put up all the different colleges up there and --

19 A That is correct.

20 Q -- those were schools that initially showed some interest in your son
21 playing for them?

22 A Right.

23 Q All right. And then you go along that process and then there's
24 something called an official visit, right?

25 A Correct.

1 Q So then a school actually says okay, we are willing to say we want your
2 son to come and stay with us and I think they can only stay up to 48 hours I think is
3 the max, but --

4 A Right.

5 Q -- we'll pay for you to --

6 A It's a weekend, yes, sir.

7 Q -- we'll pay for you to come out and we'll get you from the airport to the
8 school and you can meet the team and meet the coaches and show you around
9 campus and give you dinner and all the stuff, right?

10 A Right. That's correct.

11 Q And where did your son and I'm going to refer to him as Beau because
12 if I call him Mr. Orth, I'm calling you Mr. Orth --

13 A That's okay.

14 Q -- and it gets confusing, all right?

15 A It's all right.

16 Q Where did he actually go for official visits?

17 A He didn't -- UNLV was the only official visit. Montana invited him up for
18 an official visit, but Beau had made the decision. I ask him if he wanted to go on
19 that visit and he said he didn't want to go. He wanted go to UNLV.

20 Q Okay.

21 A So he would -- he could have gone that early to at least two that I know
22 of.

23 Q So he could have gone to UNLV and to Montana?

24 A Right, and to Montana, but --

25 Q Okay.

1 A -- there was a conflict with the Montana/UNLV visit and he wanted to go
2 to the UNLV visit first.

3 Q Okay.

4 A So therefore it -- then he just decided to go to that and then we didn't go
5 to Montana.

6 Q So of all the schools that Mr. Prince put up in the big diagram and all
7 the logos and Oregon State and Harvard and those things --

8 A Correct.

9 Q -- Beau never actually went and had an official -- recruiting visit with the
10 coaches there?

11 A No.

12 Q All right.

13 A No.

14 Q And did you get actual offer letters from schools?

15 A We had letters initially stating that they were interested in Beau and that
16 they wanted to have coaches come when season was over, because they can't
17 recruit also until after the seasons are over after the -- and they showed interest in
18 those letters also.

19 Q Okay, but I'm going a little bit beyond that so that's awesome, you
20 know, I mean exciting, right? Get those letters like hey, these places are all
21 interested.

22 A Correct.

23 Q But when push comes to shove, then it kind of narrows down to a field
24 that's saying, okay, we're ready to offer you a spot on our team.

25 A Right.

1 Q We're ready to give you a scholarship at our school.

2 A Right.

3 Q And that usually follows an offer for an official visit, right?

4 A Correct.

5 Q So of all the ones that Mr. Prince put up on the screen in the opening --

6 and you remember the graphics, right?

7 A Uh-huh.

8 Q Harvard and Oregon State and -- which ones actually sent a letter to

9 your son saying we're offering you a scholarship, come play for us?

10 A Well first of all, you take a visit, then you get the offer. He only visited

11 one school and he decided to go there so there was no need for anything else.

12 Q Okay. And the only one that actually made a formal offer other than

13 UNLV was Montana --

14 A Well they don't make an offer, sir, until --

15 Q I'm sorry.

16 A -- you take your official visit.

17 Q The only -- sorry. You're right. I rephrased that poorly. The only other

18 school that said we want Beau to come for an official visit was Montana.

19 A Montana and UNLV.

20 Q Okay. So not Harvard, not OSU, not -- I don't remember what other --

21 Nebraska. I mean, that's awesome they showed interest, but they never got to the

22 point of sending a letter to your son saying we want you to come do an official visit,

23 right?

24 A That process sometimes takes more than just a day or two. Sometimes

25 that process is drawn out all the way into the spring.

1 Q All I'm --

2 A I mean they recruit all the way up. Now, is there a -- he -- could he
3 have gone and I would have paid for a freshman year if he wanted -- let's say we
4 don't want to go to UNLV. We would not like to go to Harvard or Montana. Let's see
5 if we can get you -- let's go down to -- we know some people at Oklahoma.

6 Q Sure.

7 A I'll pay for your first year at Oklahoma. You go in as a walk-on and let's
8 see if you can make the team.

9 Q Okay. Obviously --

10 A I mean, that option is up for every kid that plays football --

11 Q He could have gone to Alabama, he could gone to the national --

12 A Absolutely.

13 Q -- champion team in the country and said I want to walk on and try out
14 for your team, right?

15 A Yes, sir.

16 Q And I know as you're dad you're certain he could have tried out and
17 made any team in the country, right?

18 A Pretty much.

19 Q All right. But I'm talking about something different. I'm talking about the
20 coaches at these schools that actually sent a letter to your son saying we want you
21 to come and have an official visit at our school so we can then consider whether
22 we're going to offer you a spot on our team as a scholarship player. There were
23 two, right?

24 A Yes, sir, and like I said before, it's a process. Let's say he doesn't get
25 the letter -- the -- the letter originally when the first series goes out. These coaches,

1 they have in their minds they have a board. They go after people, after young men.
2 They've got this, this, this and this of their needs. These are the people they want to
3 go after so they've got names on a board. They go after those names.

4 Depending on what they get, which is part of the process which
5 sometimes takes a couple of months -- sometimes these kids don't want to come
6 there, sometimes they don't. They find -- then there's secondary needs. We didn't
7 even get to that point. Beau just -- he got -- he accepted the letter from Montana.
8 We were going to go. But we went to UNLV first and he decided to stay, so
9 therefore we contacted them. After that I don't know what kind of opportunities he
10 would have had.

11 Q Okay.

12 A And I'm not to speculate so --

13 Q I understand. I appreciate it. And as I understand it, the only -- of those
14 schools, the only one that actually offered a scholarship -- because that offer you
15 said comes after the visit. The only one that actually offered a scholarship was
16 UNLV?

17 A Correct.

18 Q All right. Now what may have happened in the future we don't know.

19 A That is --

20 Q There could have been other offers coming in, but they never actually
21 made an offer, right?

22 A Well once you sign, then you pretty much no one's going to --

23 Q And as I understand it, when you get -- under the NCAA rules at the
24 time, that they could only offer you a one-year scholarship, right?

25 A It's exactly right.

1 Q Okay.

2 A They offer you a one -- everybody gets a one year and it's -- everything

3 is contingent. You got to be a good student. You can't get in any trouble.

4 Q Sure.

5 A And they -- it's like an automatically unless something happens that

6 you --

7 Q And they've changed that.

8 A -- you messed up.

9 Q Now they can do -- you're aware that now some schools can do four

10 years. Are you aware of that? But --

11 A I'm sorry?

12 Q Are you aware now they can offer multi-year scholarships, whereas

13 they couldn't back the time they were recruiting Beau? Did you know that?

14 A No, sir, I did not.

15 Q Okay. In any event, your understanding was we got a scholarship for a

16 year and if things go great, we're going to -- you're here next year and the hope is

17 that it continues on, right, for the whole career?

18 A For both parties.

19 Q Doesn't always happen?

20 A No, sir.

21 Q All right. And as I understand it, even though Beau couldn't play that

22 junior year or senior year or didn't play those years, UNLV continued to say that's all

23 right, we're going to still take care of your tuition, room and board?

24 A It's kind of a nonverbal thing, yes, sir. If you get injured, they don't

25 usually cut you loose --

1 Q Okay.

2 A -- like that. Morally that's not right.

3 Q No, and that's a -- that was a good thing to do, right?

4 A Absolutely.

5 Q Yeah. Okay. During the time that he was at UNLV playing football, he

6 made the all-conference academic team?

7 A Yes, sir.

8 Q Then that's also means he's got a B average, right?

9 A Yeah.

10 Q And there's how many kids from the team -- I mean, hopefully you got --

11 your whole team makes it, but --

12 A No.

13 Q -- probably 15 --

14 A That's not --

15 Q -- kids or 10 or 15 kids?

16 A Well I would assume -- yeah, they had a few --

17 Q Okay. I --

18 A -- and each, you know, and then you break it down into freshman,

19 junior, sophomore --

20 Q Sure.

21 A -- senior.

22 Q So he took his studies seriously too, right?

23 A Absolutely.

24 Q And you're just as proud of the fact that he got a degree and worked

25 hard and studied academically?

1 A Yes.

2 Q All right.

3 A See I've been a -- you know, a lifelong junior at UNLV and he graduated

4 in three years. It's taken me 40 just to be a junior.

5 Q Okay. All right. Wasn't sure because I thought when you were being

6 asked by Mr. Prince you were talking about Oregon. And then but Mr. Prince put up

7 Oregon State at one point showing some interest. Was it Oregon State?

8 A Yes.

9 Q Okay.

10 A The orange and black team.

11 Q Not the green --

12 A No, not the green --

13 Q -- duck team.

14 A -- 3.8 track --

15 Q Yeah.

16 A No.

17 Q Yeah. The guys that run faster than we can --

18 A Than normal --

19 Q -- see them?

20 A Yes --

21 Q Okay.

22 A -- there's no -- yeah, they're flash.

23 Q Also the -- as I understand it, Beau got some -- got quite a bit of playing

24 time maybe on special teams both years, right?

25 A Yes, he played quite a bit.

1 Q Okay. He got into the games. He didn't start a lot of games.

2 A He started a few games. Mostly he backed up star.

3 Q Okay. So as I understand it his sophomore year, so would have been

4 his second year, he was actually the defensive starter in one game?

5 A Uh-huh.

6 Q True?

7 A Yeah, one or two. Uh-huh.

8 Q Okay. And then he came off the bench in the other games to play?

9 A Most of the time, yes.

10 Q All right. And he had some good plays. I mean you talked about that

11 one game he -- was fun to watch your kid do that, wasn't it?

12 A Well yeah, but you can't gauge -- that's -- I mean, football is the greatest

13 team sport ever. It's the greatest team sport. You can't do one thing without the --

14 affecting the other 10 men.

15 Q Sure.

16 A So if you do your job, you're doing good.

17 Q Okay. So I want to talk also about I think some things about what was

18 going on with Beau physically during some of that time --

19 A Okay.

20 Q -- because we've got records that show -- I think you said that high --

21 you said that high -- college football season starts. You got to go to camp before the

22 actual games start in about August, right?

23 A Yes, there's a -- they have a winter -- they have winter workouts, they

24 have spring, and then camp starts in August, yes.

25 Q Okay. So Beau's first camp would have been in August in 2008, right?

1 A First -- yeah, first -- you mean like --
2 Q Like --
3 A -- every -- the whole -- yes.
4 Q Whole team.
5 A Uh-huh.
6 Q We're going to start practicing now getting ready for the year?
7 A Right.
8 Q And within a couple of weeks of being there he started having pain in
9 his back, right?
10 A In his sophomore year?
11 Q In his freshman year.
12 A I would assume so. He -- you know, you start playing football, you're
13 sore all the time.
14 Q Well you wouldn't have any reason to disagree with the UNLV athletic
15 department training records about what --
16 A No.
17 Q -- complaints or problems he was having --
18 A Absolutely not.
19 Q Okay. So goes through and then what happens in the spring? Do they
20 start working out again or --
21 A They do. They have -- the NCAA only lets them -- a college student
22 practice so many hours so much time. They have to allow for academics and
23 because of they're young and then the rules and they don't want anybody violating
24 or beating up our young men, you know, so they have a winter and they -- they go
25 out to UNLV, they go out to the stadium and they have like a game and then they

1 have a spring game and they -- you know --

2 Q So --

3 A -- it's kind of more of a -- to get everybody back into football --

4 Q Sure.

5 A -- and then shortly after that they go to camp up in Ely where it's really
6 serious.

7 Q Because you have to be serious if you want to go to Ely has kind of
8 been my --

9 A You -- yes, sir.

10 Q So -- sorry. That was a bad joke. The -- they do a spring camp starting
11 in what, February, March?

12 A You know, I don't know what the --

13 Q Okay.

14 A I don't remember the dates --

15 Q Fair enough.

16 A -- but it's in -- it's a winter thing. It's after February. It's after the kids
17 come back and then they -- you know, after the holidays and they do a little winter
18 thing and then they have the spring game and you can watch that on TV.

19 Q Okay.

20 A They all have it. Oklahoma. Ohio State.

21 Q And so when the spring was going on in 2009 so just after the freshman
22 season within a few months of that, were you aware that Beau was having back pain
23 and leg problems that led him to go have an MRI done?

24 A I knew he took a shot in practice and he was having problems with his
25 -- with some back pain and his leg pain, yes, sir.

1 Q All right. And so serious enough that the doctor thought he needed to
2 get an MRI of his spine.

3 A Okay.

4 Q Well I mean, you -- were you aware that --

5 A I was aware, yes.

6 Q Okay. And did you become aware that this MRI showed that he had a
7 protrusion of the disc that was pressing on a nerve in his back?

8 A Yes, sir.

9 Q All right. Was that concerning to you that your son who at that point is
10 still a very young man has a problem with a disc in his spine?

11 A Yeah. I mean, football is a violent game.

12 Q Okay. And then as I look at the records it looks like for a month or so
13 after the MRI that he's continuing to have problems, kind of finally works through
14 them. Is that your memory?

15 A Yes, sir.

16 Q And then -- sorry. Trying to get to the records here. Then in the
17 season -- the next season, his sophomore year in 2009, then in October during the
18 middle of that season he starts having problems with his back again. Do you
19 remember that?

20 A Yes. And his leg.

21 Q All right. And that's when you -- I think you said that you could see you
22 could notice a difference, maybe wasn't tackling quite the way he used to --

23 A Well --

24 Q -- he wasn't wrapping up, he was trying to protect himself a little bit.

25 A A little bit, yeah, I noticed that, but I've been watching my son play. A

1 lot of people might have watched it and go hey, that -- you know. But I notice things
2 that maybe most people don't.

3 Q Okay.

4 A He's running in -- he's in front of me since he was six years old.

5 Q So we we're -- we've got -- when he starts in August 2008, we've got
6 some back problems. We've got February 2009 we've got back problems. We've
7 got now October 2009 during his second season playing, you'd agree there was
8 some back problems then and you could notice a bit of difference because you're
9 sensitive to --

10 A Not all the time, but I could see every once in a while he would -- yeah.

11 Q Okay. And then that season ends and then you're in the spring for
12 February 2010, March, and he's having back problems again, right?

13 A Now it's mostly back.

14 Q All right.

15 A Yeah.

16 Q Well February 2010, do you recall that they did another MRI on your
17 son's spine; Dr. Milligan, the team ordered another MRI?

18 A Like I said, as a parent sometimes you don't -- aren't privy to a lot of
19 stuff like that. No, sir, I don't remember that MRI.

20 Q Okay. Do you remember him having problems that led to him -- you
21 know, having this radiating pain and no -- needing go to the doctor and needing to
22 have another examination of his back because he's got this pain and radiating down
23 his leg?

24 A That's through the team doctor, yes, sir.

25 Q Okay. And do you remember that at some point your son telling you

1 look they're sending me to a pain management doctor so I can get an injection into
2 my back because of these problems that I'm having?

3 A Yes.

4 Q Do you remember when that was for the first time?

5 A Sometime during the season. I would say that summer --

6 Q Well let me --

7 A -- or early spring.

8 Q -- see if I can trigger it's -- in sometime in February 2010. So about
9 eight months or seven months before he sees Dr. Capanna?

10 A I knew that they -- you don't do surgery unless you try to take care of it
11 with pain management, yes.

12 Q Okay. So about seven months before he goes to Dr. Capanna after the
13 end of his sophomore year he's having these pain problems, goes to Dr. Ruggeroli?

14 A Right.

15 Q All right.

16 A Okay, I don't go with Dr. Ruggeroli. This -- the staff -- medical staff
17 through the athletic department accompanied Beau to those --

18 Q Okay.

19 A That's official UNLV stuff, so I would not be aware of --

20 Q Dr. -- let me suggest to you that Dr. Ruggeroli's records indicate that
21 he's having like an average pain of four to six to seven. Sometimes his pain is 10
22 out of 10, the most severe pain ever.

23 A Right.

24 Q Do you remember having discussions with Beau --

25 A Yes.

1 Q -- that time that look --

2 A Yes.

3 Q -- dad, sometimes this back pain, I mean I can't move it's so severe?

4 A And his legs were -- go numb on him. Yes, I do remember that.

5 Q And that's seven months or so before he goes to see Dr. Capanna,

6 right?

7 A Okay.

8 Q And then season's kind of over and then go back to -- they return for

9 football which is now going to be the junior year in August?

10 A Correct.

11 Q Okay. And do you remember just shortly after getting back in August of

12 2010 your son's having some serious problems again?

13 A Correct, I -- we had an MRI again I think prior to the Ely camp or pain --

14 he -- we went to a -- I think to a pain management thing and then I drove him up to

15 Ely --

16 Q Okay.

17 A -- and dropped him off and stayed for camp.

18 Q So is it fair to say that unfortunately at the start again of that -- what

19 would have been his junior year, that Beau was having significant problems with his

20 back and his legs so that he had to go see Dr. Ruggeroli and get some injections

21 again, had to get another MRI -- was causing him some significant problems, wasn't

22 it?

23 A Yes, sir.

24 Q All right. And in the past the pain injection Dr. Ruggeroli did seemed to

25 provide him some relief, but do you remember that this time in this August timeframe

1 that it didn't seem to provide him any help?

2 A He was in camp, sir.

3 Q Okay. Did you ever talk to him? I mean --

4 A Sure.

5 Q Did Beau ever tell you that hey dad, this kind of helped me last time, but
6 it really didn't do much for me this time?

7 A Oh, I'm sure in casual talk, yes, we did.

8 Q And --

9 A My son has -- I'm sorry.

10 Q That's okay. Did your -- did Beau ever tell you that Dr. Ruggeroli says
11 look I don't think these are going to work, I think you need no -- need to go consult a
12 surgeon about maybe having surgery on your back?

13 A I don't think that conversation happened. I think for the most part he
14 was saying, you know, he was hurt -- he was hurting. He didn't know what he was
15 going to do. The thing -- you know, he was going to consult I think with the team,
16 the athletic department, to find out what direction he should go for his back.

17 Q And ultimately the team, the athletic department, recommended that he
18 go consult with a surgeon, right?

19 A Correct.

20 Q So if we say that from the start and sometime in August of 2010 up until
21 the time Dr. Capanna does surgery, I mean that's a period of, I don't know, four, five,
22 six weeks, something in there, right?

23 A Uh-huh.

24 Q And your son has had pain management treatment which hasn't
25 worked. He's gone back to the team doctors and the team and they've said we think

1 you no -- need to go get a surgical consultation, right?

2 A Correct.

3 Q At any point in that four to six weeks did you or Beau or any other
4 member of your family ask Dr. Ruggeroli or Dr. Milligan, the team doctor, or the
5 trainers, or the athletic department, hey, if I have surgery, what does that mean?

6 A Beau had those conversations.

7 Q So he had them before Dr. Capanna did surgery on him, right?

8 A I'm sure he did.

9 Q All right.

10 A UNLV pretty much had control of --

11 Q Okay.

12 A -- of who he would see, when he would go. They were in charge of his
13 medical, sir.

14 Q So Beau had conversations to your knowledge with the staff at UNLV,
15 including the athletic training department, as to what he could expect if he had back
16 surgery?

17 A Yes, and then he came to me and I suggested a red shirt.

18 Q All right.

19 A As his father.

20 Q And did Beau tell you that the athletic department at UNLV says that if
21 you have back surgery, you're going to rehab for four to six months so you're not
22 going to play this season?

23 A I don't think anybody there told him that.

24 Q Well you don't know he -- all you know is that Beau never told you that,
25 right?

1 A That's correct.

2 Q All right. But as to what the athletic department, like the trainers there
3 told him, you have no idea, do you?

4 A Right.

5 Q Well what about looking it up on the internet? I mean did you look on
6 the internet and go hey, if my son has back surgery, is he going to be back playing
7 in two weeks or is there a healing time and no, it's going to take us months? Did
8 you ever do, you know, any kind of looking to see what's expected healing time
9 here?

10 A My son did.

11 Q And did he tell you that it shows it's going to take three, four, six months
12 before he's back playing full contact sports --

13 A I think he was talking to all the doctors that he was supposed to talk to
14 that UNLV ask him to talk to. They gave him the information.

15 Q I'm sorry. I was talking about the internet. Did you ever look it up on --
16 I mean it's right you could go and say what's the recovery time for back surgery to
17 get back to football. Did anybody look that up that you know of?

18 A Well, I would imagine depending on the back surgery -- I think we
19 needed a consultation with a doctor to find out what they actually were going to be
20 able to do. How could I look up something that nobody really knew what was wrong
21 with? I -- I'm not quite sure where your question's going there.

22 Q My question is simply --

23 A I mean back surgery there's many levels of -- I don't know, sir.

24 Q Sure.

25 A I don't know --

1 Q My question is simply did you or Beau or somebody Google return to
2 football after back surgery? Something like that.

3 A I did not.

4 Q Okay. Is it your -- are you saying, Mr. Orth, that when you went to Dr.
5 Capanna you had no idea how long any kind of recovery from back surgery was for
6 a football player and -- and so when Dr. Capanna as you've testified said it's going
7 to be a few weeks, that's what -- that was the only information you had?

8 A Yes, sir.

9 Q All right. That's it. You didn't look anywhere else or get any other
10 information?

11 A He was the team physician.

12 Q And so your testimony is that you brought up red shirt and that's why it's
13 in the records and -- and is it your testimony Dr. Capanna said, oh, you don't need to
14 red shirt, you're going to be back playing in just a couple weeks, something like
15 that?

16 A I was talking to Beau in the office about red shirting. My concern was
17 him not being healthy enough to go back to play football. His wanting to go back to
18 play football was because that was his junior year, and things were changing at the
19 university and he wanted to compete for his junior day.

20 Q Sure.

21 A Dr. Capanna said he could have it done -- it was easy. In a few weeks
22 he'd be out playing football. His missing games and practices would be minimal.
23 He was the team physician hired by the university and I believed him.

24 Q All right. And you didn't look at anybody or talk to anybody else about
25 it, right?

1 MR. PRINCE: Objection; asked and answered, Your Honor.

2 BY MR. LAURIA:

3 Q And so --

4 THE COURT: You're asking like get a second opinion or anything?

5 MR. LAURIA: Well --

6 THE COURT: From another physician or --

7 MR. LAURIA: From anybody -- talk to anybody about it.

8 THE COURT: Okay.

9 BY MR. LAURIA:

10 Q You didn't talk to anybody about it other than Dr. Capanna and that's
11 the only information you say you relied on that this going to be good in two to three
12 weeks?

13 A They told us that if we would do anything going outside the university
14 that their insurance would not cover it and they didn't want anything to do with that,
15 that we had to use their team physicians.

16 MR. LAURIA: Can I see the records from Dr. Capanna?

17 MR. CARDINALE: (Indiscernible) --

18 MR. LAURIA: Yeah. Thanks.

19 Can we switch over?

20 MR. PRINCE: Yeah.

21 MR. LAURIA: I guess we got to --

22 MR. PRINCE: Just one second. Can we approach the bench for minute?

23 [Bench conference begins at 1:54 p.m.]

24 MR. PRINCE: He's going to show a record that it's -- it needs redaction
25 regarding the parents' spinal issues.

1 THE COURT: Oh.

2 MR. PRINCE: It's in the doctor -- so I want to make sure that you --

3 THE COURT: You got it?

4 MR. PRINCE: -- make sure you don't show that.

5 THE COURT: (Indiscernible) --

6 MR. PRINCE: Make sure you have the redaction done.

7 MS. TARMU: None of the defense exhibits (indiscernible) --

8 MR. PRINCE: None of the defense exhibits are --

9 MS. TARMU: (Indiscernible) --

10 MR. PRINCE: -- redacted.

11 MS. TARMU: (Indiscernible) Social Security numbers.

12 MR. PRINCE: Yeah, so we need to deal with their exhibits later.

13 THE COURT: This a Ruggeroli record?

14 MR. PRINCE: It's a Capanna record.

15 THE COURT: Capanna record. Referencing Ruggeroli or?

16 MR. PRINCE: Referencing the parents.

17 THE COURT: Right. I thought it was only they only -- I thought the parents

18 only talked to Ruggeroli?

19 MR. PRINCE: No. They -- no. They never --

20 MR. LAURIA: Judge, that's their exhibit that they haven't redacted.

21 THE COURT: I know. I know.

22 MR. PRINCE: No, we've --

23 THE COURT: I know. I know.

24 MR. PRINCE: -- we have redacted it.

25 THE COURT: I don't care whose it is. I just --

1 MR. PRINCE: It's redacted.

2 THE COURT: -- don't want it in there --

3 MR. PRINCE: Ours is redacted.

4 THE COURT: -- if it's going up on the screen --

5 MR. LAURIA: Yeah, got it.

6 THE COURT: -- so let me take a look.

7 [Pause]

8 THE COURT: Okay.

9 MR. LAURIA: Want to see it, sir?

10 THE COURT: Yep.

11 MR. LAURIA: We've crossed out the part they want.

12 THE COURT: Okay. Kind of still shows through it (indiscernible) --

13 MR. LAURIA: Thank you. Thanks --

14 [Bench conference ends at 1:55 p.m.]

15 THE COURT: Okay. You can go ahead.

16 MR. LAURIA: Thank you. Here we go.

17 BY MR. LAURIA:

18 Q Just looking at this note, this is a note from the first visit with Dr.

19 Capanna of September 1st. This is four to six weeks after your son started having

20 problems in August of 2010 again --

21 A Okay.

22 Q -- for which he went to Dr. Ruggeroli. He's patient of Dr. Michael

23 Milligan and Kyle Wilson. Kyle Wilson is the head trainer at UNLV football?

24 A Okay.

25 Q All right. Do you know who these --

1 A I don't know either one of them. I've --

2 Q Okay.

3 A I know of them.

4 Q And Dr. Capanna noted that he already had two MRIs that showed this
5 L5-S1 disc, right? And that the pain was such now that Beau was having trouble
6 even carrying his backpack to school. True?

7 MR. PRINCE: No, objection, Your Honor; misstates the document. It doesn't
8 say that.

9 MR. LAURIA: Well -- okay.

10 MR. PRINCE: Says not carrying a backpack now to school.

11 BY MR. LAURIA:

12 Q Was he --

13 THE COURT: I'll --

14 BY MR. LAURIA:

15 Q To your knowledge was --

16 THE COURT: -- sustain the objection. You can clarify it though. Go ahead.

17 BY MR. LAURIA:

18 Q To your knowledge was Beau in pain so it was difficult for him to even
19 do something like carry a backpack?

20 A I don't know that.

21 Q Okay. You know of any other reason why he wouldn't carry a
22 backpack?

23 A Maybe he left his books in his car and he just took them as he had to go
24 to class. I don't know, sir. I really don't.

25 Q Okay.

1 A I truly don't. I'm not --

2 Q No, I'm not --

3 A -- trying to be -- I don't know. He's in college. You know, if he was in
4 junior high, I'd go yeah --

5 Q I got two of them in college, I know. They want to hear -- they want to
6 tell you what they want to tell you, don't want to hear what you want to tell them.
7 Patient, his father and I had a long discussion. That's true, right? You had a long
8 discussion with Dr. Capanna.

9 A With Dr. who?

10 Q With Dr. Capanna?

11 A Yes.

12 Q Because this had been going on with Beau for a long time, there had
13 been several films, he had pain management, so wanted to talk about this and find
14 out what was happening, true?

15 A I went there as a father, yes, I -- you know, they send him out and he
16 asked me to go with him and I went.

17 Q Okay. Well, they send him out is not -- Dr. Capanna didn't send him
18 anywhere. The patient came to Dr. Capanna on a referral, right?

19 A From the university.

20 Q All right. From Dr. Milligan?

21 A Okay.

22 Q And then Dr. Capanna notes that he showed them the films and
23 explained to them, answered all their questions, showed them a model, explained
24 possible surgeries that could be done. Cannot suit up this Saturday, return -- RTC,
25 return to clinic as soon as the study is done. Do you remember that? Is that an

1 accurate description of what occurred at that visit?

2 A We talked a lot of things. I don't remember him telling him that he can
3 suit up this Saturday or cannot suit up this Saturday. I didn't know that was his
4 decision. I thought that maybe came from the team.

5 Q Okay. But you know that Beau didn't play that game, right?

6 A Correct.

7 Q All right. And so what Dr. Capanna did is had a long discussion with
8 you and Beau, discussed the films that had been taken in 2009 and earlier that year,
9 said I want to get some more testing done to make sure what's going on here and I
10 want to get an MRI of a different view so we can decide what's the best option,
11 right?

12 A Okay.

13 Q All right. Is that true?

14 A (No audible response.)

15 Q Don't let me -- I'm just trying to ask you --

16 A No, I'm listening, sir.

17 Q All right. Do you agree with what I said that that's what occurred?

18 A Yes.

19 Q All right. And this is on the 1st and surgery is done a few weeks later,
20 right?

21 A Yes.

22 Q So at that point you knew at least you're contemplating surgery, right?

23 A Well he was going to have the surgery, yes.

24 Q And then let's look at the note of September 15th. Is there --

25 MR. CARDINALE: 17th, right?

1 MR. LAURIA: I'm sorry?

2 MR. CARDINALE: I said November 17th?

3 MR. LAURIA: No, 15. Not the operative note, the office note.

4 MR. CARDINALE: Oh, okay. There it is. Okay. Top portion.

5 MR. LAURIA: I'm just -- I'm -- hold on.

6 BY MR. LAURIA:

7 Q So your son went and he did the things that Dr. Capanna asked him to,

8 right? He got this other EMG?

9 A Yeah, and you have a blood workup and all of that stuff pre -- it's pre-op

10 stuff, yes, sir.

11 Q Did you go with him to any of those visits?

12 A No.

13 Q Okay. So then you came back and Dr. Capanna explained to you and

14 Beau what these additional studies were, right?

15 A I only met with Dr. Capanna the one time. Okay?

16 Q Okay. So you only met with Dr. Capanna once?

17 A Yes, I think so.

18 Q And that's the date when you actually signed the consent form that we

19 talked --

20 A We didn't meet with Dr. Capanna on that. That was done through their

21 office. That was a pre-op.

22 Q Well, I'm not sure you understood my question so I'll ask it again. That

23 was the date -- the same date that you signed that form?

24 A Right.

25 Q That's the only time you went to Dr. Capanna's office was that one time

1 when that was signed?

2 A Yes.

3 THE COURT: You talking about before the surgery or after the surgery?

4 MR. LAURIA: I don't --

5 BY MR. LAURIA:

6 Q Did you ever go after the surgery?

7 A No, sir, I met him after he completed the surgery. He told me
8 everything was okay. Then after that it was all downhill. I wanted to go down --

9 Q My question is just did you go to Dr. Capanna's office more than once?

10 A No.

11 Q All right. And the only time you went then was on September 15th,
12 2010, and what we just put up there --

13 MR. LAURIA: Can I have that back, please?

14 BY MR. LAURIA:

15 Q I'm confused a little bit because if we see the date of this note,
16 September 1st, 2010?

17 A Uh-huh.

18 Q And then Dr. Capanna, and I think you agree, indicated that the patient
19 and his father were there and had a long discussion, right?

20 A Okay. Yes, sir.

21 Q So --

22 A Seems that way.

23 Q -- you must have been there that day too; is that right?

24 A Yes, but I never saw him after that.

25 Q Well --

1 A When we signed paperwork for him to go into surgery, he was not
2 there.

3 Q Let's put up a note from September 15th which is patient's 11. This is
4 before the surgery. On September 15th, 2011, Dr. -- 2010, excuse me, Dr.
5 Capanna notes patient in with father for follow up. So that's after he had this
6 additional testing done. Do you see --

7 A Well I may have sat outside in the office, sir. I didn't go in. But I didn't
8 meet with him but the one time, and then we signed paperwork and then he had his
9 surgery.

10 Q You've got me a little confused, sir, and I'm sorry, Mr. Orth, if I'm not
11 understanding, but I asked you first how many times did you go to Dr. Capanna's
12 office and you told me once --

13 A Well you said how many times did I meet with Dr. Capanna.

14 Q I don't think --

15 A One time.

16 Q If my question wasn't clear, I'm sorry. So let me make sure I
17 understand. You're saying now that you went to Dr. Capanna's office again on the
18 15th, but all you did on that visit was just sign the paper?

19 A I think so, yes.

20 Q All right. So for some reason Dr. Capanna noted patient in with father
21 for follow up, but whatever discussion took place on that day you weren't part of; is
22 that true?

23 A Well he was already decided to get the surgery, he was doing the
24 pre-op, there's --

25 Q So you --

1 A -- really not for me to go into the ---
2 Q Sorry. You weren't part of any of the discussion on that day; is that
3 true?
4 A No, sir.
5 Q Is my question true, you weren't --
6 A Yeah, true.
7 Q All right. So this note indicates he explained the EMG results to them,
8 answered all questions, showed them this new MRI result, explained that, again
9 answered all questions. Needs workup for this peripheral neuropathy. Do you
10 remember being told that there's some unusual condition kind of unrelated that
11 Beau's got that affects his nerves that, you know, you should have worked up with a
12 family doctor or something? Remember --
13 A No.
14 Q No?
15 A No.
16 Q Dr. Capanna notes that the options were reviewed in great detail, that
17 he showed models -- spine models, explained the surgeries. May continue playing,
18 but likely will not cause further damage. I think it's probably a misprint.
19 MR. PRINCE: No. Objection, move to strike he thinks that's a typo. There's
20 no foundation for that.
21 THE COURT: I'll grant the objection.
22 MR. LAURIA: Okay.
23 THE COURT: Strike counsel's statement.
24 MR. PRINCE: Words matter.
25 BY MR. LAURIA:

1 Q And then you weren't -- you weren't part of this discussion then on that
2 date when this whole issue of red shirting came up because you weren't there
3 talking to the doctor, right?

4 A When we first met with Dr. Capanna is when I talked about it.

5 Q So --

6 A That's when I spoke up and I said I would like my son -- I would prefer
7 that he red shirt. That way he's able to go back in and play -- be completely healthy
8 and be okay to finish his collegiate career.

9 Q Okay.

10 A I don't know what Dr. Capanna and Beau talked about as far as him
11 being a red shirt. I just know that that's when I expressed it and --

12 Q So I'm just trying to understand, Mr. Orth. Tell me again. You weren't
13 here for this visit, but when Mr. Prince asked you did Dr. Capanna tell you that he
14 was going to cure the problem, your answer was yes.

15 A Yes.

16 Q So I'm not sure --

17 A Yes, sir.

18 Q Did he say it on the first visit? Did he say it on --

19 A Yes.

20 Q -- the second visit?

21 A Yes, he said it was easy. He could do it, it was easy. We went from
22 there to his office.

23 Q And this says most likely to be beneficial and cure problem. Most likely,
24 right?

25 A It says also cure problem, sir.

1 Q All right. Let's just put up the consent form if we can. As the parent of a
2 college student, did you feel that you had some responsibility to make sure that you
3 understood what was going to happen and what the potential risks and problems
4 and complications could be?

5 A Yes. As a parent also, yes.

6 Q All right. And so did you look at this or read this at all or --

7 A Yes, sir, I did.

8 Q All right. So you understood from reading this that there was no
9 guarantees, that there could be complications, there could be problems, before you
10 signed it, right?

11 A Yes, sir, I've had -- I've had sick children before, I understand the
12 process.

13 Q Okay. Beau had shoulder surgery before. You knew that he may get
14 better, he may not get better, those things could happen, right?

15 A Yes, sir.

16 Q All right. So even with your testimony that Dr. Capanna said it's easy
17 and it's going to be fine, you knew from past experiences that well, there's always
18 risks, things can go bad, it may get better, may get worse, right?

19 A Yes, sir.

20 Q All right.

21 A Could I elaborate on that though?

22 Q Well your --

23 THE COURT: Well --

24 Q -- counsel will let you finish when he --

25 THE COURT: Mr. Prince can ask some more questions if he needs to, okay?

1 THE WITNESS: All right, sir. Thank you.

2 BY MR. LAURIA:

3 Q So I'm trying to understand then Dr. Capanna has the surgery. You
4 consent and Beau consents to the surgery. And then he seems to do pretty well for
5 a while, doesn't he?

6 A Day or two, yes, sir.

7 Q But if Dr. Cash's records indicate it's a week and Dr. Capanna's records
8 indicate that he seems to be doing fine for longer than that, would you disagree with
9 that?

10 A I don't know what -- he was having a rough time. Now was he moving
11 around and trying to do things normally? Yes, he was, but he was uncomfortable --

12 Q Okay.

13 A -- and in pain.

14 Q Because let me suggest to you -- I'm just trying to see if you remember
15 this that surgery's done on September 17th, right?

16 A Okay.

17 Q And that patient -- Beau's doing pretty well until October 5th which is --

18 A Close to two weeks.

19 Q -- 19 -- 18, 19 days later.

20 A Yeah.

21 Q And then calls the doctor late at night saying hey, something happened,
22 I'm in a lot of pain. Is that your memory?

23 A It's a little more than that. I think he waited to the last minute to where
24 he couldn't move anymore, and then he got to the point where he couldn't handle
25 the pain and that's when he called Dr. Capanna.

1 Q So he waited until 11:30 at night. So did it start the day and --

2 A Well I would imagine he was in agony and they have an emergency line
3 that you're able to call, so they called him to see if he could maybe get a prescription
4 for some pain relief.

5 Q Okay. And so Dr. Capanna said hey, come in, I'll make room, I'll see
6 you tomorrow, right?

7 A That I assume so because he went.

8 Q Okay. And Dr. Capanna saw him and examined him that day, didn't
9 ignore him and say ah, don't worry about it, go somewhere else, did he?

10 MR. PRINCE: Objection; argumentative, Judge.

11 THE COURT: Well, overruled. You can answer the question.

12 THE WITNESS: I just remember her -- him having to go and get an MRI.

13 MR. LAURIA: Okay.

14 THE WITNESS: Another MRI.

15 BY MR. LAURIA:

16 Q My question to you is simply as a dad you appreciate the doctor didn't
17 ignore your son; he said come in, I'll see you in the morning, right? Come in, I'll
18 make room for you.

19 A Well, he should have.

20 Q And he did. Right? I mean -- and then he sent him for an MRI to figure
21 out was going on, right?

22 A Right.

23 Q And you never had any further communication with Dr. Capanna?

24 A No, I've called his office a time or two and then I also talked to
25 Professor Livengood out there trying to get some answers --

1 MR. LAURIA: Move to strike as nonresponsive, Your Honor.
2 THE COURT: Well, I'll --
3 MR. PRINCE: That was his answer to the question.
4 THE COURT: Well I -- the question was just had you ever talked to Dr.
5 Capanna again, so I'll allow that --
6 THE WITNESS: No, I did not.
7 THE COURT: -- I'll allow that part to stand.
8 MR. LAURIA: Okay.
9 BY MR. LAURIA:
10 Q In fact, Dr. Capanna's records show that he tried to call Beau and get
11 information from him how he was doing. Do you have any reason to disagree with
12 that?
13 A I have no knowledge of that.
14 Q Okay. So you weren't present or aware of whatever recommendations
15 Dr. Capanna made after Beau started experiencing this severe pain to try and
16 maybe treat it non-surgically initially or conservative for a while and then see how it
17 does. You -- you're not aware of what those recommendation --
18 A Yeah, I am.
19 Q And how did you become aware of them?
20 A Beau told me he went, he had the --
21 MR. LAURIA: All right. Well move to --
22 THE COURT: Well, hold on.
23 BY MR. LAURIA:
24 Q I'm sorry, I don't want to ask you --
25 THE COURT: Okay.

1 Q -- a hearsay question because that's not admissible --
2 MR. PRINCE: No, it's statement relating medical condition, Judge.
3 THE COURT: Well, no, it's not made to a medical professional.
4 MR. PRINCE: It's recounting conversation with a medical professional. That
5 is non-hearsay.
6 THE COURT: Well --
7 MR. LAURIA: No.
8 THE COURT: -- I'm going to sustain -- or, excuse me, overrule the objection.
9 MR. LAURIA: You're going to overrule it?
10 THE COURT: Overrule the objection.
11 MR. LAURIA: Oh, thank you.
12 THE COURT: Okay.
13 MR. LAURIA: Okay.
14 THE COURT: It was his objection.
15 MR. LAURIA: That's right.
16 MR. PRINCE: No, it's his objection, move to strike it.
17 THE COURT: I think you're both objecting. I was responding to your
18 objection.
19 MR. PRINCE: I'm saying answer the question. Let him answer.
20 THE COURT: All his answer was yes, I talked to my son, I allowed that. Let's
21 keep going.
22 MR. LAURIA: Okay. Thank you.
23 BY MR. LAURIA:
24 Q And then -- so do you know did Beau go back to Dr. Capanna after that;
25 do you know whether he did or not?

1 A No, sir.

2 Q All right. And then you -- your family knew Dr. Cash?

3 A He was referred to us.

4 Q All right. Did you know him at all?

5 A I -- my wife.

6 Q Okay. And then he ended up with seeing Dr. Cash, right?

7 A Correct.

8 Q Okay. Did -- as I understand it, Beau did not obviously return to football

9 that year for his senior year, right?

10 A Yeah, he didn't return to football ever again.

11 Q Did -- I asked your son in his deposition about returning to football. I'm

12 going to read from his -- put it up.

13 MR. LAURIA: Page 56, lines 11, counsel.

14 MR. PRINCE: Okay.

15 MR. LAURIA: And do page 57.

16 BY MR. LAURIA:

17 Q So I asked him about when he made the decision not to go back to

18 football or conversations about football.

19 Question: So for example when I look at the summary of the notes of

20 Dr. Cash --

21 Uh-huh.

22 -- the first kind of documentation or discussion about football or

23 returning to football appears to be in February of 2011.

24 Answer: Okay.

25 So four months or so after surgery. Okay. I'm saying where he's

1 saying I had a lengthy discussion about his future in playing football. I recommend a
2 conservative approach. You were going to take it under consideration, maybe not
3 be able to return to the sport this year. This year.

4 Answer: Right.

5 So let me go on. And might return for his following year of eligibility,
6 right? Do you remember having that kind of discussion with him?

7 Yes, sir, because I believe the first time -- I don't think that was the first
8 time I saw him, or maybe it was, but I don't know -- we did talk about it because
9 obviously that would be the first thing on my mind.

10 Question: Try to get back?

11 Answer: Yes, sir.

12 So then he notes again -- Dr. Cash notes in April of 2011 that basically
13 you were doing well, that you were taking the next season off to complete school,
14 right? And it was your plan then to try and return for the 2012 season?

15 No, I don't believe so. At that point I just wanted to finish school.

16 Question: You were kind of done with football at that point.

17 Answer: Yeah. I hadn't just -- let me move that. Yeah, I hadn't just --
18 there was just not a good -- there wasn't really a good relationship and nobody had
19 called me. Nobody showed very much concern from the university or my coaches
20 or anything like that of that sort.

21 So they weren't making you feel like they couldn't wait to get you
22 healthy and back on the field?

23 Answer: No.

24 Question: I mean it would have been nice, right? I mean you're busting
25 your butt for these guys for a couple years, and I understand the coach may have --

1 one coach may have left and another coach took over or something.

2 Answer -- he says I'm talking about my -- my linebackers' coach.

3 Isn't it true, Mr. Orth, that Beau kind of made a determination after the
4 surgery by Dr. Cash that the coaches didn't really seem that concerned about
5 getting him back, that the coaching staff had changed and he'd lost some time
6 already with the new players in there and just decided you know what, I'm going to --
7 I'm still having some problems, I'm going to just focus on going ahead with school?

8 A I never read anything from Beau's deposition. The indication that I got
9 was Beau was getting ready for his junior year he wanted to play --

10 Q Okay.

11 A -- at all cost.

12 Q Okay.

13 A I mean, and he played for two years in pain with leg problems and
14 everything else.

15 Q Okay. How's Beau doing now work-wise, social-wise, family-wise?

16 A Good. He's a good man.

17 Q And he's got a good job and he's got a good career and a good future
18 ahead of him as far as you're concerned?

19 A Sure.

20 Q Okay.

21 A Yeah. He's --

22 MR. LAURIA: I think that's all I have.

23 THE WITNESS: Okay.

24 THE COURT: Mr. Prince --

25 MR. LAURIA: Give me one second to look at my notes, please.

1 [Pause]

2 MR. LAURIA: I think that's all I have. Thank you, sir.

3 THE WITNESS: All right, sir, thank you.

4 MR. PRINCE: Okay.

5 REDIRECT EXAMINATION

6 BY MR. PRINCE:

7 Q And based upon your interactions with Beau and Dr. Cash, tell us the
8 reason why he didn't return back to playing football again.

9 A Because his back was so bad he couldn't play.

10 Q Did Dr. Cash recommend against going back and playing?

11 A Yeah, he did. He told Beau not to play.

12 Q Mr. Lauria was asking you a number of questions early on about, you
13 know, various schools that recruited Beau --

14 A Right.

15 Q -- and offered him scholarships and just going to -- Beau passed me a
16 note. I'm just going to ask you a -- this refreshes your recollection. Do you recall
17 that Beau was offered a full-ride scholarship the University Nevada Reno? Does
18 that --

19 A Oh.

20 Q -- refresh your recollection?

21 A I apologize. Yes, he did. He got an offer, yes, because we went to a
22 camp up there that I -- yeah. I'm sorry. Nevada Reno.

23 Q Okay.

24 A You are correct.

25 Q Was Beau also offered a scholarship at the Colorado State University?

1 A full-ride scholarship. Does that refresh your recollection?

2 A We got a letter for that, yes, sir. But like I said, he took his visit and
3 everything stops after that, so yes. I thought the questions was, was anybody else
4 offering him scholarships and it was --

5 Q Yeah, once you sign it, everybody moves on.

6 A Everybody moves on. You're done.

7 Q Right. And there was interest by lots of teams, but once you sign, the --

8 A Then it's over.

9 Q -- the -- that part is --

10 A But I do apologize, yes, Nevada Reno.

11 Q Do you recall that there being a full-ride scholarship offered with the Air
12 Force also? Does that refresh your recollection?

13 A Yes. He would have gone in the military and he didn't want to go in the
14 military.

15 Q And I wanted to ask a question about Montana because that's where
16 Coach Hauck came from.

17 A Correct.

18 Q What division football -- I want you -- is Montana -- wait a minute. You
19 tell us about University of Montana and the significance University of Montana.

20 A Division I-AA.

21 Q Okay. And tell us about how they are in Division I-AA and kind of like
22 their --

23 A They are the -- they are -- they the -- they're the crème de la crème of
24 I-AA football. There's only a couple other teams they actually really compete with at
25 that level every year. One of them is Appalachia (sic) State that beat Michigan a

1 few years back. Remember the opening game? I don't know if anybody watched
2 that, but those are the type of teams that they play. They're a good football
3 program. Gosh, I think Coach Hauck up there was like a hundred and eighty and
4 five.

5 Q Okay. And --

6 A I mean I exaggerated, but they didn't lose that many.

7 Q And based upon, you know, the -- let's step back a second. In the
8 summer of 2010, that would be the summer before Beau's junior year, could Beau
9 be contacted and you -- by professional scouts before the start of his junior year?

10 A No, sir. He cannot.

11 Q His -- from a -- from a, you know, college athletic perspective, you
12 know, a college athlete playing football, is the junior year a big year for someone,
13 you know, in terms of like has a prospect for potentially going to the next level?

14 A Yes, it's against the NCAA rules to even come in contact or even have
15 an agent with any football player before his junior year is complete.

16 Q Okay. And when you met with Dr. Capanna, obviously he is aware of
17 Beau's medical history, you know, the his -- the L5-S1 disc protrusion, some history
18 of some back complaints and leg complaints. Did he leave you with the impression
19 that his surgery would resolve all of that?

20 A Yes.

21 Q So whatever he had going back, you know, before September of 2010,
22 what was your expectation based upon what Dr. Capanna told you?

23 A That he would repair Beau's back and relieve the pain and the leg pain;
24 the back pain and leg pain.

25 Q Okay. And I want to -- essentially making, you know, whatever

1 happened before his surgery, it resolve all of that?

2 A Correct.

3 Q Okay.

4 MR. PRINCE: I'd like to use Dr. Capanna's deposition for a minute. Publish
5 it.

6 May I approach the witness, Your Honor?

7 THE COURT: You may.

8 BY MR. PRINCE:

9 Q I'm just going to have you -- have this sit in front of you just for a
10 minute --

11 A Okay.

12 Q -- Mr. Orth. And Mr., you know, Lauria was asking you questions did
13 you do an internet search to try to, you know, I guess determine for yourself
14 recovery times. Were you relying on your own research or your wife's or anybody
15 else for that matter or were you relying on Dr. Capanna?

16 MR. LAURIA: Objection; leading, Your Honor.

17 THE COURT: Overruled. You can answer the question.

18 THE WITNESS: I relied on Dr. Capanna. He was a surgeon for the
19 University of Nevada. It's made clear that you will go through us for anything
20 medical. We -- he is -- he kind of belongs to us now. And you have to get okay to
21 go outside and if you go outside, it's something that if we disapprove or something
22 happens, we're not liable. So therefore we went to Dr. Capanna. Dr. Capanna said
23 that he would fix it, he would cure Beau, it would be no more pain, it was easy and
24 he'd be back playing in a few weeks. That's what my son wanted. I wanted a red
25 shirt, but I agreed because of the competitive nature of him and his desire to have

1 the junior day that he wanted. It's as simple as that.

2 BY MR. PRINCE:

3 Q Right. And were you also relying upon the statements and
4 representations made by Dr. Capanna?

5 A Yes, sir.

6 Q Okay. Like to show you page 57 of Dr. Capanna's deposition. You --
7 I'm going to -- the deposition's there in front of you if you want to read from that. I'm
8 going to publish it on the screen.

9 MR. PRINCE: Do you have it, Peter?

10 Do you have the depo? Okay.

11 Starting at line 2, Peter, we're probably going to go down to line 17.

12 BY MR. PRINCE:

13 Q Question -- me asking Dr. Capanna a question -- how long generally
14 speaking, if a microdiscectomy is correctly performed and there is a successful
15 outcome, how long is a football player typically out before they can resume full
16 contact?

17 Answer: That's a real probably. But basically, if the patients don't have
18 any pain anymore, they don't care about it. And the athletes are more aggressive
19 some construction workers are in their jobs and some of them go back in a couple
20 weeks. But generally we like to keep them out for four weeks or so at least, if not
21 longer. Let them heal the longer the better from our point of view.

22 So as far as healing goes, so approximately two to -- a four to six
23 weeks time period of being out?

24 Answer: Two to four, for sure. Possibly six.

25 Is that consistent Dr. Capanna told you at the time of your meeting, it

1 could be two to -- two to four weeks, a few weeks?

2 A He said a few weeks. That's a quote, a few weeks.

3 Q He never suggested anything on the order of months?

4 A No, sir, he did not. No, he did not.

5 Q Did Beau -- how did Beau do following his shoulder surgery?

6 A He recovered quite quickly --

7 Q Okay.

8 A -- and worked out and started getting ready for his freshman year.

9 Q Any problems with the shoulder after that?

10 A No, sir. None.

11 Q And --

12 A It's a big scar because it's a big break but it was --

13 Q Okay. Did it limit him in any way?

14 A No.

15 Q You know, I think you were -- you wanted to elaborate on the consent
16 for a minute? On -- you know, on the consent form?

17 A Yes.

18 Q And what did -- what were -- what did you want to say?

19 A Well, you know, we all sign those things when we go into surgery. But
20 if those problems occur -- if the correct operation happens, then you go, okay, I
21 signed for that, but if they do something totally opposite from what they're going for
22 surgery for, why would that even apply? I mean I feel bad that I signed it in 20/20
23 hindsight, but if he would have done the correct surgery, my son would be playing
24 football right now.

25 Q And I think you -- I think you just signed it as a witness. I mean --

1 A Yes, sir.

2 Q Okay.

3 A But still, I'm a father.

4 Q Do you feel somewhat responsible?

5 A Sometime. Damn it. Sometimes I do.

6 Q Bob, thank you. No additional questions.

7 A All right.

8 THE COURT: Mr. Lauria, anything else?

9 MR. LAURIA: I don't have anything else.

10 THE COURT: Anything from our jurors? Yes.

11 Joel, if you would, please.

12 MR. LAURIA: Do you want us to approach, Your Honor?

13 THE COURT: Yes.

14 [Bench conference begins at 2:25 p.m.]

15 THE COURT: Is Danielle coming or no?

16 MR. PRINCE: No.

17 THE COURT: She's sitting back down.

18 MR. PRINCE: She's fine.

19 THE COURT: Okay.

20 (Indiscernible) we can phrase that in a question I guess.

21 Assuming that's appropriate for somebody else. I don't know --

22 MR. PRINCE: Yeah, I agree.

23 MR. LAURIA: Yeah.

24 MR. PRINCE: Okay. Thanks.

25 THE COURT: All right, so I'll hold off on that one.

1 MR. PRINCE: Either one. Either one, yeah. I can understand --
2 THE COURT: What about that?
3 MR. PRINCE: -- why they didn't follow (indiscernible) ask that question for
4 Beau. I'll do --
5 THE COURT: What's that?
6 MR. PRINCE: I don't think it's the right question for the father --
7 THE COURT: Okay.
8 MR. PRINCE: -- why he didn't go back to Dr. --
9 MR. LAURIA: They want to ask this witness, I think it's --
10 MR. PRINCE: Oh yeah, go ahead.
11 THE COURT: This one you're okay. This one you're saying --
12 MR. PRINCE: Yeah. Yeah.
13 THE COURT: -- Beau --
14 MR. PRINCE: Yeah.
15 THE COURT: -- you're going to go through with Beau regarding bills?
16 MR. LAURIA: I think this witness could answer too. I mean --
17 THE COURT: Well, I don't know how -- what the proposal was, was how any
18 of that was going to come in, whether you're even going into it or not.
19 MR. PRINCE: I'm going to here in a minute.
20 THE COURT: With the -- with him?
21 MR. PRINCE: I don't -- no, I -- no, I don't know, maybe Dr. Capanna. I don't
22 know --
23 THE COURT: Okay.
24 MR. PRINCE: -- I haven't decided yet. He's already doing it, so --
25 THE COURT: Okay.

1 MR. LAURIA: I think it's --

2 MR. PRINCE: He already said in his opening statement, you know, how he --
3 so anyway.

4 THE COURT: Well, my problem with asking this gentleman, even though he's
5 the father, is if UNLV was paying everything, I don't know what he's going -- what --
6 who's the one that --

7 MR. LAURIA: Well --

8 THE COURT: -- should talked about the bill.

9 MR. PRINCE: Well (indiscernible) --

10 MR. LAURIA: -- but he's the dad so they could ask him as the father. Just as
11 the father, not what --

12 THE COURT: No, it's --

13 MR. LAURIA: -- somebody else --

14 THE COURT: -- it's not -- I mean I know it's logical for them to want to ask,
15 but I'm saying is it -- in my trial, is he the one to answer this question.

16 MR. LAURIA: He might be. I don't know. I don't know who's got that --

17 THE COURT: Well if we don't know, I don't want to ask him if we don't know.
18 That's just it.

19 MR. LAURIA: Well I don't know who's got that knowledge. I mean --

20 THE COURT: That's why I'm asking you all.

21 MR. LAURIA: Beau's a 25 year old so all I know is Beau said I didn't have to
22 pay a dime.

23 MR. PRINCE: Oh no, he's paid --

24 THE COURT: Okay.

25 MR. LAURIA: That's what he said in his deposition.

1 THE COURT: Well I'll let you do it with Beau then, since -- I mean he's the
2 adult and he's the patient.

3 All right, so on this one, I can form it as a question just saying can you
4 explain why did you not follow up with Dr. Capanna any more before --

5 MR. LAURIA: Well --

6 THE COURT: -- going to Dr. Cash.

7 MR. LAURIA: -- because your -- because the explanation's going to be I think
8 because of the -- their shoulder surgeries with Dr. Cash --

9 MR. PRINCE: (Indiscernible) --

10 MR. LAURIA: -- that he's -- that's she's been a patient of Dr. Cash, so --

11 MR. PRINCE: No (indiscernible) --

12 MR. LAURIA: -- you're getting into that --

13 THE COURT: No, no, no, it's not a --

14 MR. LAURIA: -- whole family history.

15 THE COURT: -- it's not why did you go to Dr. Cash, it's why did you not follow
16 up any further with --

17 MR. PRINCE: Right.

18 THE COURT: I think he answered it already which was, you know, we were --
19 we didn't like what -- kind of the way the treatment was going, but I understand --

20 MR. LAURIA: Okay.

21 THE COURT: -- what the question is.

22 MR. LAURIA: All right.

23 MR. PRINCE: Okay.

24 THE COURT: Okay.

25 [Bench conference ends at 2:28 p.m.]

1 THE COURT: Okay. Mr. Orth, I got a question for you, if I could, please.

2 THE WITNESS: Yes, sir.

3 THE COURT: Can you just explain why you all -- and I'm not -- it's not about
4 why you chose Dr. Cash, it's why did you not follow up any more with Dr. Capanna
5 when you stopped going to see him and then went off to Dr. Cash? Why didn't you
6 follow up any more with Dr. Capanna?

7 THE WITNESS: We -- part of that decision was made my wife and I, we kind
8 of talked about that. They -- because the university didn't like you going outside
9 their medical field of people and we would -- you know, they make you feel like if
10 you mess up, we wash our hands of your son.

11 THE COURT: Okay.

12 THE WITNESS: So my wife and I said to hell with it. He's in so much pain.
13 Dr. Capanna as far as I knew wasn't returning our phone calls. The university, Dr.
14 Livengood wasn't answering our phone calls. I went to see him once.

15 THE COURT: Okay.

16 THE WITNESS: So we decided to go out and just strike out on our own. She
17 went looking for a doctor and she got Dr. Cash.

18 THE COURT: Okay. Mr. Prince, do you have anything based on that?

19 MR. PRINCE: I don't.

20 THE COURT: Mr. Lauria?

21 MR. LAURIA: I don't, Your Honor.

22 THE COURT: Okay. All right. Mr. Orth, thank you very much for your time. I
23 appreciate --

24 THE WITNESS: Thank you, sir.

25 THE COURT: You can go ahead and step down.

1 THE WITNESS: Thank you.

2 THE COURT: All right. Mr. Prince.

3 MR. PRINCE: My next witness is Dr. Capanna. Is all right for a like just a
4 five-minute restroom break? I just need -- we'll be obviously for the rest of the day
5 likely, so --

6 THE COURT: Yeah, that's okay.

7 THE WITNESS: Over here or --

8 THE COURT: No, you can give it back to me, Mr. Orth.

9 MR. PRINCE: Give back --

10 THE WITNESS: Oh, okay.

11 THE COURT: That's okay. Thank you, sir.

12 Okay. We'll take a --

13 MR. LAURIA: I think we're going to take a break --

14 THE COURT: -- short recess, ladies and gentlemen, before we get started.
15 During the recess you're admonished not to talk, converse among yourselves or with
16 anyone else on any subject connected the trial; or read, watch or listen to any report
17 of or commentary on the trial by any medium of information, including without
18 limitation the newspapers, television, the internet, radio; or form or express any
19 opinion on any subject connected with the case until it's finally submitted to you.
20 Thank you.

21 [Off the record at 2:31 p.m.]

22 [Proceedings resumed at 2:49 p.m.]

23 MR. PRINCE: Judge, what's our approximate start time tomorrow? I mean
24 just --

25 THE COURT: 10:30.

1 MR. PRINCE: Okay.

2 MR. LAURIA: Do you know who we're going to have tomorrow?

3 MR. PRINCE: Yeah, Beau and Cash.

4 MR. LAURIA: Okay.

5 [Colloquy between the Court and Clerk]

6 THE COURT: Okay. Anything outside the presence?

7 MR. PRINCE: No.

8 MR. LAURIA: Don't think so.

9 THE COURT: All right, Joel, you can go ahead.

10 [Jury in at 2:51 p.m.]

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

12 All right. And you're calling Dr. Capanna?

13 MR. PRINCE: I am.

14 THE COURT: All right. Dr. Capanna, you can come on up here to the

15 witness stand if you would please, sir.

16 And we're going to be back on the record folks, continue on with the

17 plaintiff's case in chief.

18 Doctor, you can go ahead get yourself situated. And then just raise

19 your right hand. Thank you.

20 ALBERT CAPANNA

21 [having been called as a witness and being first duly sworn, testified as follows:]

22 THE CLERK: Thank you. You may be seated. And will you please state and

23 spell your name for the record?

24 THE WITNESS: Albert Howard Capanna.

25 THE COURT: And how do you spell your last name, Doctor?

1 THE WITNESS: C-a-p-a-n-n-a.

2 THE COURT: Thank you very much. Mr. Prince.

3 MR. PRINCE: Thank you.

4 DIRECT EXAMINATION OF ALBERT CAPANNA

5 BY MR. PRINCE:

6 Q And, Dr. Capanna, good afternoon. Is it Caponna or Capanna? I'm
7 sorry. I thought it was Capanna.

8 A In this country we say Capanna. It's really Caponna but -- so it doesn't
9 matter.

10 Q Okay. In front of you there is your copy of your deposition to the left.
11 We're going to be referring to that some today.

12 MR. PRINCE: And if I -- Ms. Clerk, if I can have defendant's binder number 1.
13 I think I have --

14 BY MR. PRINCE:

15 Q I'm going to hand -- your records on billing are tab one and two. We're
16 going to be looking at that as well. And you agree that Beau Orth was a patient of
17 yours, correct?

18 A Yes.

19 Q And you performed surgery on Beau on September 17th, 2010,
20 correct?

21 A Yes, sir.

22 Q And it is your position that you did not operate on the incorrect level,
23 correct, of his lumber spine?

24 A Yes, sir.

25 Q And in addition, it's your testimony that you did not perform a

1 microdiscectomy or laminotomy at the L4-5 level of Beau Orth's spine, correct?

2 A Yes.

3 Q And you as Beau's neurosurgeon and you and you alone were
4 responsible for determining the correct level of Beau's spine to operate on, correct?

5 A Yes.

6 Q And you agree that as the surgeon involved on September 17th, 2010,
7 you were the captain of the ship for Beau. Right?

8 A Yes.

9 Q The buck stopped with you. Right?

10 A Yes.

11 Q And no one else either preoperatively or during the operation was
12 responsible for determining the correct level of Beau's spine to operate on, correct?

13 A Correct.

14 Q I'm sorry?

15 A Correct.

16 Q Okay. And you agree that it is your responsibility as a surgeon
17 performing neurosurgery to properly and accurately document the procedures you're
18 performing, correct?

19 A Correct.

20 Q It's important to keep an accurate surgical record of the procedure you
21 perform, correct?

22 A Correct.

23 Q And one of the responsibilities as a surgeon is to document completely
24 and accurately as possible your operative notes so they can be placed in the
25 permanent record for the hospital, correct?

1 A Yes, it's a summary --

2 Q And that is your responsibility, correct?

3 A Yes.

4 Q In fact, UMC required you to accurately document all of your operations

5 at their hospital, correct?

6 A Yes, sir.

7 Q And I'd like to show you Exhibit 1, page -- Bate number 57.

8 MR. PRINCE: Just the top half, Peter.

9 Q Isn't it true that this is your operative note for Beau Orth from

10 September 17th, 2010, correct?

11 A One second, please. Yes, sir.

12 Q Okay. And you agree that this operative note prepared by you shortly

13 after this surgery is not accurate, correct?

14 A An operate (sic) report in a summary, yes, and part of it's not accurate.

15 Q The question is you agree this operative report is not accurate, correct?

16 A Yes, sir.

17 Q Okay. You never informed the University Medical Center that that

18 report -- that operative note was inaccurate, correct?

19 A Not to my knowledge, no.

20 Q And you've never even though when you learned that operative note

21 was inaccurate, you never issued an addendum, correct?

22 A Correct.

23 Q And at the time just before this surgery, you were on suspension at

24 UMC hospital, correct?

25 A No.

1 Q You weren't?

2 A No.

3 Q Okay. And if we can look at your records -- from your office chart --

4 THE COURT: Can I --

5 MR. LAURIA: Judge, can we approach, please?

6 THE COURT: Well, first off -- well, yeah, go ahead.

7 MR. LAURIA: Thanks.

8 [Bench conference begins at 2:56 p.m.]

9 THE COURT: Go ahead.

10 MR. LAURIA: I don't know what he's bringing up here. There's (indiscernible)

11 weren't going to talk about other matters plaintiff's problem so why are we hearing

12 about a suspension?

13 THE COURT: Well I don't know what the suspension was.

14 MR. PRINCE: Because he's on suspension -- was on suspension at UMC.

15 MR. LAURIA: What does --

16 MR. PRINCE: It's according to his records.

17 MR. LAURIA: What does that have to do with --

18 MR. PRINCE: It's in evidence. It's already --

19 THE COURT: Shh, shh, shh, shh --

20 MR. PRINCE: -- put it into evidence.

21 THE COURT: -- shh, shh, shh --

22 MR. PRINCE: And now I'm going to impeach him with it.

23 THE COURT: Okay, hold on, hold on.

24 MR. LAURIA: It is --

25 THE COURT: What does it have anything to do with? What's it for?

1 MR. PRINCE: He was on suspension from performing surgery --
2 MR. LAURIA: Shh.
3 MR. PRINCE: -- at UMC.
4 THE COURT: Okay. So where did he perform the surgery?
5 MR. PRINCE: UMC.
6 THE COURT: Okay.
7 MR. PRINCE: He -- right. And it's because of a recording keeping problem.
8 THE COURT: Well, if you want -- well, first off, I agree that there was a
9 motion in limine to exclude any other kind of problems --
10 MR. LAURIA: Right.
11 THE COURT: -- but I agree that the discussion about that was on malpractice
12 claims, investigations by the state medical board --
13 MR. PRINCE: Well we --
14 THE COURT: -- things like that.
15 MR. PRINCE: Well --
16 THE COURT: This kind of falls into an area that we never discussed, quite
17 honestly.
18 MR. LAURIA: So what does that have to do with whether he performed
19 surgery on this patient or not?
20 THE COURT: Well it's -- part of the problem is he's maintaining that he
21 performed surgery A and he didn't put it in his notes, and if he's got this history of
22 bad record keeping --
23 MR. PRINCE: Yep.
24 THE COURT: -- then I think that's kind of relevant. It's just --
25 MR. LAURIA: I think it's unduly prejudicial given its relevance. I mean,

1 whatever relevance it may have is clearly outweighed by the potential prejudice from
2 this record. So --

3 THE COURT: Well my main concern was we were talking about some kind of
4 malpractice issue that hadn't been -- suspended for some kind of malpractice issue.
5 That's what I thought -- I was waiting for you to object because I thought that was --

6 MR. LAURIA: I don't know. I haven't seen this.

7 MR. PRINCE: Well --

8 MR. LAURIA: They haven't --

9 THE COURT: Well, I mean --

10 MR. LAURIA: I haven't seen this record --

11 THE COURT: -- (indiscernible) discussed in his depo?

12 MR. PRINCE: No, it's in --

13 MR. LAURIA: No.

14 MR. PRINCE: -- it's in his --

15 MR. LAURIA: Not at all.

16 MR. PRINCE: -- it's in the stipulated exhibit, Judge.

17 THE COURT: Oh.

18 MR. LAURIA: Well --

19 MR. PRINCE: It's in the stipulated exhibit.

20 MR. LAURIA: Did you know that was in the exhibit?

21 MR. CARDINALE: No --

22 MR. LAURIA: It's not in the --

23 MR. PRINCE: It's in his chart.

24 MR. LAURIA: Excuse me, counsel.

25 THE COURT: Shh, shh, shh, shh, shh, shh.

1 MR. LAURIA: It's not in the records the copy of his chart we submitted, so --
2 MR. PRINCE: Yes, it is.
3 MR. LAURIA: -- we didn't -- excuse me.
4 THE COURT: Okay, what exhibit is it in?
5 MR. PRINCE: It's Exhibit 1.
6 MR. LAURIA: That's yours. That's not ours for Dr. Cash's records.
7 MR. PRINCE: But you stipulated for our -- the admission of our Exhibit 1.
8 THE COURT: The reality is if I you stipulate to exhibits, I have to assume you
9 know what's in the exhibits, guys. What's the Bate number?
10 MS. TARMU: What's the -- 10. 10 or 11.
11 THE COURT: 10?
12 MS. TARMU: 10 or 11.
13 MR. PRINCE: 69.
14 MS. TARMU: Oh I'm sorry. I was way off.
15 THE COURT: 10?
16 MR. PRINCE: 69.
17 THE COURT: (Indiscernible) Danielle.
18 MS. TARMU: (Indiscernible) --
19 THE COURT: First off, does anybody have any problem with Mr. Orth
20 remaining in the courtroom now? He came back in.
21 MR. LAURIA: Yeah.
22 THE COURT: And if he's in -- if he's released --
23 MR. PRINCE: No, I'm done. I'm -- he's released.
24 THE COURT: Okay. Are you okay?
25 MR. LAURIA: That's fine.

1 THE COURT: Okay.

2 MR. PRINCE: Yeah, right there (indiscernible) right there.

3 MR. LAURIA: So that's part --

4 MR. PRINCE: (Indiscernible) --

5 MR. LAURIA: -- that's part of our doctor's record?

6 MR. PRINCE: Yes.

7 MR. CARDINALE: That's a surgery schedule that I objected to.

8 MR. LAURIA: We objected to --

9 MR. PRINCE: Yu didn't -- no.

10 MR. LAURIA: -- the surgery schedule.

11 MR. PRINCE: No, you didn't.

12 MR. LAURIA: You can believe Mr. --

13 MR. CARDINALE: That's not part of his chart.

14 MR. LAURIA: That's not --

15 MR. PRINCE: It is part of his chart .

16 MR. LAURIA: Excuse me. That is not part of his chart, Judge. They tried to

17 sneak it in there.

18 MR. PRINCE: Not sneaking anything in there, that's the chart. That's his

19 office document he's -- who they're calling. That's his chart.

20 MR. LAURIA: He's got his chart in front of him. You can --

21 MR. PRINCE: No.

22 MR. LAURIA: We'll show it to you.

23 THE COURT: Well, hold on, hold on, hold on. I've had this --

24 MR. PRINCE: If I have to --

25 THE COURT: -- before in trial. Is this the thing --

1 MR. PRINCE: If I have to prove you wrong in this, I will.

2 THE COURT: -- is this the thing where if you don't sign off on your charts

3 within -- and they get over 30 days old --

4 MR. PRINCE: I don't know. I guess we're --

5 THE COURT: -- then they suspend your --

6 MR. PRINCE: I guess we're getting ready to find out.

7 THE COURT: All right. Well, we're going to have to find out outside the

8 presence first.

9 MR. LAURIA: Thank you.

10 THE COURT: Okay. All right. We'll take a short break.

11 [Bench conference ends at 2:59 p.m.]

12 THE COURT: Ladies and gentlemen, we need to take a short recess. I

13 apologize to you. If you could step outside with Joel just for probably about five or

14 10 minutes.

15 MR. LAURIA: Dennis, I'm going to show him what we objected to which is

16 (indiscernible) --

17 MR. PRINCE: It's not -- that's not part of it.

18 THE COURT: (Indiscernible) --

19 MR. PRINCE: That's not part of it.

20 MR. LAURIA: We objected --

21 THE COURT: Okay.

22 MR. LAURIA: -- specifically to that which was part of what that is. 29.

23 MR. PRINCE: That's not it. I'm looking Exhibit 1.

24 MR. LAURIA: Because -- yeah, they --

25 THE COURT: Okay. Shh. Hold on guys.

1 MR. LAURIA: Thank you.

2 THE COURT: Just hold on. Settle down.

3 Is this plaintiff's?

4 MR. LAURIA: Those are ours because --

5 THE COURT: Okay.

6 MR. LAURIA: -- when it was disclosed --

7 MR. PRINCE: Those are plaintiff's.

8 MR. LAURIA: -- we said --

9 [Jury out at 3:00 p.m.]

10 THE COURT: Look, it's either a plaintiff's sheet or --

11 MR. LAURIA: Is that plaintiff's --

12 MR. PRINCE: It's plaintiff's.

13 MR. LAURIA: -- or ours?

14 MR. PRINCE: That's the plaintiff's exhibit.

15 MR. LAURIA: So we objected to that.

16 THE COURT: Okay. Hold on. Hold on. Good gosh you guys.

17 MR. LAURIA: Sorry.

18 THE COURT: First off -- first off, although Mr. Orth was under the

19 exclusionary rule, what I asked at the bench was it's okay that he stays in the

20 courtroom now, right? I don't have a problem with it, he's already testified. So Mr.

21 Lauria, you don't have an issue?

22 MR. LAURIA: I don't have an issue, Judge.

23 THE COURT: All right.

24 MR. LAURIA: He can stay.

25 THE COURT: So Mr. Orth, you're good. Don't worry about anything.

1 MR. ROBERT ORTH: Oh, thank you.

2 THE COURT: Not that you were worried.

3 Okay. So the discussion that we were having at the bench in part was
4 that in Exhibit Number 1, at Bates stamps numbers 68 and 69 is a document labeled
5 surgery scheduling Beau Orth. And then on page 2 of that document, at the top it
6 says TC, assumably telephone call, UMC surgery, 9/16/2010, 9:20 a.m., TT, I'm not
7 sure what that means, Pam. Pam stated Dr. C is on suspension. I talked to Patrice
8 (phonetic) in medical records and she said Dr. Capanna does not have any charts
9 that are over 30 days. Okay.

10 MR. PRINCE: Right, so --

11 THE COURT: The plaintiffs -- pardon?

12 MR. PRINCE: Go ahead.

13 THE COURT: Plaintiffs were representing that this was a stipulated exhibit.

14 MR. PRINCE: It is.

15 THE COURT: Defense was saying that they didn't --

16 MR. LAURIA: That may not be -- may not be 29, Judge, so I withdraw that.

17 THE COURT: Okay, hold on. That they did not stipulate to 1. I thought they
18 had stipulated to 1.

19 MR. PRINCE: They did.

20 THE COURT: Now, if --

21 MR. LAURIA: Did stipulate to 1 --

22 THE COURT: Okay.

23 MR. LAURIA: -- and I will tell you --

24 THE COURT: Hold on. Hold on.

25 MR. LAURIA: Sorry.

1 THE COURT: If you missed something in there, I get it, it happens. But then
2 I was handed a piece of paper that -- can we agree that this is plaintiff's exhibit?

3 MR. LAURIA: It is, Your Honor.

4 THE COURT: Okay, 29 that defense is saying that they objected to was
5 University Medical Center surgery schedule of Albert Capanna, 1/1/2008 versus five
6 -- two -- 1/1/2008 through 5/11/2015. That you're objecting to?

7 MR. LAURIA: Correct.

8 THE COURT: Okay.

9 MR. PRINCE: Which this is not part of.

10 THE COURT: Which I agree. But is it contained in Number 29?

11 MR. PRINCE: No.

12 MR. LAURIA: I don't think so. I think --

13 THE COURT: Okay.

14 MR. LAURIA: -- they're different documents. So I was mistaken, Judge, I
15 apologize.

16 THE COURT: Okay, so --

17 MR. PRINCE: And, Judge, one other thing can I -- I'm going to share with
18 you.

19 THE COURT: Okay.

20 MR. PRINCE: We stipulated for the admission of Exhibit K, which is --

21 THE COURT: Okay.

22 MR. PRINCE: -- the defense chart of Dr. Capanna. Remember what Mr.
23 Lauria just represented to you was they -- this is not part of the record, it's not part of
24 the chart from Dr. Capanna and I said that's where -- exactly where it came from.
25 He said we snuck it in. I -- that was his words, snuck it in. And he throws these

1 bombs out there and it needs -- he needs be held accountable for his words
2 because Exhibit K which they offered which we stipulated for, Bate number 90, it's
3 the same thing; Pam stated Dr. C is on suspension. So I've already stipulated to the
4 defense records and this is part of the defense record, too. And he says we snuck it
5 in, trying to impugn our credibility and our integrity, when that's false. It's part of Dr.
6 Capanna's record and we attached the custodian of records' affidavit of the
7 International Neuroscience Consultant's Inc., which is Dr. Capanna, and that's --

8 THE COURT: Okay.

9 MR. PRINCE: -- part of his chart.

10 THE COURT: All right. I agree that it is Bates stamp 89 and 90 of Defense
11 Exhibit K. And here's the reason we're outside the presence of the jury. I mean, if
12 it's been stipulated in exhibits, I'm going to let him ask him. My sense from my
13 experience is if you don't sign your chart in a timely fashion, sometimes the hospital
14 says you're on suspension. And whether it's residents or doctors, they get behind
15 on signing off on charts just like I get behind on signing off on orders and they got to
16 get caught up on them every so often.

17 So if you guys want to ask Dr. Capanna questions about that and we
18 can flesh out what it is, I think it's of really minimal significance, but since it's been
19 stipulated in the exhibits, I can understand why there's a desire to ask questions
20 about it since -- since part of the allegation here is that there was some bad record
21 keeping, it would have some limited relevance, but I'll let you ask him some
22 questions before we do it in front of the jury.

23 MR. LAURIA: Judge, for the record, I need to object because I think any
24 relevance is outweighed by the prejudicial value of this exhibit, and it talks about
25 does not have any charts that are over 30 days overdue. So it is clearly about

1 signing or providing records, so --

2 THE COURT: Well, I mean that -- the statement is twofold. One sentence
3 says --

4 MR. PRINCE: Right.

5 THE COURT: -- Dr. C is on suspension.

6 MR. LAURIA: But --

7 THE COURT: Then it says I talked to Patrice and he does not have any
8 charts over 30 days old, so -- but look, why don't you guys just ask the gentleman
9 some questions and we'll flesh it out --

10 MR. PRINCE: Yeah, that's right.

11 THE COURT: -- and then we'll move forward.

12 All right. And Mr. Prince, he's your witness right now, so you can go
13 ahead.

14 MR. PRINCE: I will. And one other thing since we're have the -- outside the
15 presence of the jury. Where I do plan on going with him is about wrong level
16 surgeries. We had Dr. -- remember Mr. Lauria opened the door to this on Dr.
17 Belzberg, you know, initially doing surgery being at the wrong level and removing
18 ligament and lamina and other things. He then asked on cross-examination Dr. Yoo
19 about being at the wrong level and it can happen because it goes directly to
20 standard of care. Remember we --

21 THE COURT: Right.

22 MR. PRINCE: -- now we're talking about personal preference, things that
23 have happened to two physicians, including our own standard of care expert. I'm
24 going to talk to Dr. Capanna and confirm that he has in fact performed wrong level
25 spine surgery.

1 THE COURT: Okay.

2 MR. PRINCE: Not only in general, but on a UNLV football player, Alvin

3 Amilcar who was on the same team as Beau Orth. So, yeah, they opened the door

4 to that.

5 MR. LAURIA: I don't -- well, number one, I totally disagree because you can't

6 open a door to that by asking another doctor like Dr. Yoo --

7 THE COURT: Well you got to remember what you asked Dr. Yoo --

8 MR. PRINCE: Yes.

9 THE COURT: -- was every surgeon has gone in -- every spinal surgeon has

10 gone in at the wrong level, correct?

11 MR. LAURIA: And so I think he can ask Dr. Capanna have you ever gone

12 into the wrong level.

13 THE COURT: Okay.

14 MR. LAURIA: That's the end of the inquiry though.

15 MR. PRINCE: No --

16 MR. LAURIA: I don't think he gets to go what about Albert or what about

17 Johnson, because we can try the Albert case if we need to --

18 THE COURT: Right.

19 MR. LAURIA: -- and we can bring in all Albert's X-rays and argue whether it

20 was wrong level, right level. That's not the point. He can ask him that question.

21 THE COURT: Okay.

22 MR. LAURIA: But I don't think he go in then to a specific instance and try and

23 bring it out.

24 MR. PRINCE: Mr. --

25 MR. LAURIA: So -- excuse me.

1 THE COURT: Well --

2 MR. LAURIA: I'm not done yet.

3 THE COURT: -- let him finish.

4 MR. LAURIA: Thank you. So that's the point of the motion, Judge. Again, I
5 think he can say have you ever been at the wrong level and he will say yes. All
6 right?

7 THE COURT: Okay.

8 MR. LAURIA: But to go into a specific now am I going to refute Albert's case?
9 Well, now I got to go get Albert's records. We're going to be here till a week from
10 Tuesday trying this case because I'm going to fight that case in front of this jury.

11 THE COURT: I --

12 MR. LAURIA: I mean it makes no sense.

13 THE COURT: All right. Mr. Prince.

14 MR. PRINCE: So let me -- Your Honor, Mr. Lauria -- and I watched this
15 happen and watched this unfold. He went right with Dr. Yoo right where I thought he
16 was going to go was well when you entered that -- he then asked the next question,
17 did you actually go into the disc space? Not just remove lamina, not just remove
18 tissue. And then he goes into the next step. Did you tell the patient? I mean he
19 was getting very specific without naming names. I won't necessarily have to name a
20 name, but I'm going to say that you've performed and this -- I'm going to read the
21 quote, Judge, from his deposition. It says have you -- this is a question: Have you
22 ever performed a surgery on an incorrect level on any other UNLV athlete other than
23 Beau Orth? Answer: Yes. And so that is contemporaneous with Beau and Beau
24 will tell you that he was on his team.

25 THE COURT: Well, I --

1 MR. LAURIA: Is not why I had the motion in limine.

2 THE COURT: That's fine. I don't -- I do think the door has been opened to go
3 ask the questions that were similar to what was ask of Dr. Yoo, because the point of
4 asking Dr. Yoo the questions in my mind was to tell this jury that it's not unusual --
5 it's a very difficult thing to figure out what level you're at and it's not unusual, in fact
6 every spine surgeon goes in at the wrong level, somehow inferring that it's not
7 malpractice or substandard care to go in at the wrong level.

8 So can you ask him those questions? Yes. I think you can ask
9 questions in line with what was asked of Dr. Yoo; once you realize you're at the
10 wrong level or how did you realize you were at the wrong level? Did you go into the
11 disc space at the wrong level? But naming names and referring to cases, that we're
12 not going to go into --

13 MR. PRINCE: Right.

14 THE COURT: -- because there wasn't anything gone into with Dr. Yoo about
15 that about was it cervical, lumbar, thoracic, you know, what was the person having
16 surgery for, was it a fusion, was it a discectomy, how did you -- you know, all that
17 kind of stuff. I don't want to -- it is somewhat collateral and I don't want to go into
18 trying to then bring up names and try all these other cases, but you could ask the
19 same types of questions that Dr. Yoo was asked, okay?

20 MR. LAURIA: Or a UNLV football player or any --

21 THE COURT: No.

22 MR. LAURIA: -- of that stuff.

23 THE COURT: Look, it's unspecific to who it is. It doesn't matter --

24 MR. PRINCE: I'm not going to name a name.

25 MR. LAURIA: No --

1 THE COURT: No. It doesn't matter if it's a 60-year-old retired gentleman or a
2 UNLV football player. The import of the question was not that you did anything to a
3 particular person, just that have you gone in at the wrong level. It doesn't matter if
4 it's a football player.

5 MR. PRINCE: And performed a surgery there.

6 THE COURT: Well, that's part and parcel --

7 MR. PRINCE: Wrong level surgery.

8 THE COURT: -- of the question. You are performing surgery, then you get in
9 there and you're at the wrong level.

10 MR. PRINCE: Okay.

11 THE COURT: But not that it was a UNLV football player or anybody else. It
12 doesn't matter who it was. The import of this is not who it was, it's what was done.
13 Okay?

14 MR. PRINCE: Okay.

15 THE COURT: But if you have some questions for Dr. Capanna about the
16 issue that we started out with, let's go ahead and ask him so we can move forward.

17 MR. PRINCE: Okay.

18 THE COURT: You can go ahead --

19 MR. PRINCE: Right now?

20 THE COURT: Yeah. Yeah.

21 MR. PRINCE: In front of the jury or without?

22 THE COURT: No, no, no. What I said was we can flesh this out. You all --

23 MR. PRINCE: Oh. That's fine.

24 THE COURT: -- can ask him some questions --

25 MR. PRINCE: Yeah.

1 THE COURT: -- outside and let's figure out --

2 MR. PRINCE: Okay.

3 THE COURT: -- what it is and then we'll know.

4 [Outside the presence of the jury]

5 DIRECT EXAMINATION

6 BY MR. PRINCE:

7 Q Doctor, this is -- Bate number 69, that's part of your office record,
8 correct?

9 A Yes, sir.

10 Q And this is a record from your office -- your sole office employee who's
11 in the process of trying to schedule the surgery for Beau Orth on September 16th,
12 2010, correct?

13 A Yes, I believe so.

14 Q And your office spoke with a Pam at UMC and you were on suspension
15 at that time, correct? Because of late charting.

16 A Well I wasn't if you read the next sentence because when they call over
17 there to schedule it, the way they get you to do charts is say you're suspended, you
18 can't schedule any more cases so you can't basically operate. And then it says -- so
19 I didn't know what you were talking about. I talked to Patrice in medical records.
20 That's who they call to see if there's charts that aren't done. He said he does not
21 have any charts that are over 30 days. That's when they put you on suspension to
22 get you to get them done and -- and then obviously they went on back and forth and
23 got it schedule because I was not on suspension.

24 Q Well you must have been on suspension sometime before September
25 16th at some point for not having the charts completed within a -- in a timely manner

1 as required by the hospital.

2 A That's not correct. It happens all the time. You call up to schedule and
3 they say he's on suspension; you call them back and they check with somebody
4 else and you're not on suspension, okay.

5 Q Well you learned you're on -- your office learned you're on suspension
6 that day, September 16th, 2010, and then later the issue was resolved, right?

7 A No, I --

8 Q Initially when the call --

9 A They --

10 Q -- came in you were on suspension.

11 A No --

12 THE COURT: Well, let's --

13 A -- I was not on suspension --

14 THE COURT: Let me ask this question just to clarify. You -- what you
15 learned was in the original phone call that UMC's first person said you were on
16 suspension.

17 THE WITNESS: Yes, and often they're inaccurate about that, Your Honor.

18 THE COURT: Okay. And then a subsequent phone call that actually went to
19 medical records said no, you're not over -- you don't have charts that are --

20 THE WITNESS: Correct, and that was the end of that. Happens all the time.

21 THE COURT: Okay. All right. You have any more questions?

22 MR. PRINCE: No.

23 THE COURT: Mr. Lauria, do you have any questions?

24 CROSS-EXAMINATION

25 BY MR. LAURIA:

1 Q Yeah, Your Honor -- I mean, sorry, Dr. Capanna --
2 A Yes.
3 Q -- is it just a timing issue that you got to have them signed by a certain
4 period of time?
5 A Yeah, the -- well as the next thing says, within 30 days they're
6 supposed to be done and it says he doesn't have any that are over 30 days.
7 Q Did it have anything to do with some claim that your reports were
8 inaccurate or incomplete or --
9 A No.
10 Q -- or was it just not having them there within that time period?
11 A No, it's not having them signed. They want to get them signed because
12 they're not --
13 Q So they're there.
14 A -- official leave (phonetic) or whatever.
15 Q They've already been dictated, they're part of the record. You just
16 haven't signed off on them yet.
17 A Well, no, you could have one that's not done and they're trying to get
18 you to do that, yes.
19 Q Okay. So the issue is not some inaccuracy in the record, it's either it
20 hasn't been signed or you haven't gotten one in within 30 days?
21 A Yes.
22 Q All right. The question was have you been suspended for having
23 inaccurate records. I would --
24 MR. PRINCE: That wasn't the questions.
25 THE COURT: Well no, it wasn't --

1 MR. PRINCE: He was on suspension --

2 THE COURT: -- it wasn't at any time in the past --

3 MR. LAURIA: All right.

4 THE COURT: -- had he been suspended. I would imagine almost every
5 doctor at UMC --

6 MR. LAURIA: Every --

7 THE COURT: -- will tell you that at some point they were -- as I said -- and
8 look I have to be fair to you all. You didn't do discovery on this issue, but I had a lot
9 of it in a previous trial and I -- and what I learned about it from that trial from
10 testimony was that pretty much everybody, every physician that testified, resident or
11 doctor, was saying yes, it happens to everybody. They also said that yes, there's
12 oftentimes a failure of medical records to communicate -- once the you're on
13 suspension notice is placed in there, there's often a failure or at least a substantial
14 delay on occasion for medical records to tell them that they're all caught up now and
15 take that suspension off. So the physicians are having to go to whatever and say
16 hey, you guys got to call because I've signed all those charts so I shouldn't be on
17 suspension any longer.

18 MR. LAURIA: So, Judge, the only relevance is to the allegation that he didn't
19 chart properly, that he omitted things in his chart. This suspension/non-suspension
20 issue has nothing to do with that, we can all agree. This has to do with whether you
21 got it in or you signed it in time, not the issue that he's saying it's relevant to, which
22 is your chart was incomplete or inaccurate.

23 THE COURT: Okay.

24 MR. LAURIA: This has nothing to do with that.

25 THE COURT: Mr. Prince, anything further?

1 MR. PRINCE: Nothing. I mean I don't know that. Mr. Lauria's making that
2 statement and there --

3 THE COURT: Well --

4 MR. PRINCE: -- there could other reasons. I mean, I think charting and
5 accurately charting and timely charting, that's an important responsibility. I don't
6 know -- that's not like a ministerial act, Your Honor. I mean I don't know where --

7 THE COURT: Well, I --

8 MR. LAURIA: -- this -- they're like brushing it under the rug like this is oh who
9 cares, it happens all the time. I mean, maybe in -- you know, Dr. Canna (sic) feels
10 that way and that's why we're here today, but no --

11 THE COURT: Look, I'm --

12 MR. PRINCE: -- I mean this an important issue.

13 THE COURT: I'm not saying that it couldn't be an important issue with the,
14 you know, discipline with some -- with somebody approaches, you know, doing all
15 aspects of their job. I'm not prepared to say that's an issue here though. I mean,
16 what we have is this one statement in the chart and then what Dr. Capanna's
17 testified to today which is similar to this which is somebody made a call and was told
18 he was on suspension and thereafter another call he doesn't have any charts that
19 are overdue. And he obviously performs the surgery so he couldn't have been on
20 suspension any longer. That being the only characterization we have, since there
21 wasn't any other discovery done upon it, I think it's appropriate to not go into it at
22 trial, so I'm going to grant --

23 MR. PRINCE: Okay.

24 MR. LAURIA: Thank you, Your Honor.

25 THE COURT: -- grant the defense request to --

1 MR. PRINCE: Okay.

2 THE COURT: -- to exclude that issue.

3 MR. LAURIA: Can we tell the jury to disregard --

4 THE COURT: So yeah, you're going to -- and I'll tell them when they get back
5 in that they -- that last question and answer about suspension is stricken. But you
6 guys are going to need to make sure --

7 MR. PRINCE: Well why he -- well a question is not an answer. Now what do
8 you mean why do they have to be stricken? I mean the stricken is like there's
9 something inappropriate about it. I have the right to ask, it's a stipulated exhibit. If
10 you just want to sustain an objection or have me just move on, but to go to the next
11 step and then have -- and to like strike something that I've said in front of this jury
12 when it's in a stipulated record, I don't think that's a -- fair or -- it's like you're
13 dressing me down over something that I didn't do anything wrong. There is an issue
14 and this case does involve recording keeping and that's a record keeping issue.

15 THE COURT: I'm going to strike the question before that. I'm saying you did
16 anything wrong. I'm not telling them that anybody did anything wrong. I'm not
17 addressing --

18 MR. PRINCE: Why do we strike the question?

19 THE COURT: I'm not --

20 MR. PRINCE: Why don't you just sustain -- you sustained an objection --

21 THE COURT: Because the reality -- and you know this, Mr. Prince. The
22 reality is even though we instruct jurors that the answer is the evidence, you only
23 consider the question as it gives meaning to the answer, you hear a question and
24 sometimes when a question says something that is of great concern in a case, that
25 bell gets rung and jurors are hanging onto that and I think it's appropriate when I

1 have the remedies available to me and objections are raised --

2 MR. PRINCE: Okay.

3 THE COURT: -- to strike things and that makes them know they're not
4 supposed to give it any kind of consideration or deliberate upon it. So --

5 MR. PRINCE: Okay.

6 THE COURT: -- in any event, okay. Let's get back started.

7 MR. LAURIA: Thank you, Your Honor.

8 THE COURT: Thank you.

9 [Jury in at 3:17 p.m.]

10 THE COURT: All right, you all can be seated. Thank you.

11 Okay. We're going to be back on the record. We're going to continue
12 on with plaintiff's case in chief and the testimony of Dr. Capanna.

13 Dr. Capanna, I'll remind you that you're still under oath. Okay?

14 THE WITNESS: Yes, sir.

15 THE COURT: And ladies and gentlemen, right before we took our recess
16 there was a question answer that was raised about a suspension. I'm ordering that
17 that be stricken and that you're to disregard that. Okay?

18 Mr. Prince, you can continue on.

19 MR. PRINCE: All right, thank you.

20 DIRECT EXAMINATION CONTINUED

21 BY MR. PRINCE:

22 Q Dr. Capanna, when Beau Orth agreed to undergo the surgery and on
23 the morning of September 17th, 2010 when he showed up at University Medical
24 Center, he had the right to place his trust and confidence in you that you're going to
25 perform his surgery properly within the standards of care, correct?

1 A Yes.

2 Q And Beau had the right to trust that you would take all necessary steps
3 to perform the surgery at the correct level, correct?

4 A Yes.

5 Q Beau had the right to trust that you would take all necessary steps to
6 identify the correct level of the spine before you did any type of surgery, correct?

7 A Yes.

8 Q And you agree that in this case the correct level and what you got
9 consent from Beau Orth for was the L5-S1 disc, correct?

10 A Yes.

11 Q And you know, Doctor, based upon your education, training and
12 experience that surgery at the wrong level is one of the most significant
13 complications that can occur in spine surgery, correct?

14 A Yes.

15 Q And you understand that wrong level surgery on the spine is
16 preventable, correct?

17 A Yes.

18 Q It's exclusively within the hands of the surgeon to correctly identify the
19 level of the spine where he intends -- he or she intends to perform the surgery,
20 correct?

21 A Correct.

22 Q There's diagnostic tools available to you in the form of an X-ray to
23 properly detect the level of where you want to do the surgery before even
24 proceeding, correct?

25 A Yes.

1 Q And you and you know from based on your training and experience that
2 performing discectomy on a normal, healthy disc can cause it to herniate, correct?

3 A Yes.

4 Q You know from your education, training and experience that it can
5 create -- performing a microdiscectomy on a normal, healthy disc can create
6 instability, correct?

7 A Yes.

8 Q You agree that performing a microdiscectomy on a normal, healthy disc
9 can cause a loss of structural integrity of that disc, correct?

10 A Correct.

11 Q You agree that performing a discectomy on a normal, healthy disc can
12 cause that disc to degenerate at a much more rapid rate than the normal aging
13 process, correct?

14 A Yes.

15 Q You agree that performing a microdiscectomy on a normal, healthy disc
16 can cause that disc to become symptomatic, correct?

17 A Yes.

18 Q And in 2010 you're one of the UNLV team doctors, correct?

19 A Yes.

20 Q That's a volunteer position and it's unpaid, correct?

21 A Yes, sir.

22 Q And you make yourself available to the university athletes as a
23 consulting neurosurgeons, correct -- as a consulting neurosurgeon, correct?

24 A I'm a team physician so I do more than just the neurosurgery, yes.

25 Q Okay, but that's one of the things that you do do as a team physician is

1 make yourself available to athletes at the university for neurosurgery consultation
2 and treatment, correct?

3 A Yes.

4 Q And so these are typically young people who come to you who have
5 potentially issues involving neurologic issues for which you provide treatment and
6 recommendations for treatment, correct?

7 A Correct.

8 Q Now, when you -- you first saw Beau on September 1st, 2010, correct?

9 A Yes.

10 Q And when you first saw Beau, the primary reason you're seeing him for
11 was for symptoms in his leg, correct?

12 A Pain, yes.

13 Q Pain in his leg, correct?

14 A Yes.

15 Q Not axial or mechanical low back pain, but pain in the leg is what you
16 charted, correct?

17 A He had low back pain as well.

18 Q Okay, let's -- if we could look at Exhibit Number 1, 005. And --
19 MR. PRINCE: The first paragraph.

20 A Did you say read it, sir?

21 Q No, I'm telling my --

22 A Oh.

23 Q -- tech person. Sorry, Doctor. First sentence says history of present
24 illness. This is a 20-year-old male seen in the office for left leg pain. Do you see
25 that?

1 A Yes.

2 Q That was his chief complaint, correct?

3 A Yes.

4 Q And when -- when you're as a surgeon, when a patient comes to you,
5 the first thing you do is you take a comprehensive history from that patient, correct?

6 A Yes.

7 Q And history meaning what symptoms do you have, when did they start,
8 what's the nature of them, their intensity, correct? Location.

9 A Yes.

10 Q Those are the types of things you're looking for. Yes?

11 A Yes.

12 Q Okay. And history is critical not only in reaching a diagnosis but also
13 formulating a treatment plan, correct?

14 A Yes.

15 Q Now, when you write 20-year-old male seen in the office for left leg
16 pain, you did not chart he's there because he has significant mechanical or axial low
17 back pain, did you?

18 A No.

19 Q You charted when you took the history from Beau that he always had
20 minimal pain in the past which had went away, correct?

21 A Yes.

22 Q And --

23 MR. PRINCE: Where's my slide book?

24 Q And now look -- let's look under the diagnostic studies.

25 MR. PRINCE: Peter. No. The -- no. The -- of his record on -- still on Bate

1 number 5.

2 MR. HELLMAN: Oh. I'm sorry.

3 BY MR. PRINCE:

4 Q So now at the time of your initial evaluation, September 1st, 2010, you
5 took a history from Beau. Primarily there for left leg pain. You also reviewed two
6 MRI images, correct?

7 A Yes.

8 Q That's a direct review by you, correct?

9 A Yes.

10 Q Meaning you actually looked at the films yourself?

11 A Yes.

12 Q Because as a neurosurgeon, before you agree to operate on anybody
13 or take anybody to the operating room, you're going to review those films yourself,
14 you're not going to rely upon the radiologist, right?

15 A Correct.

16 Q So says here -- looks like it says 12/3/09. I think that's probably
17 February 3rd, 2009. That's probably a typographical error on your part?

18 A Yes, I believe it was February, yes.

19 Q Okay. And it says both show small focal left L5-S1 disc which touches
20 the nerve root just prior to going into the foramen, correct?

21 A Yes.

22 Q And you agree that --

23 MR. PRINCE: Can we have Dr. Yoo's -- you know, the first slide from Dr.
24 Yoo's presentation?

25 Q Want to talk about the foramen for just a minute. I want to put up an

1 image for us.

2 MR. PRINCE: Peter, can you zoom in on this at all? No? Anyway.

3 Q Dr. Capanna, the holes in the spine where the nerves exit out, that's
4 considered the foramen, correct?

5 A Yes.

6 Q And you said when you -- if we go back to -- and on this model here --
7 don't know if you can see. I mean, these yellow items here, those are -- that's the
8 nerve root coming out from that level, correct?

9 A Yes.

10 THE COURT: Talking about here? The little yellow nerve roots coming out of
11 there?

12 MR. PRINCE: Yeah.

13 THE COURT: Okay.

14 BY MR. PRINCE:

15 Q And that hole just where the Judge had circled, that's the foramen,
16 correct?

17 A Yes.

18 Q And so when you said you saw the disc protrusion, that was before it
19 went into the foramen, correct?

20 A Yes.

21 Q So would be a paracentral or central disc protrusion, correct?

22 A Yes.

23 Q Not a lateral disc protrusion, a paracentral disc protrusion, correct?

24 A Well there's central, paracentral and then this is actually central,
25 paracentral and lateral. It wasn't just a strictly lateral disc.

1 Q Oh. There is no -- you can't identify one radiology report that's -- before
2 your operation that ever said he had a lateral disc herniation or protrusion, can you?

3 A I just said he had a paracentral disc lateral -- but not a lateral disc. I
4 just said but not a lateral disc.

5 Q But not a -- okay, I thought you said it was a --

6 A A lateral disc is all way out there by itself.

7 Q Right. This disc -- and let's look up --

8 MR. PRINCE: Peter, if we could have demonstrative slide 10.

9 [Colloquy between counsel]

10 BY MR. PRINCE:

11 Q And you've seen this image --

12 THE COURT: Don't draw on my screen, Danielle.

13 MS. TARMU: I'm sorry --

14 THE COURT: Okay.

15 MS. TARMU: -- trying to clear it.

16 MR. LAURIA: Can we please get the information as to what --

17 THE COURT: Yeah.

18 MR. PRINCE: It's the same one, Judge --

19 THE COURT: Well --

20 MR. PRINCE: -- we've been looking at --

21 THE COURT: Hold on.

22 MR. PRINCE: -- for days.

23 THE COURT: Hold on. I know. I -- look --

24 MR. LAURIA: I just want a record of it, please.

25 THE COURT: -- it's okay. We're just making our record.

1 MR. LAURIA: Thank you.

2 THE COURT: So this is the February 3rd, 2009 MRI. It's the --

3 MR. PRINCE: It's 8 of 15.

4 THE COURT: Eight of 15.

5 MR. PRINCE: Every time I show it, it's going to be 8 of 15.

6 THE COURT: Understood.

7 MR. PRINCE: Every single time.

8 THE COURT: It's the sagittal -- what was it --

9 MR. PRINCE: Sagittal T2.

10 THE COURT: T2. Thank you.

11 MR. PRINCE: Eight of 15.

12 BY MR. PRINCE:

13 Q This is one of the films you reviewed, correct?

14 A Yes.

15 Q And don't you agree that the only pathology is at the L5-S1 disc space,

16 correct?

17 A Yes.

18 Q There's a small left-sided disc protrusion at that level, correct?

19 A Yes.

20 Q That you agree that L4-5 was a normal, healthy disc as of February 3rd,

21 2009, correct?

22 A Yes.

23 Q So was L3-4, correct?

24 A Yes.

25 Q So was L2-3, correct?

1 A Yes.

2 Q And so was L1-2. Correct?

3 A Yes.

4 Q And you agree that Beau Orth -- after that MRI, he played another full

5 college football season in the fall of 2009 after that was taken, correct?

6 A Yes, he was having symptoms but he played, yes.

7 Q Okay. And you looked at the film from February 8th -- 18th, 2010,

8 correct?

9 MR. PRINCE: Go back to Bate number 5, Peter.

10 A Yes.

11 Q And that film showed the same pathology, just a -- the same L5-S1 disc

12 protrusion, correct?

13 A And it showed a little more progression of the disc degeneration at

14 L5-S1, yes.

15 Q Showed a -- okay. Well you don't document that in your record that

16 there's more degeneration L5-S1, correct?

17 A Well if you put them up side by side, it's a little darker, it's very minimal.

18 Q You didn't chart that it was a worsening of the L5-S1 disc --

19 A No, sir.

20 Q -- did you?

21 A No. No.

22 Q And if there is a worsening, it would be very minor at best, right?

23 A Yes, sir.

24 Q Okay. Okay. And I don't want you to take my word for it. I want to go

25 to Bate number 33 of Exhibit Number 1 which is your chart, which is a -- radiology

1 report from February 18th, 2010.

2 MR. PRINCE: And Peter, I want you to go to the impression.

3 Q And the radiologist reported no significant interval change and the
4 appearance of a shallow left paracentral disc protrusion at L5-S1, correct? That's
5 what he --

6 A Yes

7 Q -- that's what he documents.

8 A Correct.

9 Q And he compared -- he looked at the earlier film from February of 2009.
10 That's why he's saying there's no interval change during that one-year period,
11 correct?

12 A (No audible response.)

13 Q That's what he says under impression, correct?

14 A Yes.

15 Q And you agree that prior to seeing you in September of 2010, no
16 radiologist ever identified any pathology at L4-5, correct?

17 A Correct.

18 Q Correct?

19 A Yes.

20 Q In fact, Beau Orth before September 1st, 2010 when he saw you, he'd
21 never had any pain management treatment, any injection therapy at the L4-5 disc
22 space, correct?

23 A Not to my knowledge, no.

24 Q And you agree that before your surgery Beau had normal anatomy at all
25 levels above the L5-S1, correct?

1 A Well, some of his higher levels are a little degenerated, but that's then
2 otherwise --

3 Q The higher levels are degenerated?

4 A Yes. In the picture you just had out.

5 Q Okay. I thought you said the rest were negative according to your
6 report?

7 A You talked about the lumbar ones. When you get up to the thoracic,
8 there's a little bit decrease in height, but that's okay. It's not marked.

9 Q Well, okay. The thoracic -- any thoracic issues that -- that doesn't
10 explain --

11 A No.

12 Q -- any of Beau's symptoms, correct?

13 A Not at all. No.

14 Q Okay. And -- do you have your deposition? To the left there it's in the
15 booklet.

16 A Okay.

17 Q And let's turn to page 21.

18 MR. PRINCE: Go ahead put that up, Peter, please. Page 21, lines 3 through
19 8.

20 Q You there?

21 A Yes, sir.

22 Q Question: And no radiologist nor you identified any pathology at L5 --
23 L4-5 or any segment above that?

24 Answer: Correct.

25 Question: In fact, Beau Orth had normal anatomy at all levels above

1 L5-S1, correct?

2 Answer: Yes, sir.

3 Is that how you answered that question at time of your deposition?

4 A Yes.

5 Q Okay. Now --

6 MR. PRINCE: Go back to Bate number 5, please.

7 Q You --

8 MR. PRINCE: Let's go down to the diagnosis.

9 Q And your diagnosis that day for Beau was focal left lumbar L5-S1 disc.

10 Do you see that?

11 A Yes, sir.

12 Q And you thought that that small left-sided disc protrusion was what was
13 causing his symptoms, correct?

14 A Yes.

15 Q And you wanted to actually have Beau undergo another MRI before you
16 performed any surgery on Beau, correct?

17 A Yes.

18 Q You did discuss your surgical options with Beau at the time of your
19 initial visit, September 1st, 2010, correct?

20 A Yes.

21 Q And one of the things you talked about was performing a form of
22 discectomy, correct?

23 A Yes.

24 Q Discectomy means removing the disc that may be compressing upon
25 the nerve causing the symptoms, correct?

1 A Removing part of the disc, yes.

2 Q And that's -- discectomy means removal of disc, right?

3 A Yes.

4 Q And there's two -- there's a couple different types and you talked about

5 arthroscopic and microscopic discectomy, correct?

6 A Yes.

7 Q We ultimately -- you ultimately did a microdiscectomy, not an

8 arthroscopic discectomy, correct?

9 A Correct.

10 Q Which is an open procedure which we're going to be talking about,

11 right?

12 A Yes.

13 Q All right. Now, you had Beau undergo a -- what they call a flexion

14 extension MRI of the spine, correct?

15 A Yes.

16 Q Which means that the patient -- instead of laying in the tube, the

17 patient's actually standing up or sitting down as the case may be, right?

18 A Yeah, we were trying to find out if the disc would bulge out more

19 because when you're lying down, you don't have the effects of gravity on it or your

20 weight pushing down on the disc. And in his case I wanted to see as well if he went

21 in forward with his body if it pulled out more, and back if it came in more or if he

22 moved there. So that's why we did the other extra study.

23 Q And so with a flexion extension series if the person is sitting up or

24 standing --

25 A Correct.

1 Q -- that means there's loading of the spine and that potentially puts the
2 spine into flexion and potentially could put pressure to see if the disc becomes
3 larger, correct?

4 A No, it doesn't put the spine in flexion, you just stand up. And then they
5 do the scan again with him in flexion and extension.

6 Q Well, just standing you're flexion.

7 A Well, yeah, to a degree --

8 Q Right?

9 A Well, it depends what part of the spine you're talking about. Some of
10 it's not, some of it's --

11 Q Well, I'm talking about --

12 A -- the opposite.

13 Q -- the lumbar spine if --

14 A Yeah.

15 Q -- when you stand up that at least a portion of your lumbar spine is
16 already in flexion, correct, to hold yourself up?

17 A Yes.

18 Q Okay. And so you had that MRI done, correct?

19 A Yes.

20 Q The flexion extension series. I'm going to put it up there for us.

21 MR. PRINCE: That is demonstrative slide number 6, Peter.

22 MR. HELLMAN: Number 6?

23 MR. PRINCE: Number 6.

24 MR. HELLMAN: Okay.

25 MR. PRINCE: And for the record, it's the sagittal T2, image 7 of 11.

1 September 2nd, 2010 for the record.

2 MR. LAURIA: Thank you, counsel.

3 BY MR. PRINCE:

4 Q And, Doctor, you agree that this is a sagittal view of the MRI, the flexion
5 extension MRI that you ordered, correct?

6 A Yes, sir.

7 Q And this is in the neutral sitting position, meaning Beau is sitting down,
8 you know, sitting down in a normal fashion.

9 A Yes, sir.

10 Q And you agree that at the bottom that the L5-S1 still shows that small
11 disc protrusion, correct?

12 A Well you see two things. One --

13 Q I'm just asking that question, sir. I'm only asking that question.

14 MR. LAURIA: Well -- I'm sorry, Your Honor, he's trying to answer --

15 MR. PRINCE: No.

16 MR. LAURIA: -- so if --

17 MR. PRINCE: I'm asking the question did -- is that what it shows right there.

18 THE COURT: Go ahead and ask the question again.

19 MR. PRINCE: Okay.

20 BY MR. PRINCE:

21 Q Doctor, this MRI, the September 2nd, 2010 MRI shows the small disc
22 protrusion at L5-S1, correct?

23 A Among other things, yes.

24 Q And it also shows that the L4-5 is normal, correct?

25 A Yes.

1 Q Shows that L3-4 is normal, correct?

2 A Yes.

3 Q And you agree that all three preoperative MRIs of Beau's lumbar spine

4 showed no pathology at L4-5, correct?

5 A Yes, sir.

6 MR. LAURIA: Judge, we'll --

7 Q And you agree that --

8 MR. LAURIA: -- we'll stipulate to that.

9 MR. PRINCE: I'm asking --

10 THE COURT: Well, he -- thank you, but you can go ahead and follow --

11 MR. PRINCE: Thank you.

12 THE COURT: And I didn't mean that to be curt at all. I meant --

13 MR. LAURIA: And --

14 THE COURT: -- I appreciate the stipulation, but you're --

15 MR. LAURIA: Sure.

16 THE COURT: -- you're entitled to go ahead and explore it if you want.

17 BY MR. PRINCE:

18 Q And you agree that even on the September 2nd, 2010 imaging of the

19 lumbar spine there was no significant change at L5-S1 even with the flexion

20 extension series, correct?

21 A There was no increase in the protrusion of the disc fragment.

22 Q Yeah.

23 A There's degeneration and decreased disc space height there compared

24 to the other levels.

25 Q Well that's been present since the initial image, right?

1 A No, the initial --

2 Q Since February of '09.

3 A -- image was better than that.

4 Q Okay. And now, certainly L4-5 did not require any surgery in

5 September of 2010, correct?

6 A Correct.

7 Q You agree that L4-5 was not a pain generator in Beau's case in

8 September 2010, correct?

9 A Well I think as one of the witnesses said, the -- you can't --

10 Q No, I'm asking you.

11 A You can't tell. I agree with what they said.

12 Q Okay. Where in your record do you ever document that you suspected

13 that L4-5 was any pain generator before you did your surgery in September of 2010,

14 anywhere? Your chart's right in front of you.

15 A I know what the chart says, thank you. Basically you --

16 Q No, I'm asking do -- where is it do you document that L4 -- you

17 suspected L4-5 as a pain generator before you performed your surgery?

18 MR. LAURIA: I'm sorry, Judge, but this is about the third time where the

19 doctor starts to answer and if the -- counsel doesn't like it, he interrupts him. I just

20 say that the doctor be given a chance to answer do we see if it's responsive or not.

21 THE COURT: Look, the reality is oftentimes as you all know you ask

22 questions and sometimes the perception is that the witness is answering something

23 other than what the question was, so when there's occasions and folks get

24 interrupted in that regard, I understand it, but let's keep going. Go ahead and ask

25 your question.

1 MR. PRINCE: Right.

2 BY MR. PRINCE:

3 Q Doctor, isn't it true you never documented any point in your records
4 before September 17th, 2010 that you even suspected L4-5 as a pain generator in
5 Beau's case?

6 A Correct.

7 Q And clearly Beau did not need any type of surgery at L4-5 since he had
8 a normal, healthy disc, correct?

9 A Correct.

10 Q And in your words -- in your belief, he had classic S1 symptoms which
11 is sciatica, right?

12 A He had back pain too which may or may not be related to it as couple of
13 the other witnesses said.

14 Q Let's look at page 61 of your deposition.

15 THE COURT: I'm sorry, what page?

16 MR. PRINCE: Page 61.

17 THE COURT: Thank you.

18 MR. PRINCE: Lines 12 through 14.

19 MR. HELLMAN: What lines?

20 MR. PRINCE: I'm sorry, 12 through 14.

21 BY MR. PRINCE:

22 Q And the question I asked at your deposition was: So he, being Beau,
23 had classic signs and symptoms of S1 nerve root compression, right?

24 Answer: Correct. Yes.

25 Did I read that correctly, Doctor?

1 A Yes, you did.

2 Q All right. And you didn't say at that time that Beau had component of

3 back pain, correct?

4 THE COURT: At the time of the deposition.

5 BY MR. PRINCE:

6 Q At the time of your deposition, correct? You --

7 A No.

8 Q It wasn't part of your answer, correct?

9 A No.

10 Q You don't even document that he had back pain at the time of your

11 evaluation of September 1st, 2010, correct?

12 MR. LAURIA: Objection; misstates the record.

13 BY MR. PRINCE:

14 Q You don't document that, do you? In your initial --

15 MR. LAURIA: Can we show --

16 Q -- consultation.

17 THE COURT: As to the --

18 MR. LAURIA: Can we show him the document?

19 THE COURT: -- back pain?

20 MR. PRINCE: Yes.

21 MR. LAURIA: Can we show him the --

22 MR. PRINCE: No -- Your Honor, I'm asking --

23 THE COURT: Well hold --

24 MR. PRINCE: -- the questions.

25 THE COURT: -- hold on. I'm just making sure I'm -- you're talking about the

1 initial doctor's report that referenced the leg pain?

2 MR. PRINCE: Yes.

3 THE COURT: Well I know you are.

4 And you're saying you don't believe that references the back at all? Or
5 the --

6 MR. LAURIA: It does mention the back.

7 THE COURT: -- you're saying that -- go ahead.

8 MR. LAURIA: It's written down in here low back problems on that record.

9 THE COURT: I think you're talking about two different records.

10 MR. LAURIA: No, we're --

11 MR. PRINCE: Yeah.

12 MR. LAURIA: -- it's the September 1st record. He just took a little slice --

13 THE COURT: Why don't you approach the bench.

14 MR. LAURIA: Thank you.

15 THE COURT: Approach the bench.

16 [Bench conference begins at 3:41 p.m.]

17 MR. LAURIA: That's why he's taking slices and pieces of it.

18 MR. PRINCE: His speaking objections --

19 THE COURT: Wait a minute.

20 MR. PRINCE: -- are totally inappropriate. He doesn't need to say that.

21 THE COURT: I -- look, that's the -- you're talking about past history.

22 MR. LAURIA: Right.

23 THE COURT: He's talking about --

24 MR. PRINCE: Past history, correct.

25 THE COURT: -- did he document his complaint --

1 MR. PRINCE: Correct.

2 THE COURT: -- as being leg pain.

3 MR. LAURIA: Well that's part of his problem --

4 MR. PRINCE: No, it's not.

5 THE COURT: Well, but that's the past history part. That's not what the

6 question is.

7 MR. LAURIA: Okay.

8 THE COURT: Anyway --

9 [Bench conference ends at 3:41 p.m.]

10 THE COURT: All right. The objection's overruled.

11 MR. PRINCE: Thank you.

12 THE COURT: But go ahead and repeat your question --

13 MR. PRINCE: Sure.

14 BY MR. PRINCE:

15 Q Let's just go to your record, Doctor, Bate number 5, so we're clear.

16 Okay. Let's start at the -- go to the history of present illness and the past history.

17 Says this is a 20-year-old male seen in the office for left leg pain. You see that?

18 A (No audible response.)

19 Q That's his chief complaint, correct?

20 A Yes.

21 Q You documented no current or ongoing low back pain as of September

22 1st, 2010 in that history of present illness, did you?

23 A It says in past history low back problems.

24 Q I'm asking you about current complaints. You -- that would be part of

25 the history of present illness, current complaints, correct?

1 A Yes.

2 Q And past history would be that he had low back pain previously,
3 correct?

4 A Yes.

5 Q Not the day he saw you.

6 THE COURT: Well to be fair, low back problems is what --

7 MR. PRINCE: No back problems, sorry.

8 THE COURT: Thank you.

9 BY MR. PRINCE:

10 Q Correct?

11 A No, I believe he had back problem -- back pain at the time he saw me
12 as well.

13 Q Okay. He -- you did not chart that, correct? That he was having -- one
14 of his chief complaints was low back pain. You did not chart that that day, correct?

15 A No, sir.

16 Q So your -- so are you saying in front of this jury here under oath today
17 that this record is now also inaccurate because you did not chart that he had low
18 back pain on September 1st, 2010?

19 A It's a summary. You don't chart everything.

20 Q Well that's a significant complaint, low back pain, isn't it? He's there for
21 his lumbar spine.

22 A Yes, but his predominant complaint was his left leg pain.

23 Q Now, in your words, you are one of the people who created the
24 microdiscectomy operations in the world. You're one of the originators of it. That's
25 your testimony, right?

1 A Yes, sir.

2 Q And you consider yourself a pioneer in the field of microdiscectomy,
3 correct?

4 A Yes, sir.

5 Q And you certainly know how to accurately document a chart, correct?
6 And the importance of it.

7 A Yes, sir.

8 Q And -- because you know the record is available to not only for your
9 own reference, but you understand that other medical professionals or others may
10 need to look at your record to see what was going on at the time you're treating
11 Beau Orth or any patient for that matter, correct?

12 A Yes.

13 Q That's why it's important for everything to be accurate, right? Yes?

14 A As was stated, it's a summary. You don't put everything in there. I
15 think it was your witness who said you'd be all day just charting one patient.

16 Q And so but you in your -- in this case, you did not completely, therefore
17 not accurately, document all of Beau Orth's presenting complaints. Is that your
18 testimony now?

19 A No.

20 Q Okay. Now you're in solo practice, correct?

21 A Yes.

22 Q You just have one office person who deals -- helps you deals with
23 patients, correct?

24 A Yes, sir.

25 Q You have no RNs, correct?

1 A Yes, I have an RN.

2 Q You do have an RN?

3 A Yes.

4 Q Oh not at the time of your deposition in January of 2015.

5 A Yes, I did.

6 Q Okay.

7 A I told you she works in the hospital and doing --

8 Q But she doesn't work in your --

9 A -- coding.

10 Q -- office so there's --of course there's nurses at the hospital.

11 A Yes. No, no, this is my nurse, okay, yes.

12 Q Right. But you don't employ a direct nurse that works in your office with

13 you, correct?

14 A No.

15 Q And you don't have any physician assistants that work with you, correct

16 A Correct.

17 Q And you agree that you only see -- in 2010, you only see patients one

18 half day per week in your office?

19 A We went through that in the deposition. It's one half to one day. I have

20 one day blocked out.

21 Q Yeah. The vast majority of those days it's only half a day, correct?

22 A Yes, but I meet people there at the office or if somebody wants

23 somebody seen, I see them at any day if we can do that.

24 Q Okay. But the reality is of your practice that it's only about one half day

25 per week, correct?

1 A No, we have a day of office hours blocked out. Usually it's about a half
2 a day there, yes.

3 Q Okay. And your -- you estimate that you do approximately 100 spine
4 surgeries a year, correct?

5 A Approximately a hundred cases, hundred and twenty, whatever.

6 Q Of spine only?

7 A No. I do head cases as well.

8 Q But I'm asking you do approximately 100 spine surgeries a year
9 according to your deposition testimony, correct?

10 A I was guessing, yes.

11 Q And you do 85 to 90 percent of your surgery at UMC, correct?

12 A Probably, yes.

13 Q Okay. And you also take trauma call at UMC, correct?

14 A Yes.

15 Q And sometimes you do surgery there you'll have to schedule, you know,
16 the operating room for even those trauma patients, correct?

17 A Well if they're emergent, we just go right to the trauma. We don't
18 schedule anything.

19 Q Right. But that'll be a record if how -- that being one of the surgeries
20 that you performed at the hospital, correct?

21 A Yes.

22 Q All right. And --

23 MR. PRINCE: Can I have the second binder?

24 BY MR. PRINCE:

25 Q Doctor, I'm showing you it's the second binder of plaintiff's exhibits. It's

1 Exhibit Number 29. I have subpoenaed the records from your -- of your surgical
2 schedule from UMC. I'm going to -- you can refresh your recollection if necessary,
3 but I have a summary here if you need look at that too. And do you recall that in the
4 calendar year of 2008, of all surgeries performed, you only performed 42 surgeries
5 total at UMC in 2008? If that's what the records show, would you have any reason
6 disagree with that?

7 A No, I don't.

8 Q Okay. If the records show from the UMC hospital --

9 MR. LAURIA: Well --

10 Q -- where you did 85 to 90 percent of your surgeries --

11 MR. LAURIA: Excuse me, Your Honor, could we approach, please?

12 Q -- did you --

13 [Bench conference begins at 3:47 p.m.]

14 MR. LAURIA: We don't have a foundation for this record. I don't know where
15 -- do we have any kind of foundation for this?

16 MR. PRINCE: What do you mean? I -- I'm asking the questions. The records
17 are there --

18 THE COURT: Well he could ask him if there's --

19 MR. PRINCE: There's an affidavit.

20 THE COURT: -- records that show about his surgeries --

21 MR. PRINCE: Yeah. I'm there to --

22 THE COURT: -- and he can either answer yes --

23 MR. LAURIA: Well --

24 THE COURT: -- or no.

25 MR. LAURIA: But we have to have foundation the record he's basing his

1 question on, right? I mean --

2 MR. PRINCE: I'm not basing it on any record.

3 MR. LAURIA: You're saying if the record shows you --

4 MR. PRINCE: Yeah.

5 MR. LAURIA: -- so you're asking him --

6 MR. PRINCE: It's right there in front of him.

7 MR. LAURIA: -- to look at a record --

8 MR. PRINCE: No, I didn't. I said -- I'm going to ask him does he recall --

9 THE COURT: What's the exhibit --

10 MR. PRINCE: -- the number --

11 THE COURT: -- number again?

12 MR. PRINCE: 29. I'm not even -- he's not -- you just distort every question I

13 ask.

14 MR. LAURIA: Excuse me, counsel.

15 MR. PRINCE: And so the -- I --

16 MR. LAURIA: Just direct your comments --

17 MR. PRINCE: -- I was asking him --

18 MR. LAURIA: -- to the Judge.

19 MR. PRINCE: And it's the distortion and that's the problem. I'm asking to the

20 number of surgeries he performs, does he have a recollection --

21 MR. LAURIA: And in his deposition --

22 MR. PRINCE: -- and if the records --

23 MR. LAURIA: -- he says I'm guessing, I don't know.

24 MR. PRINCE: Well who cares?

25 MR. LAURIA: So --

1 MR. PRINCE: Yeah, I mean -- yeah. That's the record from UMC hospital --
2 THE COURT: So this is the basis of him asking questions.
3 MR. PRINCE: Yes, it is.
4 THE COURT: Okay.
5 MR. PRINCE: Yes, it is.
6 THE COURT: So what's the objection?
7 MR. LAURIA: So the objection is where's the foundation for that record?
8 THE COURT: Well --
9 MR. PRINCE: Not even asking to admit it.
10 THE COURT: -- no, that's -- okay. You can go ahead.
11 MR. PRINCE: Thank you.
12 THE COURT: Thank you.
13 [Bench conference ends at 3:48 p.m.]
14 MR. PRINCE: Objection overruled, Your Honor?
15 THE COURT: The objection is overruled, yes.
16 MR. PRINCE: Thank you.
17 THE COURT: Why don't you repeat the question, please.
18 MR. PRINCE: Yes.

19 BY MR. PRINCE:

20 Q And don't you recall that in 2008 the number of surge (sic) you
21 performed at UMC hospital for all cases, you only performed approximately 42
22 surgeries there that year, according to their surgical record?

23 A Well this is a record of which OR room you were in, basically trauma or
24 main OR, et cetera. We do procedures as well that are not in the ORs at all; for
25 example, putting in ventriculostomies in the emergency room, intracranial pressure

1 monitors, that kind of thing.

2 Q Right.

3 A So you asked how many cases I did. I just said I guess about --

4 Q I said --

5 A -- and that's --

6 Q -- spine cases.

7 A Okay.

8 Q I said spine. And this is all surgeries they --

9 MR. LAURIA: Excuse me, can he finish his answer, Your Honor?

10 MR. PRINCE: And I -- no, he said I said something else. I said only spine
11 cases.

12 THE COURT: Okay, well --

13 BY MR. PRINCE:

14 Q Would you --

15 THE COURT: -- look, the answer --

16 THE WITNESS: And I told you I didn't know, I was guessing.

17 THE COURT: -- the answer had gone beyond the question was simply the
18 number again, so --

19 MR. PRINCE: Yeah.

20 BY MR. PRINCE:

21 Q And were you -- do you recall that in 2009 in the operating room at
22 UMC hospital you only performed 33 operative procedures, according to their
23 surgical record?

24 A No, I don't recall at all.

25 Q Do you recall that in 2010, the year of Beau Orth's surgery, you only

1 performed 36 surgeries?

2 THE COURT: In the operating room?

3 MR. PRINCE: In the operating room at UMC hospital.

4 THE COURT: According to UMC's records.

5 Q According to UMC records where you did 85 to 90 percent of your
6 surgery.

7 A I have no reason to argue with that. I don't have --

8 Q And also for 2011 you only did 47 surgeries at the UMC hospital
9 operating room, according to their surgical schedule record. Any reason disagree
10 with that?

11 A No.

12 Q Any reason disagree that in 2012 you only -- you did 50 total operative
13 procedures at UMC hospital for the year in their operating room according to their
14 surgical schedule?

15 A No (indiscernible) --

16 Q So and also, 2013 shows you only did 45 surgeries in their operating
17 room according the UMC hospital surgical schedule. Any reason disagree with
18 that?

19 A No.

20 Q Any reason to disagree that in 2014 you did only 31 cases total in the
21 UMC operating room according to the surgery schedule -- surgical schedule where
22 you do 85 to 90 percent of your surgeries?

23 A No.

24 Q So you agree that you're not performing a hundred or more spine
25 surgeries per year at -- correct?

1 A Yes.

2 Q Okay. Now, going back to your surgery -- your recommendations with

3 Beau Orth, you get the MRI back from September 2nd, 2010, continues to show that

4 there's the small L5-S1 disc protrusion, correct?

5 A Yes.

6 Q And he also went for some nerve conduction studies --

7 A Yes.

8 Q -- which showed that he had actually S1 radiculopathy, correct?

9 A Yes.

10 Q All right, let's go to your record of --

11 A And he had peripheral --

12 Q His Bate number 11.

13 A He had peripheral neuropathy as well on the study.

14 Q Okay.

15 MR. PRINCE: Bate number 11.

16 Q You agree --

17 MR. PRINCE: Peter, at the top, just bring the whole -- down -- keep coming

18 all the way down right there. Here we go.

19 Q And I'm kind of up here where it says Dr. Germin, says EMG LLE, that

20 means left lower extremity or the left leg, correct?

21 A Yes, sir.

22 Q And you have L5 radiculopathy. That's actually inaccurate, isn't it? He

23 had an S1 radiculopathy.

24 A He had a clinic (sic) S1 radiculopathy, but Dr. Germin reported an L5

25 radiculopathy.

1 Q Oh.

2 A They're both very similar as one of the witnesses showed coming down
3 the canal so he documented L5.

4 Q Oh he did?

5 A Yes.

6 Q Oh, okay. Here let's go to -- I have his record in your chart. It's Bate
7 number 25 from September 8th, 2010.

8 MR. PRINCE: Go to the impression, please.

9 THE COURT: From Exhibit 1, correct?

10 MR. PRINCE: From Exhibit 1.

11 THE COURT: Thank you.

12 BY MR. PRINCE:

13 Q Let's read the first impression. What -- it says S1 radiculopathy on the
14 left. He did not document an L5 radiculopathy, correct?

15 A That's correct.

16 Q Okay. So your note is an error then, it's a typographical error, correct?

17 A Yes, sir.

18 Q Okay. And peripheral neuropathy you -- based upon the presenting
19 complaints, you as a trained neurosurgeon who treats people with neuropathy, you
20 never suspected that Beau had any neuropathy based upon his presenting
21 complaints or your clinical examination, correct?

22 A No, but I told his father and him that he needed to see the medical
23 doctor to get a complete workup for it to not miss something that was causing it.

24 Q Right. And I'm only asking you, you didn't suspect, based upon his
25 presenting complaints and his findings on physical exam, that he had any peripheral

1 neuropathy, correct?

2 A No, sir.

3 Q His symptoms were consistent with L -- S1 radiculopathy, not an L5
4 radiculopathy, correct?

5 A Yes.

6 Q Okay. And so based on that you then -- you met with Beau Orth again
7 on September 15th --

8 MR. PRINCE: Go to that note, please, Peter.

9 MR. HELLMAN: Which one?

10 MR. PRINCE: It's just below that. Go back to Bate number 11. The 9/15.
11 Okay. No, the whole thing, please. The whole 9/15 note. There you go. The 9/15?
12 There you go. All the way down. Right there. Okay.

13 BY MR. PRINCE:

14 Q So you meet after Beau has -- oops.

15 [Colloquy between counsel]

16 THE COURT: Got too many books.

17 MR. PRINCE: Geek squad over here. Sorry.

18 THE COURT: Yeah, don't want to have another problem with the pen in your
19 jacket.

20 MR. PRINCE: I know, yeah, I'm put it -- better put it down at this point.

21 BY MR. PRINCE:

22 Q Now, so you meet with Beau and his father, at least according to the
23 note, September 15th, 2010, correct?

24 A Yes.

25 Q You're discussing options, correct?

1 A Yes.

2 Q And you -- Beau obviously as a Division I collegiate football player, he'd

3 like to go back to playing as soon as he's able, correct?

4 A Yes.

5 Q Just like any athlete would want that, right?

6 A Correct.

7 Q And you knew that that's what Beau would be thinking, right? Because

8 he was telling you those things?

9 A Yes.

10 Q And you were discussing what the options were and you made a

11 recommendation for microdiscectomy at L5-S1 because you thought that was the

12 cause based on his -- all of the available information you had of his ongoing

13 symptoms, correct?

14 A Correct.

15 Q And you told Beau that the microdiscectomy was going to be a cure for

16 his problems, correct? You told him that.

17 A No, I said it's most likely to be beneficial and cure the problem, meaning

18 it's most likely to be beneficial. I didn't say it's going to cure your problem. It's not a

19 separate sentence. You don't give -- no surgeon would say they're going to cure

20 somebody --

21 Q Okay.

22 A -- point blank.

23 Q The word --

24 A That's the hope.

25 Q -- cure -- you used the word cure, correct?

1 A Yes.

2 Q That was your word.

3 A Yes, I said mostly likely be beneficial and cure his problem or could

4 have been and solved his problem or relieved his problem.

5 Q Okay.

6 MR. PRINCE: Court's indulgence.

7 BY MR. PRINCE:

8 Q And you agree that the vast majority of Beau's complaints at that time

9 was related to the nerve root compression and that small L5-S1 disc protrusion

10 which was causing the leg symptoms, correct?

11 A Yes.

12 Q You didn't see any reason for Beau to go seek a second opinion,

13 correct?

14 A That's his privilege. I tell all my patients they can see anybody they

15 want to. It doesn't bother me.

16 Q No, you didn't recommend that he go have a second opinion, correct?

17 A No.

18 Q You told him this something that you can correct -- right? You felt that

19 this some -- a condition that you could correct?

20 A If I didn't think I could correct it, I wouldn't recommend it.

21 Q Well that's why you recommend it. You thought you could fix it, right?

22 A Yes.

23 MR. PRINCE: One second, Judge, I'm looking for something.

24 THE COURT: It's okay.

25 [Colloquy between counsel]

1 BY MR. PRINCE:

2 Q With regard to those nerve conduction studies, those aren't always 100
3 percent accurate. It's where they put kind of the needles in, you know, either your
4 legs or your arms and they try to test, you know, for nerve involvement, correct?
5 They're not always a hundred percent accurate?

6 A No, I wanted to make the best decision for Beau so that's why I sent
7 him for it. They're not a hundred percent accurate, no.

8 Q Like for example, I mean you -- that -- those could have -- the nerve
9 conduction could have come back negative, but Beau still would have had
10 symptoms which would be consistent with an S1 disc problem with pain coming
11 down the back of his leg, correct?

12 A Yes, I was just --

13 Q Even if it was negative?

14 A I was just looking for corroborative evidence, yes.

15 Q Right. Okay.

16 MR. PRINCE: Thank you.

17 Q Like to go to page 56 of your deposition. Line 6. You're talking about
18 what -- curing.

19 MR. HELLMAN: Just line 6?

20 MR. PRINCE: Line 6 through 9.

21 BY MR. PRINCE:

22 Q And I ask you the following question: And in fact, you thought it would
23 not only be medically beneficial but would likely cure his symptoms, correct?

24 Answer: Yes, sir.

25 So that's what you -- that's -- would be consistent what you told Beau

1 that this surgery would likely cure his problem, right? Just like you have in your
2 record.

3 A We just answered that from the record. Yes, sir.

4 Q And you also told him that if he continued playing it would likely not
5 cause him further damage if he continued to play, correct?

6 A That's an opinion, meaning if he didn't have any surgery and he
7 continued play, it probably wouldn't cause any more damage --

8 Q Would not cause any more --

9 A Would not. That's correct.

10 Q Okay.

11 A Would hurt.

12 Q So when Mr. Lauria tried to say earlier that was a typographical error in
13 your report, that wasn't a typographical error. You told him that he would -- if he
14 continued playing, he would likely not cause further damage, correct?

15 A That's my guess. I could be wrong. Okay.

16 Q Right. But that -- as a team physician, you know, and seeing, you
17 know, young student athletes, that's what you told Beau Orth, correct?

18 A My job's to give them all the options and tell them what I think, and then
19 they have to make up their mind.

20 Q Right, and that's what you told him, right?

21 A Yes, I think if he --

22 Q And you told him you are a pioneer in the field of microdiscectomy,
23 right?

24 A I don't know if I told him that or not.

25 Q That's what you tell patients, don't you?

1 A No.

2 Q You don't tell -- well, if Mr. Orth sat up here -- you heard him. He said

3 you told him you're one of the originators of the microdiscectomy surgery. I mean,

4 he wouldn't be wrong on that, right? That's something you would --

5 A No.

6 Q -- tell a patient, right?

7 A Somebody asked, yes.

8 Q (Indiscernible) somebody asked. How would they know unless you

9 offered it?

10 A Maybe I offered it, I don't know.

11 Q Okay. Now, with regard to the informed consent, I want to talk about

12 that for a minute.

13 MR. PRINCE: Go to 93, Bate number 93 of Exhibit Number 1.

14 Is it wicked hot in here?

15 MS. TARMU: It's hot.

16 MR. PRINCE: Judge, is there -- is the air conditioning on or?

17 THE COURT: The air conditioning is on. Unfortunately, like most things in

18 my life --

19 MR. PRINCE: I guess it's August in Las Vegas.

20 THE COURT: -- I have no control over it.

21 MR. PRINCE: We pay our bill this month or what --

22 THE COURT: I -- well that's questionable. You can --

23 MR. PRINCE: I hear you. All right.

24 THE COURT: -- talk to --

25 BY MR. PRINCE:

1 Q All right, dr. Capanna --

2 THE COURT: -- talk to Commissioner Sisolak about that, whether he paid the

3 bill.

4 MR. PRINCE: Okay.

5 THE COURT: But I don't sit under a vent so I never know. It's always hot up

6 here.

7 MR. PRINCE: Yeah.

8 THE COURT: I'll send an email out and see what I can find out for you

9 though.

10 MR. LAURIA: It's the robes, Judge.

11 THE WITNESS: I thought this was just the hot seat.

12 MR. LAURIA: The robes make it warm.

13 THE COURT: Yeah --

14 THE WITNESS: I thought this was just the hot seat.

15 THE COURT: -- the whole court --

16 MR. PRINCE: Yeah.

17 BY MR. PRINCE:

18 Q So -- now, this is a consent for surgery --

19 A Yes, sir.

20 Q -- right?

21 A Yes, sir.

22 Q You drafted it, right?

23 A What do you mean by you drafted it? I wrote what we were doing in

24 there --

25 Q Well the form. It's your form.

1 A Yes, sir. Yes.

2 Q For your office. You drafted the consent.

3 A Correct.

4 Q You yourself did.

5 A Yes, sir.

6 Q And you agree that this consent for surgery is not intended to be a

7 release of liability for you in any way, correct?

8 MR. LAURIA: Objection; that's a legal question, Judge.

9 MR. LAURIA: No, it's not. It's a part of the --

10 THE COURT: Well, we're talking about the doctor's perception of it, so you --

11 MR. PRINCE: Yeah.

12 THE COURT: -- can go ahead.

13 THE WITNESS: Basically it's to document that we've informed the patient

14 about the risks that they face having surgery.

15 BY MR. PRINCE:

16 Q Right. And it's not meant to relieve you from meeting your obligations

17 of the standard of care in performing a left-sided L5-S1 microdiscectomy, correct?

18 A If it did, we wouldn't be here.

19 Q Right, and so Beau Orth never gave consent for an L4-5

20 microdiscectomy, correct?

21 A That's correct.

22 Q And it says here, I freely agree to this surgery and I nor any family

23 member or friend will hold International Neuroscience Consultants, Dr. Capanna,

24 blameful if I have a complication or I'm not fully satisfied with the results. You're not

25 trying to suggest in any way to this jury that that's a release that he -- of any kind,

1 right? That blameful?

2 A No.

3 Q That's your words after going to law school, right? That's your words
4 that you put in there.

5 MR. LAURIA: Objection, Your Honor.

6 THE COURT: I'll sustain the objection.

7 BY MR. PRINCE:

8 Q That's your words that you put in there, right? Blameful.

9 A Yes.

10 Q That has nothing to do with explaining to a patient the risks and the
11 benefits of a surgery, correct?

12 A Well --

13 Q Being blameful. Not hold you blameful.

14 MR. LAURIA: Excuse me. May we approach, please?

15 THE COURT: Yeah.

16 MR. LAURIA: Thank you.

17 [Bench conference begins at 4:04 p.m.]

18 MR. LAURIA: I am requesting that counsel be admonished for violating the
19 motion in limine --

20 THE COURT: Well, I agree.

21 MR. LAURIA: -- in this case and he intentionally asked that question and that
22 is inappropriate.

23 MR. PRINCE: Well that's because he's talking about --

24 THE COURT: Well, hold on.

25 MR. PRINCE: -- being blameful.

1 THE COURT: Hold --

2 MR. PRINCE: He's trying like --

3 THE COURT: Hold on.

4 MR. PRINCE: -- it's like a release of liability.

5 THE COURT: Hold on. But --

6 MR. PRINCE: He drafted it.

7 THE COURT: But, but, but, but, but as we talk -- when we talked about

8 motions in limine, I said if there's a motion in limine that's granted and somebody

9 thinks for some reason they should be able to go into it, you need to bring it up at

10 the bench or outside the presence. So it was improper to ask him the law school

11 question. I will admonish them to strike it if you want me to.

12 MR. LAURIA: I don't want to call more attention to it, but --

13 THE COURT: My perception is that they may have just viewed it as --

14 MR. LAURIA: -- I think counsel ought to be admonished --

15 THE COURT: Right.

16 MR. LAURIA: -- for doing it intentionally because it's --

17 THE COURT: Well that's why I'm telling him right now.

18 MR. PRINCE: Okay.

19 THE COURT: Yeah, he knows.

20 MR. PRINCE: He's telling me.

21 THE COURT: All right?

22 MR. PRINCE: All right, just --

23 THE COURT: Okay.

24 MR. PRINCE: -- it was the blameful part. That's why --

25 THE COURT: Let's move on.

1 MR. PRINCE: Okay.

2 [Bench conference ends at 4:04 p.m.]

3 BY MR. PRINCE:

4 Q All right. And you never got a signed consent from Beau Orth ever
5 doing an L4-5 microdiscectomy, correct?

6 A Correct.

7 Q He never consented to you doing a wrong level surgery, correct?

8 A Correct.

9 Q You agree --

10 MR. PRINCE: Can we put back up the -- slide 1 is fine. That demonstrative
11 image 1. No, not -- hang on, not that one. Ten. Again this is for the record, 8 of 15
12 of February 3rd, 2009.

13 BY MR. PRINCE:

14 Q You agree that Beau Orth had normal lumbar spine anatomy, correct?

15 A Well, he's got an L5 disc so that's not normal.

16 Q Well, yeah, I -- that's a fair point. I mean he didn't have like an unusual
17 number of discs, like he didn't have what they call a transitional segment or --

18 A Correct.

19 Q -- anything unusual about his --

20 A No.

21 Q -- his lumbar anatomy?

22 A No.

23 Q He had typical five vertebrae, five disc --

24 A Yes.

25 Q -- spaces, right? Okay. And you agree that Beau Orth, other than the

1 changes at L5-S1, he did not have degenerative disc disease according to all three
2 MRIs that he had before your surgery, correct?

3 A I'm sorry, could you say that --

4 Q Sure. You agree that Beau Orth did not -- other than L5-S1, he did not
5 have degenerative disc disease at any level of his spine -- of his lumbar spine?

6 A Other than L5-S1, yes.

7 Q Okay. And you told Beau as part of your initial discussion with him that
8 he would be out of playing and could return in a few weeks?

9 A No, that's absurd.

10 Q That's absurd?

11 A Yes, it is.

12 Q Okay. All right.

13 A I told him he could return to getting back into training and exercise and
14 that kind of stuff would take a few weeks at least.

15 Q Okay. But he certainly couldn't resume full contact within a few weeks,
16 right?

17 A No one would tell him that. You don't know how he's going to do. He
18 may be worse.

19 Q Okay. Do you have page 57 of your -- I'd like to go to page 57 your
20 deposition, starting at line 2.

21 MR. PRINCE: I want to go down, Peter, to line 17. Okay.

22 Q Question by me of you: How long generally speaking -- if a
23 microdiscectomy is correctly performed and there's a successful outcome, how long
24 is a football player typically out before they can resume full contact?

25 Answer: That's a problem because basically, is your answer, if the

1 patients don't have pain anymore, they don't care about it, and the athletes are more
2 aggressive. Some construction workers are in their jobs and some of them go back
3 in a couple of weeks. But generally, we like to keep them out for four weeks or so at
4 least if not longer. Let them heal. The longer the better from our point of view as far
5 as the healing goes.

6 Question: So approximately four to six week timeframe period of being
7 out -- and the answer is two to four for sure, possibly six, yes.

8 And that's before they go back to full contact. That's what your answers
9 were, correct? That's what I asked you about --

10 MR. LAURIA: Your --

11 Q -- full contact.

12 A Yes.

13 MR. LAURIA: Your Honor, I'd request that we read the questions immediately
14 before that to put it in context.

15 MR. PRINCE: We just did --

16 THE COURT: Well you can --

17 MR. PRINCE: Yeah, you can do it --

18 THE COURT: -- ask him about that on --

19 MR. PRINCE: -- on your own.

20 THE COURT: -- cross-examination.

21 THE WITNESS: Yes, I didn't mean that everybody can go back to full contact.
22 Almost nobody does at that point because they're worried they'll hurt them self. And
23 we have a program we put them in to progressively get them through physical
24 therapy and exercises and further up.

25 BY MR. PRINCE:

1 Q Right, because I asked you the question, how long is it before a football
2 player can typically resume full contact, you say -- going down all the way, you say
3 two to four weeks for sure, possibly six, yes. You didn't say months. You just said
4 two to four weeks, maybe six, right? That's what your testimony says.

5 A Yes, but they --

6 Q Okay.

7 A -- they don't go back that fast.

8 Q And you -- and that's what you told Beau Orth, correct?

9 A No, it's not.

10 Q You never recommended that Beau Orth take a red shirt year, correct?

11 A Yes, we talked about it.

12 Q You never recommended that he take the whole year off and red shirt,
13 did you?

14 A It depends how he's doing. But once you start the year, if you suit up
15 once, that's your year.

16 Q Right. You never told Beau Orth his -- in his best interest to take a red
17 shirt year so he wouldn't lose that whole year of eligibility, correct? You never told
18 him that.

19 A I don't know if I told him to do it, but I think that's what he was planning
20 on doing.

21 Q Red shirting?

22 A Yes.

23 Q That's what you thought he was going to do?

24 A Yes.

25 Q Okay. Now, I want to go to the surgery.

1 MR. PRINCE: Bate number 57 of Exhibit Number 1. And let's go down to the
2 procedure section.

3 Q And you agree that as a surgeon that it is below the standard of care to
4 do a surgery on a wrong level of the spine, correct?

5 A Yes.

6 Q And you agree that it's completely within your hands before you started
7 the surgery to make sure -- to perform the surgery at the correct level of Beau Orth's
8 spine, correct?

9 A We do everything possible to make sure that that happens, yes.

10 Q That -- in fact, that's the standard of care that you do do it. Not do
11 everything possible but make sure that does happen.

12 A As the other witness have said, it often happens that you're not at the
13 right area about three percent of the time.

14 Q No, your job is to make sure you're at the correct level of the spine
15 before doing any surgery on that disc, right?

16 A Yes.

17 Q All right. And it's completely within your hands, correct?

18 A Correct.

19 Q And what you do in this case -- let's read into procedure. It says, you
20 know, that patient was taken the operating room. He's positioned face down,
21 correct?

22 A Yes.

23 Q And says localizing fluoroscopic X-rays done. So you had a C arm to
24 do the fluoroscopic X-rays, right?

25 A Yes.

1 Q And you got an X-ray technician in there with you?

2 A Yes.

3 Q And you can take as many images as you need to make sure you're at

4 the correct level before performing the actual, you know, cutting into a disc, right?

5 A Correct.

6 Q There was no trouble with the equipment that day, correct?

7 A No.

8 Q And it says no permanent X-rays were ordered or taken and the

9 surgeon, Dr. Capanna, interpreted all of the fluoroscopic images. So you're the only

10 one who looked at them to make the determination where to do the surgery, right?

11 A Yes, if there's a question or a problem, sometime we ask the radiologist

12 to come in and see what they think, but yes --

13 Q Right.

14 A -- in his --

15 Q You didn't do that in Beau's case?

16 A His -- no, his case was straightforward.

17 Q You've done a wrong level microdiscectomy surgery on people before,

18 correct? Not just Beau, other people.

19 A Yes.

20 Q Yeah. And that's below the standard the care, isn't it, if you do a

21 microdiscectomy on an incorrect level?

22 A It's a known, recognized complication as three witnesses have already

23 told you.

24 Q So it's a -- what does that mean?

25 A It --

1 Q That it's okay for you to do that?

2 A Didn't say it's okay, of course not. I'm a doctor. It's -- it happens.

3 Q Yeah, because you agree that the Hippocratic Oath, the first one is to

4 do no harm, correct?

5 A The objective is to minimize the risk for the patient so if you're going to

6 do something, I always use the standard if I wouldn't do it on myself or my family, I

7 won't do it on a patient. So if I'm recommending it to them, I think it's the least likely

8 to hurt them and the most likely to make them better.

9 Q No, but the first -- the Hippocratic Oath is to first to do no harm, correct?

10 That's oath you take as a surgeon.

11 A Yes.

12 Q And you agree when you do surgery at an incorrect level the spine, you

13 cause harm?

14 A Yes.

15 Q And you -- you're not trying to suggest to this jury that if you do surgery

16 at an incorrect level, you're not below the standard of care; you're not saying that,

17 are you?

18 A No, it's an accepted complication.

19 Q So every --

20 A And known to occur --

21 Q So Beau Orth accepted that you were going to do surgery at the wrong

22 level of the spine. Are you saying that?

23 A No --

24 Q And that's within the standard of care. Is that your testimony?

25 A You had three other spine surgeons tell --

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1 Q I'm just asking is that your testimony?

2 THE COURT: Well, hold on. Let him finish the answer, please.

3 MR. LAURIA: Let him answer.

4 THE WITNESS: You had three other spine surgeons tell you that it happens.

5 One of them said it happened to him a couple times or whatever. So it's a known

6 thing that happens and it's not considered, you know, malpractice or whatever you

7 want to call it.

8 BY MR. PRINCE:

9 Q It's not?

10 A No.

11 Q It's within the standard of care to operate at the wrong level of the

12 spine. Is that how you want to leave that?

13 A Yes, absolutely. We don't want to do that obviously, but it's -- it

14 happens.

15 Q Okay. Now, in this case you have Beau there, he's under anesthesia,

16 he's laying face down. He's obviously under general anesthesia, right?

17 A Yes.

18 Q And you have the fluoroscope there and that's how you identify the

19 correct level of the spine, correct?

20 A Yes.

21 Q And you use a Sharpie or marker and you kind of mark where you want

22 to make the incision, correct?

23 A Well we use a probe first and needles and then ultimately make a mark

24 when you figured out where should you be going.

25 Q Right, and so you -- that's before you make any incision you use a --

1 you know, you try to mark it and you try to find where you think the correct level --

2 A Correct.

3 Q -- is, correct?

4 A Yes.

5 Q That's completely within your control, correct?

6 A Yes.

7 Q And that's before you even make an incision, correct?

8 A Yes.

9 Q So you mark it with a Sharpie. And then after that then you would make
10 the incision and proceed to the operative field and retract all of the tissue, correct?

11 A Yes.

12 Q And after you mark it with a Sharpie, then you kind of feel with your
13 hand to identify where you want to go on the spine, right?

14 A I --

15 Q That's what you do.

16 A I feel before we even start X-raying.

17 Q And after, right?

18 A Yes, we try to make --

19 Q And that's how you determine where -- what level you're going to be at
20 is by feeling with your hand, correct?

21 A No, it's the fluoroscope. Your hand, as somebody else said, could be
22 very inaccurate because people are different and their spaces are different, et
23 cetera. So we don't just rely on feeling them. It's one more factor.

24 Q Right. And when I asked you in your deposition, you told me, well you
25 can feel the bones that stick up through the spinous process, you can palpate them

1 too and that's how you find the right level. That's what you told me in your
2 deposition. I can show it to you if you want me to.

3 A I believe you. That's -- we do that too, yes.

4 Q All right. And you had no problem visualizing Beau's spine with the
5 fluoroscope, correct?

6 A No.

7 Q And you agree that after you make an incision and you expose the
8 level, meaning the level of the spine where you want to do the surgery, sometimes
9 you bring the fluoroscope back in to check it if you're unsure, correct?

10 A Yes.

11 Q And you agree that in this case after you made the incision, you did not
12 have to turn the fluoroscope back on for any reason in Beau's case, correct?

13 A Yes.

14 Q And you have no personal practice of how many times you count the
15 levels before making, you know, the incision and exposing the field where you want
16 to do the surgery, correct?

17 A Whatever it takes. Sometimes it's a lot.

18 Q Yeah, sometimes it's many, sometimes only a time or two, correct?

19 A Depends, you know, what we see.

20 Q Right. And you agree that the standard of care does in fact require you
21 to perform surgery at the correct level, correct?

22 A Yes, we went through that.

23 Q And you understand in Beau's case that unless you're certain that
24 you're at the correct level, you should not perform any surgery on his spine, correct?

25 A Yes.

1 Q Now, you agree that if you get down -- you expose the area where you
2 want to do the surgery and you do not find the disc that you thought was there and
3 you're wondering why, you should bring back the fluoroscope to make sure you're at
4 the correct level, correct?

5 A We do that, yes.

6 Q Right. In fact that's required, isn't it?

7 A Not required. You're the surgeon, like you said, the captain. You try to
8 figure out what you have to do.

9 Q Well, you agree that patient safety is your top priority in the operative
10 (sic) room, correct?

11 A No, minimizing risk is the top priority.

12 Q Okay. If you can look at page 16 of your deposition.

13 MR. PRINCE: Page 16, lines 13 through 15. Page 16. You there? Yeah.

14 Q The question I asked of you was: Isn't it true, Dr. Capanna, that patient
15 safety is your top priority as a neurosurgeon. What'd you answer?

16 A Yes.

17 Q Now, I want to use --

18 MR. PRINCE: Go to 57, please, of Exhibit Number 1. And kind of going
19 down to the bottom paragraph.

20 Q You agree you had the microscope on at UMC, correct? When you're
21 were in the OR with Beau?

22 A Yes.

23 Q No -- and it's a high-powered microscope, correct?

24 A Yes.

25 Q It's a very small visual field with that microscope, correct, with the -- you

1 know, the high-intensity light source?

2 A Yes.

3 Q And -- so when you go in there, you -- after you make your incision, you
4 expose the field, now you're looking through the -- you know, we showed that image
5 up there --

6 A Oculus, yes.

7 Q -- through the microscope and you're looking down into the -- where you
8 want to do the procedure, correct?

9 A Yes.

10 Q And it says using the microscope on maximum power, we opened the
11 yellow ligament. Are you talking about the ligament (sic throughout) flavum?

12 A Yes (indiscernible) --

13 Q And the ligament flavum would be -- that's this yellow -- oops. This
14 yellow piece that's right behind the L5-S1 disc space, right?

15 A Yes.

16 Q In fact, it's -- the ligament is right behind every disc, correct?

17 A Goes up and down the entire spine.

18 Q Right.

19 MR. PRINCE: Want to -- want to show something. Okay. Demonstrative 36.
20 Okay.

21 BY MR. PRINCE:

22 Q It's kind of a -- you know, the spine and you can see the vertebral
23 bodies, the discs. What I want to show you is it says the ligamentum flavum. Do
24 you see that there, Dr. Capanna?

25 A Yes.

1 Q Ligamentum flavum. And, you know, the ligamentum flavum is -- you
2 know, sits in between the two lamina for each level, correct?

3 A Yes.

4 Q And it's directly behind the disc space, correct, where you want to do
5 the surgery?

6 A No, it's directly behind the spinal canal, not the disc space.

7 Q Oh -- okay, all right. Here's the spinal canal after the disc and then
8 here's the ligament, correct?

9 A Yes.

10 Q And what you do is you're taking down the -- you know, the ligamentum
11 flavum, going through the canal to get to the disc, correct?

12 A Yes.

13 Q Okay. And so when you say you -- going back to 57. Says you -- you
14 opened the yellow ligament. That means you removed the ligament at the --
15 between the L5 -- the L5-S1 disc level, correct?

16 A Not all of it. Some of it, yes.

17 Q Right. You created a defect in it, according to your note, correct?

18 A Yes.

19 Q You're the only one who's ever saw that. No one else agrees with that,
20 right? No one else see -- saw on imaging or otherwise that there -- removed
21 apportionment -- portion of the ligament at the L5-S1 level, correct?

22 A If you remove just a little bit, it's very hard to see, that's correct.

23 Q Well Dr. Cash was in there and he had the same microscope you did.
24 He didn't see it, did he?

25 A Well, I don't know that he had the same microscope, but he didn't see it

1 he said.

2 Q All right. And it says the nerve was tight in the preforaminal area and
3 indented by the disc. That means it was paracentral, correct?

4 A It means it's just before the hole that it goes out of the --

5 Q Right.

6 A -- preforaminal.

7 Q Mean it wasn't -- didn't go into the foramen and out of the foramen
8 laterally, correct?

9 A Correct.

10 MR. PRINCE: If we can have 38, please? Demonstrative 38.

11 Q And you agree -- you know, here's the L4-5 disc and here's the L5-S1
12 disc. And you agree that the nerve root which exits the L4-5 disc space is the L4
13 nerve root, correct?

14 A I can't see what you're pointing to.

15 Q It's on your screen.

16 A But you're pointing over there.

17 THE COURT: Well but you're pointing on the other screen.

18 MR. PRINCE: Oh I'm sorry.

19 MR. LAURIA: Yeah.

20 MR. PRINCE: Well here let me just go back --

21 THE COURT: So hold on, hold on. I'll -- okay, are you talking here?

22 MR. PRINCE: That's fine.

23 THE COURT: Or the other side?

24 MR. PRINCE: Yeah, it doesn't matter, it's fine.

25 BY MR. PRINCE:

1 Q Right. The -- that -- or according to this, the L4 nerve is the one that
2 exit outs (sic) the little hole, the foramen, at the L4-5 level, correct?

3 A Yes.

4 Q And you agree that L5-S1, the nerve root which exits out above --
5 branches off above the disc space, is the L5 nerve root, correct?

6 A Yes.

7 Q And so when we're talking in this case, you said preforaminal, that's --
8 the foramen is out here where that nerve exits, right? Where it branches off out in
9 that area, that's -- the foramen's out there, correct? This is the foramen, this little
10 hole.

11 A No, that drawing the Judge made is wrong.

12 THE COURT: Oh, I'm sorry.

13 BY MR. PRINCE:

14 Q All right. This is the foramen right there, correct?

15 THE COURT: Why don't you -- you know, make it easier on you. Why don't
16 you step down, Dr. Capanna, while --

17 THE WITNESS: Yes, I was going to ask you if I could do that.

18 THE COURT: -- Mr. Prince is trying to --

19 MR. PRINCE: Yeah. That's fine.

20 BY MR. PRINCE:

21 Q Yeah, step down. So you agree that this is the L4 nerve root which
22 branches off before the L5-S1 -- excuse me, the L4-5 disc, correct?

23 A Yes.

24 Q And this is the L5 nerve which branches off before the L5-S1 disc,
25 correct?

1 A Yes.

2 Q And --

3 MR. PRINCE: Peter, can you annotate it with our disc?

4 Q And in Beau's case, he had a paracentral disc which would be

5 impacting the S1 nerve root, correct?

6 A Yes.

7 Q It would not be out here laterally where the L5 nerve root exits, correct?

8 A This is a drawing that's not entirely accurate. Basically you have a big

9 curve in your spine as well as you pointed out earlier, and the nerves aren't

10 necessarily just lying like this especially if something's there with it and he had a lot

11 of degeneration in his facet joints and the hole is further over there and the nerve

12 was right next to it.

13 Q Yeah. And so but you're saying that he had an L5-S1 disc herniation

14 which would be down here, correct? Be down here. You have an L5-S1 disc

15 herniation right -- there's the L5-S1 disc, correct?

16 A Yeah, the whole thing's (indiscernible) --

17 Q Right, he had a paracentral disc -- right there. Okay. And so that would

18 affect -- that was affecting the S1 nerve root, correct?

19 A Yes.

20 Q He had -- did not have a lateral disc protrusion, correct?

21 MR. LAURIA: Been asked --

22 A No, he did not. It was --

23 Q Okay.

24 A -- strict lateral --

25 Q All right.

1 A -- herniation --

2 Q And so --

3 MR. PRINCE: Go to Bate number -- back at 57, please.

4 Q And even when you went in there -- when it says the nerve was tight in

5 the preforaminal area and indented by the disc, you're commenting that the disc

6 when you saw it in the operative field was paracentral, correct, not lateral? That's

7 what you're documenting.

8 A Well --

9 Q Yes?

10 A -- by definition, if you're at the foraminal area, you're lateral, not -- you

11 know, you're --

12 Q You're not lateral?

13 A -- you're not central. You're lateral --

14 Q Right, it's central.

15 A -- just before you went -- you're not central, no, central's in the middle.

16 Q Right, it's paracentral.

17 A Okay, paracentral.

18 Q Just off the midline.

19 A No, was more than off the midline a little bit, yes.

20 Q Okay. When you say preforaminal, you're talking about paracentral,

21 right?

22 A It was pinched between the facet joint and the disc space itself so it's

23 right there at the foramina to go out.

24 Q Okay. And you then Bate 50 --

25 MR. PRINCE: Peter, just go ahead down all the way to the end.

1 Q And then you -- after you did -- removed the portion of the ligament, you
2 did a laminotomy at L5-S1, correct?

3 MR. PRINCE: No, go back to the other page, Peter. Fifty-seven. Last
4 paragraph.

5 MR. LAURIA: I'm sorry, I'm lost, Judge. What's the question?

6 THE WITNESS: So am I. I don't know where you are.

7 THE COURT: I'm not -- go ahead.

8 BY MR. PRINCE:

9 Q We're on page 57.

10 A Yeah, I'm on 57 --

11 Q Last paragraph.

12 A Yes.

13 Q You there?

14 A Yes.

15 Q Okay. And it says we then did a laminotomy at the L5-S1 level. Do you
16 see that?

17 A Yes.

18 Q That means you removed lamina at the L5-S1 level, correct?

19 A Because it means you made it a little wider where the bones are, yes.

20 Q Right, you removed a portion of the bone, correct?

21 A Yes.

22 Q At the superior portion of the L5 -- excuse me, the inferior portion of the
23 L5 lamina, correct?

24 A Yes.

25 Q Meaning that -- inferior meaning down below, correct?

1 A Yes.

2 Q Superior means up above, right?

3 A Correct.

4 Q And if you're doing a laminotomy at L5-S1 and this accurate, it would
5 have to be the inferior portion which would be the closest to the L5-S1 disc space,
6 correct?

7 A You --

8 Q That's what your talking about.

9 A You can open both of them up if you're angling to get there. So you
10 take a little off each one.

11 Q All right. And -- okay. And so next you then do -- let's go to page 58.
12 And says -- the lateral edge says there was a disc fragment under the root. You
13 mean the nerve root, correct?

14 A Yes.

15 Q Would have to be the S1 nerve root at that point.

16 A Yes.

17 Q And against the vertebral body, correct?

18 A Yes.

19 Q And says multiple fragments were removed and the disc space -- and
20 the disc space entered and then did a discectomy. What you're saying there is you
21 actually made an incision into the disc space, put in a device and started removing
22 disc material, correct?

23 A Well in his case, we didn't have to make an incision. He had a fragment
24 out there and when we moved the nerve, we took that out, and then there were
25 multiple little fragments below there. And then there were some loose ones in the

1 disc space. Originally with microdisc you took the fragment out and that was it.
2 Now we realize you can get recurrent herniations out of there if there are loose
3 fragments so you take any little loose ones out of there. Now some people go in
4 and take out all of that soft stuff that they were showing there, the nucleus pat of the
5 disc --

6 Q And it says here multiple fragments removed and the disc entered and
7 then did a discectomy. You actually entered the disc, the L5-S1 disc, correct?

8 A Yes, you're right on the annulus, the tripart (phonetic), put a little
9 instrument in there and see if anything else is loose.

10 Q No, you actually -- you had to make an incision into the disc to get it
11 because this is a -- this was a contained disc protrusion, correct? You had to make
12 an incision into the disc.

13 A It was a bulge disc and it was right when we got there. We didn't have
14 to make an incision to take fragments out. And then we entered the disc after that.

15 Q Okay, but did you enter the disc at L5-S1, yes or no?

16 A Yes.

17 Q Okay. So you put a device in the disc at L5-S1 and you started
18 removing disc material, correct?

19 A Yes, usually in a case like his we use a very small, tiny, couple
20 millimeter Kerrison probe it's called and you pull it out with that.

21 Q Right, and you had to make an incision to gain access to the disc in
22 order to put the -- the instrument in there to start removing disc material, correct?

23 MR. LAURIA: Objection.

24 Q L5-S1.

25 MR. LAURIA: Asked and answered three times now.

1 THE COURT: I -- well, are you saying the disc space was already open for
2 insertion --

3 THE WITNESS: Yeah from the disc fragment so you just --

4 THE COURT: Okay.

5 THE WITNESS: -- followed it in. Sometime you have to open it, yes, you're
6 correct --

7 BY MR. PRINCE:

8 Q Oh, so you didn't open this disc space? You didn't open this? L5-S1.
9 Is that your testimony you did not make an incision to open the disc at L5-S1. Is that
10 your testimony?

11 A Yes, that's correct.

12 Q Okay. And it's your testimony there's nowhere in this surgical record
13 where you document that you're having any difficulty getting to the disc protrusion in
14 Beau's case, correct?

15 A Correct.

16 Q You didn't -- you never documented that you needed to go up into the
17 L4-5 space in order to come down to get into the L5-S1 space in order to get that
18 disc, right? You did not document that, did you?

19 A No.

20 Q And you're saying that's only through inadvertence, correct? That you
21 didn't dictate that.

22 A Yes.

23 Q And it's your testimony that you did not -- you were not in the -- you did
24 not enter the L4-5 disc space, correct? That's your testimony.

25 A I don't believe so, but we heard it.

1 Q Okay. Now, you did not dictate that you removed any portion of the
2 ligament at L4-5, correct?

3 A Correct.

4 Q If someone -- if someone's removing a portion of the ligament flavum at
5 L4-5, that would be a significant event during a spine surgery, correct?

6 A Yes, sir.

7 Q Similarly, if you removed any portion of the L4 lamina or a portion of the
8 L5 superior lamina, that would be a -- a significant event during a lumbar spine
9 surgery, correct?

10 A Correct.

11 Q And you did not document that, did you?

12 A No.

13 Q Now, following the surgery you reviewed the MRI report, correct? Yes?

14 A Which one?

15 Q The -- oh, I'm sorry, the October 6th, 2010 one.

16 A Yes.

17 MR. PRINCE: That's Bate number 232 of Exhibit 5. And the -- under the
18 findings status post.

19 Q And here this -- this particular doctor, Dr. Kuo, the radiologist, he says
20 status post L4 laminectomy. You disagree with that, correct?

21 A (No audible response.)

22 Q Correct?

23 A Yes --

24 Q Okay.

25 A -- the L4 part, yes.

1 Q Yeah. And -- because in your deposition you said you did laminotomy
2 at the inferior part of L5, not L4, correct? That's what you told us.

3 A Superior part of L5. We went above it.

4 Q Okay. Page 80 of your deposition, please.

5 MR. HELLMAN: What page number?

6 MR. PRINCE: Page 80, starting at line 4, down to line 13.

7 BY MR. PRINCE:

8 Q Question by me: Did you do a laminotomy at L4-5, yes or no?

9 I just had a little portion of the inferior part, not a whole laminotomy, no.

10 So did you do a laminotomy?

11 MR. LAURIA: Excuse me, Your Honor. Can we --

12 Q Mr. Lauria objects.

13 MR. LAURIA: Can we -- excuse me.

14 MR. PRINCE: What's the issue?

15 MR. LAURIA: The issue is if there's an objection, you're not supposed to
16 show the document --

17 MR. PRINCE: (Indiscernible) --

18 MR. LAURIA: -- to the jury until the objection's ruled upon.

19 THE COURT: All right, take --

20 MR. LAURIA: I think --

21 THE COURT: -- take the document down.

22 MR. LAURIA: -- that's how we're supposed to do this.

23 [Bench conference begins at 4:34 p.m.]

24 THE COURT: -- the objection.

25 MR. PRINCE: There's no objection.

1 MR. LAURIA: There's an objection that the question as it was phrased was
2 argumentative, so the appropriate way to do this I think, Judge, is to say I'm going to
3 read these pages, is there an objection, and then you do -- you don't put it up there
4 and ignore it. There's a reason the objection's made for the record.

5 THE COURT: Let me see the --

6 MR. PRINCE: So the question is so did you do a laminotomy?

7 THE COURT: All right.

8 MR. PRINCE: That's the question.

9 THE COURT: Hang on, let me --

10 MR. LAURIA: No, that's --

11 THE COURT: -- let me see it so I can see it.

12 Thank you. Got a smart one here.

13 MR. LAURIA: So you can see it in context here.

14 THE COURT: Yeah, I got -- I'll check it on this one.

15 MR. LAURIA: Yeah. Thanks.

16 MR. PRINCE: I don't like Mr. -- Mr. Lauria always interjects, Your Honor,
17 while I'm speaking. Let me finish my question --

18 MR. LAURIA: Well, you're --

19 MR. PRINCE: -- before showing --

20 MR. LAURIA: -- you're not supposed to show --

21 MR. PRINCE: Excuse me please.

22 MR. LAURIA: -- testimony when there's an objection --

23 MR. PRINCE: Well --

24 MR. LAURIA: -- unless the objection has been ruled upon and you know that,
25 counsel.

1 MR. PRINCE: That's not true. You're just -- it's a frivolous objection anyway.
2 THE COURT: Well, you can -- you can show it, you can follow up.
3 MR. PRINCE: Thank you.
4 THE COURT: It's okay.
5 MR. LAURIA: Can we get (indiscernible/break in audio) objections now are
6 we supposed to have ruling or?
7 THE COURT: Look the reality is -- well, let's just move forward --
8 MR. LAURIA: Okay. Thanks Judge.
9 THE COURT: -- and finish up for today.
10 [Bench conference ends 4:35 p.m.]
11 THE COURT: All right, you can continue on, Mr. Prince.
12 MR. PRINCE: Okay.
13 BY MR. PRINCE:
14 Q And -- I'll move this back so you can see, Doctor, also. Okay. And the
15 question -- you said you didn't do any laminotomy at L4-5. Remember you just
16 answered my question regarding that. And that's -- right? Remember that?
17 A I said we did a laminotomy at the superior part of L5 which is at the
18 L4-5 space.
19 Q Okay. Okay. The question I asked you was -- to start this was you did
20 not do a laminotomy at L4-5, correct? That was your -- that was what I initially
21 asked you.
22 THE COURT: Talking about here in court or at the --
23 MR. PRINCE: Yeah, yeah, just a minute ago.
24 THE COURT: Okay. Thank you.
25 THE WITNESS: Did a superior laminotomy at L5 which is at L4-5 --

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1 MR. PRINCE: Okay.

2 THE WITNESS: -- on the superior part.

3 BY MR. PRINCE:

4 Q Okay. So we -- let's talk about that. So the superior part of L5 just so

5 we're -- you and I are clear, the superior part of L5 would be up here, correct?

6 A No, you're showing the midline and the lamina angles down and goes

7 across where the vertebral body is. It's not there.

8 Q It's like in this area. It be more up here than down here, correct?

9 Superior is up here.

10 A But where the L5 --

11 THE COURT: You can step down, Doctor, if you want.

12 THE WITNESS: Okay.

13 MR. PRINCE: But no, I don't -- I'm not asking to --

14 MR. LAURIA: Well --

15 MR. PRINCE: -- necessarily step down, Judge. I'm just --

16 THE COURT: Well, but I want him to step down so we get this answered

17 quickly and keep moving, as opposed --

18 MR. PRINCE: Okay.

19 THE COURT: -- to you keeping pointing and --

20 BY MR. PRINCE:

21 Q The superior part of L5 is up here, correct?

22 A A little lower than that, yes.

23 Q Right about here?

24 A Approximately, yes.

25 Q Okay. So about the -- about the top third of the disc.

1 A Depends --

2 Q Or the vertebral body kind of angled like in this fashion.

3 A Yeah, and it's -- everybody varies so it can be different.

4 Q Okay. But -- and the inferior portion would be down here, right? As it

5 kind of comes down be kind of like down here.

6 A And be lower than that.

7 Q Be lower. Superior up here, inferior down here, right?

8 A Your superior's too high because you're going up to L4. It's spinous

9 process what it attaches to so it's much lower than that.

10 Q Okay. Is kind of looking at the lateral part of it. You agree that this right

11 here, that is the L5 lamina? That is, right? This part.

12 A (Indiscernible) show you --

13 Q No, I'm just asking you a question.

14 MR. LAURIA: Well --

15 Q Is this --

16 MR. LAURIA: -- Judge --

17 Q -- the L5 lamina right there?

18 A Yes.

19 Q And that's the L4 lamina right there, correct?

20 A Yes.

21 Q Okay. And so when you're talking about the L5 lamina, the superior

22 part would be up here and the inferior part would be down below, correct?

23 A Yes, but if you -- if you look where the nerve root is, it's --

24 THE COURT RECORDER: I'm sorry, I can't hear him.

25 THE WITNESS: They're different in different people, like this is all

1 (indiscernible) --

2 BY MR. PRINCE:

3 Q But the question I only have is you said the superior part is up here --

4 A Yes, that's correct.

5 Q -- inferior part of the lamina --

6 A Right.

7 Q -- is down here.

8 A Yes.

9 Q Okay. Now, you said you did a laminotomy at L5, the superior part,
10 correct?

11 A Yes.

12 Q Okay. You did no laminotomy that -- the inferior part of L4 according to
13 your testimony, correct?

14 A Correct.

15 Q Okay. Now, let's got to page 80 of your deposition, starting at line 4.

16 MR. PRINCE: Okay. Right there.

17 Q Question: Did you do a laminotomy at L4-5, yes or no.

18 I just had a little portion of the inferior part, not a whole laminotomy, no.

19 So did you do a laminotomy?

20 I just answered it twice.

21 A It should --

22 Q It's the same answer. We did part of laminotomy, the inferior part of --
23 at L5, not at L4. Do you see that?

24 A It should be saying superior part.

25 Q Well -- okay.

1 MR. LAURIA: Objection, Your Honor.

2 Q That's where --

3 THE COURT: Well --

4 MR. LAURIA: Again I would ask that we read the portion above that because

5 it's misleading as --

6 THE COURT: I'll allow you to cross-examine.

7 MR. LAURIA: Thank you.

8 THE COURT: Thank you.

9 BY MR. PRINCE:

10 Q You said the inferior part of L5, correct?

11 A Yes, but it should --

12 Q Which would be down --

13 A -- should be the superior part, yes.

14 Q Okay. But you're saying you didn't do any laminotomy at L4, correct?

15 A We didn't do any laminotomy of L4, correct.

16 Q And obviously the radiologist saw it differently, correct?

17 A (No audible response.)

18 Q Correct?

19 MR. PRINCE: Where's my expert binder?

20 THE COURT: Just so we're clear, which radiology report are you referring to,

21 which doctor?

22 MR. PRINCE: I'm sorry?

23 THE COURT: Which radiology report are you referring to --

24 BY MR. PRINCE:

25 Q In the October 6th, 2010 radiology report, Dr. Kuo says you -- there was

1 a L4 laminectomy. So you disagree with that finding, correct?

2 A Yes.

3 Q Okay.

4 A And when they're doing that, they're not talking about you took this part
5 of the bone off or that part of the bone. They're trying to localize what level you
6 were at.

7 Q Okay. And so -- so then going back to your report, you then remove --
8 you know, remove the disc and that's -- correct? And that's how you finished the
9 surgery, correct? So you documented a classic L5-S1 microdiscectomy, correct?

10 A Yes.

11 Q Now, you know Dr. Reynold Rimoldi, correct?

12 A Yes.

13 Q And he is one of your --

14 MR. LAURIA: Can we approach, Your Honor?

15 Q -- experts in this case, correct?

16 THE COURT: Yes, you can approach.

17 MR. LAURIA: Thank you.

18 [Bench conference begins at 4:41 p.m.]

19 MR. LAURIA: He's going to pull out an expert report of Dr. Rimoldi and I don't
20 see how -- it's not admitted. He objected to their admission. We stipulated they're
21 not admissible (sic). So why is he going to use an expert report of Dr. Rimoldi to
22 question this doctor?

23 MR. PRINCE: Because it's --

24 THE COURT: Well I -- I'm assuming --

25 MR. PRINCE: -- you know, he disagrees -- I'm not going to show it --

1 THE COURT: -- he's got a question to ask him.

2 MR. PRINCE: Yeah.

3 MR. LAURIA: Well, how can he -- how can he -- it's not an admissible report,

4 so --

5 THE COURT: Well --

6 MR. PRINCE: Well -- well he --

7 THE COURT: Well the --

8 MR. PRINCE: -- they questioned all the time about the reports.

9 THE COURT: Hold on, hold on, hold on. The fact that a document's not

10 admissible doesn't mean people can't ask questions.

11 MR. LAURIA: Well, you can't take -- you can ask are you familiar with what's

12 written in the report --

13 THE COURT: Okay.

14 MR. LAURIA: -- but you can't lead the question to be the report says blah

15 blah blah blah blah blah, you agree, right, which is how he's doing it, so --

16 MR. PRINCE: I haven't done anything.

17 THE COURT: Okay. Well the report is Dr. Rimoldi's opinions.

18 MR. PRINCE: Right.

19 THE COURT: Okay. So I mean, if you're asking a question you know that Dr.

20 Rimoldi has opined that dah dah dah dah dah in his report, then it's --

21 MR. LAURIA: And what if he says no, I don't know what he says?

22 THE COURT: Well then it's --

23 MR. PRINCE: Well I'm going to show it to him.

24 THE COURT: -- then it's no.

25 MR. PRINCE: Well I'll show it to him.

1 MR. LAURIA: Well it's not admissible. What does it -- he --

2 THE COURT: Well but you -- it doesn't have to be admissible to refresh
3 recollections, to impeach witnesses --

4 MR. PRINCE: Right.

5 THE COURT: -- to talk to them about it. I mean the fact that something gets
6 admitted --

7 MR. LAURIA: Sure.

8 THE COURT: -- and goes to the jury is completely separate from how
9 questions get asked during trial.

10 MR. LAURIA: I'm not disagreeing, but if the document's not coming in and if
11 we don't have any testimony on it, why's he questioning this witness about it?

12 THE COURT: Well I think he's still entitled to ask him the --

13 MR. LAURIA: All right.

14 THE COURT: I'm going to -- we got to get through the questions first.

15 MR. LAURIA: All right.

16 THE COURT: Go ahead.

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

18 BY MR. PRINCE:

19 Q Dr. Capanna, you -- you know during this litigation your lawyers had
20 requested that Beau be seen by another orthopedic spine surgeon who you know in
21 town by the name of Reynold Rimoldi, correct?

22 A Yes, I was told that.

23 Q And you've read Dr. Rimoldi's report, correct?

24 A Yes.

25 Q And you agree that Dr. Rimoldi, who is a -- someone hired by your

1 counsel, indicated that you performed surgery at the wrong level at L4-5 and not
2 L5-S1, correct? You know that?

3 A Yes.

4 Q And you obviously disagree with your own expert, right?

5 A Yes.

6 Q And he also indicated that there was an L4-5 laminotomy, correct?

7 A Yes.

8 Q And there was no laminotomy at L5-S1 which would be opposite of
9 what you just testified to, correct?

10 A Yes.

11 Q And so you disagree with him, as well as the radiologist as well,
12 correct?

13 A Yes.

14 Q And you disagree with Dr. Cash that there was surgery into -- evidence
15 of surgery into the L4-5 disc level? You disagree with that?

16 A No.

17 Q You don't -- okay. And you disagree with Dr. Cash that there was no
18 laminotomy at L5 near the L5-S1 disc?

19 A Yes.

20 Q And you disagree that that L5-S1 disc was virgin in tissue, meaning that
21 there was no evidence of prior surgery?

22 A Yes.

23 Q Okay. So therefore you must disagree with Dr. Belzberg that there was
24 no clear evidence of surgery also at the L5-S1 disc level? And that's -- you have to
25 disagree with that then too, right?

1 A He said there was.

2 Q There was?

3 A Yes.

4 Q Okay. Now, so following the surgery you go out and you tell Beau's dad

5 everything went great, correct? No complications, no problems.

6 A I don't know if I said everything went great, but I tell him that everything

7 went okay.

8 Q Okay. And you didn't tell him about any complications, correct?

9 A No, sir.

10 Q You didn't tell him about any difficulties you had with the surgery,

11 correct?

12 A No, sir.

13 Q You did or you didn't?

14 A I don't believe so, no.

15 Q Okay. Because you didn't think there was any problems, correct?

16 A No, sir.

17 Q You thought it was a successfully performed surgery, at least at that

18 time, right?

19 A Yes, sir.

20 Q Now, after the surgery, you saw Beau back in the office, correct?

21 A Yes.

22 Q The first time you saw him he -- no evidence of infection, correct?

23 A No.

24 Q Am I correct?

25 A Yes, you're correct.

1 Q Okay, I'm sorry. The no -- might have been a double negative. That's
2 why I'm just clarifying. And he reported that he still had some ongoing pain
3 complaints, correct?

4 A Can you tell me --

5 Q And some numbness.

6 A -- you're looking?

7 Q Yeah, no, he had -- he reported that he had some ongoing numbness,
8 right?

9 A Yes.

10 Q Okay. And but overall from at least at that standpoint, you thought he --
11 everything looked -- seemed fine?

12 A Yes, he was doing very well.

13 Q Okay. And then about a week later on October the 6th -- or actually the
14 night of October 5th you get a call on your service late at night that Beau is in
15 extreme pain, correct?

16 A Yes, I called him back.

17 Q Okay. And at that -- then you worked him in the next day, correct?

18 A I met him at the office, yes.

19 Q Met him at the office and let's talk about that. It's Exhibit Number 1,
20 Bate number 10.

21 Okay, before I go -- ask you that, I'm going to ask you about your
22 October 6th note. But just for the record, isn't it -- it's your testimony that you
23 performed no discectomy at all at L4-5, correct?

24 A Correct.

25 Q And when you see Beau on October the 6th, Beau was in extreme pain,

1 right?

2 A Yes.

3 Q Hurt to urinate?

4 A Correct.

5 Q Hurt to have a bowel movement, correct?

6 A Yes.

7 Q He -- the wound -- it says no rubor or calor. What does that mean?

8 A It means no redness or no heat when you touch it.

9 Q And says there is spasm left paraspinal L4-5 to S-1. So now he has
10 actually his muscles are tight and you can actually feel the knots or the contraction
11 of the muscle at the L4-5 to S1 region, correct?

12 A Yes.

13 Q I might have just asked this but I forgotten, but -- there is no sign of
14 infection at that point, correct?

15 A No.

16 Q And so you gave him some pain mediation. You gave him a -- some
17 kind of a dose pack which would be a steroid, right?

18 A Correct.

19 Q And you told him to go have an MRI, correct?

20 A Yes.

21 Q And Beau followed your direction and went and had that MRI the
22 following day, correct?

23 A Yes.

24 Q The same day, I think. You saw him October 6th. He went to Steinberg
25 on October 6th, right?

1 A Yes, that's correct.

2 Q Okay. And you agree that that was a significant change in Beau's

3 condition from what he was preoperatively, correct?

4 A And postoperatively.

5 Q And post-op, right.

6 A Yes.

7 Q He had a dramatic worsening, correct?

8 A Yes.

9 Q And -- so let's talk about the MRI of October the 6th for a minute. You

10 ordered it with and without contrast, correct?

11 A I don't recall to be honest with -- probably, yes.

12 Q Well your note says with and without.

13 A Okay.

14 Q Well it's Bate number 10 if you can just look at it, just verify --

15 A I'm sorry, where?

16 Q Bate number 10. I'm putting it back up there.

17 A Okay.

18 Q It says MRI W ampersand --

19 A Yeah, correct.

20 Q -- without.

21 A Yes, you're right.

22 Q So with and without contrast dye?

23 A Correct.

24 Q Okay. That's so you can make sure that, you know, you get a good

25 visualization of what's going on with Beau, correct?

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1 A Well and it helps you differentiate if it's an infection or not. If you don't
2 do the contrast part, then it's hard to know if you're just seeing inflammation or an
3 infection.

4 Q All right. And you --

5 A It's not a hundred percent but it helps.

6 Q You agree that when you make an incision into somebody and go into
7 their spine, retract their -- the muscles, the fascia, the tissue, you're always going to
8 have some swelling, some edema, every time, every patient?

9 A Yes. To a degree --

10 Q That's common. Right?

11 A Yes.

12 Q And expected. Right?

13 A Yes.

14 Q Okay. And so you order the film and -- you get the film and it's
15 available to you to read by October the 7th, 2010, the very next day, correct?

16 A Yes.

17 Q And you read the film twice, correct?

18 A Yes, I (indiscernible) --

19 Q And did you -- were you able to like log into Steinberg and like go -- you
20 know, use their service where you could kind of like get to the film and use the
21 viewing software?

22 A Yes.

23 Q Is that how you did it?

24 A Yes, I believe so.

25 Q And you agree that when you're looking at, you know, an MRI of the

1 spine, not every image is going to show a lot of clarity. There's only maybe a few
2 images that really give you a good depiction of what's going on, correct?

3 A Yes, you have to look at all of them to understand the thing.

4 Q Right. And so not every -- for example, the sagittal, which is the side
5 view we've been looking at, not everyone gives you a real accurate picture --
6 depiction of the anatomy, right?

7 A Correct.

8 Q You have to look at the ones that give you the -- kind of the most
9 accurate, you know, description of the anatomy, right?

10 A You have to look at all of them, as someone said yesterday, and put it
11 into three dimensions so you can understand what's going on.

12 Q Right. And what I want to do is I'm going to put up -- I'm going to scroll
13 through the October 6th, 2010 MRI and I want to scroll through the sagittal T2 view,
14 okay?

15 THE COURT: You're going to go through all the planes?

16 MR. PRINCE: Yeah, just for the -- just the sagittal. Yeah, I'm going to go
17 through it all. It's easy.

18 THE COURT: Okay.

19 MR. PRINCE: You there?

20 BY MR. PRINCE:

21 Q No, and this is the sagittal T2 view. Does this --

22 MR. PRINCE: What?

23 Q Image 1. Does that show you much information, Doctor?

24 A No.

25 Q How about image 2? Does it show you much information?

1 A No.

2 Q Image 3. Does that show you much information at that point?

3 A You can see a couple of nerve roots --

4 Q Yeah, the anatomy starting to come -- the spinal anatomy starting to

5 come into view now, right?

6 A Yes.

7 Q Four. This is image 4 of 15. Now the anatomy starting to come in a

8 little bit clearer view?

9 A Yes, you're looking at all the foramen now, the little holes with the

10 nerves in them --

11 Q Yeah.

12 A -- all up and down.

13 Q But the disc space aren't completely visualized at that point, correct?

14 A The side of them are beginning to be shown.

15 Q Right. Remember yesterday -- the reason I'm doing this remember

16 yesterday there was a question about whether you're showing all the cuts or the

17 accurate cuts? Remember those questions --

18 A Yes.

19 Q -- by your counsel yesterday?

20 A Yes.

21 Q All right. So image number 5, well you're starting to see with more, you

22 know, clarity the disc spaces. You can see those between the vertebral bodies with

23 the white, correct?

24 A Yes.

25 Q You don't -- the spinal canal is not easily shown there yet. It's slide 5 --

1 or image 5, right?

2 A Yes.

3 Q Now at image 6 still the discs are coming into better view and you start
4 to see some of the spinous process, but the canal is not, you know, completely
5 visualized yet, correct?

6 A Correct.

7 Q Slide number 7 the -- now you still see the discs, discs are coming into
8 better view, but the canal is not really completely opened up to its normal condition,
9 right?

10 A Correct.

11 Q Now we go 8. So now it's starting to come together a little bit more,
12 right?

13 A Yes.

14 Q Nine. See that?

15 A Yes.

16 Q Now that clearly now shows that there's some abnormality at the L4-5
17 disc space. There's a fragment outside of the disc, correct? You can see it.

18 A That's actually not a fragment, that's actually the reaction in scar tissue
19 as one of the experts pointed out.

20 Q No. No, you said that that's actually -- it would be too soon for scar to
21 form. You said -- you testified --

22 A No, it's enhancing tissues, beginning scar.

23 Q Right.

24 A That's what the radiologist --

25 Q There's some --

1 A -- said, too.

2 THE COURT: You guys can't talk over each other, please.

3 BY MR. PRINCE:

4 Q There's some problem -- there's some problem that wasn't there before,
5 now at L4-5, correct?

6 A Definitely.

7 Q And now you can see clear surgical track, you know, between the L4
8 and the L5 lamina directly behind the L4-5 disc, correct?

9 A Yes.

10 Q All right. And you had been able to clearly see that the day -- on
11 October 7th, the day after Beau came to you complaining of severe pain, correct?

12 A Yes.

13 Q Now -- and we're on image 10 now. Now you can even see that
14 fragment or abnormality even a little bit better outside of the L4-5 disc space,
15 correct?

16 MR. LAURIA: Well, it's compound, Judge. Is he asking about a fragment or
17 an abnormality?

18 THE COURT: I'll sustain the objection.

19 BY MR. PRINCE:

20 Q You see this fragment --

21 A Yes.

22 Q -- adjacent to the L4-5 disc space. Do you?

23 A Yes.

24 Q And there's still -- right there at the bottom of that -- at L5-S1, there's
25 still a protrusion there, isn't there?

1 A Yes.

2 Q Okay. And there's now clear this -- this white light right behind, you

3 know, the L4-5 disc, right by the fragment, that's clear evidence of surgical track,

4 correct?

5 A Yes.

6 Q And that would have been your surgical track, nobody else's, correct?

7 A Correct.

8 Q All right. And so this would have been available to you the first day on

9 October 7th, 2010, after Beau came to you in extreme pain with a change of clinical

10 condition, correct?

11 A Yes.

12 Q Now we go into image 11. Now you really can't see very well the spinal

13 canal, correct?

14 A Yes.

15 Q It's not -- image 11 is not as good as 10, correct?

16 A Correct.

17 Q And it's certainly not as good as nine, correct?

18 A Well nine's showing that you've operated here too as well, yes.

19 Q Okay. Yeah, so once we get into 11, that doesn't really give you much

20 diagnostic information, does it?

21 A No.

22 Q Certainly 12 doesn't give you much diagnostic information, correct?

23 A Correct.

24 Q Thirteen doesn't give you much diagnostic information at all given that

25 jumbled up mess, right?

1 A Correct.

2 Q Fourteen doesn't give you really anything now. Right?

3 A Yes.

4 Q And 15 doesn't either?

5 A Correct.

6 Q So the best cuts are 9 -- hang on. Number 9 and 10, correct? Don't

7 you agree?

8 A I thought 11 was okay too.

9 Q Okay.

10 MR. LAURIA: That's on the --

11 BY MR. PRINCE:

12 Q That's 11 so --

13 A No. The other way, I'm sorry.

14 Q So you thought -- 11's not a very good -- it's not -- doesn't show --

15 A No. Eight, nine and 10.

16 Q So 10, nine and 8?

17 A Yes.

18 Q Okay.

19 A And --

20 Q But --

21 A -- if you go back to eight --

22 Q No, I'm just -- I just want to -- terms of clarity. So if I've shown this jury

23 in my demonstrative slides cuts nine and 10, those are two of the best cuts of the

24 sagittal view of the October 6th, 2010 MRI films, even according to your own

25 testimony, right?