### 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 Electronically Filed Aug 08 2017 01:47 p.m. Elizabeth A. Brown Clerk of Supreme Court
ALBERT H. CAPANNA, M.D., Appellant,	Case No. 70227
VS.	
BEAU R. ORTH, Respondent.	

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

### **VOL. 7 PART 2**

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1	тне	COURT: Thank you.
2		You guys can be seated. Thank you.
3		All right, we will be back on the record. We are going to continue on
4	with the de	fendant's case in chief and the testimony of Dr. Rimoldi.
5		Dr. Rimoldi, I will remind you that you are still under oath, okay?
6	ТНЕ	WITNESS: Yes, sir.
7	ТНЕ	COURT: All right. Mr. Prince.
8	MR.	PRINCE: Okay, thanks.
9		CROSS-EXAMINATION
10	BY MR. PF	RINCE:
11	Q	Dr. Rimoldi, good afternoon.
12	A	Good afternoon.
13	Q	You and I know each other, right?
14	A	Yes, we've met before.
15	Q	I've taken your deposition many times, right?
16	A	More than a dozen, I think.
17	Q	Yeah. And I just to just establish a few things up front. You're
18	obviously c	harging for your professional time to be here, correct?
19	A	That's correct.
20	Q	And according to your fee schedule, your you charge for \$12,000
21	for a full da	y of testimony for being out of your office, correct?

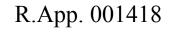
- A I believe that charge is \$14,000.
- Q Oh, it's -- okay -- oh, I'm a little light. Okay. And then a half day, it was
- $^{24}$  6,000. Is it higher now?

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A Seven thousand dollars.

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1	Q	Okay. And that's so if Dr. Cash charged a comparable amount to be
2	here for a f	ull day, that would be what a usual and customary charge would be for a
3	surgeon lik	e yourself coming to have to testify?
4	A	I think that's reasonable.
5	Q	And this isn't cheap, is it?
6	A	I'm sorry?
7	Q	This isn't inexpensive, is it?
8	A	No.
9	Q	And when you do a defense medical examination, you charge for the
10	exam and r	reviewing one inch of records well, it was \$2,300. Is it more now?
11	A	I believe it's \$2,500.
12	Q	Right. And for every inch of additional records, it was a thousand
13	dollars. Is	it more than that now?
14	A	I think it's the same.
15	Q	Okay. So in this case, we have binders full of information, you would
16	have review	ved, you know, initially \$2,500 or \$2,300 for the initial exam and one
17	inch of reco	ords and a thousand bucks for every inch after that.
18	A	That's a fair statement.
19	Q	Okay. And you were initially retained by counsel, the former lawyers for
20	Dr. Capanr	na, to perform a medical evaluation for the defense side of this case,
21	correct?	
	1	

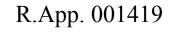
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Q You weren't appointed by the Court to serve as an independent

<sup>24</sup> || physician to conduct an examination of Beau Orth, correct?

A Not to my knowledge.

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1	Q	And your you only saw Beau Orth one time, on July 17th, 2013,
2	correct?	
3	A	That's correct.
4	Q	You've not examined him any time since then.
5	A	No, I haven't.
6	Q	You've not taken a history, nor performed a physical examination any
7	time after J	uly 17th, 2013, correct?
8	A	That's a correct statement.
9	Q	And you know Dr. Capanna, correct?
10	A	Yes, I do.
11	Q	And you operated probably in some of the same hospitals over the
12	years, have	en't you?
13	A	Yes, sir.
14	Q	So even though he's a neurosurgeon, you would consider him a
15	colleague c	of sorts?
16	A	Yes, I would.
17	Q	Okay. And when you're when you review this case, you agree it's
18	your respor	nsibility to be open minded, fair, and objective, correct?
19	A	That's correct.
20	Q	You shouldn't be an advocate, correct?
21	A	That's correct.

Q You shouldn't be biased towards Dr. Capanna in favor -- against my

## <sup>23</sup> || client, Beau Orth, correct?

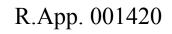
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- A That's correct.
- Q And you shouldn't selectively review information which only benefits Dr.

## -125-



1	Capanna a	nd doesn't benefit Beau Orth, correct, and	
2	A	That's a fair state	
3	Q	And vice versa?	
4	A	I'm sorry.	
5	Q	And, I'm sorry. And vice versa, you shouldn't do something that only	
6	favors Beau	u to the detriment of Dr. Capanna.	
7	A	Those are fair statements.	
8	Q	Now, you agree that in this case, you are serving not in the role of a	
9	treating phy	/sician, correct?	
10	A	That's correct.	
11	Q	I think you outlined that for the jury earlier, right?	
12	A	Yes, in describing the independent medical evaluation, yes, sir.	
13	Q	And from time to time, you have patients who undergo medical	
14	evaluations	, correct?	
15	A	Certainly.	
16	Q	I mean, they're in litigation and the defense hires someone like yourself	
17	to conduct	an examination and review records, correct?	
18	A	Yes.	
19	Q	And at times, the reviewing physician will disagree with your opinions,	
20	your treatm	ent recommendations, correct?	
21	A	At times, that's correct.	

Ш 22 Doesn't necessarily make you wrong or them right, it just means you Q 23 have a difference of opinion, correct? 24 Α That's a fair statement. 25 Q And also, you understand that sometimes your patients will go for a -126-GAL FRIDAY REPORTING & TRANSCRIPTION (623) 293-0249 10180 W. Altadena Drive, Casa Grande, AZ 85194 R.App. 001421 <sup>1</sup> second opinion, whether in Las Vegas or elsewhere, before they agree to undergo
 <sup>2</sup> an operative procedure, correct?

A Yes, they do.

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Q And sometimes the second -- you know, the second opinion physician
may disagree with your course of treatment, as well as recommendations for
treatment, correct?

A At times.

Q Doesn't necessarily make him right and you wrong, it just means you
 have a difference of professional opinion, correct?

A I think that's a fair statement.

Q And don't you agree that it's always -- it's reasonable for Beau to follow

<sup>12</sup> || the advice and recommendations of his treating physicians, including Dr. Cash?

A Yes.

Q You're not critical of Beau Orth in any way, are you, in this matter?

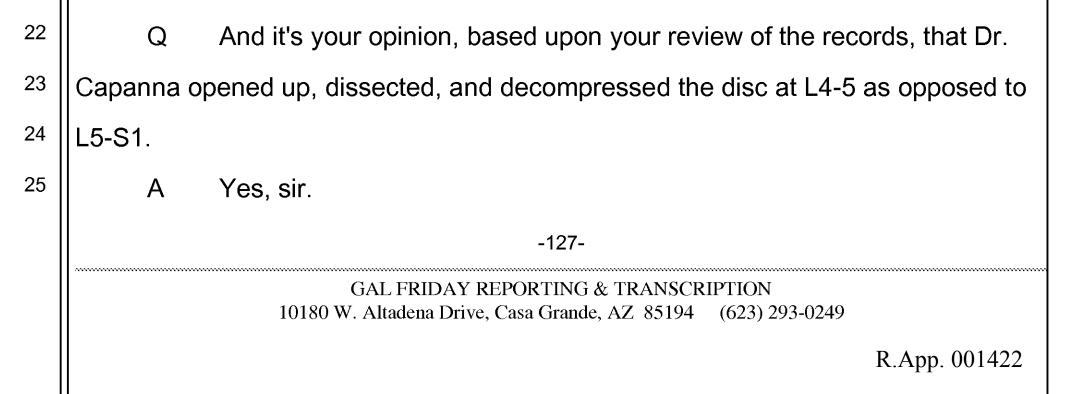
A No.

Q And you're not here saying that he doesn't have the symptoms that he's
 complaining of to both Drs. Cash and Dr. Ruggeroli, correct?

A That's correct.

<sup>19</sup> Q And -- okay. Now, what I know is, it's your opinion that Dr. Capanna <sup>20</sup> operated at a -- the incorrect level, L4-5 instead of L5-S1, correct?

<sup>21</sup> A Yes, sir.



Q Okay. And you agree that that caused Beau -- that -- strike that. You
 agree that as a result of that, you know, dissection and decompression of L4-5, that
 caused Beau to herniate at that level, L4-5, correct?

A I am -- I'm not clear on that. I'm not stating that, or can't recall opining
 <sup>5</sup> that because of that operation, that that caused a hernia at that level.

Q A herniation.

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A A herniation at that level.

Q All right. You agree that by dissecting and decompressing an otherwise
 9 normal, healthy disc, that that increased the potential, at least, for L4-5 to herniate.

A I can't state that to a reasonable degree of medical probability.

Q All right. And you're aware that before -- excuse me, before September
 17th, 2010, all imaging studies demonstrated that Beau Orth had normal anatomy, a
 normal, healthy disc at L4-5, correct?

A To the best of my knowledge, yes.

Q Because your knowledge is based on a direct review of all of the MRI
 imaging studies that took place before September 17th, 2010, correct?

A That's correct.

Q On every one of those, the only abnormality ever seen before
 September 17th, 2010 was a small left-sided paracentral disc protrusion.

 $^{20}$  A I believe that to be the case, yes, sir.

21 Q And based upon your review of the MRI imaging, was it your belief that

the L5-S1 disc protrusion was a contained disc protrusion?
 A Yes.
 Q Meaning that there was no fragment outside of the L5-S1 disc space,
 correct?

- A That's what the scan appeared to denote, yes.
   Q And you agree that Beau Orth did not have any significant degenerative disc disease at any level above L5-S1, correct?

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I can't recall that he did.

Q Okay. And you agree that there's no information in the record that you saw that Beau was symptomatic at the L4-5 disc level before Dr. Capanna's surgery on September 17th, 2010, correct?

A I can't recall specifically where there were notes stating he was
 <sup>9</sup> symptomatic from that level.

Q In fact, the opposite is true; that it appeared, based upon your review of
 the records, as well as the deposition of Dr. Capanna, that Beau Orth had classic S1
 symptoms, meaning sciatica-type symptoms.

A Well, I'm not going to say he had classic S1 symptoms, but based on
 everything that I reviewed, it appeared that the left side of the L5-S1 disc was the
 problem.

Q Okay. Causing him to have radicular -- radiating symptoms down the
 back of his left leg, correct?

- A That's correct.
- <sup>19</sup> Q In an S1 distribution.

A Yes.

<sup>21</sup> Q All right. Now, you agree that following the September 17th, 2010

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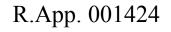
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- surgery by Dr. Capanna that there wasn't fact evidence that Beau had a -- suffered
- <sup>23</sup> || or experienced a herniation at the L4-5 level, correct?
  - A Can you restate that question?
  - Q Sure. After the surgery of September 17th, 2010, you agree the

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1	imaging stu	idies show that Beau suffered from a L4-5 disc herniation?
2	A	No, I think he had a protrusion at that level.
3	Q	A protrusion at that level that did not exist before.
4	A	Certainly, there were changes there that didn't exist before, yes.
5	Q	And you agree that by operating on a normal, healthy disc, that that
6	affected the	e structural integrity of the L4-5 disc.
7	A	Certainly, it did.
8	Q	Right. And as a result of Dr. Capanna's surgery, since he according
9	to your test	imony, he dissected and decompressed an otherwise normal disc, he
10	would have	been removing disc material from an otherwise healthy disc, correct?
11	A	Yes.
12	Q	And that, would you agree, caused that affected the structural
13	integrity of	that L4-5 disc, correct?
14	A	Yes, it wasn't like it was before.
15	Q	All right. And you agree that based upon your review of the October 6,
16	2010 MRI s	scan, that the it showed a left-sided L4-5 laminotomy, correct?
17	A	That's correct.
18	Q	And you agree that the October 6, 2010 MRI scan showed that there
19	was no lam	ninotomy on the left side at L5-S1, correct?
20	A	That's what it appeared to be on my review of that scan, yes.
21	Q	In your practice, Dr. Rimoldi, I understand that you review MRI imaging

 22 of the spine, whether cervical or lumbar, frequently, correct?
 23 A Yes, sir.
 24 Q On the order -- you said, I think, in your deposition, approximately 200
 25 scans a week.

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 R.App. 001425

1	A	That's an estimate and that sounds about right.
2	Q	Right. And so probably more than 500 a month, correct?
3	A	That's a fair statement.
4	Q	And so you're obviously based upon your education, training, and
5	experience	, you have a lot of familiarity with reviewing MRI images of the lumbar
6	spine, corre	ect?
7	A	Yes, sir.
8	Q	You don't rely on radiology reports to make surgical decisions or
9	recommend	dations, do you?
10	A	Not surgical decisions, absolutely not.
11	Q	You review the films yourself and make recommendations and perform
12	surgery acc	cordingly to your review.
13	A	That's correct.
14	Q	And you agree you did review plain X-ray images taken by Dr. Cash
15	at his office	e, correct?
16	A	Yes, I did.
17	Q	And you reviewed an X-ray of October the 12th, 2010, it was taken
18	about 10 da	ays before Dr. Cash's surgery, that showed changes consistent with an
19	L4-5 lamino	otomy, based upon your review of that imaging study, correct?
20	A	I'd have to look at that image that you're referring to. I mean, I'm not
21	doubting w	hat you say, but I would have to look at that image. I can't recall that as

#### 22 I'm sitting here today.

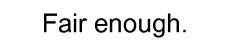


Okay. Why don't you look at your report, page 5. I think you commented --

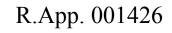
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1	Q	on it there.
2	A	And you're talking about my July 17, 2015 report?
3	Q	Yes, sir.
4	A	Is there a specific dates that you're referring to?
5	Q	Yes, October 12th, 2010, on page 5. It says 10/12/10, X-rays of the
6	lumbar spin	ne show changes consistent with an L4-5 laminotomy
7	A	Yes, I see that.
8	Q	Okay. So that have been based upon your direct review of the October
9	12th, 2010	imaging by Dr from Dr. Cash's office that showed left-sided L4-5
10	laminotomy	on plain imaging.
11	A	Yes.
12	Q	Okay. Now, you agree that based upon the medical records, there was
13	a significan	t change in Beau's clinical status about two weeks after the surgery by
14	Dr. Capann	a.
15	A	From a subjective standpoint, yes.
16	Q	Well, and an objective standpoint, right?
17	A	I don't know what you're referring to there.
18	MR. I	PRINCE: If we can look at Exhibit Number 3, Bate number 137. Let's
19	look at the l	history, the data and the history.
20	Q	You've seen this record from Dr. Cash, correct?
21	A	Yes.

Q It says a 21-year-old male that is a UNLV football player. It talks -- he
 had surgery by Dr. Capanna. Says the patient had good relief for a week and then
 felt back pain and recurrent left leg pain. Back disability index is 94 percent with
 pain 6 out of -- you know, between 6 and 10 out of 10 on an analog scale. Don't you
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 R.App. 001427

1	agree that	that presentation was significantly different than how he was initially
2	postoperat	tively?
3	A	Yeah, from a subjective standpoint.
4	Q	Right. Well, pain is always subjective, correct?
5	A	Yeah, you can't measure it. Pain is subjective.
6	Q	Right. I mean, you treat patients with pain every day.
7	A	Certainly if they didn't have paid, I guess I probably wouldn't be treating
8	them.	
9	Q	Right, or they yeah, right. I mean, they're all of your patients have
10	some pain	or discomfort, right? Some symptoms.
11	A	Yes, that's a fair statement.
12	Q	Otherwise, they wouldn't be coming to see you, in all likelihood.
13	A	l would
14	Q	And so
15	A	That's a correct statement.
16	Q	You have no reason to believe that Beau was (sic) accurately
17	describing	his pain level to Dr. Cash that day, do you?
18	A	None whatsoever.
19	MR.	PRINCE: And if you go down to the physical examination.
20	Q	And it says on physical examination, the patient has a painful stance.
21	He lists to	the right standing, he has an antalgic gait, and is unable to walk very well.

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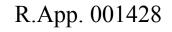
# Do you see that?

A Yes.

Q That's a significant change in his clinical condition from not only before

<sup>25</sup> surgery, but also immediately postoperatively.

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1	A	I'm not certain what his gait exam showed prior to surgery.	
2	Q	Okay. Well, do you want to look at that? Would that help you?	
3	According t	o Dr. Capanna's records, he had no problem with his gait, had no	
4	difficulty wa	Iking, did not have a painful stance. But if would	
5	A	Is that	
6	Q	Does that comport with your recollection?	
7	A	Well, that was after surgery, correct?	
8	Q	Before surgery, I'm talking about.	
9	A	But for that initial period of time after surgery, he was doing well.	
10	Q	Yeah, for about a week, right?	
11	A	Yes.	
12	Q	But I mean	
13	A	So I I'm just to be clear, I'm not certain that this is an objective	
14	finding that's significantly different.		
15	Q	Well, you're not suggesting	
16	A	It could be	
17	Q	I'm sorry?	
18	A	It could be a subjective finding. He was complaining of pain and	
19	walking		
20	Q	You don't	
21	A	with an antalgic gait. That's the only	

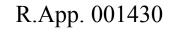
Q Well, you're not saying just because it may be subjective that there's
 anything wrong with that, right?
 A No. I'm just clarifying. I -- you asked me a question and I said
 subjective. And, I mean, the next thing that you did was you pulled this record to -- I
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 R.App. 001429

1	guess you were looking for objectivity, and I'm just giving my point that the record	I
2	speaks for itself, and I	I
3	THE COURT: Will you	I
4	THE WITNESS: stated that that is subjective.	I
5	THE COURT: Can I interrupt you for just a second? Will you explain to the	I
6	jury what you when you guys talk subjective and objective findings	I
7	THE WITNESS: Yes.	I
8	THE COURT: from a physician's standpoint?	I
9	THE WITNESS: That's a good point. Subjectivity is something that you rely	I
10	on a patient to tell you. We talked about the concept of pain. Pain is not something	I
11	I can see on a scan or an X-ray. I rely on the patient to describe that. We try to	I
12	assess scales, but they're still subjective scales. Zero to 10 scale, we talk about,	I
13	where the pain's a 6 or it's a 2. Patients respond to pain differently and so that's still,	I
14	I consider, subjective.	I
15	Objective findings are things that I can see on an X-ray or a scan or	I
16	things that I can clearly measure on a physical exam that can't be controlled by the	I
17	patient. For example, range of motion, one could say, well, you know, that's	I
18	subjective because when he bent over, you know, he didn't bend over as far as a	I
19	normal person would. But a patient can still control that; maybe they stop because	I
20	of pain. So I consider that subjective as well. I'm not really sure that I can measure	I
21	that.	I

- True muscle weakness, certainly things that I see on an MRI scan,
- $^{23}$  || things that I see on X-ray and I can see those things, those are objective findings.

- <sup>24</sup> So objectivity is something that you can see on a scan. If the patient wasn't in the
- <sup>25</sup> || room, you could still identify those things on X-rays, MRIs, where subjective things,

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you rely on the patient to communicate those things to you. You can't measure them on an X-ray, you can't measure them specifically on those types of tests. 2 **BY MR. PRINCE:** 3

Any time a patient comes to you and tells you what their symptoms are, Q pain, numbness, tingling, other limitations, that's always going to be subjective, 6 correct?

Yes. Pain, limitations, numbness, tingling, yeah, those are all 7 Α 8 subjective things, that's correct.

9 Right. And you agree that a history is vital to reaching a diagnosis and Q 10 coming up with a treatment plan, correct?

Absolutely. Α

12 Q In fact, it's the cornerstone of everything that you do. The patient is 13 telling their problem and they're almost describing for you what their diagnosis is, 14 right?

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That's a fair statement, yes, sir. Α

16 Q All right. So the mere fact that it's subjective doesn't mean that the 17 fellow is doing anything wrong, it just means it's just subjective, you can't look on an 18 MRI scan and say that that person has pain or doesn't have pain.

That's a correct statement. Α

20 All right. And so -- but now, you know, you agree that postoperatively, Q 21 it's a significant change if he now has an antalgic gait and was unable to walk very

22 well and was walking with a limp, right? 23 Α Yes, that's what that says. 24 All right. And it says he has weakened toe-and-heel walking. To you, Q 25 as an orthopedic spine surgeon, weakness is a significant change in condition, -136-GAL FRIDAY REPORTING & TRANSCRIPTION 10180 W. Altadena Drive, Casa Grande, AZ 85194 (623) 293-0249 R.App. 001431

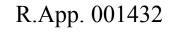
1	correct? You're looking for it.			
2	A	Certainly. If it's a new onset weakness, absolutely.		
3	Q	Right. That could mean that something more significant is going on and		
4	you should	investigate further, correct?		
5	A	That's correct.		
6	Q	Which may include having to do another surgery, correct?		
7	A	Could.		
8	Q	Right, because if you don't address the weakness soon enough, you		
9	could develop, for example, a drop foot.			
10	A	That's possible.		
11	Q	And it says he has diminished left Achilles reflex, he has numbness		
12	down the lateral aspect of his leg and thigh. You agree that the numbness down the			
13	lateral aspect of his leg and thigh, that's a new report by Beau of a condition in his			
14	leg, correct?			
15	A	I'm not doubting what you're saying.		
16	Q	Okay.		
17	A	He did have leg symptoms prior, too.		
18	Q	Yeah, down the back of the leg.		
19	A	Well, I can't recall the records per memory, but I'm not doubting what		
20	you're saying.			
21	Q	Okay, fair.		

# A But he did have leg pain before.

23

- Q And don't you agree that based upon that presentation, that Beau
- <sup>24</sup> required a second surgical procedure by Dr. Cash since the original surgery was
   <sup>25</sup> done at the wrong level?

-137-



1	A	Yes.	
2	Q	The surgery by Dr. Cash to not only correct the issue of what was seen	
3	at L4-5, bu	t also perform the surgery that was indicated at L5-S1?	
4	A	That's what he did, two levels, yes.	
5	Q	And you agree that after the surgery, Beau did remain symptomatic,	
6	correct?		
7	A	You're talking after Dr. Cash's surgery?	
8	Q	Yes, I am.	
9	A	Yes.	
10	Q	I'm sorry, yes, right. He never returned to being pain free, correct?	
11	A	No.	
12	Q	He never returned back to playing football, correct?	
13	A	Not to my knowledge.	
14	Q	And unlike maybe some of the you know, those studies that you	
15	talked abou	bout with Mr. Lauria, Mr Beau didn't just have two levels done, two	
16	microdisce	ctomies at two different levels, he actually had two microdiscectomies at	
17	one level, l	_4-5, correct?	
18	A	That was part of the total surgery that he had.	
19	Q	Right. And so when Dr. Cash went into correct the problem at L4-5, he	
20	had to rem	ove additional disc material within the L4-5 disc space, correct?	
21	A	I'm not certain if he removed a protrusion or he removed more nuclear	

material that was well contained still within the L4-5 disc.
 Q Right. He -- I think he -- Dr. Cash testified that he actually had to -- you
 know, he removed the fragment, which is the extruded part of it, and then he went in
 there, had to remove additional fragment with -- inside the L4-5 disc space. You
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have no reason to disagree with that, right? If that's what he said he did?

2 Well, I guess I would just wonder why he would remove more nuclear Α 3 material that was inside the disc if it wasn't causing any pressure on the nerve. But no, I don't -- I'm not in disagreement with that.

Q Right. And you agree, Dr. Rimoldi, that, you know, as a spine surgeon, when you're performing a microdiscectomy, you know, through a microscope, you can visualize, you know, a motion -- spine motion segment with much more clarity than you can get with an MRI image, correct?

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I disagree with that statement.

10 So you think you can see the disc better through an MRI than you can Q on the microscope? 11

12 Α Well, on the microscope, you're looking at one portion of the disc. You 13 can't see the entire disc. You can't see in the center of the nucleus. You can't see 14 the anterior annulus --

15 Q Right.

Α

-- or the lateral annulus, so that's a false statement that you made. Α

17 Well, you can -- Dr. Cash certainly said he visualized a disc fragment as Q 18 well as the epidural fibrosis outside of the L4-5 disc space, correct?

19 Α Yes.

20 All right. He could certainly visualize that with a microscope better than Q 21 you could visualize that same portion of the anatomy through an MRI, correct?

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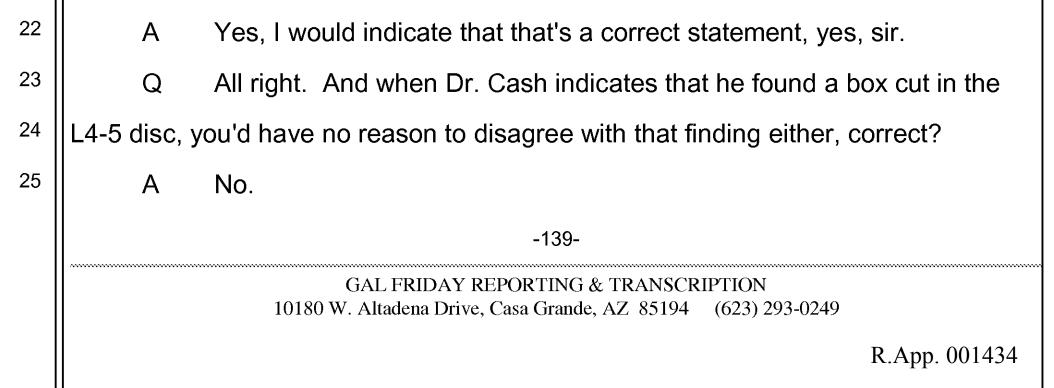
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1	Q	All right. And that would be consistent with your opinion that Dr.	
2	Capanna	dissected and then decompressed L4-5, correct?	
3	A	That would be consistent, yes, sir.	
4	Q	All right. If Dr. Cash said he had to go in and remove additional disc	
5	material	additional disc fragment from the L4-5 space, that would be further loss of	
6	some of th	ne structural integrity of the L4-5 disc itself, correct?	
7	A	If he had to do that, yes.	
8	Q	Now, when Dr. Cash had to assuming he did that, obviously that disc	
9	is no longe	er a healthy, normal L5 L4-5 disc, correct?	
10	A	Well, what do you mean by healthy?	
11	Q	It was a normal, healthy disc before the surgery by Dr. Capanna,	
12	correct?		
13	A	Yes.	
14	Q	And there was no indication that L4-5 at any time before Dr. Capanna's	
15	surgery was symptomatic, correct?		
16	A	Nothing that I could see.	
17	MR.	PRINCE: Let's look at slide 7, demonstrative slide 7.	
18	Q	I'm showing you two images, Dr. Rimoldi, one from February 3rd, 2009,	
19	and one fr	om September 2nd, 2010. It's September 2nd, 2010 is image 7 of 11;	
20	the other o	one is 15 of 18. Anyway, you agree that on both of these images, L4-5 is	
21	a normal,	healthy-looking disc, correct?	

22 It looks a little different in that September 2nd scan. The --Α 23 Actually, probably more hydrated, right? Q 24 The hydration looks about the same. А 25 Q Okay. Does the height appear to be better on the September 2nd, -140-GAL FRIDAY REPORTING & TRANSCRIPTION 10180 W. Altadena Drive, Casa Grande, AZ 85194 (623) 293-0249 R.App. 001435 2010 scan?

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A Well, the height is different at all the levels up and down the spine. In fact, when you look at this, you can see that the dimensions of the vertebrae are different. I mean, the vertebrae look like they are almost taller here than they are wide, and here they're wider than they are tall. So this is probably unfair to compare these in detail.

Q Yeah, I guess I'm not -- I don't want to -- I'm doing that, I'm not comparing them in detail. I'm just showing them to you, that the L4-5 disc is a normal, healthy disc in both images.

Α

Yes, based on these two images, that disc appears healthy.

Q Right. And on the September 2nd one, that was actually a flexionextension, so he was actually sitting up at that point. He was laying down on the -- I don't know if it would make a difference in terms of the vertebral height.

A No, it wouldn't.

<sup>15</sup> Q Okay. But the point I'm making is it's -- they're -- it's normal, healthy <sup>16</sup> preoperatively, right? L4-5 is, I'm talking about.

A Yes.

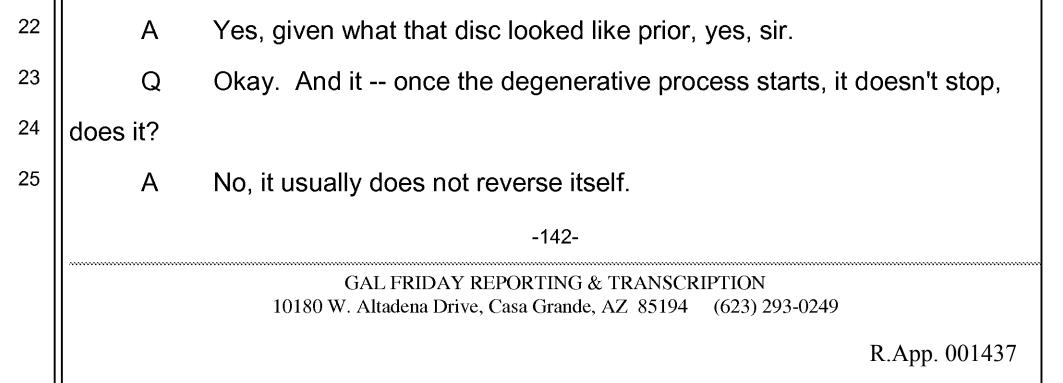
Q Okay. And you agree that postoperatively, that there is degenerative
 change at L4-5, correct?

A Yes.

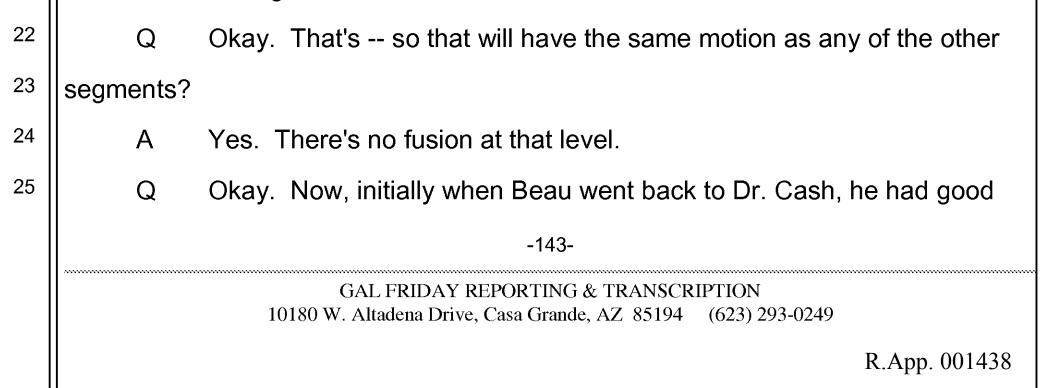
<sup>21</sup> MR. PRINCE: Let's look at demonstrative slide 12.

 Q And I'm showing you a sagittal T2 image of the lumbar spine, of Beau's
 lumbar spine. And don't you agree that the L4-5 disc, it has significantly desiccated,
 correct?
 A Yes. The signal is different.
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1	Q	Right. And it's no longer normal, healthy with you know, like with the	
2	white like ir	n the other discs above that level, correct?	
3	A	No, it doesn't appear like the disc above.	
4	Q	And you agree that that L4-5 disc, as a result of microdiscectomies at	
5	that level c	aused that disc to degenerate, correct?	
6	A	Well, it caused those desiccative changes which you also see in	
7	degenerative discs, yes.		
8	Q	Right. That's L4-5 is now a degenerative disc, isn't it?	
9	A	Yes.	
10	Q	Okay. And that's not how you would normally see the an L4-5 of a	
11	normal, hea	althy 22-year-old; it wouldn't normally expect to look like that, correct?	
12	A	Not normally.	
13	Q	All right. And you agree it's the two microdiscectomies at L4-5, the one	
14	done by Dr	Capanna and the one done by Dr. Cash, that caused that disc to	
15	degenerate like that, correct?		
16	A	Yes, to give that appearance, yes, sir.	
17	Q	And don't you agree, Dr. Capanna (sic), based upon the imaging	
18	studies, that the L4-5 disc condition has suffered accelerated degenerative cascade		
19	secondary to the two microdiscectomy surgeries?		
20	A	The degeneration there has been accelerated.	
21	Q	Okay. More so than the normal aging process, correct?	



1	Q	Right. It will continue to typically get worse with time, correct?
2	A	That's a fair statement, as
3	Q	And
4	A	As in everybody.
5	Q	As right. And now after undergoing two microdiscectomies at the
6	L4-5 level,	Beau does not have much left of any of the disc material that was once in
7	that disc sp	pace, correct?
8	A	No, I
9	Q	It's been removed.
10	A	I disagree with that.
11	Q	He's got significant disc material?
12	A	Yes.
13	Q	Okay. It no longer functions in the same way that it did before when it
14	was a norm	nal, healthy disc, correct?
15	A	No, it's not functioning the same because some of the nucleus has
16	been remo	ved from it.
17	Q	Right. And when that happened, the shock-absorption of the L4-5 disc
18	has now be	en compromised as a result of those two microdiscectomies, correct?
19	A	Biomechanically, yes.
20	Q	And that alters the motion at the L4-5 segment, doesn't it?
21	A	I disagree with that statement.



1	relief immediately following the surgery, correct?				
2	A	Yes.			
3	Q	And that improved his symptoms, wouldn't you agree?			
4	A	Yes.			
5	Q	And Mr. Lauria asked you about whether, you know, there was any			
6	discussion	of fusion surgery with Dr. Cash in any of the records. Do you remember			
7	that?				
8	A	Yes.			
9	Q	Actually, Dr. Cash discussed potential for fusion at L4-5 at the time of			
10	the initial c	onsultation, correct?			
11	A	I can't recall that.			
12	Q	All right. If it's in the records, do you have any reason to disagree with			
13	that?				
14	A	You'd have to show it to me in the record.			
15	Q	Okay.			
16	MR. PRINCE: Let's look at 137, Exhibit 3, recommendations.				
17	Q	One said the patient appears to be crippled at this time from the			
18	recurrent disc herniation and I would recommend surgical intervention. The patient				
19	realizes a second operation most likely will yield a successful result. The patient				
20	also recognizes if this is a recurrent herniation at L4-5 and he has another injury at				
21	this level, h	ne most likely will require fusion surgery. Do you see that?			

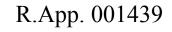
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Q So fusion surgery was discussed in -- at the beginning of the treatment

<sup>24</sup>  $\|$  on October the 12th, 2010, the very first day he sees Beau?

A I think that's part of the informed consent process, that you discuss rare

-144-



risks of surgery. But that doesn't imply to me that that's a statement that would be
 stated or taken as a -- to a reasonable degree of medical certainty that he's going to
 require that.

Q Right. It's certainly Dr. Cash telling a patient about what the potentials
are for the future for a disc that's now going to be operated on for the second time in
about a month.

A I'm sorry, I didn't understand your question. Was that a statement?Q Let me re-ask it, then.

A Yes.

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Q Don't you agree that by Dr. Cash telling Beau that there is a potential
 for a fusion at L4-5 at some point in the future because now you're going to have a
 second surgery at the L4-5 disc level in about a month?

A I'm sorry, I'm not understanding --

THE COURT: It's still not a question.

A -- your question.

<sup>16</sup> MR. PRINCE: Still not a question, okay. Maybe I'm a little -- thanks for
 <sup>17</sup> reminding me of that.

<sup>18</sup> BY MR. PRINCE:

Q Do you -- now that statement there, obviously Dr. Cash is having some
 discussion with the patient regarding at least the potential for fusion at L4-5, correct?
 A Yes.

22	Q	It would be reasonable for him to have that discussion sir	nce Dr. Cash is	
23	going to go in and operate for the second time in one month at the L4-5 disc level			
24	which was previously normal and healthy, correct?			
25	A	It would be reasonable to mention that		
		-145-		
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Q In order to --

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A -- in discussion -- I'm sorry?

Q I'm sorry, I didn't mean to interrupt you. In order to set expectations for
 4 the patient and what they may -- you know, be think -- what could happen long term,
 5 right?

A That's reasonable.

Q All right. Now, you agree that Beau Orth suffers from chronic mechanical low back pain, correct? Based upon your review of the records.

A Yes.

Q And you agree that even though you saw him for a single encounter in July of 2013, he's had a longstanding relationship with Dr. Cash, almost for five years now.

A That's a fair statement.

Q And when you have a longstanding relationship as a physician, you
 really get to know your patient over that period of time, don't you?

A Yes.

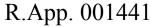
Q You kind of get to know how they describe their pain, you're more
 familiar with their pain, their complaints, their -- any change in their symptoms, right?

<sup>19</sup> A That's a fair statement.

<sup>20</sup> Q And you treat patients long term, many patients long term, correct?

A That's correct.

Q And so while not everything may have -- given the fact that you see
 them, you see your patients, you're, you know, seeing them on -- no, not too -- not
 necessarily every month, but periodically, you may have a discussion, a verbal
 discussion between the two of you, meaning between yourself and the patient, that
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may not always land itself in your daily dictation for your office note, correct?

2 Yes, there's some things I discuss that may not appear in the record. Α 3 Certainly, if they were pertinent, they would be in the record.

4 And now Dr. Cash testified here under oath, in court, that he Q 5 recommended to Beau that he not return back to playing football. If he -- assuming 6 that that's what testified to, you wouldn't -- you're not critical of Dr. Cash recommending to Beau not to return back to playing football, are you? 7

> No. Α

Α

Α

Right, because he could have the potential risk of re-injury, correct, and 9 Q 10 making his condition worse?

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Certainly, those are factors that should be discussed, yes.

12 And while, you know, playing football was certainly -- you know, college Q football and maybe even going the next level may be an athlete's hope and dream, I 13 14 guess long term they need to be thinking about their health and what that decision --15 how that could affect, you know, their medical future, correct?

16

That's a fair statement.

17 And you're not critical of Beau for following the recommendation of Dr. Q 18 Cash for not returning back to playing football, correct?

19 I'm not aware that he made that recommendation specifically, but no, I Α 20 wouldn't be critical of that.

Right. I mean, that's a -- that would be a reasonable recommendation Q

R.App. 001442

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# to make given Beau's condition and his status, correct? А Certainly. Assuming he made it, right? Q Α Yes, sir. -147-GAL FRIDAY REPORTING & TRANSCRIPTION 10180 W. Altadena Drive, Casa Grande, AZ 85194 (623) 293-0249

24 25 MR. PRINCE: If we could go to page 59 of Beau's deposition. Get Beau's deposition, 59. Okay, starting at lines 3, we're probably going to go through line 23.

Q Do you remember Mr. Lauria was asking you questions about Beau and his decision making and about being done with football and --

A Yes.

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Q -- going to go to school?

A Yes.

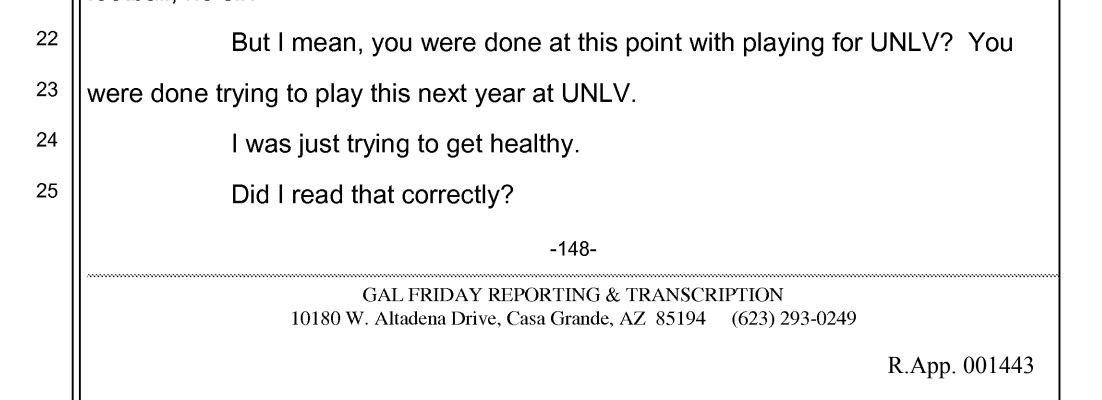
Q Okay. I want to show you something else. This is from page 59 of his
 deposition, line -- starting at line 3: Okay, but after you have the surgery, I think you
 said that coaches didn't come see you or weren't talking to you or weren't really
 involved.

Answer: Yeah, I didn't receive any -- receive calls from any of the
 training staff, really none of the coaches or my position coach or anybody.
 All right. So you were kind of done with football at that point?
 The answer: No, I wasn't done with football. I was just concentrating

<sup>16</sup> on my and trying to get my degree at that time.

Okay.

There was always other options outside of playing college football and I
 honestly had -- I had more years of eligibility. I still to this day have years of
 eligibility. I just can't play. So there was always more -- so I was not done with
 football, no sir.



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Yes. Α

Q 2 Okay. Mr. Lauria, he didn't show you that part of the deposition, 3 correct?

Α

No.

All right. And you're not critical of Beau for concentrating on his own 5 Q personal health, his own condition, keeping himself strong so he could avoid any risk of recurrence of any herniation, either at L4-5 or L5-S1, correct? 7

> Not at all. Α

And you agree that football is a very -- is a violent sport? Q

Yes. Α

You're a sports medicine guy, right? Q

> Yes. Α

13 And, I mean, obviously as a defensive back and, you know, with the Q 14 kind of hits those guys take and give, there is a strong -- a significant potential, given 15 his status of having two microdiscectomies at L4-5 and another one at L5-S1 within a month, that he could suffer a significant injury to his spine as a result of that 16 weakened condition. 17

> I guess in someone with a normal spine, but yes. Α

And Dr. -- or Mr. Lauria was asking you questions about various 19 Q 20 articles. Remember that?

- Yes. Α
- 22 None of those articles or even the abstracts have as part of their patient Q 23 population someone like Beau who had two microdiscectomies within a three-week 24 period of time and then a third surgery at L5-S1, correct? None of them -- there's 25 nobody that fit that profile. -149-GAL FRIDAY REPORTING & TRANSCRIPTION 10180 W. Altadena Drive, Casa Grande, AZ 85194 (623) 293-0249 R.App. 001444

A Well, certainly there were similar patients that had a multi-level surgical
 procedure, but I'm certain if it was within that time frame.

Q Well, I'm not just talking about multi-level, you know, meaning two
 Ievels. I'm talking about two procedures at one level and one at the second level.
 There was no patient that fit that profile in the study.

A There were similar patients that had two-level surgical procedures.

Q I understand two-level. But what about two microdiscectomies at one
8 level? In that patient population.

Α

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I can't recall the specifics on that.

Q Okay. So you can't point to any article where there was a wrong-level
 surgery, a surgeon had to go in and correct a level -- correct the problem and then
 go in and do a second level?

A No, I don't think there's any paper out there one way or the other that
 states outcome with regard to that. I have to rely on the literature that has the most
 similar patients, but I don't believe there's any controlled study that's -- looks at that
 scenario that you're talking about.

Q Right. I mean, there's not one article that you can think of that would fit
 Beau's kind of condition and his history, correct?

A No, that's incorrect. The articles that I can think of are the articles that I
 reviewed. They're the most common. There's no controlled study that has a patient
 population that's had wrong-level surgery at one level and then two decompressions

at another level. There is no -- I don't know of any controlled study that looks at that
 specifically. I don't know where you get a patient population large enough to suffice
 looking at that specific scenario that Beau has.
 Q Okay. And the -- I guess the patient population that you've seen in
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those studies is either a single-level properly performed or a multi-level properly
 performed discectomy --

3 Yeah. Α -- and how they do. 4 Q Yeah, that's a fair statement. 5 Α 6 Right. Q And the probability states that they won't need a fusion. 7 Α 8 Q Right. Now, you were -- you saw that in Dr. Cash's records that, you know, after the surgery, you know, Beau underwent physical therapy, correct? 9 10 Yes. Α 11 He went to Keith Kleven physical therapy and completed about six to Q eight months worth of physical therapy. 12 13 I recall that. Α 14 From your review of the records, Beau was a compliant patient, Q 15 correct? 16 As far as I could tell, absolutely. Α 17 Q Never acted, you know, contrary to his doctor -- or his physician's recommendations, correct? 18 19 Not that I was aware of. Α 20 And you saw that Beau continued to work out in order to keep his core Q 21 strong, correct?

23 24

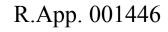
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## A Yes, sir.

- Q That's a good thing to do, isn't it?
  - A Yes, sir.
- Q That's one way you, as a patient, can protect yourself from any further

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injury and can potentially minimize your symptoms, correct?

A Right.

Q And when you saw Beau in July of 2013, at that point he seemed to be
 4 doing reasonably well?

A Yes.

Q All right. And you knew that he had degeneration -- you know, the
 accelerated degeneration at L4-5 secondary to the two microdiscectomies at L4-5,
 correct?

A Yes, sir.

Q And you knew that that process was going to continue to worsen with
 time, not improve, correct?

A It would progress.

Q Correct. And you -- based upon your review of the medical records,
 obviously Beau's condition changed after he saw you and went back to Dr. Cash in
 March of 2014, correct?

- 16
- A From a subjective standpoint.

Q Right. When you say subjective standpoint, I guess pain -- if a patient
 18 says I've got increased pain, I guess that's always going to be subjective.

- <sup>19</sup> A Yes, I just want --
- $20 \parallel Q$  That doesn't mean they're lying?
- A I didn't say that.
- Q Okay. No, I know. Oh, so you -- okay, I just want to make sure that
   you're not saying Beau is overstating his symptoms or magnifying his symptoms,
   anything like that?
   A You asked me a question. I just made a comment just to clarify for the
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<sup>1</sup> || jury.

Q Okay. And you have no reason to disagree that Beau, at least
 subjectively, he -- his condition started to change in March of 2014; he now has
 increased pain.

A Yes, sir.

Α

Α

Q And it was reasonable for him to go back to Dr. Cash to be evaluated
 because he had increased pain and symptoms down his left leg.

- Yes, sir, that's a fair statement.

Q And that -- with that change in presentation, obviously Dr. Cash, you
 know, he was -- it was reasonable for him to order an updated MRI image of the
 lumbar spine, correct?

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A Yes, sir.

Q And that's something that you do as a orthopedic spine surgeon if
 patients come back to you, you know, with complaints of pain. You haven't seen
 them for a while, you'll re-scan them or re-image them?

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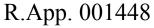
That's one avenue, absolutely. It seems like a reasonable avenue.

Q Right. And you agree that when Beau came back and was complaining
 of, you know, back pain, you know, 3 to 9 out of 10, and talking about limitations he
 was having, that that's a change in his clinical condition, correct?

A From a subjective standpoint.

Q Right. And he was now also complaining of some new -- like sensory

deficits that he didn't complain of before then, correct?
 A Yes, sir.
 Q He was complaining of, you know, numbness and tingling radiating to
 the lateral left thigh and leg, correct?



A Yes, sir.

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Q Which is consistent with an L -- potentially an L5 problem, correct?

A Could be.

Q Right. From a dermatome standpoint, it's at least in that dermatomal
 pattern, correct? That subjective description.

A That's hard to say. There's crossover between dermatomes. You're talking about a dermatome proximal to the knee, above the knee. They're much more inconsistent there, but --

Q Well -- okay.

A So I wouldn't use the word classic or that means specifically S1.

Q But it -- well, let me ask it this way. You agree that pain, numbness, and tingling radiating to the lateral left thigh and leg, that's consistent with an L5 problem?

A Could very well be, yes, sir.

Q Now, Dr. Cash ordered another -- and updated image that we talked
 about. And the radiologist indicated --

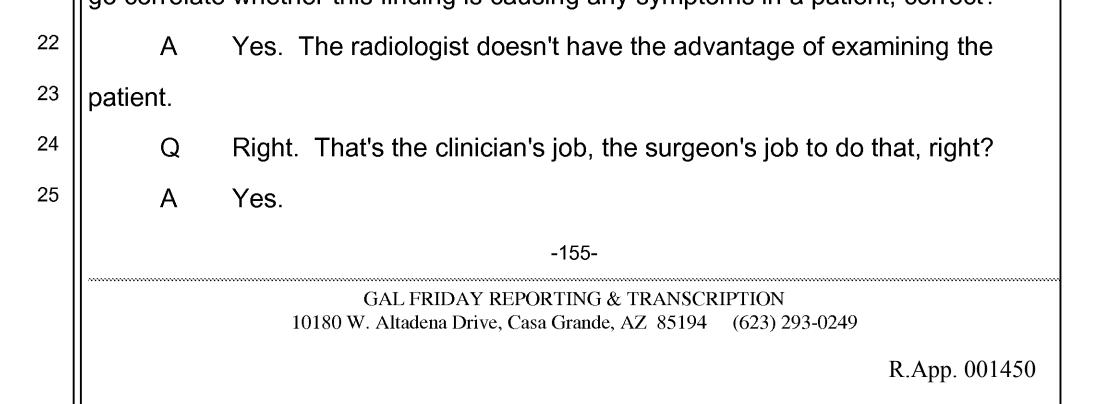
<sup>17</sup> MR. PRINCE: If we can go to like 228 of Exhibit 5, please. Okay, the
 <sup>18</sup> impression. Okay.

Q And at number 2, it says disc desiccation at L5-S1. The radiologist also
 noted disc desiccation up in the findings at L4-5, he just didn't put it in the
 impression section, correct?

A No, I'm not certain what the radiologist was noting at that time.
 Q Okay.
 MR. PRINCE: Here, Peter, go grab L4-5 under the findings and bring it down
 to the end.

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1	Q	You see it, L4-5 there	
2	A	Yeah.	
3	Q	on the findings, says disc desiccation. You agree with that finding	
4	A	Yes.	
5	Q	right?	
6	A	Yes.	
7	Q	We've talked about that.	
8	A	Yes.	
9	Q	That's the secondary accelerated degenerative change secondary to	
10	the two mic	crodiscectomies, correct?	
11	A	Yes.	
12	Q	All right. Now, it says at L5-S1, it says correlate for potential left S1	
13	radiculopat	thy. Do you see that?	
14	THE COURT: At the bottom of the		
15	THE WITNESS: You're talking about		
16	MR. PRINCE: At the bottom under number		
17	THE	WITNESS: under the impression. Yes, I see that.	
18	BY MR. PF	RINCE:	
19	Q	Right. And that's one of the ways that a radiologist communicates with	
20	say a treat	ing spine surgeon, it's like, you know, clinical correlation or tells you, hey,	
21	go correlat	e whether this finding is causing any symptoms in a patient, correct?	



Q And so what you're -- what he's trying to suggest to you is like compare, you know, this radiology finding of an L5-S1, you know, disc bulge with a central protrusion to determine whether or not that is potentially a cause of the patient's symptoms, correct?

A Yes.

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Q All right. Now, you can do that by, you know, taking a detailed history, physical examination, but you also can order certain types of diagnostic injections to assist you as a surgeon to determine whether or not L -- the left S1 is a primary source of the problem, correct?

A You can get information one way or the other, yes. I don't think you can use any of those specifically and state that, hey, will all certainty, this is the issue.
They are aids that should be put together in total.

Q And what we're talking about is various pieces of the puzzle, right, Dr.
 Rimoldi?

A That's a fair statement, yes, sir.

Q Right. We're talking about taking a history, that's a critical piece of the
 puzzle, correct?

A Yes.

Q Physical examination findings, that's a critical piece of the puzzle,
 correct?

- A Absolutely.
- 22 Radiology findings such as an X-ray, MRI, or CT scan, correct? Q 23 Yes, sir. Α 24 Q And pain management injections, that's another piece of the puzzle that 25 helps you kind of complete the diagnostic picture for a patient, correct? -156-GAL FRIDAY REPORTING & TRANSCRIPTION 10180 W. Altadena Drive, Casa Grande, AZ 85194 (623) 293-0249 R.App. 001451

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A That's a fair statement, yes, sir.

Q And in this case, you know that Beau underwent a -- in March of 2014,
 a left-sided L5-S1 transforaminal epidural steroid injection, correct?

- A
- Yes.

Q And you agree there is not only a therapeutic component and hopefully it will maybe, you know, help -- lessen some of those symptoms, but there's also a diagnostic component to that to assist you as the surgeon to determine, hey, is that at least a portion of the problem or a -- the problem itself?

A Depending on how it's done, yes.

MR. PRINCE: And let's look at Bate number 281.

Q Okay. You know Dr. Ruggeroli, correct?

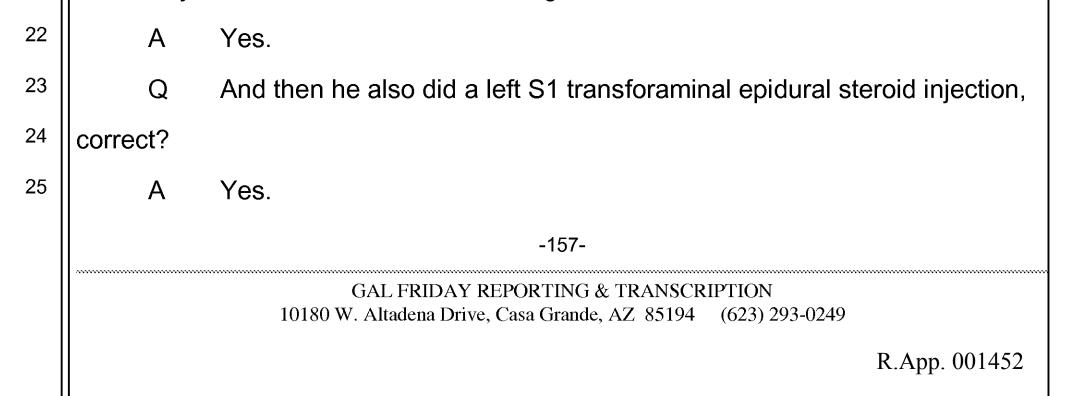
A Yes.

Q And he's a competent, well-known, respected pain management
 specialist in our town, correct?

- <sup>15</sup> A Yes.
- <sup>16</sup> Q Okay. And under --

<sup>17</sup> MR. PRINCE: Kind of go to the procedure, please, Peter. And then go down
 <sup>18</sup> to medications also. All right.

Q And so the preoperative diagnosis was lumbar disc herniation,
 protrusion, slash, bulge, and then he described a left L5-S1 transforaminal epidural
 steroid injection, which we've been talking about, correct?



Q So he did two things, right? Injected two places.

A Yes.

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Q And the lidocaine, that's the anesthetic, that can give you the immediate
 diagnostic information as a surgeon, right, depending on what the pre-pain score
 was -- the pre -- strike that. The pain score before the procedure and then
 comparing to the pain score after the procedure.

As you discussed, one piece of the puzzle, yes.

Q Right. And I want to, just while we're here, talk about what it means to
 9 inject those levels.

MR. PRINCE: And if we can go to 38, demonstrative 38.

Q Because when -- Dr. Rimoldi, what I'm showing is a diagram of a spine
 model and where the certain nerves exit, you know, the foramen as well as what
 nerves kind of go below the various disc levels, right?

A Yes.

Q Okay. And so when Dr. Ruggeroli says he's injecting the L5-S1 nerve,
 he's injecting in this area right here, correct? Kind of up here near the foramen, up
 in that area?

A Well, he's injecting between these two pedicles, between this S1
 pedicle --

Q Okay.

A -- and between this L5 pedicle. So that's where he's placing the

#### <sup>22</sup> || medicine.

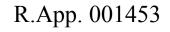
## Q That's the first one, right?

A Yeah.

Q Here, can you draw a circle around that for me? Okay. And then

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where is he injecting -- he said he did a left-sided S1 injection Show me where he did that. 2

3 Well, I'm not certain. He could have done the S1 injection through the Α same portal here as that's the traversing nerve root, or he could have placed the 4 5 needle between then S1 and S2 pedicle here and done it.

And that's what he says he did, right? Q

I don't know. I'd have to look at that report in detail. Α

Okay. And so let's -- well, let's look at it then because I think that's --Q Yes, sir. Α

10 Q -- what he did. Well, if he says here -- I'm going to read it for you -- that he injected, you know, at the L5-S1 segment and then the left S1 dorsal foramen, 11 where's the left S1 dorsal foramen? 12

> The dorsal foramen here would be in this area right here. Α

> Okay. And let's -- I want you to verify this. Let's look at --Q

15 MR. PRINCE: Go back to 281. And go to the -- right there, the last paragraph, Peter. 16

17 Okay, there's lots of words here. And then it says here -- says -- next Q 18 he says with 22 gauge needles were used to penetrate the skin and were advanced one towards the caud -- should be cauded -- says be caudal aspect of the L5-S1 19 20 foramen. That's what you just -- that's the first circle you drew, correct --

Yes. Α

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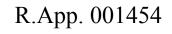
#### -- in yellow? Q

#### Yes, sir. Α

Q And then it says with the other needle directed towards the lateral

25 aspect of the left S1 dorsal foramen. That's the one that was below, correct?

-159-



1 Yes. Α 2 Okay. Q 3 MR. PRINCE: Could we put that back -- that image back up? that's 38. So draw where he injected the first needle. 4 Q L5-S1. 5 Α 6 Yes, L5-S1. Okay. And where did he inject the next? Q He's actually affecting two nerves at that point, correct? 7 8 Well, it's not all that clear, though. He could be affecting two nerves at Α 9 the first point because you can see the S1 nerve root traverses --10 True. Q -- here. So if he injects the medicine and he's looking at an X-ray to 11 Α 12 localize the needle, that medicine diffuses out and he could be affecting L5 and S1 13 at this level, you know, without the added benefit of S1. I'm not certain I would place 14 too much value in the S1 injection because conceivably both nerve roots could have 15 been injected during the first process. 16 Right. So I guess what you're saying is when you do the first injection Q 17 where you wrote the yellow, it's going to obviously affect L5 -- the L5 nerve root and 18 potentially the S1 root. 19 That's correct. Α 20 And so he went further down and he went to the foramen for S1 and he Q 21 injected there, too. So you've got to agree that S1 is probably -- he completely

22 blocked that one, right, with those two injections? 23 Α I'm not certain if he completely blocked it. 24 Q Well, that would be the goal --25 Α If he completely blocked it, the patient may not be able to leave the -160-GAL FRIDAY REPORTING & TRANSCRIPTION 10180 W. Altadena Drive, Casa Grande, AZ 85194 (623) 293-0249 R.App. 001455

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hospital for --

Q Well --

A -- or the surgery center for a period of time because he couldn't plantar
 4 Iflex his foot, so --

Q Well, assuming he didn't block it at that level, I mean --

A At what level?

Q To the point where the patient can't walk. There's no indication of that,
8 that he couldn't walk out of --

- A Well, then he --
- Q -- surgery center.

A Then your previous statement that he completely blocked the S1 nerve
 root would be incorrect.

Q So then -- but he did inject it to the point where hopefully you gain some
 diagnostic information of whether there is pain coming from the S1 root -- the S1
 nerve, rather.

A Well, the way the injection was described, I don't know if you can infer
 that because if he blocked L5 and S1 from the first injection, if all the pain was
 coming from L5, you wouldn't really be able to differentiate that --

<sup>19</sup> Q Okay.

A -- if he got a good block at S1 as well at that level. So you can't tell by
 the process that he describes specifically and state, well, the pain is coming from L5

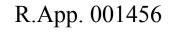
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## Q Okay.

- A I would say that the injection process, if he was better after the
- <sup>25</sup> || injection, would indicate that one of those nerve roots, in the method that Dr.

-161-



||Ruggeroli described, was producing some of his pain.

Q Okay.

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A You can infer that piece of the puzzle from the process, but you can't
 infer any more than that. You can't say, well, since he blocked S1 in two places,
 one further down the line, that it's an S1 problem, we can say that for certain. You
 can't state that.

Q Okay. So then let's look at what the -- what happened.

MR. PRINCE: If we can go to Bate number 406.

Q And I want to look at the -- that's from this -- this is the pain
 management procedure record from that injection. Okay, Doctor?

A Yes, sir.

Q Okay.

<sup>13</sup> MR. PRINCE: Peter, the top left box.

Q And so you understand that typically they'll record the pain score
 immediately before the procedure, correct?

- <sup>16</sup> A Yes, that's --
- <sup>17</sup> Q That's a typical --
- <sup>18</sup> A -- what they --
- <sup>19</sup> Q Typical practice?
- $^{20}$  A Yes, it's a reasonable thing to do.

<sup>21</sup> Q Right, because to you as a surgeon, you not only want to know how the

patient responded to it, but you're also looking for this kind of diagnostic information,
 did the pain level --- did the pain score go down immediately following the procedure,
 correct?
 A Yes, that's an important piece of the puzzle.
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1	Q	All right. If we go
2	MR.	PRINCE: Go to 407 now, Peter.
3	MR.	HELLMAN: What slide?
4	MR.	PRINCE: 407. Next page.
5	BY MR. PF	RINCE:
6	Q	And the pain score remained a 6, correct?
7	A	That's what that states.
8	Q	And so it doesn't appear that L5 or S1, at least based upon this, is the
9	primary so	urce of the pain, at least according to this, correct?
10	A	Yeah, if you're just going to take this partial piece of that document out
11	and unders	stand that he had the injection on that day, yeah, they both say 6 out of
12	10. So	
13	Q	Right.
14	A	that piece of the puzzle doesn't tell you too much.
15	Q	Right. So it tells you, however, this, don't you agree, Doctor, that based
16	upon this d	liagnostic injection, it does support that L5-S1 is not the primary pain
17	generator i	n Beau's case?
18	A	I'm not certain you can infer that based just on this document. That
19	specific pie	ece of the puzzle, yeah, that would indicate that L5-S1 isn't causing any
20	pain.	
21	Q	Right. And I didn't say it wasn't causing any. I said it's not the primary

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# pain generator in Beau's case --

Yeah, I --

A Well --

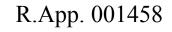
Q

Α

-- L5 -- based upon this study, you know, taken in --

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1	Q	consideration with all the other data
2	A	You were talking about this study and it would indicate to me, just
3	based on t	his study, that L5-S1 wasn't causing any of his pain.
4	Q	Okay.
5	A	That portion of the puzzle that you're looking at.
6	Q	Oh, okay. And with regard to the radiofrequency treatment, if Beau
7	wasn't di	dn't get any significant relief from that, then you're not critical of him for
8	not continu	ing to undergo the radiofrequency ablations, correct?
9	A	No, that wouldn't be something that I'd recommend. If other healthcare
10	providers recommended it no, I think that in my opinion, everything that's been	
11	discussed	is disc pathology, disc degeneration
12	Q	Right.
13	A	disc, disc. And now you're talking about some new portion of the
14	anatomy, I	guess, the facet. So
15	Q	Right.
16	A	I mean, if you're going to give radiofrequency ablations, then I guess
17	you're goin	g to say nothing or there is no pain coming from the disc because he's
18	going to get all these radiofrequency ablations.	
19	Q	Well, obviously the he had one at the recommendation of Dr.
20	Ruggeroli.	His testimony is it didn't work. So, therefore, you're not critical of him for
21	continuing	to not undergo those procedures if they're not beneficial to him, right?
	1	

22 I guess, just like I wouldn't make the recommendation for repeated Α 23 radiofrequency ablations for the rest of his life. 24 Now, I want to -- I probably didn't kind of tie this in, but I want to go back Q 25 to the MRI image of March 13th, 2014, you know, the one -- that's 228. I kind of -164-GAL FRIDAY REPORTING & TRANSCRIPTION 10180 W. Altadena Drive, Casa Grande, AZ 85194 (623) 293-0249 R.App. 001459

want to tie in the pain management procedure at L5-S1 to what, you know, this 1 2 clinical correlation statement means. And you agreed -- you know, we just looked at 3 this a moment ago, the radiologist suggested, you know, to correlate for the potential for a left S1 radiculopathy, correct? 4 5 That's what the radiologist states there. Α 6 And Dr. Cash, he attempted to correlate that by sending Beau for an Q L5-S1 transforaminal epidural steroid injection. That's one way to do it, correct? 7 8 It's a piece of the puzzle Α 9 Right. And the L5-S1 injection did not correlate with that finding on the Q 10 MRI, correct, based on what we just talked about? 11 That's correct. Α 12 Q Suggesting that Beau has some other source of pain that is not 13 primarily coming from L5-S1, correct? 14 Yes. But if you look at the other piece of the puzzle, he had an absent Α 15 reflex there, which would suggest S1. So you have to take the -- everything 16 together. It gets confusing when you're relying on one part of one document and 17 inferring principles, medical principles. 18 Well, I'm not necessarily -- I'm saying it's just one piece of the puzzle, Q right? 19 20 That's correct. I just want to make sure that the jury understands that. Α 21 Q Understood that. And, therefore, you agree -- you -- L4-5 is an all

likelihood, ba	ased upon all the pieces of the puzzle, a pain generator in Beau's case?
A	I believe that some of his ongoing symptoms are emanating from that
area.	
Q	Okay. Including the radiculitis or symptoms that are going down his leg,
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	A area.

<sup>1</sup> || correct?

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A I can't state that. It's difficult to discern whether that's coming part or
 <sup>3</sup> parcel from L4-5 or L5-S1.

Q His symptoms that he describes going down the lateral part of his leg
and down -- down his thigh and into his leg, you agree that's consistent with an L4-5
problem, correct?

A It would be consistent with a L5-S1 problem.

Q And you have patient who have -- you treated who are -- have painful
 9 degenerative discs, correct?

A Yes.

Q And when they don't respond to conservative treatment, one of the
 things that you offer them as a potential option is a reconstruction -- reconstructive
 fusion surgery, correct?

A On rare occasions.

Q Right. That's an option for patients who have ongoing mechanical low back pain, significant disc degeneration, as well as pain that radiates down their leg.
 That's one potential surgical option to treat that patient, correct?

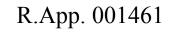
A An elective surgical option that the patient would have to choose,
 absolutely.

Q Right. And just -- it would depend upon the severity of their symptoms,
 correct?

- Q I mean, you agree that Beau is no longer a candidate for
- <sup>24</sup> || microdiscectomy surgery at L4-5, right? He doesn't need that.

A As we sit here today?

-166-



Q	Yeah.
A	Yeah. I agree with that.
Q	Right. And you know that Beau is going to continue to worsen over
time at the	L4-5 level, correct?
A	No, I'm not certain of that.
Q	Well, you know radiographically he's going to worsen over time,
correct?	
A	Just like my discs without surgery are worsening over time and so are
yours.	
Q	Yeah, but he's 25 and he
A	That's correct.
Q	And he that's you agree, that's a significant degenerative condition
for a 25-year-old healthy male?	
A	Certainly, it's significant.
Q	Yeah. All right. Now, you agree that if when if you perform spinal
a spinal reconstructive fusion surgery let's say you did it at two levels, okay?	
You agree that that would put adjacent level stress on the levels above those two	
levels that are fused, correct?	
A	That's correct.
Q	And when you fuse two levels, so let's say L4-5 and L5-S1, that
prevents th	ose two segments of the spine from really having any motion
	A Q time at the A Q Correct? A yours. Q A yours. Q for a 25-yea A Q for a 25-yea A Q tou agree Ievels that a Q

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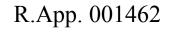
# permanently, correct?

## A That's correct.

Q And if it had -- there was any facet component, it would theoretically

## <sup>25</sup> deal with that, correct? Fusion.

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Yeah, depending on the fusion taking and assuming it heals, certainly. Α 2 Right, because once you, you know, fuse the motion segment, there's Q 3 not going to any -- there's not going to be any movement of the facet joint either, correct? 4

That's correct. Α

6 So if there's a minor component of facet pain, it will be resolved with the Q fusion surgery typically, right? 7

8 When you say -- when you're talking about pain being resolved with a Α fusion, I have to be clear on this, that there is no guarantee of that. In fact, I rarely 10 tell -- in fact, I'm going to say never tell my patients that are going to undergo a fusion, whether it be for a disc problem, a facet problem, an instability problem, a 12 tumor problem, that they're going to be pain free. That's not going to happen.

13 Right. And the best you can do as an orthopedic spine surgeon when Q 14 you fuse a segment or multiple segments of the spine is hopefully you're going to 15 provide some relief of symptoms, correct, and improve the quality of life.

16 That's the key, right. You're going to take -- if their pain is up here Α 17 somewhere, you know, where this is let's say a pain of 10 out of 10 and no pain is 18 down here, maybe you get them down to here, a 4 or a 5 out of 10. You're not going 19 to relieve all their pain with a fusion. Nobody can do that.

20 And you agree that if you fuse two segments of the spine in a 30-year-Q old male at the L4-5, L5-S1, more likely than not there's going to be an adjacent 21

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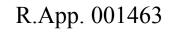
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### segment breakdown at L3-4 during that person's lifetime, correct?

- Α There will be an adjacent level breakdown that is like the situation we're
- 24 looking at here, maybe a progression of degenerative changes.
  - Right, because when you fuse -- for example, if you fuse L4-5 and Q



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L5-S1, that's going to cause L3-4 to degenerate at a faster rate, correct?

- Your -- there's more stresses placed through L3-4.
- Right. Q

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And there are reports that the segment above a two-level fusion will Α degenerate faster than we manifest degenerative changes on our own as part of the 6 aging process, yes, sir.

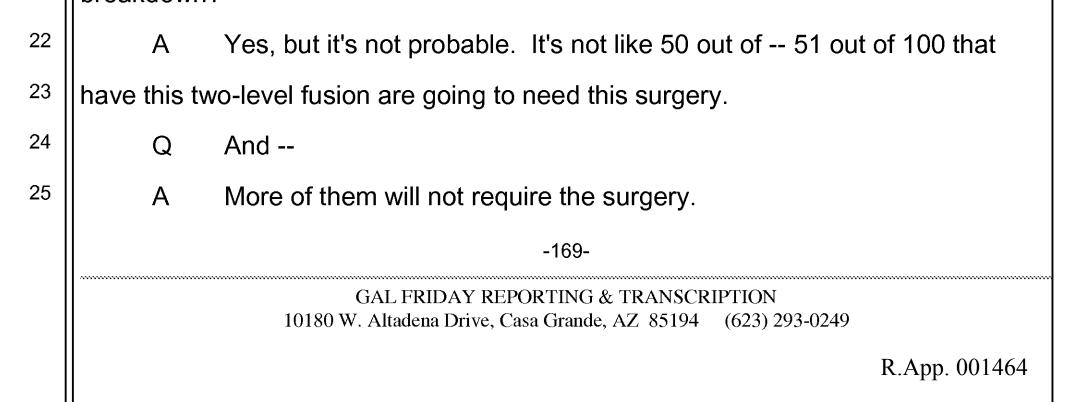
Right. It will degenerate at a faster rate than the normal aging process I Q think is what you're saying, correct?

That's correct. Α

10 And in a -- when you do a fusion surgery on someone who's say only Q 30 years old, there is a significant likelihood, meaning more probable than not, that 12 there's going to be an adjacent segment breakdown at L3-4, which requires fusion in the future? 13

14 No, I won't -- I disagree with that, where you indicate that it requires Α 15 fusion. There will be a breakdown, there's no question about that. It will be in a --16 accelerated over the normal aging process. Some patients will experience 17 symptoms that may necessitate fusion. Usually that's because of accompanying 18 stenosis or tightness around the nerves. But many patients won't require surgery.

19 Well, you agree that a patient undergoes a two-level fusion at L4-5 and Q 20 L5-1 (sic) is at an increased risk of a fusion at L3-4 due to adjacent segment 21 breakdown?



Q And are you familiar with the literature that people who undergo a
 Iumbar fusion, that the adjacent level will break down at a rate of approximately 3
 percent per year?

- A Yes, yes. That's a fair statement.
- Q And that's cumulative, right?
  - A Yes.

Q Okay. So if you live 10 years, about a 30 percent increased chance
 you're going to need a, you know -- strike that. If you life an additional 10 years after
 your fusion surgery, there's about a 30 percent likelihood you may require a fusion
 surgery due to an L3-4 breakdown?

- A There's no -- no, I disagree with that.
- Q Okay.

Α

A It's not 30 percent that would require a fusion.

Q Well, you agree that before Dr. Capanna did his surgery, Beau was not
 at any risk, based upon what you know of his condition at that time, of an L4-5
 Ifusion at any time in his lifetime, correct?

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No, I can't speculate on that, at any time in his lifetime.

Q You agree that Beau did not have any risk to have an L3-4 fusion when
 he underwent surgery with Dr. Capanna?

- <sup>20</sup> A At that point in time, yes, but I can't speculate that, you know, when --
- 21 Q I guess you --22 -- he reaches his fifth or sixth decade of life that he won't require a Α fusion for some degenerative instability or something. 23 24 You agree that the surgery performed by Dr. Cash was as a result of Q 25 the wrong-level surgery performed by Dr. Capanna? -170-GAL FRIDAY REPORTING & TRANSCRIPTION 10180 W. Altadena Drive, Casa Grande, AZ 85194 (623) 293-0249 R.App. 001465

## A Yes --

Q Okay.

A -- that was the reason that Dr. Cash did the second surgery, yes, sir.

Q And don't you agree, Doctor, in some ways, once you start performing surgeries on the spine, it kind of creates -- I'm not going to call it a domino effect, but it kind of creates a cascade of events that can -- you know, once you addressed one level, you may have to start addressing another level and continue on for some period of time with that?

A That's why the option of continued conservative care should strongly be considered in somebody who has a pain level in 2 out of 10, yes, sir.

Q Right.

A Because you want to avoid situations --

Q Right.

A -- with multi-level lumbar spine fusions in patients that down the road say, geez, I'm -- wish I would have never done that.

Q Right. And it creates this whole cascade -- once you start down the
 fusion path, it creates a whole nother level of potential risk for that patient, right?

- A Are you talking about me or --
- <sup>19</sup> Q In general.
- <sup>20</sup> A -- a health care --
- $21 \parallel Q \ln general.$

```
    A Yes, it can.
    MR. PRINCE: Let me check my notes, Your Honor.
    BY MR. PRINCE:

            Q And you're not critical of Beau because he doesn't take significant
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amounts of narcotic pain medication, correct?

No, not at all. Α

3 I mean, some patient elect -- are more stoic, have a higher pain Q threshold and, therefore, they may not take much pain medication, but may have a very high level of pain.

> Yes. Α

Right. And just because Beau can work does not mean that he does 7 Q 8 not have pain or limitation, correct?

That's correct. Α

10 Q And just because Beau continues to, you know, I guess be as active as 11 he can but pay for it, you're not critical in any way of that, correct?

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I'm not certain what you mean by pay for it. Α

Meaning if, for example, he go -- he likes to go golfing and then they all 13 Q go golfing and then, you know, for the next two or three days, he's going to have 14 15 some pain.

I'm sorry, I see. That -- yes, that's reasonable. Α

17 Right. I mean, he's still got to try to live. He's only 25 years old, right? Q 18 Yes, sir. Α

19 And you encourage your patients, you know, who are maybe the same Q 20 age bracket as Beau, have similar issues, I mean, just try to stay as active as they 21 can and stay within their limits, right?

#### 22 That's a fair statement. А 23 Q Sometimes it's best to leave the limits up to the patients themselves, 24 they know their body the best. That's reasonable. 25 Α -172-GAL FRIDAY REPORTING & TRANSCRIPTION 10180 W. Altadena Drive, Casa Grande, AZ 85194 (623) 293-0249 R.App. 001467

1	Q Just because there's no formal lifting, bending, or twisting restriction
2	doesn't mean that Beau doesn't have ongoing pain limitation every day, correct?
3	A That's a fair statement.
4	MR. PRINCE: I'm almost done, Judge.
5	[Colloquy between counsel]
6	MR. PRINCE: Okay, Doctor, thank you. I don't have any additional
7	questions.
8	THE WITNESS: Thank you, sir.
9	THE COURT: Mr. Lauria.
10	MR. LAURIA: Thank you.
11	REDIRECT EXAMINATION
12	
	BY MR. LAURIA:
13	Q We spent about 20 minutes with the diagram of the nerve roots and the
13	Q We spent about 20 minutes with the diagram of the nerve roots and the
13 14	Q We spent about 20 minutes with the diagram of the nerve roots and the injections and the epidural steroid injections, so I just want to clear this up, hopefully
13 14 15	Q We spent about 20 minutes with the diagram of the nerve roots and the injections and the epidural steroid injections, so I just want to clear this up, hopefully once and for all if we can. I want to look at
13 14 15 16	Q We spent about 20 minutes with the diagram of the nerve roots and the injections and the epidural steroid injections, so I just want to clear this up, hopefully once and for all if we can. I want to look at MR. LAURIA: Can you put me on thank you.
13 14 15 16 17	Q We spent about 20 minutes with the diagram of the nerve roots and the injections and the epidural steroid injections, so I just want to clear this up, hopefully once and for all if we can. I want to look at MR. LAURIA: Can you put me on thank you. THE COURT RECORDER: I'm sorry.
13 14 15 16 17 18	Q We spent about 20 minutes with the diagram of the nerve roots and the injections and the epidural steroid injections, so I just want to clear this up, hopefully once and for all if we can. I want to look at MR. LAURIA: Can you put me on thank you. THE COURT RECORDER: I'm sorry. MR. LAURIA: That's all right.

MR. LAURIA: Yeah --

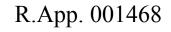
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MR. CARDINALE: The ELMO. THE COURT RECORDER: Sorry.

# $^{25}$ BY MR. LAURIA:

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3/26/2014. You went through this report with Mr. Prince, 3/26/2014. It 1 Q was a left L5-S1 transforaminal epidural steroid injection and a left S1 transforaminal 2 3 epidural steroid injection. Yeah. 4 Α It shows the medications he used, IV conscious sedation, fluoroscopic 5 Q needle localization, correct? 6 7 Α Yes. 8 All right. And we -- Dr. Ruggeroli, after this transforaminal epidural Q 9 steroid injection, found the patient got no relief, right? 10 Yes. Α 11 All right. And Mr. Prince's assertion to you was doesn't that indicate Q that he's not having an L5-S1 problem, right? 12 13 That's correct. Α 14 MR. PRINCE: Objection. That's not -- wasn't my question. So it --THE COURT: Well --15 16 MR. PRINCE: -- misstates my question. BY MR. LAURIA: 17 18 Wasn't he --Q THE COURT: Overruled. 19 20 MR. PRINCE: I said primary generator. BY MR. LAURIA: 21

22 Wasn't he suggesting to you, Doctor, that the L5-S1 area was not a Q 23 generator of pain or a primary generator of pain in Mr. Orth? Based on that injection, yes. 24 Α 25 Q Okay. Well, based on that injection, I mean, he did L5 and S1 and -174-GAL FRIDAY REPORTING & TRANSCRIPTION (623) 293-0249 10180 W. Altadena Drive, Casa Grande, AZ 85194 R.App. 001469 there's no relief, right? So that must mean that it's not a pain generator, right?

A If you're going to rely completely on that.

Q Well, I'm going to look at -- I want to look at another study. I think Dr. Cash, when I asked him about it, said it may not have been in the same procedure, but I think it was exactly the same procedure, and let's look at page 326, which is 8/13/20 (sic), Dr. Ruggeroli doing the procedure. Do you agree, Doctor, that the primary pain generator in Mr. Orth in 8/13/2010 was L5-S1?

A Yes.

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Q Has anybody disagreed with that opinion?

A I don't believe so.

Q All right. Everybody agrees that 8/13/10 was L5-S1 was causing Mr.
 Orth's pain. Dr. Ruggeroli described doing a left L5-S1 transforaminal epidural
 steroid injection, a left S1 transforaminal steroid injection, IV conscious sedation,
 fluoroscopic needle, exactly the same medications, true?

- A Yes.
- <sup>16</sup> Q He did exactly the same procedure in 2010 that he did in 2014, right?
  - A Yes.

<sup>18</sup> Q And that was just prior to seeing Dr. Capanna five days later.

- <sup>19</sup> A Yes.
- $^{20}$  Q And everybody agrees that his problem at that time was L5-S1, right?
  - A That's correct.
- Q I'm going to put up page 325 and we'll see what Dr. Ruggeroli says
   about that injection. Too big, but -- status post-left L5-S1 transforaminal epidural
   steroid injections, no significant relief. Pain in lower extremity is still impairing
   performance. So he got no relief from that one either, did he?

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1 That's what that note says. Α 2 Does that mean that in fact that L5-S1 which everybody thought was Q 3 the pain generator wasn't the pain generator? 4 No. Α All right. Well, does it mean, then, as was suggested, that just because 5 Q 6 he didn't get relief on 3/26/14 that L5-S1 is not the pain generator? No. 7 Α 8 All right. Did precisely the same procedure before the surgery and Q 9 didn't get relief, and precisely the same one later, true? 10 That's correct. Α 11 And you would assume that he injected in exactly the same spots that Q 12 you were drawing up there in 2010 as in 2014 in all of the stuff that we saw, true? 13 He describes the same procedure, so I would expect those things, yes, Α 14 sir. 15 All right. Mr. Prince has said do you know if the studies have someone Q who has the specific timing and characteristics of the surgeries on Mr. Orth. Do you 16 17 know whether they have a specific factual scenario like him? 18 Α No. Does that make them any less reliable in the medical community as a 19 Q 20 basis for opinions on what future care is? 21 No.

22 Q All right. There are patient in there who have single-level discectomies. 23 Α Yes, sir. 24 Q There are patients in there who have had multi-level discectomies. 25 Yes, sir. Α -176-GAL FRIDAY REPORTING & TRANSCRIPTION 10180 W. Altadena Drive, Casa Grande, AZ 85194 (623) 293-0249 R.App. 001471

А

1	Q There are patients who have had repeat discectomies like Mr. Orth had
2	that is a
3	MR. PRINCE: Objection; leading, Judge. He's just it's on some leading.
4	All the questions are leading. Every one of them are leading.
5	THE COURT: For the whole week and a half?
6	MR. PRINCE: For a whole week and a half.
7	MR. LAURIA: There were a couple that weren't, Judge, probably a couple.
8	THE COURT: Just clarifying.
9	MR. LAURIA: Sure.
10	THE COURT: I will sustain the objection as leading.
11	BY MR. LAURIA:
12	Q Are there reports in the studies, Doctor, that cover patients who've had
13	discectomies and re-herniated and had a repeat discectomy?
14	A Yes.
15	Q All right. That's the equivalent of Mr. Orth's condition; he had a
16	MR. PRINCE: No.
17	Q discectomy, and had a herniation, had a repeat procedure done,
18	true?
19	A If you're focusing on that one level, yes.
20	Q All right. And there are multi-level patients in there, too.
21	A That's correct.

 Q In your opinion, to a reasonable medical probability, are the studies that
 are done at Harvard or Johns Hopkins or Stanford, are they as applicable to Mr.
 Orth as they are to other patients who have undergone these types of procedures?
 A Certainly.
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And do some of those studies measure the number of patients who've 1 Q 2 had re-herniations, required a second discectomy, and then the percentage of those 3 that have gone on to require a fusion surgery? Can you state that again? I'm sorry, I lost my --4 Α 5 Do any of --Q 6 -- train of thought. Α Sorry. That's okay. Do any of those studies talk about the patients who 7 Q 8 have had a discectomy, had a re-herniation, and had a second discectomy, the percentage of those that have gone on to require fusion? 9 10 Yes. Α 11 All right. Q 12 They do talk about that Α 13 And were the percentages still in the 20, 30 percent range at best? Q 14 Yes. It was not probable that they would go on to require a fusion. Α 15 There was a lot of discussion with Mr. Prince about the L4-5 disc and Q 16 degeneration of the disc. Would you agree that Mr. Orth had -- at L5-S1 had a 17 degenerative disc before he even saw Dr. Capanna? 18 Yes. There were some degenerative changes noted at L5-S1. Α And you would agree that the L5-S1 disc was going to continue to 19 Q 20 degenerate following a microdiscectomy? 21 Yes. А

22 All right. So Mr. Orth was going to continue to have L5-S1 disc problem Q 23 regardless of what occurred at Dr. Capanna's surgery, do you agree with that? 24 Yes. Α 25 Counsel has asked about, again, Dr. Cash indicating that -- telling Mr. Q -178-GAL FRIDAY REPORTING & TRANSCRIPTION 10180 W. Altadena Drive, Casa Grande, AZ 85194 (623) 293-0249 R.App. 001473

Orth he should not return to football or don't return to football. Did you see anywhere in the records where he actually said that, where he recorded that?

A No.

Q All right. Is that something that you, in your experience, is generally
 recorded by other spine surgeons if they're giving a recommendation like that to a
 patient?

A Yes.

Q All right. So you would expect to see something like don't go back to
 heavy labor, right? You do it on people that are lifting all the time; or don't return to
 a certain activity?

A Yes.

Q Going back to April of 2011, patient is taking next season off to
 complete school. Nowhere in the records of Dr. Cash did you find any mention of
 I'm telling him he shouldn't play football or it shouldn't be done?

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No, I didn't see that.

Q All right. But you said something, you were asked by counsel about
 there's a significant risk to returning to football with a -- after having this two-level
 microdiscectomy.

<sup>19</sup> A Yes.

Α

Q Is there a significant risk, in your opinion, to returning to a contact sport
 like football with a single-level microdiscectomy?

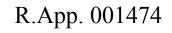
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#### A Yes.

- Q And what are the risks of returning to football if you have a single-level
   microdiscectomy?
  - A I would -- as far as I know, the risks are the same if you have a two-

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<sup>1</sup> || level microdiscectomy.

Q Risk is you could re-injure your disc, you would re-herniate, require
 I further surgery?

A Yes, sir.

Q All right. There was -- Mr. Prince brought out in the first note by Dr. Cash of October 12th, 2010 which --

MR. LAURIA: Is that it? It's the first visit. Here we go.

BY MR. LAURIA:

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Q Again, saying that there was a discussion of fusion surgery. Do you
 recall that testimony? That's on October 12th, 2010.

A Yes.

Q I'm going to represent to you that Dr. Cash has testified in this case that
 he told Mr. Orth on his very first visit that because he'd had a microdiscectomy, he
 was going to require two fusion surgeries.

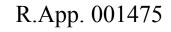
<sup>15</sup> MR. PRINCE: No, objection, Your Honor; beyond the scope of my
 <sup>16</sup> cross-examination. That did not -- was not covered by me, nor was it covered by
 <sup>17</sup> Mr. Lauria during his original direct exam.

THE COURT: It's technically correct, but I want very badly for Dr. Rimoldi not
 to have to come back. So I'll let you ask the question and then you can go back into
 on --

<sup>21</sup> MR. LAURIA: Thanks.

THE COURT: -- recross if you need to. BY MR. LAURIA: Q The -- Doctor, I just want to clarify. You -- this record -- well, when you read this record, is it telling the patient that, Mr. Orth, you are going to require, to a -180-GAL FRIDAY REPORTING & TRANSCRIPTION

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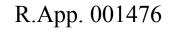
1	reasonable	medical probability, a fusion in the future?	
2	A	No.	
3	Q	What is he saying by this statement?	
4	A	He's discussing additional surgery and potential risks of the surgery.	
5	He talks ab	out recurrent disc herniation and the spinal fusion. So in my when I	
6	reviewed this record, it's he's going through the informed consent process with		
7	him.		
8	Q	Is he essentially telling the patient look, if you have yet another	
9	herniation a	at this level, then you may need a fusion sometime in the future?	
10	A	No, he doesn't say that, but	
11	Q	Well, if he says	
12	A	you know, he	
13	Q	l'm sorry.	
14	THE	COURT: You can	
15	Q	Patient recognized if this is a recurrent herniation at L4-5 and he has	
16	another inju	ury at this level, then he will most likely require a fusion	
17	A	Yes.	
18	Q	(indiscernible) I'm sorry.	
19	A	Yes, that statement does state that. I think that's part of his informed	
20	consent pro	ocess as he's planning on performing an additional surgery.	
21	Q	So he's saying in the event you herniate this disc again in the future,	

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## you may need a fusion.

- A Right.
- Q Okay. Not that you're going to need a fusion. And I think we've
- <sup>25</sup> covered it, but when you reviewed his records, other than this statement, did you

-181-



see any mention of a fusion before two months ago?

No. Α

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3 Oh, so the images were put up, but I can't ask them to put them up Q again, but you noted that there was some abnormality in the comparison films that they put up from 9/2/2010 and 2/3/09. Do you recall that?

Certainly. If I didn't see the -- his name on the top, I would have Α suggested it was a different patient. The dimensions of the vertebral bodies were completely different.

9 In one of them, they're kind of more elongated and in of them, they're Q 10 very block and square; is that your interpretation?

11 Right. One was more rectangular with the width of the bodies being Α much greater than the height, and the next view, they were about equal in 12 13 dimension, equal width, equal height.

Q Can you explain why that is?

Different technique in the scan. Α

16 Q All right. Do you believe those scans or those images can be readily compared? 17

I wouldn't. Α

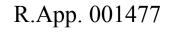
19 When you were asked a question about the disc fragment at L -- sorry Q 20 -- the fragment at L5-S1, Mr. Prince used the word contained. And I think you said 21 contained within the L5-S1 disc space. Is that different than being contained within

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### the nucleus or the annulus?

- Α Certainly if it's --
  - Let me ask it again, that's a poor question. Is there a difference Q
- 25 between being contained within an L4-51 (sic) disc space and being contained



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entirely within the annulus?

A Certainly.

Q Okay. So when the term contained is used in regard to the L5-S1 disc
 space, that doesn't mean that some portion hasn't extruded out of the annulus or the
 annulus hasn't opened, agree?

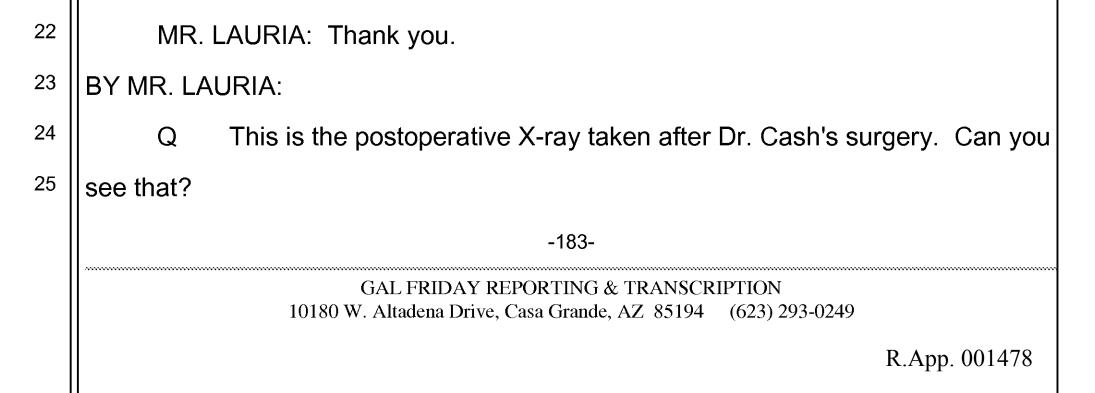
A That's correct.

Q All right. I wanted to ask you about the images --

MR. LAURIA: I want -- put up the plain films -- this one first. Put up this one first. And now I need you to switch me, if you would. Thank you.

Q Doctor, this is an image that was made by Dr. Cash, post-op X-ray after
 his surgery of 11/3/2010, except the little diagram next to it. But what do you see - MR. PRINCE: Objection, beyond the scope of the cross, Judge. We didn't -- I
 didn't ask one thing about post-Cash-operative X-ray.

- <sup>14</sup> THE COURT: Mr. Lauria?
- <sup>15</sup> MR. LAURIA: He asked about the laminotomy at L4-5 and so I'm giving --
- <sup>16</sup> MR. PRINCE: Pre-Dr. Cash.
- <sup>17</sup> MR. LAURIA: Excuse me, can I finish?
- <sup>18</sup> THE COURT: Hold on, hold on. Let him -- let Mr. Lauria finish, please.
- <sup>19</sup> MR. LAURIA: So I'm entitled to show him for a comparison view, Judge, the
- $^{20}$  || before and after so he can make a comparison.
- <sup>21</sup> THE COURT: You can go ahead.



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A Yes.

Q And what do you see in regard to any abnormality in the lumbar spine in
 the areas of L4 and L5?

A What I see is on the -- and I'm assuming this to be the left side. There's
 a defect in the bone. It looks like the entire lamina of L5 has been removed and a
 portion of the lamina of L4 on the left side. That's what I see, postoperative
 changes. That's all I see.

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Okay. So --

THE COURT: And just so I can be clear, you're assuming this is the left side, correct? Is that what you're saying?

THE WITNESS: Yes.

<sup>12</sup> THE COURT: Okay.

<sup>13</sup> || THE WITNESS: Yes.

<sup>14</sup> || THE COURT: Just making sure.

<sup>15</sup> MR. LAURIA: And -- I wish I could make little marks.

<sup>16</sup> || BY MR. LAURIA:

Q

Q And then where we see --

<sup>18</sup> THE COURT: I haven't given you privilege to do that yet.

<sup>19</sup> MR. LAURIA: I'm trying, Judge.

Okay.

 $^{20}$  || BY MR. LAURIA:

<sup>21</sup> Q Where we see the space or the lines going across, that's where the disc

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## || space is essentially?

Q

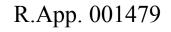
A Yes. This being L4-5 here.

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A And this being L5-S1 here.

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1	Q So up above that last red mark that you made, that's indication of a
2	laminotomy at L4, and it's a laminotomy because he only took a portion of the bone,
3	not the entire lamina as down here at L5. Is that fair?
4	A That's a fair statement.
5	Q Let's go to the one that's October 12th, 2010. That's a pre-op Dr. Cash.
6	That's after Dr. Capanna's surgery. Are you able to say with any reasonable
7	certainty in looking at this film that in fact there was a laminotomy performed?
8	A No, I can't.
9	Q Okay. Very different appearance in the bone before Dr. Cash's surgery
10	and after?
11	A Yes.
12	Q One more thing.
13	MR. LAURIA: Can you go back to that back to the testimony if we had it
14	MR. CARDINALE: Oh, yeah. Cash?
15	MR. LAURIA: Yes.
16	BY MR. LAURIA:
17	Q Just for review, I want to ask you about the testimony of Dr. Cash in this
18	case. Question
19	MR. PRINCE: Your Honor, object to being definitely beyond the scope. I
20	never talked about any deposition or the testimony of Dr. Cash. You ruled on this
21	previously.

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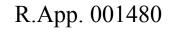
MR. LAURIA: This is the trial testimony.

THE COURT: Well, why don't --

MR. PRINCE: You ruled upon --

MR. LAURIA: It's the trial testimony.

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1	THE COURT: Well, let's approach. Let's approach. Let's approach the			
2	bench, please.			
3	MR. PRINCE: Are you going to have him take that down			
4	MR. LAURIA: It's trial.			
5	MR. PRINCE: before you rule?			
6	[Bench conference begins at 3:07 p.m.]			
7	MR. PRINCE: I'm asking to take it down until you rule.			
8	THE COURT: Who's got it up?			
9	MR. PRINCE: Yeah, you			
10	THE COURT: Paul?			
11	MR. LAURIA: Well, she'd have to turn it off. So			
12	MR. PRINCE: No, you're			
13	THE COURT: Okay.			
14	MR. PRINCE: you're you can turn it			
15	THE COURT: Thank you. Okay.			
16	MR. PRINCE: Thank you.			
17	THE COURT: All right. What are we			
18	MR. LAURIA: It's trial testimony, it's not a depo.			
19	MR. PRINCE: I didn't ask about trial testimony.			
20	THE COURT: Well, just because you didn't ask about trial testimony doesn't			
21	make the issue ripe for somebody to ask about it, assuming you asked some			

questions about it. I'm just trying to make sure it's an issue that's been gone into. I
 generally try and give people some leeway because I don't want to say okay, well I'll
 just recall him again in case in chief, but I don't want to keep going, going and going
 and beyond. So what is this issue - <u>-186-</u>
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1	MR. LAURIA: All this
2	THE COURT: that you were going ask him about?
3	MR. LAURIA: What it goes to is what Dr. Cash says was on that 8/31/12 (sic
4	throughout) film that he asked him about what the postoperative changes
5	(indiscernible) the postoperative changes were at the L4-5 level.
6	THE COURT: Okay. All right.
7	MR. PRINCE: And what level?
8	MR. LAURIA: L4-5.
9	MR. PRINCE: What film?
10	THE COURT: The 8/30
11	MR. LAURIA: 8/31/12.
12	THE COURT: '12
13	MR. PRINCE: There's no 8/31/12.
14	THE COURT: Or 8/13/12.
15	MR. LAURIA: 8/13/12, excuse me.
16	THE COURT: Not 8/31. Today's the 31st.
17	MR. LAURIA: Feels like the 10th.
18	THE COURT: I know.
19	[Bench conference ends at 3:08 p.m.]
20	THE COURT: All right. You can go ahead.
21	MR. LAURIA: Thank you.
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THE COURT: You can put it back up. MR. LAURIA: Can we go back to that? Thank you. There we go. BY MR. LAURIA:

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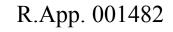
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Q I'm showing you the testimony talking about is there any more

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<sup>1</sup> cushioning based on your review of the MRI image of August 31st, 2012 at L4-5 disc
 <sup>2</sup> space. No, the cushion has been taken out through two surgeries.

Do you have an opinion, Doctor, based upon your review of the MRIs and as we went through the reports of the radiologist as to whether all of the cushion has been taken out of the L4-5 disc?

A No, that's absolutely a false statement.

Q All right.

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MR. LAURIA: Let's scroll down, please, Paul. Let's -- you can stop there.

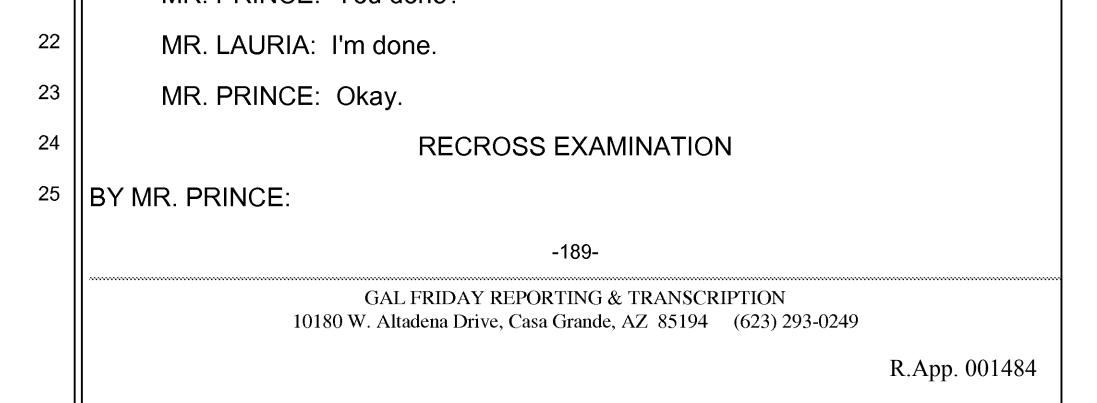
9 And then we talked about L5-S1 on that same film of 8/31/12 where Q 10 there's a little bit of disc protrusion, you don't have the axial, just a little bit of disc. 11 The disc has no more jelly. It's not going to have a big protrusion obliterating the 12 nerve. It's collapsed. It's going to lead to bone on bone. It's almost there. This is 13 the most symptomatic level. Doctor, do you have an opinion to a reasonable 14 medical probability, based on your review of the films and what the radiologists say 15 whether or not the films of 8/31/12 show a lack of jelly in any disc space or any disc 16 space being bone on bone?

- A No, there's no space that's bone on bone.
- Q Is it even close?
- A No.

Q Come down again. Now, he's asking about the L4-5 disc space, and
 Dr. Cash testifies, this has lost all of it's shock absorption capacity essentially, let's

<sup>22</sup> say a great majority of it, maybe 80, 90 percent. This is flat. This is not a shock
 <sup>23</sup> absorber anymore and it's less mobile. Do you have an opinion to a reasonable
 <sup>24</sup> medical probability whether Dr. Cash's statements regarding 80 to 90 percent loss of
 <sup>25</sup> its capacity is accurate or inaccurate?
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1	А	That is inaccurate.	
2	G	And do the radiologists who interpreted this study concur with your	
3	opinion		
4	MR. PRINCE: Objection for foundation, speculation.		
5	BY MR. LAURIA:		
6	Q	You've reviewed the	
7	THE COURT: Thank you.		
8	G	radiology reports for this procedure, correct?	
9	A	Yes.	
10	C	Do they indicate anywhere that there is an 80 to 90 percent loss of this	
11	disc height or absorption or anything like that?		
12	A	No.	
13	C	We put up when I was first questioning you the report of the procedure	
14	two years after that in March of 2014, and they describe some mild desiccation,		
15	true?		
16	A	That's correct.	
17	C	All right. They don't describe any significant loss of disc height?	
18	A	No, they don't.	
19	C	Thank you, Doctor. Appreciate it.	
20	A	You're welcome.	
21	MR. PRINCE: You done?		



Q	Just have a few questions, Doctor.	
A	Yes, sir.	
Q	Okay.	
MR. PRINCE: I just need control of the monitor.		
Q	Mr. Lauria asked you a moment ago about some questions about, you	
know, before Dr. Capanna performed surgery, about Dr. Ruggeroli's transforaminal		
epidural steroid injections. Remember those questions?		
A	Yes, I do.	
Q	And your testimony was, well, he performed the exact same one at in	
August of 2010 as he did in March of 2014, right?		
A	Based on that descriptive report, yes.	
Q	Right. And that there was no relief following the August of 2010	
procedure, correct?		
A	Yes.	
Q	Remember that?	
A	That's what that showed in that note.	
Q	Well, we've got to be careful how we use the word relief, correct?	
Because there's a steroid component and that could be long-term relief because of		
providing the patient any lasting benefit because of the steroid, correct?		
A	Yes, that's where you're looking at therapeutic benefit.	
Q	Right. And then there's the diagnostic part of it, that's when you inject	
	A Q MR. Q know, befo epidural sta A Q August of 2 A Q procedure, A Q Because th providing th	

like the anesthetic at the level and that provides like the immediate diagnostic
 information that you would use as a surgeon, correct?
 A That's one piece of the puzzle -- Q Right.

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-- as we talked about before, yes.

2 One piece of the puzzle, right. And so in -- so when Dr. Ruggeroli says, Q 3 you know, he didn't receive any -- you know, any significant benefit, typically from a patient's standpoint he goes, yeah, I got better for a few days and then after that --4 5 after about a week, I just kind of went back to normal, right? 6

MR. LAURIA: Objection to --

MR. PRINCE: That's what the therapeutic aspect of it would be.

MR. LAURIA: -- compound question.

THE COURT: Well, I'll agree. Please break it up a little bit.

**BY MR. PRINCE:** 10

Α

11 Typically, after a patient undergoes a transforaminal epidural steroid Q injection, they'll go back to the doctor, right? 12

Α Yes.

The pain physician. Q

Yes. Α

16 And the pain physician will say, how are you feeling, did you improve, Q 17 how did you do following the injection?

Yes. Α

The patient will say, oh, I've done fantastic and either -- or I've gotten no 19 Q 20 benefit, or somewhere in between, right?

That's a fair statement, yes, sir. Α

22 All right. And so if a -- just because a patient says, hey, I didn't get Q 23 much benefit from that, that doesn't mean that -- diagnostically speaking, that L5-S1 24 is not a problem, it just means they didn't receive any therapeutic benefit from the 25 steroid injection, correct? -191-GAL FRIDAY REPORTING & TRANSCRIPTION 10180 W. Altadena Drive, Casa Grande, AZ 85194 (623) 293-0249 R.App. 001486

A Well, if they said they didn't get any benefit, yeah, obviously they didn't
 get benefit.

Q Right. But we -- diagnostically, you need to look at how are -- what was
 the pain score just before the procedure and then how is it just after the procedure,
 correct?

A You can rely on that as one piece of the puzzle.

Q Right, because typically the steroid doesn't kick in for, you know, hours
8 or even maybe a day or two, correct?

A That's a fair statement.

Q So -- all right. And let's look at -- we're going to go to the February,

<sup>11</sup> 2010 L5-S1 injection. Okay? We're going to go to the pain management record.

MR. PRINCE: Please put up 438 of Exhibit Number 9.

<sup>13</sup> Q This is again from February, 2010. The pre-procedure pain score was <sup>14</sup> a 5. Okay?

<sup>15</sup> A Yes.

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Q And if we go to the next page, 439, it shows that the post-procedure
 pain score was zero, correct?

A Yes.

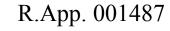
<sup>19</sup> Q So it had significant benefit to Beau at that time, correct?

 $^{20}$  A Looking at this one document.

<sup>21</sup> Q Now, I want to show you the 8/26/2010 (sic) report. Remember, Mr.

Lauria said that he got -- there was no relief after that injection, correct?
 A I'm sorry, what injection are you talking about?
 Q The 8/26/10 injection. Remember that? The one just before Dr.
 Capanna's surgery.

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1	A	I thought we were talking about August 13, 2010.
2	Q	Oh, I'm sorry. August it is August 13, 2010. What I'm sorry, if I
3	used the wr	rong date, then that's my fault. I'm sorry.
4	A	No worries. I just want to be clear.
5	Q	No, thank you for clarifying that. And so I want to look at the pain
6	score, the p	pre-procedure pain score from that. That's Bate number 425. And it's a
7	7, correct?	Do you see that?
8	A	That's what this one states, 7 out of 10, yes.
9	Q	Okay. And if we go to 426, pain score went down to 4 and a half. So
10	there was s	ome reduction in pain following the administration of the anesthetic,
11	correct?	
12	A	I'll just state that I'm not sure that's 4 and a half. It could be 4 to 5, I
13	don't know.	
14	Q	Oh, okay. I see what you're saying. Anyway
15	A	But there was a mild to modest reduction, I guess.
16	Q	Okay, and so all right. And so from a diagnostically speaking, this
17	suggests th	at L5-S1 is a potential a pain generator for Beau in August on
18	August 13th	ח, 2010.
19	A	Okay, this I just wanted to make sure. This goes with that August
20	13th	
21	Q	Yes, it does.

25

# A -- 2010.

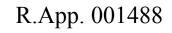
Q And if you want to see the --

A No, no.

Q

-- record, I'll show it to you.

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1	A	No, I just wanted to be clear for the jury.
2	Q	Yes, it does.
3	A	Okay.
4	Q	It goes with that.
5	A	It would tell me that after that injection, based on this one document,
6	that he had	a mild to modest reduction.
7	Q	Right. Okay. So there diagnostically speaking, there was information
8	available to	o a surgeon which should that, hey, that L5-S1, based upon this mild to
9	modest pai	in reduction immediately post-procedure would suggest that that is the
10	source of E	Beau's problem?
11	A	If you're just going to rely on that, and I would suggest a healthcare
12	provider do	pesn't, yes.
13	Q	It's one piece of the puzzle.
14	A	That's correct.
15	Q	Along with the history, physical exam, and MRI findings.
16	A	That's correct.
17	Q	Right. You put it all together, it looks like Beau had a problem at L5-S1
18	before his	surgery with Dr. Capanna, correct?
19	A	Yes.
20	Q	All right. And then put it go back to March of 2014, and where Beau
21	got no pair	relief of any kind, diagnostically it doesn't looking at the total picture, it

22 does not appear that L5-S1 was a primary pain generator as of March of 2014? 23 If you're going to look at that document as one piece of the puzzle. Α 24 Q Along with all the other pieces, correct? 25 Α Well, no, you can't -- that would imply that you're indicating that I'm -194-GAL FRIDAY REPORTING & TRANSCRIPTION 10180 W. Altadena Drive, Casa Grande, AZ 85194 (623) 293-0249 R.App. 001489 || saying that all the pieces of the puzzle show that, and that's not true.

Q Okay.

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A I just want to be clear. If you look at all the pieces of puzzle, he's had a reasonable post-op course after his two-level discectomy that was done by Dr. Cash. But if you look at that piece of the puzzle in and of itself, the statement that you say is correct, that it would suggest that L5-S1 wasn't the primary pain generator --

Q Okay.

A -- in March of 2014.

Q Okay. And when we were talking -- you were talking about comparing
 the scans from February, 2009 to August of 20 -- 2010, I didn't ask you to conduct a
 direct comparison. We were just looking at, you know, images just to show kind of
 the condition of both L4-5 and L5-S1, not a direct comparison, right?

A Well, you were showing two scans and you were asking me questions
 about both scans.

Q Well, I didn't ask you to compare them. I just said -- because they're
 different scans, right?

- A Yeah.
- <sup>19</sup> Q Different equipment?

<sup>20</sup> A Well, it's different dimensions. I mean, you can't --

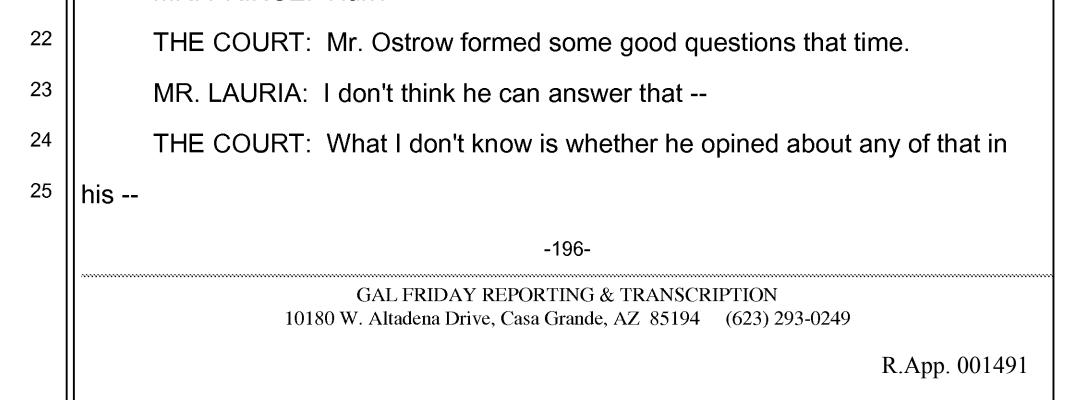
Q Right.

22 -- infer anything one way or the other from --Α 23 Either way, L4-5 was normal in both scans, no matter what you looked Q 24 at, right? 25 Yeah, it looked as a normal disc to me based on those two studies that Α -195-GAL FRIDAY REPORTING & TRANSCRIPTION 10180 W. Altadena Drive, Casa Grande, AZ 85194 (623) 293-0249 R.App. 001490

<sup>1</sup> you showed.

Q And there was a small L5-S1 disc protrusion based on both -- either
 scan, correct?

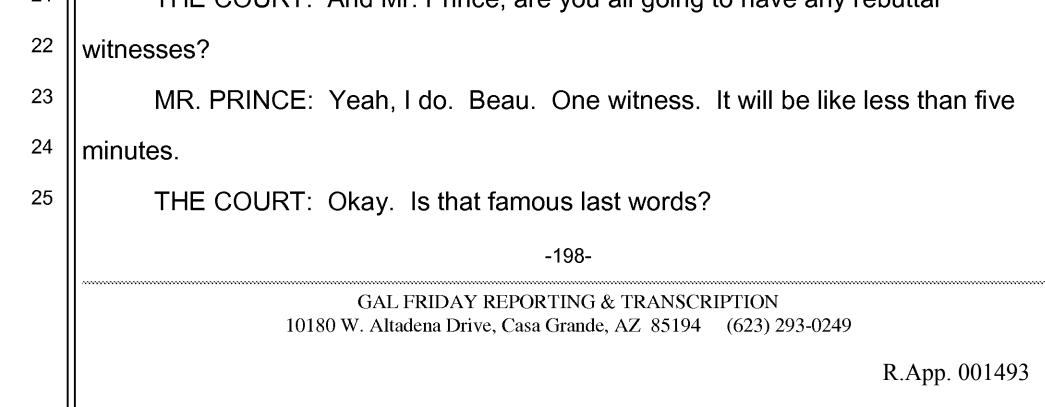
4	A	Yes.
5	Q	They were consistent with each other?
6	A	Yes.
7	Q	Okay. Thank you, Doctor.
8	MR.	PRINCE: No additional questions.
9	ТНЕ	COURT: Mr. Lauria, anything further?
10		FURTHER REDIRECT EXAMINATION
11	BY MR. LA	URIA:
12	Q	The only thing is, Doctor, have all the opinions you've expressed today
13	been to a re	easonable medical probability?
14	A	They have.
15	Q	All right. Thank you, Doctor.
16	A	Thank you.
17	ТНЕ	COURT: Anything from our jurors? Yes? Joel.
18		We're getting close, Doctor.
19		[Bench conference begins at 3:20 p.m.]
20	тне	COURT: Mr. Ostrow.
21	MR.	PRINCE: Huh?



1	MR. LAURIA: He hasn't in standard of care so he
2	THE COURT: in his reports or anything.
3	MR. LAURIA: really can't talk as to (indiscernible)
4	MR. PRINCE: I'm okay with it.
5	THE COURT: But are these things that he's offered opinions on before?
6	MR. LAURIA: Yeah
7	MR. PRINCE: Yeah.
8	MR. LAURIA: I don't think he can answer that because it's he's not
9	(indiscernible) standard of care expert so he hasn't opined on standard of care or
10	those procedures.
11	MS. TARMU: Well, but at least some of them aren't standard of care.
12	MR. PRINCE: But no, no, Mr
13	THE COURT: Look
14	MR. PRINCE: Tony's asked
15	THE COURT: I think these are very good
16	MR. PRINCE: all kind
17	THE COURT: questions
18	MR. PRINCE: all kinds of he's asked all kinds of witnesses about, you
19	know, well you've done wrong levels (indiscernible) he didn't do that with this
20	particular doctor.
21	THE COURT: Well, look I think they're good questions, but my worry is if the

 guy hasn't offered an opinion at them and nobody's deposed him or read a report - MR. PRINCE: True, that's true.
 THE COURT: -- where he's offered opinions about that, then we get some
 kind of answer and you guys are like oh now we need to - -197 GAL FRIDAY REPORTING & TRANSCRIPTION 10180 W. Altadena Drive, Casa Grande, AZ 85194 (623) 293-0249
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1	MR. LAURIA: And we need four more
2	THE COURT: Yeah.
3	MR. LAURIA: hours with him.
4	THE COURT: Yeah.
5	MR. PRINCE: Okay.
6	THE COURT: So okay. Thank you.
7	[Bench conference ends at 3:22 p.m.]
8	THE COURT: All right. Dr. Rimoldi, I can't imagine that getting off a plane
9	and from returning home, you wanted to come to court for five hours, but
10	nonetheless, I very much appreciate your time. You are excused, sir.
11	THE WITNESS: Thank you.
12	THE COURT: Thank you.
13	THE WITNESS: Appreciate it. Thank you.
14	MR. LAURIA: Thank you, Doctor.
15	THE WITNESS: You're welcome.
16	THE COURT: Mr. Lauria, do you all have any further witnesses?
17	MR. LAURIA: No, Your Honor, subject to admitting the documentary
18	evidence
19	THE COURT: Okay.
20	MR. LAURIA: we would rest.
21	THE COURT: And Mr. Prince, are you all going to have any rebuttal



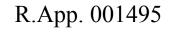
1	MR.	PRINCE: No.
2	THE	ECOURT: All right. Mr. Orth, if you would raise your right hand again for
3	me, please	e, sir.
4		BEAU ORTH
5	[having	been called as a rebuttal witness and being first duly sworn, testified as
6		follows:]
7	ТНЕ	CLERK: Thank you. You may be seated.
8	THE	ECOURT: All right. And you previously spelled your name, so don't worry
9	about that.	
10		Mr. Prince, you can go ahead.
11		DIRECT EXAMINATION OF BEAU ORTH
12	BY MR. PI	RINCE:
13	Q	Beau, you heard the questioning of Mr. Lauria of Dr. Rimoldi about you
14	not returni	ng to football. Do you recall that?
15	A	Yes, sir.
16	Q	Tell the jury why you didn't return to playing football?
17	A	I returned to football because Dr. Cash
18	Q	Why you did not return to football.
19	A	I did not return to football because Dr. Cash said that I couldn't.
20	Q	Is there any other reason why you didn't other than your doctor told you
21	not reco	mmended you not to?

Well, the doctor recommended me not to and my future -- I mean, the 22 Α 23 future damage that I could cause just wasn't worth it. 24 If it was any reasonable option, Beau, for you to return back to playing Q football, would you have? 25 -199-GAL FRIDAY REPORTING & TRANSCRIPTION 10180 W. Altadena Drive, Casa Grande, AZ 85194 (623) 293-0249 R.App. 001494

1	A	Absolutely.
2	Q	Would you have ever given it up if it was a reasonable option for you to
3	go back an	d pursue?
4	A	No, sir.
5	Q	Thank you.
6	MR.	PRINCE: No additional questions.
7	THE	COURT: Mr. Lauria?
8	MR.	LAURIA: I don't have any further questions, Judge.
9	THE	COURT: Any from our jurors? No?
10		Mr. Orth, thank you again for your time. You can go ahead and step
11	down.	
12		Plaintiff going to have any further rebuttal witnesses?
13	MR.	PRINCE: Nothing, Your Honor.
14	THE	COURT: Mr. Lauria, any surrebuttal to that?
15	MR.	LAURIA: No, Your Honor.
16	THE	COURT: All right. Ladies and gentlemen, that brings us to the
17	conclusion	of witnesses and evidence in this case.
18	MR.	TAYLOR: Hallelujah.
19	THE	COURT: There you go, Mr. Taylor. Those are famous last words. But,
20	as you can	imagine, look it's 3:30 in the afternoon. There's no way we're going to
21	get around	to arguing this case today. I still have to some jury instructions we

get around to arguing this case today. I still have to -- some jury instructions we
 can't finalize until all the evidence is presented because of the nature of some of
 them, so I've got to finish that with the attorneys now. And then I've got to get them
 typed and corrected and in an order for you, and it's going to take several hours, I'm
 sure, to argue the case anyway. So we're going to have to do that tomorrow.

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I've moved backwards my criminal calendar, so I'm planning on starting 2 our trial at 10:00, and then my plan would be to go for -- I don't know as I sit here 3 right now and I'll have to talk to the attorneys a little further, I don't know that we can get all the arguments done before we would take a lunch break. I think that's 4 probably unrealistic. But what I would plan on doing is just buying you lunch anyway 5 6 so you don't have to leave. We'll -- if we have to take a break during the arguments and let you eat lunch, we'll do that. And as soon as you're done with lunch, we'll get 7 8 you back in, finish up the arguments so you can start your deliberations.

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9 So there's two things that I can usually get really quickly when we're 10 buying you lunch. That is pizza, which includes salads, things like that, or Capriotti's 11 from downstairs, a sandwich shop. So just kind of think about that and chat with 12 Joel when you go outside about what you want for lunch tomorrow and we will have 13 that available for you, okay?

14 And with that, I'll see you tomorrow at 10:00. During the recess, you 15 are admonished not to talk or converse among yourselves or with anyone else on 16 any subject connected with the trial; or read or watch or listen to any report of or 17 commentary on the trial by any medium of information, including and without 18 limitation no newspapers, no television, no internet; and you cannot form or express 19 any opinions on any subject connected with the case until it's submitted to your for 20 your deliberations tomorrow. Okay. Have a good evening.

[Jury out at 3:26 p.m.]

22 THE COURT: Okay. And just real quickly for the record, with regard to the 23 last questions, I know originally the questions that were posed by the juror, plaintiff 24 was okay with me asking. I think though from my last comment at the bench -- Mr. 25 Prince, I just want to make sure though that you thereafter agreed with not asking -201-GAL FRIDAY REPORTING & TRANSCRIPTION 10180 W. Altadena Drive, Casa Grande, AZ 85194 (623) 293-0249 R.App. 001496 || them.

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MR. PRINCE: 1 a	Jic	J.
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THE COURT: Okay, because they were questions that I thought were good
 questions and they were put together in a good way by the juror, but they were
 asking Dr. Rimoldi to express an opinion on something that he had never been
 asked to opine on, wasn't deposed on, hadn't offered any opinions in his reports.
 And my worry was we were going to end up going off into something that was going
 to cause --

MR. PRINCE: Right.

THE COURT: -- some problems. Okay. We'll take a break for a second
 while you guys --

<sup>12</sup> MR. PRINCE: Yeah, I have --

<sup>13</sup> || THE COURT: -- use the restroom --

<sup>14</sup> MR. PRINCE: -- a 50(a) motion myself, so --

<sup>15</sup> THE COURT: Okay. Use the restroom whatnot, and then we'll start up with

<sup>16</sup> || jury instructions. Okay. We are -- hold on, before you --

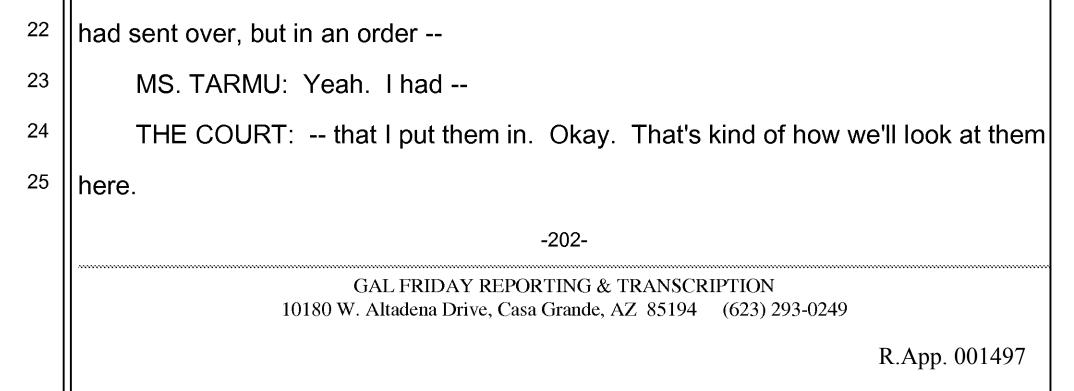
[Off the record at 3:27 p.m.]

[Proceedings resumed at 3:44 p.m.]

<sup>19</sup> THE COURT: Joel, could you hand them each a copy of that.

<sup>20</sup> THE MARSHAL: Okay.

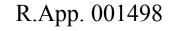
<sup>21</sup> THE COURT: These are just the most recent set of instructions that Danielle



1	[Colloquy between counsel]	
2	THE COURT: For the first thing that we had is	
3	[Colloquy between counsel]	
4	THE COURT: Okay. So Mr. Lauria, you had some questions about some of	
5	the language that's in some of the instructions, correct?	
6	MR. LAURIA: I believe so, Your Honor.	
7	THE COURT: Okay. First paragraph of your email was talking about the	
8	rebuttable presumption instruction, page that's going to be back a little ways. It's	
9	about two-thirds of the way through there. I didn't number them right now. So	
10	MR. LAURIA: The issue I have, Your Honor I'm down I'm there now.	
11	THE COURT: You got it?	
12	MR. LAURIA: Thanks. You want me to address it?	
13	THE COURT: Yeah. Plaintiffs, you guys got it?	
14	MR. PRINCE: Yes.	
15	THE COURT: Okay. Go ahead.	
16	MR. LAURIA: The issue I have is that the burden of proof would then shift to	
17	the defendant to prove by a preponderance of the evidence that personal injury was	
18	not	
19	THE COURT: Well actually, let me do this. Let me give you a copy of one that	
20	I was kind of typing on while we were in court so you guys can look at this as well	
21	because	

MR. LAURIA: I'll pass it along.
 THE COURT: -- in addition to what you were talking about saying, I think it
 should say standard of care, I realize that we didn't put the last part of it in there
 from the standard instructions which is the if you don't find the rebuttable
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presumption then plaintiff still carries their burden.

MR. PRINCE: Okay.

MR. LAURIA: And Your Honor, I apologize. I do not have the actual pattern instruction in front of me.

THE COURT: Yeah, the pattern instruction goes over the course of two pages and the instruction that I typed up just -- and what we were talking about the other day was really just -- toward the end of the first page. The second page has the last paragraph, which is what I've now added on at the bottom of the instruction that says, if on the other hand you do not find by a preponderance of the evidence that the defendant performed a surgical procedure on the wrong organ, blah, blah, blah, then the burden of proving that any personal injury was caused by medical negligence remains with the plaintiff, okay?

So that I think needs to be in there. That's part of the pattern instruction.
 I know that's not really what your objection is to, but nonetheless I added that
 because I think that needs to be in there. Okay, go ahead.

<sup>16</sup> MR. LAURIA: Well, my -- one, I'm a little confused and I suggested violated the
 <sup>17</sup> standard of care as opposed --

THE COURT: Okay.

<sup>19</sup> MR. LAURIA: -- to negligence. And my concern is this, Your Honor, it doesn't
 <sup>20</sup> remove the entire burden of proof from the plaintiff. They still have to prove that any
 <sup>21</sup> damages they claim were clearly caused by the violation of the standard of care. So

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 <sup>22</sup> you know, it doesn't eliminate a causation proof for the plaintiffs by giving this
 <sup>23</sup> instruction. But as it's worded, I think it can be confusing in that regard.
 <sup>24</sup> THE COURT: Well, wait, what - <sup>25</sup> MR. PRINCE: You - <sup>204-</sup>
 <sup>204-</sup>
 <sup>204-</sup>
 <sup>36</sup> GAL FRIDAY REPORTING & TRANSCRIPTION 10180 W. Altadena Drive, Casa Grande, AZ 85194 (623) 293-0249
 <sup>37</sup> R.App. 001499

1	THE COURT: Okay, what do you mean? Now you've confused me. I mean it
2	doesn't relieve them of their burden to prove an injury.
3	MR. LAURIA: Right.
4	THE COURT: But it absolutely I mean it presumes that the injury was
5	caused by negligence.
6	MR. LAURIA: So
7	THE COURT: That's what that statute stands for.
8	MR. PRINCE: And medical negligence is a defined term. It's a separate
9	THE COURT: No.
10	MR. PRINCE: instruction so it which is the standard of care issue.
11	THE COURT: I know.
12	MR. LAURIA: So the injury
13	THE COURT: Right.
14	MR. LAURIA: Right. The confusion is when you start using that term. The
15	injury is to the L4-5 disc, right, if there's an injury?
16	THE COURT: Okay.
17	MR. LAURIA: But that's not the same as damages, right?
18	THE COURT: Right.
19	MR. LAURIA: That's not the same as proving that damages occurred. And I
20	think that the way this is written, as I interpret it, it can be confusing to saying well
21	okay, well, we have to disprove everything they claim. That's my concern here.

MR. PRINCE: No.

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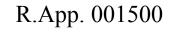
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THE COURT: Well no, I disagree with that. I mean, look, there are three

 $^{24}$  || levels of this. There is establishing the standard of care. There's establishing that

 $^{25}$  || there was a violation of the standard of care. And there's establishing what the

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1	damages were that flowed from that violation of the standard of care. Okay. I	
2	mean, that's just the basic proving negligence, right? Okay. So what the pattern	
3	instruction talks about is, if you prove by a preponderance of the evidence that	
4	somebody operated on the wrong part of somebody's body, then you've essentially	
5	presumed it's presumed that you violated the standard of care.	
6	MR. LAURIA: Right.	
7	THE COURT: You were negligent.	
8	MR. LAURIA: Right.	
9	THE COURT: That doesn't say that they don't have to prove any of their	
10	damages.	
11	MR. LAURIA: Well, what	
12	THE COURT: They still have to prove the damages and there's, you know, the	
13	instruction packet is replete with other instructions that talk about that.	
14	MR. LAURIA: And my only concern is again, you I think you've correctly	
15	identified it. If they if you find that they've proven he's operated at the wrong level,	
16	you find a violation of the standard of care, right? I mean, that's the	
17	THE COURT: Okay.	
18	MR. LAURIA: rebuttable presumption that we would then have to prove no it	
19	wasn't within the standard of care. But this talks about, rebuttable presumption, that	
20	there was an injury caused by negligence and suggests that we have	
21	THE COURT: No. No, no, no	
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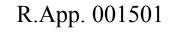
## MR. LAURIA: Okay.

THE COURT: No, no, no. Well, I mean, read the paragraph that starts with

<sup>24</sup> || except. Except that such evidence as described above is not required in a

 $^{25}$  || rebuttable presumption that a personal injury was caused by negligence arises. So

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it's saying that the injury -- whatever the injury is, the rebuttable presumption is that
the injury was caused by the negligence. Not that there was an injury, just that the
injury was caused by the negligence. That's exactly what the statute speaks to.
The -- or excuse -- and the pattern jury instruction. The law provides for a rebuttable
presumption that a personal injury was caused by negligence where the personal
injury occurred under the following circumstances.

MR. LAURIA: So what is the remaining burden of proof as you interpret the law under this instruction?

9 THE COURT: Well, plaintiff still has the burden of proof of showing that they
 10 were injured, and showing that -- what the damages were, and what their monetary
 11 damages are from that injury. But if the -- if -- and they have the burden of showing
 12 to the jury that there was an operation on the wrong part of the body under this part
 13 that we're talking about.

MR. LAURIA: Sure.

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<sup>15</sup> THE COURT: And once they've done that, there's a rebuttable presumption
 <sup>16</sup> that it was negligent.

MR. LAURIA: I understand that, and I don't have a problem with that.

<sup>18</sup> THE COURT: Okay.

<sup>19</sup> MR. LAURIA: What I'm concerned is, I -- because if I don't understand it,

<sup>20</sup> Judge, I mean -- and I'm not the sharpest knife in the drawer by any means, but --

<sup>21</sup> || you've probably figured that out over the last 10 days. As I read this, it's confusing

 to me, and I can't tell exactly what -- so what burden do they still have? Maybe we
 need to -- I mean, we need to have some specificity as this does not relieve the
 plaintiff of all their burdens.
 MR. PRINCE: It's not even saying that.
 -207 GAL FRIDAY REPORTING & TRANSCRIPTION 10180 W. Altadena Drive, Casa Grande, AZ 85194 (623) 293-0249
 R.App. 001502 THE COURT: Well, but you got to consider all the instructions together. MR. PRINCE: Read them together, correct.

THE COURT: There are instructions -- I mean, for instance, let's see, when we get to the instruction on damages. Whether any of these elements of damage have been proven by the evidence is for you to determine. Neither sympathy, et cetera, et cetera. It is only required that plaintiff prove each item of damage by a preponderance of the evidence. So we tell them that plaintiff has the burden of proof on proving their damages.

9 We tell them, you know, a little earlier in the instructions that the plaintiff 10 has the burden of proof on proving negligence. We tell them that they have the 11 burden of proof of proving negligence through the use of expert testimony. And then 12 this instruction just seeks to tell them that if they prove that there was an operation 13 under this circumstance, that it's presumed that the negligence occurred. That's all 14 that instruction speaks to. I mean, in my mind, in Egdatar (phonetic) I think that's 15 what was outlined and I think the pattern instruction which this is almost verbatim of, 16 that's all it's really speaking to. It's just saying all that's being presumed here is that 17 the injury, whatever the injury was, was caused by negligence.

<sup>18</sup> MR. LAURIA: So --

<sup>19</sup> || THE COURT: If there was any injury -- I mean, if there was an injury.

<sup>20</sup> MR. LAURIA: Well, that's -- but I mean this kind of presumes there was an
 <sup>21</sup> linjury, right, by the --

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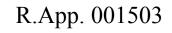
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#### THE COURT: Well, essentially yeah.

- <sup>23</sup> MR. LAURIA: So I mean are we taking away -- of the -- you know, the
- <sup>24</sup> standard burden of proof instruction? Are we taking away the first three elements
- $^{25}$  and now they only have to prove the fourth?

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THE COURT: No. I mean, the instruction may presuppose that there was an injury, but the case -- there's nothing in here that says you're mandated to find that an injury occurred.

MR. LAURIA: Okay.

THE COURT: The instruction's just saying that if there was a -- that there's a rebuttable presumption that an injury was a result of medical negligence if you operated on the wrong part of the body.

MR. LAURIA: Okay. I -- Judge, I will just -- I mean, I'll --

THE COURT: Well, in any event, so I think that's -- that one's okay. And I don't agree that the language should be a violation of the standard of care. I think what it is, is it's a negligence instruction, and in this case medical negligence. And just as the pattern uses the terminology negligence, I think the instruction should use that as well.

The next one that you were talking about the language of
 was -- one, two -- if you flip back about six instructions, it's the damages for pain and
 suffering.

MR. LAURIA: Toward the back or toward the front? I'm sorry, I

<sup>18</sup> || was --

<sup>19</sup> || THE COURT: Oh, go -- keep going back.

<sup>20</sup> MR. LAURIA: Okay.

<sup>21</sup> THE COURT: I'm sorry. Back another six instructions or so. The one that

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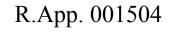
## begins the damages for pain and suffering.

## MR. PRINCE: Yeah.

THE COURT: Okay. And I agree. I don't know that there's any need to have

 $^{25}$  on the other hand. I don't think the on the other hand is that big of a deal, but I think

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it's more appropriate just to say damages for pain and suffering compensate 1 2 damages for loss of enjoyment of life compensate.

3 MR. PRINCE: Well, the only issue I had was, with that, Judge, is just to ensure that they're -- there's differentiation. And I think that was the point of the instruction. On the other hand, that's kind of like well, that's one type of damage. This is another type of damage.

THE COURT: Yeah, I don't think the instruction, even with on the other hand, 7 8 can be read in my mind to create separate categories for them to make an award on in terms of -- and the verdict form doesn't ask them to do that. But I don't think it's 9 10 inappropriate to define both of those things for them. I just don't think you really need on the other hand. 11

#### MR. LAURIA: And I think it does kind of suggest it's a separate --

13 THE COURT: Okay.

14 MR. LAURIA: -- category which I think is best left out. So --

15 THE COURT: Anyway, so in anticipation of that, I changed one of the instructions. So I'll give you copies of that one --16

MR. LAURIA: Thank you.

THE COURT: -- as well. You can kind of stick that into your packet for that 18 19 one.

20 MR. LAURIA: Thank you.

21 THE COURT: There's two of those. Okay. And then I'll just tell you that I

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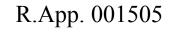
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changed your read backs instruction to be a play backs instruction.

### MR. PRINCE: Okay.

THE COURT: So that's -- but I've already replaced it in your packet so don't worry about that.

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And then the next thing we have is, Mr. Lauria, you all were going to propose something regarding punitive damages, and we have to talk about our 42.021 issue.

MR. LAURIA: Correct, Your Honor. I just think it's appropriate since there have been all kinds of insinuations and allegations and claims that Dr. Capanna 6 knew, but didn't tell the patient, and mislead the patient, and -- about what was on the X-ray, and that this jury be instructed that there is no claim for punitive damages. There's no action that would support a claim for punitive damages in this case. And 9 so I think it is important that they be instructed that those are inappropriate. They're 10 not to award damages based on a punishment if they think that the insinuations are accurate, but that their damages need to be awarded only on the elements that are 12 recoverable in this case, and punitive damages are not recoverable.

13 So I think that clarification is necessary given all of the, again, kind of the 14 argument, or the hounding, or the pointing, or the saying, you knew, you didn't tell 15 him. You know, that kind of thing. If a juror believed that those occurred they may 16 say well, let's cream the guy because, you know -- and they need to be told and 17 instructed in the law. I mean clearly that's an appropriate --

18 MR. PRINCE: No.

19 MR. LAURIA: It's an accurate statement of law.

20 THE COURT: Well, just --

21 MR. PRINCE: I don't even know where -- I didn't have --

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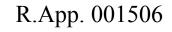
#### THE COURT: -- just out of curiosity --

MR. PRINCE: How do you give a punitive --

THE COURT: Where did it -- hold on. Where did this come from because I

#### can't find it on CALJIC --25

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1	MR. LAURIA: It's a
2	THE COURT: on the CACI.
3	MR. LAURIA: Yeah, it's CACI. It's a standard CACI In fact I've got the cite
4	down there to it.
5	THE COURT: I know, but I looked
6	MR. PRINCE: I don't even have a copy of it.
7	THE COURT: them up and they don't I was looking at the December 2014
8	California Civil Jury instructions and there is no 3924. So I can't find it.
9	MR. LAURIA: That Judge, maybe my book's a little bit you know, not
10	December 2014, but
11	THE COURT: Okay.
12	MR. LAURIA: or maybe they renumbered it. I don't know. But
13	MR. PRINCE: How does it read even?
14	THE COURT: Pardon?
15	MR. LAURIA: I sent it to you.
16	MR. PRINCE: How does it even read? I haven't seen it.
17	MR. LAURIA: Oh, I sent it to you guys.
18	MS. TARMU: Hold on. Let me look.
19	MR. PRINCE: Danielle's looking.
20	MS. TARMU: Did you send it like in an email?
21	THE COURT: It says you must not include in your award any damages to

punish or make an example of the defendant. Such damages would be punitive
 damages and they cannot be part of your verdict. You must award only the
 damages that fairly compensate plaintiff for his loss.
 MR. PRINCE: Yeah. You've already instructed on the damage calculations.
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1	And so I mean, we're not there's no item in there for punitive damages, there's
2	you know, if they're following the jury instructions and carefully reading them we
3	don't have it, apparently, Danielle says. But any event, that's not a Nevada based
4	instruction. You don't give a non-punitive damage instruction in these types of
5	cases in Nevada. I don't know
6	MR. LAURIA: Well, I have had them given in Nevada, Judge
7	MR. PRINCE: Well
8	MR. LAURIA: where just where they were
9	MR. PRINCE: I haven't finished my argument?
10	MR. LAURIA: Sorry, I thought you were done, Dennis.
11	THE COURT: Hold on.
12	MR. PRINCE: I'm talking a little slow.
13	THE COURT: Hold on.
14	MR. PRINCE: And so anyway, nevertheless, you it you've instructed
15	adequately on negligence. You've instructed adequately on the damages the jury
16	may consider giving.
17	THE COURT: All right, Mr
18	MR. PRINCE: And there don't need to be any further instruction on that,
19	particularly and interjecting that concept.
20	THE COURT: Mr. Lauria?
21	MR. LAURIA: Your Honor, they again, because of the nature of the

allegations here. This isn't just a standard med-mal case, right, where they're
 claiming not only did he do it, but then he hid it and this -- and then what he said he
 did isn't what he did. The kinds of things that are done to inflame a jury's passion in
 a case like this. So all you're saying -- it's a correct statement of the law. You're not
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telling them anything confusing or that's not accurate. You're just telling them look,
 even if you feel that way, because we tell them don't -- you know, don't use passion
 or prejudice.

THE COURT: Right.

MR. LAURIA: But all it says is, you know, you're -- in this case, you're not authorized to base a decision on punitive damages because that's not part of the case.

8 THE COURT: I know. But I got to tell you, I just never advocate instructing a
 9 jury on the things that aren't part of the case.

MR. PRINCE: Right.

THE COURT: I mean, because you're basically inserting something in there
 that isn't part of what they've been told about, or instructed about, or heard evidence
 about. And I just always think that you go down a dangerous path trying to now get
 people to think about something that has never even been mentioned to them and
 they have no reason to think about.

<sup>16</sup> MR. LAURIA: Well --

THE COURT: Now, I'm not saying that necessarily means somebody's going
 to go hey, lightbulb, oh, yeah, let's punish --

<sup>19</sup> MR. LAURIA: Well --

<sup>20</sup> THE COURT: -- this guy. That's a good idea.

<sup>21</sup> MR. LAURIA: Yeah, I don't --

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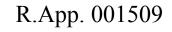
#### THE COURT: But --

MR. LAURIA: -- think that's -- I think if they're inclined to go that way they're

<sup>24</sup> going to go that way anyway. And this just tells them as a matter of law, you can't. I

<sup>25</sup> || mean -- and so it's a correct statement of the law that provides some protection

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against them going in a direction they shouldn't be going. And given the facts and
 the presentation of this case, I just think it's appropriate and it's required to make
 sure that we don't have some element of that in the verdict.

THE COURT: Well, I'm not going to give that. I mean, I've given them 4 5 instructions that very clearly define what the case is about, what the damages issue, 6 how they're suppose to, you know -- what are proper considerations for the damages issue. I don't want to give them something that's inserting into their 7 8 thought process something that isn't involved here. I mean for that matter you could, you know, go on and say give them the instructions about fraud saying fraud's 9 10 not a part of the case, but because there's some issue with medical records that 11 they may be thinking about that, it's just -- I -- no. I don't agree that that's necessary.

<sup>12</sup> I've never given a non-punitive damages instruction in any personal
<sup>13</sup> injury case regardless of the nature of allegations against somebody. Twofold,
<sup>14</sup> number one, I don't think anybody's ever proposed it, but I don't think that I ever
<sup>15</sup> would give it just for the very reason that I'm stating. I don't really think it's a good
<sup>16</sup> idea to raise things that aren't part of a case.

Okay. And then the last thing is our 42.021 instruction. I did get the
 proposed one that you all had typed up. And I will tell you that, you know, in my
 searching through my fellow judges, I didn't get a whole lot of responses. The one
 response that I had that I thought might bare some fruit was Judge Kishner, and she
 said, you know, actually it looks like maybe we didn't give that instruction because

we can't find it anywhere now. Judge Wiese said I found the statute unconstitutional
 so I've never given it, which, you know, that's the easy way out. Nobody else said
 that they had ever given such an instruction.
 MR. PRINCE: Right.
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THE COURT: And probably the one thing I got that helped me the most as to where I sit right now in my decision making was somebody that just asked me, why 3 would you give that? And I was kind of, well what do you mean why would I give that? Do you think the statute is unconstitutional? And that judge said, no, no, I think the statute's very much constitutional. But why would you give them an instruction that pertains to a particular piece of evidence without other instructions that pertain to particular pieces of evidence? Which was very thought provoking for me. But let me hear what you guys have to say on the one that you propose.

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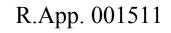
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9 MR. PRINCE: Like I said preliminarily I'm just renewing my motion on the 10 constitutionality. I just think when -- now that you've had a chance to try to work an 11 instruction to see how unworkable it -- the statute -- statutory scheme really, really 12 is, once you start to really conceptually think about it and then implement it in a case 13 like this because you have to have -- there's no other testimony that how can the 14 jury then make a determination of what is a reasonable medical expenses solely 15 based on the reimbursement amount on the record that's before them. They don't 16 have -- for example, if they brought somebody else in, an expert of some type, to 17 talk about the reasonable charge is what a reasonable physician would accept as a 18 reimbursement for the service, that may be one way to accomplish it.

19 But on the evidence they have -- this jury has before it, there's no basis 20 for the instruction. There's no basis for even -- unfortunately for the evidence to 21 come in because there's -- then they're not going to be told -- given any guidance

- 22 what to do with it. And it's very specific directed towards medical expense. And it
- 23 allows the jury to speculate. It invites speculation. For example, what if a juror's
- thinking, well, they have health insurance. I wonder if they have to pay the health 24
- 25 insurance back? You know what I mean? You know, then you're not telling them

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the whole story. I mean, they're not being told that held -- the university nor the private insurance for the family has to be reimbursed back, because they don't have to be reimbursed that.

MR. LAURIA: We can add that on there. I'm okay with that.

MR. PRINCE: I'm not advocating any -- adding anything on there. I'm just saying to you that it invites speculation by the jury. There's not adequate guidance given to them. And I think this -- I think as you realized, trying to come up with what's a workable instruction, it's almost completely unworkable. And so therefore that lends credibility to the -- I mean, a lot of persuasiveness, I think, to the vagueness problem that it has.

THE COURT: All right.

12 MR. PRINCE: So anyway --

13 THE COURT: Mr. Lauria?

14 MR. LAURIA: Judge, I -- we've taken it right from the statute. It is again, a 15 correct statement of the law. Plaintiff has requested, and you said you were going 16 to give, an instruction that says they can't consider whether plaintiff has medical 17 expenses -- I mean insurance to cover future medical expenses.

THE COURT: Right.

MR. LAURIA: So if you give them that one, and I think you're only giving that 19 20 one because you were planning to give this one, as I understood your --

21 THE COURT: No, no, no. I'm giving that one because there's no guarantee of

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somebody having insurance in the future --MR. LAURIA: Okay. But you don't --THE COURT: -- that makes something payable to them. MR. LAURIA: -- normally give that instruction, right? -217-GAL FRIDAY REPORTING & TRANSCRIPTION 10180 W. Altadena Drive, Casa Grande, AZ 85194

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THE COURT: No, normally you give an instruction that says you're not to
 consider whether somebody has insurance.

MR. LAURIA: Sure. So in this case -- again, I just think that you just need a
 basic -- what we tried to draft is something that is basically reflects the statute
 because you're telling them, you can't consider whether there's insurance in the
 future.

THE COURT: Right.

<sup>8</sup> MR. LAURIA: So why aren't -- why are you not permitted to tell them - <sup>9</sup> because the statute clearly says, you are permitted to consider evidence that
 <sup>10</sup> payments have been made.

THE COURT: And that evidence came in at trial.

<sup>12</sup> MR. LAURIA: Right.

13 THE COURT: I mean, here's my thing. For instance, we don't give an -- you 14 got to step back a little bit, and this kind of is what I started thinking through when 15 the judge posed that question to me. If we give people jury instructions that talk 16 about the generalities of the justice system and how they can -- how they deal with 17 general concepts, you know, what's direct and circumstantial evidence? How do 18 you use common sense? You know, how do you consider all the instructions as a whole, how you vote, things like that, how you elect a foreperson, if you need to 19 20 hear evidence again. General concepts that apply in every kind of criminal trial. 21 And then you give them special instructions that define the law surrounding the type

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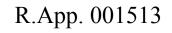
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## of case that they have.

It is very, very rare that you give an instruction that pertains to particular

- <sup>24</sup> || pieces of evidence. The reason being that you always have an instruction, and we
- <sup>25</sup> have it here, that says in considering any proposition in the case, you consider all

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the evidence that you're given regardless of who produces it, okay? So we don't 2 then go in and give a specific piece of evidence about that bill or that photograph or 3 what have you. Sometimes you may do that because there's a particular tentative law that applies to how they can consider this evidence. For instance, in criminal --4 5 well, it actually applies to civil cases as well. If you're going to introduce evidence of 6 somebody's prior bad acts somehow because that pertains to deciding an issue in the case, then the Supreme Court has said that generally doesn't come in at a trial. 7

8 There are only specific ways that a jury should consider that. Not to infer 9 that people are bad people, or that they have a propensity to do back things, but 10 because it pertains to proving a particular item in a particular case. So we want to 11 have a written jury instruction on that. We do not give instructions that say, you 12 know, plaintiff has produced witnesses who say Mr. Orth is going to need two fusion 13 surgeries in the future, and the defense has produced experts to say he's not going 14 to need those surgeries, you can consider all that when you decide what, if any, 15 award to give him.

16 MR. LAURIA: Of course. I mean --

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17 THE COURT: Well, we don't do that because that's evidence and they know 18 they consider the evidence. You give them instructions like we did here on insurance because generally speaking, insurance is off limits, and they need to 19 20 know that they cannot give any kind of award with some kind of concern for Dr. 21 Capanna's insurance. They cannot give an award with any kind of concern about

Mr. Orth's future insurance. But in this case, they've been given evidence about 22 insurance that's paid for things so far, and what Mr. Orth has paid in terms of 23 24 procuring that insurance. So that's evidence that's in front of them. It's evidence 25 that they can consider. So it's kind of a redundancy to say, in this case the -219-GAL FRIDAY REPORTING & TRANSCRIPTION 10180 W. Altadena Drive, Casa Grande, AZ 85194 (623) 293-0249 R.App. 001514 defendant introduced evidence of amounts paid by insurance, and plaintiff
introduced amounts he paid for that insurance, you can consider that. I mean, if
we're going to do that then why is it just about one piece of evidence versus another
piece of evidence?

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MR. LAURIA: Well, again, I just think it's confusing, Judge, without some instruction when we're saying, you know, you're not to consider insurance for the doctor, which I object to anyway, and you're not to consider whether there's future --insurance to pay for future medical specials. And so all we're telling them is you can't consider insurance, you can't consider insurance. And then -- well, can they consider this or not? I mean, I --

11 THE COURT: Well, but you're basically -- and this is kind of at the end of the 12 day what I -- as I was thinking through it decided. This is the kind of micro 13 management instruction that I disagree with. I think people are always so worried 14 that jurors just won't follow the instructions that they want to over instruct juries. And 15 so this was one that basically presupposes -- well, they -- they're not going to read 16 or understand an instruction that says you can't consider future insurance issues 17 with the plaintiff. So because we're worried they won't read or understand that, we 18 need to give them this one. We have to presume that the jury is going to follow the 19 law that I give them, and that they're going to read that instruction and say, we can't consider anything related to whether Mr. Orth will have future insurance. That's the 20 21 future.

We can consider it, and we were given evidence about the fact that there
 was insurance that made payments so far. So we can consider that because the
 judge told us in here, consider all the evidence that we were given no matter who it
 was that produced it in deciding, you know, what kind of an award to give. And then
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we give them instructions on damages that tells them how to go about those things,
and the cost of those things, and the methods of calculation are non-specific. And
so I just, you know, going back through this I think, no, this isn't an appropriate one.
You know, it's just like saying are we going to give them an instruction that says
plaintiff introduced a life expectancy table. Defendant introduced experts to talk
about factors that pertain to the plaintiff that might lead him to live a shorter life
span, so you can consider all that.

Plaintiff introduced photographs and defense had somebody that
introduced photographs. You can consider all of that. We can always do those
things, but it -- you just have to presume that the jurors are going to do their job and
they're going to follow the law that we give them. So I don't think my trouble in
formulating this instruction originally gives me any pause to go back and say, oh, the
statutes unconstitutional. I still think the statute, regardless of what I think about it
personally, meets constitutional unless --

<sup>15</sup> MR. PRINCE: Be bold, Judge, be bold. The citizenry of the State of Nevada - <sup>16</sup> THE COURT: Look --

<sup>17</sup> MR. PRINCE: -- is counting on you.

THE COURT: Hey, I've been bold plenty of times before, but this one I just -- I
 still think it's constitutional. I just think in retrospect that this isn't an instruction that
 you need to try and formulate an instruction on because it's that one off thing where
 you're trying to talk about a particular piece of evidence, and it's not a piece of

 evidence that mandates anything under the law. So in any event, I'm not going to
 give that instruction.
 Okay. And you -- plaintiffs didn't have any further instructions, right?
 MR. PRINCE: No.
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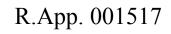
1	THE COURT: No? Okay.
2	MR. LAURIA: And Your Honor, the one more thing I just want to raise,
3	again, for the record, because I understand the Court's position but I want to make
4	sure that my rights are preserved. Normally in a case in a for future damages
5	case, especially future medical specials, the instruction would be, and the verdict
6	form would have reduce them to a net present value. To reduce them to a net
7	present value though requires me to have some economic testimony
8	THE COURT: Right.
9	MR. LAURIA: to show what that net present value was. It is my position,
10	because of the timing of the disclosure of those future damages in this case
11	THE COURT: Okay.
12	MR. LAURIA: that I was prevented from essentially having economic
13	testimony to address the issue of the net present value of the case. So I just want to
14	make a record that the timing of the disclosure of the future damages has
15	prevented me from being able to present it as a net present value.
16	THE COURT: Okay. Mr. Prince?
17	MR. PRINCE: Your Honor, the future damage component was known at a
18	minimum in May. They never asked for any additional relief in terms of hiring an
19	economist to construct if that's what their desire was, a future you know, a
20	present value. Those I mean, I had Dr. Cash testify as to the present value based

<sup>22</sup> || says he's familiar with that. He does a survey of the various medical costs that we

<sup>21</sup> upon his knowledge of medical costs and you know, now and how they grow. He

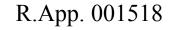
- <sup>23</sup> were talking about in the case. So at this point -- I mean, he -- the defense didn't
- <sup>24</sup> offer that testimony. They had an opportunity to go out and get that had they
- <sup>25</sup> wanted to, had they really felt they were that prejudiced by it. I think that's just one

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1	additional add-on to this whole delay argument.
2	MR. LAURIA: Well, Your Honor
3	THE COURT: Mr. Lauria?
4	MR. LAURIA: for the record, Dr. Cash did not talk about a net present value.
5	MR. PRINCE: Yes, he did.
6	MR. LAURIA: He just said here's what it cost today.
7	THE COURT: No, I don't think he talked about a net present value.
8	MR. PRINCE: I asked the question, the current value of those services.
9	MR. LAURIA: That's not the same as net present
10	MR. PRINCE: Present the present value. Yeah, so I used those words. I for
11	sure did.
12	MR. LAURIA: That's not the same as the net present value as we all know
13	because that's based on a discount.
14	THE COURT: No, I agree that the questions were, what's the current cost of
15	these proceeding things.
16	MR. LAURIA: And again
17	THE COURT: But here's the thing. I know you when I made my rulings
18	before trial, asked to stay the proceedings to take a writ because you disagreed with
19	the ruling, but I don't recall there being any, I want to move to continue the trial so I
20	can go hire an economist now
21	MR. LAURIA: Well

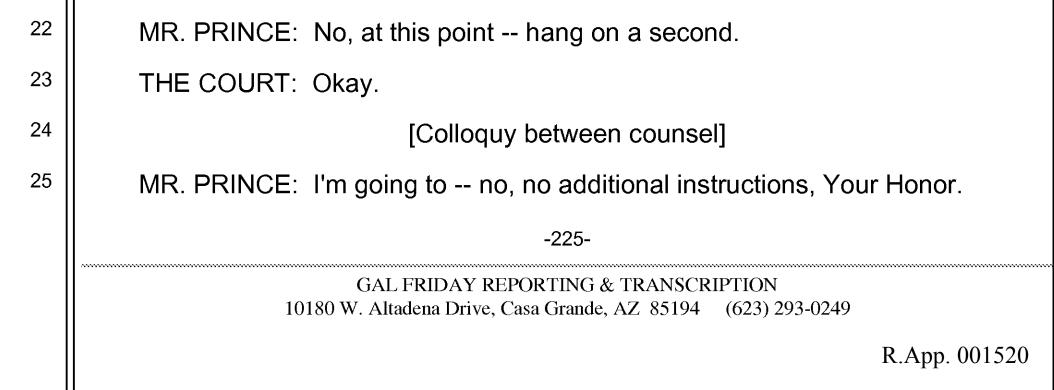
THE COURT: -- to address these issues. So I think that's - MR. LAURIA: -- I did request a continuance to address the Ruggeroli issue, I
 believe, at the time. So -- and you said we're going forward, Judge, so -- and again,
 given the timeliness or the untimeliness of the presentation, I don't think it's fair to
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1	place the obligation on the defendant to seek extraordinary relief. So it's for the
2	record. I mean, it's
3	THE COURT: Okay.
4	MR. LAURIA: out there.
5	THE COURT: Well, I just also want my record to be clear
6	MR. LAURIA: I understand.
7	THE COURT: in two areas that I don't think you preserved that timely. And
8	even if you preserved it timely as to Ruggeroli, which I'm not necessarily agreeing
9	to, they aren't proceeding with any request for future damages for Ruggeroli. So
10	that one's irrelevant.
11	MR. LAURIA: Well, okay.
12	THE COURT: Okay. All right. So let me number off our packet and we'll get
13	you out of here. So page 1 is obviously number 1. Number 2 is going to be if in
14	these instructions. Number 3, the masculine form. Number 4, the purpose of the
15	trial. Number 5, your purpose as jurors. Number 6, you must decide. Number 7,
16	the evidence which you are to consider. Number 8, in determining whether any
17	proposition. Number 9, although you are to consider. Ten, if during this trial.
18	Eleven, you must not it doesn't have a line on it.
19	MR. PRINCE: That's 11?
20	THE COURT: Yeah. I don't know why that doesn't have that on there.
21	Anyway, I'll put instruction number at the top of that one. That's 11.

 Twelve, credibility or believeability; 13, an attorney has a right to
 interview; 14, discrepancies; 15, a witness who has special knowledge; 16, an
 expert witness has testified; 17, a hypothetical question; 18, certain testimony has
 been read; 19, you are not to discuss plaintiff; 20, you are not to discuss defendant;
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1	21, whenever in these instructions I state; 22, the preponderance; 23, the plaintiff	
2	seeks to establish; 24, medical negligence means; 25, plaintiff has the burden; 26,	
3	illegal cause; 27, you must determine; 28, in performing professional services; 29, it	
4	is the duty of a physician; 30, the standard of skill and care; 31, a physician is not	
5	necessarily negligent; 32, causation of injury; 33, in this case liability; 34, plaintiff	
6	has the right to rely; 35, more than one person; 36, a person who has a condition;	
7	37, the law requires; 38, in determining the amount of losses; 39, damages for pain	
8	and suffering; 40, no definite standard; 41, whether any of these elements; 42,	
9	according to a table of mortality; 43, the Court has given you instructions; 44, it is	
10	your duty; 45, if during your deliberation; 46, when you retire; 47, now you'll listen to	
11	the arguments of counsel.	
12	Plaintiff has a copy of those 47?	
13	MR. PRINCE: I do, Judge.	
14	THE COURT: Other than the objections that were raised on Friday or today,	
15	do you have any objections to any of those 47?	
16	MR. PRINCE: No.	
17	THE COURT: Do you have any others that you're proposing be given that you	
18	would like to have marked as court exhibits	
19	MR. PRINCE: One moment.	
20	THE COURT: because the Court is not going to give them?	
21	[Colloquy between counsel]	



1	THE COURT: Okay. And you've got a copy of the verdict form?
2	MR. PRINCE: I do.
3	THE COURT: And you're in agreement with that as well?
4	MR. PRINCE: I am.
5	THE COURT: All right. And Mr. Lauria, you all have a copy of the 47?
6	MR. LAURIA: We do, Your Honor.
7	THE COURT: And other than the objections raised on Friday or earlier today,
8	do you have any objections to any of the 47?
9	MR. LAURIA: I do not.
10	THE COURT: Okay. And do you have some that you want to have marked as
11	court exhibits that are being proposed but not given?
12	MR. LAURIA: I do. I think that
13	THE COURT: Okay.
14	MR. LAURIA: they are the ones that we presented two versions of the
15	42.021, and the version on not punitive damages not permitted.
16	THE COURT: Okay. Can you give Debbie clean copies of those because
17	mine are all marked up?
18	MR. LAURIA: Sure.
19	THE COURT: Okay.
20	MR. LAURIA: Do you need them right now?
21	THE COURT: No. you can just bring them tomorrow, that's fine. And then do

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you have a copy of the verdict form as well?

MR. LAURIA: I'm looking.

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THE COURT: It should be on the back of the packet that I gave you guys. MR. LAURIA: Yes. And my only question, Judge, and I haven't seen it put this -226-GAL FRIDAY REPORTING & TRANSCRIPTION 10180 W. Altadena Drive, Casa Grande, AZ 85194 (623) 293-0249 R.App. 001521

1	way before, because I don't think we have any issues of related expenses. So the
2	only evidence has been for medical expenses. So I don't know what related
3	expenses means. And there's been no evidence of related expenses.
4	THE COURT: Well, that's a good question. I don't even think I noticed that
5	actually.
6	MR. PRINCE: Well
7	MR. LAURIA: So I think if it says past medical expenses, future medical
8	expenses, I have no problem.
9	MR. PRINCE: I think related would be related to health care.
10	THE COURT: Well
11	MR. PRINCE: I mean, there's various
12	THE COURT: I tell you what, I'm going to change that because I like to make
13	it, obviously, in line with the instruction that they're given which is the reasonable
14	medical expenses they've incurred.
15	MR. PRINCE: Okay.
16	THE COURT: So I mean, I'll I want to just leave it as past medical
17	expenses
18	MR. PRINCE: Okay.
19	THE COURT: and future medical. So I'll I have it on my computer. I'll
20	change it.
21	MR. PRINCE: So you're going to fix it?

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THE COURT: Yeah. Other than that, any objections to the verdict form? MR. LAURIA: No, Your Honor. THE COURT: Okay. Then that is it. I will see you guys tomorrow 10:00. MR. PRINCE: Oh, I have a motion. -227-GAL FRIDAY REPORTING & TRANSCRIPTION 10180 W. Altadena Drive, Casa Grande, AZ 85194 (623) 293-0249 R.App. 001522 THE COURT: Oh, I'm sorry.

MR. PRINCE: A 50(a) motion.

THE COURT: Okay.

MR. PRINCE: We're moving for the directed verdict at the conclusion of all of the testimony because, Your Honor, the only competent testimony that Dr. Capanna met the standard of care in this case was offered by Drs. Yoo and Dr. Cash. The only standard of care expert witness that was identified who testified on behalf of the plaintiff was Dr. Belzberg. And Dr. Belzberg barely testified in his -- in the trial testimony and I have the transcript here, that solely looking at the records and the MRI imaging he could not determine that Dr. Capanna met the applicable standard of care in treating Beau Orth.

Moreover, on 68 of his trial transcript he says I'm not the judge, I'm not a
jury. I've read Dr. Capanna's deposition as to what he did at the time of the surgery.
I listened to Dr. Cash this morning. He has a very different explanation of what
happened at the surgery. If you believe what Dr. Capanna said, yes, he was within
the standard of care with what he did. And again, a very unusual approach to 5-1,
but it wouldn't be outside the standard of care. And no, if I believe Dr. Cash that Dr.
Capanna was never at 5-1, and was only at 4-5, I would say that he was outside the
standard of care.

And then there was some questions asked about, you know, can a
 surgeon be at the wrong level and be within the standard of care. And he answered

<sup>22</sup> yes, but that wasn't particularized to Dr. Capanna. It was only kind of in a
 <sup>23</sup> hypothetical sense, and so there was no competent testimony that Dr. Capanna did
 <sup>24</sup> in fact meet the standard of care.
 <sup>25</sup> And under *Morsicato* you have -- have to have to a reasonable degree of
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medical probability that a defendant met the standard of care in order to meet the 2 evidentiary requirements for expert witness testimony on the standard of care 3 testimony. And they have to have that in order to defend them self. Just like we have the obligation to the burden to prove it. 4

THE COURT: So -- I'm sorry. What are you making of the testimony that said if you believe Dr. Capanna's version of what occurred then he did not violate the standard of care?

MR. PRINCE: Correct. Because it doesn't meet the requirements of expert opinion testimony on standard of care. It has to be more probable than not --

THE COURT: Okay.

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MR. PRINCE: -- meaning a reasonable degree of medical probability. He's just saying, well, if you believe one version, it's this way. If you believe another version, it's that way.

THE COURT: Right.

15 MR. PRINCE: That's not an affirmative of an opinion that the doctor met the applicable standard of care. That's just some alternative that's being given. 16

17 Typically -- I mean you can give alternative causation theories, but you can't give an 18 alternative standard of care opinion.

19 THE COURT: Right.

20 MR. PRINCE: And so -- you know, using the Williams example. I mean, you 21 might be able to get away with it in a causation issue on an injury issue, but not as it

22 relates to standard of care. There needed to be affirmative testimony that he met 23 the standard of care. We're already -- he's -- Dr. Belzberg acknowledged wrong 24 level surgery. Dr. Rimoldi today confirmed wrong level surgery. Dr. Yoo confirmed 25 wrong level surgery. Dr. Cash confirmed wrong level surgery. The evidence is -229-GAL FRIDAY REPORTING & TRANSCRIPTION 10180 W. Altadena Drive, Casa Grande, AZ 85194 (623) 293-0249 R.App. 001524

overwhelming that he was at the wrong level and therefore negligent in his care.
And that -- kind of this alternative well if you believe this way, you know, Dr.
Capanna, he met it. If you believe Cash, he didn't meet it. Kind of throwing your
hands up in the air. I don't -- like for example, I don't know what to believe. That's
kind of essentially what he's getting down to. That can never be the evidentiary
threshold to meet -- you know, to state to a reasonable degree of medical probability
under *Morsicato*.

8 THE COURT: Well, but you acknowledge that, you know, most medical 9 malpractice cases, when they're talking about the standard of care, they're -- the 10 debate is over whether a particular procedure was the right thing to do or not. 11 Whether that met the standard of care as opposed to the allegation here being that 12 the procedure, you know, doing a discectomy was fine. That his conduct in 13 performing the discectomy was fine. It's just that he went to the wrong place, is the 14 allegation, to do the discectomy. So what you're having to decide is did he go there, 15 to the wrong place accidently, or did he go there intending to do what he described 16 that he was intending to do.

That's not anything that Dr. Belzberg could affirmatively say, you have to
believe Dr. Capanna, and therefore find that he did not violate the standard of care.
I mean, it was -- I was kind of surprised the way he phrased it as well to be quite
honest, but I think what he's saying, admittedly, to the jury is, if you believe him
when he's describing why he was where he was, then he didn't violate the standard



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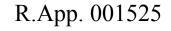
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MR. LAURIA: And that's for reasonable medical probability.

THE COURT: Well, yeah. I mean, all --

MR. LAURIA: Right.

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THE COURT: -- of these things --

MR. LAURIA: Right.

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THE COURT: -- were to a reasonable degree of medical probability.

MR. PRINCE: Yeah, but I mean that --

THE COURT: I don't have an issue with that.

6 MR. PRINCE: -- kind of like -- that alternative like well, he -- he's not saying based on the evidence he's reviewed that it's his opinion based upon the state of the 7 8 evidence that he met the standard of care. He's not saying that. And I'll read the --9 read it again. I mean, it's just if you believe -- I'm not the judge and the jury. I've 10 read Dr. Capanna's deposition as to what he did. When I listen to Dr. Cash he has a very different explanation. If you believe what Dr. Capanna said, yes, he was within 11 the standard of care in what he did. If you -- that's not him saying I've objectively 12 reviewed the information. I formulated an opinion based upon an adequate 13 14 foundation of factual information and therefore competent to give opinion testimony 15 to this jury. It does not meet that requirement.

MR. LAURIA: Can I address --16

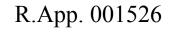
MR. PRINCE: So there -- well, hold on.

18 MR. LAURIA: I'm sorry. I thought -- I keep thinking your done, Dennis, 19 because you pause.

20 THE COURT: It's okay. I think you guys have both done that during the trial. 21 MR. LAURIA: I think --

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        THE COURT: Like I said, you're an old married couple. Sometimes --
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        MR. PRINCE: No.
        THE COURT: -- you pause --
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        MR. PRINCE: No.
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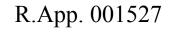
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1	THE COURT: and the other one
2	MR. PRINCE: No.
3	THE COURT: thinks it's time
4	MR. PRINCE: No.
5	THE COURT: to start talking.
6	MR. PRINCE: I'm please.
7	THE COURT: I know, you don't want to be married to each other but you are.
8	MR. PRINCE: I don't want to be married to him.
9	MR. LAURIA: Yeah, I'm not
10	MR. PRINCE: There's no circumstance
11	MR. LAURIA: married to you either so there.
12	MR. PRINCE: under which that so
13	MR. LAURIA: Oh I'm hurt.
14	MR. PRINCE: nevertheless, I don't think that that is a sufficient evidentiary
15	basis to state to a reasonable degree of medical probability that someone met their
16	standard of care consistent with the requirements of <i>Morsicato</i> . And the purpose of
17	that has to be some basis of reliability for the testimony and the way you accomplish
18	that in these medical malpractice cases or in medical causation in non-medical
19	malpractice cases, there has to be a sufficient basis to make it trustworthy, to make
20	it reliable testimony. And here you don't have that with him.
21	And he even went to the next level of saying, just looking at the records I

- <sup>22</sup> can't say it was looking at that. I -- you know, Dr. Capanna says one thing, and I
- <sup>23</sup> guess if you believed it, all right, even though it was a non-traditional approach,
- <sup>24</sup> maybe it was within the standard of care. So I don't think that record is enough for
- <sup>25</sup> || them, and therefore the only evidentiary -- the only evidence in the record would

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therefore be our evidence, and therefore it would be required to give us a directed 2 verdict on both the standard of care in injuring the disc as well as causation.

THE COURT: Mr. Lauria?

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MR. LAURIA: Judge, it's a hypothetical as you get in every malpractice case. Because -- and a witness will give an opinion that somehow met the standard of care, and they're always relying on some certain aspects of evidence, right? And then you get the hypothetical and say well, if A, B, C, D and E, or if that evidence is incorrect, or if you interpret this film this way, then you agree he didn't meet the standard of care, right? And witnesses always have to go yes, you're right, if facts B, then he didn't. But in my opinion, I'm relying and I'm believing facts A, and then he did. Clearly before this section Dr. Belzberg had testified to his opinion to a reasonable medical probability Dr. Capanna met the standard of care.

13 When he is given the alternative hypothesis, if you assume X, well, then you know, I'm not the judge or jury that -- that's different. So I think we clearly met 14 15 that standard. It is up to the jury to decide. You don't decide -- if an expert says just 16 because yes, if you give me that hypothetical or you take that away, now he hasn't 17 met the standard of care, that doesn't take away his testimony about first complying 18 with them. So I think that's what he's saying here. He's saying, I've read Dr. 19 Capanna's testimony. We now have Dr. Capanna's testimony also on the record in 20 this trial, where he describes what he did and how he did it, which is just exactly in 21 conformity with what Dr. Belzberg said he relied upon.

If the jury finds that evidence credible, and we have the testimony of Dr. 22 23 Belzberg, then to a reasonable medical probability under Dr. Belzberg's standard, he's met the standard of care. He said I'm not going to be the judge or jury of the 24 25 facts or not, but if the doctor as described what he did, that's appropriate within the -233-GAL FRIDAY REPORTING & TRANSCRIPTION 10180 W. Altadena Drive, Casa Grande, AZ 85194 (623) 293-0249 R.App. 001528

standard of care. So that is not a Rule 50(a) decision this Court can make. I think 2 that's a matter for the judge -- the jury to decide factually, you know, what do they 3 believe occurred? Do they believe he went to the wrong level and did a discectomy at L4-5 or do they believe his testimony that he was at L4-5 for a reason to do 4 something else and inadvertently injured the disc at L4-5. 5

If they believe that by the testimony of Dr. Belzberg, that is not malpractice. To a reasonable medical probability, that is within the standard of care. So I think you've got that testimony. The questions for the jury to decide, factually, what scenario do they believe occurred?

10 MR. PRINCE: Well, I'm going to read the question. The question to what --11 that answer -- I read you the answer without the question.

THE COURT: Right.

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13 MR. PRINCE: I think I'm almost done. I'm going to try to get you to a 14 reasonable degree of medical probability. Do you agree -- is it your opinion that Dr. 15 Capanna complied with the standard of care of a neurosurgeon in his care of Mr. 16 Orth. In listening, and again I'm not a judge, I'm not a jury, that whole sequence I just read to you --17

THE COURT: Right.

MR. PRINCE: -- he's not giving an opinion to a reasonable degree of medical 19 20 probability. He's saying I don't know. There's two potential scenarios. I'm not giving an opinion. If you believe one way, it's one way. If you believe one -- another 21

way, it's another way. For example, let's assume you're doing a -- an abdominal 22 surgery and you're removing a gallbladder and you injure the bile duct or you injure 23 a ureter. I mean, is it below the standard of care to injure a ureter? No. I mean, I --24 25 or you could say well, you didn't protect the ureter. You didn't identify it, so therefore -234-GAL FRIDAY REPORTING & TRANSCRIPTION 10180 W. Altadena Drive, Casa Grande, AZ 85194 (623) 293-0249 R.App. 001529

you're below the standard of care in not identifying it before you did the surgery, or 2 you didn't take the necessary precautions for it. I mean, so there's usually a 3 foundational basis to give an opinion, not just well, I don't know, sure -- well, I'm not sure what to believe. I don't really believe either so I'm leaving it to the jury to 4 5 decide. I mean, that's not an adequate foundation for expert testimony --

THE COURT: Well --

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MR. PRINCE: -- in a medical malpractice case.

8 THE COURT: Well, here's what I think. I'm going to deny the motion. I think in 9 any situation a expert coming in to talk about standard of care could phrase an 10 answer the way Dr. Belzberg did because you're -- and often times when you're 11 talking about standard of care, allegations of violations of that, the allegation is the 12 doctor didn't do these certain things during the treatment. And the doctor's saying, 13 no, no, I did A, B. I prepared for the ureter. I identified it. I did these things. And 14 unfortunately it got cut during the process of doing the abdominal surgery, and you 15 know what, I feel bad but that was -- that's an acceptable risk of that. And the 16 retained experts come in and say that is an acceptable risk, so he's within the standard of care. 17

18 They could always say, if you believe what he testified to or what he put in his records about how he identified it beforehand, then he's within the standard of 19 20 care. They could always make that disclaimer. So I don't really think the disclaimer in and of itself says now he's not giving an opinion about that. 21

22 MR. PRINCE: Oh, okay, well --23 THE COURT: And just like I said, I just -- it was an odd way to word it. I've 24 never heard him say well if you believe the doctor. 25 MR. PRINCE: Well then let me go to the next question. -235-GAL FRIDAY REPORTING & TRANSCRIPTION 10180 W. Altadena Drive, Casa Grande, AZ 85194 (623) 293-0249 R.App. 001530

THE COURT: Okay.

MR. PRINCE: Right, okay, fine, the disclaimer -- I don't think the disclaimer gets there because under your hypothetical, the doctor was already given an opinion about -- based upon, you know, he adequate protection -- adequate identification of the ureter, did indigo carmine, indigo blue, whatever the case scenario would be, and he protected it, and you know, ureter injuries happen, known risk --

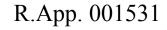
THE COURT: No, no, no, I'm not saying that they -- that in my example the doctor's already identified all those things. I'm just saying if somebody asks that doctor -- the expert doctor on the stand during that trial under the hypothetical scenario I just -- I've just proposed, did Dr. Jones violate the standard of care, they could always -- no matter what the situation is, they could always insert that disclaimer into their answer because part of their answer, obviously, presupposes that the doctor has adequately described what the doctor did during the procedure that's at issue in the trial.

<sup>15</sup> MR. PRINCE: Well, this -- well, we know for a fact that Dr. Belzberg doesn't
 <sup>16</sup> believe that Dr. Capanna did adequately describe it. We know the operative report
 <sup>17</sup> is wrong.

THE COURT: I know. I know. I know.

<sup>19</sup> MR. PRINCE: And so the next question was to him, on page 68 of the
 <sup>20</sup> transcript: In your opinion, can a surgeon be at the wrong level be within the
 <sup>21</sup> standard of care? Answer, yes. So that's in a hypothetical context, not

particularized to Beau Orth's case. So therefore he never corrected the inadequate
 basis. Anyway, that's my position.
 THE COURT: All right. Look, I don't disagree with a lot of what you say about
 what the other testimony was, but I think that there's enough evidence for the
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	defendant's to ward off a Rule 50 request and be able to move forward with their
2	defense in the case. So I don't think it's appropriate to enter any directed verdicts
3	on that issue.

- MR. LAURIA: Thank you, Your Honor.
- THE COURT: All right.

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- MR. LAURIA: Moving additional evidence in, when do you want us to do that?
- 7 THE COURT: What's that?
- <sup>8</sup> MR. LAURIA: We need to have some documentary evidence I believe --
- <sup>9</sup> MR. PRINCE: Yeah, I need to know what you're doing --
- <sup>10</sup> THE COURT: Okay.
- <sup>11</sup> MR. PRINCE: -- because I don't know what you're doing.
- <sup>12</sup> || THE COURT: You're just talking about replacing things that we have and --
- <sup>13</sup> MR. LAURIA: No, I think there are some that have marked but haven't been
- <sup>14</sup> || moved into evidence, so I --
- <sup>15</sup> || THE COURT: Oh, okay.
- <sup>16</sup> MR. PRINCE: What is that?
- <sup>17</sup> MR. LAURIA: Well, we have the -- we've replaced Exhibit DD.
- <sup>18</sup> MR. PRINCE: Well, yeah, you never -- well, I have an issue with DD
- <sup>19</sup> || because --
- <sup>20</sup> MR. LAURIA: I took out the language --
- <sup>21</sup> MR. CARDINALE: And I gave it to him three days ago.

1	MR. CARDINALE: Kyle.
2	MR. LAURIA: I'm sorry?
3	MR. CARDINALE: Kyle Wilson.
4	MR. PRINCE: Kyle Wilson.
5	MR. LAURIA: Well, we talked to Kyle Wilson about it. We talked about
6	we've talked about his condition prior to seeing Dr. Capanna which included these
7	records. So we've questioned witnesses on his condition as noted in the UNLV
8	records and what it was and what his back pain was. So
9	MR. PRINCE: No. Kyle Wilson, the record will be very clear, like I was
10	listening for this, they never showed Mr. Wilson triple D ever.
11	THE COURT: Is it triple D or DD?
12	MR. CARDINALE: Double D.
13	MR. LAURIA: DD.
14	MR. PRINCE: DD, sorry.
15	THE COURT: DD. Okay.
16	MR. PRINCE: They never showed double D to Mr. Wilson, ever.
17	THE COURT: Okay.
18	MR. PRINCE: And it had a general description. And so therefore we never
19	established the relevance. No expert they said relied upon those records. Dr.
20	Rimoldi clearly didn't rely upon those records. Dr. Belzberg clearly didn't rely upon
21	those records. So therefore they're not relevant. The testimony's the testimony,

 what it is, but those records haven't been -- there's no foundation for them, and
 there's -- they never established relevancy through any witness.
 MR. LAURIA: Wait. I thought we weren't raising foundation objections here.
 So that was - 
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MR. PRINCE: Fine, that's authenticity. I don't have a problem they're 1 2 authentic. I agree with that. I mean --

3 MR. LAURIA: I mean, we have them in the report of Dr. Cash, so they're part of his testimony and his evaluation in this case. So I think -- and at the beginning of 5 the -- this case, Judge, we were -- he said I'll stipulate to move them in if you take 6 out the references to things that aren't in the back. I mean, that was the stipulation on the record. We can go back and read it. 7

THE COURT: That's what I recall.

MR. LAURIA: Yeah. So --

MR. PRINCE: Okay.

11 THE COURT: Hold on.

[Colloquy between counsel]

MR. PRINCE: You know what? I think you are right. I -- and I did. I did

14 stipulate if they redacted. That's true. I did it with Paul. So just let us --

15 THE COURT: I have --

16 MR. PRINCE: -- let's -- let me just have a look at them one more time to --

17 THE COURT: -- object to DD, EE through XX, UUU through N, I think. But I

18 think that was -- DD was one of the ones that you said, but it's okay if it's just the 19 back.

20 MR. PRINCE: Right, with the redacted, yes.

21 THE COURT: Yeah.

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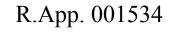
### MR. LAURIA: Okay.

THE COURT: All right. So those will be admitted so long as they're redacted

or removed things unrelated to the back.

#### [Defendant's Exhibit DD admitted]

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1	MR. LAURIA: We have the new record	
2	MR. PRINCE: Well, the problem there's other well they're not completely	
3	redacted	
4	THE COURT: Okay.	
5	MR. PRINCE: because	
6	THE COURT: Well, I have no idea if they are or not.	
7	MR. PRINCE: I know, they're not, because there's certain like for example,	
8	on games missed or whatever like, that there's still things about concussion, finger,	
9	and a thumb.	
10	MR. LAURIA: We've taken everything, Judge, I believe that doesn't talk about	
11	back we've taken out.	
12	MR. PRINCE: Well no, it's not true.	
13	THE COURT: Okay. Well	
14	MR. LAURIA: Well, you said you haven't looked at it.	
15	THE COURT: Hold on. Hold on.	
16	MR. PRINCE: I have looked at them. Oh, I have looked at them. I'm going to	
17	look at it one more time but I know that for a that one for a fact.	
18	THE COURT: All right. Look at them again and we'll figure it out in the	
19	morning what if any more redactions. So what if you think there's other things that	
20	need to be redacted, you guys are going to need to be able to point those out to me	
21	so we can get it decided tomorrow morning.	

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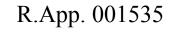
# MR. PRINCE: Fine.

MR. LAURIA: All right. Thanks, Judge. I'm going to work backwards from this

<sup>24</sup> point. We have five T's, TTTT. We got -- this is -- yeah, crazy. How about

<sup>25</sup> || numbers next time so --

-240-



1	MR. PRINCE: Well, I don't know why you don't do numbers. Just pick like a
2	number range.
3	MR. LAURIA: This are the Southern Hills billing records. We needed an order
4	from you to get
5	THE COURT: Right.
6	MR. LAURIA: to show the actual amounts that were billed. We have an
7	affidavit from the custodian of records as to the accuracy of the records and the
8	amounts paid and accepted.
9	MR. PRINCE: Yeah, untimely disclosure.
10	THE COURT: I don't have TTTTT.
11	THE CLERK: You don't you wouldn't have it. They just gave it today
12	THE COURT: Yeah, let me see.
13	MS. TARMU: Yeah, it needs to be redacted.
14	MR. PRINCE: Yeah and then the back where there's explanation of benefits.
15	That's on this can't obviously be a hospital which are in the hospital records.
16	MR. LAURIA: Judge, I think I've got another copy here. I'll show you what it is.
17	THE COURT: Nope, they're in here.
18	MR. LAURIA: Again, this is one of those that I thought, when we were talking
19	about these, we didn't have an objection to the billing records. And so we said we
20	advised the Court we're having trouble getting them from this one hospital
21	THE COURT: Right.

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thought we had a stipulation on it.

MR. PRINCE: No, we don't. No.

<sup>3</sup> MR. LAURIA: Okay. Well then -- so then I stipulated to admit his billing
 <sup>4</sup> records on a false pretense because I would never --

MR. PRINCE: Well, I --

MR. LAURIA: Excuse me. I would never have stipulated if he was going to pull this and go I'm not stipulating now.

MR. PRINCE: No, no.

MR. LAURIA: I told him before the trial, I'll stipulate to your bills and you
stipulate to mine that show the write offs. That was the agreement we had. So
that's the only reason I agreed we didn't have to call all of these custodian of records
people in this case. Otherwise if he's not going to stipulate I would have said, call
them all Dennis. Bring them all in here and you have them say the bills and I'll tell
them what the write offs are.

<sup>15</sup> MR. PRINCE: I stipulated to what they had already produced. So -- and I -- I <sup>16</sup> guess I wasn't clear that it wasn't the -- these bills.

THE COURT: All right. TTT -- let me start over. TTTTT, five T's, so that's going to be admitted.

[Defendant's Exhibit TTTTT admitted]

<sup>20</sup> MR. LAURIA: Thank you, Your Honor.

<sup>21</sup> MR. PRINCE: So what about the explanation of benefits in the back? All right,

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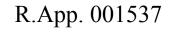
## || that's fine, just leave it all.

THE COURT: Well hold on. We can redact that out --

MR. PRINCE: That's -- no, it's okay. I want it in there.

THE COURT: All right.

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1	MR. PRINCE: Leave it in there. It's part of the (indiscernible) so
2	THE COURT: Okay. What's the next one?
3	MR. LAURIA: Next is PPPP
4	MR. PRINCE: What is that?
5	MR. LAURIA: PP.
6	MR. PRINCE: What is that?
7	MR. LAURIA: Five P's. It's Dr. Cash's report of 7/28 that you first sent to me
8	or seven yeah, 7/28 report.
9	MR. PRINCE: No. Expert reports are inadmissible.
10	THE COURT: Yeah, generally I don't
11	MR. LAURIA: It's not a report, it's a medical visit, Judge. It's not an expert
12	report.
13	MR. PRINCE: Let me see it. I mean, I want to see the record.
14	MR. LAURIA: Well, go get it. I'm not your servant.
15	THE COURT: This is follow up, July 28th, 2015, and I would agree, it appears
16	to be a medical record.
17	MR. PRINCE: Well, we obviously don't have all of your exhibits because we
18	don't have it.
19	MR. LAURIA: I gave it to you this morning I believe or whenever we had it
20	marked.
21	MS. TARMU: Well, we
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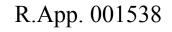
MR. PRINCE: Well we have --

MS. TARMU: -- we got one.

MR. PRINCE: -- the binder here -- we have your whole exhibit binders --

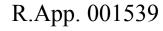
MS. TARMU: You only gave me one today. You gave me the five T's.

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1	MR. PRINCE: Can I look at the P that one?
2	MR. CARDINALE: It wasn't today.
3	MR. LAURIA: It wasn't today. It was several days ago.
4	MR. CARDINALE: It was last week.
5	MR. PRINCE: Okay, then I don't have it. If you show it to me I'll let me look
6	at it.
7	MR. LAURIA: I don't have it in front of me.
8	MR. PRINCE: Where's your exhibits then?
9	MR. LAURIA: They're probably in these boxes if you want to
10	MS. TARMU: We have we've never gotten a complete set of exhibits from
11	you guys. I mean, we've emailed
12	THE COURT: Well, look, you're not you guys aren't disputing that Cash
13	gave
14	MR. PRINCE: No, I don't, but there was one of his records was obviously
15	incomplete. It was like not even like the pain scores weren't completed. He's
16	talking about cervical pain and so he had a revised record. I think
17	MS. TARMU: It was July 28th.
18	MR. PRINCE: they're trying if it's they're both dated the same day. So
19	there was a problem with there's a
20	THE COURT: You just want to make here, come look at this
21	MS. TARMU: The weird one was July 28th, 2015, I think.

MR. LAURIA: I agree, Judge, it's -- what is - MR. PRINCE: Yeah. He's trying to use -- he's trying to -- like for example - yeah. It's the patient comes in complaining of neck pain on an average pain level of
 something out of 10. It's like the blank -- something's wrong with the dictation - -244 GAL FRIDAY REPORTING & TRANSCRIPTION
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1	MR. LAURIA: Right.
2	MR. PRINCE: and so there's all sorts of issues with it. We have the correct
3	7/28
4	THE COURT: You're not objecting to the document, just that it's the correct
5	document?
6	MR. PRINCE: Yes, right, I am objecting to the document because it's incorrect.
7	It's inaccurate.
8	THE COURT: Well, no. You're not objecting to the July 28th, 2015 actual
9	medical report being introduced, just to make
10	MR. PRINCE: Oh.
11	THE COURT: sure it's the correct one.
12	MR. PRINCE: Yes. I have we have that in there, but I object to this one
13	because he wants to try to
14	THE COURT: Okay.
15	MR. PRINCE: put a little smear job on again, on Dr. Cash, because he's
16	under indictment.
17	THE COURT: All right. Mr. Lauria?
18	MR. LAURIA: Your Honor, what it is, it's the report that was served on me or
19	the I'm sorry, medical record, let's be clear. The medical record that was served
20	on me by counsel after again, after within the 30 days of trial in this case,
21	showing a visit to Dr. Cash three weeks before he's going to come in and testify.

The fact that they're rushing to get a document out or putting it together, and so Dr.
 Cash has already got his diagnosis before he's got any of his physical findings, is
 something that can be considered. There's no reason that's not admissible. They
 produced it.
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1	THE COURT: Well yeah. I'm not going to admit this one. This is a template
2	diagram. I mean, it's the patient comes in complaining of neck pain. On average
3	the pain level is slash 10, so there's not even the pain level part in there. The worst
4	pain level is blank slash 10. The pain period. The pain usually occurs while
5	looking down, slash, looking up, slash, reading, slash, driving, slash, turning, period.
6	Blank helps the pain feel it's obvious that nothing's been put in here yet that, you
7	know, all
8	MR. LAURIA: But it's already got a diagnosis and a treatment plan.
9	THE COURT: All medical offices, though, have all these kind of templates and
10	they pump information in and then they print them out. But I mean, I'm no. I'm
11	not going to admit this one. I mean if there's one that actually is reflective of the visit
12	and has the information in there, then that's fine. I don't but I'm not
13	MR. LAURIA: But they're offering that
14	MR. PRINCE: We do.
15	MR. LAURIA: and I object to that, but that's all right.
16	THE COURT: All right. Well, I'll admit the corrected July 28th the accurate
17	July 28th, 2015 medical record. Whoever has it, whoever's proposing it. But not
18	this one.
19	THE COURT: All right, what's the next?
20	MR. LAURIA: We would move in the articles discussed by Dr. Rimoldi. They
21	are Exhibits UUUU.

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1	MR. LAURIA: No, I sorry. Here's what I'm showing is the list. From UUUU,
2	three U's
3	THE COURT: No oh, UU no, you said four U's.
4	MR. LAURIA: No, I said three U's to four M's, I think.
5	THE COURT: So three U's.
6	MR. LAURIA: It's starts with the medical abstracts.
7	THE COURT: Okay. Microdiscectomy for the treatment of lumbar disc
8	herniation?
9	MR. LAURIA: Yes.
10	THE COURT: Okay. Other than the objections you all raised about timeliness,
11	is there any objection
12	MR. LAURIA: Yes, it is. They're not admissible. And rule I mean instruction
13	number 16 says that expert's reliance on books, treatises, articles, et cetera, have
14	not been admitted into evidence. So those haven't been admitted into evidence. He
15	didn't move for the admission of those during the testimony of Dr. Rimoldi. They're
16	hearsay. They're not
17	MS. TARMU: Form
18	MR. PRINCE: ever admitted into evidence. You can cross-examine
19	MR. LAURIA: That's
20	MR. PRINCE: based upon then, but they don't come physically into
21	evidence.

MR. LAURIA: You know what, Judge, he's totally wrong because if you read
 the Nevada statute it's different than the federal statute. He's right under the federal
 rules. Federal rules, you can read them but they don't come into evidence. Nevada
 statute is specific and says they're admissible into evidence, they come in.
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MS. TARMU: Where? What rule?

MR. LAURIA: Fifty-two -- I can cite it for you. Let me find it.

MS. TARMU: I'm looking at it right here, 51.255.

THE COURT: I'll tell you, I've never admitted them, but I'll look at whatever
 you're proposing.

MR. LAURIA: I got to find the section now. I just had it last night. 51.255. He's right about the federal rule. They don't get admitted. But in Nevada it says you can. That's one of the distinctions.

MR. PRINCE: No.

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MR. LAURIA: Not bad for a California lawyer.

MR. PRINCE: It says to the extent called to the attention of an expert witness

<sup>12</sup> || upon cross-examination a statement contained in the, you know, periodical,

<sup>13</sup> pamphlet, or whatever, it's not inadmissible under the hearsay rule. It doesn't

<sup>14</sup> establish that the actual treatise comes into evidence, or the article or book. It's a

<sup>15</sup> || mechanism by which you can cross examine certain witnesses either during direct

<sup>16</sup> and/or cross-examination. And therefore that -- so the evidence comes in that

<sup>17</sup> || format, but the articles themselves do not.

<sup>18</sup> MR. LAURIA: That is incorrect. And if you look at --

<sup>19</sup> MR. PRINCE: Rules of jury instruction 16.

<sup>20</sup> MR. LAURIA: If you look at the scholar's articles in Nevada, it clearly states
 <sup>21</sup> these are admissible.

 THE COURT: No, no, no.
 MR. LAURIA: They are an exception to the hearsay rule.
 THE COURT: I don't disagree with the idea that things -- I think what the
 statute says is they're not inadmissible under the hearsay rule. So it's not that

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