

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

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

vs.

BEAU R. ORTH,  
Respondent/Cross-Appellant.

Case No. 69935

District Court Case No. A648041

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

vs.

BEAU R. ORTH,  
Respondent.

Case No. 70227

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

**VOL. 8 PART 1**

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**RESPONDENT/CROSS-APPELLANT'S APPENDIX**

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1 they're automatically admissible, it's that they're not inadmissible as hearsay.

2 MR. LAURIA: So they are --

3 THE COURT: So then you have to establish -- and I've read this before, a  
4 case -- there's case law talking about, you know, not just that somebody relied upon  
5 them, because you can rely upon inadmissible stuff all the time.

6 MR. LAURIA: Sure.

7 THE COURT: But in order to admit them, I mean, some of the foundational  
8 things that they're talking about is establishing the reliability of the information  
9 contained in the treatise.

10 MR. LAURIA: And I did that --

11 THE COURT: It's not just I've read some papers and I'm relying upon them in  
12 my opinion.

13 MR. LAURIA: And I did that with Dr. Rimoldi. I said are these reliable  
14 authorities in the field of spine medicine and spine surgery on the issue presented  
15 here, which is the incidents of fusion of microdiscectomy? And he said as to each of  
16 these, yes, they are. So he's authenticated them as reliable authority, which is what  
17 the statute requires him to do. I've had this happen before, in fact, in a case with Mr.  
18 Prince where we had this issue and again, once the expert establishes them as  
19 reliable authority --

20 MR. PRINCE: That's actually --

21 MR. LAURIA: -- they're not hearsay and they're admissible.

22 MR. PRINCE: That's actually not correct, Judge. He's saying well just  
23 because you say it's reliable, therefore it's wholesale coming in. Not true. If you  
24 read carefully -- read --

25 [Colloquy between counsel]

1 THE COURT: I know, it refers to statements.

2 MR. PRINCE: It talks about statements, right, provisions, portions. Mr. Lauria  
3 didn't point out any of the articles. He just said hey, did you review them? Was that  
4 a basis for your opinion? He didn't -- wasn't particularized about any statement,  
5 portion thereof, of any article. So therefore he never established the relevancy other  
6 than a general relevancy that I looked at these and these generally say --

7 MS. TARMU: Studies.

8 MR. PRINCE: -- you know, or support my position on that you will typically not  
9 require a fusion following a successful one or multiple level microdiscectomy. So he  
10 never did anything consistent with the statute regarding a statement in any treatise,  
11 book, article, et cetera, which can come into evidence.

12 MR. LAURIA: Judge, the hearsay rule is all statements, right? We say a out of  
13 court statement. These are out -- the whole thing is an out of court statement. For  
14 him to argue I need to --

15 THE COURT: No, no, no. But the point of it is is that not everything within a  
16 treatise has anything to do with the issue at a particular case. Just because there's  
17 an article doesn't mean it is verbatim, word for word, applicable to the trial,  
18 everything in it. I think that's why it's talking about -- or use of the term statement is,  
19 when you're saying somebody -- I'm familiar with this study and it partly deals with  
20 an issue that's involved in this trial, and based upon that I have a opinion.

21 MR. LAURIA: Well, I don't think so, Judge.

22 THE COURT: Most of these are all just kind of abstracts though, I think.

23 MR. LAURIA: They are abstracts which are the shortened versions that --  
24 they're submitted with the peer reviewed publication.

25 THE COURT: Right. Right.

1 MR. LAURIA: You've got testimony about that.

2 MR. PRINCE: Which means they're incomplete on their face.

3 MR. LAURIA: So -- no. I think the term statement is referring here to like, you  
4 know, as -- this is a hearsay exception. So in hearsay we're always talking about out  
5 of court statements. I don't think they're saying you have to pick a particular  
6 statement, because how would you then admit a statement from an article. You  
7 admit the entire article.

8 THE COURT: Well, I know, but I guess part of my problem here is, you know,  
9 the testimony is that the literature supports that somebody doesn't need a fusion just  
10 because they have a microdiscectomy. And then the evidence is well, this guy  
11 doesn't fall into any kind of study pertaining to whether they're going to need a  
12 fusion surgery or not.

13 MR. PRINCE: Right.

14 THE COURT: So giving them abstracts, which don't reference anything about  
15 the particular issues facing the people that are in the study, how is a jury suppose to  
16 read those and figure out whether they -- in their mind apply or don't apply?

17 MR. LAURIA: Well, we have testimony from Dr. Rimoldi. We heard it this  
18 afternoon where he said, actually, the abstracts and studies do deal with patients  
19 who've had two level microdiscectomies, and they do deal with patients who've had  
20 a discectomy and re-herniated and required another surgery for that, and then  
21 what's the instance of them going on to fusion. So are they exactly precise timing  
22 wise the exact same characteristics? No, but we've got two levels. We've got  
23 recurrent surgery at the same level for a herniation in those studies. And --

24 THE COURT: No, but where do I find that or where does --

25 MR. LAURIA: Oh, sure.

1 THE COURT: -- a jury find that in there?

2 MR. LAURIA: You -- if you look at the abstracts, Your Honor, if I can  
3 approach?

4 MR. PRINCE: But the problem is, Judge --

5 MR. LAURIA: -- it will tell you that -- it will tell you, we had 887 people, 146 of  
6 them were this.

7 MR. PRINCE: But Judge, the --

8 THE COURT: No, that's what I'm saying I'm looking at them and I'll -- and I see  
9 but it'll say we identified a bunch of adults who had lumbar decompression.

10 MR. LAURIA: Right. So it just depends on which -- so this is repeat surgery  
11 after lumbar decompression for herniated disc, right?

12 THE COURT: Right.

13 MR. LAURIA: So it'll talk to -- mean age forty-seven five years old, talks about  
14 insurance. (Indiscernible) range from -- the adjusted mean re-operation rates of  
15 surgeons were -- certain time at 90 days. Let's find another one that maybe sets it  
16 out a little clearer.

17 On 35,309 patients undergoing initial discectomy, 5,000 approximately  
18 had at least one re-operation, 803 had two or more re-operations --

19 THE COURT: Okay.

20 MR. LAURIA: -- right. So there's data in here and then it talks about these  
21 specific risks. I mean, if the argument is --

22 MR. PRINCE: But --

23 MR. LAURIA: -- you don't have a study on Beau Orth, well, you're never going  
24 to have a study -- they'd never be admissible, right, because you're never going to  
25 have that information. Again, it's like the cancer patient that -- the analogy I gave



1 you. We use percentages in cancer patients.

2 THE COURT: Right. No, I get that analogy. It's just --

3 MR. PRINCE: But what's a jury to do with that, Judge, because you had no  
4 expert testimony commenting on any aspect of -- any particularized aspect of the  
5 studies. It was just general hypothetical discussion, kind of a --

6 THE COURT: Well, here's the reality that I don't want to keep you around here  
7 for a long time. I'm going to have to read every one of these to figure out if I think  
8 they have applicability. So I'm not going to rule until tomorrow. My inclination is not  
9 to admit them, but I'm going to have to go through and read all, one, two, three, four,  
10 five, six, seven, eight -- all 20 abstracts to figure out if they have enough information  
11 in them to --

12 MR. LAURIA: Judge --

13 THE COURT: -- in my mind, be relevant.

14 MR. LAURIA: If I may?

15 THE COURT: Yeah.

16 MR. LAURIA: Can I make a suggestion? I will go look at them too. I will try to  
17 narrow it down. If I can send an email to you and counsel narrowing it down.

18 THE COURT: I mean, that's fine, but that's -- I don't want to wait around to get  
19 that until you read them. I just need to kind of start reading them myself as well.  
20 Okay. So what's the next group of exhibits?

21 MR. LAURIA: We have a exemplar computation of damages to show the  
22 amounts that were billed, the amounts paid and the amounts written off.

23 THE COURT: What's that one?

24 MR. LAURIA: Did we mark that, Paul?

25 MR. CARDINALE: Yeah, I -- I have to print it off. There's no hard copy --

1 MR. PRINCE: Well I think you can always -- using your exemplar, I mean  
2 assume -- yeah --

3 MR. CARDINALE: Okay.

4 MR. PRINCE: -- to do that. I mean a summary, right --

5 MR. LAURIA: I mean, are you admitting a summary?

6 MR. PRINCE: You objected to it. So -- I'm going to use a summary, yeah, I'm  
7 going to use a summary, yeah.

8 MR. LAURIA: All right. Okay.

9 THE COURT: You're using a summary in your closing argument?

10 MR. PRINCE: Yes.

11 THE COURT: You're not -- he didn't seek admission of a summary?

12 MR. LAURIA: Right. I mean I think a summary is admissible.

13 THE COURT: Well, but I'm just asking which exhibit is it?

14 MR. LAURIA: I don't know that it's been -- I saw Paul was marking it, but I  
15 don't think he's marked it. So --

16 MR. PRINCE: We have a medical summary. We're going to -- we'll submit a  
17 revised one by -- I'll agree. If they're -- if they want to have a summary of whatever  
18 they're doing then I guess --

19 THE COURT: Okay.

20 MR. PRINCE: -- I'll agree. I mean it's just a --

21 MR. LAURIA: Well, just out of curiosity, because when you initially had your  
22 summary you included the hospital charges for both surgeries. Are you including  
23 both hospital charges?

24 MR. PRINCE: And Dr. Capanna, yes, I'm going to be asking for the full -- all  
25 the medical expenses.

1 MR. LAURIA: Oh.

2 MR. PRINCE: Yes.

3 THE COURT: All right. So whatever medical summary defense is proposing,  
4 Mr. Prince is agreed and that will be marked next in order.

5 MR. PRINCE: Well, right, and as long as they're going to agree to mine too.

6 MR. LAURIA: Well, I haven't seen yours so I don't know what it is.

7 MR. PRINCE: Well, I don't agree with any of your number -- I mean the  
8 numbers are the numbers. So it's -- and it's our Exhibit 27 with the exception of --

9 MR. LAURIA: We'll just use them in closing. That's -- just make it easier.

10 THE COURT: All right.

11 MR. LAURIA: Let's not admit them.

12 THE COURT: Thank you. Next?

13 MR. LAURIA: I believe that's it, Your Honor.

14 THE COURT: Okay. All right. So I will start reading through these, and yeah,  
15 if you want to like send me an email narrowing it down that would be great, but I'm  
16 going to start taking a look at them.

17 MR. LAURIA: Okay. I'll try to get --

18 MR. PRINCE: I just want to make --

19 MR. LAURIA: -- through it as quick as I can.

20 THE COURT: Okay.

21 MR. PRINCE: Your Honor, I want to make one record on the -- those issues  
22 with regard to the -- number one, they're abstracts, they're not complete articles. So  
23 therefore there's really nothing for me to go into with Dr. Rimoldi because he didn't  
24 touch upon any aspect of any article. There's nothing particularized about his  
25 review that supported any of his opinions in this case. The statute allows us to the

1 extent call to the attention of an expert witness -- I mean, that -- they're talking  
2 about a very specific line of questioning to the expert about a particular aspect of an  
3 article, or a treatise, or a book. That was not done. Not one singular abstract or  
4 article was brought to the attention of Dr. Rimoldi where he testified about any  
5 aspect of it.

6           Secondly, the abstracts on their face are incomplete. So therefore -- that  
7 was in one of our objections because abstracts, as you commonly know, they're  
8 maybe other information that's contained in there that may have been very beneficial  
9 to us, that had they even brought it to his attention, we could have cross examined  
10 the doctor on. So the abstracts is just nothing more than a summary, and it's select  
11 information. It's not complete information. And so for that reason the abstracts  
12 aren't reliable for that purpose because it's not the entire body of the work.

13       THE COURT: Okay.

14       MR. LAURIA: Your Honor, and just the evidence before the Court as -- from  
15 Dr. Belzberg is the abstract is part of the paper. I mean, it's published with the  
16 paper so it is the summary.

17       THE COURT: I hear you.

18       MR. LAURIA: And it's --

19       THE COURT: Well, that's -- you know, that's like saying -- not to be -- I'm not  
20 trying to be cute or anything, but that's like saying reading the cliffs notes is --

21       MR. PRINCE: Right.

22       THE COURT: -- the same --

23       MS. TARMU: Yes.

24       THE COURT: -- as reading War and Peace.

25       MR. PRINCE: Exactly.

1 THE COURT: It's not. I mean, you're not going to get the same thing from just  
2 reading that than you are by reading and digesting what the article means. And  
3 there -- it's very difficult sometimes to say an abstract is going to give the layperson  
4 enough information that really makes the connection between how it applies to  
5 something or it doesn't. That's my concern.

6 MR. LAURIA: I think it may be harder if you give them a 20-page study. I  
7 mean but --

8 THE COURT: Well, I mean you may think it's harder because if they're going  
9 to be of a mind set to read it they're going to actually have to read it. But that gives  
10 you more information about the people, the procedures, the process, than the  
11 abstract does.

12 MR. LAURIA: But -- to agree -- to some degree, except doctors rely on  
13 abstracts all the time. I mean --

14 THE COURT: Well, yeah, I know, but they're not trying to decide somebody's  
15 liability at a trial. I mean, they're just talking about looking for information that helps  
16 them in their practice of treating people.

17 MR. LAURIA: Okay. The only other thing is --

18 THE COURT: They obviously know that they can go pull the whole article if  
19 they need to and figure out how it pertains to things.

20 MR. LAURIA: The learned treatises -- he left out the part that says to the  
21 extent called to the attention of an expert witness on cross or relied upon by the  
22 expert in direct.

23 THE COURT: Look, I agree that Rimoldi references a bunch of these, if not all  
24 of them, in his July 2015 report. That's a -- seem to be at least what we were talking  
25 about at the bench, almost a whole basis for him expressing that opinion. And that

1 report was I looked at all these articles and this is why I think this was bad. So it's  
2 clear that they were brought to his attention before court. It's clear to me that  
3 obviously there was questions asked of him in court. They weren't focused specific  
4 questions on things -- bless you -- within those, it's just generally talking about the  
5 articles. So I'm still where I was five minutes ago --

6 MR. LAURIA: Okay.

7 THE COURT: -- which is I need to look at them and figure out if I think they  
8 have any applicability, some of them, all of them, none of them.

9 MR. LAURIA: Thank you, Your Honor.

10 MR. PRINCE: Okay.

11 MR. LAURIA: Have a good evening.

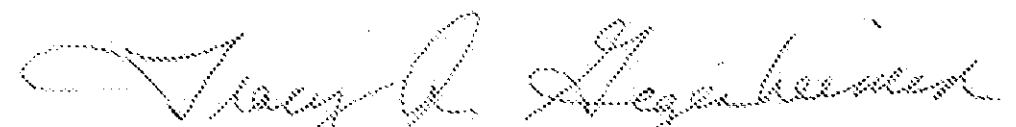
12 THE COURT: All right.

13 MR. LAURIA: And I will try to get to those as quick as I can. So --

14 THE COURT: Okay.

15 [Proceedings concluded at 4:57 p.m.]

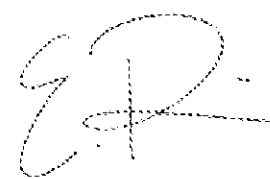
16 ATTEST: We hereby certify that we have truly and correctly transcribed the  
17 audio/visual proceedings in the above-entitled case to the best of our ability.

18 

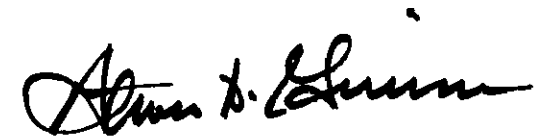
19 Tracy A. Gegenheimer, CER-282, CET-282  
20 Court Recorder/Transcriber

21 

22 Tami S. Mayes, CET-547  
23 Transcriber

24 

25 Erin Perkins, CET\*\*D-601  
Transcriber



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

TUESDAY, SEPTEMBER 1, 2015

**TRANSCRIPT OF PROCEEDINGS**  
**JURY TRIAL - DAY 10**

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For the Defendant:

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PAUL A. CARDINALE, ESQ.

RECORDED BY: SARA RICHARDSON, COURT RECORDER

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FOR THE PLAINTIFF:

(None)

FOR THE DEFENDANT:

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1 Tuesday, September 1, 2015 at 10:26 a.m.

2  
3 [Outside the presence of the jury]

4 THE COURT: -- jury instruction issue. I changed that one instruction to  
5 reflect the word events instead of motor vehicle collision, okay?

6 MR. PRINCE: Okay.

7 THE COURT: And then with regard to the articles, I know I had read through  
8 the articles defense was proposing and told them I would admit VVV and NNNN,  
9 and then the plaintiffs were proposing this morning, as I understood it, Ms. Tarmu, to  
10 admit AAA and YYY --

11 MS. TARMU: Yes.

12 THE COURT: -- which is why why why are we still here? But not in abstract  
13 form, in full form, correct?

14 MS. TARMU: Yes, and also move to admit the full text of the defense  
15 abstracts --

16 THE COURT: Of the two --

17 MS. TARMU: -- if we're going to give the abstracts.

18 THE COURT: -- VVV and NNN (sic).

19 MS. TARMU: Yes.

20 THE COURT: Okay. So do you have any objection to the full text of yours?

21 MR. LAURIA: I don't care, Your Honor, whether they -- the full text goes in or  
22 not.

23 THE COURT: Okay. And do you have any objection to your AAA and YYY  
24 coming in as well?

25 MR. LAURIA: I'm sorry, it's four As.

1 THE COURT: Three A, three Y?

2 MR. LAURIA: I don't know what those are. What is -- what are we talking  
3 about?

4 MR. PRINCE: Your articles.

5 THE COURT: They're three of your articles that were proposed that I know I  
6 had read the YYY before I got the email saying we're just going to pursue the ones  
7 that you're going to pursue.

8 MR. LAURIA: Judge, at this point let's just withdraw them all. Let's not admit  
9 any of them.

10 MR. PRINCE: Okay, good.

11 MR. LAURIA: I think that's the easiest way.

12 THE COURT: Okay.

13 MR. PRINCE: The easiest way.

14 MS. TARMU: Yeah.

15 THE COURT: All right. So none of them will be admitted.

16 MR. PRINCE: Perfect.

17 THE COURT: That was easier. Okay, you guys have anything else before  
18 we get started?

19 MR. PRINCE: We have nothing, Judge.

20 MR. LAURIA: I don't think so.

21 MR. PRINCE: Ready to go.

22 THE COURT: All right, so the plan is because it's probably going to take me  
23 30 minutes to read jury instructions and then Mr. Prince's argument I'm assuming  
24 will be an hour and a half or so. The plan would just be then to give them lunch at  
25 that point and then continue into your argument and the rebuttal.

1 MR. LAURIA: Do you think it'll be an hour and a half or more, Dennis?

2 MR. PRINCE: I think an hour and a half.

3 MR. LAURIA: Okay.

4 THE COURT: All right. And --

5 MR. PRINCE: It's a simple case, right?

6 THE COURT: -- do you have any -- do you have any sense of how long you

7 think you'll be?

8 MR. LAURIA: I'm thinking I'll be about an hour, Judge, but --

9 THE COURT: Okay.

10 MR. LAURIA: -- you know, I mean I write all kinds of stuff down and then I get

11 talking and I never know where I'm going.

12 THE COURT: Okay. And are you going to need to break after I read the

13 instructions or are you ready --

14 MR. PRINCE: No.

15 THE COURT: -- to roll right in?

16 MR. PRINCE: Be ready to go.

17 THE COURT: Okay. All we'll do is generally after we get through that I'll

18 have Joel move the screen out in front of the jury since they're not -- need to see me

19 anymore.

20 All right. Joel, you can go ahead and get them in.

21 MR. LAURIA: The -- okay. I guess I can see it here, although I can't see it

22 here as well as there, but that's fine.

23 THE COURT: What's that? Oh, it'll kind of be angled so you --

24 MR. LAURIA: Okay.

25 THE COURT: -- guys can see it as well as your monitor should be on too.

1 MR. LAURIA: That screws me up because my glasses it's right at an in  
2 between --

3 THE COURT: Oh, oh, yeah, yeah, yeah.

4 MR. LAURIA: -- spots so I can't read anything there.

5 THE COURT: I have him kind of put it at the end of the witness stand --

6 MR. LAURIA: Okay.

7 THE COURT: -- just kind of angled --

8 MR. LAURIA: That's fine.

9 THE COURT: -- so you should still be able to see it --

10 MR. LAURIA: As long as I can kind of see it, that's --

11 THE COURT: Okay.

12 MR. LAURIA: Getting old is hell, Judge.

13 THE COURT: Yeah, look, I know, I get it. I need bifocals actually.

14 MR. PRINCE: Yeah. It can kind of be kind of still over there a little bit, Judge,  
15 so I can kind of not have to like look over my shoulder at the --

16 THE COURT: Do you want me to leave it where it is?

17 MR. PRINCE: No, I'm going to -- I'll move it -- or do it I -- with Joel's help  
18 maybe --

19 THE COURT: Okay.

20 MR. PRINCE: move it a little --

21 THE COURT: Okay.

22 MR. PRINCE: -- this way and kind of like about that --

23 THE COURT: Okay.

24 MR. PRINCE: -- so I can kind of not -- don't have to look over my shoulder at  
25 it.

1 THE COURT: Just about like that (indicating) or that --  
2 MR. PRINCE: Just about like that.  
3 THE COURT: That?  
4 MR. PRINCE: Just kind of --  
5 THE COURT: Okay.  
6 MR. PRINCE: -- about like that.  
7 THE COURT: All right. Very good.  
8 MR. LAURIA: And Your Honor, just so I'm clear because you said you  
9 changed the one instruction that dealt with auto -- I don't know which one you're  
10 talking about.  
11 THE COURT: Thirty-eight.  
12 MR. PRINCE: The damage instruction.  
13 THE COURT: The email that Danielle sent last night that said the damages  
14 instruction it said motor vehicle collision. And so I changed it to say as a legal -- as  
15 a legal result of the events in questions instead of the motor vehicle collision.  
16 MR. LAURIA: Okay. I -- got it.  
17 THE COURT: See that at line 3?  
18 MR. LAURIA: Right.  
19 THE COURT: Okay.  
20 [Pause]  
21 THE MARSHAL: Everyone ready?  
22 THE COURT: Yep.  
23 THE MARSHAL: Come on in.  
24 [Jury in at 10:31 a.m.]  
25 THE COURT: You all can be seated. Thank you.

1 All right. Good morning, ladies and gentlemen. We're going to be back  
2 on the record in 648041. Our jurors are all present.

3 As we discussed at the close of our trial day yesterday, we had  
4 completed the presentation of witnesses and evidence so now I get to read -- and I  
5 have to by law read to you the jury instructions. So you'll recall back when we  
6 started this process couple weeks ago I had indicated that you'd get a packet of  
7 instructions so you can read along. The reasoning behind that is pretty simple. I  
8 think it's a lot easier obviously for you to begin understanding them if you can kind of  
9 see them and read them while I'm reading them to you.

10 I will tell you that you'll get to take your packet with you when you go  
11 back to deliberate. So to the extent you want to write any notes on any of them  
12 while I'm reading them to you, feel free to do so. Also obviously the attorneys may  
13 talk about specific instructions so you can write notes on there as well during their  
14 arguments. The only thing I suggest to people is maybe you write your name or  
15 your initials or something on the front of your packet just because you'll get back  
16 there at the big table and you're going to have 10 packets floating around, okay?

17 And I will try and get through them as quick as I can so we can get on  
18 to the arguments.

19 [The Court read the instructions to the jury]

20 THE COURT: Okay. You also should each have attached to your packet of  
21 instructions a copy of the verdict form.

22 And Joel, can you help Mr. Prince -- you guys swing that around a little  
23 bit? Thank you.

24 The verdict form is pretty self-explanatory. It has instructions on there  
25 as you address the questions that are contained, just make sure you follow the

1 instructions as you work through it. The attorneys may talk about a little further with  
2 you when they do their arguments.

3 [Colloquy between counsel the Marshal]

4 THE COURT: Can you still see that, Mr. Lauria?

5 MR. LAURIA: I can. Thank you, Your Honor.

6 THE COURT: Okay.

7 MR. PRINCE: Okay.

8 THE COURT: All right. Ladies and gentlemen, thank you very much for your  
9 patience with me. Mr. Prince, on behalf of Mr. Orth.

10 CLOSING ARGUMENT BY THE PLAINTIFF

11 BY MR. PRINCE:

12 Your Honor, thank you, and pleases the Court and counsel and Dr.  
13 Capanna.

14 You know as children, our parents always encourage us to pursue our  
15 dreams, follow our passions and live life without regret. I think as parents -- I know I  
16 -- done this with my son who's the exact same age as Beau, you tell your son and  
17 your encourage him, and all your children, follow your dreams, pursue your passion  
18 and live life without regret. And we're always kind of -- we're forward looking in the  
19 sense of where are we going? We always want to get to a destination. But part of  
20 the fun of life, the sweet part of life is the journey. And the journey is what gives us  
21 the fulfilment of our life. It's the steps along the way, it's the struggles, the ups and  
22 downs, the sweet sense of victory and success and -- and the defeats along the  
23 way.

24 I think that the late Arthur Ashe who was only a Hall of Fame tennis  
25 player but a great humanitarian, I think he says it best. Success is a journey, not a

1 destination. The doing is often more important than the outcome. I think that's true.  
2 It's your chance. It's your chance to pursue your dreams. I guess we never know  
3 whether we're going to get to the final destination, but it's the opportunity that we're  
4 trying to fulfill that dream. And in this case, certainly Beau Orth was pursuing his  
5 dream. He was there. It was his dream to pursue. It was his journey.

6 As you saw he's a fantastic individual. He comes from a great family  
7 who gave him love, strength and support. He was gifted. And it was his opportunity  
8 to pursue a dream playing football because that was his passion. That was his  
9 dream. He wasn't living with regret. And unfortunately, his journey stopped. He  
10 couldn't take that journey anymore because of a wrong level surgery.

11 And it really -- it's not about does -- is Beau going to make it in the NFL  
12 is -- or not, but it's his right to pursue it. We certainly had every indication that he  
13 was going there. He was successful at every level of athletics. He lived life tall and  
14 strong because he felt successful. He had people around him who was encouraging  
15 and supporting him and loving him. And that's still just to this day, but that's made  
16 him who he is and who he was at the time.

17 And there's many examples of player just because -- even if you don't  
18 go to a Division I college, you can still have a great professional career. Even if you  
19 don't -- you go undrafted, you can have a fantastic professional career.

20 Tom Brady, maybe one of the greatest quarterbacks of all time, he was  
21 drafted in the sixth round a hundred and ninety-ninth pick. He's won four Super  
22 Bowls, multiple Super Bowl MVP, multiple League MVP.

23 (Indiscernible) close to home for me I like the Dallas Cowboys. Tony  
24 Romo, he has set every passing record for the Dallas Cowboys. He didn't go to a  
25 Division I school and he was undrafted.



1 Kurt Warner, who was a quarterback for the St. Louis Rams and the  
2 Arizona Cardinals, undrafted, Hall of Famer, Super Bowl winner.

3 The point is that Beau had a dream, he was pursuing it and he was  
4 living life without regret. And why we're here is because that stopped short.

5 Now, you know times it feels like and -- and, you know, when we watch  
6 the news like as Americans, we can't agree on anything. We're constantly fighting.  
7 We constantly are tearing people down. But there's something that binds us all  
8 together. There's these core values and core beliefs of hard work, integrity,  
9 honesty, accepting responsibility for your actions, being compassionate and helping  
10 others.

11 I think the founding fathers of this country they clearly understood that,  
12 and they didn't want to leave it to chance that politicians were going to protect those  
13 values, because those values are present here, right? I mean, we value people's  
14 safety, we value people's right to be free from harm, to be free from emotional injury  
15 and -- we all get it, right? If you break something, you have to pay for it. If you hurt  
16 something, you have to accept those consequences.

17 And the founding fathers of this country they didn't want to leave that to  
18 chance, those -- the enforcement of those common values and they -- you know,  
19 there's these -- this case is a common law case. It's man's law. It developed over  
20 hundreds of years. And they put it right here in the Seventh Amendment to the Bill  
21 of Rights of the Constitution that we have the right to a jury trial. The jury -- the  
22 juries, you enforce our values. You protect our beliefs.

23 And there's a reason why we don't get to talk to you. There's a reason  
24 why you sit separate and apart from everybody, because you didn't want the job in  
25 the first place. You're free from influence. You have no stake in the outcome.

1           When you got here two weeks ago, you didn't know what kind of case  
2 you were coming on. It could have been a car accident case, it could have been a  
3 criminal case, could have been a capital murder case. You didn't know. And you  
4 didn't want the job anyway. But that's exactly why you're perfect for the job because  
5 you're not influenced in any way.

6           And your decision here is important because, well, it affects the public.  
7 A jury speaks as the conscious (sic) of our community, as the enforcer of our values  
8 and our beliefs. And you can see that there's many people here watching this case  
9 today because it's open to the public. Everything that we've said and done over the  
10 last two weeks is recorded for all time and eternity, and for that reason your decision  
11 here is very important.

12           And we trust juries -- hang on a second. Sorry. To make some of the  
13 most important decisions in our life. In fact, probably the ultimate decision. Only a  
14 jury, ladies and gentlemen, can decide in a criminal case, in a capital murder case  
15 whether someone lives or dies. So we give -- we empower juries to make decisions  
16 based on evidence, based on the law. You make the most important decisions in  
17 life.

18           And I think John Adams is -- said who was one of the founding fathers  
19 said representative government, which is our elected officials, and trial by jury are  
20 the heart and lungs of liberty. I think that's true and I think Thomas Jefferson felt the  
21 same way because you're the most democratic of all of our institutions because  
22 you're free from influence. And for that reason, you have power to decide cases just  
23 like this and to enforce our values.

24           And the only protection Beau has -- his only option is to come to court.  
25 His only protection is in the law. He has no other protection available to him

1 because Dr. Capanna has always refused to accept any responsibility for what he  
2 did.

3 MR. LAURIA: Your Honor, may we approach, please?

4 MR. PRINCE: And so for --

5 [Bench conference begins at 11:05 a.m.]

6 MR. LAURIA: I believe counsel is making an improper social justice argument  
7 here in closing argument, suggesting that they have to protect society, that this is --  
8 from Dr. Capanna (indiscernible) so I'm concerned you know that's improper --

9 THE COURT: Well --

10 MR. LAURIA: -- closing argument.

11 THE COURT: -- I would say generally speaking that comment about  
12 responsibility is troublesome. The only thing I would say about this case is that  
13 there was a lot of testimony about whether he ever acknowledged anything --

14 MR. PRINCE: Right.

15 THE COURT: -- to Beau about the kind of surgery he did or whatnot then or  
16 I'm sorry, you know, even if he didn't intend it that he caused him any kind of injury,  
17 anything like that, so -- I mean, don't bring it up again in that kind of a context --

18 MR. PRINCE: About what?

19 THE COURT: -- saying he refuses to accept responsibility and that's why we  
20 had to come to court. Everybody has --

21 MR. PRINCE: Okay.

22 THE COURT: -- everybody has a right to be in court. So it's one thing to say  
23 Dr. Capanna has refused to accept responsibility and the evidence shows --

24 MR. PRINCE: Oh, yeah, oh -- okay, yeah.

25 THE COURT: -- (indiscernible) impose that --

1 MR. LAURIA: But yeah, I just don't want --

2 MR. PRINCE: (Indiscernible) --

3 THE COURT: Okay.

4 MR. LAURIA: -- I don't want it to --

5 MR. PRINCE: Understood.

6 MR. LAURIA: -- be about argument, Judge.

7 MR. PRINCE: Okay.

8 THE COURT: Okay.

9 MR. LAURIA: Thank you, Your Honor.

10 [Bench conference ends at 11:06 a.m.]

11 THE COURT: All right, Mr. Prince --

12 MR. PRINCE: Thanks.

13 THE COURT: -- you can continue.

14 MR. PRINCE: Sure.

15 So Beau's only option is to come to court and that's why we're here.  
16 And instruction number 1, this is as you have your packet and this is, you know, very  
17 important. It basically just tells you to follow the rules. It is your duty as jurors to  
18 follow the instructions and apply the rules of law to the facts as you find them to be  
19 regardless of any opinion you may have as to the wisdom of the law. Whether you  
20 agree with it or don't agree with it, you have to set that aside and just simply follow  
21 the rules. That's the oath that you took.

22 But I don't think we're asking you be doing anything here that's  
23 inconsistent with your beliefs anyway. I think everybody believes in personal  
24 accountability, responsibility, and if people harm someone, they must be held  
25 accountable. We talked about that during the voir dire. So I don't think you're going

1 to find anything in these instructions that's going to be at odds with how you feel  
2 personally about this type of a case.

3 And what are the -- we've talked some about some core values that  
4 really came up in this case and one of them is trust. The other one has been  
5 honesty, and the third has been accountability. And as I'm going to show you, Dr.  
6 Capanna violated Beau's trust. He was dishonest to Beau and now is refusing to be  
7 accountable for anything that he's done and all the harm that he's caused Beau over  
8 the last five years and what Beau has to go forward with over the 50 years.

9 And first the breach of trust. Instruction number 34 it says a plaintiff has  
10 the right to rely on the recommendations of his healthcare providers when ordinary  
11 care has been -- exercised in selecting a healthcare provider. What does that  
12 mean?

13 That as a UNLV team neurosurgeon, Beau had the right to rely on the  
14 recommendations of Dr. Capanna. There's been some suggestion that Beau could  
15 have -- why didn't you go get a second opinion? Why didn't you go somewhere  
16 else? He didn't have to go anywhere else. You're -- you -- Dr. Capanna told him  
17 and his father he was an originator of this microdiscectomy procedure. He was a  
18 pioneer in the field. He was a team neurosurgeon for the University of Nevada Las  
19 Vegas. He had the right to rely on those recommendations by Dr. Capanna.

20 But also, I asked Dr. Capanna this during the trial, and the question  
21 was, Dr. Capanna, when Beau Orth agreed to undergo the surgery on the morning  
22 of September 17th, 2010, when he showed up at the University Medical Center, he  
23 had the right to place his trust and confidence in you that you're going to perform his  
24 surgery properly and within the standards of care. He answered yes.

25 I further asked Dr. Capanna: And Beau had the right to trust that you

1 would take all steps necessary to perform the surgery at the correct level. Of course  
2 he answered yes. And Beau had the right to trust that you would take all steps to  
3 identify the correct level of the spine before you did any type of surgery? Of course  
4 he answered yes. So Beau did have the right to trust him and Beau did place his  
5 trust in him and Dr. Capanna violated that trust.

6 Even Dr. Belzberg, the doctor from Johns Hopkins who was here for a  
7 short time one afternoon, said -- I asked him this during the trial: You agree that  
8 patients are entitled to trust their neurosurgeons are going to do the surgery  
9 properly? Answer: Yes They're entitled to trust that their surgeon is going to  
10 diligently locate the correct level of the spine before performing the surgery. Of  
11 course he said yes.

12 And -- but also more than that, as a patient, Beau had the right to know  
13 from Dr. Capanna the whole truth about his condition and his surgical outcome. It's  
14 his body, it's his life, it's what's affecting him and he had the right to know the truth.  
15 And he didn't get to know the truth here and as you're going to see.

16 On October 6th, 2010, Dr. Capanna -- as we've seen this MRI image  
17 many, many times, it's just one of many that show the problem. He knew he injured  
18 Beau by operating at L4-5 instead of L5-S1. I know you have that image memorized  
19 in your mind at this point, but he knew that moment because it's obvious.

20 And even according to Dr. Belzberg, Beau had the right to know the  
21 truth. And you agree that as a neurosurgeon is required to tell the patient the whole  
22 truth about their condition, even if there's complications, and not hide that from  
23 them. Of course he answered yes because it makes -- it's common sense, right?

24 But here's a very important instruction. Instruction number 4, it's a very  
25 simple statement, but it's really -- I think describes what we've been doing here. The

1 purpose of the trial is to ascertain the truth. And really Beau's been on that mission  
2 since October of 2010, on a mission to find the truth because Dr. Capanna has  
3 refused to accept responsibility or be accountable for what he did or be honest with  
4 Beau. So Beau had no other option other than to come before you and put on  
5 evidence so that you, ladies and gentlemen, can ascertain the truth. And that's  
6 really your function is to ascertain the truth; what really happened here and who  
7 should be held accountable. Who should bear this harm that came to Beau?  
8 Should it be Beau or should it be Dr. Capanna? That's really been the quest we've  
9 been on is to find the truth and we think we've shown that here this past two weeks.

10 And Dr. Capanna even admitted during the testimony that it was clear  
11 something was abnormal at L4-5 when he saw the MRI. He said yes, sir. And it  
12 would have been clear to you when you first saw that -- that on October 6th, 2010,  
13 that film, there was an injury to the L4-5 disc that did not exist before your surgery?  
14 Of course he said now yes. And -- and you would have caused it, correct? Answer:  
15 Yes, sir.

16 So he knows the moment he sees that X-ray -- or that MRI, that there's  
17 an abnormality, that there's an injury to L4-5 and he caused it. So he knows all  
18 three of those things the minute he lays eyes on that MRI image because he saw he  
19 -- according to his own notes, at least two times. But he concealed it from Beau.

20 And here's the summary from Dr. Capanna's records, October 7th,  
21 2010. This is after Beau came in the previous day in excruciating pain. He called  
22 and talked to Beau and says told the MRI showed significant edema; radiologist  
23 says little disc; I disagree.

24 Well obviously Dr. Capanna's now said something obviously a lot  
25 different than that in court today because it was only when we got in court that now

1 he's admitted to you that he injured that disc. So it's not a normal disc. There is  
2 disc fragment there. There is scar tissue there that's clearly abnormal that clearly  
3 wasn't there the day before Beau's surgery. But as you heard from Beau, in kind of  
4 a tearful moment, he was told he only had swelling and was given antibiotics.

5 Beau had no sign of an infection and I suggest to you, ladies and  
6 gentlemen, that was a way for Dr. Capanna to kind of divert any attention to himself.  
7 Hopefully this thing settles down that there's a potential for an infection so no one --  
8 he does not have to acknowledge to Beau or anybody else for that matter that he  
9 hurt him.

10 What should have happened here is he had Beau in his office, explain  
11 -- show him the MRI films, show him what they showed and help try -- and offered  
12 suggestions about how do we correct the problem. That should have happened and  
13 it didn't.

14 We heard from head trainer Kyle Wilson last week, and I was surprised  
15 to learn this myself because I didn't know this; that Dr. Capanna never tells officials  
16 at UNLV that he injured Beau at L4-5. You recall last Friday when Mr. Wilson was  
17 here, he said the first time he's even heard of Dr. Capanna injuring Beau at L4-5  
18 was in the courtroom when I asked him about it or told him about it.

19 What happened for the last five years -- why doesn't anybody at UNLV  
20 know from the head neurosurgeon that your team doctor's injured a player? That's  
21 not being honest and that's a breach of a core value that's involved in this case.

22 Responsibility and accountability. Dr. Capanna has consistently and  
23 hasn't this -- throughout this trial refused to accept responsibility or be accountable  
24 for his actions. And he's not accepting any responsibility for not only doing surgery  
25 at the wrong level of Beau's spine, but also the consequences of his actions. And



1 that's why we're here.

2 And Dr. Capanna -- in fact, he's adamant he's not below the standard of  
3 care. Question was, during the trial: And it's your position that you did not operate  
4 on the incorrect level, correct, of his lumbar spine? Answer: Yes. We know that is  
5 flat wrong.

6 And in addition, it's your testimony that you would -- you did not perform  
7 a microdiscectomy or a laminotomy at the L4-5 level of the lower -- should be  
8 lumbar -- spine. His answer was yes. We know that answer is obviously wrong.

9 And I want to play for you -- you remember when Dr. Capanna was  
10 testifying --

11 I'll tell you when, Peter.

12 Before remember demonstrating his surgery? For the very first time he  
13 admits that he hurt Beau, he's very sorry and he feels terrible. He said that for your  
14 benefit, ladies and gentlemen. He didn't do that for Beau because he didn't look him  
15 in the eye and tell him that that's what happened. He -- in fact he never apologized  
16 to Beau before that.

17 Go ahead, Peter.

18 [Testimony of Dr. Capanna played for the jury]

19 MR. PRINCE: He's never apologized to Beau Orth ever. Even -- he was  
20 talking to you -- he was directing that comment to you and it was for your benefit  
21 only, to hopefully lessen the impact of your decision in this case. And the right thing  
22 to do would have been to immediately tell Beau hey, we had a complication, tell him  
23 the whole truth about his healthcare and about his condition so that he could take  
24 steps to fix it -- either Dr. Capanna fix it or have somebody else go fix it.

25 MR. LAURIA: Your Honor, may we approach, please?

1 THE COURT: Yeah.

2 [Bench conference begins at 11:17 a.m.]

3 MR. LAURIA: As I raised in my concern requesting an instruction that  
4 punitive damages are not available in this case, what counsel is doing is essentially  
5 trying to inflame the jury for a basis that is fraud, misrepresentation. Those  
6 suggestions not on the medical care, but on Dr. Capanna's disclosure or supposed  
7 non-disclosure of facts, again I am concerned that, you know, this jury is being  
8 misled that they're not allowed to focus on that as part of their damages. That is not  
9 permitted in this case as a matter of law and they're not being told that.

10 THE COURT: All right. Mr. Prince?

11 MR. PRINCE: Your Honor, it goes to Dr. Capanna's credibility.

12 THE COURT: (Indiscernible) little bit.

13 MR. PRINCE: It goes to Dr. Capanna's credibility, his believability, his  
14 explanation for what occurred. He is the one who brought up the idea that he was  
15 sorry. He's one who interjected that into the case. And so once he did that, I had  
16 the right to bring out the evidence that he never told Beau he was sorry.

17 THE COURT: Well, look I think the way it's been argued is in the context of  
18 what would have been medically proper, to tell the patient I -- you know, there was a  
19 complication from your surgery and this is what's -- what we have now and this is  
20 what we're going to need to sit down and talk about and do and that he didn't do  
21 that. And then it was your -- your doctor at trial said no, I looked right at him and  
22 apologized to him which isn't what happened, so I'll -- I'm not going to strike it or  
23 anything.

24 MR. PRINCE: Okay.

25 THE COURT: You can continue on.

1 MR. LAURIA: All right.

2 THE COURT: Okay.

3 MR. PRINCE: Okay.

4 [Bench conference ends at 11:18 a.m.]

5 THE COURT: You can continue.

6 MR. PRINCE: And even though Beau had -- Dr. Capanna just admitted to  
7 hurting Beau and that he was sorry, he's still adamant that he's not below the  
8 standard of care for wrong level surgery and here's what he said: It's within the  
9 standard of care to operate at the wrong level of the spine, is that how you want to  
10 leave it? Answer: Yes, absolutely. I mean we don't want to, obviously, but it  
11 happens. That's ridiculous. It's never within the standard of care in a normal  
12 anatomy of the spine to operate at the wrong level. It's unsafe and not acceptable  
13 by anybody's standards.

14 And what's been Dr.'s (sic) Capanna's defense to this case? One is  
15 kind of a defend, deny and confuse the issues to avoid responsibility at all cost.  
16 He's deflecting the attention to Dr. Cash on how -- criticizing Dr. Cash. He criticizes  
17 Beau Orth. He's trying to suggest on one hand he's sorry, but on the other hand he  
18 didn't do anything wrong, that Beau really doesn't have a significant injury or  
19 problem at L4-5, that it's really -- so he's done -- that's what he's done.

20 He's minimized Beau's talents, abilities and accomplishments. I mean  
21 we had questioning from counsel about -- to Beau and his father about, you know --  
22 you know, how many campus visits he had, whether he really got scholarships or  
23 not that he said he had, about whether he started games, was he a backup, he  
24 didn't -- and when they're trying to ask Kyle Wilson about that, he said, you know, he  
25 was a great player, he got a lot of playing time. He played defense, he played all

1 the special teams. He had a bright future and he had no limitations.

2 And he's even gone so far as yesterday suggesting that Beau was done  
3 with football anyway. Nothing could be further from the truth. There's only one  
4 reason why Beau's football career was derailed. That's because of the wrong level  
5 surgery. And that's been the kind of all-out approach, this, you know, kind of a win  
6 at all cost attitude towards this case.

7 And the other -- finally, he's been trying to divert attention, deflect  
8 criticism and blame others, including Beau. And that's no -- that's why Dr. Capanna  
9 will not accept any responsibility and has tried to do anything he can in his power to  
10 avoid the -- accepting the consequences of his actions.

11 And Beau is -- Dr. Capanna even went as far as saying that Beau's not  
12 telling the truth. So you're saying Beau's history is wrong? Beau is not telling him  
13 the truth, in my opinion. My records are just the opposite of that. Talking about in  
14 the context of what he told Dr. Rimoldi. Well Dr. Rimoldi didn't say that. That's Dr.  
15 Capanna saying that Beau is not telling the truth. That's nothing more than  
16 diversion and deflection, trying to get away from this in any way he can. A win at all  
17 cost strategy.

18 But really what we're talking about in this case is patient safety. The  
19 vast majority of doctors in this country that deliver healthcare day in and day out,  
20 they do a great job. They really do. At the top of that priority list is patient safety.  
21 And why we're here is because obviously something happened where the patient  
22 safety, Beau's, was compromised.

23 And the first of the Hippocratic Oath from a physician is always to do no  
24 harm. And that really applies in the case of surgeons. Applies to all of them but  
25 particularly to surgeons.

1           And Dr. Capanna acknowledged that. I -- because I asked him during  
2 the trial isn't it true that the patient safety is your top priority as a neurosurgeon.  
3 Answered yes, sir. Isn't it true that as a surgeon you should not perform surgery in  
4 any area where you're unsure if you're at the correct motion segment of the lumbar  
5 spine? Of course he answered yes. And you agree that if you're unsure where  
6 you're at in the operative field, you can injure adjacent structures to the intended  
7 area where you want to perform the surgery? Of course he answers yes.

8           But the buck stops with Dr. Capanna in this case because he's the  
9 surgeon. And I asked him during the trial says and you as Beau's surgeon and you  
10 alone were responsible for determining the correct level of Beau's spine to operate  
11 on. He answers yes. And you agree that the -- as the surgeon involved on  
12 September 17th, 2010, you were the captain of the ship for Beau. Answered yes.  
13 And the buck stopped with you, right? Answered yes. And no one else, either  
14 preoperatively or during the operation, was responsible for determining the correct  
15 level of Beau's spine to operate on. Of course he says yes.

16           So the buck does stop with Dr. Capanna. He and he alone was  
17 responsible for Beau's safety that day.

18           But I think really, ladies and gentlemen, as so many cases, it's cases for  
19 common sense and the Judge doesn't ask you to check your common sense at the  
20 door. There's an instruction specifically on this point, and is instruction number 9.  
21 Although you are to consider the only -- consider only the evidence in the case in  
22 reaching a verdict, you must bring to the consideration of the evidence your  
23 everyday common sense and judgment as reasonable men and women. You are  
24 not -- thus you are not limited solely to what you see and hear as the witnesses  
25 testify. You may draw reasonable inferences from the evidence which you feel are

1 justified in light of common experience, keeping in mind that such inferences should  
2 not be based on speculation or guess.

3           What does this mean? Use your everyday common experience and  
4 common sense to decide this case. You don't even need to go any further than that,  
5 quite honestly, in this case because this is obvious. When you look at this October  
6 6th, 2010 film, the problem at L4-5 is obvious. And you can see here L5-S1  
7 remained in the same condition as it was before surgery.

8           But the single most important fact -- there's only one fact that even  
9 decides the whole case, the box cut. Once Dr. Cash finds and when he does the  
10 surgery at L4-5, the box cut on the L4-5 disc, that's the single most important fact  
11 that you know that a surgeon had to be there and that's what caused the injury in  
12 Beau's case and caused that disc to herniate.

13           And Dr. Belzberg, he even testified: And you have no reason to  
14 disagree with any of Dr. Cash's findings or contradict Dr. Cash's findings that he  
15 made during his operation. That's correct. Dr. Cash was the only one there. He's  
16 the one that's most familiar with the condition of Beau's spine at L4-5 after the  
17 surgery by Dr. Capanna.

18           And there's the box cut. Remember Dr. Cash did that for you -- right in  
19 front of you he used a scalpel and showed you that's the only way that you can  
20 create that box cut is with something sharp. And so that's the single most important  
21 fact in deciding this case.

22           I think what's obvious now and I think from our common sense is that  
23 Dr. Capanna performed the correct surgery, but at the wrong level. He clearly  
24 described that he was doing a left L5-S1 microlaminotomy and a left-sided L5-S1  
25 microdiscectomy. He describes, you know, what he's doing there, removing disc

1 fragment, removing disc herniation, but as you know now, everybody other than Dr.  
2 Capanna, every surgeon has agreed that that's not accurate.

3           So ultimately what happens is he dictates a wrong note. He thinks he  
4 did a surgery at L5-S1 and he documents it technically correct, but unfortunately for  
5 Beau, it was at the wrong level.

6           And after that surgery he came out and he told Robert Orth that  
7 everything went thumbs up, excellent, no problems. Unfortunately nobody knew at  
8 that time what cascade of events was going to happen.

9           And it's more than just a recordkeeping issue. So Dr. Capanna I asked  
10 him what does he -- what did he want to tell the jury, what did he want to tell you, at  
11 his deposition. And he says because it was just a little addition to try to get to where  
12 I was trying to go to and I didn't remember to dictate it, that's all. All he's saying is  
13 this is just about recordkeeping, I just didn't dictate a critical part of my report. I  
14 didn't dictate that I removed a significant part of Beau's anatomy and did surgery at  
15 the wrong level so it's just a recordkeeping problem. Well it's more than a  
16 recordkeeping problem, as you've now come to learn.

17           I want to talk a minute about, because we got to go forward now with  
18 kind of the legal standards, the burden of proof in this case. We talked about it a  
19 little bit during the voir dire, but let's look at what the Judge has instructed you. It's  
20 instruction number 21 and it's really -- it's the preponderance of the evidence  
21 standard is what we're talking about. It says the term preponderance of the  
22 evidence means such evidence as when weighed to that opposed to it has more  
23 convincing force and from which it appears that the greater probability of truth lies  
24 therein.

25           What does that mean? You just need to tip the scales, just make it

1 more likely than not. That's the legal standard in this case and in all civil cases.

2 And the law does not require absolute certainty. Instruction number 41,  
3 talking about whether any of these elements of damage have been proved by the  
4 evidence is for you to determine. Neither sympathy nor speculation is a proper  
5 basis for determining damages. However, absolute certainty as to the damages is  
6 not required.

7 The law doesn't require that level of certainty, just prove by a  
8 preponderance of the evidence it's just more likely than not. More true than not true.

9 And we know in the criminal context it's beyond a reasonable doubt. It's  
10 like this (indicating). You have to be very, very certain before you take somebody's  
11 liberty away. That makes sense to have a higher burden there, doesn't it? And so  
12 here we believe we tipped the scale on its side, demonstrating not only how Dr.  
13 Capanna was below the standard of care and how he injured Beau, but also Beau's  
14 damages.

15 The next level of proof would be clear and convincing evidence, just  
16 more than -- somewhere in between more probable than not and beyond a  
17 reasonable doubt. And in here our rule that applies to us in our case is just more  
18 likely true than not true.

19 And if you're a football fan and football player and it makes sense -- I  
20 use this not -- I use this in every case, not just Beau's case. So it happens to  
21 ironically apply here. Is this you just got to move it past the 50 yard line. You don't  
22 have to make a first down, you don't score a touchdown, just have to make it more  
23 likely than not.

24 And I give you these things as kind of a visual aid to -- so that you can  
25 understand -- you may have questions. There might be some looming issues you



1 may not have full answers to. But it's the whole picture we're looking -- we're  
2 looking for the whole context.

3 And you can see here there may be a few pieces of the puzzle missing,  
4 but you get the whole picture and I think that's really applicable here. We can see  
5 that this is a puzzle, there's a few pieces missing, but you know you can tell that's a  
6 picture of the world.

7 And that really applies in these cases. All the evidence, all the  
8 documents you saw, those are all pieces of the puzzle and I think you all get the big  
9 picture here.

10 We talked a lot about the anatomy during the course of the trial. I can  
11 tell you as a trial lawyer who deals with spine injuries for commonly, it's the -- you  
12 can't go over this enough and I'm not going to spend a lot of time with it, but I think  
13 it's important for us as we kind of finish our discussion today to go over a few pieces  
14 of it.

15 We know what we're talking about here is the L4-5 disc space. We  
16 know here's the L5-S1 disc space where the surgery should have happened.

17 We've talked a lot about the ligament which sits right behind the disc  
18 both at the L4 and the L5 -- all levels of the spine actually, but it's the ligament that  
19 had to be removed before you do the surgery.

20 We talked about the lamina which is the boney -- part of the boney  
21 structure behind the disc. We talked about the L5 lamina, which is the boney  
22 structure at the -- behind the L5-S1 disc.

23 What has the evidence established that's clear, that every witness has  
24 agreed to? That before September 17th, 2010, Beau had a small left-sided disc  
25 protrusion at L5-S1. All other levels of Beau's spine were normal. We've even

1 heard testimony L4-5 it was a normal, healthy, pristine disc in a healthy, active,  
2 athletic 20-year-old male.

3 And we can see here -- shown you this image many times, but you can  
4 see how L4-5 looks healthy. It looks hydrated. It's big, it's thick and it looks just like  
5 the other discs above it. And we're -- only thing we're talking about just before the  
6 surgery was what -- down there at L4 -- excuse me, L5-S1.

7 And when Beau goes to see Dr. Capanna, his primarily (sic) complaint  
8 at that time was just leg pain, because he was having classic sciatica pains.

9 Dr. Capanna when he read the MRI's, other than the L5-S1 small disc,  
10 everything else was negative.

11 On physical examination when he put his hands on Beau, palpation  
12 was negative, meaning he wasn't having pain that day in his back.

13 So the primary problem was leg pain. Did he have back pain from time  
14 to time? He did. But it really wasn't his main problem.

15 And they also discussed what the options were, including a discectomy  
16 on September 1st, 2010.

17 Dr. Capanna acknowledged in his deposition that Beau had classic  
18 symptoms of S1 nerve compression; as we would know it, sciatica, which is the pain  
19 down the back of the leg. And that's important because Beau has something  
20 different going on now than he had before his surgery.

21 But Beau consented after meeting with Dr. Capanna, going through the  
22 explanations, along with his father, because it was described it was an easy  
23 procedure, it was a simple procedure and he could expect to return to football within  
24 a few weeks.

25 And when Beau signed this consent for surgery, he never consented to

1 surgery at the wrong level. That does not relieve Dr. Capanna from performing his  
2 obligation -- his obligation to identify the correct level of the spine before he does the  
3 surgery. So the -- Beau only consented to that procedure and there was no medical  
4 reason for Dr. Capanna to be doing anything at the L4-5 level. No witness has  
5 confirmed that.

6 And most the -- vast majority of the time a microdiscectomy is more  
7 than 92 percent successful. You know, as we know, it's a very small incision. It's  
8 performed under the -- with the assistance of a microscope and you get very focal  
9 right to the disc, and you remove the fragment that's pushing on the nerve to give  
10 the -- to -- for the relief for the patient for the pain down the back of the leg.

11 And this is what Beau had but more on the other side. I guess it's this  
12 side actually. A very small disc protrusion that was compressing on that nerve on  
13 the left side and was producing the pain down the back of his leg. Once you take  
14 that off, that pressure off, the pain typically goes away in a vast majority of time.

15 And so Beau's expectation was, and so was Dr. Capanna -- everyone  
16 else for that matter, was that Beau was going to return to football. And the final  
17 pre-op visit, Dr. Capanna puts in his records that microdiscectomy is likely to be  
18 beneficial and cure the problem, meaning eliminate it. And that's what he -- you  
19 heard from Beau and you heard from his father, that that's what Dr. Capanna  
20 explained.

21 I asked him at his deposition: And in fact, you thought it would not only  
22 be medically beneficial but likely cure his symptoms and of course he said yes. And  
23 I'm using -- those are Dr. Capanna's words, cure. While there's no guarantee in life,  
24 he certainly told Beau that a successfully performed L5-S1 microdiscectomy, that's  
25 going to cure your problem, you're going to be able to get back on the football field

1 pursuing your dreams.

2           And we talked about in trial, you know, even including Head Trainer  
3 Wilson, many instances of -- both at the professional level and the collegiate level,  
4 players going back to playing football, having successful careers after  
5 microdiscectomy surgery. Robert Gronkowski, tight end for the New England  
6 Patriots. Tony Romo, my guy from Dallas. Arian Foster is a running back for the  
7 Houston Texans. John (sic) Pierre-Paul is a lineman for the New York Giants. And  
8 Peyton Manning has had actually had multiple surgeries, a -- you know, Hall of  
9 Fame quarterback from the Denver Broncos. And Troy Aikman, another Dallas  
10 player also had microdiscectomy and had a very successful Hall of Fame career  
11 after that.

12           So I share those things with you because it wasn't the end of the road  
13 having the microdiscectomy. Even Kyle Wilson, bringing it back to the University of  
14 Nevada Las Vegas level, he said yeah, we have players have microdiscectomy and  
15 they go on to have successful collegiate careers. So it wasn't the end of the line for  
16 Beau. It was a way to keep him at his top performance, at peak performance, and  
17 that's why he agreed to undergo the surgery.

18           We talk a lot about what does it mean for medical negligence or  
19 medical malpractice and let's look at the instructions that you're being given today.

20           It talks -- instruction number 25 talks about our burden of proof; that we  
21 have to prove that there is an acceptable standard of medical care, that the doctor  
22 meaning Dr. Capanna, he departed from that meaning he fell below that standard,  
23 and that Dr. Capanna's conduct was a legal cause of injury to Beau and Beau  
24 sustained damages and was we're going to show we've more than -- not only  
25 satisfied our burden, it's with overwhelming evidence that we've satisfied that

1 burden.

2 But what does medical negligence really mean? It means the failure of  
3 a physician, hospital or employee of a hospital in rendering services to use the  
4 reasonable care, skill or knowledge of -- ordinarily used under similar circumstance.

5 So what does that mean in our case? That Dr. Capanna was negligent  
6 by operating on L4-5 instead of L5-S1 because reasonable care requires surgery at  
7 the correct level. And as we're going to talk about in a minute, this is something that  
8 Dr. Capanna completely controlled. It was preventable and he controlled the  
9 outcome here.

10 Instruction 29 because Dr. Capanna held himself out as a specialist.  
11 It's the duty of a physician or surgeon holds himself out as a specialist in a particular  
12 field of medicine to have the knowledge and skill ordinarily possessed and to use  
13 the care and skill ordinarily used by reasonably well-qualified specialists in the same  
14 field. A failure to do that is negligence.

15 We know that Dr. Capanna was negligent by operating on L4-5 instead  
16 of L5-S1. Reasonable care for a board certified neurosurgeon is to operate at all  
17 times on the correct level.

18 Dr. Capanna may try to find some solace in this; that a physician is not  
19 necessarily negligent because his efforts proved unsuccessful, meaning that hey,  
20 things happen, sometimes in surgery you -- you can't always predict the outcome.  
21 But in this case we're not talking about that because the outcome here was  
22 preventable by Dr. Capanna and he knows that.

23 Here's the issue. He is negligent if his lack of success is due to a  
24 failure to perform any of his duties as defined in these instructions. Had he only  
25 performed a surgery at L5-S1 and there was some complication from that and

1 healing problems, infection problems, nerve problem, there is no case. We're  
2 talking about it because Dr. Capanna was required to identify the correct level of  
3 Beau's spine before performing surgery, and that he failed to do, and that failure  
4 was a breach of his duty. It's not because we had a known complication at L5-S1.

5 But more than that, the law even goes a step further. When you do  
6 surgery on the wrong body part, the law presumes you're negligent, and the Judge  
7 has given you this instruction. It's instruction number 33. I'm going to walk through  
8 this with you because Dr. Capanna, he is presumed negligent now that he operated  
9 on the wrong body part.

10 Says -- instruction 33 reads in part: Except that such evidence as  
11 described above is not required, meaning an expert witness, and a rebuttable  
12 presumption that a personal injury was caused by negligence arises where evidence  
13 is presented that the personal injury occurred in the following circumstance: One, a  
14 surgical procedure was performed on the wrong patient or the wrong organ, limb or  
15 part of the patient's body. We know that applies in Beau's case. He clearly  
16 operated on the wrong part of the spine, a portion that was normal and healthy.

17 And so what the -- the Court says to you if you find by a preponderance  
18 of the evidence in this case that the defendant, meaning Dr. Capanna, performed a  
19 surgical procedure on the wrong organ, limb or part of the body, there is a rebuttable  
20 presumption that the defendant committed medical negligence. That presumption  
21 exists in this case.

22 And then that burden shifts to Dr. Capanna to prove he wasn't  
23 negligent. So our -- we've satisfied that burden, and he's not come forward with any  
24 credible evidence to suggest he met his duty as a surgeon. Not one.

25 You remember Dr. Belzberg? He said the best he could do -- if you

1 believe Dr. Cash, then Dr. Capanna was below the standard of care. If you believe  
2 Dr. Capanna that he had to go up to go down, it's not -- remember it's not -- it was a  
3 very non-traditional route, then he -- maybe he met the standard of care. That's the  
4 best he could do.

5 That's not enough, ladies and gentlemen. That doesn't carry the day.  
6 You need to be able to say unequivocally, yes, based on the evidence, based upon  
7 the MRI imaging and the medical records, that yes, he met the standard of care and  
8 no doctor has said that in this case.

9 And I asked Dr. Capanna about patient safety because this violating the  
10 standard of care really deals with patient safety and injuring -- not injuring patients,  
11 and he said that patient safety is his top priority. And I asked him isn't it true that as  
12 a surgeon, you should not perform surgery in any area where you're unsure if you're  
13 at the correct motion segment of the lumbar spine? Of course he agreed. And if  
14 you're unsure where you're at in the operative field, that you could injure an adjacent  
15 segment? Of course he agreed.

16 But what are the patient safety rules? The patient's safety is a  
17 surgeon's top priority. That doctors should never needlessly endanger a patient by  
18 doing surgery in an area he shouldn't be. A doctor must accurately document all  
19 significant medical conditions, procedures and decisions in the patient's chart. We  
20 know that didn't happen here, even though he's obligated to do that. That a diligent  
21 spine surgeon will correctly identify the part of the body where he intends to operate.  
22 That a spine surgeon will take all steps necessary to identify the levels of the spine  
23 before performing the surgery. And a spine surgeon must avoid injury to normal,  
24 healthy discs and a surgeon should never blame the patient or others for his  
25 mistakes. We have a violation of every one of those in this case that the evidence

1 does show to you. Every single one.

2 And this is the standard for what should a reasonable neurosurgeon do.  
3 They have to be diligent and they have to take all steps necessary to locate and  
4 mark the correct level before the surgery.

5 The minute you've enter that disc space, you've jumped -- you jumped  
6 into the Grand Canyon. There's no turning back at that point. That's the key time. I  
7 suggest that that any time you go the wrong level would be below the standard of  
8 care, but even giving him the benefit of the doubt, before you make that cut, before  
9 you put that scalpel in that normal, healthy disc, you better make sure because it's  
10 entirely within your control, and that's what didn't happen in Beau's case.

11 This case comes down to this, it's something very simple. Ordering a  
12 simple X-ray. Remember the fluoroscope we've talked about so many times? That  
13 would have taken only seconds to confirm that he was at the correct level.

14 Dr. Cash, in painstaking detail says he is OCD about worrying about  
15 this. He'll shoot it as many times he has to, puts the little marker in. Dr. Yoo said  
16 the same thing. Dr. -- we didn't hear -- Dr. Belzberg didn't testify about it. But that's  
17 what a surgeon does. And particularly a spine surgeon because you're only looking  
18 in a hole this big and the discs look about the same. So you have to really be  
19 certain, and that's what didn't go down in this case.

20 And that's the fluoroscopy but as you can have the X-ray tech hit that  
21 button as many times as you need to to make sure that you're at the correct level  
22 before you start. And Dr. Capanna confirmed that for us. He says -- I asked him  
23 you can take as many images as you need to make sure you're at the correct level  
24 before performing the actual, you know, cutting into a disc. Of course he answers  
25 yes.



1           And you agree that in this case after you made the incision, you did not  
2 have to turn the fluoroscope back on for any reason in Beau's case. He didn't make  
3 double sure. He didn't triple check his work. He just marked it on the skin, thought  
4 he was there, and unfortunately he guessed wrong. And Beau's going to have to  
5 pay for that now. His journey ended because of that mistake.

6           And wrong level spine surgery is below the standard of care always  
7 because it's preventable. And here's why. I asked Dr. Capanna this, that wrong  
8 level spine -- he confirmed is a significant complication and a clear indication of  
9 surgeon error. Doctor, based on your education, training and experience, that --  
10 surgery at the wrong level is one of the most significant complications and can --  
11 that can occur spine surgery. Of course he said yes.

12           And here's my point. And you understand -- this is me questioning still  
13 Dr. Capanna -- that wrong level surgery on the spine is preventable. He says yes.  
14 It's exclusively within the hands of the surgeon to correctly identify the level of the  
15 spine where he intends -- he or she intends to perform the surgery. Of course he  
16 agreed. And there are diagnostic tools available to you in the form of an X-ray to  
17 properly detect the level where you want to do the surgery before even proceeding.  
18 Of course he answers yes. It's because it's exclusively within the -- the physician's  
19 hands what makes it so egregious and such a clear error.

20           Now it's your job to make sure that you're at the correct level of the  
21 spine before doing any surgery on that disc. Of course he says that's correct.  
22 Right? And it's completely within your hands. Answer: Right. Those are Dr.  
23 Capanna's words and his agreement with basic concepts of patient safety for spine  
24 surgery.

25           And he knows the consequence of this and the seriousness of them,

1 that performing a discectomy on a normal herniated disc can -- on a normal -- I don't  
2 know why it says herniated, but should be non-herniated -- can cause it to herniate.

3 And you know from your education, training and experience that it can create --  
4 performing a microdiscectomy on a normal, healthy disc can create instability. Yes.

5 And you agree that further -- that's by Dr. Capanna -- that performing a  
6 microdiscectomy on a normal, healthy disc can cause a loss of structural integrity of  
7 that disc? Answer is right. Exactly what happened in Beau's case.

8 And you agree that performing a discectomy, meaning removal of disc,  
9 on a normal, healthy disc can cause that disc to generate (sic) at a much -- much  
10 more rapid rate than the normal aging process? Answer: Yes.

11 And you agree that performing a microdiscectomy on a normal, healthy  
12 disc can cause that disc to become symptomatic. Answer: Yes.

13 And that's exactly what's happened in Beau's case. The medicine is  
14 unequivocally clear on that point.

15 What have all spine surgeons agreed to except Dr. Capanna in this  
16 case? One, after Dr. Capanna's surgery, there is clear evidence of surgery at L4-5.  
17 After Dr. Capanna's surgery, there's no evidence of surgery at L5-S1. After Dr.  
18 Capanna's surgery, there's evidence of laminotomy, meaning the bone removal  
19 we've been talking about so much this past two weeks, at L4-5. After Dr. Capanna's  
20 surgery, there is no evidence of laminotomy at L5-S1. Dr. Capanna disagrees with  
21 every one of those points, even though every witness has testified to that with the  
22 exception of the radiologist who's a non-surgeon.

23 And even looking at the postoperative MRI, the October 2010, Dr.  
24 Belzberg doesn't even suspect surgery at L5-S1. Here's my question of him at the  
25 trial: So obviously you as a trained neurosurgeon, you're going to be looking for

1 images which in any way indicate was surgery performed at L5-S1 as indicated in  
2 the report. Of course he answered yes. And you couldn't find any, could you? No, I  
3 could not.

4 That's his own witness speaking and I -- I'm showing you this because  
5 we know what Dr. Cash said, we know what Dr. Yoo said. But I want -- I want to  
6 even confirm this even -- make my point even further using Dr. Capanna's own  
7 expert.

8 Dr. Belzberg further said just based upon a review of the records and  
9 the MRI, he couldn't state to a reasonable degree of medical probability that Dr.  
10 Capanna met the standard of care if you're just looking at the records. And he  
11 answered, that's correct. It's only if he assumes that Dr. Capanna is correct and that  
12 he went up above to L4-5 in a non-traditional way to get to L5-S1. And that's the  
13 state of the evidence in this case. It's overwhelming that Dr. Capanna did not meet  
14 the standard of care in this case.

15 But I want to share with -- kind of go through the summary of Dr.  
16 Capanna's testimony because I think you're going to see a lot of inconsistency. I  
17 think you're going to see a lot of blame shifting. I think what you -- you know, one of  
18 the instructions the Judge gave you, if you find that any witness, whether it be Beau,  
19 Dr. Capanna or anybody else, has lied about anything, you have the right to reject  
20 their testimony in its entirety.

21 And Dr. Capanna said he hasn't -- he didn't do surgery at the incorrect  
22 level which we know is wrong.

23 He went above the L5 lamina, meaning the L4-5 area, to get down to  
24 the L5-S1 disc space. Everybody who's talked about that has said that's impossible  
25 to do. You physically can't even get down there. You can't see what you're doing

1 down there if you're up above it.

2 He explored L4-5. L4-5 was normal, he didn't need to explore it.

3 He -- he said -- now he confirmed he's moved things around at L4-5.

4 He finally admitted because the box cut he may have put a probe into  
5 the L4-5 disc space.

6 He may have made L4-5 weaker which we know of course he did.

7 His surgery contributed to an L4-5 herniation.

8 And finally he's confirmed that this surgery made it more likely for L4-5  
9 to herniate.

10 So when confronted with clear facts of a problem at L4-5, he knows that  
11 the MRI images shows he's done all of these things he has to somewhat  
12 acknowledge but he won't. Without you telling him, he's never going to accept his  
13 responsibility. You -- he has -- he has to listen to you. He has to, because here in  
14 this case the buck stops with you.

15 He -- Dr. Capanna also disagrees with the Steinberg Diagnostic  
16 radiologist opinion that there's no laminotomy findings at L5-S1. He disagrees with  
17 Dr. Rimoldi's opinion that there's no laminotomy at L4 -- at L5-S1. He disagrees  
18 with Dr. Rimoldi's opinion, his own expert, that he did surgery at L4-5 instead of  
19 L5-S1. And he disagrees with Dr. Rimoldi's opinion that Beau required a second  
20 surgery by Dr. Cash.

21 He also disagrees with Dr. Belzberg's opinion that there's no evidence  
22 of surgery at L5-S1. He disagrees with Dr. Yoo there's no evidence of surgery at  
23 L5-S1. And he disagrees with Dr. Cash there's no evidence of surgery at L5-S1,  
24 even though Dr. Cash said that it was virgin tissue, it had never been operated on  
25 before because he was there with a microscope and had the best opportunity to see

1 it.

2 And ladies and gentlemen, a probe -- slipping a probe in does not  
3 cause a box cut. Remember Dr. Cash sit there with his probe he had that Penfield 4  
4 and all it did was just put little slits, little holes, but it never will ever leave a hole with  
5 a precision cutout in it like that.

6 Now, when you get back to the jury room -- sorry.

7 When you get back to deliberations, one of the first things you're going  
8 to do is pick a foreperson. And then you're start deliberating. And you have a jury  
9 verdict form. And on the first page of it is -- there's a couple questions. And the first  
10 question is, do you find by a preponderance of the evidence that the defendant was  
11 negligent in the care and treatment of the plaintiff. Of course the answer's  
12 overwhelmingly yes.

13 The next question is, do you find by a preponderance of the evidence  
14 that defendant's negligence was the legal cause of plaintiff's injuries? Of course he  
15 injured Beau. He admitted he injured Beau. So that answer that question is  
16 obviously yes.

17 Those are the first two questions that you answer and those are going  
18 to be quick answers for you, I believe.

19 Then we have to get to what happened to Beau. How do you balance  
20 the harms and the losses suffered by Beau as result of this wrong level surgery?  
21 What amount of money do you put into your verdict that somehow balances out the  
22 complete loss and destruction of somebody's hopes, dreams, and just so he doesn't  
23 have to live with regret, how do we accomplish that, both physically speaking and for  
24 the emotional harm of what's been taken from him?

25 And the problem is in this case, as I'm sure you can appreciate, that

1 when you're doing spine surgery, it's like a domino effect. Once you have the  
2 surgery, it kind of like -- there's more things are going to wrong. It's going to have  
3 an impact, L5-S1, L4-5, two surgeries. Is going to be a fusion. If you fuse one level,  
4 you're going to fuse another. And if you fuse two, you're going to end up fusing a  
5 third.

6 And the problem is with Beau's care is, and what happened in this case,  
7 one wrong level surgery has created an entire domino effect that has had a  
8 significant impact on a young man's life. Not only is it up to this point, he's doing --  
9 managing pretty well because he's only 25 years old and he's still healthy and  
10 strong, but we're also going to be have to be concerned with how is this going to  
11 affect Beau in the future? What are medical care needs going to be? How do we  
12 address that?

13 And so Beau -- while Beau looks fine now, we also have to be forward  
14 thinking in this case about this domino effect and what it's going to look and mean to  
15 Beau when he's 40, when he's 50, when he's 60, when he's 70, for the next 50  
16 years. So we're going to be talking about that.

17 And instruction number 26 is kind of what's a cause of an injury, legal  
18 cause. A legal cause of injury, damage, loss of (sic) harm is a cause which is a  
19 substantial factor in bringing about the injury, damage, loss or harm.

20 And we know what started this whole cascade of events, the whole  
21 domino effect was Dr. Capanna caused all of the damage by the wrong level  
22 surgery. The wrong level surgery started the entire domino effect and Beau's going  
23 to suffer the consequences of that for the rest of his life. He already does suffer the  
24 consequences of it now, but it's only been five years. He's got another 50 to go.

25 And I want to kind of put this in perspective. But for -- kind of like at law

1 school when you're in law school, but for something happening, you know, kind of  
2 like a causation. Like if this wrong level surgery didn't happen, where are we? If he  
3 didn't do that.

4 One, Beau would have returned to playing football and lived out his  
5 dream.

6 Beau would have had a normal disc at L4-5.

7 He would not need two disc surgeries at L4-5 in less than one month.

8 Beau would not have had accelerated degenerative change at L4-5.

9 Every expert's agreed to that.

10 Beau would not suffer from discogenic pain at L4-5. Every expert has  
11 agreed that Beau suffers from L4-5 pain.

12 Beau would not be a surgical candidate for a two-level fusion at the age  
13 of 25 due to the injury at L4-5.

14 Beau would not be facing a two-level fusion by the age of 30, because if  
15 you're going to -- we're going to talk about this. If you fuse L4-5 which is his primary  
16 pain generator, you've got to take care of L5-S1 because you know you're going to  
17 be back there within a couple of years. And so you may as well reduce the risk to  
18 Beau and do both because L5-S1 has a degeneration as well.

19 We know that Beau would never need an L3-4 fusion had this -- had Dr.  
20 Capanna not done the incorrect surgery.

21 And Beau would not miss out on any aspect of the prime of his life. He  
22 would not have any limitation. As you can see, he's got special gifts, both as a  
23 person inside on the outside, and he has special athletic gifts just unfortunately  
24 many of us don't have. And he -- he should not be worrying about why can't I go  
25 snowboarding. This guy's as strong as an ox. He could -- he should snowboard

1 50 days a year if he wanted to, every day.

2 Why should he have to worry about oh if I go play golf with my buddies,  
3 I'm going to pay for it the next few days? Why couldn't he go out and play 36 every  
4 day if he wanted? He shouldn't be in that position, but it's because of the wrong  
5 level surgery that put Beau there.

6 He can't wash his car outside like he enjoys without having to worry  
7 about back pain. Why should he at 25 be even considering thinking about that I  
8 have limitations in my back and therefore I avoid certain things?

9 And Beau would not have a 60-year-old man's spine by the age of 25.  
10 That's just because of one wrong level surgery and those consequences are  
11 significant.

12 Before Dr. Capanna performed surgery on Beau, he could bench press  
13 over 400 pounds, he could bench press 225 pounds 32 times, he could leg press  
14 more than a thousand pounds, he could squat the weight room more than 500  
15 pounds, he could run a 40-yard dash in 4.5 seconds and he could play football  
16 without limitations, and he had a bright future ahead of him athletically.

17 He could do every one of those things now (sic). He can't do that now.  
18 And you heard from Kyle Wilson that Beau was a gifted athlete. He was strong, he  
19 was fast and UNLV was proud to have him. That -- he could do all of that the day  
20 before -- he was playing football the days before he went in for surgery. And you  
21 remember what Dr. -- what Mr. Wilson said. Beau never missed -- I think he missed  
22 one practice, but never missed any games. One practice in two years because of  
23 any low back problems. And he said it was common for players to have low back  
24 strains and low back pain. But that's -- he could do all of those things before. He  
25 can't now.



1           And what the defense has done in this case is move from denying injury  
2 to try and deny treatment for the injury that he caused. And unfortunately, that --  
3 you have to decide who should that risk fall on. Should it fall on Beau? Should he  
4 suffer this risk about whether we're debating whether he needs surgery -- fusion  
5 surgery? He's got his surgeon and another surgeon, a board certified neurosurgeon  
6 saying yes, it's likely he needs fusion surgery. That's the likelihood.

7           They're going to say oh no, there's no -- there's no evidence now or it's  
8 all speculation. But who should that risk really be on? Should it be on Beau?  
9 Should Beau have to shoulder that risk, that burden? No. He didn't ask for this. He  
10 shouldn't shoulder any risk of this. So they've moved now to try to deny the  
11 treatment for the injury that Dr. Capanna himself caused.

12           Instruction 35 says more than one person may be to blame for causing  
13 an injury. If you decide that the defendant, meaning Dr. Capanna, was negligent  
14 and his negligence was a legal cause of injury to the plaintiff, it is not a defense that  
15 some third person who's not a party to the suit may also be to blame. Well, Dr.  
16 Capanna's the sole -- is solely responsible for all the harm caused to Beau.

17           Instruction 36. This is a very important instruction. Remember there's  
18 been discussion about that Beau had some degeneration at L5-S1. Absolutely true.  
19 He did. But in this case, the law says you take the victim as you find them. And if  
20 you make something worse because you hurt them, you have to pay for that too. It's  
21 called an aggravation.

22           Let's read what this instruction says. A person who has a condition or  
23 disability at the time of an injury is not entitled to recover damages therefor.  
24 However, he is entitled to recover damages for any -- any aggravation of such  
25 preexisting condition or disability legally resulting from the injury. This is true even if

1 the person's condition or disability made him more susceptible to the possibility of ill  
2 effects than a normal, health person would. And when a preexisting condition or  
3 disability is so aggravated, the damages to such condition or disability are limited to  
4 the additional injury caused by the aggravation.

5 What does that mean to you; what's the rule here? That Dr. Capanna's  
6 also responsible for making L5-S1 worse due to the instability and structural  
7 problem at L4-5 that he alone caused.

8 So when you're talking about in your deliberations whether or not is it  
9 mostly L4 or -- is it L5-S1, we know from the evidence and the -- the only doctor who  
10 has had five years of a history with Beau, Dr. Cash, that that's made L5-S1 worse  
11 because of a structural instability at the L4-5 disc level. Dr. Capanna, according  
12 under the law, is responsible for that as well.

13 Instruction 37 says the law requires that if you find the defendant, Albert  
14 Capanna, M.D.'s negligence caused plaintiff, Beau Orth's injuries which clear, you  
15 must also find defendant liable for any subsequent medical services made  
16 necessary by those injuries and any further injuries or damages plaintiff may have  
17 suffered as result of the medicals -- those medical services even if those medical  
18 services were negligent.

19 What does that mean? That means that Dr. Capanna's fully  
20 responsible for everything he caused Beau. There were some questions yesterday  
21 about -- remember of Dr. Rimoldi kind of attacking and deflecting towards Dr. Cash  
22 well if -- shouldn't Dr. Cash have taken him to surgery sooner? Suggesting  
23 somehow Dr. Cash made an error. There's no evidence of that. But even if that  
24 was the case, even if Dr. Cash was negligent, instruction 37 says because Dr.  
25 Capanna, you put Beau in that situation, you're responsible for that harm too,

1 because that's foreseeable.

2 And so Dr. Capanna's responsible for the surgery, medical care and  
3 treatment as result of the wrong level surgery even if somehow that care was  
4 negligent. That's not a defense. So when they try to blame Dr. Cash for anything,  
5 always remember instruction 37 that tells you, you can't do that. Okay.

6 Beau had no other reasonable option for surgery other than surgery by  
7 Dr. Cash. We know when he gets there he's in severe pain. He's got a disability  
8 index of 94, high rate of pain. He couldn't walk. He had weakness. Dr. Cash found  
9 on exam that remember he had a limp. He had an antalgic gait which means he  
10 was limping. Remember he had weakness which was a very worrisome sign. Every  
11 surgeon has said that. He looked at the MRIs and at that time it appeared to Dr.  
12 Cash that he was crippled.

13 But one of things that Dr. Cash also talks about is hey, I'm going to  
14 have to go in now and do another surgery at L4-5 within just a few short weeks of  
15 your first surgery. He's also talking about a fusion that day. What that was going to  
16 mean to Beau in his future, putting that -- setting an expectation for Beau that hey,  
17 at some point you may have to have a fusion at that level because now we're doing  
18 two operations on the same level in a person who's only 20 years old. That was not  
19 only appropriate, that's the -- that was the right thing to do so Beau could make an  
20 informed decision. He really had no other option other than agreeing to the surgery  
21 at that time.

22 Dr. Cash goes in and does -- on October 22nd, 2010 he does a -- you  
23 know, a surgery at L4-5. He has to do a revision surgery to fix the problem caused  
24 by Dr. Capanna. Then he also has to go and do the surgery that Dr. Capanna didn't  
25 do in the first place. He had to fix the mistakes.

1 And now Dr. Cash is being vilified for being a caring, compassionate  
2 doctor and fixing Dr. Capanna's mistakes in this case. And you heard from Beau  
3 that Dr. Capanna -- Dr. Cash has been patient with him. He's been informative.  
4 He's cared. Spent a lot of time with him. That's -- oftentimes you hear, you know,  
5 people complaining about their healthcare -- they feel like a number, they feel like  
6 they're pushed in and out of the doctor's office quickly. And that's the opposite here.  
7 No one knows Beau Orth's condition better than Dr. Cash. As you heard from Beau,  
8 no one else is ever going to touch his spine other than Dr. Cash.

9 And what we know is that over time Beau has now worsened to the  
10 point where L4-5 is now worse than L5-S1. You can see that L3-4 and everywhere  
11 above remains normal. Look at that narrow disc at L4-5. That was a normal,  
12 healthy, pristine disc, and for someone who's 20 years old or now 22 by the time  
13 that was taken, that has significant accelerated degeneration that should not be  
14 there and the only reason why it's there is because of Dr. Capanna's wrong level  
15 surgery.

16 2004 (sic) which is a -- unfortunately Beau worsened and he's  
17 continued to worsen. And he goes back to Dr. Cash reporting a pretty high level of  
18 pain, six out of 10. And this is someone who has a very high pain threshold. And  
19 he reports that he had back pain with numbness and pain going down the side of his  
20 leg which is the lateral leg and numbness and tingling to the left heel and bilateral  
21 three toes. Dr. Cash notes he's got a laminotomy defect and loss -- significant loss  
22 of disc height at L4-5 and L5-S1. So as predicted, Beau's condition has worsened  
23 with time.

24 And I want to point out here on the -- why it's different because we  
25 talked about remember L5 is the lateral part of the leg. It's this part of the leg. And

1 it's also going into the lateral three toes. A little bit of that may be a little component  
2 of S1. That's possible. I think we're going to show you evidence that there is -- the  
3 S1 is not the primary problem in a minute. But even if it is, it's a very minor  
4 component of everything that's going on in Beau's spine.

5 And we're looking at the progressive degeneration. I'm only showing  
6 you as a lawyer's perspective so -- because the sagittal T2 gives you the best  
7 image. It's quick and easy to understand. And you can quickly see from February  
8 of 2009 how Beau's spine looked and it looked that way up until the time of surgery  
9 and now what it looks like in 2014. Look at that. Who would want that disc? I'm  
10 sure the doctor will tell you oh, that's -- you know, it's a little degenerated. Well  
11 nobody want that disc if you're 25 years old, right? Who would want that? Because  
12 it's getting worse and it's never going to get better. And so we know that Beau has  
13 had progressive worsening, part of the overall domino effect in this case.

14 And I thought Dr. Rimoldi said some interesting things yesterday that I  
15 think support Beau's position. We know Dr. Cash supports Beau's position, we  
16 know Dr. Yoo does, but let's see what Dr. Rimoldi testified to, because some of it's  
17 important.

18 That Dr. Capanna opened up, dissected and decompressed L4-5. That  
19 -- exactly what Dr. Cash says, right?

20 He performed a wrong level surgery, which I think we all know that's  
21 what happened.

22 That October 6th, 2010 MRI shows post-surgical change at L4-5. It  
23 shows no post-surgical change at all at L5-S1. So we know if that's the case, then  
24 Dr. Cash has -- he's the one who had to go down there and fix that, the original  
25 problem for which Beau was going to surgery in the first place.

1 And that there were two microdiscectomies at L4-5 caused an  
2 accelerated cascade of degenerative change at that level. That's very important.  
3 That accelerated cascade of degenerative change, that's the domino effect. Once  
4 you start that process for someone -- he may -- he was going to degenerate  
5 probably in his fifties or sixties like everybody would, but not at 22. And so once you  
6 -- once that disc was injured and it started that cascade of degenerative change, it  
7 was -- it's never going to stop. It's going to worsen with time. It will never improve  
8 and will continue to worsen.

9 That the recent injection at L5-S1 confirmed that L5-S1 is not the  
10 primary pain generator, meaning that L4-5's the primary problem.

11 That Beau's symptoms have worsened over time.

12 And that a fusion surgery is a reasonable treatment option for  
13 progressive, meaning getting worse, symptomatic degenerative spinal complaints.  
14 That's exactly what Beau has, progressive symptomatic degenerative spinal  
15 complaints due to the cascade of change caused by the original surgery, the domino  
16 effect.

17 Now, instruction number 20 talks about you're not to discuss or even  
18 consider whether or not the defendant was carrying insurance that would reimburse  
19 him for whatever sum of money he may be called upon to pay the plaintiff. Whether  
20 or not the defendant was insured is immaterial and should make no difference in  
21 your verdict in any way. Don't be consider (sic) where the money comes from. Your  
22 job is to balance these harms and these losses. It's up to you to decide what you  
23 think is fair, reasonable and appropriate for what happened to Beau and what he's  
24 going to go through in the future. But if someone starts to talk about whether Dr.  
25 Capanna has insurance or where the money was going to come from, please

1 remind them that under instruction 20 you can't do that.

2           Now going to talk to you about the different categories of damage that  
3 Beau can recover and is entitled to in this case. Let me read the first part of it to  
4 you. Says in determining the amount of losses if any suffered by the plaintiff as a  
5 legal result of the surgery and incident in question, you will take into consideration  
6 the nature, extent and duration of the injuries or damage you believe from the  
7 evidence the plaintiff has sustained and you'll decide upon a sum of money sufficient  
8 to reasonably and fairly compensate the plaintiff for the following items. We're going  
9 to talk about the first two first.

10           Number 1, the reasonable medical expense the plaintiff has necessarily  
11 incurred as result of the medical malpractice, being how much has he already  
12 incurred up till today. The reasonable medical expense you believe the plaintiff is  
13 reasonably certain to incur in the future as result of the medical malpractice.

14           To date, Beau Orth has incurred 136,349 -- \$300.49. I've included in  
15 items number 1 and 2 Dr. Capanna's charges and UMC's charges. Beau did not get  
16 the benefit of that surgery. He didn't also get the benefit of going to that hospital that  
17 day and I believe that's -- that should be a recoverable item and expense for Beau.  
18 And so all of those charges -- the only testimony you have in the record is that those  
19 charges are reasonable and customary for those services, so those are, going back,  
20 the reasonable medical expense Beau has incurred.

21           One of things we've been talking about what's been interjected in this  
22 case is that some of the medical expenses have been paid by insurance. If you  
23 recall, I spoke to Dr. Cash and Dr. Capanna that on the one hand, reasonable  
24 medical expenses is not determined by how much is paid by insurance. Remember  
25 that? And because every doctor, they negotiate differently with insurance

1 companies. So do hospitals. The reimbursement rates differ dramatically  
2 depending on who the insurance company is.

3 And so the amount reimbursed, even by Dr. Capanna's own testimony,  
4 does not tell you whether or not the expense was a reasonable medical expense.  
5 And so we go back to the jury instruction -- the jury instruction says the reasonable  
6 expense the plaintiff has necessarily incurred as result of the medical malpractice.  
7 And so when you're talking about amounts paid by insurance or even a thought of  
8 that, it's really comparing apples to oranges because this doesn't define what a  
9 reasonable medical expense is.

10 And so as jurors following the jury instructions, I submit you shouldn't  
11 consider at all how much were paid by insurance. Dr. Capanna's counsel's --

12 MR. LAURIA: Objection.

13 MR. PRINCE: -- going to get up here and say looking at --

14 MR. LAURIA: Your Honor, may we approach?

15 THE COURT: Yeah.

16 MR. LAURIA: Thank you.

17 [Bench conference begins at 12:12 p.m.]

18 MR. LAURIA: I believe that's a misstatement of the law to suggest that the  
19 law -- that this instruction says that they can't consider the amounts that have been  
20 paid by insurance, so that's what counsel just suggested and I think that misstates --

21 MR. PRINCE: I --

22 THE COURT: Well I don't --

23 MR. LAURIA: Excuse me.

24 MR. PRINCE: -- suggested that they have to --

25 MR. LAURIA: I think that misstates the law.



1 THE COURT: I don't think he said that the law or the statute says you can't  
2 consider it. He said I don't think you should consider it.

3 MR. LAURIA: No, I don't think that's what he said, Judge. I think he said this  
4 instruction says you're not supposed to consider --

5 THE COURT: Well, in the first part of it. The last statement that he just made  
6 was so I don't think you should consider that when you're coming up with the award.

7 MR. LAURIA: I think right before that he said because --

8 THE COURT: Yeah, but the --

9 MR. LAURIA: -- this instruction says that which is clear misstatement the law.

10 THE COURT: -- the statute talks about you may introduce evidence payable.

11 MR. LAURIA: All right.

12 THE COURT: There's nothing about that that says mandatorily what the jury  
13 has to do with that evidence or not, so you guys are free to argue what you think  
14 they should consider and how much weight they can give any pieces of those  
15 evidence.

16 MR. LAURIA: Right. But you can't argue that a reasonable medical expenses  
17 instruction means you can't consider insurance payment which is what he just said --

18 MR. PRINCE: Well I already (indiscernible) --

19 MR. LAURIA: -- because that misstates the law.

20 MR. PRINCE: -- the evidence. No, it's not.

21 THE COURT: I don't think that's the -- I don't think that's what said, but --

22 MR. PRINCE: No.

23 THE COURT: -- you can go --

24 MR. PRINCE: Yep.

25 [Bench conference ends at 12:14 p.m.]

1 MR. PRINCE: And --

2 THE COURT: You can continue.

3 MR. PRINCE: -- the only reason why the defense is going to be arguing for  
4 this is because they're looking for some discount from you.

5 Who should shoulder that -- why should Beau have to shoulder that  
6 expense -- why should that be? And remember in the opening statement Mr. Lauria  
7 stood up and said Beau's never came out of pocket one penny. Remember that?  
8 He was very adamant about that. And Beau testified he had to go to collections --  
9 he's had to pay about \$6,000 out of his own pocket for all of this jazz and -- so that's  
10 wrong. And he had to go to collection he's -- applying for a home had to deal with  
11 the adverse impact on his credit report caused by Dr. Capanna.

12 I'm suggesting, ladies and gentlemen, there's no reason to discount.  
13 The jury instruction says the reasonable medical expense the plaintiff has  
14 necessarily incurred and we know from Drs. Cash and Capanna that the charges  
15 themselves are reasonable. What someone agrees to be reimbursed for a variety of  
16 reasons is separate and independent from that.

17 So for past medical expenses when you get to this page, may want to  
18 write some of these numbers down. It's going to be \$136,300.49 for past medical  
19 expenses.

20 But what's Beau's future? We have to be thinking about that in this  
21 case. It's a big component of the case. We know he's continued to worsen. I mean  
22 he had -- went back in March of 2014 to Dr. Cash complaining of increase pain,  
23 increase symptoms. Has a high pain threshold even though he may not be taking  
24 pain meds. That's to his credit right now. He's not -- and so he's managing the best  
25 he can. He tries to stay strong. He works out, manages his core.

1 July 28th, 2015, went back to see Dr. Cash. Says complaining of  
2 moderate back pain on average six out of 10. The worse pain is a 10 out of 10. It's  
3 always there. And people who have -- suffer from chronic pain, it's kind of a vicious  
4 cycle because it affects your sleep. Then it makes you fatigue. Then it kind of  
5 makes the pain worse. And you're going to have your good days and you're going  
6 to have your bad days. But chronic pain does affect people's quality of life, and  
7 that's what's happening in Beau's case. But unfortunately for Beau, at a very young  
8 age.

9 And so one of the ways we need talk about is well what -- what's  
10 causing Beau's pain. Dr. Cash says it's L4-5, which that's what the evidence shows.  
11 But let me kind of work this I think diagnostically. It's not just me talking, it's the  
12 medical evidence in the case.

13 March of 2014 you recall that Dr. Cash sent Beau for an updated MRI  
14 and there was some further desiccation at L5-S1 and that the radiologist says  
15 correlate for potential left S1 radiculopathy. So Dr. Cash -- okay, I'm going to do  
16 that. So he does. And so he sends Dr. or Beau back for an L5-S1 left-sided  
17 epidural injection both at the L5-S1 level and left S1, and here's what I'm talking  
18 about. There's an injection of Lidocaine because that gives immediate relief. It's  
19 like the anesthetic like if you put -- you know, inject yourself with an anesthetic.  
20 That's going to take -- if you have -- that's a pain problem for you, it's going to  
21 resolve it immediately.

22 And Dr. Ruggeroli this is where he injected. He said he injected at  
23 L5-S1 -- that's up here at this nerve root near the L5-S1 disc -- and he also injected  
24 he called the preforamin -- that little foramin is that little hole where the nerve comes  
25 out -- just before that. So he injected both levels to determine is L5-S1 a problem

1 for Beau, and that's how you diagnostically determine that, and here's what we  
2 found.

3 Dr. -- Beau's pain response to the immediate -- remember the Lidocaine  
4 injection. He came in six out of 10. He left six out of 10 so we know that confirms  
5 that L5-S1 is not the primary pain generator and in fact according to Dr. Rimoldi --  
6 oops. With no immediate pain reduction confirms that L5-S1 is not the primary pain  
7 generator and he even went the next step saying it's no pain generator at all.

8 I want to kind of -- there was some discussion yesterday about Beau's  
9 response to the pain injections and -- he had. So let's just look at them so we're  
10 clear.

11 February 24th, 2010, remember that was Beau's first injection by Dr.  
12 Ruggeroli. He came in with a pain out of five. He left -- and this was the same  
13 injection, the identical. He's only had this -- the -- he's had three of the same type.  
14 He left with a zero, so we know at that time L5-S1 was responsible for those  
15 symptoms.

16 He came back in August of 2010. His pre-pain score was seven, and it  
17 went down to four out of five. According to Dr. -- well excuse me, Dr. Rimoldi  
18 yesterday, that's a mild to modest pain relief confirming that L5-S1 is a pain  
19 generator.

20 Well let's put all this information together. I created this little slide for us  
21 that talks about, you know, the date of the injection, same injection each time,  
22 pre-pain score, post-pain score. The first time he was five out of -- five to zero.  
23 Clearly, pain relief. Seven to four to out of five, which is about almost a 40 -- a 30 to  
24 40 percent relief. The final one, March of 2014, no pain reduction.

25 So putting all those pieces of the puzzle together, we know now that

1 well, previously L5-S1 was responsible for Beau's pain. We know it's not now. And  
2 that's the most objective diagnostic information we have.

3 Now, except Dr. Cash, all experts have testified that with successful  
4 microdiscectomy a patient will not require a fusion in the future, and there's been a  
5 lot of discussion about articles and data and studies. The problem with all of that is  
6 it's not particularized to Beau. Beau is an individual who is unique who's had  
7 something extraordinary happen to him that's not going to be reported in the  
8 literature. As you heard from Dr. Rimoldi, Dr. Yoo and as well as Dr. Cash, they're  
9 not going to report wrong level surgeries in the literature and having to do what  
10 Beau did and having two significant microdiscectomies at one -- at a single level  
11 within less than a month.

12 And so talking about studies and things like that in the abstract and  
13 these statistics, while in general I think that's helpful. I think that's probably accurate  
14 that most people go on to have a successful result from a microdiscectomy. That's  
15 not Beau, because he doesn't fit that model. He -- remember we heard from Dr.  
16 Yoo and even Dr. Rimoldi yesterday he deserves a case study unto himself, a  
17 long-term study. And hopefully maybe one day he gets it for the benefit of other  
18 people.

19 But -- instruction number eight, it doesn't matter, says in determining  
20 whether any proposition has been proved, you should consider all of the evidence  
21 bearing on the question without regard to which party produced it. The weight of the  
22 evidence is just that, is that in general with a successful microdiscectomy a patient  
23 will not require a fusion in the future. We agree. Dr. Cash seems to disagree with  
24 that, but he -- at least he sets his patients' expectations that hey, if you have a  
25 microdiscectomy may -- you know, you may want -- some point you may have to

1 have a fusion. I think that's conservative advice quite frankly if you think about it.

2 And what's going to happen is the defense get up here is going to --  
3 they're going to cherry pick. They're going to try to say Dr. Cash is wrong on the  
4 one hand in his opinion, oh but then you have to take and accept that as being true  
5 and Beau is always going to require a fusion in the future. So under their theory,  
6 Beau is in the same position now as he would always be in.

7 We know that's not the case, because the defense is going to be saying  
8 well you'd have incurred these costs for a fusion surgery no matter what in the future  
9 at both the L4-5 and L5-S1 levels. You're going to have a 3-4 breakdown so hey, no  
10 harm, no foul, I didn't do anything wrong. That's the position they're going to take in  
11 front of you.

12 I'm suggesting to you that Beau is unique, those studies don't fit this  
13 case cleanly or neatly, and importantly, not -- there is no -- even though they talk  
14 about what any these studies in the abstract, think about this: Did they show you  
15 one study? They never showed you one study. They talked about statistics is about  
16 all they did. And unfortunately, Beau is not a statistic. He's a person. He's a  
17 human being who has real problems.

18 And we know now that Beau is a surgical candidate because of pain  
19 symptoms and breakdown at -- of L4-5 and not L5-S1. While he's a surgical  
20 candidate now, he needs to hold on for as long as possible because once you start  
21 this process, it's another domino effect. And so Dr. Cash has instructed him, as any  
22 reasonable surgeon would, hold on as long as possible to have that.

23 But what did an injury at L4-5 cause? A significant loss of disc material  
24 following two microdiscectomies, an accelerated degenerative change at L4-5 that's  
25 going to worsen over time, loss of structural integrity and stability at L4-5, significant

1 stress and strain at L5-S1 due to problematic mechanics at L4-5 caused by the  
2 wrong level surgery. He's going to have to have a two-level fusion due to the  
3 degeneration at L4-5. They're going to need to include L5-S1 because it'll be sure  
4 to break down quickly and the way to -- according to Dr. Yoo and Dr. Cash, you  
5 need to address those both the same time. That be the most reasonable approach.

6 But even under Dr. Cash's theory, Beau would not have had two levels  
7 fused for more than 25 years. Think about that. Even in general if Dr. Cash is right,  
8 15 years out from your original surgery you're going to have one fusion. You're  
9 going to enjoy another 17 years of life before you even get to L4-5 even assuming  
10 he's right. Well by that time Beau is in his mid to late forties, early fifties and he's  
11 got to enjoy an incredible period of life without having an L4-5 problem whatsoever.  
12 If anything, this accelerated all of Beau's problems. This accelerated everything that  
13 needs to happen in the next five plus years. So now he's going to have to have a  
14 fusion by the time -- before he's 30 or maybe in his early thirties at the latest to  
15 address all of these issues started at -- started by the L4-5 injury.

16 And now Beau's going to -- we know that he's going to have to have  
17 L3-4 fused to -- due to adjacent segment breakdown in his lifetime after he does the  
18 first two-level fusion. So those are big decisions. But it's the reality and it's the  
19 reality that Beau lives with every day and is a pretty sobering experience when  
20 you're sitting here listening in court to having your life dissected like that. I think he  
21 described himself thinking he's a lab rat.

22 And we know that two levels is going to be the L5-S1 and L4-5 to  
23 stabilize those two areas, and that's going to be a cost of \$350,000.

24 We know that once you stabilize these two through fusion, that now  
25 L3-4 is going to be a significant risk of breakdown. That is a known phenomena in

1 about three percent per year in patients. And it's because the additional strain, the  
2 additional stress because those motion segment at L4-5 and L5-S1, they weren't  
3 going to be operating normally anymore. They don't provide the same cushion that  
4 they did before. They don't operate the way God made us anymore. And so now  
5 L3-4's going to have to take that stress and it's going to -- once he does that, L3-4  
6 will start to break down and ultimately going to require a fusion. At that point Beau's  
7 going to have now a three-level fusion probably by the time he's in his early forties.  
8 And the cost of that is \$342,000.

9 And I want to point out instruction number 19 because it's important.  
10 That is judge instruction -- instruction 19. You are not to discuss or even consider  
11 whether or not the plaintiff will have insurance in the future to cover the medical bills  
12 and treatment. Therefore, whether or not the plaintiff will be insured in the future is  
13 immaterial and should make no difference in any verdict you may render in this  
14 case.

15 So what does that mean? Health insurance is not to be considered by  
16 you in making an award for future medical cost. So when you're talking about that  
17 as part of your deliberations, please remember instruction 19 that you can't even  
18 consider that for any reason in coming up with an award for future medical cost, and  
19 the only evidence you have is the evidence we submitted through Dr. Cash, no other  
20 -- there's no other testimony that contradicted that in any way.

21 And so when you go back to your verdict form, we're going to ask for  
22 future medical expenses you fill in \$692,000. Now I want to talk about that for a  
23 minute. That's conservative. And the reason why it's conservative because that  
24 doesn't take into consideration if there's any complication whatsoever.

25 What if he has significant blood loss? What if you have an infection?



1 What if the fusion didn't hold? What if it required another surgery? That's best case  
2 scenario for Beau. That -- and we know just what happened here. Complications  
3 can arise. So that's the most conservative view for Beau, and that's all we're asking  
4 for that's all we can -- reasonably predict at this point in time. We can't factor in a  
5 complication, but we can do is put in what the reasonable medical charge would be  
6 for those procedures to plan for Beau's future.

7 Now, let's talk about what the law -- how the law values people's safety.  
8 And how the law values people's -- our safety is we value to be free from physical  
9 and emotional injury. That's important to us because people's lives matter. Their  
10 physical wellbeing and their mental wellbeing matter to us. And the law gives  
11 protection for that.

12 And number 3 says the physical and mental pain, suffering, anguish,  
13 disability and loss of enjoyment of life endured by the plaintiff from the date of the  
14 surgery to the present. You know, oftentimes physical injury we can deal with  
15 physical pain. But oftentimes the emotional pain and emotional injury, that leaves  
16 the most lasting scar. It's the what if's, it's the -- what about Beau laying in bed at  
17 night? What if this hadn't happened to me, being upset about his condition. What if  
18 I been given my chance? I see those guys competing I competed with my whole life  
19 and I could do it better, and now I can't.

20 And what about him working kind of thinking about his future? Can I  
21 coach like my dad did? Can I play with my kids the way my dad played with me?  
22 Those are serious concerns. And Beau -- and the law says that mental pain,  
23 suffering and anguish -- think about -- more of the categories deal with mental and  
24 emotional issues than they do physical. And so that's a large component of this.

25 The next one -- we're going to talk about the loss of enjoyment of life

1 and what that means. The Judge gave us an instruction on that because it really  
2 applies here.

3 And then we're going to talk about number 4, the physical and mental  
4 pain and suffering, anguish, disability and loss of enjoyment of life which you believe  
5 the plaintiff is reasonably certain to experience in the future as result of the medical  
6 malpractice. And I want to kind of -- have you understand the differences, but  
7 they're part of the same damage category so you include them together. You know,  
8 the mental pain -- physical, mental pain, suffering and loss of enjoyment of life, but  
9 they're truly different. And so when you're deliberating, be thinking about the  
10 differences and you have to add them together.

11 Damages for pain and suffering compensate a plaintiff for the physical  
12 discomfort and the emotional response to the sensation of pain caused by the injury.  
13 On the other hand, damages for loss of enjoyment of life compensate for the  
14 limitations resulting from the defendant's negligence on the plaintiff's ability to  
15 participate in and derive pleasure from the normal activities of daily life or the  
16 plaintiff's inability to pursue his talents, recreational interests, hobbies or avocations.

17 That instruction was tailor made for Beau. His ability to pursue his  
18 dream, his love, his passion, that's destroyed. He can never get that back. There's  
19 only a certain amount of time in a man's life that he can participate in that kind of a  
20 game. Golf -- you can golf forever, assuming you're physically able. But that's  
21 something you can enjoy well into your seventies and your eighties.

22 And unfortunately, there's a window of time as a football player that you  
23 have. And Beau was well on is way -- not only did he not get to complete --  
24 compete and finish his, you know, Division I college experience, he lost the  
25 opportunity to go to the next level, to go play professional football. And that is

1 invaluable, because we only heard -- remember we heard from Beau's dad who  
2 knew a lot about this, only one percent of all the players in high school level get to  
3 go play in a Division I college football program. That takes a lot of talent, dedication,  
4 strength and commitment. And Beau loved it. And it was his first love.

5 But let's think about this: Who would volunteer -- what reasonable  
6 person would volunteer to --

7 MR. LAURIA: Your Honor, may we approach, please?

8 MR. PRINCE: -- give up their hopes and dreams and suffer a lifetime --

9 THE COURT: Yeah.

10 MR. LAURIA: Thank you.

11 [Bench conference begins at 12:31 p.m.]

12 MR. LAURIA: That's a little bit like a Golden Rule --

13 MR. PRINCE: No --

14 MR. LAURIA: -- argument if he's -- excuse me. That is clearly a Golden Rule  
15 argument because he's asking them who would do that which is putting them in that  
16 same position, who would give up those opportunities for money. It is -- whether he  
17 phrased it as you personally or a third person --

18 THE COURT: No.

19 MR. LAURIA: -- would give it up --

20 THE COURT: No, no, no, no. I disagree.

21 MR. LAURIA: Okay.

22 THE COURT: We'll make a record if we need to.

23 MR. LAURIA: Okay.

24 [Bench conference ends at 12:32 p.m.]

25 MR. PRINCE: I'm almost done.

1 THE COURT: You can continue.

2 MR. PRINCE: And what reasonable person would give up their hopes, their  
3 dreams and agree to suffer a lifetime of pain, discomfort and limitation for money?  
4 Would it be a million dollars -- if I give you a million dollars today, but I give you a  
5 65-year-old man's spine, you won't be able to finish playing your college career,  
6 you're going to have discomfort and as you get older, it's going to get worse with  
7 time, you're going to need future surgeries, who would do that? Who would sign up  
8 for something like that?

9 Who would do it even for five million? How about 10 million? Those  
10 are big losses. And -- you know, that's what juries do. You decide based on the  
11 evidence of a case what somebody's loss of their hopes and dreams means, what's  
12 to suffer a lifetime of pain, but the only thing you can do is award money. That's the  
13 only thing you can do. And come up with what you think is fair based upon the  
14 losses that Beau sustained that you heard in this evidence.

15 And pain's kind of an interesting cycle because if you have increased  
16 pain, then you have anxiety and stress and fear and it affects you and affects your  
17 mood, and then, you know, affects your activities and is kind of like in this weird,  
18 vicious cycle and pattern. Beau's not quite there yet, but he's getting there. If he's  
19 having to worry about can I go and participate in life the way I want to, he's worried  
20 about. If he's uncomfortable and experiencing pain and discomfort and stopping  
21 some of his activities, activity avoidance, it fits this cycle of pain.

22 And, you know, our health means everything and to someone young  
23 and active with a bright future, it really means something. And it's valuable. And the  
24 law places a high value on that.

25 And so what is the price of pain? Beau has completely missed out on

1 his -- finishing his college career. He's already had multiple surgeries. He's had  
2 multiple injections, he's had -- go to the doctor, he -- what about the day he woke up  
3 in the hospital and he was -- he broke down and he had a very emotional moment --  
4 when you're -- on that witness stand is much different than sitting out here watching.  
5 It's a very emotional experience.

6           How about his fear when he was in the hospital can I even walk that  
7 day? Took him an hour to get out of bed to walk downstairs for dinner. He would  
8 lay down in his parents' room with a blanket and a pillow on the floor. And he has to  
9 worry about his activities. He doesn't participate in life the way he did.

10           He still tries. Not saying he doesn't try. Not saying he doesn't on some  
11 and have a good life, because he picked himself up and he dusted himself off and  
12 he's moving forward. He's going to have a good life, but it's not going to be a whole  
13 life the way he wanted it, the way he envisioned.

14           And the right thing to do is to award something that you feel is fair and  
15 appropriate for Beau and that you feel would be justice in this case because I think  
16 Dr. King said it best: Injustice anywhere is a threat to justice anywhere --  
17 everywhere. And Beau's only protection is in the law. He has no other protection.  
18 He only has one opportunity to come talk to you about this (sic) issues, so for the  
19 past pain, suffering, loss of a -- his disability, the loss of enjoyment of life because of  
20 everything he's had to endure so far, complete loss of his collegiate career and  
21 professional opportunities, I'm suggesting \$2,500,000 would be reasonable and  
22 appropriate for Beau.

23           Now, let's -- we got to talk about the future for Beau. Beau has  
24 additional -- has a life expectancy of 52 years. And how long is 52 years? It's 624  
25 months. It's 18,980 days.

1 MR. LAURIA: May we approach, Your Honor?

2 THE COURT: (No audible response.)

3 [Bench conference begins at 12:36 p.m.]

4 MR. LAURIA: It is also improper closing argument to suggest a mathematical

5 calculation based upon a time period as a measure of general damages in the

6 future. So that is an improper

7 THE COURT: I don't remember if --

8 MR. LAURIA: -- closing argument --

9 THE COURT: -- if that was raised by motion in limine in this case or not, but I

10 know I've --

11 MR. PRINCE: I'm not even arguing per diem anyway so his --

12 THE COURT: Pardon?

13 MR. PRINCE: His objection's irrelevant.

14 THE COURT: His objections are irrelevant?

15 MR. PRINCE: His objection is, yeah, because I haven't even done anything.

16 All I've been saying what is -- what's 52 years.

17 THE COURT: I know that we haven't even got there yet --

18 MR. PRINCE: I'm not asking for a per diem, so he doesn't have to --

19 THE COURT: -- but I'm assuming the objection is going to be a per diem

20 argument --

21 MR. LAURIA: Absolutely.

22 THE COURT: -- but it depends on --

23 MR. PRINCE: Well --

24 MR. LAURIA: Whether -- excuse me.

25 MR. PRINCE: -- per diems are allowed anyway, so it doesn't --

1 THE COURT: -- it depends on how it's phrased --

2 MR. PRINCE: Right.

3 THE COURT: -- and I can't get there until I get there. You know? I mean to  
4 start talking about how long is somebody's life, okay, until we get there --

5 MR. LAURIA: All right.

6 THE COURT: Thank you.

7 [Bench conference ends at 12:36 p.m.]

8 MR. PRINCE: Objection overruled, Judge?

9 THE COURT: You can continue.

10 MR. PRINCE: Thank you.

11 It's 27,331,200 minutes. And that's 52 years. And, you know, life is  
12 short. And then when you get thinking about an -- you know, as we age, we look  
13 back at our youth and look at what could have and should have been. And Beau's  
14 going to be doing that. He's not going to be doing that just because he made life  
15 choices and when people make their own life choices, that's on them and they have  
16 to accept those consequences, things we're talking about.

17 But when someone else puts you in a situation where you've lost out on  
18 your opportunity to enjoy the prime of your life, that now you suffer chronic pain and  
19 that it's going to get worse with time -- when you have to listen to that, that it's going  
20 to get -- my condition's going to get worse with time, it'll never improve. There'll be  
21 times sure he's have his good days and he's going to have his bad days, but he's  
22 going to have a lot to endure.

23 And I want to share with you the -- what's 50 years that -- it's a very  
24 long time. And this be kind of -- this is kind of interesting anyway (indiscernible) 50  
25 -- how much 50 years is. And we're going to look at what means 50 years going