IN THE SUPREME COURT OF THE STATE OF NEVADA

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

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

VOL. 7 PART 1

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CLERK OF THE COURT

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

MONDAY, AUGUST 31, 2015

PARTIAL TRANSCRIPT OF PROCEEDINGS

JURY TRIAL - DAY 9

APPEARANCES:

For the Plaintiff: DENNIS M. PRINCE, ESQ.
DANIELLE A. TARMU, ESQ.

For the Defendant: ANTHONY D. LAURIA, ESQ.
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RECORDED BY: SARA RICHARDSON, COURT RECORDER

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FOR THE PLAINTIFF:

(None)

FOR THE DEFENDANT:

Monday, August 31, 2015 at 8:15 a.m.

MR. LAURIA: Morning, Your Honor.

THE COURT: Good morning guys. How you doing?

MS. TARMU: Good --

MR. PRINCE: Good morning.

MS. TARMU: -- morning.

MR. PRINCE: Morning, Judge.

THE COURT: I got everybody's emails and everything about the jury instructions, but we'll get back to that once we get through the witnesses.

MR. LAURIA: Okay.

THE COURT: Okay. You guys have anything before we get Dr. Kaye in here?

MR. PRINCE: No.

MR. LAURIA: I don't believe so.

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

[Courtroom at ease]

[Jury in at 8:17 a.m.]

THE MARSHAL: Jurors are present, Your Honor.

THE COURT: Thank you very much.

You guys can be seated, thank you.

All right, folks, welcome back. Good morning. We will continue on with our trial. We are back -- as you'll recall from Friday, plaintiffs rested their case in chief. We're back to the defendant's case in chief.

So Mr. Lauria, who's your next witness going to be?

MR. LAURIA: Thank you. I'd like to call Dr. Marc Kaye.

THE COURT: Okay.

THE CLERK: You can go ahead and stand --

MR. KAYE: Okay, thank you.

[Direct Examination of Marc Kaye begins at 8:17 a.m. - previously transcribed

[Bench conference begins at 8:28 a.m.]

MR. PRINCE: I just want to lodge an objection I can see where this is going. Dr. Kaye only authored one report. He didn't comment on any films after the 2010 --

MR. LAURIA: Where'd Paul go?

MR. PRINCE: I'm sorry, he never --

MR. LAURIA: Can you pull up the deposition (indiscernible) --

MR. PRINCE: Yeah. He never offered any opinions at his deposition --

MR. LAURIA: (Indiscernible) --

MR. PRINCE: Okay. Never offered any --

MR. LAURIA: (Indiscernible) Paul's getting it.

MR. PRINCE: -- never any opinions concerning the 2012 or 2014 MRI.

THE COURT: Okay.

MR. LAURIA: Judge, we produced them with a slideshow that included the 2012 film. He questioned him about it at his deposition.

THE COURT: Okay.

MR. LAURIA: And in his deposition he clearly said I reviewed the 2014 film --

MR. PRINCE: But there's no --

MR. LAURIA: Hold on. Can I finish please.

THE COURT: Hold on. Let him finish.

MR. LAURIA: So he reviewed the 2014 film at that time. We went through

this with Dr. Yoo who until July 17th of 2015 doesn't mention seeing the 2014 film. You allowed it because he wrote in -- in July that he'd seen it. My doctor says I reviewed that film, I'm ready to talk about it and he never asked him any questions about it. So he's indicated as part of the studies he reviewed. Mr. Prince was aware of that --

MR. PRINCE: What page are you at?

THE COURT: Page 10 -- 9, 10, 11, 12.

MR. PRINCE: Okay.

THE COURT: He says he reviewed the 2014 films.

MR. LAURIA: Correct. And we sent him a PowerPoint that included the 2012 films on it --

MR. PRINCE: I can't -- I couldn't even read that though.

THE COURT: Well --

MR. PRINCE: I can't even --

MR. LAURIA: -- that showed he -- I mean if you go back in deposition he says he's reviewed that also.

THE COURT: Go -- that he said he reviewed the 2012?

MR. LAURIA: He's reviewed both. He said he's reviewed both.

THE COURT: No, no, no, where does he say he's reviewed 2012?

MR. LAURIA: We can find that specific reference --

MR. PRINCE: With regard to, Judge, the 2014, page 9, says yes, there was an MRI of the lumbar spine March 13th that I may be asked to render opinions on. But as you sit here today, have you been asked to render an opinion on the March 2014 lumbar spine (indiscernible) ask this -- I specifically asked that question. So --

THE COURT: What line are you looking at right now?

MR. PRINCE: I'm at --

THE COURT: Okay.

MR. PRINCE: -- page 9 --

THE COURT: Okay.

MR. PRINCE: -- line 9 and I went on to 10. So if he hasn't been asked to render any opinions, didn't have any at that point. So what was I -- what am I supposed to do?

MR. LAURIA: Well --

MR. PRINCE: If he had an opinion, I guess he would have shared that with me right (indiscernible) --

MR. LAURIA: Let's go back --

MR. PRINCE: Excuse me. Hang on.

THE COURT: Hold on.

MR. PRINCE: (Indiscernible) --

MR. LAURIA: Let's go back to Dr. Yoo who I asked at his depo if he'd even seen those films --

MR. PRINCE: That has nothing to do --

MR. LAURIA: -- and he said -- excuse me.

MR. PRINCE: -- with Dr. Yoo. Has nothing to do --

MR. LAURIA: Excuse me.

THE COURT: Well, no, no, no, no, no.

MR. LAURIA: Could I --

MR. PRINCE: -- with Dr. Yoo.

MR. LAURIA: Could I finish?

THE COURT: I know.

MR. PRINCE: He has nothing --

THE COURT: Hold on. Hold on.

MR. LAURIA: Thank you.

THE COURT: Hold on, let him finish.

MR. PRINCE: He keeps interrupting me --

THE COURT: Let --

MR. PRINCE: I wasn't finished.

THE COURT: I know. You guys keep doing it to each other. So just --

MR. PRINCE: But I wasn't -- I was looking for something in the deposition.

THE COURT: Okay.

MR. LAURIA: Dr. Yoo --

THE COURT: Go.

MR. LAURIA: -- in his deposition said I haven't seen those films, I haven't reviewed them. So when I questioned him, he hadn't seen them. They then just before trial --

THE COURT: Right.

MR. LAURIA: -- end of July, all they do they don't show -- he doesn't express any opinions about them in his report. He just says --

THE COURT: Okay.

MR. LAURIA: -- I looked at them. He got to testify about them over my objection extensively in this case. So my radiologist said he knew earlier than that that he looked at that film specifically. So to now say they get to get Dr. Yoo to testify about these films when he told me in deposition I haven't even looked at them, and now he's going to say my doctor says yeah, I reviewed them, I haven't been asked to give a specific opinion about them at this time is blatantly unfair and,

Judge, we don't -- we can't anticipate everything Dr. Cash or Dr. Yoo's going to say --

THE COURT: I know.

MR. LAURIA: -- in the trial. So --

THE COURT: Hold on. I'm trying to read this long answer he gave.

MR. PRINCE: But with regard to Dr. Yoo, he already had expressed his opinions. He kind of updated what --

THE COURT: I know.

MR. PRINCE: -- materials and his opinions never changed as to primarily the ongoing condition of Beau Orth and how he progressively worsened. That was already an existing opinion of his.

MR. LAURIA: That is --

MR. PRINCE: So --

MR. LAURIA: -- untrue.

THE COURT: Here's the thing. Will you let me finish this -- let me finish reading this answer on page 12 because he's describing everything that he has at the depo and you all could have asked him questions about any of those things, so I'm just trying to see. (Indiscernible) lumbar spine, September 2010, MRI, March 2014, MRI of the brain? He had an MRI of the brain?

MR. LAURIA: Yeah, he had -- he's had two of them --

MR. PRINCE: Yeah, that was something --

THE COURT: Okay.

MR. PRINCE: -- unrelated. I don't even know what that was about.

THE COURT: MRI of the lumbar spine.

MR. PRINCE: Think he had some headaches or something.

THE COURT: Lumbar spine from August 2012, lumbar spine (indiscernible) -- well, I'm going to allow him to talk about them.

MR. LAURIA: Thank you.

MR. PRINCE: Okay.

[Bench conference ends at 8:32 a.m.]

[Direct Examination of Mark Kaye 8:32 a.m. to 9:32 a.m. - previously transcribed]

THE COURT: Mr. Prince.

MR. PRINCE: Thanks.

CROSS-EXAMINATION

BY MR. PRINCE:

Q Dr. Kaye, good morning.

A Good morning.

Q You were retained as a forensic expert in this case, correct?

A Yes.

Q And as a forensic expert you're here to provide assistance to the Court and to the members of the jury, correct?

A Yes.

Q Your opinions, analysis and testimony should be unbiased and objective at all times, correct?

A Yes, sir.

Q You weren't asked by the Court to come in and provide some unbiased, objective opinion; you were hired by the lawyers for the defendant, correct?

A That is correct, yes.

Q And you should call it the way you see it and not as an advocate for one side or the other. Wouldn't you agree with that, Doctor?

A I would.

Q And in performing your analysis and rendering your opinions in this case, isn't it true that you should not be selective in how you review information, including the cuts from the various films that you showed here today?

A I think you should show the best images possible to demonstrate the pathology, yes.

Q And not the one to advocate potentially facts that may only help Dr. Capanna to the exclusion of facts which may help Mr. Orth?

A I think that's correct, yes.

Q Now the defense counsel at one point represented in this trial that you're a neuroradiologist. You're not a neuroradiologist, correct?

A I'm not board certified in neuroradiology advanced, only interventional.

Q Right. And you're an interventional radiologist, correct?

A Correct.

Q And a diagnostic radiologist, correct?

A Yes.

Q And you're -- that's a -- radiology is a nonsurgical specialty, correct?

A Well, we -- I do minimally invasive procedures that some would call surgical procedures.

Q I mean, you're -- you don't hold yourself out as a surgeon even though you do some minimally invasive procedures, correct?

A I don't hold myself out as a surgeon, but there's an overlap. I do procedures, spinal procedures, kyphoplasty, vertebroplasty, that neurosurgeons do, orthopedic surgeons do. They might call it surgery. I call it interventional radiology.

Q Right, but in your practice patients don't come to you for ongoing spinal

complaints, recommendations for treatment, including surgery, correct? You don't see patients for that purpose?

A Well, I see patients who, for example, have spinal fractures that I'll do -- let me finish -- that I do vertebroplasties or kyphoplasties on that, again, some doctors would call that surgery. I would call it basically a minimally invasive procedure.

Q So would a neurosurgeon consider you, as a radiologist, a surgeon?

A You would have to ask them, but --

Q Right, but you don't have -- you don't have a -- you don't typically, in a clinic setting, have patients like Beau Orth or people who have ongoing chronic spine complaints come to you for evaluation and treatment, do you?

A Not exactly like in that context. That's correct.

Q As a diagnostic radiologist, you are given X-rays, CT scans and MRI films to review, correct?

A Correct. But as an interventional radiologist --

Q That's all I'm asking if -- it was yes or no.

A Okay.

MR. LAURIA: I'm sorry. Judge, could he be allowed to --

BY MR. PRINCE:

Q I said as a diagnostic --

MR. LAURIA: -- answer the question?

Q -- radiologist --

THE COURT: Let him listen to the question. Okay. Go ahead.

BY MR. PRINCE:

Q As a diagnostic radiologist, you look at films, CT scans, MRIs, X-rays of

all aspects of the -- various aspects of the body, correct?

A When I'm acting as a diagnostic radiologist, yes.

Q And you spend about 50 percent of your time working as a diagnostic radiologist, correct?

A That's correct, yes.

Q And you don't look exclusively at spine films, correct?

A That's correct.

Q Neuroradiologists have that additional training and specialization in primarily looking at spine films, correct?

A Well, they may have additional training and -- but I would say most of them are not -- accept in academic centers, most of them do other things. They read mammograms. The vast majority of them just don't do neuroradiology.

Q Okay. And in your practice you look at, at most, on average between 30 and 50 lumbar spine MRI films per month, correct?

A That is correct. And I also look at quite a few CT scans and X-rays of the lumbar spine.

Q Right. And if there was going to be testimony today from the defense expert, Dr. Rimoldi, he reviews 200 scans a week, that would be far more than what you do as a radiologist in a hospital setting, correct?

A That would be more, yes.

Q And you agree that orthopedic spine surgeons, neurosurgeons, that they are also trained to review images of the spine, including MRIs and CT, correct? They do that every day?

A Well, I don't know if they do it every day. Depends on their practice. Some orthopedic surgeons do knee arthroscopy and shoulder stuff. If they're spine

-- or they're primarily focused on spine, that's probably true.

Q And -- but if you're a spine surgeon, either a neurosurgeon or an orthopedic spine surgeon specializing in diseases of the spine, you agree that they look at MRIs, CT scans and other radiological image all day every day with regard to conditions of the spine, correct?

A I don't know if they look at X-rays all day long, or MRIs all day long every day. That I don't know.

Q Right. And you know from your own training that while a report may accompany an MRI image, the spine surgeons typically will review the film themselves and make a recommendation for treatment primarily based upon their own read?

A You'd have to -- that's -- you'd have to ask the neurosurgeons or spine surgeons what they base their opinion on.

Q Okay. And you agree that you've never examined my client, Beau Orth, correct?

A I've never examined him, just his X-rays and MRI studies, yes.

Q You've never done a clinical exam of my client, Beau Orth, correct?

A That's correct, yes.

Q You've never taken a history from him, correct?

A That's correct.

Q You never physically examined him and like put your hands on him and, you know, performed any testing, correct?

A I've never met him until I walked in today.

Q Right. And that's not typically what you do as a diagnostic radiologist, correct?

A Well, I --

Q Examine patients, put him through various orthopedic testing, neurologic testing, that's not what you do as a diagnostic radiologist in a hospital setting, correct?

A What we do -- looking -- reviewing the studies, most the time if we're just doing reviewing an MRI or X-rays on the patient, as a diagnostic radiologist we may -- we probably wont's see the patient or talk to the patient or examine the patient.

Q Yeah, that's the vast majority of the time, if not 100 percent of the time, correct?

A I'm sorry?

Q That's the vast majority of the time, if not 100 percent of the time --

A It's not a hundred percent because a lot of times we have to go in -- if we're doing a post-contrast study, we have to be there, we have to inject the patient with the contrast. But it's the vast majority of the time.

Q Right. And because other medical specialists send a patient for an MRI, correct? And then you'll interpret the film and send a report back, along with the imaging itself, to the ordering physician?

A Sometimes. Some of them want to see the imaging, some don't.

Q Right. And when you read MRI and CT, you're at a hospital, correct? You don't work at like a radiology facility when you're doing that?

A Most of my work is done at a hospital, but I also read MRIs in outpatient settings, yes.

Q Right. But you work -- the vast majority of your work as a diagnostic radiologist is in a hospital setting, correct?

A That's correct, yes.

Q Okay. And most people who are coming there already have -- if they're coming in there for surgery, all the imaging has been done preoperatively, correct?

A No, you asked me that at my deposition. No, that's not correct.

Q Okay.

A You have patients who come in the emergency room, it might be somebody who picked up a --

Q But that's not what -- that wasn't my question though.

A Okay.

Q My question was -- if you listen carefully was patients who are coming into the hospital for spine surgery, elective spine surgery -- I'm not talking about the trauma patients, I'm talking about elective spine surgery. All of the imaging has been done primarily before -- in general rather, before the patient even gets to the hospital, correct?

A If they're coming in to the hospital that day for surgery, the imaging is done before surgery. That's correct.

Q Right. And where you may get involved if some -- if a patient comes into the hospital, you know, who had an injury or some kind of a trauma, they may refer the patient for radiology, for a CT, MRI or some other radiological study, correct?

A That's only partially correct.

Q Okay. Now in this case you agree that every level above L5-S1 before Dr. Capanna's surgery was normal, correct?

A Yes.

Q You agree they're all normal, healthy discs except L5-S1, correct?

A That's correct.

Q You agree that you saw no evidence of degeneration at any level above L5-S1, correct?

A That's correct.

Q And you agree therefore that L4-5 immediately before the surgery with Dr. Capanna was a normal, healthy, pristine disc for a 20-year-old man?

A That's correct.

Q Right. And you agree there's no evidence of any type of inflammatory disease or other process that existed in Beau Orth's spine before September 17th, 2010 in the vertebral bodies of his spine, correct?

A That's correct. The only abnormality was the disc at -- disc herniation at L5-S1.

Q Right. And you agree that that was a small left paracentral disc protrusion, correct?

A It was small, but it's not the size. It's where it is, it's location.

Q Right. The question was it is a left paracentral disc protrusion?

A It's a left paracentral disc protrusion, yes.

Q Right. There are central disc protrusions, there's paracentral disc protrusion and there's lateral ones, correct?

A Well, that's one terminology -- one set of terminology. Some people would say right. Some people would say left. It can be -- the disc can actually be in the nerve ramin (sic). It could be extruded. It could be away from the disc space level. There's a number of variations.

Q Right. But you agree that my description of being central, paracentral or lateral, that those are terms, you know, radiologists use?

A Those are acceptable terms, yes.

Q Right. And based upon your review, it was a contained disc protrusion, correct?

A I don't know what you mean by contained.

Q There was no fragment or extruded portion of the disc at L5-S1 before Dr. Capanna's surgery based upon your review of all of the imagining?

A It was not extruded, but the term contained I think is not commonly used. It's just a disc herniation. Extruded would mean it's separated.

Q Right. Contained meaning in the sense there's continuity of the L5-S1 annulus around the protrusion, and there was no free fragment outside of the annular portion of the disc?

A No. No, that's not correct.

Q Okay. You saw portion of the disc material outside of the disc --

A No. What you said you --

Q -- on your review of the imaging?

A The statement that you just read -- and I have a slide, I think I showed the slide -- was you said it was contained within in the annulus. Okay? There was an annular disrupt -- there was a disruption of the annulus allowing the disc to herniate or protrude. That's what the jelly donut thing that they've talked about. So the annulus was disrupted and that was what was allowing the disc to herniate. It wasn't extruded, meaning it wasn't separated. It was still in continuity with the native disc.

Q That's what I'm --

A Okay.

Q That's what I'm talking about.

A Well, you said -- in the statement I thought you said that the annulus was intact, and so --

Q I never said the word intact. I said --

A Contained within the annulus. I forgot the terminology.

Q Right, because the outer -- you have the outer rim of the annulus, correct, and -- right?

A Well, the --

Q And annulus has an outer rim, correct?

A The outer rim or the outer part of the disc is the annulus. The center portion is the nucleus, which is the gelatinous material.

Q Right. And the disc has been described as a -- the annular portion as like almost a radial tire and it's very tough as compared to the disc itself?

A It's fibrous tissue and that's what holds it in place.

Q Right. And --

MR. PRINCE: Can I have demonstrative 17, please?

Q And I'm showing a disc in the annulus. Do you see that, Doctor?

A Yes.

Q All right. And you can have disruption of the annulus because the nucleus has to get somehow towards the outer portion of the annulus, right --

A I'm sorry.

Q -- in order to cause a protrusion? Disc material has to be able to get out of the nucleus and get into the annulus in order to cause the abnormal, you know, contour of the disc, right?

A Well, that's what I'm saying basically, and the slide that I showed I think demonstrated that well.

Q All I'm asking is a yes or no question.

MR. LAURIA: Judge, I'm sorry, it wasn't a yes or no question.

MR. PRINCE: It was.

MR. LAURIA: He's trying to answer and it's inappropriate to interrupt.

THE COURT: I think it was a yes or no question.

THE WITNESS: Okay. I'm sorry. What was the question again?

THE COURT: Repeat the question.

BY MR. PRINCE:

Q That the nuclear -- the nucleus material has to get, you know, through the annular portion, the annulus fibrosis of the disc, in order to cause a protrusion? It has to get out into the outer portion of the annulus?

A That's not exactly a correct statement, so I can't --

Q All right.

A That's not exact -- I know where you're going with that, but I don't want to answer yes or no because it's not entirely correct.

Q Okay. And when you have an extruded disc fragment like you showed on the T1 image from October 6th, 2010 with contrast, that means that there's actually disc material outside of the annulus, right? It got outside of the -- the outer portion of the annulus?

A Both of those are outside the annulus.

Q Okay. And in this case Dr. Capanna states in his operative report that there are intraoperative fluoroscopic X-rays which were taken to ensure the surgery was being done at the correct level. You've never seen those films, have you?

A That's correct.

Q You've never been asked to look at those films, correct?

A Well, I've never seen the studies.

Q Have you ever asked for them?

A I don't recall.

Q I mean --

A I thought I was provided with everything that was available.

Q Well, it's not in --

A I don't remember specifically if I asked for them or not.

Q Well, the whole case is about a wrong level surgery. You know that, right? That's the --

A I know there's an allegation of that, correct.

Q Right. And so didn't you ask for the fluoroscopic images taken intraoperative by Dr. Capanna?

A I asked for all of the images that were available.

Q No, I'm asking specifically did you asked for those?

A I don't know if I specifically -- I don't recall. It's been a while, but --

Q I mean, as a radiologist working in a hospital, do you ever review or interpret intraoperative fluoroscopic X-rays of the spine?

A After surgery -- sometimes they save images after surgery.

Q Okay. And send them to you for review?

A That's correct.

Q And what's the purpose of the review?

A To document that the images were obtained and what levels they were obtained.

Q Okay. And to document where the procedure was performed, correct?

A That's correct.

Q Using the markers, correct?

A Correct.

Q And so you have -- you've never seen any of those intraoperative fluoroscopic X-rays to confirm that Dr. Capanna did in fact do surgery at the correct level, correct?

A I didn't see any images that were taken. They don't do it every -- in every spine surgery case.

Q And you agree that the first time there's any significant pathology at L4-5 was following Dr. Capanna's September 17th, 2010 surgery, correct?

A That's correct, yes.

Q Okay. Before that date, L5 was always interpreted as normal, at least according to three MRI imaging studies, correct?

A L4-L5.

Q L4-5, correct?

A Correct.

Q Right. And you agree that the October 6th, 2010 MRI shows postoperative changes in the soft tissue and in the posterior boney elements at both L4-5 and L5-S1, correct?

MR. LAURIA: Compound.

A That's --

THE COURT: Well, hold on.

MR. LAURIA: Objection.

A -- not entirely correct --

MR. LAURIA: Objection; compound.

THE COURT: Hold on. Hold on.

A -- no.

THE COURT: Hold on. I'm going to sustain the objection. Why don't you break it down if you --

MR. PRINCE: What's the objection?

MR. LAURIA: Compound.

THE COURT: Compound question. Just break it down.

MR. PRINCE: Oh, okay. Oh, it's fine. Fine. Easy.

BY MR. PRINCE:

Q Doctor, isn't it true that based on your review the October 6th, 2010 MRI, it shows postoperative changes in the soft tissues?

A It shows postoperative changes in the soft tissues, that's correct. Yes.

Q In fact, you'd always -- that soon after surgery, being just a few weeks, you'd always expect to see changes in the soft tissues, correct?

A That would be -- the vast majority of the time you would, yes.

Q All right. Now you also agree that based upon your review of the October 6th, 2010 MRI, it showed postoperative changes at the posterior boney elements at both L4-5 and L5-S1, correct?

A That's not entirely correct.

Q Okay. Do you have your report in front of you?

A My report or deposition?

Q Report, sir.

A What -- I'm sorry, which --

Q Do you have your report is what I'm asking you?

A Which report, sir?

Q Well, I only have one.

A You mean the report of the MRI?

THE COURT: No, I think he means the report that you --

BY MR. PRINCE:

Q Your forensic report.

A Oh, my report. Okay. No, I don't have it front of you -- in front of me.

Q Okay. Would you like a copy?

A Yes, please.

Q Okay.

MR. PRINCE: I thought I brought an extra one.

THE COURT: Here you go, Doctor.

THE WITNESS: Thank you.

MR. PRINCE: Oh, okay. Good.

THE COURT: August 5th, 2013?

MR. PRINCE: Yeah.

THE COURT: Yeah.

BY MR. PRINCE:

Q Are you on -- you've only authored one report, that's August 5th, 2013, correct?

A I believe so.

Q Okay. And I want you to go to the third page and tell me when you're there.

A I'm here.

Q Okay. And in the first full paragraph where it says Mr. Orth underwent a lumbar MRI, are you there?

A The second paragraph?

Q The first full paragraph which would be Mr. Orth underwent a --

A Yes.

Q Okay. And this is all dictated by you and this was the report you submitted for the Court, correct?

A Yes.

Q And I want you to down to the fourth sentence and I'm going to read the sentence, okay? And all I want you -- it's a yes or no question. All I want you to say is did I read it correctly or not. And it reads this way: There are postoperative boney changes at both the L4-5 and L5-S1 levels. Did I read that correctly?

A Yes.

Q Okay. So a minute ago when you disagreed with my question that there are postoperative boney changes at L4-5 and L5-S1 levels, that's inconsistent with your report, correct?

A That is correct, but there were --

Q I'm just asking --

A Okay. Well, the fine --

Q Hang on. I'm not asking you any --

A Okay. I know, the fine point --

THE COURT: Hold on. Hold on. He'll follow --

THE WITNESS: Go ahead.

THE COURT: He'll ask some more questions.

BY MR. PRINCE:

Q Posterior elements include the lamina, correct?

A That is correct.

Q All right. And your finding was in fact that there was boney element

change at L4-5 according to your report, correct?

A Correct.

Q All right. And I recall when I read that statement to you at your deposition you told me you didn't even understand the question?

A Well, we can look through -- I have my deposition.

Q Oh, I have it. Would you like -- if you could look --

A Yeah. Okay.

Q We can look at it.

MR. PRINCE: Can I have the doctor's deposition, please?

Your Honor, may I approach the witness?

THE COURT: You may.

MR. PRINCE: Thanks.

THE WITNESS: I have it here. I have my deposition here.

MR. PRINCE: I know. I'm handing you the official court copy though.

THE WITNESS: Okay.

MR. PRINCE: Thank you.

THE COURT: And what was the date, just for the record?

MR. PRINCE: It is June 15th, 2015.

THE COURT: Thank you.

THE WITNESS: Which page are we on?

BY MR. PRINCE:

Q Hang on. We're on page 53.

A Okay.

Q Starting at line number 8. I read the following question to you. I'm asking you, do you agree with this statement that on the October 6th, 2010 MRI

there were changes in the soft tissues and posterior elements at both L5-S1 and L4-5 levels? You said -- Answer: Well, let me break it down.

A Yes.

Q Question: I just want to know if you agree with the statement, yes or no?

Answer: I'm not sure I understand the statement. Is that what you said?

A Yes.

Q Okay. And then I want you to go to your report, page 3, where it says, there are also changes in the soft tissues and posterior elements at both the L5-S1 and L4-5 levels, correct?

A Yes.

Q And so you didn't understand your own statement when I asked you at that time -- at the time of your deposition, correct?

A Well, I think -- I think leading --

Q Is that how it read?

MR. LAURIA: Can he answer the question, Your Honor?

THE COURT: Well, to the -- the question was is that how it read?

BY MR. PRINCE:

Q Yeah, the deposition.

A That's how it was read, yes.

Q Right.

A Okay.

Q Now it's your opinion that there is no evidence of -- you saw no evidence -- strike that. You do agree though that after the -- Dr. Capanna's

September 17th, 2010 surgery, there was a left-sided disc fragment within some postsurgical scarring at L4-5, correct?

A Correct.

Q And you agree the disc fragment at L4-5 was not present before Dr. Capanna's surgery, correct?

A That's correct.

Q And regardless of whether we're looking at a T1 or a T2 weighted image, which is a little different -- they're a little bit of a different of MRI imaging, you agree that the October 6th, 2010 MRI shows disc fragment within the postsurgical scarring at L4-5, correct?

A That's not an entirely correct statement.

Q Right. And you showed us earlier that there was a disc fragment at L4-5 using the contrast portion of the MRI, correct?

A Right, and the contrast was only the T1 weighted images. That's the -- only on that series.

Q Right. You take the T1 weighted images and you look at the T2 weighted images, no -- and when you -- to look at the overall condition of the spine, correct? If you want to like give an accurate read of a patient's spine and interpret the radiological films correctly, you have to look at both and harmonize them, right, and look at it all together?

A You look at the sequences, the T1, the T2, the STIR images, the axials and sagittals, but when you're trying to determine if it's disc or scar material, you -- the T2 are not going to be a help, only the post-T1 contrast.

Q And you agree that -- I know the -- you know, the MRI technology is very good at showing the condition of soft tissues, including the disc morphology,

correct? It's probably one of the best imaging tools we have?

A That is correct.

Q But you agree that the use of a high-powered microscope during surgery, that would be by far and away the most sensitive to see boney structures, tissues, nerves, as well as the condition of the disc, correct?

A I don't -- I don't know. I don't know. I don't use a high-powered microscope and I don't know what -- how that would compare to imaging with an MRI.

Q So you don't know if using of the high-powered microscope intraoperatively, you know, in order to perform the surgery, you don't think that's more sensitive than an MRI as to what the condition of the spine is?

A Well, it depends on what you're talking about. A microscope is good for looking at a little area, but the MRI gives you a global picture of everything. But again, I don't use a microscope. And if the microscope was great, then they wouldn't do MRIs. They'd just go in with a microscope.

Q Well, you wouldn't just go in to do surgery without an MRI first. I mean that would be almost ridiculous, right?

A That was -- that would be correct. That's why.

Q Right, but the point is when you're intraoperatively, your actually visualizing exactly what's happening, because an MRI is not 100 percent accurate, is it?

A I'm not a -- I don't use a microscope --

Q Right.

A -- for my procedures.

Q In fact, you wouldn't even be -- you wouldn't even have the privileges to

even do any sort of spine surgery at any hospital to use a microscope, right?

A I don't have privileges to use a microscope, that's correct.

Q Right, nor do you have privileges to do spine surgery, correct?

A I do kyphoplasty, vertebroplasty, nerve blocks and other types of injections.

Q Okay. Well, do you have the -- do you have the privileges at any hospital to perform a microdiscectomy, lumbar reconstructive fusion?

A No.

Q In fact, you --

A No.

Q -- don't do any of those in your practice --

A That's correct.

Q -- right?

A That's correct.

Q And you have no reason to dispute the intraoperative findings of Dr. Cash, correct?

A I have no opinion about that.

Q Right. So therefore, you have no reason to dispute that Dr. Cash saw the fragment within the scar tissue using a high-powered microscope?

A I have no reason to dispute it. I don't have any real particular expertise or knowledge of it.

Q Now in your opinion, there is evidence of surgery that Dr. Capanna performed surgery at L5-S1, correct?

A Correct.

Q You have no opinion on whether he performed surgery at L4-5, correct?

A That is correct.

Q You saw no -- and based on your review, you saw no evidence of any sort of surgery at the L4-5 level, correct?

A No, that is not correct. I think I've said that there were changes there that could be due to surgery.

Q Right, but it's your opinion that you saw no clear indication of surgery at L4-5, correct?

A I said the disc -- the disc fragment could be due to surgery or it could be due to degeneration or the epidural fibrosis could be due to surgery or it could be due to extension from the L5-S1 level.

Q Okay. Isn't it true, Doctor, that you saw on your review of the October 6th, 2010 MRI no definitive evidence of surgery at L4-5?

A No, that's not correct.

Q Okay. Do you have your deposition?

A Yeah.

MR. PRINCE: Can we probably -- do you have it, Kaye?

Q Well, I've got it. Just tell me -- tell me when you're at page 70. I'll just read.

A Which page?

Q Seventy, sir.

A Okay.

Q Ready?

A Uh-huh.

Q Lines 10 through 12.

A Right.

Q Okay, the question I asked you was is there any evidence of surgery at L4-5?

Your answer was not that I could say definitively.

A Right.

Q Did I read that --

A But if you read down --

Q Did I read that correctly?

A If you read down line 13 through 16 --

MR. PRINCE: Your Honor, please instruct the witness --

THE COURT: Hold on. Hold on, Doctor.

THE WITNESS: I'm sorry, sir.

THE COURT: Did he just read that portion correctly?

THE WITNESS: He read that --

BY MR. PRINCE:

Q Did I read that portion --

THE WITNESS: -- portion correctly.

Q -- correctly?

A Yes, sir.

THE COURT: Thank you.

BY MR. PRINCE:

Q And -- well, we can finish that up. That's fine, the next part is. The next question was: Question: Is there any radiological changes that you see are consistent with the surgery at L4-5 based upon the October 6th, 2010 MRI study?

Your answer was: Well, there's epidural fibrosis. There's blood in that area. But again, that could be related to surgery at L4-5 or it could be related to

surgery at the lower level or it could be related to the disc herniation or extrusion, correct?

A Correct.

Q Okay. And keep going, line -- page 70, line 21: Okay. So you agree that there is some radiological evidence of the surgery at L4-5, correct?

Question -- then going on to page 71.

A Yes, I got you.

Q I don't think that's my testimony. I didn't say there was evidence of surgery at L4-5. I read that testimony correctly, didn't I?

A That's correct.

Q So the only place you're saying there was definitive evidence of surgery was L5-S1, correct?

A That's correct.

Q Okay. I want to read something for you.

MR. PRINCE: Ready for Belzberg.

Q I want to read you some testimony from the other defense expert, Dr. Belzberg, from Johns Hopkins, okay?

A Yes.

Q I want to ask if you agree or disagree because that will just save us --

MR. PRINCE: I'm sorry, page 75, starting at line 12.

A Oh, is that going up on the screen?

Q It will be.

A Okay.

Q You can look at yours if --

A Okay.

Q It's a big monitor.

MR. CARDINALE: What lines?

THE COURT: It should come up on there.

MR. PRINCE: Line 12 through --

THE WITNESS: That means that I have to come over here.

MR. PRINCE: -- 24.

BY MR. PRINCE:

Q My question of him during the trial, it says: You reviewed every cut, both sagittal and axial, which is the top down cuts, correct?

He answered, yes.

And every one of them demonstrated that it showed postsurgical scarring at L4-5 consistent with surgery being performed at the L4-5 level, correct?

Answer: Yes.

Question: And your testimony as I understand it, there is clear evidence of a surgical procedure at L4-5, correct?

Answer: Yes.

And you agree there is no postoperative changes at the L5-S1 level, correct?

There are no postoperative changes that I saw deep in the spinous process to -- at L5 to suggest surgery at L5-S1 that I could see.

Do you see that?

A Yes.

Q You obviously disagree with that?

A Yes.

Q Okay. I want to look at page 77 of Dr. Belzberg's trial testimony, 2

through -- 2 through 19. This is me questioning Dr. Belzberg at trial.

So obviously you -- as a trained neurosurgeon, you're going to be looking for images which in any way indicate that surgery was performed at L5-S1 as indicated in your report, correct?

Answer: Yes.

And you couldn't find any, could you?

Answer: No, I couldn't.

And in your words you saw no clear evidence that surgery was performed at L5-S1, correct?

Answer: I saw no clear evidence deep -- again, deep to that level that there was surgery at the L5-S1 level.

Obviously you disagree with that testimony as well, correct?

A Yeah, my interpretation is different.

Q Do you know anybody who shares your interpretation other than Dr. Capanna?

A Dr. Kuo or Kuo, the person who read the study.

Q And --

A The radiologist who interpreted the study from October 6th, 2010.

Q Oh, no, he saw, sir -- he saw evidence of -- clear evidence of surgery at L4-5, right? Clear evidence of that --

A Well, yes, but you --

Q -- correct?

A I thought you were asking me about L5-S1. That's what the question was, and he saw there was -- described it as a disc bulge, not a disc herniation.

Q Right. And obviously here today you're not expressing any opinion on

whether Beau's -- the -- what we saw in his current imaging studies from 2012 and 2014, whether that is a cause of his pain currently, because you haven't examined him and that's not part of your field of expertise?

A I'm not testifying to that.

Q Right.

MR. PRINCE: Now if we can look at demonstrative slide 25, the right side.

Q I'm showing you on the right side here an axial cut, an axial T2, image 22, from October the 6th, 2010. Do you see that?

A Okay. Yes.

Q Okay. And don't you agree -- don't you agree, Doctor, that right there there is evidence of disc bulge which is having -- in contact with the nerve root at the L5-S1 level?

A No, I don't know what you're -- no.

Q That's not a nerve root right there?

A Well --

Q This little white piece right there -- I'm still not getting it right. In the middle of that, you don't think, right here, that that is -- that's a nerve root right there, correct?

A That -- I'd like to see the ones above and below it. But that --

Q No, I'm just asking you --

A Let me --

Q I'm just asking you is that a nerve root?

A I'm not certain. It may well be, but I'm not certain.

Q That's evidence of -- that's disc bulging right there, correct?

A There's disc bulging, but I don't see contact with the nerve root.

Q And you agree that that side is narrower, which would be the left side, where this nerve -- where this disc bulge is and that nerve root, it's narrower than it is on the right, correct?

A They --

THE COURT: Well, he said he's not sure if it's a nerve root. So why don't you just --

THE WITNESS: If I can --

THE COURT: In regard to the narrowing --

BY MR. PRINCE:

Q Do you agree --

THE COURT: -- you can ask that question.

Q -- this part here, it's narrower on the -- which would be the left side, which would be the right side of the image, correct, where that little hole is?

A I'm sorry, can you repeat that --

Q This is --

A -- about the left/right?

Q This would be the left side?

A Yeah, that's marked left, L.

Q Right. I know. I'm just saying it's the right side if we're just looking at it. But the left side, that is narrower than the right side, correct --

A On that particular --

Q -- on that image?

A On that particular image, but you don't just look at one image like that.

Q Right. Well, now you also agree that there is clear evidence of surgical track at L4-5 on axial imaging, correct?

A I'm sorry, can you --

THE COURT: Are you talking about the --

A -- repeat that again?

THE COURT: Which --

BY MR. PRINCE:

Q Right. Let's just show -- that's fine. I'll --

THE COURT: Hold on. Which film, please?

MR. PRINCE: Demonstrative 33.

THE COURT: Okay. And you talking about the October 2010?

MR. PRINCE: October 6th, 2010, yes.

THE COURT: Thank you.

BY MR. PRINCE:

Q Right. I mean, do you agree that on this right image, which is an axial image, axial T2, image 16, that that is evidence of clear surgical track going toward the L4-5 disc level?

A Well, there's postsurgical changes. I wouldn't call it a track, but there are postsurgical changes.

Q So if other spine surgeons have testified that that is an indication of surgical track, do you disagree with them?

A I wouldn't call it a track, because a track implies that that's the course that it went in. It's postsurgical, that's for sure.

Q So are you disagreeing when they say -- they use the word that is consistent with surgical track?

A I'm just saying that I wouldn't describe it as a track. That would imply that that's the -- that's the pathway, okay? I'd just say that's postsurgical change.

Q Okay. So whether you want to call it a track or postsurgical change, that is clear evidence of postsurgical change right at the L4-5 disc space, correct?

A I'd have look at the sagittal images to see exactly where that's located.

Q I'm just saying I'm looking at this -- is this change right here, this postsurgical change, that's consistent with postsurgical changes at the L4-5 disc level, correct?

A What I'm telling you is looking at this image -- you may be a better radiologist than I am, but I can't tell looking at that image without seeing the sagittal, the localizer, exactly where that is.

Q Okay. And clearly you -- this right here, that dark spot, that is the fragment or, you know, the epidural fibrosis which is coming into contact with those nerves, right?

MR. LAURIA: Compound, ambiguous as phrased.

THE COURT: Well, I'll sustain it. Why don't you break it down.

BY MR. PRINCE:

Q Do you agree that you can see the epidural -- whether you want to call it a fragment or epidural fibrosis or a combination of the two, that's present on this image, right, which is --

MR. LAURIA: Again, it's compound. Those are different.

THE COURT: Well, over -- that one's fine. Overruled.

THE WITNESS: Okay. That is -- that's epidural -- that's what -- you can determine on the subsequent studies with contrast that's an area of epidural fibrosis.

BY MR. PRINCE:

Q Right. Thus, having an impact on the canal, correct --

A Well, it's --

Q -- according to that image?

A It's in the canal, that's correct.

Q Okay.

MR. PRINCE: If we can look at demonstrative 10. That is from the February 2009 image. It's slide -- or image 8 of 15, sagittal T2.

Q You showed primarily today the T1s with and without contrast, correct?

A No, I think we -- I showed a number of different things. We showed the T1s with and without contrast to show the enhancement of the scar. That was the purpose of that.

Q When you did the comparison though between the February 2009 and the March -- you know, the 2014, you showed it in a T1 weighted image. Do you remember that?

A Those were shown in T1, the sagittal T1s, yes, sir.

Q Right, but the -- in the T -- the T2 is best to show kind of like the disc and its hydration and its fluid content, correct?

A The T2 will show you if there's desiccation in the fluid content, that's correct.

Q Right. It's more sensitive for desiccation than the T1 weighted image, correct?

A That's correct, yes.

Q All right. And you agree that here there's clearly -- L4-5 is a normal, well-hydrated, healthy, pristine disc, correct?

A I would agree, yes.

MR. PRINCE: And let's look at slide 12.

Q Now this is an axial -- sagittal T2 from the August 31st, 2012 slide and

you agree -- it's 8 of 15. You agree on the sagittal T2 that shows you, you know, the -- the hydration of the disc, there is a significant loss of hydration at L5 -- excuse me, L4-5 and disc space desiccation?

A Well, the disc is -- there is some desiccation, which means basically loss of fluid content in the disc, at L4-L5 and L5-S1. That's correct.

Q Right. But when you showed --

A But let me -- can I finish?

THE COURT: Yeah, go ahead.

THE WITNESS: Thank you, sir.

But there's not 80 to 90 percent loss of disc space heights. There's minimal narrowing or loss of disc space heights on those images.

BY MR. PRINCE:

Q Okay. I'm not asking that.

A Okay.

Q My point is when you showed the T1 weighted image --

A Yeah.

Q -- it doesn't show desiccation as well as the T2 image, correct?

A That's correct. The --

Q Right.

A -- T2 shows desiccation better. I think the T1 shows the disc height better.

Q Right. But the T2 clearly here -- clearly when it's dark and black like that, that's no longer a normal, healthy disc. Don't you agree?

A No, I wouldn't agree. It's not black, it's gray. Okay?

Q Okay.

A It's not -- when they're black, they're black, like the example I showed. But that's gray. It's lost water content, but it's not severe. I mean it's lost water content, it's desiccated, but it's not black.

Q Okay, gray. I'll use your word, gray. It certainly doesn't look like it did before Dr. Capanna's surgery; normal, healthy, well-hydrated disc like that at L3-4, correct?

A Yeah, but the L3-4 disc didn't look like the L4-5 disc before surgery either. They both -- they looked different. The L3-4 disc was a little bit bigger.

Q I'm just asking you the L4-5 no longer looks well-hydrated and normal as of August 31st, 2012, correct?

A There is loss of fluid content, that's correct.

Q Which means disc desiccation, correct?

A That's what disc desiccation is, yes.

Q That means also disc space narrowing, correct?

A Well, they usually go together. Usually. That's what bulging is. It loses water content and it starts to bulge or pancake out.

Q Right. And obviously that L4-5 disc is not normal for a 22-year-old young man, correct?

A That's correct. It's not normal for anybody.

Q Right.

MR. PRINCE: And I want to look at Exhibit Number 5, Bate number 228, Peter, please.

MR. HELLMAN: What Bates stamp?

MR. PRINCE: Two twenty-eight under the -- go from L4-5 under the findings all the way down to impression two.

MR. LAURIA: Can you identify what it is, please?

MR. PRINCE: It's the report dated March 13th, 2014 from Steinberg Diagnostic for an MRI of the lumbar spine with a comparison to October 6th, 2010.

THE WITNESS: I'm sorry, which report is this, from 2014?

BY MR. PRINCE:

Q Yes, sir.

A Okay.

Q You just looked at it a minute ago. If you need to look at the whole thing, I can show the whole thing.

A No, no, no. I couldn't read when it wasn't magnifying.

Q Okay. Do you need -- do you need the full report?

A Well, that would be -- I think that would be helpful.

Q Okay.

MR. PRINCE: If I could have binder one. Thank you.

BY MR. PRINCE:

Q Here you go. Exhibit Number --

A Okay.

Q Exhibit Number 5, but Bate number 228 will be the full report.

A The 228 --

Q Yeah.

A Okay. Thank you.

MR. PRINCE: Let's just go to the top, Peter. Let's just --

THE WITNESS: Okay.

MR. PRINCE: -- go to the date and then clinical history.

BY MR. PRINCE:

Q And when a patient comes in and has an MRI, when you're reviewing -- you know, you're drafting a report based upon your review, Doctor, don't you put a little note as to what the clinical history was, like a short description?

A Oftentimes, yes, or it's included in the heading, depending on how the demographic data's --

Q Right. But here --

A -- set up.

Q Here it says the clinic history is back pain down left leg, left leg weakness and numbness, history of surgery, okay? Okay.

A Yes.

MR. PRINCE: And I want to go -- now go to the findings and then -- Peter, and then go from L4-5 through impression one. Okay.

Q Now if we just talk -- L4-5, we talked about disc desiccation just a minute ago, right? We looked at it, right?

A Yes.

Q And under impression two it talks about, you know, disc desiccation at L5-S1 with stable disc below it. Do you see how that reads?

A Yes.

Q And then it says correlate for potential left L -- left S1 radiculopathy. Do you see that?

A Yes.

Q That means -- that's an indication from the radiologist to the surgeon that you should do -- you know, clinically correlate any symptoms to that radiographic finding, correct?

A Yes.

Q That means that the surgeon, the treating physician, would look at the patient's symptoms, the -- where the symptoms are located, do a physical exam to correlate to determine whether or not L5-S1 is causing any sort of the problem that's been described?

A I think that's part of it, but I think there's a little more to it.

Q Okay. But clearly when -- obviously Dr. Chen is not examining Mr. Orth that day, right?

A He's examining his MRI, but he's not examining the patient, yes.

Q He's not -- Dr. Chen -- like in an outpatient radiology facility like say Steinberg, or anywhere else in the country for that matter, I mean the Dr. Chens of the world, they're sitting there reviewing images that are presented to them for review, correct? They're not --

A Yes.

Q They're not taking histories, performing exams and diagnosing patients, right?

A Well, they're diagnosing them based upon the MRI studies.

Q Well, it's not a diagnosis; it's a radiologic finding, right?

A Well, it may be a diagnosis, yes. A herniated disc, a protruding disc is a diagnosis. A spinal cord tumor's a diagnosis. A fracture of the spine is a diagnosis.

Q Okay. And it would be up to the referring surgeon or physician to correlate any ongoing symptoms to whether or not they match up with that finding at L5-S1, correct?

A That's correct.

Q In this case that would be Dr. Cash, correct?

A If that -- yeah, if that's the ordering doctor, yes.

Q Right. And you have no reason to disagree with any of his diagnoses, right, because you're not an orthopedic spine surgeon, correct?

MR. LAURIA: Well --

A I think --

MR. LAURIA: -- overbroad. Overbroad as phrased, Your Honor.

A I think I can disagree with him, even though I'm not an orthopedic spine surgeon --

Q Okay.

A -- on certain things. But I didn't examine Mr. Orth, so I don't really have an --

Q You have no opinion?

A -- opinion about that.

Q Okay.

A I think what the report is doing is saying listen, if the patient's having symptoms, this is where we think it's most likely arising from.

Q Okay. And so you don't know what steps Dr. Cash took to correlate whether the left S1 radiculopathy -- you know, whether there was left-sided S1 radiculopathy?

A That's correct, I don't know.

Q You agree that the disc herniation we see on October 6 was a new or an acute herniation, correct?

A It was new. It wasn't -- October 6, 2010?

Q Yes.

THE COURT: At what level, I'm sorry?

MR. PRINCE: L4-5.

THE COURT: Thank you.

THE WITNESS: L4-5. That wasn't present preoperatively, yes.

BY MR. PRINCE:

Q And you agree that that was probably acute given --

A Well --

Q -- given the epidural fibrosis in that area?

A Well, I think it occurred between -- it certainly occurred between the time of the last exam and the postoperative exam. So probably it was acute, yes. A recent origin --

Q Right.

A -- probably a better way to put it.

Q Acute means recent onset or recent origin?

A Yes, that's a recent origin.

Q Okay. And --

MR. PRINCE: I'm almost done, Your Honor. I'm just checking my notes.

BY MR. PRINCE:

Q You agree that just looking at a film you can't -- with regard to an MRI, if there's a disc bulge, disc protrusion, a disc herniation, you can't tell solely based on that whether the patient has pain or not coming from that level, correct?

A That's correct.

Q You need -- there needs -- there's more to it; the MRI is just one piece of the overall diagnostic puzzle, correct? There needs to be clinic correlation --

A Generally, that's correct, yes.

Q -- clinical correlation, history, physical exam, radiological studies such as an MRI, any diagnostic, you know, injections into the spine, right? That's -- those

are all pieces of the overall diagnostic puzzle?

A Well, that's (sic) encompasses the history, yes.

Q You agree that the fibrosis is the body's reaction to something being where it shouldn't be?

A No.

Q You don't think that in this case the fibrosis was the body's response to the disc fragment being outside of the disc space?

A No.

Q Okay.

A No. That's wrong.

Q Is the -- is fibrosis -- is there typically postsurgical fibrosis where there's been surgery in a particular area?

A Fibrosis is what you see -- is frequently seen -- epidural fibrosis is frequently seen following surgery. Just having a disc herniation, just like the disc herniation at L5-S1, there was no fibrosis associated with the herniation. It's the -- so the herniation doesn't produce the fibrosis. It's generally surgery -- postsurgical changes that produce the fibrosis.

Q Okay. And the fibrosis we saw in this case is slightly, you know, cephalad or toward the head, and in a caudal below the -- the L4-5 disc space, correct?

A Well, there are several areas. There's fibrosis -- there's enhancing fibrosis there and also at L5-S1, and then posteriorly.

Q Okay.

MR. PRINCE: And if we can look at slide two. And --

MR. LAURIA: Could we get the image, please?

MR. PRINCE: Ten of 15, October 6th, 2010.

BY MR. PRINCE:

Q This area right here, this kind of mushroom immediately adjacent to the L4-5 disc, you would agree that that's consistent with the fibrosis as well as -- which contains the disc fragment, correct?

A That's what it is, yes.

Q Okay. And so the fibrosis is immediately adjacent to the L4-5 disc, correct?

A That's part of it. You're seeing part of the fibrosis on that image.

Q Yeah.

A That's not -- that's -- you're going off to the side there and you're seeing part of it, but it's actually much more extensive. You could see on the earlier images it actually went from here all the way up through there, if you look at the other studies.

Q But it --

A Okay. That's --

Q On this image --

A You're looking at the tip of the iceberg.

Q Okay. And you're saying that this white right here and this, you know, light right there --

A I'm sorry, I can't see what you're doing.

Q -- right there, kind of coming in from this white or lit up area going over towards the L4-5 disc space, you're saying that is not evidence of a surgical track toward L4-5. Is that your testimony?

A Yes, sir.

Q Okay. And so anybody who testifies differently, then obviously you disagree?

A That is correct.

Q And if a doctor -- a spine surgeon comes in and testifies that in reviewing Dr. Cash's plain X-ray taken on October the 12th, 2010 showing evidence of an L4 laminotomy, you would disagree with that as well?

A Excuse me, if a spine surgeon says on Dr. Cash's -- what was the date of the study?

Q October 12th, 2010, before his surgery --

A Okay.

Q -- then you --

A Laminotomy?

Q At L4, you would disagree?

A Yes.

Q Okay. And if a spine surgeon came in -- came in to testify that there -- on the October 6th, 2010 MRI, that there is L -- laminotomy at L4-5, you would also disagree with that?

A Well, the laminotomy -- there's a lamina -- we had this discussion at the deposition. There's a lamina for L4, and there's a lamina for L5. So when you describe it, there was evidence of a laminotomy at L5 -- involving the L5 lamina, but not the L4 lamina.

Q The superior portion of the L5 lamina, correct?

A That is correct. Okay. But not L4 lamina. The disc is L4-L5. The lamina is either L5 or L4 or S1.

Q Right. But the -- well, you said --

A Yeah.

Q Well, that's -- in your report you talk about -- I know you're trying to --

A That's correct. Yes.

Q Hang on.

A Yes.

Q You're trying to -- I know you kind of dressed me down on the use of the L4-5 lamina.

A Right.

Q In your report, that's the language you use, L4-5 and L5-S1, correct?

A I said there was boney changes there, but it's the L5 lamina.

Q Right. And in this case, the L --

A And I didn't dress you down, I just corrected you.

Q And the L5 lamina, it would be the superior part or towards the head, that's where there would be evidence of a laminotomy, correct?

A That's correct.

Q Not the inferior portion or below?

A I thought it was the top portion, yes.

Q Okay. And the top portion of the L5 lamina is closer to the L4-5 disc space than it is the L5-S1, correct?

A That is correct, yes.

Q Okay. So there would be the -- inferior portion, or the bottom portion of the L5 lamina, that would be just above the L5-S1 disc space, correct?

A Yes.

Q I know this is kind of a side view, but the L5 -- the L4 lamina would be kind of out over here, right?

A Well --

THE WITNESS: Your Honor, may I get --

THE COURT: You may.

THE WITNESS: Thank you.

BY MR. PRINCE:

Q Yeah, sure. Here.

A Thank you.

Q Get a little closer.

A Okay.

Q No, even better than that let's just use the model. Would that --

A No, this is fine. No.

Q I think -- yeah, let's use the model. Do you agree that right here, just for example, that is the L4 lamina, correct?

A I'm sorry, I can't see. You're --

Q That's the L4 lamina, this one?

A That is the L4 lamina, that's correct.

Q Right. That's L4. That's the L5 lamina, correct?

A I'd have to -- that's -- this is -- let's just hold it up here a little bit --

Q Okay. Sure.

A -- so everybody can see. This is the lamina here at L5.

Q Right.

A That's the L5 lamina.

Q Okay. Now the L5 -- the inferior -- excuse me, the superior part of the L5 lamina, that's adjacent to the -- or just around the L4-5 disc space, correct?

A That's what we said, yes, it's closer there.

Q The inferior, or the bottom part of the L5 lamina, that's just outside of the L5-S1 disc space, correct?

A That's correct.

Q And the L5 lamina that you saw was superior, not inferior, correct?

A The defect was superior, that's correct.

Q Indicating that someone had been at L4-5, correct?

A Well, they'd been -- they've been -- okay. They took a piece of bone off over here, okay? Now --

Q That's the L4 lamina.

A I'm sorry. The L4 -- right over here. They took a piece of bone right there.

Q Right. To -- that would be indicating they're trying to get into the L4-5 disc space, correct?

A That I -- that I can't speak to.

Q Okay. There's no evidence of inferior L5 lamina removed, a laminotomy, correct?

A That's correct.

Q Okay. Thank you.

MR. PRINCE: No additional questions.

THE COURT: Mr. Lauria, how long do you --

MR. LAURIA: Yeah, I've got a few. Thanks, Judge.

THE COURT: All right. We'll take a recess, ladies and gentlemen. During the recess you're admonished not to talk or converse among yourselves or with anyone else on any subject connected with the trial; or read, watch or listen to any report of or commentary on the trial by any medium of information, including without

limitation newspapers, television, the internet and radio;, or form or express any opinion on any subject connected with the case until it's finally submitted to you. We'll be in recess for about 15 minutes. Thank you.

You can obviously step down as well, Doctor. Okay.

THE WITNESS: Okay. Yeah. I just wanted to know what to do with all this paperwork.

THE COURT: No, you can leave all that there --

THE WITNESS: Okay. Good.

THE COURT: -- for right now.

THE WITNESS: Thank you, sir.

THE COURT: Mr. Lauria may have some more questions for you.

MR. LAURIA: Yes.

[Off the record at 10:33 a.m.]

[Proceedings resumed at 10:44 a.m.]

[Outside the presence of the jury]

THE COURT: Mr. Prince, you all ready?

MR. PRINCE: Yes.

THE COURT: Bring them in.

[Jury in at 10:44 a.m.]

THE MARSHAL: Jury is present, Your Honor.

THE COURT: Thank you.

You all can be seated. Okay. We're going to continue on with the testimony of Dr. Kaye in the defense's case in chief.

Doctor, I'll remind you that you're still under oath, okay?

THE WITNESS: Yes, sir.

THE COURT: Thank you. Mr. Lauria.

MR. LAURIA: Thank you. I'll take this down for a second.

REDIRECT EXAMINATION

BY MR. LAURIA:

Q Dr. Kaye, you were asked about your findings in regard to the lamina and -- well, I guess I will leave this up for that. What you -- it's -- I believe what you said, and please correct me if I'm wrong, is that you saw some indication -- and we can't see the lamina on this image, right?

A Right.

Q So -- but we're just trying to get a level or an idea that you saw some portion that the top of the L5 lamina was removed?

A Correct.

Q But you didn't see any removal at the bottom of L5-1?

A That's correct.

Q It -- removal of a small portion at the top of L5 lamina would be consistent with Dr. Capanna's description of what he did in surgery, would it not?

A Correct, yes.

Q That he went up to that level in an attempt to get down and unfortunately during the course of that, the L4-5 disc may have been entered, but that some removal of that top portion is consistent with what he said he did?

A That's correct, yes.

Q Now, Dr. Belzberg has testified that to do an L5-S1 microdiscectomy that you don't always need to remove lamina. I want you to assume that that's what he testified to here in court under oath. Do you agree with that statement from a radiologic standpoint?

A That's -- frequently we don't see any bone removal following and L5-S1 microdiscectomy.

Q If surgery is done at -- a microdiscectomy or a surgery is done at L4-5 and another surgery is done at L5-S1, at what level would you expect as a radiologist to see the most evidence of surgical change?

A At L4-L5.

Q Why? Why would you see more there than if it's done at L5-S1?

A Because there's more tissue muscle and vascular tissue around L4-L5 than lower down in the spine where it's mostly fat and so you get more bleeding and more fibrosis subsequently.

Q All right. So if you did identical procedures at L4-L5 and an identical procedure at L5-S1, it's your opinion that there would be more evidence of surgery at L4-5 than there would be at L5-S1?

A Generally that's what you see, yes.

Q You were asked a question about this report and I think where it said something about correlate for potential left 1-S1 radiculopathy and Mr. Prince asked you and you started to say well that's partially true. Do you remember what you wanted to add there? That's okay.

A You'd have to read it back to me, I'm sorry.

Q Yeah, I don't -- I don't have that ability right at the moment.

A Okay, I'm sorry.

Q If we look at this report also, Dr. Chen notes the presence of postsurgical changes at L4-5. Do you see that?

A Yes.

Q Does he note the presence, as he's reviewing it, of postsurgical

changes at L5-S1?

A He doesn't describe any postsurgical changes at L5-S1.

Q Well, this is March of 2014, so we know --

A Right.

Q -- Dr. Cash has done surgery at L5-S1 --

A Yes.

Q -- but we're not -- the radiologist, Dr. Chen, isn't seeing -- isn't reporting evidence of postsurgical changes there?

A That's correct.

Q Is that consistent with what you just testified to that you would see more changes at the L4-5 level than you would at the L5-S1 level?

A Well, that's partially correct in the sense that you'd see more in the way of the epidural fibrosis at L4-5. I don't know within the body is a report. Obviously, they did a laminectomy at L5 and L4 and I don't know if he described that in the --

Q Okay.

A -- body of the report or not. If I have -- okay.

Q But as far as the soft tissues itself or the fat or the epidural fibrosis, it'd be -- you'd expect it to be less at L5-S1 than L4-5?

A That's correct, yes.

Q You were asked and you were questioned and your deposition was read about -- and I think the question used the word definitive. Do you see definitive evidence of findings of a laminotomy. Do you recall that?

A Yeah, something -- I think there was -- they were asking about whether or not there was surgery at L4-L5.

Q I think the question was --

A Yeah.

Q -- do you see definitive evidence of surgery. How would you --

A Yeah.

Q -- how would you define definitive in your mind?

A Well, absolute there's a piece of missing bone or that obviously the -- there's been complete removal or a large portion removal of the disc or something that's much more impressive.

Q Okay. So you're not disagreeing that the changes at L4-5 are surgical?

A That's correct, they could be surgical, yeah.

Q All right. They could be something else, but there's not -- it's not definitive just from looking at the film?

A That's correct.

Q Okay. Then you were asked about that we had -- or you had put up in your slideshow T1 images as opposed to T2 images.

A Yes.

Q Do you recall that when you were questioned by Mr. Prince?

A Yes.

Q And I think you said that the T2 image of the sagittal view that is the spine kind of like that will show moisture content or water better?

A That's correct, that's the most sensitive.

Q So that will show desiccation the best?

A That'll show desiccation or loss of water content.

Q What -- in your opinion, which series or studies shows the height changes or the height of the disc the best?

A The T1 change -- the T1 images show the anatomy better. It's clear

there, so that would show the height changes.

Q Is that why you -- is that why you put up the T1 images when comparing or looking at the height changes?

A That's right.

MR. PRINCE: Objection; leading.

A Could have done the T2, but the T1 I think are better.

Q You were asked a question about -- something about nobody agrees with your opinions in this case except Dr. Capanna. And you pointed out that Dr. Kuo, the only other radiologist who reviewed that film as part of his practice agreed with you?

A That's correct.

Q Dr. Kuo, as you did, says that there is a bulge at the L5-S1 level, not a herniation, true?

A That's correct.

Q Dr. Kuo does not describe finding impingement at L5-S1 on the nerve root?

A Correct.

Q That although all the other radiologists prior to that reading MRIs had found that?

A Yeah, the three MRIs prior to surgery all show a left disc herniation and nerve root impingement.

Q Okay. And when you were shown an image, I think it was their slide -- it was an axial view and it was a slide, but it didn't have the marker to show you what level --

A That's correct.

Q -- they're on? And I think you said you need to compare the slices that are just adjacent to it to get an actual view of the level?

A Correct.

Q So without the actual marker showing where that slice was taken from, are you able to identify where that is?

A Not just looking at that one image like that, no.

Q All right. You would need the marker and you'd need to scroll through the anatomy to get the complete picture as to whether there's -- what that nerve root looks like throughout it?

A Correct, and also you got to remember I think I was asked about whether the left canal or nerve parameter was narrower than the right side, okay? Patients get in the scanner, they're not exactly 90 degrees perpendicular. Their spines are perfectly straight and they can be tilted, and so that's why you have to look through the sequences, you just don't look at one. It may look like that on one, but if the patient is a little bit off, which they frequently are, no one is going to be perfectly symmetrical in there, you look at the images above and below and then you see, because that -- that was not a perfectly positioning as is often the case.

Q Would it be helpful to scroll through those now? Do you want to see those or --

A Yeah, we could do that. Also, I thought of --

Q Let's move on. I just want to spend the time --

A Okay, fine.

Q -- I think they are trying to -- again, just so it's clear because Mr. Prince was asking you about fragment here and can you see the fragment, the only place that you can actually differentiate the fragment is on the after-contrast T1 images?

A Exactly.

Q So anybody who says they could visualize the fragment on anything other than a post-contrast T1 is mistaken?

A That's correct.

Q You can see the area where the fragment is?

A Right.

Q You can see scar tissue?

A Correct.

Q But you can't see the fragment itself?

A That is correct.

Q Oh, you were asked about -- I think you were asked you wouldn't have privileges to go into a hospital as a spine surgeon and do spine surgery with a microscope. You agree with that, right?

A Yes.

Q Would -- to your knowledge, would spine surgeons have privileges to go into the radiology department and issue a radiology report in reading X-rays at a hospital?

A No, I don't know of any place where they have privileges to do so.

Q That's your specialty, true?

A That's correct.

Q You were also asked about soft tissue changes at L5-S1 after a microdiscectomy and I think you said in the vast majority of cases, you would see --

A Yeah.

Q -- it but not always?

A That's correct.

Q All right. So while you -- it's usually there, it doesn't always show up?

A That's correct, and it depends also on how soon after surgery. If you do it immediately after surgery, you're going to see blood and changes in the soft tissue. Six months later, you might not see anything.

Q You were not shown any fluoroscopic images from Dr. Capanna because they weren't saved in this case interoperatively. That's not unusual, is it?

A No, it's -- it occurs that they're not saved, that's correct.

Q And you're not always asked to read interoperatively fluoroscopy image after a procedure is done, are you?

A That's correct.

Q All right. Has anything that Mr. Prince questioned you about changed your opinions in this case at all?

A No.

Q Do you still believe that -- that your opinion is correct that if we compare the preoperative and the postoperative levels of the disc in Mr. Orth's spine, that he doesn't have severe degenerative changes at L4-5?

A That is correct, he doesn't have severe disc degeneration at L4-L5.

Q And he doesn't -- he hasn't lost 80 to 90 percent of his disc height, he's not bone-on-bone or even close to bone-on-bone?

A That is correct, yes.

Q And do you -- is it still your opinion that there is evidence of surgical changes at L5-S1 that you note that Dr. Kuo apparently notes --

A Right.

MR. PRINCE: No, he does not note that.

A Yes.

Q -- it suggests to you that surgery had been performed on that --

A That is right.

Q -- one?

A The fact that the disc -- the disc herniation or protrusion at L5-S1 was removed.

Q And is now described as a bulge?

A That's correct.

Q And are those opinions to a reasonable medical probability?

A Yes.

Q Thank you.

A Thank you.

THE COURT: Mr. Prince.

MR. PRINCE: Okay.

RECROSS EXAMINATION

BY MR. PRINCE:

Q And quickly we're going to be looking at Exhibit Number 5, Bate number 232.

MR. PRINCE: I want to go to -- just to the finding section, Peter. Okay.

Q Just talk about the first finding. Status post left L4 laminectomy. Obviously you and Dr. Kuo aren't in agreement on that, are you?

A Yeah, the --

Q That's a yes or no.

A That's a yes.

Q Okay. And Dr. Kuo does not describe any postsurgical change at L5-S1, does he?

A No, he does not.

Q Right. The only thing he described -- he's describing a bulging disc at L5-S1, correct?

A That is correct.

Q He's not describing any scarring, epidural fibrosis, anything consistent with someone having a recent surgery at L5-S1, correct?

A That is correct.

Q So you guys aren't in total agreement then, are you?

A I didn't say we were in total agreement.

Q Okay. Very good.

MR. PRINCE: No additional questions.

MR. LAURIA: Nothing further, Your Honor.

THE COURT: Anything from our jurors? Yes.

[Bench conference begins at 10:59 a.m.]

MR. PRINCE: Mr. Ostrow is at work again.

THE COURT: Are you guys okay with that?

MR. PRINCE: Yeah, I'm fine with it.

MR. LAURIA: Yeah, I'm -- yeah, that's fine.

THE COURT: Okay. The only thing I would -- before you get into that, the only thing I would say with this is I don't necessarily want to read his statement. I mean, that's kind of for them to discuss as jurors.

MR. LAURIA: Yeah, I agree.

THE COURT: But if he's just saying it -- I can say if a disc appears, you know, bigger on an MRI later, is there any explanation for that.

MR. LAURIA: Yeah, I think that's --

MR. PRINCE: Do you want to say --

THE COURT: Because this is just his opinion. I don't need to tell the jurors their opinions to other jurors.

MR. PRINCE: Well, I think he's kind of telling him the context of his question though, right?

THE COURT: Well --

MR. LAURIA: But he can't --

MR. PRINCE: I mean I guess what -- to him it looked that way, so you know, I mean I guess -- but I think it adds context to the questions we asked --

THE COURT: Okay. Well, go ahead look at that one first.

MR. LAURIA: I don't think you can ask him about --

THE COURT: Well, go -- concentrate on that one, you guys go ahead.

MR. PRINCE: He can't answer any of those questions.

THE COURT: Okay.

MR. LAURIA: Yeah, he can't answer those.

THE COURT: Okay.

MR. LAURIA: They're surgical questions.

THE COURT: All right.

MR. PRINCE: I have no issue with that question.

MR. LAURIA: I don't think you can ask it, Judge, because you're right, it is his opinion that they appeared larger to him, the others might completely disagree, so --

MS. TARMU: He gave opinions on the size of a disc cut.

MR. LAURIA: But jurors don't get to ask that in front of the other jurors. They can discuss their opinions at the end of the case but not now.

THE COURT: Well --

MR. PRINCE: But they've been looking at the films and so how could they otherwise describe the question?

THE COURT: No, that's why --

MR. PRINCE: It looks like this is something here or X location, what does that mean? I mean I don't -- I mean I guess they have to like add some context, otherwise that question will never make any sense.

THE COURT: I guess I could ask it hypothetically. Hypothetically, if --

MR. LAURIA: That's -- I don't think that solves any of the problem, Judge.

THE COURT: Well, I'm going to find a way to ask it. All right. Thank you.

MR. PRINCE: Okay.

[Bench conference ends at 11:03 a.m.]

THE COURT: Okay. I got a question for you, Dr. Kaye, if I would -- or if I could, excuse me. There was a point in time in the testimony when you were looking at comparison MRIs from March 13th of '04 (sic) and March 3rd of 2009. Do you recall that?

THE WITNESS: March -- I'm sorry, give me the dates again, sir.

THE COURT: The March 13th, 2014 and the March 3rd 2009 MRIs, you were looking at some comparisons --

THE WITNESS: Yes.

THE COURT: -- of them.

MR. PRINCE: I think it's the February one, Judge.

THE WITNESS: February.

THE COURT: Oh, excuse me, February.

THE WITNESS: I think it's February.

THE COURT: That's right, it was February.

THE WITNESS: Yes.

THE COURT: In regard to the discs, and I'm not talking about 4-5 or S1, the discs above that, if there was a perception by anybody that a disc -- one of those upper discs, looked larger in one -- in the later MRI than it did in the earlier MRI, is there any explanation for that? Can a disc be more hydrated or larger five years later or --

THE WITNESS: No, I don't think so. It may be the difference in the type of equipment that was used. I don't -- I didn't see any significant difference, but a disc wouldn't get bigger generally. It would get smaller. So if there was a perception of it, it might have been due to the difference of equipment or -- but I didn't perceive that myself.

THE COURT: Okay. Mr. Lauria, any questions based on mine?

MR. LAURIA: I don't think so.

THE COURT: Mr. Prince?

MR. PRINCE: No, Judge.

THE COURT: Dr. Kaye, thank you very much for your time --

THE WITNESS: Thank you, sir.

THE COURT: -- today. I appreciate it, sir.

THE WITNESS: Thank you for having me.

THE COURT: Mr. Lauria.

MR. LAURIA: Your Honor, we would like to call Dr. Reynold Rimoldi.

THE COURT: Okay.

MR. LAURIA: And I am hoping he has made it from the airport, Your Honor.

MR. PRINCE: Can we approach while we're doing that?

THE COURT: Yes.

[Bench conference begins at 11:04 a.m.]

MR. PRINCE: I don't know how long he'll take today where we're going to end up being it sounds like -- I mean I don't see us closing -- I'm not feeling -- feeling a little dizzy for some reason.

THE COURT: Okay.

MR. PRINCE: And so I don't -- if we can close tomorrow, that'd be my preference. Get through all the witnesses today.

THE COURT: Well, I --

MR. PRINCE: I mean --

THE COURT: -- don't --

MR. PRINCE: -- I don't think --

THE COURT: I don't know that --

MR. PRINCE: I don't want to break up the --

THE COURT: -- we're getting anywhere near it actually.

MR. PRINCE: Okay.

THE COURT: I mean, because Dr. Kaye was supposed to be in and out.

MR. LAURIA: Well --

THE COURT: And that was two and a half hours, so if we do that again and we break for lunch and we finish settling the instructions since there's some more chatting about them now, then no, I'm not going to have you guys start closing at 3:30 in the afternoon.

MR. PRINCE: Okay. That's fine.

THE COURT: Don't worry about it.

MR. PRINCE: Okay.

MR. LAURIA: What time are we now, 11:15? Want to go to about 12?

THE COURT: Right now?

MR. LAURIA: Yeah.

THE COURT: Yeah. Well, I'll -- I want to go and try and get Dr. Rimoldi done --

MR. LAURIA: I don't --

THE COURT: -- and get him out of here.

MR. LAURIA: Well, I don't know that we're --

THE COURT: So --

MR. LAURIA: -- going to be done in 40 minutes. I mean --

THE COURT: Well, because the reality is I'm not going to break for lunch and bring them back for an hour. I mean, we'll get him done and they can go home for the day.

MR. PRINCE: Well, I think -- I think they'll probably be -- Mr. Lauria is probably a couple hours with him.

THE COURT: With Rimoldi?

MR. PRINCE: Yeah.

THE COURT: Yeah, but I mean that takes us to 1, 1:30.

MR. LAURIA: You're not -- you don't want to break until 1, 1:30?

THE COURT: Well, we'll -- let's get started.

MR. LAURIA: Okay.

THE COURT: We'll see where we get.

MR. PRINCE: And I'm feeling a little weird.

THE COURT: Okay. All right. Well hey, give me a hi sign if it becomes an issue.

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

THE COURT: Dr. Rimoldi, come on up, sir.

MR. RIMOLDI: Thank you.

THE COURT: And you can go ahead and set all your documents down and get yourself settled. And then if you could please raise your right hand for me, please.

REYNOLD RIMOLDI

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

THE CLERK: Okay. You may be seated.

THE WITNESS: Thank you.

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

THE WITNESS: Yes. My name is Reynold Lewis Rimoldi, the last name is R-i-m-o-l-d-i.

THE COURT: Mr. Lauria.

MR. LAURIA: Thank you.

DIRECT EXAMINATION OF REYNOLD RIMOLDI

BY MR. LAURIA:

Q Good morning, Dr. Rimoldi.

A Good morning.

Q Thank you. You -- I appreciate you coming. You just flew in from dropping your daughter at college on the east coast?

A That's correct, just landed from Washington, DC. She's attending Georgetown.

Q And you just scrambled over here immediately after that?

A That's correct.

Q Okay. Doctor, I'm going to find out what is your specialty?

A I'm an orthopedic surgeon with an active practice here in the Las Vegas valley. I'm fellowship trained in spine surgery and also board certified by the American Board of Spine Surgery. And my practice deals primarily -- I would say 80 percent of my practice deals with pathology to the spine, from the base of the skull to the tip of the tailbone.

Q Let's talk about your medical training. Where did you go to medical school?

A I attended the Medical College of Wisconsin in Milwaukee, Wisconsin. I was there from 1980 to 1984 receiving the degree of medical doctor.

Q And then following your four years of medical school, did you do a residency?

A I did. I attended the University of Texas Medical Branch in Galveston, Texas where I completed a one-year general surgery internship and that was followed immediately by four years of orthopedic surgery residency training. Yes, sir.

Q And following that residency training -- we've heard how grueling residency was then. I assume it was the same for you?

A Yes, it was grueling.

Q Long days and long weeks?

A That's correct.

Q Following the completion of your orthopedic residency, you could have gone and practiced general orthopedics -- general orthopedic surgery anywhere in the country?

A Yes, sir.

Q Just gotten a license in that state, but you had the full qualifications to

go do that. Did you decide you wanted some additional training?

A Yes.

Q And what did you do after that?

A I attended a spine fellowship from 1989 to 1990 at the Ranchos Los Amigos Medical Center, which a University of Southern California affiliate. And I spent that year specializing in nothing but taking care of pathology of the spine. It involved performing numerous surgical procedures on all areas of the spine as well as authoring peer reviewed research articles that dealt with spinal pathology or surgical treatment of spinal pathology.

Q Is -- and just a side, Ranchos Los Amigos, there is a facility, and I think it's the same one, that deals with a lot of difficult patients, quadriplegic patients, patients who have had significant severe spinal injuries?

A That's absolutely correct, a lot of groundbreaking work in taking care of paralysis from traumatic injuries, from conditions such as polio, the development of the halo brace was originated there. So a lot of groundbreaking work was done regarding spinal pathology at that facility.

Q And when did you complete your fellowship -- and that was a USC affiliated fellowship?

A That's correct. I completed that in the summer of 1990. It's so long ago, I have to think, 1989 to 1990 was the academic year that I attended there.

Q And so what did you do after that?

A Well, I actually did another fellowship. I did a six-month fellowship at the Houston Clinic in Columbus, Georgia pertaining to sports medicine, dealing with pathology of the shoulder, knee, ankle, elbow, arthroscopic minimally invasive treatment to pathology affecting those areas. So I did a six-month fellowship in

sports medicine after I completed the spine fellowship.

Q And after that fellowship, what did you do?

A Then I entered private practice. My initial private practice setting was in southern California. And we, the other surgeons that hired me, developed a satellite practice here in the Las Vegas valley. And that side of the practice just grew leaps and bounds. And so I worked there from '91 to '94 and because the Las Vegas side of things grew so much, myself and a couple others at the time underwent an amicable split with the California group. And I set up shop, so to speak, in the Las Vegas valley and I've been here ever since. So from 1994 until the present.

Q All right. And currently what's the name of the practice that you're in?

A It's the Nevada Orthopedic and Spine Center.

Q And how many other orthopedic surgeons are in practice with you?

A Well, I think there's approximately 15 covering all facets of orthopedists, orthopedic surgery; hand surgeons. We have three fellowship trained hand surgeons, three fellowship trained spine surgeons, myself being one, some that are fellowship trained and specialized in joint reconstruction like new hips and new knees for severe arthritis, a gentleman for pediatrics, pediatric orthopedics. The pathology in the child is different and unique and the requires fellowship training and we have one of those. And then we have a musculoskeletal tumor fellow. Musculoskeletal tumors are extremely rare, but to perform proper treatment, fellowship training in that area is required. So we're the one-stop shop. Not toot our horn, but the Nevada Orthopedic and Spine Center is a one-stop shop. We deal with all aspects of orthopedic surgery as a group. And there's about 15 of us.

Q And you work with two other -- regularly, with two other orthopedic spine surgeons?

A That's correct.

Q And then you indicated you are certified by the American Board of Spine Surgery, that's -- that's in addition to the American Academy of Orthopedic Surgeons?

A That's correct, I'm -- I think you meant the American Board of Orthopedic Surgeons. As soon as I completed my residency and all of my fellowship training, I became certified by the American Board of Orthopedic Surgery, which covers all facets of orthopedic stuff, all those aspects I just mentioned from spine to hand to pediatrics, children's orthopedic problems. But then I also became board certified in -- by the American Board of Spine Surgery. So both those boards, yes, sir.

Q Okay.

A And I recertified in both those boards I think on two occasions each and my certificate extends out to I think 2022 to 2025, something like that.

Q So in addition to being boarded in general orthopedics, you have the added qualification of being boarded specifically in spine surgery?

A Yes, sir.

Q Okay. What have you reviewed to form your opinions that you are going to express in this case?

A I reviewed medical records pertaining to a Beau Orth. I've reviewed deposition testimony of key people who are involved in this matter. I've involved or I've reviewed diagnostic images, not only the reports, but the actual images. And I also examined Mr. Orth. So in a nutshell, that's what I've done to prepare myself.

Q And you have reviewed the records of Dr. Ruggeroli and Dr. Cash in this case?

A Yes, I have.

Q And their depositions?

A That's correct.

Q One of the things that was testified to, to bring you up to date -- I'm not going to have you give an anatomy lesson because I think we're beyond that and I think these folks have heard it now a few times, so -- but one of the things that was brought up was -- I want to focus right now on two lumbar epidural injections because I'll represent to you that there's been testimony in this case that a -- because a patient did not respond to a lumbar epidural steroid injection at L5-S1, that indicates their problems are not at that level as a preface, all right? You're aware that prior to surgery by Dr. Capanna, Mr. Orth underwent a lumbar epidural steroid injection?

A Yes, my recollection believes that to be the case, yes, sir.

Q And that was done by Dr. Ruggeroli at the L5-S1 level?

A I don't have that record sitting in front of me, but --

MR. LAURIA: Well, can you grab those for me? August of 2010. That's okay. I think we've showed it and we'll mark it.

Q But let me represent to you that Mr. Orth, as reported by Dr. Ruggeroli, although he responded to an epidural steroid in February, didn't have a response to the epidural steroid in August of 2010. I want you to assume that, okay?

A Yes, sir.

Q And we can bring that up. Does that in your opinion mean that Mr. Orth was not having problems attributable to the L5-S1 disc and the L5-S1 herniation at that level?

A No. I mean, it would imply that after that injection that it did not seem

that -- if one was to look at that document in and of itself, that procedure would suggest that perhaps there was something coming from another level.

Q Okay. Would you agree with me that a -- the fact that you don't respond to an L5-S1 epidural injection doesn't rule out that you have pathology at that level that's causing you a problem?

A That's correct, that's a fair statement.

Q And you understand that in April of 2014 -- now take you past both Dr. Capanna and Dr. Cash's surgeries -- that Mr. Orth had another lumbar epidural steroid injection by Dr. Ruggeroli?

A I recall that.

Q And that he didn't have much response to that one either. In your opinion, does that rule out that there's L5-S1 pathology any more than the response to the lumbar epidural in 2010 ruled out L5-S1 pathology?

A Not solely in and of itself. That's one piece of the puzzle.

Q Now, you've read the reports and the depositions of again Dr. Cash and Dr. Ruggeroli in this case, true?

MR. PRINCE: Can we approach, Judge?

THE COURT: Yes.

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

MR. PRINCE: He's never commented on any deposition testimony from anybody. His -- he has two -- three reports --

THE COURT: Right.

MR. PRINCE: -- none of them ever talk about reviewing any depositions from Drs. Cash nor Ruggeroli. He talks about reviewing the Orth deposition and the Capanna deposition. I took his deposition on June -- June 17th, which is --

THE COURT: Okay.

MR. PRINCE: -- he wasn't like -- you know, no depositions at that point of anybody. And his -- he did his supplemental report --

THE COURT: Right.

MR. PRINCE: -- which you said was timely, which July 24th, and he does not comment on future -- on Dr. Cash nor Dr. Ruggeroli. And remember --

THE COURT: Okay.

MR. PRINCE: -- we dropped the facet issues. That's a nonissue.

THE COURT: I remember.

MR. PRINCE: So without -- he can't -- that would be inappropriate. If he had additional depositions, you already ruled that the July --

THE COURT: Mr. Lauria.

MR. PRINCE: -- report was timely.

MR. LAURIA: Judge, it's pretty hard for him to have read the deposition of Dr. Cash when it wasn't even completed yet. It was completed the day before that, so --

THE COURT: Well, I know, but his supplemental is all about the articles essentially.

MR. PRINCE: Right, he took the deposition of --

THE COURT: That he's reviewed the articles.

MR. PRINCE: -- Dr. --

THE COURT: -- and that he disagrees with --

MR. PRINCE: -- Cash at the end of June.

THE COURT: -- the opinions.

MR. PRINCE: So it was a month later.

MR. LAURIA: I'm sorry, what?

MR. PRINCE: You took the deposition of Dr. Cash at the end of June.

MR. LAURIA: So the transcript wasn't available --

MR. PRINCE: A month later.

MR. LAURIA: -- as the time his deposition was taken, so --

THE COURT: Well, I know, but I mean in his supplement he would say I've reviewed the depositions of folks.

MR. LAURIA: Well again, Your Honor, we're scrambling to try and cover this newly thrown --

THE COURT: I know, but --

MR. LAURIA: -- issue at us.

THE COURT: -- you know, I'm so tired of this on the fly. Objection is sustained. Okay. Confine him to what's in there.

MR. LAURIA: So --

[Bench conference ends at 11:19 a.m.]

THE COURT: The objection is sustained. Mr. Lauria.

MR. PRINCE: Thank you.

MR. LAURIA: Thank you.

BY MR. LAURIA:

Q You have reviewed the records of Dr. Ruggeroli and Dr. Cash, have you not?

A Yes.

Q Did you see any indication that -- anything that suggested that Mr. Orth needed years and years of pain management or RFA injections?

MR. PRINCE: Objection sustain -- objection, Your Honor, for the reasons we talked about earlier on the --

THE COURT: Well --

MR. PRINCE: -- the radio frequency stuff.

THE COURT: -- I'm going to allow that question.

THE WITNESS: No, I didn't see any reason for prolonged pain management in the way of radio frequency ablations.

BY MR. LAURIA:

Q Would it be necessary to make that determination to find out how the patient responded in the first place?

A Yes.

Q If you don't know how the patient responds to a treatment like that, is there any basis, in all your training as a surgeon, to give an opinion as to whether that's needed or indicated?

A Not that I can think of.

Q Okay. Now, you've read Dr. Cash's records in this case, right?

A Yes, sir.

Q There's no report prepared by Dr. Cash other than are contained in his chart that you're aware of?

A I believe that to be the case.

Q In going through Dr. Cash's records, did you see any indication or documentation that at any time prior to May of 2015 that he indicated that Mr. Orth required two fusion surgeries in the future?

A I didn't see that.

Q As an -- as a orthopedic spine surgeon, fellowship trained, if you are making a prognosis that a patient you're seeing is likely going to require more probably than not spinal fusion, not once but twice in the future, is that something

you believe should be recorded in your chart?

A Certainly.

Q And you didn't see any indication of that, even a hint of that, in Dr. Cash's records?

A I didn't.

Q Now, is this the first case in which you have given testimony and Dr. Cash has given testimony on the other side of the case?

A No, I've -- I can recall many medical record reviews and independent medical evaluations that I performed in patients who have been injured in the workplace or been involved in a personal injury where Dr. Cash has been on the other side. I can't recall a situation such as this.

Q Sure, not maybe a med mal, but a car accident or a injury at work or a slip and fall or some other type of personal injury claim, have you been involved in those where Dr. Cash has been on the other side before?

A Certainly, on several occasions.

Q All right.

MR. LAURIA: The exhibit list, the testimony, what did you mark that?

MR. CARDINALE: Dr. Cash's testimony?

MR. LAURIA: Uh-huh, what exhibit is it in our book?

MR. CARDINALE: I believe it's quintuple Q, I believe.

BY MR. LAURIA:

Q Quintuple Q, five Qs I think --

MR. PRINCE: Can we have a discussion about this, Judge?

[Bench conference begins at 11:23 a.m.]

THE COURT: What are we looking at?

MR. LAURIA: It's the elicited testimony of Dr. Cash.

MR. PRINCE: Yeah, but --

THE COURT: Okay.

MR. PRINCE: -- how is he going to testify on that, number one? And what is he going to say? Start talking about he's seen Dr. Cash do things in other cases, number one, would be a completely undisclosed opinion. And two --

THE COURT: What are -- what is it?

MR. LAURIA: Just going to establish that some of these cases are also ones that he's also been involved --

THE COURT: Well --

MR. LAURIA: -- with Dr. Cash in.

THE COURT: -- first off, what's the relevance of the cases that he and Dr. Cash had together? I mean, you can bring out that they've been on opposite sides of things, I get that. But what's --

MR. LAURIA: But --

THE COURT: -- the relevance?

MR. LAURIA: Well, the relevance may be that Dr. Cash expresses the same opinion as to a need --

MR. PRINCE: No.

MR. LAURIA: -- for fusions in every case that involves a discectomy, which --

THE COURT: Well, you --

MR. LAURIA: -- Dr. Cash said.

THE COURT: You can ask him that.

MR. LAURIA: All right.

THE COURT: That was brought out with Dr. Cash that that was his opinion

that --

MR. LAURIA: Right.

THE COURT: -- he believes that once you've had this microdiscectomy, you're going to need a fusion surgery.

MR. LAURIA: Okay.

THE COURT: That's fine.

MR. PRINCE: Right, but I don't want him to be able to say you've seen Dr. Cash in many other cases -- that's the path he's going, Judge, and it's --

THE COURT: Well --

MR. PRINCE: -- it's irrelevant and it's --

THE COURT: -- that question has --

MR. PRINCE: -- collateral.

THE COURT: -- that question has already been asked, that --

MR. PRINCE: I know, but --

THE COURT: -- part of it has sailed.

MR. PRINCE: -- he's going to start kind of --

THE COURT: But if you just --

MR. PRINCE: -- based upon your familiarity with Dr. Cash, all this other jazz. I want him to stay completely away from it. That type of objection is inappropriate -- I mean that type of question.

THE COURT: He can ask him a question if in his experience with Dr. Cash he believes that Dr. Cash is always recommending fusion surgery.

MR. PRINCE: No, Judge, how do you say in his experience that? I mean, how do you -- without identifying every case law where it's collaterally attack what the status was in every case, that's an undisclosed opinion in the worst form. I

understand about updated medical records and stuff like that, but dealing with these issues, I mean how --

THE COURT: Well, I'm already admitting this --

MR. PRINCE: No, I know.

THE COURT: -- because this is --

MR. PRINCE: But how can you say --

MR. LAURIA: Okay. Well, then I'll --

THE COURT: Okay. Hold on.

MR. PRINCE: But how can he ask like a general in your experience with Dr. Cash all of a sudden create this image of well Dr. Cash always recommends surgery?

MR. LAURIA: Dr. Cash admitted that.

THE COURT: All right. Well -- hold on. Hold on.

MR. PRINCE: No, he doesn't.

THE COURT: You know, I keep falling into this rabbit hole, so let me go back first. Is it in any of his reports?

MR. LAURIA: Is what?

THE COURT: This, that you want to ask him an opinion about --

MR. LAURIA: This specific --

THE COURT: -- Dr. Cash?

MR. LAURIA: -- part?

THE COURT: Yeah.

MR. LAURIA: No.

THE COURT: And why not?

MR. LAURIA: Because we didn't --

THE COURT: If you're asking him that he's had all these cases with Dr. Cash and he's reviewed his testimony apparently in all these --

MR. LAURIA: Because --

THE COURT: -- other cases and he has this opinion that he's always doing these things --

MR. LAURIA: Because --

THE COURT: -- how come he doesn't disclose that?

MR. LAURIA: Because Dr. Cash's deposition I don't think was even transcribed at the time we got these reports done, Judge.

THE COURT: No, that -- this was nothing about Dr. Cash's deposition. You all were saying that Dr. Cash always says that people need fusion --

MR. LAURIA: Well, I didn't know that --

THE COURT: -- surgery.

MR. LAURIA: -- until I took his deposition and when I asked him that. I asked Dr. Cash, you --

MR. PRINCE: Well, that report addresses that.

MR. LAURIA: I didn't know until I asked Dr. Cash that question.

THE COURT: All right.

MR. LAURIA: And that's what he told me.

THE COURT: We're not going there.

MR. LAURIA: I can't ask him that at all?

THE COURT: No, no.

[Bench conference ends at 11:25 a.m.]

BY MR. LAURIA:

Q Okay. You're aware in this case that for the first in May of 2015 Dr.

Cash indicates that there is a need for future fusion surgery in Mr. Orth?

A I'm not certain on the specific date, but yes, he did indicate that.

Q Well, just a couple months before this trial, right? I mean, it's not back in 2010, or 2011, or 2012, or 2013, or 2014, right?

A That's correct.

Q All right. And in fact, you're aware that Dr. Cash last saw Mr. Orth in March of 2014, 14 months before he -- now just months before trial?

MR. PRINCE: Objection; leading, Judge.

THE COURT: Well, I'll sustain the objection. You can rephrase the question.

MR. LAURIA: Sure.

BY MR. LAURIA:

Q You're aware that Dr. Cash last saw Mr. Orth in March of 2014?

MR. PRINCE: Objection; leading.

THE COURT: Well, overruled. That's just kind of a predicate.

THE WITNESS: That's correct, to the best of recollection.

BY MR. LAURIA:

Q All right. And Dr. Cash agreed with that when he testified and that he hadn't seen, or examined, or evaluated, or treated, or had any further information about Mr. Orth in the 14 months before he went from not mentioning any need for fusion surgery until two months before -- or three months before trial for the first time say after five years of taking care of this gentlemen, that now he needs two fusion surgeries?

A That's correct.

Q Did Dr. Cash indicate in your review of the records that Mr. Orth was unable or could not from a physical standpoint return to try and play football?

A Yes, he stated that.

Q All right. Do you recall when it was he stated that?

A As I sit here today, I can't recall the specific date.

MR. LAURIA: Do you have the April 2011 record of Dr. Cash?

MR. CARDINALE: I should have it. What was the date?

MR. LAURIA: April 2011.

[Colloquy between counsel]

BY MR. LAURIA:

Q Doctor, I'm going to show you what is Defendant's Exhibit P010 and 011.

MR. PRINCE: What's the date of the note?

MR. LAURIA: I'm looking but I -- 4/19/2011.

BY MR. LAURIA:

Q So approximately six months after his surgery on October 22nd, 2010. Okay. As of that time, six months postoperative, the patient has pain of 2 to 3-10, chronic mild low back pain. Is that -- how would you describe that?

A Yes, I'm assuming that's on a 0 to 10 or 1 to 10 visual analogue scale with 10 being the worst you can imagine. This is close to the low end, so yes, chronic mild.

Q Patient has some dull pain in the back, if you look down at the last section there, with numbness in the left buttock and pins and needles, tingling in the bilateral heels and left foot.

A Yes, I see that.

Q He's got some radicular pain at that point?

A I'm not certain if I would classify it as radicular pain. He had radicular

symptoms. I'm not certain if the dull pain he's referring includes the left, lower extremity. So he had some sensory abnormalities.

Q Okay.

A It doesn't say pain in the lower extremity. I believe -- the way I interpret that is pain in his back.

Q Okay. If the -- if a patient has some element of back pain preoperatively and a microdiscectomy done, can you guarantee that microdiscectomy is going remove that element of back pain?

A No.

Q And why not?

A There's other potential factors, scar tissue from surgery, the surgery -- you know how they say medicine is an art and a science? There's some art form to the surgery and it just -- it depends. Sometimes patients have complete resolution of their pains, but most of the times they'll have some ongoing symptoms after a successful microdiscectomy procedure.

Q As of 4/19/2011 -- and let me get it up there again. Is that big enough to --

A Yes, I see that.

Q Okay. So at that point Dr. Cash thought the patient was doing well, certainly doesn't mention any need for a future fusion surgery, does he?

A No, not at all in that scenario. I don't see why it would.

Q All right. At this point the patient is going to have some persistent intermittent numbness in the lower extremities, so that would mean that there's going to be some residual radicularopathy (sic)?

A Radiculitis is how I would term -- I'd use that term, inflammation about

the nerve from the surgical procedure.

Q Okay.

A Yes, sir.

Q And he talks about the -- the patient is taking the next season off to complete school?

A That's what it says.

Q All right. Do you see any indication or order or -- by Dr. Cash that he not return to football at that time, or that he can't or that it's physically impossible?

A No, I don't see that.

Q Does it appear that this was a decision -- and whether it's because the back was hurting or he's having the numbness or whatever the reasons are, it was a decision made by the patient as opposed to the doctor ordering him not to compete?

MR. PRINCE: Objection; foundation, calls for speculation from this witness.

THE COURT: Sustained, excuse me.

BY MR. LAURIA:

Q From your review of the note, do you see any indication that the patient taking the season off to complete school was an order by his physician?

A No.

Q I'm going to --

MR. LAURIA: The testimony of Mr. Orth in this case.

Q I'm going to show you the deposition testimony of Mr. Orth, starting at page 56, line 11 and it goes on. So for example, when I look at the summary of the notes of Dr. Cash -- that's me.

Uh-huh. That's Mr. Orth.

The first kind of documentation or discussion about football or returning

to football appears to be in February of 2011.

Answer: Okay.

So four months or so after surgery?

Answer: Okay.

Where he's saying -- Dr. Cash is saying I had a lengthy discussion about his future playing football. I recommended a conservative approach. We were going to take it under consideration.

May not be able to return to the sport this year?

Answer: Right.

And then it goes on to say --

MR. PRINCE: Page 57?

MR. LAURIA: Page 57, starting at line 1.

MR. PRINCE: Okay.

BY MR. LAURIA:

Q And might return for his following year of eligibility?

Answer: Right.

Do you remember having that kind of discussion with him?

Yes, sir, because I believe the first time -- I don't think it was the first time or maybe it was, but I don't know. We did talk about it because obviously that would be the first thing on my mind.

Question: To try to get back?

Yes, sir.

Okay. So then he notes -- again, Dr. Cash notes in April of 2011 --

Okay.

-- that basically you were doing well, that you were taking the next

season off to complete school, right?

Answer: Uh-huh.

And was it your plan then to try and return for the 2012 season?

No, I don't believe so. At that time I just wanted to finish school.

You were kind of done with football at that point?

Answer: Yeah, I hadn't -- there just was not -- let me go onto page 58. There was just not good -- I guess there was -- wasn't really a good relationship and nobody had called me. Nobody showed very much concern from the university or my coaches or anything like that, of that sort.

Question: So they weren't making you feel like they couldn't wait to get you healthy and back on the field?

Answer: No.

I mean, it would have been nice, right? I mean, you've been busting your butt for these guys for a couple years and I understand the coach may have -- one coach may have left, another coach took over, or something?

Answer: I'm talking about my -- my linebackers' coach.

Again, when you reviewed Dr. Cash's records, did you see any clear indication in this timeframe when Mr. Orth said he decided to take the time off and concentrate on school that Dr. Cash was saying from a physical standpoint as his orthopedic surgeon, I am telling him he cannot compete in football?

A I didn't see that in his notes.

Q Based on all the information that you have about what his condition was, was he absolutely prevented from attempting to compete if he wanted to?

A He could compete if he wanted to.

Q All right. Now, obviously with any injury or you've had surgery, there's a

risk of further injury, true?

A Absolutely.

Q And if you had a surgery on a disc, it may make it more likely to have problems in the future if you continue to play?

A Yes.

Q So it certainly wouldn't be unreasonable to suggest, having surgery on two discs and having a laminectomy, to say you ought to be concerned because you could have some injuries here?

A Sure.

Q All right. But it would not be absolutely preventative in your opinion?

A No, given that he was doing well, if he wanted to attempt to return to competitive football, he had no reason not to attempt that.

Q Dr. Cash has testified in this case in trial that he calls hospitals and anesthesiologists and therapists every year so he can determine the cost of future for fusion surgeries. Do you do that on an annual basis, do you call around and figure out how much a fusion is going to cost?

A Not at all.

Q Does anyone in your practice do that that you're aware of, any of the other spine surgeons?

MR. PRINCE: Objection. Your Honor, could we approach please?

A Not that I know of.

[Bench conference begins at 11:37 a.m.]

MR. PRINCE: He's never offered any opinion on surgical costs. We know that -- the surgical cost letter dated back in it was either April or May, so we know that's been out there for a long time. He's never in one report, one deposition,

anywhere, talked about --

THE COURT: Well, let me --

MR. PRINCE: -- cost.

THE COURT: -- let me just interrupt you for a minute. Where are we going with what we're doing with that?

MR. LAURIA: Well, I was just going to ask him whether he had an opinion as to what a -- what the reasonable cost is for a spinal fusion.

THE COURT: Not if he hasn't expressed it before.

MR. LAURIA: All right.

THE COURT: Okay.

[Bench conference ends at 11:38 a.m.]

BY MR. LAURIA:

Q So that's not something you routinely do, you don't feel like you have to -- the need to call around and make that call and find out what those costs are going to be every year?

A Nope.

Q All right. Do you personally on a yearly basis offer testimony on how much spinal fusions are going to cost in multiple cases?

MR. PRINCE: Objection; relevance, foundation, Judge. We just -- you just ruled on this exact issue.

THE COURT: Mr. -- approach the bench.

MR. LAURIA: That's not the question I'm asking, Judge, so --

THE COURT: I know.

MR. LAURIA: -- I'm asking a different question.

THE COURT: Approach the bench.

[Bench conference begins at 11:38 a.m.]

THE COURT: What are you going to be asking him about?

MR. LAURIA: The question that I asked -- well, I can't -- I can't remember what the question was now, but it --

MR. PRINCE: It was about surgical costs.

MR. LAURIA: -- I wasn't going to ask him whether these costs were reasonable or not.

MR. PRINCE: Okay. With the question that he just said -- you know, Judge, we just ruled on this. You asked him a question about surgical costs.

MR. LAURIA: I did, but I didn't ask him whether they were reasonable in this case or anything about whether they were reasonable in this case.

MR. PRINCE: Well, I think he had the same impression I did, which is why we're asking about this if we can't go into that.

THE COURT: Right. Totally, you can't ask him about surgical costs, whether --

MR. PRINCE: So I mean, if there's -- if I --

THE COURT: -- it's even reasonable, nothing.

MR. PRINCE: -- missed something, I apologize, if there's some other reason for bringing that up that you were going into something else.

MR. LAURIA: Well, I think there is. I think there's an inference from the fact that Dr. Cash calls every year to get surgical costs that make him -- that -- you know, my doctor doesn't testify as to that year after year and Dr. Cash may. They can make that inference from the evidence --

MR. PRINCE: No, Judge.

MR. LAURIA: -- that's in front of them.

THE COURT: Well, but he hasn't expressed any opinion about that, so there's no reason for him to go into any of that.

MR. LAURIA: I'm not asking about an opinion. I'm asking him whether he does that.

MR. PRINCE: No, you were just asking about costs.

THE COURT: Why would you ask him if he doesn't?

MR. LAURIA: Forget it. I'll withdraw it.

THE COURT: Okay. All right.

MR. PRINCE: So is my objection sustained?

[Bench conference ends at 11:39 a.m.]

THE COURT: Yes, yes.

MR. PRINCE: Thank you.

THE COURT: Yes, let's move on. Thank you.

BY MR. LAURIA:

Q I wanted to ask you a question because I -- again, the jury has heard a lot of evidence in this case and so I want to move kind of quickly with you, Doctor. The testimony has been that when Mr. Orth first presents to Dr. Cash on October 12th, 2010 that he is essentially crippled, right? And I think he -- Dr. Cash uses that word as well?

A I don't recall the specifics of the wording.

Q Okay. But it -- and then Dr. Cash actually does surgery, not until 10 days later, on October 22nd?

A Yes, sir.

Q As an orthopedic spine surgeon, who's board certified taking care of people, if you have a patient who is in such severe pain that they can't get out of bed

for an hour-and-a-half, that they have to crawl on the ground to get to the bathroom, that they cannot move at all, would you wait 10 days to take them to surgery?

A Based on that information and that information alone, no, I would do the surgery earlier.

Q And if you already had an MRI that was done five or six days before, so you didn't need any additional studies, would there be any reason to wait 10 days to take someone like that to surgery?

A Not that I can envision.

Q If you needed to get an operating room to take someone like that in extreme pain, can't walk, can't get up off the floor to surgery, could you get an operating room available on --

MR. PRINCE: Objection; relevance --

Q -- an emergency basis if you needed to?

MR. PRINCE: -- foundation, leading, argumentative.

THE COURT: Well, I'll -- you can answer the question, Dr. Rimoldi.

THE WITNESS: Yes, I could get an operating room earlier than 10 days.

BY MR. LAURIA:

Q All right. Did you see in Dr. Cash's records any explanation as to why he waited 10 days to take Mr. Orth to surgery?

A Not that I can recall.

Q Let's look at -- I want to go through some of Dr. Cash's postoperative records again if we can. I know we've gone -- looked at the one.

MR. LAURIA: Let's go to 11/3 -- just get them out and just have them in order, Paul, if you would.

[Colloquy between counsel]

BY MR. LAURIA:

Q So let's just go through these quickly if we can, Doctor, because this is something that's important to you. You're in the same specialty as Dr. Cash, so -- true?

A That's correct.

Q So the patient postoperative course is something that's of particular interest to you as to how they're doing because --

MR. PRINCE: Objection; leading, Judge.

THE COURT: Well, sustained.

BY MR. LAURIA:

Q Do you see patients similar to Mr. Orth in your practice?

A Absolutely.

Q Do you have an expected course that you anticipate after surgery?

A Certainly.

Q Have you performed microdiscectomies at more than one level than the lumbar spine?

A I have.

Q All right. And do you expect a certain course of a patient on who you've done a multilevel lumber microdiscectomy?

A Yes.

Q Is it significantly different than a patient than whom you do one level?

A Not significantly.

Q All right. Let's talk about what Dr. Cash reports in regard to Mr. Orth. As of November 3rd, 2010, the report is back and leg pain, now mild at 1 to 10 at night and in the morning. Is that about what you would expect after a multilevel

microdiscectomy?

A Yes, after a successful one.

Q All right. And the patient hadn't taken any pain medications all day that day and we are basically nine days after surgery?

A Yes.

Q All right. So he says X-rays two-view of the lumbar taken in the office today for post-op evaluation show laminectomy defect and loss of disc height at L5 and S1. Have you seen those X-rays?

A I have.

Q All right. Do you believe that you can see appreciable loss of disc height nine days post-op on that plain film?

A Not compared to preoperative films.

Q And so Dr. Cash felt the patient is doing well two weeks after surgery and then he recommends he continues wearing a back brace. Do you see that?

A Yes.

Q Do you know why the back brace was prescribed in this case?

A I can only speculate.

Q Do you typically prescribe a back brace for a patient who's undergone a lumber microdiscectomy?

A I don't.

Q Okay. The partners in your practice, in your office, do they typically prescribe a back brace for patients who've undergone a lumbar microdiscectomy?

MR. PRINCE: You know, objection, Your Honor. We've talked about Mr. Lauria wanted the preference testimony excluded and so it's been excluded, about personal preference.

THE COURT: Mr. Lauria?

MR. LAURIA: Your Honor, I'm asking if --

MR. PRINCE: Yeah, they filed a motion on that.

MR. LAURIA: -- what the practice is and we're trying to find a reason for the back brace, so --

THE COURT: Well, you can ask Dr. Rimoldi about his.

MR. LAURIA: Well, he's --

THE COURT: Well, actually, approach the bench.

MR. LAURIA: Sure.

[Bench conference begins at 11:45 a.m.]

THE COURT: And the objection is based on what -- not talking about standard of care, but just talking about people's practice.

MR. PRINCE: And you --

MR. LAURIA: Well --

MR. PRINCE: -- you have -- you filed a motion --

MR. LAURIA: -- the preference to standard of care specifically. The issue with preference is standard of care is what a reasonable doctor would do, not --

THE COURT: Right.

MR. LAURIA: -- what anyone prefers.

THE COURT: Right.

MR. LAURIA: This talks about -- I'm trying to figure out whether he says I don't use a back brace. I'm finding out if his partners do you.

THE COURT: Shh, shh, shh.

MS. TARMU: You're so loud. I can hear you all the way from the seat.

THE COURT: Why -- it's either a standard of care issue --

MR. PRINCE: It is a standard of care issue.

THE COURT: -- or it's a personal preference issue. And if it's a personal preference issue, it's not really relevant. If it's a standard of care issue, then ask away.

MR. PRINCE: And more importantly, Mr. Lauria, he's the one who filed the motion on preference issue, so it's --

THE COURT: No, I know.

MR. LAURIA: On standard of care.

THE COURT: But I'm really less concerned about who filed --

MR. PRINCE: No.

MR. LAURIA: That's fine, Judge.

THE COURT: -- the motion than if we --

MR. PRINCE: That is the standard -- that is the standard of care. He's trying to backdoor --

THE COURT: If we have it. I'm just trying to kind of get us through this, guys --

MR. PRINCE: -- a standard of --

THE COURT: -- on things that we need to get through.

[Bench conference ends at 11:46 a.m.]

BY MR. LAURIA:

Q Again, in any event, the doctor thought he was doing well after that procedure and based on what he reports and finds, do you agree?

A Yes.

Q All right. I don't want to go through every one of these notes because we'll be here -- and the people have seen them, but you would agree with me that

Dr. Cash sees him again in February, we just saw the note in April of 2011, and then Dr. Cash doesn't see him again until August of 2012, so there was a gap of 16 months or so between visits to the doctor?

A Yes, sir.

MR. LAURIA: Can you show me the August 2012 note?

Q August 2012, so now we're almost two years postoperatively, low back pain, 1 to 2 out of ten, morning and nights, sounds just like the one right after surgery, doesn't it?

A Yes.

Q Okay. Continues to work out, protect his core, the lumbar 3V shows disc collapse, is he saying that's on a plain X-ray again?

A That's what that implies, yes, three --

Q All right.

A -- views.

Q Did -- and where does he describe seeing this disc collapse on his X-ray? Does he describe seeing significant changes in 2012 at L4-5 on the disc or somewhere else?

A That's one level lower, L5-S1, not at L4-5.

Q So when Dr. Cash, in your interpretation, reviewed his own X-rays in 2012, the place where he thought there was significant disc change was at L5-S1, not L4-5?

A That's what that would state.

Q So the patient had some low grade backache, numbness down the posterior left leg and thigh. Any report of severe pain, any report of severe limitations on his activities?

A Not from that note.

Q All right. Let's go onto the next note. We've got a visit in 2012, I think about a week later after the MRI. Again, it's very brief, so I just want to make sure we have all these in mind. Again, low back pain, mild 1 to 2 out of 10, not severe, another chronical of that, is that how you describe that?

A Yes, mild just as Dr. Cash would.

Q And he's got an aching pain in the left buttock and some numbness in the left posterior leg?

A Yes.

Q All right. Describes findings on the MRI as a small disc bulge at L5-S1 with an annular tear?

A Yes.

Q And some dehydration or, I guess, desiccation at L4-5 and L5-S1?

A He uses the term dehydration at those two levels.

Q That's the same as desiccation; is that true?

A Yes.

Q All right. Any description in that report of severe changes at the L4-5 level, severe loss of disc height, anything like that?

A No.

Q Any mention in 2012, now after this MRI, that it's his opinion that a fusion or two fusions are going to be required in Mr. Orth?

A No.

Q He describes his impression is post-laminectomy -- what does post-laminectomy mean?

A It means he has had a surgical procedure where some of the bone on

the back of the back bones, if you will, has been removed.

Q All right. And his impression is lumber radiculopathy, which is what he's been describing basically throughout, true?

A That's correct, with the left, lower extremity tingling and numbness.

Q All right. In your review of the records, did you note that Dr. Cash didn't, again, see this patient until March 12th, 2014, so what's that, 18 months later approximately?

A Yes, sir.

Q Did you see Mr. Orth during 2013, during that 18 months when Dr. Cash didn't?

A I'm just going to check the date of my independent medical evaluation. I saw him on July 17th of 2013.

Q Okay. So you saw him between this visit of September 4th, 2012 -- and I'm going to put up the next time -- the next and kind of last time until just before this trial that Dr. Cash saw the patient.

[Colloquy between counsel]

BY MR. LAURIA:

Q Now, 3/12/14, Mr. Orth comes in and he's got back pain 6 to 8 out of 10. That's pretty different than this 1 to 2 back pain that's been going on, do you agree?

A Yes, I do.

Q And how long, if you'll look at the bottom of the second paragraph, had he had this significant or pain of 6 to 8 out of 10?

A Three days ago.

Q All right. So that wasn't a chronic condition that had been present for

the 18 months, it was something that had just happened recently, fair?

A According to -- according to that note, yes.

Q All right. Dr. Cash, again, notes his impression is post-laminectomy syndrome, same thing that he had two years ago?

A Yes.

Q Lumbar radiculopathy?

A Yes.

Q All right. Again, he says, X-rays of the lumbar spine, I guess those are the ones taken in his office, right?

A Yes.

Q Show laminectomy defect, that's that bone that he removed in the spine that we put up the plain film of?

A That's correct.

Q And some loss of disc height at L4-5 and L5-S1?

A That's correct.

Q Does he describe severe changes at the L4-5 level in that note?

A No.

Q Does he indicate that there is a need or he anticipates there's going to be a need for fusion?

A No.

Q Let's look at that MRI again real quickly if we can.

[Colloquy between counsel]

BY MR. LAURIA:

Q So we've gone over this quickly and I don't want to go through it again, but it's something that you've read and relied upon, right?

A Yes.

Q 3/14/2014 MRI ordered by Dr. Cash. And when you read this MRI report, what was your -- and you've seen the films, true?

A Yes.

Q What was your impression of what was going on in the spine?

A That these were normal postsurgical changes.

Q The radiologist notes at the bottom correlate for potential left S1 radiculopathy. What does that mean as a surgeon? What is that telling you?

A That there was something that the radiologist saw that was either impinging or irritating on the S1 nerve which exit the spine for the L5-S1 disc is. So at that lowest level in your back, right above the tailbone.

Q Is there any indication -- and you have the -- we can show you the whole report, but obviously the impression, any indication that there are significant loss of the disc height at the L4-5 such that it's lost 80 to 90 percent of its height?

A No.

Q All right. You've seen the film, has it lost 80 to 90 percent of its disc height by this time?

A No.

Q Is it close to bone-on-bone or -- strike that. Would you describe the finding on this MRI as anywhere close to being bone-on-bone?

A No.

Q Doctor, in your experience as a spine surgeon, although you read your own films, if a radiologist observed 80 to 90 percent loss of disc height or a condition that was almost bone-on-bone, would you expect them to report that to you in their report?

A Yes, I would.

Q You don't see anything suggesting that here?

A No, I don't.

Q Let's go back to the last visit by Dr. Cash with this patient in March of 2014, let's go down to it -- this is after the MRI. This is what -- oops, sorry, I want to make sure it's clear, right there. That's Dr. -- let's look what Dr. Cash wrote about the MRI, his interpretation of it on March of 2014. Can you read what -- what he wrote?

A Do you want me to read it?

Q Yeah, please. I mean, I think the jurors can read it, but I want it in the record.

A Yes, Dr. Cash states, MRI of the lumbar spine, postsurgical changes L4-5 with minimal disc bulge, disc protrusion with annular tear, L5-S1 contacting and displacing the descending left S1 nerve root in the lateral recess without impingement.

Q And then under his impression, he's got the same impression that he's had for the past three to four years, right, post-laminectomy syndrome?

A Yes.

Q Lumbar radiculopathy?

A Yes.

Q And now he adds disc protrusion with annular tear at L5-S1 displacing the descending S1 nerve root, true?

A Yes.

Q Does he describe any significant changes, any significant findings on the MRI film at L4-5?

A No, he doesn't.

Q He describes simply postsurgical changes with a minimal disc bulge?

A Yes.

Q Now a significant loss of 80 percent of the disc height, or almost bone-on-bone, or any other significant finding in your opinion?

A That's correct.

Q Do you agree with the interpretation of Dr. Cash as it's recorded in this note?

A Yes.

Q If Dr. Cash came in and testified and put up that film in front of the jury and said, now L4-5 shows it's almost bone-on-bone, he's lost 80 to 90 percent of his disc height, if he said that here just a few days ago, would you accept his notation of March 14th as the more accurate or what he came and said a few days ago in court?

A If that's what he said, I'd accept the notation that he made as being the accurate description of that MRI.

Q And that's the same interpretation you have --

A Yes, sir.

Q -- of that MRI? That's the same interpretation that the radiologist of the MRI, true?

A Which -- I'm not certain what radiologist you're referring to.

Q Sure, the -- we just put up the radiology report. I could put it back up there, from --

A Oh, yes.

Q -- Steinberg, Dr. Chen?

A I'm sorry, yes. Yes.

Q Postsurgical changes at L4-5, minimal disc bulge present. If you go to the end of that paragraph, that's what Dr. Cash notes too, right?

A Yes, I'm sorry, I wasn't sure if you were referring to Dr. Chen. That's correct.

Q And then the disc at L5-S1 on the left nerve root causing radicular syndrome, that's the same thing that Dr. Cash wrote, right?

A That's correct.

Q So the three of you are -- you three are in agreement on that portion of it?

A Yes.

Q In reviewing the records of Dr. Cash, did you ever see an addendum? Did he ever go back and correct the record or like, hey, I've gone back and looked at these films and now I look at them and, by the way, there are these terrible changes? Did you ever see anything like that?

A No, I didn't.

Q Did you ever see anything by Dr. Cash until just a couple months before we came in here at this trial where he indicated that because of these significant changes at L4-5 this patient was going to need two fusions?

A I didn't see that.

Q Do you -- you've -- do you recall Dr. Yoo indicating in his deposition that he thought there was only a 20 to 30 maybe approaching a 50 percent chance --

MR. PRINCE: Your Honor, objection. You already ruled on these issues concerning depositions.

THE COURT: Mr. Lauria.

MR. LAURIA: Well --

MR. PRINCE: That'd be a violation of your order.

MR. LAURIA: -- he's read the depositions, so --

MR. PRINCE: That'd be a violation of your order.

THE COURT: No, sustained.

BY MR. LAURIA:

Q Now, let's go back to your examination and your evaluation because you -- you're the other person who evaluated Mr. Orth here. That occurred in July of 2013?

A Yes, July 17th of 2013.

Q And tell me, when you do an examination like that, what do you do, Doctor? What -- what is -- tell us the process, how it works.

A Yeah, the -- an independent medical evaluation is a little bit of a different type of evaluation than I usually perform. Usually I enter into relationships with patients that I'll see on many occasions. For Mr. Orth, I was only asked to see him on one occasion and I was asked to formulate opinions to the best of my area of expertise as to alleged injuries that Mr. Orth sustained as a result of this situation, if any. And also to opine, in an expert fashion, to give my opinion as to what type of future care and treatment that Mr. Orth would require, if any, as a result of this situation.

So initially, I explained to Mr. Orth that I wasn't entering into a formal physician/patient relationship like his other treaters because I only had the opportunity to see him on one occasion. And after doing that, then I take a history from Mr. Orth. Now, I should mention that a lot of work goes into this evaluation prior to seeing Mr. Orth because I was provided with abundant medical records in

this case and I had reviewed those prior to seeing him, so I had an understanding of the situation at hand prior to seeing Mr. Orth.

Q Let me stop you there. So you'd seen Dr. Cash's records up to that point, you'd seen Dr. Capanna's records up to that point, Dr. Ruggeroli's records, the scans and the studies that had been done, had you seen those things?

A Yes, I'd seen all the pertinent medical records up until that day, July 17th of 2013. So I had reviewed those so I kind of -- in this examination, it benefits me. That's the way I like to do it. I kind of hit the ground running, so to speak. I know a little bit about the history and what's going on from my review of the medical records.

Certainly I take a history, make sure that the medical records are as accurate, to ask Mr. Orth did he indeed see Dr. Cash, Dr. Capanna, Dr. Ruggeroli on these occasions. I also take a past medical history seeing if there was anything going on with the affected areas prior to, what type of surgeries, if any, did he -- Mr. Orth had in addition to prior medical treatment. I ask about family history, medications that he's taking, any allergies he's on (sic), social history, what he's doing for a living, what he's doing for work as well as habits, such as smoking, drinking, and illicit substances, if there's any of that, that was pertinent.

Then I ask about the quantity and the quality of pain, having him fill out the visual analogue scale. He's prepared a body schematic to show where the pain is and he describes what type of pain he's having, is it a throbbing pain, is it a sharp pain, is it a burning pain, that type of thing, and that's recorded.

Then after that, I perform the physical exam. The physical exam consists of inspection, looking at him, looking at the wound, looking at his back. It consists of palpation, where I physically palpate areas to try and elicit pain. It

consists of measuring range of motion to the lumbar spine, having him forward flex and extend, bend side to side and twist at the waist. It involves performing special neurologic tests, testing sensation in the lower extremities with a pinwheel tester in key areas that I know are supplied by key nerves that exit the back. It consists of performing muscle strength evaluations where I test muscle strength of key muscles that I know are innervated by key nerves that exit the lower back at different areas. I take reflexes. I make sure that the hips aren't involved by performing a physical exam, checking hip range and motion. Those are the main things that I do in the physical exam. And I record those findings.

And then I look at the diagnostic images, if any, and refer to those and describe those. And after I've done all of that, then I formulate my opinions as to the injuries that he alleges and what treatment is reasonable and necessary in the past and going on into the future.

Q And in this case, in every case, once you do a medical evaluation like that, it incuses in a report, correct?

A That's correct.

Q And your report -- in this case, you were hired by counsel for Dr. Capanna before I became counsel back in 2013, true?

A Yes.

Q All right. You were hired to do that evaluation by the attorneys representing Dr. Capanna at the time, and you wrote in your report that Dr. Capanna, in your opinion, had done surgery at L4-5 and not L5-S1?

A Yes, I did.

Q All right. Were you -- did you know that writing that in your report wasn't going to help Dr. Capanna's case?

A I'm basically doing my best to provide the most accurate report that I can and be truthful, and I always do that. And based --

Q Okay.

A -- on the information that I saw, that was the truth.

Q All right. So whether it -- whether it helped or hurt whoever hired you, you were going to say the truth what your opinion was?

A That's correct.

Q Okay. And did you do that -- not only in that portion of the report, but did you do that throughout the report?

A Yes, I did.

Q What were your findings in regard to and your impressions in regard to Mr. Orth and his future course?

A Well, I felt that he hasn't had a reasonable response to the surgeries. His pain level, when he saw me, I believe was a 2 out of 10, which was consistent with the prior records that were noted by Dr. Cash.

Q So in the year from August of 2012 to July of 2013, it hadn't changed?

A Yes, and he communicated that there was no significant turn for the worse.

Q Okay.

A It appeared that he was quite functional. He was performing a managerial-type job. Let me just -- to be accurate, just look at what I recorded.

Q Sure.

A Yeah, he was employed as a store manager having received a marketing degree from UNLV and was quite functional at that. I felt that he was stable and not going to require further treatment, other than over the counter

analgesics for flare ups of his symptoms.

Q Did you form an opinion or did you have an opinion, Doctor, as to whether or not having a two-level microdiscectomy significantly changed what Mr. Orth's outcome may have been from a one-level microdiscectomy?

A No, I'd expect the same type of findings whether a one-level was done or a two-level was done.

Q Was there any limitations that you could see, medical limitations, on his physical activity level at that time?

A No.

Q Did he report that he was limited in his physical activities in any significant way?

A Not that I can recall.

Q Is that something that you would note if it was significantly affecting his life, that he couldn't -- that he couldn't do something, was problematic, is that something you would record?

A Absolutely.

Q All right. I want to go to Mr. Orth's testimony that was taken in April of 2015, so a little -- almost two years after you saw him. Sorry, that was -- I'm looking at here and it's all aligned for me, but it's not for everyone else. Page 71, I asked Mr. Orth: All right, since -- so the last treatment we had was the treatment by Dr. Ruggeroli?

Dr. Ruggeroli: Yes, sir.

In May of 2014, so 11 months ago?

Yes, sir.

And what is your condition now?

Every day it's up and down.

Question: Some days are good?

Answer: Some days are good, some days are bad. Like I said, if I do something normal, just normal life, or wash my car, I pay for it the next day. I try to be -- I try to be as active as I can. I was a Division I college athlete, so obviously -- and I'm 25, so you know, you've got to live your life.

Sure. You know, so do you have any recreational or sports activities now?

I work out.

Do you go to a gym?

I go to a gym, go to LVAC. I played flag football for a little bit, just running around with my friends and stuff, nothing contact -- no contact or anything like that. But I do, I work out. I try to work out, you know, four times a week. I don't do anything -- obviously, no lower body stuff anymore, everything is upper body, trying to do core work and just be as strong as I can. I guess I'm just a competitive person.

Do you play baseball, softball, any of that stuff?

No, sir.

Are you a golfer?

I try, I pay for it. I probably golfed, in the last year, I would say maybe three times, so I wouldn't say I do it a lot.

What about skiing, waterskiing, anything like that?

I try to go snowboarding.

All right.

I try to snowboard, but that might be like once a winter, twice a winter.

Once again, it's one of those activities that's really tough the next day, sometimes during.

So I mean, you snowboard, but the next day you may wake up and your back is stiff?

Answer: I'm done. It's tough, but there are just things I love to do, so -- I've done my entire life.

Any -- sure. Any other activities you currently do?

Currently, no, sir. Currently, I just work. Like I said, I started a new job about six months ago.

And so on. From a -- from a medical standpoint as a orthopedic surgeon, do you sometimes have to place limitations or restrictions on someone's activity level?

A Yes, sometimes I'm asked to do that.

Q From everything that you saw about Mr. Orth, would a doctor -- strike that. As a doctor, would you put restrictions on his activity level or would it be limited by his own pain? I mean, if he can do it, awesome. If it's -- if it's painful, you know, avoid it.

A Yeah, certainly I would caution him. He had surgery on his back and from a preventive standpoint, you know, avoid heavy lifting if he could, but I'm not going to state that he can't lift anything. Certain activities, if he was working in manual labor, you know, I would -- not that I'm going to say you can't do that, but I certainly would caution him as to, you know, potential issues that may arise from doing something like that that could place additional stress on his back.

Q And there's no -- no question, Doctor, that people have -- sometimes have back pain that we can't -- we can't see and we can't visualize that limits their

activity?

A That's correct.

Q All right. Some days are good, some days are bad?

A Yes, sir.

Q Do you believe, to a reasonable medical probability that there is any way that any spine surgeon could say as of the last record that you're aware of, in March of 2014, that Mr. Orth's pain symptoms were due to one level or another?

A No.

Q All right. Why not?

A Well, there's surgical changes at those levels. There was irritation of nerve roots at those levels. The patient had surgery at two levels. And by having persistent symptoms, whether it be back pain around the incision that he had or symptoms in the leg that was bothering him before, I mean, it could be from one or more issues at one or both levels, or just from normal scar tissue formation that someone would have. Surgery rarely makes a person, whether it's done at one level or two levels, like God makes them.

Q The other issue, when you first learned that Dr. Cash now, just a couple months ago, brought up for the first time that Mr. Orth was going to need spinal fusions, was that surprising to you?

A It was surprising in one way, but it wasn't in another.

Q What do you mean?

A Well, I mean, seeing how the process here involved and that discussion kind of came up in close proximity, that was a little surprising. But I've been in evaluating or I've been involved with Dr. Cash before and I know that he's

Q We're not supposed to --

A -- stated that before.

Q We're not supposed to -- stop -- I'm going to stop you for a second. Was it surprising from a medical standpoint, given what you've seen in his reports, what you'd seen in the radiologist report, what the MRI showed?

A Yes.

Q All right. And when you reviewed those same MRIs, those same records, those same findings, do you believe that it is medically probable that in the future Mr. Orth is going to require not just one spinal fusion, but two?

A I disagree with that.

Q Why, Doctor?

A Because given how he was doing in 2013 with the pain level at 2 out of -- 2 out of 10 on a visual analogue scale, he was quite functional, he had decided to stop playing football and I think he will go his life without requiring fusion surgery.

Q In forming your opinions in this case regarding spinal fusion surgery in people who undergo discectomy, did you do a review of the peer reviewed literature?

A Yes.

Q Was it all just limited to people who had simple -- simple one-level microdiscectomy or did it include different age groups, different types of surgeries, multiple levels?

A Yes.

Q All right. So it was not just only simple one-level microdiscectomies?

A That's correct.

Q All right. We have identified various articles.

MR. LAURIA: And if I can approach?

THE COURT: You may.

BY MR. LAURIA:

Q I'm going to ask you to look at starting at Exhibit SSS. I'm sorry, starting at UUU.

A Yes, I'm there.

Q Okay. These are abstracts of the peer review journal articles that the jury has heard a little bit about them. Do you --

A Yes.

Q All right. And so when a author submits an article, they submit the abstract along with it as a summary of the conclusions in the article, true?

A Yes. I'm sorry, though, I'm looking at what you described --

MR. LAURIA: Can I approach again, Your Honor?

THE COURT: Yes.

THE WITNESS: I'm at UUU, there's three of them.

BY MR. LAURIA:

Q Let me help you. Yeah, we're down to three Us.

A Okay. I'm sorry.

Q That's okay. UUU, article entitled Microdiscectomy for the Treatment of Lumbar Disc Herniation: An Evaluation of Reoperations and Long-Term Outcomes, 2014 Evidence-Based Spine-Care Journal. Have you reviewed that?

A Yes.

Q All right. Is that a reliable authority relied upon by spine surgeons in the theory of medicine?

A Yes.

Q All right. Go to the next -- the next one if you would. VVV, article

entitled Limited Microdiscectomy for Lumbar Disc Herniation, a Retrospective Long-Term Outcome, Journal of Spinal Disorder Technology 2014. Have you reviewed that?

A Yes.

Q The next article, WWW, Recurrent Disc Herniation and Long-Term Back Pain, Neurosurgery 2009. Have you reviewed that?

A Yes.

Q Is that also a -- are these -- is that also a reliable authority in the field of spine surgery?

A Yes, these are all from peer-reviewed journals.

Q XXX, Long-Term Back Pain After a Single-Level Discectomy, Journal of Neurosurgery of the Spine 2010. Is that a reliable authority?

A Yes.

Q All of these, Doctor -- and please take a look, go down the list, I want to make sure that these -- through Exhibit NNN, there's about 10 more or 15 more, are those all articles that you reviewed to prepare your opinions in this case?

A Yes.

Q And are all of those, Doctor, reliable authorities in the field of spine medicine on the incidents of postoperative complications and/or need for fusions in patients who have had discectomies either at one or multiple levels?

A Yes.

Q Is that, in part, what your opinions in this case are based upon?

A Yes.

Q Let me represent to you -- and I'm almost done. I know that the jurors are probably getting hungry and I am too. Dr. Yoo I think was asked a final question

-- actually a juror asked the question of Dr. Yoo when he was on the stand, and I think the question was, if the problems -- or if there are changes at L5-S1, could he say with any certainty that those changes had been progressed faster because of the surgery at L4-5. I believe Dr. Yoo said he -- theoretically, that was thought, but there wasn't actually any proof to make that more probable than not. Do you agree with that?

A I agree with that.

Q So on a theoretical basis, that may occur, but it is a part of science, it's not part of the established medical science as spine surgery?

A That's correct.

Q All right. From what I read to you as to Mr. Orth's report to me of how he was doing in April of 2014 -- April of 2015, sorry, just a few months ago, is that significantly different than how he reported he was doing to you back in 2013?

A Yes.

Q All right. In what way?

A It's primarily from a subjective standpoint.

Q Sure.

A Things that you can't measure, in other words. He described his level of pain as being quite different than what he described to Dr. Cash when he saw him after that.

Q Okay. And you haven't seen him since 2013, true?

A That's correct.

Q All right. And nobody saw him after 2014 until just a couple weeks ago before this testimony, right?

A That's my best recollection, yes, sir.

Q In your opinion, again, I want to know in what ways you believe having to have a second level discectomy done impacted Mr. Orth's future, future care needs?

A I don't think it did.

Q And why not?

A Noting on how he's doing after, I would have expected, whether he had a one-level or a two-level procedure, or one or two surgeries, given what's described in the medical records, would indicate to me that he had a successful result from the surgery.

Q Well, Mr. Orth is indicating that he's having pain now, is that -- is that unexpected? Does that mean he hasn't had a somewhat successful result?

A Not from my review of the medical records and examining him.

Q All right. If he is having pain at the 1 to 2 or 2 to 3 level, some chronic pain, is that something that you can cure with a discectomy?

A In this case, I don't think you can.

Q All right. Do you have patients who continue to have low back pain complaints, 1 to 2, 2 to 3 even after you treat them with a discectomy?

A Yes. In fact, I would say I have more patients that fall into that category than patients who come in and say they're completely pain free. That's extremely rare.

Q Have all of your opinions been expressed to a reasonable medical probability?

A Yes, they have.

Q All right. Thank you, Doctor.

A You're welcome.

THE COURT: Okay. We will go ahead and take a lunch recess, ladies and gentlemen, at his time. During the recess, you're admonished not to talk or converse among yourselves or with anyone else on any subject connected to the trial; or read, watch or listen to any report of or commentary on the trial by any medium of information, including without limitation any newspapers, television, internet or radio; or form or express any opinion on any subject connected with the case until it's finally submitted to you. I will see you back at 1:30. Okay. Thank you.

[Off the record at 12:23 p.m.]

[Proceedings resumed at 1:33 p.m.]

[Outside the presence of the jury]

THE COURT: You guys have anything outside the presence?

MR. PRINCE: I don't.

MR. LAURIA: Judge, I just have one question. I know that there's been publicity in this case now. There's been a couple things online, articles. I don't know if it's customary and I think I just would like -- in a very general way, is there a way to ask the jurors whether they've been exposed to that or --

THE COURT: I don't know that you can really do that in a general way. You're just kind of -- the only time I've ever done that during a trial absent obviously the initial instruction to them about not watching any news, media --

MR. LAURIA: Sure.

THE COURT: -- reports, anything like that is if anybody has some, you know, sense that somebody has seen something or heard something or they're talking in the hall about something --

MR. LAURIA: I haven't heard anything. I just -- you know, so I can't say there's a specific --

THE COURT: Okay.

MR. LAURIA: -- instance. I just didn't know whether there was a general way to say, you know --

THE COURT: No, I mean, every day -- remember, every time we take a recess, I give them that admonition which tells them you can't watch or listen to any news or media reports or anything like that.

MR. LAURIA: Sure.

THE COURT: So I'd be hesitant to say, you know that admonition I give you every time, are you listening to me? Is anybody --

MR. LAURIA: No, understand.

THE COURT: -- going to watch --

MR. LAURIA: That wouldn't be how I would phrase it, actually, but there might be a more gentle way.

THE COURT: But that's why, I mean -- you know, when I first started doing that and I was talking to other judges, they were, like, no, I don't give them that whole admonition every time we just take a break. I give them the whole thing every single time that we take a break so --

MR. LAURIA: Right.

THE COURT: -- they're not getting on their phones or TV or computers or anything and they're constantly being told don't listen to any news reports or watch any news reports, anything like that.

MR. LAURIA: Okay.

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

[Jury in at 1:35 p.m.]

THE MARSHAL: The jury is present, Your Honor.