then how do you get to part D, the comparing the forces?

A. Sure. As the name implies, you compare the two. What we know is if the spine can withstand the forces of the everyday activities without creating damage to the structures of the spine, then it should be able to withstand those same forces or lower forces in the accident.

Q. So is it like if you can run a mile, well, then you can run half a mile?

A. Sure. Yeah.

Q. All right. And, then, how did you get from the comparison of forces to checking the national databases?

A. Sure. So my result for 2D, the comparison of forces, said that the likelihood for injury was very low. The forces from the subject accident -- well, we'll get into that. But I then wanted to check with the NASS/CDS database -- that's the NHTSA database -- to see if, in fact, accidents like this would be likely to create this damage. And the answer was no, it's not likely.

MR. ROBERTS: Objection. Foundation.

THE COURT: I'm going to sustain that at this point.

BY MR. STRASSBURG:

Q. All right. Let's get started.

Okay. Great. Thank you. Thank you very much.

Now, let -- let me just talk again about this concept of force comparison. Remember we just covered that?

A. Sure.

Q. Do you have an illustration with you that explains how you utilize this comparison of forces to come to the conclusions you're going to express here today?

A. Yes.

MR. STRASSBURG: Permission to show Slide 8?

MR. ROBERTS: No objection.

THE COURT: That's fine.

BY MR. STRASSBURG:

Q. All right. Would you explain to us, and -- and maybe you ought to come down here just so we can -- it seems to be quicker if we do it this way.

Could you explain to us how this illustrates the logic you employed of your -- with your force comparison.

A. Sure. So the idea is that the forces preaccident from activities of daily living, if those

were applied to the lumbar spine, then the structures of the spine, the ligaments, the muscle, all of it could resist those forces without damage. So that's --

Q. How do we know that?

A. Because we know she doesn't have pain, she doesn't have any problems before the accident.

Q. All right. So let me get this straight. Did you do any bone-sampling of her spine to see how strong her bones were?

A. No.

Q. Did you do any, like, analysis of the degree of deterioration of the bones of her spine to see how strong they were?

A. No.

Q. And did you do any analysis of the disks in her spine to see what their, like, frictional coefficient was?

A. That doesn't make any sense, but no.

Q. Don't beat around the bush, Doctor.

A. Sorry.

Q. You know, if you got a comment, just hit me.

All right. So did you -- did you do -- do any analysis to see what condition her facets were in to -- you know, for her particular spine?

A. So I did review the medical records. I did

look at what was in there. But this force comparison does not require that. We know that her spine could resist the forces of activities of daily living before the accident. So that gives us a -- a bound that we know below that level the spine should be able to resist the forces.

Q. All right. And so, then, of what relevance is it to you, the forces on her spine from the accident?

A. Well, if the forces from the accident are lower than the forces that can be resisted by the spine, then it would not create damage to the spine.

MR. STRASSBURG: Permission to show 9.

MR. ROBERTS: Objection to foundation, Your Honor, particularly the green arrow within the yellow arrow. No foundation for that.

THE COURT: There's not. Sustained.

BY MR. STRASSBURG:

Q. Okay. So if the -- the logic, then, is that, if her spine was strong enough to resist and manage the forces that it had gotten used to over the 30 some-odd years of her life -- right? -- then you know that, just by logic, that therefore the spine had to have the strength to summon up at least a resistive force equal to those forces from preaccident activities of daily

living; right?

A. That's right.

MR. ROBERTS: Objection. Leading.

MR. STRASSBURG: Summaries, Judge.

THE COURT: It was leading, though. Sustained.

MR. STRASSBURG: Was summarizing -- I'll shut up.

BY MR. STRASSBURG:

Q. So what is your logic, then, fitting into this image of how you then take the -- the output of your calculation or the forces on the spine from this accident, how do you relate that to this logic here on the screen?

A. I think we've said it a few times, but if the forces in the accident are lower than the forces that the spine can resist, then you're not going to create spine damage.

MR. STRASSBURG: Permission to show Slide 9 now?

MR. ROBERTS: Same objection, Your Honor.

THE COURT: I don't know what the forces from the accident are. You haven't laid that foundation yet. Sustained.

MR. STRASSBURG: Never mind. Okay.

BY MR. STRASSBURG:

Q. All right. Let's begin.

Let me direct your attention to your accident reconstruction analysis. You with me?

A. I am.

Q. Okay. And we start with the vehicles in the collision. What vehicles did you analyze?

A. A 2001 Hyundai Santa Fe and a 2007 Suzuki Forenza.

Q. And did you perform any analysis of the actual vehicles in the accident?

A. No. This is not with the actual physical vehicles that were involved in the accident.

Q. What did you use in their place?

A. Computer models and exemplar vehicles and data specific to the vehicles in the crash.

MR. ROBERTS: Objection. Move to strike just one portion of that, Your Honor.

THE COURT: Let's just talk about the exemplar of the Santa Fe.

MR. STRASSBURG: Judge, the Suzuki exemplar inspection was from --

THE COURT: Come on up, guys, if we're going to have a little discussion.

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(A discussion was held at the bench, not reported.)

THE COURT: Objection is overruled.

MR. STRASSBURG: All right. Permission to show Slide 12?

MR. ROBERTS: No objection.

THE COURT: That's fine.

BY MR. STRASSBURG:

Q. All right. Would you describe for us the vehicles that you analyzed both photographically and as exemplars?

A. Yes. These are just generic pictures of the two vehicles -- or the make and model and year of the vehicles involved in the crash.

Q. All right. And is the analysis of exemplar vehicles a recognized technique in your discipline?

A. It is.

Q. Has it been validated by peer-reviewed scientific studies?

A. It has.

Q. And has that borne out the test of time?

A. It has.

Q. And is the analysis of photographs of vehicles involved in accidents for the use in accident reconstruction, is that a legitimate standard technique

in your discipline?

A. It is.

Q. And has it been the subject and validated in peer-reviewed scientific investigations and studies?

A. It has.

Q. And has it borne the test of time?

A. It has.

Q. And did you use them both?

A. I did.

Q. All right. In -- in doing your analysis, what relevant facts about the accident did you harvest from your review of the records?

A. The accident occurred January 2nd of 2011, at about 6:00 p.m. It happened about 100 feet north of Peak Drive on Rainbow Boulevard. We had Ms. Garcia in her Santa Fe traveling south at approximately 30 miles per hour in what we call the No. 1 lane. So there's five lanes, two in each direction and then a middle lane, a turn lane, if you will. She's in the left lane of the two.

At that time and location, we have Mr. Awerbach coming out of Villa Del Sol. He's going to go northbound on Rainbow, so he's making a left turn. And his -- the front of his Suzuki contacts the passenger side rear, so the rear door area, of

Ms. Garcia's vehicle.

Q. Okay. And did you harvest any information about the rest location?

A. Yes. Ms. Garcia testified that she spun around and was facing the opposite direction at the end of the event.

Q. All right.

A. Or I should say her vehicle was facing the opposite direction.

MR. STRASSBURG: Permission to show Slide 13?

MR. ROBERTS: No objection.

THE COURT: That's fine.

BY MR. STRASSBURG:

Q. Is Slide 13 an accurate summary for us of the information that you just testified to that you harvested from your review of the records?

A. Yes.

Q. And the sources of the information are set forth on this slide?

A. They are.

Q. Now, what information did you harvest regarding the Suzuki?

A. That it was making a left turn, it contacted the Santa Fe, and then it could not be moved afterwards.

MR. STRASSBURG: Okay. Permission to show 14?

MR. ROBERTS: No objection.

THE COURT: That's fine.

BY MR. STRASSBURG:

Q. Does 14 accurately summarize the information you harvested from -- regarding the Suzuki?

A. Yes.

Q. And the sources of that information set forth at the bottom?

A. Yes.

Q. All right. Now, after you got this information, particularized, as you say to the -- to this particular accident and vehicles, what types of vehicle motion did you analyze?

A. In general, we break down motion into two categories: linear motion and rotational motion.

Q. And, like, why do you do that?

A. Well, they're different, and you need to treat them as different. So you have to as an engineer.

MR. STRASSBURG: Permission to show Slide 15?

MR. ROBERTS: No objection.

THE COURT: That's fine.

/////

BY MR. STRASSBURG:

Q. Now, does Slide 15 accurately depict, generically, for -- for a generic vehicle, these two types of motion?

A. Yes, although it doesn't really show the initial positions shaded out as I would have hoped.

Essentially, linear motion, for the left-hand part of the slide, the car is going to the right. So you're moving along in a straight line.

Rotational motion, on the right-hand side of the slide, is the vehicle spinning around.

Q. Is -- is there a physical, scientifically described process that would account for how Ms. Garcia's vehicle would be subjected to rotational motion?

A. Well, the physics drives it, yes.

Q. All right. And did you -- did you undertake any considerations of center of mass or center of rotation of these vehicles or not?

A. I did.

Q. And how did that factor into your just overall assessment?

A. Sure. The force applied to the Santa Fe did not go through its center of mass. It was actually behind its center of mass and at an angle. So the

force that was applied to the vehicle created a lateral force, so a linear motion related to that.

And then that same force created what we call a torque -- so it's a force over a moment arm -- that created a rotational motion of Ms. Garcia's vehicle at the same time.

Q. All right. Now, in -- in doing a -- did you do a quantification of these motions and forces?

A. I did.

Q. What was your first step in performing that quantification?

A. The very first thing is to look at the vehicles, the photographs, the repair estimates, things of that nature.

Q. All right. And what is the purpose of that -- that analysis? What's the overall logic that you're going to use to perform your first calculation?

A. Well, the first thing that I need to do is to be able to line up the vehicles. I need to be able to match up the -- the damage areas between the two so we can see how they contacted.

Q. All right. Now, did you perform any analysis of the difference between the velocity of the vehicles after the collision compared to before?

A. Yes.

Q. And why was that important to you?

A. That difference between just prior to the collision and just after the vehicles separate, the change in velocity, what we call delta-v, is a good indicator of accident severity when there's not intrusion into the seated area. So if -- if the door doesn't crush in and hit someone, then delta-v is a good indicator of severity. And that's why we look at it.

MR. STRASSBURG: Permission to show Slide 16?

MR. ROBERTS: Objection to the extent this is intended to show the actual locations of these vehicles. No objection if you are simply demonstrating to the jury where he placed them in his analysis.

MR. STRASSBURG: I agree.

THE COURT: Okay. That's fine.

BY MR. STRASSBURG:

Q. Now, how does Slide 16 illustrate the analysis you performed in calculating this quantity, delta-v?

A. This slide is simply showing what we mean by delta-v or change in velocity.

So in the left column, we have just prior to impact, each vehicle has initial velocities; during the impact, there's forces between the vehicles that

accelerate the vehicles; and then after the impact, they separate, and each has its own velocity afterwards.

The difference between the final velocity and the initial velocity, we call that the change in velocity. And, again, that's a good indicator of accident severity.

Q. Now, look, Doctor, really, who you trying to kid here? Even I know that after vehicles collide, there is no acceleration; there's only deceleration. I mean, what are you talking about here?

A. In engineering, we use "acceleration" for both positive and negative. So positive acceleration you might call normal acceleration, and a negative acceleration you might call deceleration. But in physics and engineering, we just call it acceleration.

Q. Okay. Now, what about this final velocity? Isn't this just zero?

A. After the cars come to rest, yes. But immediately after separation of the two vehicles, no, they're not zero.

Q. And does the delta-v measure between, like, a little bit before a collision compared to the final velocity -- or final rest place or a little bit after the collision?

A. It's just before and just after vehicle contact.

Q. And why is that helpful to you?

A. Again, it's a good indicator of how severe the accident is.

Q. Now, has the utilization of delta-v to determine accident severity for biomechanical analysis, has that been recognized in your discipline as the standard technique?

A. Yes.

Q. Has it been the subject of peer-reviewed scientific articles validating its accuracy?

A. Yes.

Q. And has it been utilized outside the litigation context, or is it just for courts and lawyers?

A. No, we use it in general too.

Q. Yeah, like what?

A. For example, the NASS, the NASS database, they indicate delta-v in the accidents that they analyze. Again, it's an indicator of severity.

Q. Okay. But -- okay. So it's close enough for government work.

But what makes you think it's close enough for you to swear to in a court of law?

A. I'm not sure what you mean by "close enough."
Q. What familiarity do you have with the validity studies of delta-v?
A. Well, delta-v is just a metric, a number that we have as part of our analysis. So it's -- it's just part of an analysis. It's not valid or invalid.
Q. And how would you characterize the scientific studies that have validated its use in the way that you used it here? Are they extensive? Are they sparse? Are they questionable? What are they?
A. If you look at the motor vehicle accident reconstruction literature, you'll find the term "delta-v" and that metric used all over. It's very common. We've been using it for a long time in the community.
Q. Does it represent the predominant school of thought, the vast majority school of thought, or is it kind of a close-to-the-minority position?
A. I think just about everyone uses it.
Q. Okay.
THE COURT: You at a good breaking point, Mr. Strassburg?
MR. STRASSBURG: Yeah. If you want, sure. Go ahead.
THE COURT: I have a meeting at noon.

MR. STRASSBURG: No problem. I'll stop wherever you want.

THE COURT: Let's go ahead and take our lunch break, folks. We'll go till 1:15. I'll be back before then.

During our break, you're instructed not to talk with each other or with anyone else, about any subject or issue connected with this trial. You are not to read, watch, or listen to any report of or commentary on the trial by any person connected with this case or by any medium of information, including, without limitation, newspapers, television, the Internet, or radio.

You are not to conduct any research on your own, which means you cannot talk with others, Tweet others, text others, Google issues, or conduct any other kind of book or computer research with regard to any issue, party, witness, or attorney involved in this case.

You're not to form or express any opinion on any subject connected with this trial until the case is finally submitted to you.

Before you leave, let me just ask you, does anybody have a problem if we were going to start at 8:30 tomorrow morning? Anybody have to take kids to

school or something that 8:30 is a problem for them?

Because I told you we have to end early at 2:00 o'clock, and we're just going to kind of go through. So I'm thinking, if we start at 8:30, we can maybe take a 15-minute break about 10:00 or 10:30, another 15-minute break around noon or so, and go till 2:00.

I think that's what our plan is going to be as long as we have witnesses here.

All right. Thank you, folks. See you back at 1:15.

(The following proceedings were held outside the presence of the jury.)

THE COURT: All right. We're outside the presence of the jury.

Anything we need to put on the record, Counsel?

MR. SMITH: I would like to make a record about the discussion of the exemplar vehicle.

THE COURT: Okay.

MR. SMITH: I think Your Honor should not allow a discussion of it as we go forward. And let me explain why.

THE COURT: You want to leave our witness here, or should we excuse him? Do you care?

MR. SMITH: I think we can leave him here because, if the Court changes its ruling, then he'll be aware of the ruling.

THE COURT: Okay.

MR. SMITH: The first time we were ever provided notice of there being an exemplar vehicle of the Suzuki Forenza was when we received the 98-page PowerPoint a day or two ago.

Mr. -- or Dr. Scher referred to exemplars when he was on the stand today, and Mr. Roberts made an objection to that. We approached the bench and were later -- in a later approaching of the bench were given page 56, line 11, of Dr. Scher's deposition as the proof that we had been told in the past about the exemplar of the Suzuki because there clearly is no mention of an exemplar of the Suzuki in any of his reports.

Page 56, line 11, of the deposition does not talk about an exemplar. And let me read the entire section of that deposition that would explain to the Court what was being discussed. And it starts on line 7, again, page 56.

"So if we look at Table 2 on page 5 of that same report, those crush depths, plural, are estimates?

"ANSWER: That's right. And this is just one example going from zero inches -- sorry -- I'm looking at the column that says '2007 Suzuki Forenza,' and you see the C1 through C6 in the left column?

"QUESTION: Yes.

"ANSWER: So those are estimates of the crush depth starting from zero at one end to 4 inches of depth at the other end.

"QUESTION: And those are straight from the photographs; right?

"ANSWER: Those are from photographs and an exemplar inspection.

And if you look at Table 2 on page 5 of the report, which we were discussing, Table 2 includes values from both of the vehicles.

So when he says "photographs," plural, he's talking about photographs of both of the vehicles because that is all Dr. Scher had in his possession about the Suzuki at the time.

And then when he says "exemplar," singular, he must be talking about the exemplar of the Santa Fe because, at that point in time and until we started trial, there was never a discussion of an exemplar of the Suzuki Forenza.

And keeping in mind, Your Honor, that's an 89-page deposition where I was allowed to ask questions before I was cut off with a time limit. And then counsel for the defendants was entitled to ask questions as well. And there is absolutely no discussion of exemplars, plural, or any exemplar of the Suzuki Forenza in that deposition.

And Your Honor made a comment at the bench that maybe the comment in the -- in the deposition about exemplars, plural, is vague. But it's not. It's "exemplar." And even if it was vague, there's no follow-up in the deposition. There's no mention of it in the deposition.

And what they intend to do today is put up pictures of an exemplar Suzuki that we've never been given before and then provide the jury with measurements of that exemplar vehicle that we've also never been given before and that are not in either the deposition or in the reports.

So the jury can't be provided information today that Dr. Scher did not have and did not rely upon when he produced his reports and made his opinions. And -- and if he did have that information or relied upon it, then he had to have given it to us by the time he authored his opinions. And as you would expect, his

report includes a list of what he relied upon, and there is no exemplar of a Suzuki.

Again, we learned about this a couple days ago, and we were given these pictures -- or maybe it was even yesterday, but within the last couple of days. It's the first time we were ever given any of these pictures or measurements.

MR. STRASSBURG: Judge, Dr. Scher was deposed by Mr. Smith on March 4, 2015. Reading from page 42, line 2.

"QUESTION: Besides testimony from Ms. Garcia and Mr. Awerbach and pictures of the vehicles, what information do you actually have?

"ANSWER: Repair estimate for her vehicle; satellite imaging -- imagery that gives me information about the location; information from the accident report; data from crash tests run by NHTSA, of course; the laws of physics, but I think that's a given; certainly information regarding other vehicle parameters from, say, places like expert auto stats and things of that nature. I forgot exemplar vehicles. Sorry. Yes, there's also undamaged vehicles that are substantially similar to the

vehicles involved in this accident."

MR. SMITH: And I took that in the deposition as a general statement of what he relies upon, but he had not provided us with the pictures and the measurements. And nowhere in here or anything is there a discussion of the pictures and the measurements that he's now claiming he relied upon to offer his opinions.

So even if there was a use of a plural -- and I apologize. They didn't give us that page when we were up there. But if you look at that, that's a section about every -- the types of things that he relies upon and -- and what he would rely upon.

And even if he was talking about the specific one, he still has to have told us what his measurements were so that we could provide them to our own rebuttal expert, which we have, to actually go through and do his calculations.

He didn't have any of that, and he can't spring new pictures and -- and new data on us at trial. And that's what they intend to do, not just discuss even that he looked at an exemplar, that the exemplar is the basis for his analysis, here's the measurement that he did, here's the photographs he relied upon, all things that we weren't provided until the last couple of days.

MR. STRASSBURG: Judge, not so. The photograph of the Suzuki exemplar is in Dr. Scher's file that was produced. He'll be calling it up from the server and can submit that to you.

MR. SMITH: I have a flash drive that he gave me at his deposition on my computer that does not have any of that. And that was his entire file, and that's what was attached to his deposition.

So I disagree with Mr. Strassburg, and I would ask him to prove when was that ever given to us. We have -- they gave us his flash drive twice. We have the originals. I have a copy on my computer. I went through it after we got that slide show in order to verify. That is not on there, and I'm happy to show that file to the Court.

MR. STRASSBURG: Do you have it?

THE COURT: So let me ask -- Dr. Scher, I'm going to ask you a question. In your August 21, 2014, report, you have a section entitled "Inspection of an Exemplar Hyundai Santa Fe."

Do you have a section in either of your reports that deals with an inspection of the other exemplar vehicle?

THE WITNESS: No, Your Honor.

THE COURT: Why?

THE WITNESS: I hadn't done the inspection at the time the report was issued.

THE COURT: When did you do it?

THE WITNESS: Sometime after -- there was a report and rebuttal to Dr. Freeman, and that's when I went and got the Suzuki Forenza exemplar.

THE COURT: Was it before your October 10, 2014, report or after?

THE WITNESS: It would be after the three reports.

THE COURT: Was it before or after your deposition?

THE WITNESS: Before my deposition.

THE COURT: I mean, I think that the deposition says that there are -- I mean, it says that there are exemplar vehicles that he relied on.

I mean, whether or not he can use photographs and measurements that weren't disclosed is a different issue. I mean, I don't have a problem with him saying that he relied on exemplar vehicles. But I think, if he has specific measurements, it probably should have been disclosed.

MR. STRASSBURG: Well, Judge, I want to be entirely fair to the plaintiff in a case like this.

Dr. Scher, can you give your opinions without

recourse to photographs of the exemplar Suzuki?

THE WITNESS: I believe so, yes.

THE COURT: Yeah, let's just --

MR. STRASSBURG: Fair enough.

THE COURT: Let's have him offer his opinions without talking about the measurements or without the pictures of the exemplar to the Suzuki.

MR. STRASSBURG: Fair enough. I'm fine with that, Judge.

THE COURT: I think that's more fair based on the fact that they're saying that this is something that they haven't seen before.

MR. STRASSBURG: More fair is always better, Judge.

THE COURT: I try.

MR. STRASSBURG: Hey. All right.

THE COURT: Is that all we need to do?

MR. SMITH: Yes, Your Honor.

THE COURT: All right. Off the record.

(Whereupon a short recess was taken.)

(The following proceedings were held outside the presence of the jury.)

THE MARSHAL: Remain seated. Come to order.

THE COURT: We ready?

MR. SMITH: We have one thing to ask about.

THE COURT: Hold on. We're missing somebody. Where is Mr. Mazzeo?

MS. ESTANISLAO: He is on his way.

THE COURT: Are we waiting for him?

MS. ESTANISLAO: No. You may proceed.

THE COURT: You're okay arguing for him?

All right. Let's go back on the record, then. We're outside the presence.

What do you got?

MR. SMITH: Before we took a break, Dr. Scher mentioned a rebuttal to Dr. Freeman, a report that he wrote. And that is not something that we received.

THE COURT: Okay.

MR. STRASSBURG: What do you mean by this rebuttal?

THE WITNESS: Maybe I misspoke, but it was a rebuttal to him. It was a report detailing some of the arguments against me being able to testify. I attribute that to Mr. -- or Dr. Freeman, but I guess maybe it wasn't Dr. Freeman. Maybe it was plaintiff's counsel.

MR. SMITH: So, then, that would be the response that he made to our Hallmark motion. And -- and we also don't think that anything in his response to the Hallmark motion that isn't in his earlier

reports is admissible, because once we file the Hallmark motion, he can't supplement his opinions based upon our arguments.

THE COURT: Probably true. It's got to be in the reports or the deposition. Limit him to that.

MR. SMITH: Okay.

THE COURT: Anything else?

MR. SMITH: That was it.

THE COURT: We ready to go or we going to wait for Mr. Mazzeo?

MS. ESTANISLAO: No, we're ready to go.

THE COURT: Ready to go? Okay. Let's go.

THE MARSHAL: Jury entering.

(The following proceedings were held in the presence of the jury.)

THE MARSHAL: Jury is present, Judge.

THE COURT: Thank you.

Go ahead and be seated.

Back on the record, Case No. A637772.

Do the parties stipulate to the presence of the jury?

MS. ESTANISLAO: Yes, Your Honor.

MR. ROBERTS: Yes, Your Honor.

THE COURT: Thank you.

Doctor, just be reminded, you're still under

oath.

Go ahead.

BY MR. STRASSBURG:

Q. Dr. Scher, describe for us, please, the inputs that you utilized to put into the PC-Crash modeling software that you used.

A. Sure. PC-Crash uses vehicle-specific information for the vehicles in this accident, and then it uses speeds and angles of the vehicles relative to one another and the orientation of the vehicles.

Q. Okay. And after you input that into PC-Crash, what are the outputs of PC-Crash?

A. The rest positions of the vehicles, the vehicle motions over time. So it integrates the equations of motion forward in time from the accident through to when the vehicles come to rest. It gives the speeds and rotations for the vehicle. And it also gives the damage energy. So that's the energy attenuated or absorbed by the vehicles to create the damages to the vehicles in the accident.

Q. Do you use generic vehicles or do you use the actual ones involved in this accident?

A. The information for the vehicles is case-specific. So it's vehicles involved in this accident.

Q. All right. Did you use any information from the Santa Fe?

A. Yes.

Q. Could you describe it, please.

A. Sure. I assume you mean the subject Santa Fe. And for that, we used the damage information to figure out where the vehicle was hit. So that's the photographs and repair estimates.

Q. Did you make use of the damage photographed?

A. I did.

MR. STRASSBURG: Permission to display 30?

THE COURT: Any objection to 30?

MR. ROBERTS: Let me flip forward to it, Your Honor.

No objection, Your Honor.

THE COURT: Okay. Go ahead.

BY MR. STRASSBURG:

Q. What use did you make of the information on Slide 30?

A. So here we see the rear passenger door on the Santa Fe. We can see the damage to the bottom portion to --

Is it okay to point to some things on the screen?

Q. Come on down.

A. Here we see -- doesn't show up too well on this screen, but there is damage here on the bottom portion of the door. You can see this contact transfer mark. There's damage to the rocker panel. You can see the tires flat.

So the impact is along this section of the vehicle from about the end of the driver's door over to the wheel.

Q. Where is the center of gravity or center of rotation on the vehicle?

A. It's going to be closer to the center of the vehicle. If you were to look along the line, I would say in between the front and back door, it's going to be in that ballpark, maybe a little bit forward.

Q. Okay. And what's the significance of that offset between the place of impact and the center of rotation? Stay there, would you, Doctor.

A. It basically means that, because the force is not through the center of mass, it's going to create rotation, it's going to create a torque about the center of mass of the vehicle. So the vehicle's going to rotate during the accident.

Q. All right. Do you have occasion to review anything else about the damage to the Santa Fe?

A. There was a -- a damage estimate, a repair

estimate, for the vehicle as well.

MR. STRASSBURG: Permission to show 32?

MR. ROBERTS: Sorry. Thirty --

MR. STRASSBURG: 32.

MR. ROBERTS: No objection.

THE COURT: That's fine.

BY MR. STRASSBURG:

Q. Please describe the use you put to this information.

A. So the damage estimate matched up well with what they saw in the pictures. It showed what parts the vehicle would need to be repaired, replaced. And so the front right rocker panel -- or I'm sorry -- rear rocker panel would have to be replaced, the doors. There would be refinishing of the quarter panel. And then the right rear wheel had damage. So there was contact to the wheel that also damaged the suspension components too. So that was all consistent with what we see in the pictures.

Q. All right. You mentioned the term "exemplar." Define that.

A. An exemplar vehicle is essentially a like make, model and, if not the same year, then what we call a sister clone. So, basically, the vehicles from a manufacturer may be the same for multiple years. So

if you have a 2001 in an accident, the 2002 and 2003 may be the same. It's called a sister clone.

Q. Did you make any use of that information for your analysis here?

A. Yes. For the check portion of my analysis.

MR. STRASSBURG: Permission to show 33?

THE COURT: Any objection to 33?

MR. ROBERTS: No objection.

THE COURT: Go ahead.

BY MR. STRASSBURG:

Q. Explain the use you made of information from the exemplar.

A. We don't see it in this picture, but there's others where I have tape measures in the picture, and I have measured components of the vehicle.

MR. STRASSBURG: Permission to show 34.

MR. ROBERTS: No objection.

THE COURT: That's fine.

THE WITNESS: Here we go. So we actually get a measure of distance that we can then use to do photogrammetry with the actual pictures of the subject vehicle, the vehicle that was in the accident. And, just as important, we get a measure of distances here that we can look at for the accident vehicle so that we can say there is this much space from the back of the

front door to the tire. That's 50 inches. And we'll -- I'll show you why that's important and interesting in a minute.

MR. STRASSBURG: Permission to show 36.

THE COURT: Any objection to 36?

MR. ROBERTS: Yes, Your Honor. I believe beyond the scope of his report. That's --

THE COURT: Come on up.

(A discussion was held at the bench, not reported.)

THE COURT: So I'm going to sustain the objection on the foundation ground only.

BY MR. STRASSBURG:

Q. Okay. Would you explain, Doctor, how you utilize your analysis of measurements of the vehicle, this 50 inches, to make a determination of crush?

A. Sure. The process is called photogrammetry. So I took pictures of the subject vehicles that we had that were given to me and then pictures of the exemplar vehicle, and knowing lengths, so distances, in the pictures of the exemplar, I can match them up and, with the aid of a computer, figure out how much deformation there is in the vehicle, the subject vehicle, the accident vehicle.

Q. Prepare an illustration to show the results

of your calculations from a perspective that will make them meaningful?

A. Yes.

MR. STRASSBURG: Permission to show 36.

MR. ROBERTS: No objection, Your Honor.

THE COURT: Go ahead.

BY MR. STRASSBURG:

Q. Explain 36, please, how that illustrates what you just described.

A. Sure. We see a top-down view of a schematic of a Santa Fe. And in orange I have drawn in what I think is the damage profile for the Santa Fe. And you can see it goes across the 50 inches that I showed you in the picture a few minutes ago.

And what is labeled from left to right going with the arrows above the 50 inches is the amount of crush into the vehicle -- that's permanent deformation of the vehicle -- that was produced in the accident.

Q. Did you perform any analysis of the front of Mr. Awerbach's Suzuki?

A. Yes.

Q. Describe.

A. I think the -- that it would be easiest to show a picture of the vehicle and show how it matched up in orientation with this, using the picture.

MR. STRASSBURG: Permission to show 37?

MR. ROBERTS: No objection.

THE COURT: Go ahead.

BY MR. STRASSBURG:

Q. Hold on. I can do this.

Okay. Proceed.

A. So here we have a picture of the Suzuki that was involved in the accident. Obviously, this is the front bumper.

It's a little bit hard to see on the screen here, but there are marks that go along the bumper starting from about the point here (witness indicating) all the way over to the driver's side. And these marks actually match up well with the damage here (witness indicating). It's about 50 inches going over to the wheel.

So we know that the impact was no further than this area here on the passenger side of the Suzuki. And from the other pictures of the vehicle, we know that there's more damage on the driver's side over here than on this portion. We actually don't see any deformation, permanent damage, to the frame, the bumper system, anything on this side except the bumper cover's pulled off.

And that's consistent with the bumper

interacting with this tire as it's turning. The tire on the Santa Fe would grab on to the bumper of the Suzuki and actually pull it off. It's only held on with very small plastic screws or clips. So to pull the front bumper cover off actually is -- is not that much force. But it gives us an indication of how the vehicles were lined up during the accident.

Q. All right. So the quantifications that you harvested from this case with this specific particularized data about this accident, you inputted this into PC-Crash. And what were the results when you ran that program?

MR. ROBERTS: Objection. Foundation.

Permission to voir dire the witness, Your Honor?

THE COURT: Come on up for a minute first.

(A discussion was held at the bench, not reported.)

THE COURT: All right. So I'm going to let Mr. Roberts ask some questions out of order here.

MR. ROBERTS: Thank you, Your Honor.

VOIR DIRE EXAMINATION

BY MR. ROBERTS:

Q. Dr. Scher, Mr. Strassburg just asked you

about what your calculation was on PC-Crash. I just want to go back and try to ask you a few questions about foundation.

There's certain things that you had to enter into PC-Crash in order to get the answer you want to give; right?

A. That's correct.

Q. And the accuracy of your delta-v is based on that accuracy of your input data; correct?

A. Yes.

Q. Okay. You told Mr. Strassburg that -- and he showed a PowerPoint -- the first thing you did is you're looking at the point of the collision, because you have to tell PC-Crash where the vehicles were at the first point of impact; right?

A. That is true.

Q. And you put 100 feet north of Peak on the PowerPoint slide. Do you recall that?

A. That's from the accident report. That's what the police reported. The actual distance is actually greater than that. But that's on the police report. Yes.

Q. So when you say the -- and that was what I was getting to, because you didn't place the point of collision 100 feet north of Peak, did you?

A. No, I did not.

Q. Okay. How did you determine what the point of impact was if it was different from the police report?

A. Based on the testimony from Mr. Awerbach and Ms. Garcia.

Q. Did either one of them testify as to the point of impact?

A. They testified about how the accident happened, about how Mr. Awerbach was pulling out of the, I guess, driveway, for lack of a better term, from Villa Del Sol. So that happens to be, I think, 200 and some-odd feet north of the intersection, not 100 feet as the police reported. And it does say "approximately" on the police report.

Q. So you had Mr. Awerbach going straight across the lanes, correct, until he turned a little bit at the end which way?

A. Mr. Awerbach turned left. So he didn't go straight across; he actually turns left, as if he was going north onto Rainbow.

Q. So you had him going straight across and then immediately before impact turning a little bit to the left; right?

A. That's incorrect.

Q. Okay. Do you have -- perhaps we could have his animation that you wanted to show the jury.

So -- well, that's okay.

MR. STRASSBURG: Yeah, if you'll stipulate to let him see it, I'd be happy to show it to him.

MR. ROBERTS: Sure.

MR. STRASSBURG: Okay. You got it.

THE COURT: Which slide is that?

MR. ROBERTS: 46, I think.

MR. STRASSBURG: Well, the -- it is shown in static form on Slide 49, but it is shown on video on this, which we can present.

MR. ROBERTS: If you could just put the first frame up and stop there. Okay. So if the jury is looking at this --

MR. STRASSBURG: Judge, I'd ask to be able to show them the whole video. If he's going to voir dire him, he ought to have to voir dire him on the whole thing.

MR. ROBERTS: If that's what Mr. Strassburg wants to do, we can show him the whole thing. Then we'll go back to this frame.

THE COURT: Okay.

MR. STRASSBURG: Dr. Scher, my computer skills being what they are, I wondered if you could

help me with this.

THE WITNESS: Sure.

MR. STRASSBURG: If you don't mind.

THE WITNESS: Not a problem.

MR. STRASSBURG: Don't break nothing now.

THE WITNESS: I'll try. See where the -- okay. So I'm going to play it, and I'll back it up.

MR. ROBERTS: Okay.

THE WITNESS: There we go. And now we can -- I think we will be able to explain this.

MR. STRASSBURG: I think you want to do the stop at the first panel.

THE WITNESS: Right here?

MR. STRASSBURG: Yeah, I think so.

Is that right, Mr. Roberts?

BY MR. ROBERTS:

Q. That's correct. Now, Doctor, you'd agree that the -- Jared said that he came out of this driveway -- right? -- and was turning left?

A. That's correct.

Q. Okay. So you don't have him cutting across, like some people do, making a left-hand turn; you've got him coming straight out?

MR. STRASSBURG: Can you see him with Mr. Roberts in the way? Or can you see --

THE WITNESS: Yeah. So I do not have, in this particular slide, Mr. Awerbach going a sharp angle north on Rainbow at the time of the impact. So on this slide, that's correct.

BY MR. ROBERTS:

Q. And that's not based on any evidence that you've seen in the record on this case; right?

A. What's not based on --

Q. Neither Mr. Awerbach or Ms. Garcia testified as to the angle that he came out of the driveway to make his left-hand turn; right?

A. No. That's true.

Q. And the position right here is about 200 feet from Peak Drive, not 100 feet as in the police report.

A. That's right. The police were off by a little bit. They say "approximately."

Q. So you're just guessing at this; right?

A. No, it's not a guess. It's actually part of a part of a family of solutions that work to produce the accident kinematics as we know them.

Q. And we'll get to that in a second. But here you've got a little bit of a left-hand angle right before impact; right?

A. There is a slight angle, yes.

Q. Okay. Were you aware that Mr. Awerbach said

that he initially turned right to avoid the collision?

A. He said a lot of things. He may have said that. I don't recall specifically.

Q. And then he said he turned right and then he came back left, but he never said what the angle was when the impact occurred; right?

A. I'm not sure he would know. I don't think he did say.

Q. So when he said he turned it right, he could have been right or left, and you don't know; right?

A. No, because that would be inconsistent with Ms. Garcia's testimony.

Q. Okay. So let's look at this angle right here. Ms. Garcia's coming this direction from north to south; correct?

A. Sorry. Let me stand over here because it's hard to see.

Q. Sure. That's fine. Please do.

So Ms. Garcia's coming right here from north to south before the impact; right?

A. Yes.

Q. You've got an angle. What angle is this of her vehicle toward the median?

A. I don't recall for this slide. Obviously, it's a little bit to the left. You know, I would

approximate it as maybe 10 degrees, but I don't recall off the top of my head.

Q. Okay. There's no evidence in the record of what her angle was at impact; right?

A. No. She merely says that she swerved to the left.

Q. But you don't know how much she swerved?

A. That's right.

Q. Okay. Now, you told the jury it's one of a family of solutions that make things fit?

A. That's right.

Q. So before we move on to that, one more factor. You have to input a coefficient of friction in PC-Crash; correct?

A. Yes.

Q. And, typically, you can go out to the roadway where the accident occurred and you can measure that coefficient of friction; right?

A. You could.

Q. And that's how much resistance the pavement offers. Some pavement is slicker than other pavement; right?

A. Sure. Just to be clear, coefficient of friction is dependent upon the two materials that are in contact. So it's the resistance to motion across

the surfaces.

Q. And you used an average out of a book for typical asphalt; right?

A. I used 0.8, which is from a reference. But I also tested other coefficients of friction to see if it would make a difference.

Q. Okay. When you say "tested," you mean you put different data into your program?

A. That's right. So it's called a sensitivity analysis. What you do is you vary, say, coefficient of friction for one of the particular impact scenarios. And you see, does it make a large difference in the output in what happens? And, within reasonable ranges of coefficient of friction, it does not affect this accident, the kinematics in the accident.

Q. And you say you assume there were no skid marks, even though the vehicles spun 180 degrees; right?

A. Right. I didn't see pictures of skid marks. That's correct.

Q. And skid marks could be based on what the coefficient of friction was. If there's of lots oil on the road, it might be slicker than a coefficient of friction you would otherwise expect?

A. There would have to be a lot of oil on the

road to make a difference in this accident.

Q. Do you know how often it rains in Las Vegas?

A. I don't.

Q. So you mentioned that you put in a family of solutions. And you do iterations. And just so the jury understands, what you're doing is you're -- you're looking at a -- you're plugging in the speeds. And the speed of Mr. Awerbach's vehicle, you put in at 20 miles and 14 miles; right?

A. No. Actually -- so I adjusted the speeds of Mr. Awerbach's vehicle and Ms. Garcia's vehicle for a much larger range than that.

Q. Okay. Did you adjust Mr. Awerbach's up to 30?

A. I'll have to take a look at my notes. I don't remember what the top end was. But I can tell you, for the accident, the upper bound is about 20.

Q. That's right. You found the most likely was 14; the upper boundary is 20.

And you discredited Mr. Awerbach's top range of 30 when you did your analysis; right?

A. Well -- so I discounted the 30 that Mr. Awerbach said. That's correct. But, no, I don't think the most likely was 20. I think it was 18, if I remember correctly.

Q. And you used 30 for Ms. Garcia.
A. That's right.
Q. For --
A. For this one. But I've also adjusted that, so there's a range that I use in my analysis.
Q. Okay. And then what you do is you -- you put in different angles of impact, you put in different input data, and then you check or validate the outcome by seeing if it matches up the actual resting point of the vehicles; right?
A. So we don't know the resting points exactly. But in this particular case, we have testimony that Ms. Garcia was essentially turned around. She was facing the opposite direction after the accident. And so that's what we matched to.
You'll see at the end of this particular slide her vehicle was in a different lane. We have other -- well, I didn't put it in animation. But we have other runs where she has to swerve to the left, because her steering wheel is turned to the left. She actually goes straight back into her lane, as she testifies, facing the opposite direction with the speeds that we were just talking about.
Q. So correct me if I'm wrong, but your report says, "An iterative process was performed" -- which is

fancy word for, "repetitive," "over and over again"; right?

A. Not fancy, but sure.

Q. -- "process was performed to determine which speed and impact configuration would result in the final point of rest to the vehicles and calculated energy from the crush energy analysis."

So you're trying to validate your approach by seeing if the vehicles end up in your animation where they actually ended up in real life; right?

A. In the orientation in this case, yes.

And then we check that, as you just read, by looking at the energy. For example, we didn't know before -- wait.

I didn't know before I started the analysis if Ms. Garcia's vehicle just turned 180 degrees or it rotated all the way around and then went another 180 degrees. But because the damage to the vehicles would have to be so great in order for that to happen, we know that could not have been the case that she could only have gone 180 degrees around.

Q. Okay. If you could now play it to the end of the last frame for the jury.

A. Sure. Yeah. (Witness complies.)

Q. Okay. You would agree with me that, although

you may have other iterations and other animations that you've done, the one you -- the one you want to show the jury, Ms. Garcia's vehicle is spun around and it's not in the lane where she said it was facing oncoming traffic but it's across the median and over on the other side of the road; right?

A. In this one it is, yes.

Q. So if you assume that in actuality Ms. Garcia's vehicle is in this lane where she said it was, this iteration could not be reality; right?

A. It is with a slight change in steering angle. Actually, I have a picture if you want me to pull it up.

Q. Sir, if all of your inputs are accurate, the final resting place of the vehicles will be where they ended up in real life; right?

A. Sure.

Q. And there's no evidence in real life this is where the vehicles ended up.

In fact, it's inconsistent with real life; right?

MR. MAZZEO: Objection, Your Honor. Could we approach?

THE COURT: Sure.

/////

is not an expert, believes, that is not an important factor.

MR. ROBERTS: If he testified to that, Your Honor, we move to strike because that's contrary to his expert report in two places.

MR. MAZZEO: Well, I'm not saying that he didn't come up with a final resting point in his report, but in terms of the PC-Crash test analysis, that is not important for determining the -- the -- the speeds and the delta-v ultimately.

THE COURT: All right, guys. So under Hallmark, in determining whether an expert's opinion is based on reliable methodology, district court should consider whether the opinion is, one, within a reasonable -- recognized field of expertise; two, testable and has been tested; three, published and subject to peer review; four, generally accepted in the scientific community; and, five, based more on particularized facts rather than assumption, conjecture, or generalization.

Now, in the Hallmark case the supreme court found that Tradewinds in that case did not make really any attempt to prove the first several things there and consequently found that the expert should not have been allowed.

On -- I'm trying to find the pages for you -- page 652 of the P.3d cite, going on to page 653, it says, "Tradewinds also did not offer any evidence showing that these types of opinions were generally accepted in the scientific community. Further, his opinion was highly speculative because he conceded he formed it without knowing, one, the vehicle starting positions; two, their speeds at impact; three, the length of time the vehicles were in contact during impact; or, four, the angle at which the vehicles collided."

It says that "Tradewinds did not introduce evidence that Dr. Bowles attempted to recreate the collision by performing an experiment, so they could not address whether his opinion was the product of reliable methodology."

Further, they find that "Dr. Bowles' opinion was based more on supposition than science because he did not inspect Hallmark's vehicle, he could not identify an area or angle of impact, and he did not know the speed of the vehicles at the time of the collision."

That was their collision after looking at the O'Neil v. Windshire Copeland Associates case. Further, after looking at the Smelser v. Norfolk Southern

Railway Company case, they said that in that case it did not consider critical pieces of information, instead relied heavily upon assumptions.

"Analogous, here, Dr. Bowles concluded that the forces involved in the collision did not cause Hallmark's back injuries by either assuming or failure -- failing to consider critical pieces of information such as the vehicles' starting positions, the speeds, length of time the vehicles were in contact, and the angles of impact."

I'm very familiar with the Yeghiazarian case because that was my case. And the evidence in that case was very different from this case. So I don't know that it necessarily helps me.

The notes that I had taken in -- while Dr. Scher was on the stand, he placed the point of impact at a location different from what the police report shows. He based it on deposition testimony, is what his testimony was.

I think he agreed that there was no evidence of what angles either vehicle was at at the point of impact. He discounted Mr. Awerbach's 30-mile-per-hour testimony, and I think he testified that he concluded it was somewhere between 14 and 20. He used those two numbers. He used 30 miles an hour for Ms. Garcia.

Now, when Mr. Strassburg started questioning him, he talked about speeds, angles of impact, vehicle information, laws, distance, coefficient of friction. And in -- to his credit and to Mr. Strassburg's credit -- I mean, he asked all the right questions as far as whether the studies that he was basing his opinions on, whether the laws of physics were laws that have been testable and able to be tested and subject to peer review and things like that.

The concern or the problem that I guess I have is the point of impact, he doesn't know. The speeds of the vehicles, he doesn't know, because he's -- he started with the testimony of the parties, but he basically said they were wrong.

The point of impact as provided in the police report he says is wrong. He talks about crush and deformation to determine speed and angles, but he testified in his deposition, apparently, that he didn't see the crush and he was only making estimates based on photographs that he's seen.

I think this case is similar to the old cases of Choat and Levine that you can't use photographs to determine speed. Part of reason for that is because, in looking at photographs, you can't see the damage that's underneath a bumper or underneath the outside

section of a vehicle that you're looking at in a picture.

He's using these pictures of crush and deformation to determine speed and angles in this case, which I don't think it has sufficient foundation or evidentiary basis. He talks about coefficient of friction being, I think, .8.

Now, I think coefficient of friction, whether he went down to .7 or .9, I'm not going to say that he can't testify based on coefficient of friction because I think that is a standard that's used pretty much everywhere in any case, and I'm okay with that.

The problem is he even testified that he overestimates the crush for purposes of his photogrammetry and uses photogrammetry to determine speed and angles.

Starting and ending positions in this case are unknown.

Further, in Hallmark, even if I get past the initial analysis, you get to the point where, if he's used technique, experiment, or calculations, then the Court should consider whether they're controlled by known standards; the testing conditions, if they're similar; the technique in calculation, does it have a known error rate and was it developed by the -- by the

proffered expert for purposes of this case.

In looking at that, I don't know that I can say that any of his opinions are controlled by known standards because the opinions that he's offering, I think, are based more on assumption, conjecture, and generalization than they are on the particular facts of the case.

I don't know that I've ever excluded an expert from trial based on lack of foundation in the Hallmark case, but in this case I'm going to have to. Sorry, guys.

So how do we proceed from here? I know this doesn't make you guys happy. So tell me what you want me to do.

MR. MAZZEO: Tell us what we want to do from -- from what perspective, from -- with regard to Dr. Scher, he's done basically; right? I mean, that's your --

THE COURT: Well, I don't think there's a foundation for any of the opinions that he's offered or for the opinions that I think you want him to offer, which are even further -- I mean, any opinions that he has to offer that deal with injury or forces, whether forces of daily life, are more than what he experienced in the accident. I think that's all based on the

conclusions that he has about the speed and the forces and the impact that I can't let him testify about.

I mean, I guess I'm asking you, is there something that you want to -- that he can offer that's separate and aside from those opinions?

MR. MAZZEO: May we have a moment, Judge?

MR. STRASSBURG: Well, let's go talk to him, Judge, let's find out.

THE COURT: And I guess, if you want him to testify about, for example -- well, I'm thinking that he can probably still testify about the -- the forces that are put on a body during the ordinary activities of daily living. But I don't know that that matters if nobody's going to say that the accident was more or less than that. I don't know that that has any relevance.

So I don't know. You guys talk and decide if there's something that you think he can offer in light of that ruling.

MR. STRASSBURG: Thank you, Judge.

THE COURT: Let me know. Off the record.

(Whereupon a short recess was taken.)

THE COURT: Want to go back on first or stay off?

Go back on the record. We're still outside

MR. ROBERTS: Thank you, Your Honor.

VOIR DIRE EXAMINATION

BY MR. ROBERTS:

Q. Dr. Scher, could you direct us to the place in either one of your reports where you say that the only thing that matters is the rotation of Ms. Garcia's vehicle?

A. I don't say the only thing that matters is the rotation of the vehicle.

Q. And just so we're totally clear for the Court on the conclusions that you would like to offer to the jury, the first thing you said you did was the PC-Crash analysis; right?

A. The first thing is the accident reconstruction analysis overall.

Q. Right. Okay. Using PC-Crash.

A. PC-Crash is part of that, yes.

Q. And -- and here -- here are the notes that your counsel wrote down when he was asking you what had to go into PC-Crash in order to get delta-v.

MR. STRASSBURG: Objection.

BY MR. ROBERTS:

Q. And you told --

MR. STRASSBURG: I don't represent him.

BY MR. ROBERTS:

Q. You told him speed --

MR. ROBERTS: I'm sorry, Your Honor.

THE COURT: Yeah, you said "your counsel," so that's true.

BY MR. ROBERTS:

Q. Okay. This is what you told --

THE COURT: Just say, these are the answers that you gave to Mr. Strassburg.

MR. ROBERTS: Yes.

BY MR. ROBERTS:

Q. Who hired you in this matter?

A. Mr. Strassburg.

Q. Who do you send your bills to?

A. Mr. Strassburg.

Q. Who pays it?

MR. MAZZEO: Beyond the scope of voir dire.

BY MR. ROBERTS:

Q. So Mr. Strassburg asked you what had to go into PC-Crash, what was important. You told him speed; correct?

A. I did.

Q. And you told him angles; correct?

A. That's right.

Q. And you told him vehicle specs; right?

A. That's right.

Q. And you want to know the mass of the vehicle; right? And the wheel base and the center of gravity, all that stuff?

A. That's right.

Q. So you plugged all this into PC-Crash, and one of the things you get out of PC-Crash is delta-v; right?

A. That is a result, yes.

Q. And this is delta-v of Ms. Garcia's vehicle; correct?

A. Actually both vehicles, but yes.

Q. But what -- what you used in your conclusion was the delta-v of Ms. Garcia's vehicle; right?

A. That is one of my conclusions, yes.

Q. Okay. And you concluded it could be no greater than 9; right?

A. That was the upper bound, correct.

Q. Okay. So another one of the drawings. Okay. So Ms. Garcia's vehicle is traveling along.

A. I think there's a newer version.

Q. Is there? Okay.

MR. STRASSBURG: That's Court Exhibit 8.

MR. ROBERTS: Oh, did you tear it off?

MR. STRASSBURG: Yeah, I gave it to the

Court.

THE COURT: I have clips for you.

MR. ROBERTS: Got two, Your Honor. Audra beat you.

THE COURT: You got some?

MR. ROBERTS: Yes.

BY MR. ROBERTS:

Q. Okay. I have got now Court's Exhibit 8. Is that right? So Ms. Garcia's vehicle is traveling this way; right?

A. Down on the page, that's right.

Q. Okay. She's traveling southbound. And if she's going 30 miles an hour, that's her velocity. But there's no delta-v at this point as long as she's not accelerating or decelerating or moving laterally; right?

A. That's right.

Q. So now Mr. Garcia's -- excuse me. Mr. Awerbach's vehicle hits her. And the delta-v that you're calculating is caused by Mr. Awerbach's vehicle; right?

A. By the contact with it, yes.

Q. By the contact with it. Energy from Mr. Awerbach's vehicle is transferring to Ms. Garcia's vehicle and causing it to accelerate.

INSTRUCTION NO. 27

Certain charts and summaries have been received into evidence to illustrate facts brought out in the testimony of some witnesses. Charts and summaries are only as good as the underlying evidence that supports them. You should therefore give them only such weight as you think the underlying evidence deserves.

INSTRUCTION NO. 28

There was in force at the time of the occurrence in question a law (NRS 484C.110) which read as follows:

> It is unlawful for any person who . . . [i]s under the influence of a controlled substance . . . to drive or be in actual physical control of a vehicle on a highway or on premises to which the public has access. . . .
>
> It is unlawful for any person to drive or be in actual physical control of a vehicle on a highway or on premises to which the public has access with an amount of a prohibited substance in his or her blood or urine that is equal to or greater than:

Prohibited substance	Urine Nanograms per milliliter	Blood Nanograms per milliliter
. . . .		
(h) Marijuana metabolite	15	5

A violation of the law just read to you constitutes negligence as a matter of law.

INSTRUCTION NO. 29

It has been established as a matter of law that Defendant Jared Awerbach was impaired at the time of the January 2, 2011 collision. After the subject collision, Defendant Jared Awerbach consented to having Las Vegas Metropolitan Police Department take a sample of his blood. The Las Vegas Metropolitan Police Department Toxicology Laboratory tested Defendant Jared Awerbach's blood and determined that at the time of the subject collision, Defendant Jared Awerbach had 47 nanograms of marijuana metabolite per milliliter of blood. This exceeds the legal level of 5 nanograms of marijuana metabolite per milliliter.

Defendant Jared Awerbach has been deemed impaired as a matter of law.

INSTRUCTION NO. 30

In order to establish a claim of negligent entrustment against Defendant Andrea Awebach, Plaintiff has the burden of proving the following elements by a preponderance of the evidence:

(1) That the Defendant Andrea Awerbach knowingly entrusted her vehicle to an inexperienced or incompetent person; and

(2) That the Defendant Andrea Awerbach's entrustment of her vehicle was a proximate and a legal cause of the damage to Plaintiff.

Among other factors, you may consider that fact that Defendant Jared Awerbach was unlicensed as evidence that he was inexperienced or incompetent to drive a motor vehicle on the date of the collision.

Entrustment may be established through proof of either express or implied permission.

INSTRUCTION NO. 31

The law provides for a rebuttable presumption that Defendant Andrea Awerbach gave Defendant Jared Awerbach permission, express or implied, to use her car on the day of the subject accident.

The effect of this rebuttable presumption is that it places upon Defendant Andrea Awerbach the burden of proving, by a preponderance of the evidence, that she did not give Defendant Jared Awerbach permission, express or implied, to use her car on the day of the subject accident.

INSTRUCTION NO. 32

An owner of a motor vehicle is liable for any damages proximately resulting from the negligence of an immediate family member in driving and operating the vehicle upon a highway with the owner's express or implied permission.

As advised in these instructions, Defendant Jared Awerbach was negligent and caused the accident that gives rise to this case. You must then determine whether or not he was driving with the express or implied permission of Defendant Andrea Awerbach.

If you find that Defendant Jared Awerbach did not have such permission, then your verdict must be in favor of Defendant Andrea Awerbach.

But if you find that such permission, express or implied, had been given, you must find Defendant Andrea Awerbach also liable.

INSTRUCTION NO. 33

In determining the amount of losses, if any, suffered by Plaintiff as a proximate result of the accident in question, you will take into consideration the nature, extent and duration of the injuries or damages you believe from the evidence Plaintiff has sustained, and you will decide upon a sum of money sufficient to reasonably and fairly compensate her for the following items:

1. The reasonable medical expenses Plaintiff has necessarily incurred as a result of the accident.

2. The reasonable medical expenses which you believe Plaintiff probably will incur in the future as a result of the accident.

3. Any loss of household services proximately caused by the accident from the date of the accident to the present and any loss of household services you believe Plaintiff will probably experience in the future as a proximate result of the accident.

4. The physical and mental pain, suffering, anguish and disability endured by Plaintiff from the date of the accident to the present, including lost enjoyment of life or the lost ability to participate and derive pleasure from the normal activities of daily life, or for the inability to pursue talents, recreational interests, hobbies, or avocations.

5. The physical and mental pain, suffering, anguish and disability which you believe Plaintiff will probably experience in the future, as a proximate result of the accident, including lost enjoyment of life or the lost ability to participate and derive pleasure from the normal activities of daily life, or for the inability to pursue talents, recreational interests, hobbies, or avocations.

INSTRUCTION NO. 34

Where Plaintiff's injury or disability is clear and readily observable, no expert testimony is required for an award of future pain, suffering, anguish and disability. However, where an injury or disability is subjective and not demonstrable to others, expert testimony is necessary before a jury may award future damages.

INSTRUCTION NO. 35

A person who has a condition or disability at the time of an injury is not entitled to recover damages therefor. However, a Plaintiff is entitled to recover damages for any aggravation of a preexisting condition or disability, caused by the injury.

This is true even if a condition or disability made Plaintiff more susceptible to the possibility of ill effects that a normally healthy person would have been, and even if a normally healthy person probably would not have suffered any substantial injury.

Where a preexisting condition or disability is so aggravated, the damages as to such condition or disability are limited to the additional injury caused by the aggravation

INSTRUCTION NO. 36

No definite standard or method of calculation is prescribed by law by which to fix reasonable compensation for pain and suffering. Nor is the opinion of any witness required as to the amount of such reasonable compensation. Furthermore, the argument of counsel as to the amount of damages is not evidence of reasonable compensation. In making an award for pain and suffering, you shall exercise your authority with calm and reasonable judgment and the damages you fix shall be just and reasonable in light of the evidence.

INSTRUCTION NO. 37

Whether any of these elements of damage have been proven by the evidence is for you to determine. Neither sympathy nor speculation is a proper basis for determining damages. However, absolute certainty as to the damages is not required. It is only required that Plaintiff prove each item of damage by a preponderance of the evidence.

INSTRUCTION NO. 38

If you find that Plaintiff is entitled to compensatory damages for actual harm caused by Defendants' breach of an obligation, then you may consider whether you should award punitive damages against Defendant Andrea Awerbach. The question whether to award punitive damages against a particular defendant must be considered separately with respect to each defendant.

You may award punitive damages against Defendant Andrea Awerbach only if Plaintiff proves by clear and convincing evidence that the wrongful conduct upon which you base your finding of liability for compensatory damages was engaged in with oppression and/or malice on the part of Defendant Andrea Awerbach. You cannot punish Defendant Andrea Awerbach for conduct that is lawful, or which did not cause actual harm to the Plaintiff. For the purposes of your consideration of punitive damages only:

"Oppression" means despicable conduct that subjects the Plaintiff to cruel and unjust hardship with a conscious disregard of the rights of the Plaintiff.

"Malice" means conduct which is intended to injure the Plaintiff or despicable conduct which is engaged in with a conscious disregard of the rights or safety of the Plaintiff.

"Despicable conduct" means conduct that is so vile, base or contemptible that it would be looked down upon and despised by ordinary, decent people.

"Conscious disregard" means knowledge of the probable harmful consequences of a wrongful act and a willful and deliberate failure to avoid these consequences.

The purposes of punitive damages are to punish a wrongdoer that acts with oppression and/or malice in harming a plaintiff and deter similar conduct in the future, not to make the Plaintiff whole for her injuries. Consequently, a plaintiff is never entitled to punitive damages as a matter of right and whether to award punitive damages against the Defendant is entirely within your discretion.

At this time, you are to decide only whether Defendant Andrea Awerbach engaged in wrongful conduct causing actual harm to the Plaintiff with the requisite state of mind to permit an award of punitive damages against Defendant Andrea Awerbach, and if so, whether an assessment of punitive damages against Defendant Andrea Awerbach is justified by the punishment and deterrent purposes of punitive damages under the circumstances of this case. If you decide an award of punitive damages is justified, you will later decide the amount of punitive damages to be awarded, after you have heard additional evidence and instruction.

INSTRUCTION NO. 39

Clear and convincing evidence is that measure or degree of proof which will produce in the mind of the jury a firm belief or conviction as to the allegations sought to be established. It is an intermediate degree of proof, being more than a mere preponderance but not to the extent of such certainty as is required to prove an issue beyond a reasonable doubt. Proof by clear and convincing evidence is proof which persuades the jury that the truth of the contentions is highly likely.

INSTRUCTION NO. 40

If you find that Plaintiff is entitled to compensatory damages for actual harm caused by Defendant Jared Awerbach's breach of an obligation, you may also consider whether you should assess punitive damages against Defendant Jared Awerbach on the basis of his impairment with a controlled substance, if Plaintiff proves that:

1. Defendant Jared Awerbach willfully consumed or used marijuana knowing that he would thereafter operate a motor vehicle; and
2. Defendant Jared Awerbach thereafter caused actual harm to Plaintiff by operating a motor vehicle.

The purposes of punitive damages are to punish a wrongdoer that harms the plaintiff and to deter similar conduct in the future, not to make the Plaintiff whole for her injuries. Consequently, a plaintiff is never entitled to punitive damages as a matter of right and whether to award punitive damages against the Defendant is entirely within your discretion.

INSTRUCTION NO. 41

There are no fixed standards for determining the amount of punitive damage award; the amount, if any, is left to your sound discretion, to be exercised without passion or prejudice and in accordance with the following governing principles.

The amount of punitive damage award is not to compensate the Plaintiff for damages suffered but what is reasonably necessary (in light of the Defendant's financial condition) and fairly deserved (in light of the blameworthiness and harmfulness inherent in the Defendant's conduct) to punish and deter the Defendant and others from engaging in conduct such as that warranting punitive damages in this case. Your award cannot be more than otherwise warranted by the evidence in this case merely because of the wealth of the Defendant. Your award cannot either punish the Defendant for conduct injuring others who are not parties to this litigation or financially annihilate or destroy the Defendant in light of the Defendant's financial condition.

In determining the amounts of your punitive damage awards, if any, against Defendant Jared Awerbach, you should consider the following guideposts:

The degree of reprehensibility of the Defendant's conduct, in light of (a) the culpability and blameworthiness of the Defendant's fraudulent, oppressive and/or malicious misconduct under the circumstances of this case; (b) whether the conduct injuring Plaintiff that warrants punitive damages in this case was part of a pattern of similar conduct by the Defendant; and (c) any mitigating conduct by the Defendant, including any efforts to settle the dispute.

The ratio of your punitive damage award to the actual harm inflicted on the Plaintiff by the conduct warranting punitive damages in this case, since the measure of punishment must be both reasonable and proportionate to the amount of harm to the Plaintiff and to the compensatory damages recovered by the Plaintiff in this case.

How your punitive damages award compares to other civil or criminal penalties that could be imposed for comparable misconduct, since punitive damages are to provide a means by which the community can express its outrage or distaste

for the misconduct of a fraudulent, oppressive or malicious Defendant and deter and warn others that such conduct will not be tolerated.

Evidence has been presented concerning Defendant Jared Awerbach's 2008 car accident. You cannot use such evidence to award Plaintiff punitive damages for conduct injuring others who are not parties to this litigation, or conduct that does not bear a reasonable relationship to the conduct injuring Plaintiff that warrants punitive damages in this case. You may consider such evidence only with respect to the reprehensibility of the Defendant's conduct and only to the extent the conduct is similar and bears a reasonable relationship to the Defendant's conduct injuring Plaintiff that warrants punitive damages in this case.

INSTRUCTION NO. 42

The court has given you instructions embodying various rules of law to help guide you to a just and lawful verdict. Whether some of these instructions will apply will depend upon what you find to be the facts. The fact that I have instructed you on various subjects in this case, including that of damages, must not be taken as indicating an opinion of the court as to what you should find to be the facts or as to which party is entitled to your verdict.

INSTRUCTION NO. 43

It is your duty as jurors to consult with one another and to deliberate with a view toward reaching an agreement, if you can do so without violation to your individual judgment. Each of you must decide the case for yourself, but should do so only after a consideration of the case with your fellow jurors, and you should not hesitate to change an opinion when convinced that it is erroneous. However, you should not be influenced to vote in any way on any questions submitted to you by the single fact that a majority of the jurors, or any of them, favor such a decision. In other words, you should not surrender your honest convictions concerning the effect or weight of evidence for the mere purpose of returning a verdict or solely because of the opinion of the other jurors. Whatever your verdict is, it must be the product of a careful and impartial consideration of all the evidence in the case under the rules of law as given by the court.

INSTRUCTION NO. 44

If, during your deliberation, you should desire to be further informed on any point of law or hear again portions of the testimony, you must reduce your request to writing signed by the foreman. The officer will then return you to court where the information sought will be given to you in the presence of the parties or their attorneys.

Readbacks of testimony are time consuming and are not encouraged unless you deem it a necessity. Should you require a readback, you must carefully describe the testimony to be read back so that the court reporter can arrange his notes. Remember, the court is not at liberty to supplement the evidence.

INSTRUCTION NO. 45

When you retire to consider your verdict, you must select one of your number to act as foreman, who will preside over your deliberation and will be your spokesman here in court.

During your deliberation, you will have all the exhibits which were admitted into evidence, these written instructions and forms of verdict which have been prepared for your convenience.

In civil actions, three-fourths of the total number of jurors may find and return a verdict. This is a civil action. If your verdict is in favor of the Plaintiff, you are directed to make special findings of fact consisting of written answers to the questions in a form that will be given to you. You shall answer the questions in accordance with the directions in the form and all of the instructions of the court. As soon as six or more of you have agreed upon a verdict and six or more of you have agreed upon every answer in the special findings, you must have the verdict and special findings signed and dated by your foreman, and then return with them to this room.

INSTRUCTION NO. 46

During opening statements, counsel for Defendant Andrea Awerbach stated that "just because there's no evidence of any preexisting records, doesn't mean that none exist." You should disregard this statement. There is no evidence that Plaintiff Emilia Garcia ever sought medical treatment related to back pain prior to the accident. It would be improper for you to speculate that such medical records exist.

INSTRUCTION NO. 47

Now you will listen to the arguments of counsel who will endeavor to aid you to reach a proper verdict by refreshing in your minds the evidence and by showing the application thereof to the law; but, whatever counsel may say, you will bear in mind that it is your duty to be governed in your deliberation by the evidence, as you understand it and remember it to be, and by the law as given you in these instructions, and return a verdict which, according to your reason and candid judgment, is just and proper.

Given this 8TH day of March, 2016

HONORABLE JERRY A. WIESE II

EXHIBIT 6

EXHIBIT 6

CASE NO. A-11-637772-C

DEPT. NO. 30

DOCKET U

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

EMILIA GARCIA, individually,

Plaintiff,

vs.

JARED AWERBACH, individually; ANDREA AWERBACH, individually; DOES I-X, and ROE CORPORATIONS I-X, inclusive,

Defendants.

REPORTER'S TRANSCRIPT
OF
PROCEEDINGS

BEFORE THE HONORABLE JERRY A. WIESE, II

DEPARTMENT XXX

DATED WEDNESDAY, MARCH 9, 2016

REPORTED BY: LEAH ARMENDARIZ, RPR, CCR #921

Now, here's my plan. Because I know you want to get to it, and I don't blame you. I'm going to talk about -- don't told me to this, but I'm going to talk about my top 10 assumptions that they want you to make that you shouldn't, and then I'm going to talk to you about my top 10 arguments that you may have and how to deal with them.

Because, you know, people raise all kinds of different arguments in jury deliberations, and I'm saying you need to be ready because there's very sensible reasons for all of them, and they all weigh in favor of Jared Awerbach and his mom, Andrea.

Now let's talk about my first one. Oh, if this is helpful, write it down. I'm not going to waste time writing it down. And if it's not, don't feel like you have to.

Let's talk about the first assumptions they want you to make and that is that the physical forces on her spine from the collision had to be greater than the physical forces on her spine from all those 30-odd years of the activities of daily living.

MR. ROBERTS: Objection, Your Honor. No argument based on all the evidence.

MR. STRASSBURG: I get to point out what's not been proven too.

THE COURT: Come on up.

(A discussion was held at the bench, not reported.)

THE COURT: Okay, folks. I'm just going to reinstruct you again. I'm going to let Mr. Strassburg talk about the forces of -- as he said so far, anyway, but you need to remember that Dr. Scher came and testified about forces of impact, and I struck that testimony and instructed you to disregard it, so you're not to consider any testimony by Dr. Scher as it relates to this argument that is being made.

Go ahead, Mr. Strassburg.

MR. STRASSBURG: Thank you, Judge.

Now, let me talk about this assumption that they want you to make because you've heard testimony -- and I can show it to you here by Dr. Oliveri. Remember that was the doctor -- he wasn't a treating doctor. They hired him for a purpose.

Let me show you what Dr. Oliveri -- let me show you his -- and this is right out of the record of the court. It was on February 22, 2016. It was on Page 212. And this was my partner, Tindall, doing this. And in expressing thanks to you, I certainly didn't mean to exclude him. I thank Mr. Tindall for all the work he's put in to this.

"True or false, in order for plaintiff to have experienced low back pain due to a slipped vertebra or an offset, the vertebra at L5-S1 would have had to move."

And Dr. Oliveri's answer -- remember the guy who did his residency at Stamford. He said:

"True. If you're talking about a slipped or moved vertebra by definition."

So for the plaintiff to prove cause, that the offset to the vertebra was caused by this accident, they have to prove to you that the vertebra moved as a result of the collision, and that they have not done. What they want you to make is an assumption, and that's not proof.

Now, let me show you the plaintiff's logic that I'll prove to you it's wrong. Here's what they want to show you. They want you to assume that the force of the collision was greater than the strength of her spinal structure, and that's this and all the ligaments and the muscles that support it. The force of the collision was greater than the strength of her spine to resist it, and the strength of her spine, that was greater than all the forces of the activities of daily

living before the accident. Because we know that those forces of daily living, those didn't cause her any pain because she was pain free before the accident.

So, however strong her spine was, it was strong enough for the vertebra not to move during her activities of daily living before the accident. What did those involve? Well, you've heard her say she rode the roller coasters. She rode the roller coasters at New York-New York. She road them at Circus Circus. And that didn't hurt her spine one bit.

And the spondylolisthesis, the offset, was present for all those roller coaster rides, didn't cause her any pain. And they want you to assume that the forces from this fender-bender, you've seen the pictures of the vehicle, those forces caused her spine to move, and those forces were greater than the forces of the roller coasters that she rode before the accident that didn't cause her any pain. They haven't proven it. They want you to make that assumption. You should not do that. And you should look at that scale and you should say, I'm pulling that assumption off that scale on her side because that doesn't belong there because that's not evidence.

Now, let me show you an illustration, a demonstration that makes this point another way. You

also seen count -- bless you.

MR. ROBERTS: Objection. This is -- this was put on the screen during Dr. Scher's testimony and it's been stricken.

MR. STRASSBURG: Permission to approach.

THE COURT: Come on up.

(A discussion was held at the bench, not reported.)

THE COURT: The objection is overruled.

MR. STRASSBURG: Now, on the left side, the forces on the spine from the activities of daily living. On the right side, we know that two equal and opposite forces don't -- can't make something move. If I'm pushing on Mr. Roberts and he's pushing back at me with the same force, there's not going to be motion.

To have motion, the force on one side has to be greater than on the other. Now this is what the plaintiff wants you to assume. Because they know that for all they've shown with evidence, well, it could be this where the red arrow is the force from the fender-bender, and it's less than the forces of activities of daily living, and they want you to make an assumption, but in a courtroom, you don't get assumptions. You have to prove with evidence. So take that assumption off their side of the scale.

They want you to believe that the collision that caused this was greater in terms of force on her spine than riding a roller coaster at New York-New York or Circus Circus or any of the other things she did for years and years before this accident with no pain.

Again, to be fair, a close-up view shows the deflated tire, scrape on the bottom that, I don't know, I can't see it on the left one, but on the right there is. So there you have the picture.

And, you know, they mentioned that now it's been totaled, but as you remember, the car -- her car had over 103,000 miles on it.

Now, there was some testimony about the door, remember that, Mr. Roberts wanted to draw your attention to this because of the door. See, and he wanted you to assume that that happened in the accident. But, his own client, she testified it was March 4th, Page 111:

"Q And I see the back door is sticking out. Had you opened it?

"A I tried."

So, you see, she changed the conditions. The car wasn't in the same condition it was just after the accident, but he's asking you to make another assumption.

Now, let me show you how they went about

trying to do this. Remember Dr. Kidwell? He was -- he was this guy. The guy who did all this treatment that didn't work. Well, Kidwell said to you -- and, again, just to be fair, this is Kidwell -- Kidwell's nutshell. So, on February 24, 2016, Page 106. And I'm sorry this takes a little longer doing it this way, but I can't remember what I had for breakfast two days ago. How are you supposed to remember what somebody said on February 24th? I don't know. So I thought just to be safe, I'd show it to you again. And this is the official record of the court. So these were the words you heard. Okay.

"Q Can you explain to us the medical mechanism that you believe resulted in the forces of the collision resulting in the pain?

And what was Dr. Kidwell's answer?

"A It's my understanding" -- oh, where did he go? He talked to -- "as part of the collision she was traveling approximate 35 miles an hour" -- from her -- "struck by another vehicle" -- that's true -- "causing her vehicle to spin at least 180 degrees."

That's kind of spin because we know it was only 180 degrees. It wasn't 360 or any more. 180 degrees.

And then Dr. Kidwell says:

> "It's pretty high velocity, probably hyperextended or laterally flexed her spine. She already had a spondylolisthesis there."

See, there's the preexisting condition. Even Kidwell admits that.

The sequence of events -- okay, remember that. I'm coming back to that. The sequence of events, this is very telling. The sequence of events caused that to become damaged with progressive pain. That's it in a nutshell.

Okay. So that's how Kidwell goes about this. Now, does Kidwell know what the forces are? I mean, does he know whether the forces are greater in the collision than of daily living? Let me show you what he says, because we asked him about this.

Okay. February 24, Page 07.

> "Q When you say the forces of the collision resulted in lateral movement of her spine, which way do you believe her spine moved?

"A I don't know. I mean, she spun 180 degrees. If you ever watched a video of people of crash-test dummies, they get flopped all over the place. I mean, nobody is really there to videotape it, but I dare say if you took one of the crash test dummies and put it at in a 180 spin while traveling at 35 miles an hour, it would result in some shaking up, for lack of a better word.

"I am not a biomechanical engineer. I have done some airline airplane crash reconstructions in my job as a flight surgeon in the Navy, but no, I don't hold myself out to be a biomechanical engineer."

So, use your common sense. Do you think they videotape crash dummies in accidents where nobody gets hurt or do you think they videotape crash tests where the physical forces are enough to cause injury, because that's what they want to study.

Well, Kidwell admits he's not a biomechanical engineer. So what he's giving you is a doctor, treating a patient making an assumption just because a witness

makes an assumption. That doesn't mean that you make one. Because you make your decision on evidence. And anybody that tries to talk you out of that in the jury room, just gently remind them, are we dealing with assumptions here or real proof?

Now, so where did Kidwell get his knowledge of physical forces? And he said -- he testified February 24th, Page 111, Lines 6 through 9 and he says:

"Well, I've ridden in F4s, F14s and various other plains, and I'm well familiar with g-forces. I pulled 9 Gs in an F16 one time."

Did it hurt his spine? Of course not.

Page 110:

"Q And those 9 Gs injured your back, did they?

"A Played a little havoc with my neck.

"Q But your spine was okay?

"A Well, I don't know. I haven't had it imaged before and after."

So, you see, when it comes to his spine, he's got to see it on an MRI. When it comes to somebody else, he'll make an assumption, particularly if he's getting paid for the treatment.

All right. Now, remember I told you to look for the sequence of events? Here it comes. Here's another one from Dr. Kidwell. And this, again, February 24th and this is Page 108.

"Q Just to enable us to better understand where you're coming from, is it your belief that the forces of the accident caused the -- this L5 vertebra to slip forward over the disk between it and the S1?

"A Well, absence edema on an MRI you would have to expect that the pars defect was preexisting and was spondylolisthesis to some degree.

"Q Could the injury have exacerbated that sheering?

"A Sure, I would go that far."

Do you see any evidence for him to get that far? No. He's willing to make that assumption, but you are constrained to make the plaintiff show you evidence, real proof. Proof in a courtroom. And he said:

"But what most of my testimony, most of my causation is based on, A" -- okay. Here it comes. Remember the sequence -- "on a temporal

relationship between the onset of symptoms and this traumatic event, and I know of no other preexisting pain. I know of no other traumatic event or any other rational cause to suggest that something else caused this lady's pain."

So what Kidwell wants you to do is follow him down this road of logical fallacy. What Kidwell wants you to say is because it happened before her pain, it must have caused her pain. Kind of like a rooster. Because the rooster crows before Sunset, therefore the rooster caused the Sunset. It's fallacious. It's an assumption. It's not proof.

And just to be complete. Was there an edema? Well, no. Page 88, February 24:

"Q Is it correct to say that the radiologist respected this MRI --

"A I can say that.

"Q -- didn't -- hold on. Did not identify any presence of edema?

"A Correct.

No edema. No motions. No cause. Unless you want to do it Kidwell's way, the rooster's way.

Again, I'll go back to Dr. Stamford,

Dr. Oliveri that on edema, February 22, 2016. Page 160:

"Q There was no evidence of any hemorrhage or specific finding of edema.

"A Correct.

No edema, no bruising. No physical forces greater than the roller coasters she rode before. No causation. Unless you're willing to make an assumption and that you should not do.

MR. ROBERTS: Objection. Move to strike there the reference of physical forces greater than the roller coaster.

THE COURT: He's not relying on Dr. Scher. He's just using common sense. I'll allow it.

MR. STRASSBURG: Speaking of roller coasters, that's turn to Ms. Garcia's testimony, March 2nd, Page 265.

"Q Let's talk about before the accident. Tell the jury what types of things that you used to like to do before the crash" --

You can tell that's Mr. Roberts because he always calls it a crash, we call it an accident, because he wants you to make an assumption. What do you think he wants that assumption to be?

"A Amusement parks, you know, here in town. You've got Circus Circus, you've got New York-New York, and their roller coasters. Swimming, the movies, going to the park. Enjoying activities with them at the park, walking on a daily basis after work, you know, trying to stay healthy."

She rode roller coasters at New York-New York at Circus Circus. She rode them before the accident. It didn't cause her any pain before the accident. And if you -- what the plaintiff wants you to assume that the forces of that collision that made that fender-bender were greater than the forces from the roller coasters at Circus Circus and New York-New York. That's an assumption you should not make.

And, you might consider a couple other facts. She testified March 4, Page 79.

"Q In the accident, you were wearing your seat belt and shoulder belt?

"A Yeah. The seat belt covers your shoulder and your chest, yes.

A laptop -- or the lap belt, right? So she's belted in.

"Q The airbags did not deploy?

"A No, sir."

So think about that. Hyundai puts a computer now, that fancy computer, it didn't even know anything had happened that required it to go to work and fire the deployment of the airbag.

Yet the plaintiff wants you to assume that the forces that wouldn't even wake up that computer were greater than the ones that her spine was subjected to on those roller coasters. They're asking you to make an assumption. That you should not do. That's not proof.

And, you know, just in case there's any doubt of what Kidwell was up to, you know, with the rooster, here's what he said, again, February 24th, Page 111:

"Q It sounds as though your opinion is based most firmly on your reasoning that she's pain free before, she hurts afterwards, the only thing between these two is this accident, therefore, it has to be the collision. Right? Stands to reason, doesn't it?"

"A It absolutely stands to reason. I agree with you."

She's pain free before; the rooster crows before sunrise. She hurts afterwards; the sun comes up.

Take until 1:15. Have a good lunch.

(Jury exited.)

THE COURT: All right. Outside the presence. I know you guys want to make a record for a couple of things. Can we do it when we come back at five after 1:00?

MR. ROBERTS: That's fine, Your Honor.

THE COURT: All right. We'll see you when we get back.

(Recess taken from 11:58 a.m. to 1:07 p.m.)

(The following proceedings were held outside the presence of the jury.)

MR. ROBERTS: The first matter, Your Honor, are objections to the slides and associated argument with regard to the forces of daily living, and the forces of the collision put on the screen, a slide that had been used with his expert, Dr. Scher. It was the same slide he used with Dr. Scher. He had taken off some words that had been excluded. Obviously the evidence and the slides had all been struck. The jury was told to disregard it, and now they're looking at the same slides without the words and making the same arguments, but now it's just common sense instead of from a doctor.

And that's improper, and I would like for the proposed slides that were to be used with Dr. Scher to be marked as a court's exhibit, and I'd like the exhibits he showed the jury today that I objected to as a court's exhibit, and when the court looks, you'll see at one point when I objected again, he actually put up an exhibit that the Court had excluded when Dr. Scher was even on the stand for no foundation, and that was the spine. Arrows from each side and then he's got a big arrow and little arrow inside it.

Now, when he wanted to show it during Dr. Scher's testimony, the big arrow was the forces of daily life and the little arrow were the forces of the collision, and so he's trying -- he's already told the jury what Dr. Scher was going to say. He already got Dr. Scher to say some stuff. Those opinions were excluded. The jury is not supposed to even think about them, and now he's allowed to go bang and try to bring back all of these things in their mind and to get them to find that the forces of the collision were not enough to cause the injuries to the spine when there's no medical evidence of that. And that's why I objected to the slide and why I think that argument was improper with no medical evidence -- excuse me, no scientific evidence to support it in the record.

THE COURT: He never made the statement that you just made, your last statement.

MR. ROBERTS: I understand. He wants the jury to reach that conclusion, and if not for wanting the jury to make -- to speculate that that's true, all of the things he talked about would have no relevance, and therefore, their prejudice would outweigh any probative value. It's only for that conclusion. He never got to that. He's talking about those things. Otherwise, it's just prejudicial, and he said the forces were less than a roller coaster.

THE COURT: I don't remember an objection to that though.

MR. ROBERTS: I did, I think. I meant to -- I meant to object.

THE COURT: I don't know how the question was asked.

MR. ROBERTS: The record will reflect whether I did or not, but --

THE COURT: Again, I think if the statement was made that the forces of this impact were less than forces of a roller coaster, I would have sustained that objection because that's a conclusion that doesn't have a basis in evidence, I agree, but I think the way --

MR. ROBERTS: And he may not have said it that

way. He may have said it in a way to infer that or get the jury to assume that. That's what he's saying.

THE COURT: Well, and that's part of the closing argument is what can you infer from the evidence that has come in. I've got to try to let him make those inferences. Even if Dr. Scher was stricken and I told the jury Dr. Scher is stricken, and these opinions are not Dr. Scher's opinions.

MR. ROBERTS: But you can only ask the jury to infer things that don't require an expert.

THE COURT: Agreed.

MR. ROBERTS: And this is something that requires an expert and you can't ask them to infer something that a doctor or biomechanic or physicist is to know. Otherwise, you're asking them to speculate.

THE COURT: I understand your argument. What else?

MR. ROBERTS: The others were the objections I made to other arguments for which there's no medical evidence and for which medical evidence would be required to reach those conclusions. One is the roller coasters. I've talked about that.

The other is this inference that he wants the jury to make that she was hurt in the shower. Not a single doctor testified that she was hurt in the shower.

plead with you your verdict should take that into account.

MR. ROBERTS: Same objection, Your Honor.

THE COURT: Overruled.

MR. STRASSBURG: I plead with you your verdict should take that into account. You should not financially destroy these people. Your verdict should not be a penny over $50,000.

You will be getting a verdict form. It looks like this. Mr. Mazzeo yesterday showed you how to fill it out. We're fine with that. On the first page, past medical expenses, 20,018.52.

Future medical expenses caused by the collision, zero.

Past loss of household services caused by the collision, zero.

Future loss of household services caused by the accident, zero.

Past pain and suffering and loss of enjoyment of life -- well, let me go to future pain and suffering and loss of enjoyment of life. Zero.

His total was 30,018.52. He advocated past pain suffering, loss of enjoyment of life $10,000.

Well, you know I'm advocating for more of that, but total verdict, no more than $50,000, and

remember, Ms. Garcia doesn't get to recover twice. She only gets one recovery.

Question 2: "Do you find that plaintiff proved by clear and convincing evidence that Jared Awerbach willfully consumed marijuana knowing he would thereafter operate a motor vehicle?"

Yes or no. You should answer that question no.

Number 3: "Should punitive damages be assessed against Defendant Jared Awerbach for the sake of example and by way of punishing the defendant?"

No, no they should not.

Number 4: Will you assess punitive damages against Jared Awerbach in the amount of."

It's blank. And it's a big, long blank. Not applicable. No punitive damages.

The other ones relate to the mom, and I won't address them. So that's the verdict form and that's how I submit to you justice requires it be filled out.

Again, I want to thank you for sitting here so

EXHIBIT 7

EXHIBIT 7

CASE NO. A-11-637772-C

DEPT. NO. 30

DOCKET U

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

EMILIA GARCIA, individually,

Plaintiff,

vs.

JARED AWERBACH, individually; ANDREA AWERBACH, individually; DOES I-X, and ROE CORPORATIONS I-X, inclusive,

Defendants.

REPORTER'S TRANSCRIPT

OF

JURY TRIAL

BEFORE THE HONORABLE JERRY A. WIESE, II

DEPARTMENT XXX

DATED WEDNESDAY, MARCH 2, 2016

REPORTED BY: KRISTY L. CLARK, RPR, NV CCR #708, CA CSR #13529

I'm sorry.

BY MR. SMITH:

Q. Now, you said to Mr. Strassburg that there was sufficient time for the pseudarthrosis to have developed by the time you saw Ms. Garcia in September 2014; right?

A. Yes. Adequate -- adequate time. Correct.

Q. You would agree, in October 2014, when you wrote your report, you did not opine that Ms. Garcia has pseudarthrosis --

A. I did not.

Q. -- right?

You also have never said in any report or your deposition that the rods were placed wrong; right?

A. That's correct.

Q. You have also never said in your report or your deposition that the screw was loose and had moved; right?

A. Correct. I hadn't seen those X rays. You're absolutely correct.

Q. The first time that you have ever told those opinions to Ms. Garcia's counsel or to Ms. Garcia was today as you sat on the stand a few minutes ago; right?

A. Well, we discussed it before. But once I saw the X rays to affirm my position that there's a

pseudarthrosis. But you're correct.

Q. You have never said in any deposition testimony, in any written report, and you and I have certainly never had a conversation about it, that the screw became loose; right?

A. That's correct. If you remember, you -- you asked me during my depo about the cause of the ongoing pain. And I said it could be scar formation or pseudarthrosis or both. Pseudarthrosis is as a result of the failure of the construct. By definition, loose screws.

Q. You said at your deposition it might be one of those things, but you weren't sure; right?

A. That's right.

Q. When was the first time you told defense counsel that you had this opinion that the screw was loose?

A. When I was shown those -- the X rays that we discussed with the jury today.

Q. And you didn't write a report updating your opinions so that we would know about it; right?

A. That's correct.

Q. Now, you waited until today to give us this testimony so that we couldn't come to court with additional scans or evidence to prove that what you're

saying is incorrect; right?

MR. MAZZEO: Objection, Your Honor. Foundation. Beyond the scope.

There's no basis for Mr. Smith to allege that he has additional scans to contradict what Dr. Klein testified to.

THE COURT: That sounds like testimony by counsel. I'm going to let him answer the question based on his understanding.

MR. MAZZEO: Thank you, Judge.

THE WITNESS: You're right. I -- it wasn't my purpose beforehand to challenge you. All I -- I answered your questions based on what I thought would be causing her pain. But I wasn't challenging you to give me some studies.

BY MR. SMITH:

Q. Well -- and what happened the last time that you gave us studies is, we reviewed those studies, provided them to you, and you ultimately admitted that the studies don't say exactly what you said they did; right?

MR. MAZZEO: Objection. Vague. Misstates prior testimony.

THE WITNESS: Yeah. I don't understand your question. Which studies are you talking about? That

was vague.
BY MR. SMITH:
Q. All the studies that we talked about where the one doesn't talk about the McKenzie program, the studies that we talked about that say surgical treatment is better than conservative treatment, and you said the opposite of that in your report.
MR. MAZZEO: Objection. Asked and answered, Judge.
THE COURT: Overruled.
THE WITNESS: Wait. Wait.
Mr. Smith, you're talking about studies. We were talking about articles. Before that, you're talking about diagnostic studies. And, now, which is it?
BY MR. SMITH:
Q. By studies, I meant articles. And now I understand your confusion.
A. Yeah.
Q. And I apologize.
A. Okay.
Q. So previously --
A. Yes.
Q. -- you talked about these articles, and when we had time to review those articles, you admitted that

they don't say what you said they say in your report.

A. No. I didn't admit they didn't say what I said. I said it's a difference of understanding.

You printed the articles, you brought them, we discussed them, and I shared in my report, and again at the depo and again today, my interpretation.

Sometimes you read an article, you come away with a different interpretation. I'm trained in medicine and surgery. You don't have that advantage. You may, as a layperson, misunderstand the purpose of the article, so ...

Q. Now, waiting until today to give us this opinion didn't give us an opportunity to come up with a different interpretation; right?

MR. MAZZEO: Objection, Your Honor. Counsel knows there's a cutoff for experts to disclose opinions.

MR. SMITH: Agreed.

THE COURT: That's the point he's trying to make. Stipulated. Overruled. He can ask the question.

THE WITNESS: Can I have the question again, Mr. Smith?

MR. SMITH: Can you read it back, please.

(Record read by the reporter.)

THE WITNESS: That's correct.

BY MR. SMITH:

Q. Now, the slides that counsel put up for you to review of that June 2014 X ray --

A. Yes.

Q. -- did you review the actual set of films taken in June 2014 or just the demonstrative exhibit that they made?

A. Demonstrative exhibit.

Q. You're testifying today that this screw came loose. That's not Ms. Garcia's fault, is it?

A. No. Well, it didn't come loose. The X ray suggests it is loose. In other words, when it comes loose, it backs out.

Q. That's not her fault; right?

A. No, it's not her fault.

Q. And, again, that's a potential complication of a fusion surgery; right?

A. It is.

Q. And the only way you can really tell if the screw came loose, like you said earlier, is to do a CT scan; right?

A. That is the definitive diagnostic study.

Q. If Ms. Garcia gets a CT scan that shows this screw came loose --

A. Yes.
Q. -- then she's going to need another surgery at those same levels to fix it; right?
A. Certainly at one level, Mr. Smith. If the screws are secure in S1 and L4, something's going to have to be done on the right side as well.
Q. And that surgery is another fusion surgery; right?
A. A reexploration and refusion. Uh-huh.
Q. Reopen her up completely, take out that hardware, and put in additional hardware; right?
A. I don't know that -- no. I don't know that Dr. Gross has that skill set. It can be done endoscopically now so she doesn't have to have a big open procedure.
Q. Still another surgery, she has to go to the hospital?
A. Yes. It's another general anesthetic on her abdomen. Yes.
Q. This -- this would have to be from the front this time?
A. No, no, no, no. Because you can't approach the screw from the front. It's from the posterior. But it could be done now endoscopically.
Q. Which doctors in town do this endoscopically?

MR. MAZZEO: Objection. Beyond the scope, Judge.

THE COURT: Overruled.

THE WITNESS: I don't know who's done that -- done that training. I know Dr. Duke does some endoscopic procedures, and I think Dr. Archie Perry does.

BY MR. SMITH:

Q. And you don't know anyone specifically that would do this endoscopically in Las Vegas; right?

A. I don't know anybody in town that's taken Dr. Yeung's course. That's Y-e-u-n-g in Los Angeles.

Q. So, again, you're recommending a potential treatment that you don't even know if she can get?

A. Here in town?

Q. Right.

A. No. I think there's a skill set among surgeons here in town to do that.

Q. Now, you understand that you're the only doctor that has reviewed her medical records and met with her -- or met with her who's opined that there's a pseudarthrosis; right?

A. Yes. I'm the only one that has -- it's been suspected, I think, by -- because Dr. Gross asked Dr. Lemper to inject the hardware. You remember that.

EXHIBIT 8

EXHIBIT 8

CASE NO. A-11-637772-C

DEPT. NO. 30

DOCKET U

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

EMILIA GARCIA, individually,

Plaintiff,

vs.

JARED AWERBACH, individually; ANDREA AWERBACH, individually; DOES I-X, and ROE CORPORATIONS I-X, inclusive,

Defendants.

REPORTER'S TRANSCRIPT

OF

PROCEEDINGS

BEFORE THE HONORABLE JERRY A. WIESE, II

DEPARTMENT XXX

DATED FRIDAY, FEBRUARY 12, 2016

REPORTED BY: KRISTY L. CLARK, RPR, NV CCR #708, CA CSR #13529

as the MRI back in 2011. No evidence of nerve root impingement. No evidence of pressure on any exiting nerve. No acute trauma or trauma to the lumbar spine.

Purpose for doing an MRI, detect nerve compression, explain the patient's complaints of pain pathologic instability, fracture, tumors, infection, or it's done after unsuccessful conservative treatment. And they show no problem. No progressive accelerated change from the January 2011 to the November 2012 MRI. Only degeneration. No radiculopathy, and the doctors will tell you, no radiculopathy. Radicular pain is where there's pressure on an exiting nerve root. There's no evidence of any extrinsic pressure on any exiting nerve root as it enters or is within the neuro foramina. Not going to define every medical term for you. And I know it's overwhelming. I know it's -- I know it's late on a Friday afternoon, and I appreciate you just hanging in here with me.

I do want to discuss -- at this point, I want to go over some of the experts so that you're familiar with who they are and what their testimony is going to be in this case. So we have biomechanical engineer and accident reconstructionist, Dr. Irving Scher. He determined -- biomechanical evaluation is to determine how the body moves during a traumatic event and how, if

at all, it's prone to risk of injury.

Accident reconstruction applies the standard engineer -- engineering calculations to determine impact, speed, and delta-v. Delta-v is what? For -- for accident reconstructionist and biomechanical engineers, it's an effective indicator for the severity of an impact and resulting injury potential. So he did an assessment, biomechanical assessment, determining -- assessing motion and forces experienced by the plaintiff, Ms. Garcia, during the impact.

And what did he do? He inspected the Hyundai exemplar, photographs, and the repair estimate. He also used a computer simulation model, Matamo (phonetic), to demonstrate the impact on the lumbar spine from a far-sided lateral impact. As you know, you saw the photograph of the vehicle in this case, when Jared's vehicle struck the passenger side, the rear passenger door of her vehicle, it's called a far-sided lateral. The lateral part -- the far sided because the occupant is on the other side of the vehicle. And it's a lateral impact because of where the points of contact are between the vehicles.

He compared the estimated lumbar loads experienced during the motor vehicle accident to the loads experienced by activities of daily living:

Climbing stairs, walking, lifting, lifting coin bags. And he determined that the lumbar loads during activities of daily living that we engage in were greater on Ms. Garcia than the motor vehicle accident and concluded that it was not scientifically probable that the motor vehicle accident caused damage to the lumbar spine or exacerbated any preexisting condition of the lumbar spine.

Dr. Michael Klein, an orthopedic surgeon specializing in diagnosing and treating spinal injuries. Dr. Michael Klein, he does a lot of forensic work. Okay. He also teaches. Clinical professor at the Department of Orthopedic Surgery at UC Davis. He does that voluntarily. He doesn't get paid for that. He does it because he enjoys doing it.

He did a forensic evaluation. He was hired by the defense in this case. And, ladies and gentlemen, the defense -- the -- the defense -- defendants have a right to hire experts to verify the -- the nature and extent of the harms or the -- the injuries that the plaintiff is claiming she sustained that are related to this accident as opposed to being related to something else. So we have a right and an obligation to do that.

And -- and so -- and the primary objective is

EXHIBIT 9

EXHIBIT 9

CASE NO. A-11-637772-C

DEPT. NO. 30

DOCKET U

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

EMILIA GARCIA, individually,

Plaintiff,

vs.

JARED AWERBACH, individually; ANDREA AWERBACH, individually; DOES I-X, and ROE CORPORATIONS I-X, inclusive,

Defendants.

REPORTER'S TRANSCRIPT

OF

PROCEEDINGS

BEFORE THE HONORABLE JERRY A. WIESE, II

DEPARTMENT XXX

DATED TUESDAY, FEBRUARY 16, 2016

REPORTED BY: KRISTY L. CLARK, RPR, NV CCR #708, CA CSR #13529

a minute. Okay. Here we go.

See, now we're moving down through the spine slice after slice. The nerve roots are not impinged upon. Every slice. Keep going down. You see the canal changes shape as you get closer to S1. The nerve roots, they diminish in number because they're exiting. And here we are at the bottom. So you can see in clicking down through the spine, slide by slide, the nerve roots are not impinged upon by that displaced vertebra. And because they weren't pinched, they didn't cause pain from those locations. And we will prove that to you, and this is the kind of proof you'll be seeing.

Now, we'll prove to you that the forces of that impact were so low that they weren't any greater than the forces on her spine from her activities of daily living that she had gotten used to over the years without any pain. So you see, one of the logic tools for this kind of analysis is causes lead to effects. But you see, the magnitude of the cause has to bear some relationship to the magnitude of the effect; right?

If I come in and tell you that I pushed a semi tractor-trailer 100 yards, right, then I'm the cause and that's the effect, the displacement of the

truck, your first reaction is that's baloney because the magnitude of the cause, me, is so outweighed by the magnitude of the effect. That's just simple, like common sense. I'm just putting words to your intuitions. Anyway, if -- if I say to you a semi tractor-trailer displaced me 100 yards, right, you buy that because the magnitude of that cause is more than enough to outweigh the magnitude of, well, me.

So we have a biomechanical engineer, and he is going to come in and show you how he proves this. And the logic is triangular. You see here, I have a triangle. This is just the way -- I mean, this may help you. It may not. I don't know. But here we have a triangle. A is big, B is smaller, C is the smallest. And so if we think of A as the strength of the spinal structure of Ms. Garcia right before the accident, you know, with all of the degeneration and the conditions and all that stuff, just as we found her; right? It had a certain strength. And then we compare that to the forces that she has subjected her spine to -- sorry. Bear with me. I'm almost getting there. The forces she subjected her spine to over the years and years of daily living. And then we compare it to the forces of the accident or Dr. Scheer does. And what he will prove to you is that the forces on her spine from

the collision were less than the forces on her spine from the activities of daily living that she had gotten used to for years before the accident.

And how do we know that? We know that because she had no pain. So whatever forces she was subjecting her spine to before the accident, climbing stairs, walking, running, whatever, they were not enough to move the spinal bones to cause her pain. So if the force of the collision was even less than that, that's going to prove that the forces of the collision aren't responsible for her pain because they're so much less than the forces of daily living. And we know that those forces of daily living are less than the strength of her spine and whatever condition it may be because there's no pain before the accident.

So that's the logic. I mean, it's just common sense. But that's the logic of the biomechanical engineer's proof to you that this accident didn't cause what she says it did. Because this impact which you can see, it was right here. That's the impact. That was not great enough to cause $16.2 millions in damages.

Now, let me just do this once more, maybe looking at it a different way. You see, because the spine didn't move, it was centered between two opposing

forces that were equal. You know, because I'm pushing equally with both arms here, my hands don't move. But if I push more with one than the other, you see it moves.

Now, we will prove to you that because the spine did not move, because she wasn't in pain before the accident, that, therefore, the resistance force of her spine, its strength, was greater than or equal to the activities of daily living. And then we will prove to you that the forces of the collision shown here in green, they were less. And so if these greater forces from the activities of daily living before couldn't overcome the power of her spine, well, then the smaller forces from the collision couldn't either.

And -- and, you know, I'm going to leave some stuff out. He's going to do it the way engineers do it. He's got computers. He's got science. He's got, like, the guy in *The Martian*, he's going to science the you-know-what out of it. And I'm not going to bore you with that now. So let me skip that, but it's coming. I promise you that.

Now, one of the other kinds of proof will be the course of treatment. Five years of treatment. Well, that's been analyzed, and the takeaway here is, is here -- here is all the time she saw doctors. The

"traffic accident report."

A. Yes.

MR. ROBERTS: Page 20, line 20.

BY MR. ROBERTS:

Q. With respect to this accident, do you have an independent recollection regarding this accident that you investigated on January 2nd of 2011?

A. I do.

Q. And what is that recollection based on? And given the number of accidents that you've investigated over the course of your career, I guess my question is: Did you review any materials to refresh your recollection as to this particular accident, or do you have an independent recollection of?

A. Okay.

Q. Yeah, I remember this clearly, vividly, the people, the names, et cetera?

A. I remember portions independently from looking at the reports of the accident in reference to the male driver. I did review reports of the accident to recall the totality of the circumstances with this accident.

Q. And the date of the accident I stated is January 2nd of 2011; right?

A. Yes, sir.

Q. What was the approximate time of the accident?

A. Evening approximate. I'd have to refer to the report if I can.

MR. ROBERTS: Page 22.

BY MR. ROBERTS:

Q. So go ahead, take a look at it. And I guess my question was the approximate time of the accident.

A. The time of the accident report reflects 5:57 p.m., military time 1757.

Q. And the location of the accident?

A. Was Rainbow and Peak Drive. Just north of Rainbow Boulevard and Peak Drive. Just north of.

MR. ROBERTS: Page 28.

BY MR. ROBERTS:

Q. Can you tell me what independent recollection you have concerning your investigation of this accident which -- concerning details which may not be reflected in either the traffic accident report or the arrest report?

A. This particular subject who I arrested in reference to this accident had an issue where he was placed into custody after tests were done, and he was transported to jail, city jail. And a pat down was conducted prior to the fact of any weapons before I

entered the booking facility, and the correction officer -- as we entered the booking facility, the correction officer does what they're required to do to prepare him for accepting him into booking. And he had a pair of gym shorts underneath a pair of long pants. And in those gym shorts, in his right front pocket, he had a clear plastic bag with green leafy substance which later tested positive for marijuana. And the correction officer who was doing his business in front of me pulled out that clear plastic baggie and gave it to me. And then me and the subject had a conversation in reference to that. So that was what made me recall this incident.

MR. ROBERTS: Page 30.

BY MR. ROBERTS:

Q. So there's a total number of two individuals involved in this particular accident; right?

A. Yes, sir.

MR. ROBERTS: Page 32.

BY MR. ROBERTS:

Q. Can you tell me what your observations were when you arrived on the scene at the location of this accident?

What were your initial observations?

A. I don't recall. But based on the report, two

vehicles on the roadway facing different directions. Motorist in Vehicle 1, which is the male, sitting behind the wheel and the vehicle was on, running. The lights were on. The subject -- the male subject was sitting behind the steering wheel driver's seat and keys were in the ignition.

Q. And how long after --

MR. ROBERTS: Excuse me. Page 35. With me?

BY MR. ROBERTS:

Q. And how long after the accident did you arrive on the scene?

A. Oh, okay. Yes, sir. So I arrived approximately 15 minutes post, after.

Q. And just for the record, it states on the bottom of the first page of Exhibit A, time noted as 1759 which would be 5:59 p.m.; correct?

A. Yes, sir.

Q. And it states the arrival time is 1812 which would be 6:12 p.m.

A. Yes.

Q. Moving on to the second page of this report, there's a -- in the lower bottom corner, we have the letters AIC.

What does that stand for?

A. That's the impact of the -- the location of

the two cars met.

Q. That would be the initial contact location?

A. Correct.

Q. And what are those coordinates that you have?

A. I have 100 feet north of south and 27 feet west of east.

Q. And what are those numbers based on?

A. Those numbers are based on the location of the intersection and the curb lines on the roadway.

MR. ROBERTS: Page 38.

BY MR. ROBERTS:

Q. Moving down on the -- excuse me.

Moving down on the left-hand side of the page, there's a section for alcohol/drug involvement. And the box for drugs is marked with an X.

Do you see that?

A. Yes.

Q. And then method for determination, there's an X for driver admission.

Do you see that?

A. Yes.

Q. Once that -- is it your determination that drugs were involved in this particular accident based on the admission of the driver or based on something else?

EXHIBIT 10

EXHIBIT 10

CASE NO. A-11-637772-C

DEPT. NO. 30

DOCKET U

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

EMILIA GARCIA, individually,

Plaintiff,

vs.

JARED AWERBACH, individually; ANDREA AWERBACH, individually; DOES I-X, and ROE CORPORATIONS I-X, inclusive,

Defendants.

REPORTER'S TRANSCRIPT

OF

JURY TRIAL

BEFORE THE HONORABLE JERRY A. WIESE, II

DEPARTMENT XXX

DATED THURSDAY, FEBRUARY 25, 2016

REPORTED BY: KRISTY L. CLARK, RPR, NV CCR #708, CA CSR #13529

on today. So we're going to take that witness out of order is my understanding.

So, Mr. Strassburg, who's your witness?

MR. STRASSBURG: Jared Awerbach would call Dr. Irving Scher from Seattle, Washington.

Dr. Scher?

THE COURT: Come on up, sir. I'll have you step all the way up on the witness stand. Once you get here, please remain standing, raise your right hand, and be sworn.

THE CLERK: You do solemnly swear the testimony you're about to give in this action shall be the truth, the whole truth, and nothing but the truth, so help you God.

THE WITNESS: I do.

THE CLERK: Please state your name and spell it for the record, please.

THE WITNESS: Irving Scher. I-r-v-i-n-g. Last name is S-c-h-e-r.

THE COURT: Thank you.

Go ahead, Mr. Strassburg.

DIRECT EXAMINATION

BY MR. STRASSBURG:

Q. Dr. Scher, what did I engage you to do?

A. To do two parts of an analysis, an accident reconstruction analysis; that is, to figure out what happened to the vehicles in the accident. And then a biomechanical engineering analysis, which is what happened to the occupants during the accident.

Q. And how old a man are you?

A. I'm 42.

Q. Where are you from?

A. I live in Seattle, Washington.

Q. Okay. Do you have any education that was useful to you in performing the assignment that I gave you?

A. Yes.

Q. And would you share that with us?

A. Sure. I went to undergrad at the University of Pennsylvania -- that's in Philadelphia -- where I majored in mechanical engineering and applied mechanics. I got a minor in chemistry there.

And then I went to UC Berkeley, where I studied mechanical engineering. And I got my master's and PhD at Berkeley. My concentrations were in dynamic systems -- that's how objects move and how they interact -- and biomechanics.

And then, after that, I was an adjunct professor at USC for a period of time. And now I'm

part of guidance engineering up in Seattle, Washington. But I'm also part of the applied biomechanics lab at the University of Washington.

Q. And in your education at -- what was it? -- the University of Pennsylvania?

A. Yes.

Q. And in Philadelphia?

A. That's right.

Q. What was your grade point?

A. It was a 3.58.

Q. And what were the courses that you were taking in which you earned that 3.58 out of 4?

A. Standard mechanical engineering courses: statics, dynamics, strength of materials, physics. It was very heavy in math as well. I also took a number of courses in chemistry, for example, organic chemistry and physical chemistry.

Q. And in your postgraduate program, did you get grades in that program at Berkeley?

A. I did.

Q. And what was your grade point?

A. It was a 3.71.

Q. Out of?

A. Out of 4.

Q. Now, you mentioned a word, "biomechanics."

Would you tell us what you mean by that?

A. Sure. Biomechanics is the study of the human body as a mechanical system. So it's essentially applying the principles of engineering mechanics to biological systems of the human body.

Q. All right. And do you have a illustration of an example of a human body performing a load-bearing activity that might be relevant to explain how you applied biomechanics in this case?

A. Yes.

MR. STRASSBURG: Permission to show Slide 3?

MR. ROBERTS: No objection, Your Honor.

THE COURT: That's fine.

BY MR. STRASSBURG:

Q. And please explain how this slide illustrates the application of biomechanics that you performed for this case.

A. Sure. In this picture we have an individual during one of these strongman competitions lifting an atlas ball, a very big, heavy ball. And as a biomechanical engineer, the first thing that goes through my mind is there are huge loads on the lumbar spine.

Because if you look at what's happening as a mechanical system, you have the muscles in the back

pulling with a very short lever arm on the vertebrae. Then you have this large mass very distant from the what is essentially the fulcrum. And it's very heavy, very long lever arm. And those have to balance at least quasi-statically.

And so what you wind up finding out is that the forces from the muscles on the lumbar spine compress the lumbar spine with very, very large loads.

Q. Now, I see that you've utilized a male illustration in this. This case involves, as you know, a female.

Can you give us a verbal illustration of how these would apply in the case of, say, a female?

A. Sure. For example, if a woman is lifting an atlas ball, that would be the same type of analysis. But it applies to lifting any object, whether it's a box, a bag of coins. If a woman is pregnant and has a child, and that child is going to be distant from the spine, that mass over that long lever arm is going to create large loads on the lumbar spine.

It's the same type of analysis.

Q. And, obviously, as we saw yesterday, Ms. Garcia has been pregnant on three occasions.

A. She has.

Q. Okay. And how would you characterize the

loads on the lumbar spine that a typical pregnancy would impose?

A. In general, they would be higher than one would expect. Loads on the lumbar spine tend to be higher than I think people realize in general.

Q. Well, now, you mentioned a lever, a fulcrum.

Would -- would the loads from carrying a child to term -- would it just be the weight of the child or would it be less or more?

A. It's the weight of the child plus the upper body. All of the mass that's above the level of the lumbar spine that we're interested in would come into play.

Q. Now, do -- does biomechanics that you are in, does it concern itself with injury?

A. It does.

Q. Now, as a biomechanical engineer, when you use the term "injury," do you use it the way a physician does or in some other -- with some other meaning?

A. No. As a biomechanical engineer, when I think of injury, I think of damage to structures of the body, so physically breaking a bone or tearing a ligament or evulsing part of a ligament off of a bone.

Medical doctors include pain as injury. And

because that's subjective, we don't deal with that in biomechanical engineering.

Q. You just deal with facts?

A. Just with the objective damage to the structures of the body.

Q. Now, do you have a illustration with you that would enable you to illustrate for us how biomechanics principles are applied to the study of injury as biomechanical engineers like yourself understand that term?

A. Yes.

MR. STRASSBURG: Permission to show Slide 4?

MR. ROBERTS: No objection, Your Honor.

THE COURT: That's fine.

BY MR. STRASSBURG:

Q. Now, I'm showing you Slide 4. You have brought a -- a picture of what appears to be an X ray or some medical imaging and a list of relationships.

Can you explain to us with this illustration how biomechanics studies this relationship between the physical forces and injury as biomechanical engineers understand that term?

It's sort of like damage -- yeah, it's sort of damage but not pain; right?

A. That's correct.

Q. Okay. Go ahead.

A. So as an injury biomechanist, I look at the relation between mechanical loads and damage to the structures of the body.

And so if you look on the right-hand side of the slide, you'll see an X ray of the tibia and fibula. That's the shin bone and the small bone that goes on the outside of the tibia. And the two orange circles indicate fractures of those bones. It happens to be what's called a spiral fracture of the tibia and fibula.

And the mechanism is -- and this is where the biomechanics becomes important. It's a torsion, a twisting of the tibia that creates this type of spiral fracture. And we know that from biomechanical engineering studies. We also know from these biomechanical engineering studies how much torque it takes and how to try to prevent that.

In this case it was a ski that did not release during a twisting fall, and so the bindings actually allowed too much torque to be applied to the tibia. And as injury biomechanists, we want to try to prevent that torque from being applied.

So it's not just analyzing accidents afterwards for, say, the purpose of litigation. It's

actually to improve safety, and that's the main focus of injury biomechanics.

Q. Now, when -- when you say the term "mechanism," how do biomechanical engineers, when they analyze human systems, use the concept of a mechanism?

A. The mechanism here is the forces, the torques, and the directions of those forces and torques as they apply to the structures of the body and would those forces and torques create the damage that we're seeing.

For example, in this slide, if there were a large compressive load instead of a torsion, the fracture would be different or maybe the person wouldn't have been injured. So we know what load was applied to the tibia in this case, in the picture, based on the fracture itself.

Q. And have you applied the term -- the concept of tolerance in -- in performing a biomechanical analysis?

A. There are a lot of different ways to do that. There are biomechanical engineering studies that look at how much force, how much torque it takes to create damage to tibia, to vertebrae, to different structures of the body. But there's another way of doing it as well, and that's to look at what forces the body can

withstand or resist under normal activities. And you can use that as a lower limit for what the body can tolerate.

Q. Without injury?

A. That's right.

Q. All right. And then injury severity, how do you factor that into a biomechanical analysis?

A. Sure. Essentially, if you have 10,000 pounds applied to a structure versus 2,000 pounds, the 10,000 pounds will have more likelihood to create damage and would likely create more damage. So it's the relationship of the amount of force, the amount of torque to the amount of damage.

Q. Okay. Now, the factor of likelihood, how do biomechanical engineers use that idea in performing the kind of biomechanical analysis that you did in this case?

A. We use what's called a factor of risk analysis. Essentially, you have some level that you choose as the tolerance value or the amount of force or torque that the structure can withstand. And then you look at the loads that are applied in the activity that you're interested in, and you see what percentage of the tolerance value you come to.

If it's less than 1, injury likelihood is

low. If it's greater than 1, it's high. And if it's much greater than 1, then injury likelihood is very high.

Q. And does the biomechanical analysis of likelihood -- does that have anything to do with epidemiology?

A. No, it does not.

Q. What does it have to do with?

A. This is a relationship between forces. Certainly you can have likelihoods from epidemiology.

Epidemiology is the study of injuries and illness and the rates that they occur at. So it's essentially statistics. This is different. This is forces and the relationship of forces.

Q. Now, Dr. Scher, are you just a hired gun for lawyers to bring into court, or do you do biomechanical engineering outside the litigation context?

A. Most of my time is spent doing other activities, other biomechanical engineering endeavors. Litigation takes up maybe 30 to 40 percent of my time depending on, you know, the week that we're in.

Q. So what other kind of biomechanical work do you do that's got nothing to do with litigation?

A. My main focus is snow-sport and water-sport safety. So I look at how injuries are created during

skiing and snowboarding and water sports like waterskiing, wakeboarding, and things like that. And I do a lot of research and try to promote safety in those areas.

I happen to be one of the two U.S. representatives for snow-sport safety in the ISO and the scientific chairman for the International Society for Ski Safety. Things like that. So that's what most of my time is taken up with.

Q. So can you tell us what makes Lindsey Vonn so fast?

A. She's good.

Q. Okay. Now, in your -- Guidance Engineering, who founded that company?

A. Me and two other people.

Q. And what does it do?

A. We do engineering consulting work. We do engineering analyses for cases like this. But we also do a lot of research for product development, for snow-sport safety, water-sport safety, things of that nature as well.

Q. Do you have any experience providing -- doing accident reconstruction and biomechanical analyses with respect to automobile accidents?

A. Yes.

Q. Tell us that.

A. I have done automobile crashes, analyzed them for, jeez, about 10 or 11 years now. And while it's not the main focus of my work, the same principles that apply for preventing injuries in recreational sports apply to motor vehicles as well.

Q. And what are the scientific disciplines that one must master to do a valid accident reconstruction?

A. I think you have to have a good understanding of physics, mechanics in general, and you have to be reasonably good at math.

Q. And do you have any licenses as an engineer?

A. I do.

Q. And what are they?

A. I'm a professional engineer in the state of Washington, California, and Alaska.

Q. And what is your discipline?

A. Mechanical engineering.

Q. And how long have you been a licensed PE in those states?

A. I think starting in 2004. But I could be wrong on that date. I think that's what it is.

Q. And have you practiced mechanical engineering for biomechanical purposes ever since your licensure?

A. I have.

Q. Now -- and have you had occasion to submit yourself to a court of law for qualification as an expert in biomechanics on prior occasions?

A. I have.

Q. And have you been so qualified?

A. I have.

Q. Now, one of the issues I want to get out of the way first is, do you see that there is a difference between what biomechanical engineers such as yourself --

Oh, I should ask, how come you don't have a license in biomechanical engineering?

A. There's not one offered. There is no PE discipline of biomechanics.

Q. So does that mean biomechanics isn't like a real science?

A. No, it's real. There are departments all over and universities all over the country that study this. There are divisions of the National Institute of Health that deal with biomechanics. You know, Harvard has a program. Stanford has a program. Penn has a program, University of Washington.

This is a real discipline. It just doesn't happen to have a PE license for it.

Q. And do biomechanical engineers ever work in

industry, or do they just work in consulting?

A. Well, they do both.

Q. Could you give me some examples of the application of biomechanical engineering in industry that we might be familiar with?

A. Sure. I have friends who work for a company that does restraint systems, so airbags and seat belts for fire trucks and ambulances. And those biomechanists look at safety in those vehicles.

I have friends who do medical devices. So whether it's a stent or a hip replacement or a knee replacement, helping to design those and make them better for the end user.

So these are all biomechanical engineers in industry.

Q. Now, viewed biomechanically, does the human -- is the human body subjected to the same physical forces and laws as any inanimate physical system is, or are there different ones that are special to the body?

A. It's the same laws of physics. The same laws of physics apply to cars, people, animals, everything.

Q. Okay. As I promised now, could you explain -- I get -- do you see any difference between what biomechanical engineers do and what physicians do

when it -- when it comes to determining the cause of injuries?

A. Yes.

Q. And could you describe for us that difference?

A. I can. I have an illustration, I think, that will help describe it better, if it's okay to show that.

MR. STRASSBURG: Fair enough. Permission to show Slide 5?

MR. ROBERTS: Objection. Hearsay. Incorrect statement of the law.

THE COURT: Come on up.

(A discussion was held at the bench, not reported.)

THE COURT: Objection is overruled. You can show Slide 5.

BY MR. STRASSBURG:

Q. Dr. Scher, without treading into the medicine, can you use this slide to describe for us how biomechanical engineering perceives the difference between what it does and medicine?

A. Sure. So the way I like to describe this is, going from the upper left in the slide where it says "event" to the bottom right in the slide that says

"outcome." I usually like to lay these out one at a time.

So if we have some type of event -- whether it's an auto accident, someone skiing, someone walking, whatever it is, they trip, they fall, they land on something -- during that event, there are forces and motions, forces upon the individual and motions created from the forces and their actions. Those forces and motion cans create injury.

And here -- this is a broader sense of injury. This is not just damage to the structures of the body. It could also be pain. There could be some problem. And the person needs to figure out what's wrong and how to get better. They need to get diagnosed and treated to get to an eventual outcome. Hopefully they have the same function, the same abilities as they had before the event.

The link between the event and the injury and specifically damage to the structures of the human body, that's biomechanical engineering. The forces, the motions, looking at the physics of what happened, the physics for the person.

After the injury, the diagnosis and treatment, that's not biomechanical engineering. That would fall under the category of medicine. That's what

medical doctors do, not biomechanical engineers.

Q. Now, did you perform an analysis of the forces and motions involved in Ms. Garcia's accident on January 2nd, 2011?

A. I did.

Q. And what is the difference, as you see it, between forces and motion?

A. Motions are generally how different body parts move specifically relative to one another, and force is -- as we all take the term "force" -- would mean having something press on or -- or shear or move -- or not move, but apply a force, apply a physical force to a structure.

Q. Now, just as a preview of where we're going in all this, I'd ask you, have you come to any conclusions about this accident based upon your biomechanical engineering?

A. Yes.

Q. All right. And can you preview for us, real short, just quick, what those conclusions are?

MR. ROBERTS: Objection. Foundation.

THE COURT: I think I have to sustain that at this point.

MR. STRASSBURG: Okay. All right. Before we get into these bases for his opinions, I move that he

be recognized by the Court as an expert in biomechanical engineering.

MR. ROBERTS: No objection, Your Honor.

THE COURT: He'll be so recognized.

MR. STRASSBURG: Thank you.

BY MR. STRASSBURG:

Q. Now, in performing your analysis, did you utilize a particular methodology?

A. I did.

Q. And is the methodology you use one that you cooked up on your own, or is it a standard analysis procedure in biomechanical engineering?

A. It would be standard for analyzing the biomechanics of a motor vehicle accident.

Q. And has it been recognized by many professional organizations outside the litigation context?

A. Yes.

Q. Explain.

A. For example, the government, through NHTSA, the National Highway Transportation Safety Administration, they actually analyze a certain number of accidents per year and they use the same methodology that I used in this case.

Q. All right. And you performed two types of

investigations?

A. It has two parts, yes.

Q. And what were they?

A. The accident reconstruction part, that's what happened to the vehicles. And the biomechanical engineering part, that's what happened to the people.

Q. In this case Ms. Garcia?

A. That's right.

Q. And when you analyze biomechanically what happened to her, what level of specificity did your analysis -- was it powerful enough to take you to? Was it just the gross level of her body or more particularized to parts of her body?

A. Not sure I understand your question.

Q. I don't blame you.

Did you -- what I meant was, did you just look at how her body moved, or did you look at how her spine moved?

A. I look at how her body moved and how her spine moved.

Q. All right. And how were you able to do something like that?

A. So using the accident reconstruction to figure out what happened to the vehicles, I was then able to use a computer simulation using a software

package that is standard in the biomechanical engineering community. And I looked at what happens to the occupants or someone of the same height and weight as Ms. Garcia with the vehicle moving how it did in the accident.

Q. And did you perform any analysis of forces?

A. Yes.

Q. Would you tell us what?

A. Sure. Using that same computer package, it actually provides information about the forces and the torques that occur at various levels of the spine. So I'm able to get forces from the accident, and then I compared them to forces of other activities and looked at the difference between the two force levels.

Q. These other activities like what?

A. For example, walking or picking up a 20-pound box or package or picking up a 25-pound bag of coins, things like that.

Q. And did you make any attempts to double-check your work?

A. I did.

Q. How did you do that?

A. I looked at the national databases, specifically the one that I mentioned a few minutes ago, the one from NHTSA, and I wanted to see if there

were similar accidents; and, if there were, would they have injuries that are being claimed in this case.

Q. And when you did your accident reconstruction analysis, did you do -- make any efforts to check your work on that?

A. I did.

Q. How?

A. I used a two-part analysis series. The first was I analyzed the motion of the vehicles themselves using a software package called PC-Crash, and I imagine we'll get into that. And then I checked the work with a basic set of hand calculations using crush energy, and they matched up very well.

Q. All right. And is there a slide that you have that summarizes what we've just covered?

A. There is.

MR. STRASSBURG: Permission to show 7?

MR. ROBERTS: No objection.

THE COURT: That's fine.

BY MR. STRASSBURG:

Q. Why don't you come down here. Do you mind?

A. I don't mind.

Q. Right here, please, and let's just make sure -- all right. Now, is this the roadmap for your entire presentation?

A. It is.

Q. Okay. So when we get to here, are you done?

A. I'm done.

Q. Okay. Now, in performing the accident reconstruction analysis, what were the -- the -- what was the data that you utilized to -- to do this with respect to the motions of the vehicles?

A. Well, sure. Pretty much everything that you provided me. So there were deposition testimonies; there were repair estimates; photographs of the vehicles. I went to a satellite imagery to get what the roadway look like, the measurements of the roadway, things of that nature. And then I took vehicle-specific information -- for example, wheel base and weights of the vehicles -- and --

Q. Which vehicles?

A. The Hyundai Santa Fe that Ms. Garcia was driving and the Suzuki Forenza that Mr. Awerbach was driving. And --

Q. Well, wait a minute. Do you -- did you actually look at the vehicles involved in the accident?

A. No, I didn't personally inspect the physical -- physically, the vehicles. I used the photographs in a process called photogrammetry to look at what the damage was on the vehicles.

Q. All right. And did you do anything to check the results of your photogrammetry analysis of the actual photographs of the actual vehicles?

A. I'm sorry. One more time.

Q. Okay. How did you use the photogrammetry analysis? Did you just look at the vehicles in the crash report or did you look at other vehicles as well?

MR. ROBERTS: Objection. Beyond the scope of his report.

MR. STRASSBURG: This is the exemplar.

THE COURT: Come on up for a minute.

(A discussion was held at the bench, not reported.)

MR. STRASSBURG: I will withdraw the question.

BY MR. STRASSBURG:

Q. Now, in your biomechanical engineering analysis, when you looked at the motion of her body, how did you relate that to lumbar spine forces in the accident?

A. Sure. So when I did the analysis using the program called MADYMO, it actually provided the motions and the forces on the lumbar spine in the simulation itself.

Q. Okay. And when you did the analysis of the

motions of the vehicles, did you use computer software or did you do that by hand?

A. Both.

Q. And the software?

A. The software is a program called PC-Crash. It allows you to do the balance of linear momentum, the balance of angular momentum, the conservation of energy quickly and easily, easier than I can do it by hand. So I can do a number of parameters and look at how they affect the motion of the vehicles?

The hand calculations parts were the crush analysis to check that the PC-Crash model was giving me results that I could believe in.

Q. Okay. So to get to here, motions of the vehicles, that's the PC-Crash part.

A. That's correct.

Q. Then to get to here, B, 1B, that's the crush energy analysis by hand that you did.

A. That's right.

Q. Okay. And then you take those results, and you pour them into here, which is the MADYMO software; right?

A. That's right.

Q. All right. And then how do you -- and that gets you to B, which is the lumbar spine force from

this particular accident; right?

A. That's right, on someone of the same height and weight as Ms. Garcia.

Q. All right. And then how do you get from the results of the MADYMO analysis of spine forces to the lumbar spine force from other activities?

A. Sure. For that, it's essentially the method that I was talking about earlier where the person was lifting the Atlas ball, but there's a piece of software that I use that does those calculations for me very quickly, and it's called Michigan 3D.

And so I put in the various positions and forces that someone of Ms. Garcia's size would have to lift or would be lifting or moving, and then it would provide me with the forces on the lumbar spine.

Q. So when you say other activities, you don't mean in this accident; you mean before this accident?

A. Before and after.

Q. All right. Like activities of daily life; right?

A. That's right.

Q. Now, when -- after you get the results from your analysis for lumbar spine force from this accident, your analysis for lumbar spine force from the other activities of daily living before the accident,

No. 71348

IN THE SUPREME COURT OF THE STATE OF NEVADA

EMILIA GARCIA,
Appellant,

v.

ANDREA AWERBACH,
Respondent.

APPELLANT'S APPENDIX
VOLUME V, BATES NUMBERS 1001 TO 1250

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ALPHABETICAL INDEX

Vol	Page Numbers	Description	Date Filed
I	22 – 28	Amended Complaint	01/14/2013
V	1031 – 1282	Appendix of Exhibits to Plaintiff's Motion for New Trial or, in the Alternative, for Additur	05/26/2016
V, VI	1304 – 1486	Appendix of Exhibits to Plaintiff's Renewed Motion for Judgment as a Matter of Law	05/26/2016
I	1 – 6	Complaint	03/25/2011
III	642 – 646	Decision and Order Denying Defendant Andrea Awerbach's Motion for Relief from Final Court Order	04/27/2015
III	623 – 629	Decision and Order Denying Plaintiff's Motion to Strike Andrea Awerbach's Answer; Granting Plaintiff's Motion for Order to Show Cause; and Granting in Part and Denying in Part Plaintiff's Motion to Strike Supplemental Reports	02/25/2015
I	164 – 165	Defendant Andrea Awerbach's Correction to Her Responses to Plaintiff's First Set of Requests for Admission	10/20/2014
III	630 – 641	Defendant Andrea Awerbach's Motion for Relief from Final Court Order	03/13/2015
I	96 – 163	Defendant Andrea Awerbach's Motion for Summary Judgment	11/08/2013
I	13 – 21	Defendant Andrea Awerbach's Responses to Request for Admissions	06/05/2012
I	29 – 35	Defendants' Answer to Amended Complaint	02/07/2013
I	7 – 12	Defendants' Answer to Complaint	01/23/2012
I	36 – 60	Defendants' Second Supplement to List of Witnesses and Documents and Tangible Items Produced at Early Case Conference	07/22/2013
I	61 – 95	Deposition of Andrea Awerbach [Vol. 1]	09/12/2013
I, II	166 – 391	Deposition of Andrea Awerbach [Vol. 2]	10/24/2014

ALPHABETICAL INDEX

Vol	Page Numbers	Description	Date Filed
XXVI, XXVII	6441 – 6942	Deposition of Jared Awerbach	
III	581 – 616	Deposition of Teresa Meraz	01/08/2015
IV	948 – 997	Jury Instructions	03/08/2016
IV	998 – 1000	Jury Verdict	03/10/2016
VI, VII	1499 – 1502	Minute Order	08/22/2016
VII	1513 – 1554	Notice of Appeal	09/19/2017
III	647 – 649	Notice of Department Reassignment	08/27/2015
VII	1508 – 1512	Notice of Entry of Judgment Upon the Verdict	08/21/2017
III	617 – 622	Order Granting, in Part, and Denying, In Part, Plaintiff's Motion for Partial Summary Judgment that Defendant Jared Awerbach was Per Se Impaired Pursuant to NRS 484C.110(3); and Denying Defendant Jared Awerbach's Motion for Partial Summary Judgment on Punitive Damage Claims	01/28/2015
IV	946-947	Order Modifying Prior Order of Judge Allf	02/12/2016
VI	1487 – 1498	Order Re: Post –Trial Motions	08/12/2016
VII	1503 - 1507	Order Vacating Judgment as to Jared Awerbach only	08/21/2017
V	1001 – 1030	Plaintiff's Motion for New Trial or, in the Alternative, for Additur	05/26/2016
III, IV	650 – 900	Plaintiff's Motion to Disqualify Defendant Jared Awerbach's Counsel Randall Tindall and Motion For Reassignment to Department 27 on Order Shortening Time and Request for Leave to File Extended Memorandum of Points and Authorities	09/08/2015
II, III	392 – 580	Plaintiff's Motion to Strike Defendant Andrea Awerbach's Answer	12/02/2014
V	1283 – 1303	Plaintiff's Renewed Motion for Judgment as a Matter of Law	05/26/2016
IV	933 – 945	Plaintiff's Trial Brief Regarding	02/10/2016

ALPHABETICAL INDEX

Vol	Page Numbers	Description	Date Filed
		Permissive Use	
IV	901 – 932	Reporter's Transcript of Proceedings	09/15/2015
VII, VIII	1555 – 1765	Trial Transcript – 02/08/2016	11/10/2017
VIII	1766 – 1996	Trial Transcript – 02/09/2016	11/10/2017
VIII, IX, X	1997 – 2290	Trial Transcript – 02/10/2016	11/10/2017
X	2291 – 2463	Trial Transcript – 02/11/2016	11/10/2017
X, XI	2464 – 2698	Trial Transcript – 02/12/2016	11/10/2017
XI, XII	2699 – 2924	Trial Transcript – 02/16/2016	11/10/2017
XII, XIII	2925 – 3177	Trial Transcript – 02/17/2016	11/10/2017
XIII, XIV	3178 – 3439	Trial Transcript – 02/18/2016	11/10/2017
XIV, XV	3440 – 3573	Trial Transcript – 02/19/2016	11/10/2017
XV, XVI	3574 – 3801	Trial Transcript – 02/22/2016	11/10/2017
XVI, XVII	3802 – 4038	Trial Transcript – 02/23/2016	11/10/2017
XVII, XVIII	4039 – 4346	Trial Transcript – 02/24/2016	11/10/2017
XVIII, XIX	4347 – 4586	Trial Transcript – 02/25/2016	11/10/2017
XIX, XX	4578 – 4819	Trial Transcript – 02/26/2016	11/10/2017
XX, XXI	4820 – 5045	Trial Transcript – 03/01/2016	11/10/2017
XXI, XXII	5046 – 5361	Trial Transcript – 03/02/2016	11/10/2017
XXII, XXIII	5362 – 5559	Trial Transcript – 03/03/2016	11/10/2017
XXIII, XXIV	5560 – 5802	Trial Transcript – 03/04/2016	11/10/2017

ALPHABETICAL INDEX

Vol	Page Numbers	Description	Date Filed
XXIV	5803 – 5977	Trial Transcript – 03/07/2016	11/10/2017
XXIV, XXV	5978 – 6203	Trial Transcript – 03/08/2016	08/23/2018
XXV, XXVI	6204 – 6422	Trial Transcript – 03/09/2016	08/23/2018
XXVI	6423 – 6440	Trial Transcript – 03/10/2016	08/23/2018

ALPHABETICAL INDEX

Vol	Page Numbers	Description	Date Filed
I	22 – 28	Amended Complaint	01/14/2013
V	1031 – 1282	Appendix of Exhibits to Plaintiff's Motion for New Trial or, in the Alternative, for Additur	05/26/2016
V, VI	1304 – 1486	Appendix of Exhibits to Plaintiff's Renewed Motion for Judgment as a Matter of Law	05/26/2016
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III	623 – 629	Decision and Order Denying Plaintiff's Motion to Strike Andrea Awerbach's Answer; Granting Plaintiff's Motion for Order to Show Cause; and Granting in Part and Denying in Part Plaintiff's Motion to Strike Supplemental Reports	02/25/2015
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I	96 – 163	Defendant Andrea Awerbach's Motion for Summary Judgment	11/08/2013
I	13 – 21	Defendant Andrea Awerbach's Responses to Request for Admissions	06/05/2012
I	29 – 35	Defendants' Answer to Amended Complaint	02/07/2013
I	7 – 12	Defendants' Answer to Complaint	01/23/2012
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XXVI, XXVII	6441 – 6942	Deposition of Jared Awerbach	
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III	647 – 649	Notice of Department Reassignment	08/27/2015
VII	1508 – 1512	Notice of Entry of Judgment Upon the Verdict	08/21/2017
III	617 – 622	Order Granting, in Part, and Denying, In Part, Plaintiff's Motion for Partial Summary Judgment that Defendant Jared Awerbach was Per Se Impaired Pursuant to NRS 484C.110(3); and Denying Defendant Jared Awerbach's Motion for Partial Summary Judgment on Punitive Damage Claims	01/28/2015
IV	946-947	Order Modifying Prior Order of Judge Allf	02/12/2016
VI	1487 – 1498	Order Re: Post –Trial Motions	08/12/2016
VII	1503 - 1507	Order Vacating Judgment as to Jared Awerbach only	08/21/2017
V	1001 – 1030	Plaintiff's Motion for New Trial or, in the Alternative, for Additur	05/26/2016
III, IV	650 – 900	Plaintiff's Motion to Disqualify Defendant Jared Awerbach's Counsel Randall Tindall and Motion For Reassignment to Department 27 on Order Shortening Time and Request for Leave to File Extended Memorandum of Points and Authorities	09/08/2015
II, III	392 – 580	Plaintiff's Motion to Strike Defendant Andrea Awerbach's Answer	12/02/2014
V	1283 – 1303	Plaintiff's Renewed Motion for Judgment as a Matter of Law	05/26/2016
IV	933 – 945	Plaintiff's Trial Brief Regarding	02/10/2016

ALPHABETICAL INDEX

Vol	Page Numbers	Description	Date Filed
		Permissive Use	
IV	901 – 932	Reporter's Transcript of Proceedings	09/15/2015
VII, VIII	1555 – 1765	Trial Transcript – 02/08/2016	11/10/2017
VIII	1766 – 1996	Trial Transcript – 02/09/2016	11/10/2017
VIII, IX, X	1997 – 2290	Trial Transcript – 02/10/2016	11/10/2017
X	2291 – 2463	Trial Transcript – 02/11/2016	11/10/2017
X, XI	2464 – 2698	Trial Transcript – 02/12/2016	11/10/2017
XI, XII	2699 – 2924	Trial Transcript – 02/16/2016	11/10/2017
XII, XIII	2925 – 3177	Trial Transcript – 02/17/2016	11/10/2017
XIII, XIV	3178 – 3439	Trial Transcript – 02/18/2016	11/10/2017
XIV, XV	3440 – 3573	Trial Transcript – 02/19/2016	11/10/2017
XV, XVI	3574 – 3801	Trial Transcript – 02/22/2016	11/10/2017
XVI, XVII	3802 – 4038	Trial Transcript – 02/23/2016	11/10/2017
XVII, XVIII	4039 – 4346	Trial Transcript – 02/24/2016	11/10/2017
XVIII, XIX	4347 – 4586	Trial Transcript – 02/25/2016	11/10/2017
XIX, XX	4578 – 4819	Trial Transcript – 02/26/2016	11/10/2017
XX, XXI	4820 – 5045	Trial Transcript – 03/01/2016	11/10/2017
XXI, XXII	5046 – 5361	Trial Transcript – 03/02/2016	11/10/2017
XXII, XXIII	5362 – 5559	Trial Transcript – 03/03/2016	11/10/2017
XXIII, XXIV	5560 – 5802	Trial Transcript – 03/04/2016	11/10/2017

ALPHABETICAL INDEX

Vol	Page Numbers	Description	Date Filed
XXIV	5803 – 5977	Trial Transcript – 03/07/2016	11/10/2017
XXIV, XXV	5978 – 6203	Trial Transcript – 03/08/2016	08/23/2018
XXV, XXVI	6204 – 6422	Trial Transcript – 03/09/2016	08/23/2018
XXVI	6423 – 6440	Trial Transcript – 03/10/2016	08/23/2018

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Attorneys for Plaintiff Emilia Garcia

DISTRICT COURT

CLARK COUNTY, NEVADA

EMILIA GARCIA, individually,

Plaintiff,

v.

JARED AWERBACH, individually; ANDREA AWERBACH, individually; DOES I – X, and ROE CORPORATIONS I – X, inclusive,

Defendants.

Case No.: A-11-637772-c
Dept. No.: 30

PLAINTIFF'S MOTION FOR A NEW TRIAL OR, IN THE ALTERNATIVE, FOR ADDITUR

Plaintiff Emilia Garcia ("Plaintiff"), by and through her counsel, hereby files Plaintiff's Motion for a New Trial or, In the Alternative, for Additur. This Motion is made and based upon the attached Memorandum of Points and Authorities, the pleadings and papers on file herein, and any oral argument that this Court may allow.

DATED this 20th day of May, 2016.

D. Lee Roberts, Jr., Esq.
Timothy A. Mott, Esq.
Marisa Rodriguez-Shapoval, Esq.
WEINBERG, WHEELER, HUDGINS,
GUNN & DIAL, LLC.

Corey M. Eschweiler, Esq.
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NOTICE OF MOTION

TO: All Interested Parties; and

TO: Their Respective Counsel.

PLEASE TAKE NOTICE that **PLAINTIFF'S MOTION FOR A NEW TRIAL OR, IN THE ALTERNATIVE, FOR ADDITUR** will come on for hearing in the above-entitled Court on the 23rd day of June, 2016, at the hour of 9:00 a.m., in Department XXX, or as soon thereafter as counsel may be heard.[1]

DATED this 26th day of May, 2016.

D. Lee Roberts, Jr., Esq.
Timothy A. Mott, Esq.
Marisa Rodriguez-Shapoval, Esq.
WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC.

Corey M. Eschweiler, Esq.
Adam D. Smith, Esq.
Craig A. Henderson, Esq.
GLEN J. LERNER & ASSOCIATES

Attorneys for Plaintiff

[1] The Court requested during a Status Check on May 10, 2016 that the hearing for all post-trial motions be set for June 23, 2016 at 9:00 a.m. and requested that Counsel note the same in their post-trial motions.

ORDER SHORTENING TIME

Good cause appearing, it is ordered that the hearing on **PLAINTIFF'S MOTION FOR A NEW TRIAL OR, IN THE ALTERNATIVE, FOR ADDITUR** shall be heard on the 23rd day of June, 2016, in Department XXX at 9:00 a.m.

JERRY A. WIESS II
DISTRICT COURT JUDGE

Submitted by:

D. Lee Roberts, Jr., Esq.
Timothy A. Mott, Esq.
Marisa Rodriguez-Shapoval, Esq.
WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC.

Corey M. Eschweiler, Esq.
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AFFIDAVIT OF COUNSEL IN SUPPORT OF ORDER SHORTENING TIME

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

Timothy A. Mott, being first duly sworn, deposes and says:

1. I am over the age of eighteen, of sound mind, and give the following affidavit based on my personal knowledge.

2. I am an attorney with WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC, and counsel of this matter for Plaintiff Emilia A. Garcia ("Plaintiff").

3. This Motion must be heard on an order shortening time as the Court requested during a Status Check on May 10, 2016 that the hearing for all post-trial motions be set for June 23, 2016 at 9:00 a.m. and requested that Counsel note the same in their post-trial motions.

4. Thus, Plaintiff respectfully requests that this matter be heard on order shortening time on the date so indicated.

Timothy A. Mott, Esq.

Subscribed and Sworn before me
this 26th day of May, 2016

Kelly L. Pierce
Notary Public

KELLY L. PIERCE
Notary Public State of Nevada
No. 14-12464-1
My appt. exp. Dec. 4, 2017

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MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION/STATEMENT OF FACTS

This personal injury action arose on January 2, 2011, when Defendant Jared Awerbach, while driving a car owned by his mother, Defendant Andrea Awerbach, failed to yield the right of way and made an improper left turn and crashed into Plaintiff Emilia Garcia's approaching vehicle. Following the collision, Mr. Awerbach was found to have illegal levels of marijuana metabolites in his blood, and ultimately plead guilty to the crime. As a result of the collision, Ms. Garcia suffered severe injuries to her spine and underwent a two level lumbar fusion on December 26, 2012. Ms. Garcia incurred $574,846.01 in past medical special damages. Ms. Garcia sued Mr. Awerbach for negligence and negligence *per se*, Ms. Awerbach for negligent entrustment and joint liability pursuant to NRS 41.440, and asserted a claim for punitive damages against both Jared and Andrea. Prior to trial, the Court entered an order deeming Jared liable for causing the collision.

Trial started on February 8, 2016 and a verdict was returned almost five weeks later on March 10, 2016. The jury returned a verdict awarding Ms. Garcia all of her past medical expenses amounting to $574,846.01, zero dollars in future medical expenses, zero dollars in past and future loss of household services, $250,000 for past pain, suffering, and loss of enjoyment of life, and zero dollars for future pain, suffering, and loss of enjoyment of life. (*See* Jury Verdict, Ex. 1). The jury also awarded $2,000,000 in punitive damages against Mr. Awerbach and found that Ms. Awerbach did not give Mr. Awerbach permission to drive her vehicle on the day in question. (*Id.*).

Ms. Garcia now files a Motion for a New Trial or, in the Alternative, for Additur. The Motion is based on the following: (1) jury misconduct; (2) the verdict being contrary to the undisputed evidence; (3) improper biomechanical engineering opinions and arguments being presented to the jury; (4) the aggregate effect of the aforementioned in addition to repeated violations of Pre-Trial Orders by Defendants' Counsel; and (5) the damages awarded being inadequate.

First, the jury engaged in improper experimentation during deliberations on a critical issue that materially effected Ms. Garcia's credibility in the eyes of the jury and, as a result, substantially prejudiced Ms. Garcia and substantially affected the verdict. According to deliberating juror number 5

(Mr. Keith Burkery), he witnessed Ms. Garcia, during the trial, while sitting in the front row of the audience chairs directly behind her lawyers, lean over the wood hand-rail/divider behind her lawyers and grab a water bottle (to the best of his recollection) off a box and, based on his observations, the task did not appear to hurt Ms. Garcia.[2] As a result, during deliberations, the jurors gained access to the courtroom and selected a juror they believed was similar in size and stature to Plaintiff (Juror Number 6, Ms. Jessica Bias), and the juror attempted to reenact Ms. Garcia's actions by picking up a bottle of water off the ground on the other side of the wood hand-rail/divider. Ms. Bias (has spina bifida, has had back pain throughout her life, among other considerations) found the task more difficult to complete than she originally had thought. The improper experimentation conducted by the jury created new evidence outside the trial and was done at its own doing. The credibility of Plaintiff was assaulted repeatedly throughout the course of the trial by the Defendants and was Defendants' primary defense. The jury's improper experimentation had the effect of improperly introducing new evidence into trial that prejudiced Ms. Garcia and had an impact on the jury's verdict.

Second, during deliberations, the jury was improperly advised by the Court that it may award Ms. Garcia all of her past medical expenses and none of her future medical expenses under Jury Instruction 25 related to aggravation of original injury caused by negligent medical or hospital treatment. Having been give express permission by the Court to award nothing for future treatment caused by negligent medical care, the jury returned a verdict awarding Ms. Garcia all of her past medical expenses (i.e., $574,846.01) and none of her future medical expenses. The advisement was improper because Ms. Garcia's future medical expenses was either undisputed or was disputed on the exact same grounds as her past expenses. Because the jury determined that all of Ms. Garcia's past medical expenses were directly and causally related to the subject collision, the jury had no choice but to award Ms. Garcia future medical expenses. The jury cannot disregard the undisputed evidence to issue an inconsistent verdict, and advising the jury that it may do so was improper.

Third, Defendants inappropriately previewed Dr. Scher's foundationless opinions pertaining to forces of impact several times during opening statements, inappropriately rung the bell on his

[2] Mr. Burkery's testimony is attached hereto via a Declaration, and is addressed in great detail in the Argument below. (*See* Declaration of Keith Burkery, Ex. 2).

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foundationless testimony pertaining to forces of impact during his direct examination over repeated sustained objections from Ms. Garcia's Counsel, and then, even after Dr. Scher was stricken in full and the jury was admonished to disregard his testimony, Mr. Awerbach's Counsel inappropriately drew (as the testimony had already been previewed several times and the bell had already been rung) on the stricken testimony, over constant objection by Ms. Garcia's Counsel, by comparing the forces of the subject collision to Ms. Garcia's activities of daily living. Mr. Awerbach's Counsel then took it even further and *testified* as a biomechanical engineer in closing that the forces of impact from riding a roller coaster were greater on Ms. Garcia's lumbar spine than the subject collision. The bell was rung on Dr. Scher's foundationless opinions (which were stricken in full) and Mr. Awerbach's Counsel's antics (i.e., misconduct) of repeatedly re-ringing the bell and setting forth *his own biomechanical engineering opinions* in closing arguments tainted the jury and without question prejudiced Ms. Garcia and prevented her from having a fair trial.

Fourth, in addition to the aforementioned, the myriad violations of motions in limine by Defendants' Counsel throughout the course of trial, collectively prejudiced Ms. Garcia and substantially affected the jury's verdict. Defendants' Counsel violated, at a minimum, 15 Pre-Trial Orders, many of which were violated multiple times. The accumulation of juror misconduct, advisement to the jury that it may award all past medical expenses and no future medical expenses, the improper presentation of biomechanical engineering opinions, and repeated violations of Pre-Trial Orders (some of which being blatantly intentional), in the aggregate, prejudiced Ms. Garcia, denied her a fair trial, and substantially affected the jury's verdict.

Finally, the damages awarded to Ms. Garcia are clearly inadequate as they fail to compensate her for undisputed future medical care and future pain and suffering (which stems from the undisputed future medical care). As a result, the Court should order a new trial or, in the alternative, an additur in the amount of $2,166,715 for Ms. Garcia's future medical expenses and $250,000 for her future pain and suffering.

LEGAL STANDARD FOR A MOTION FOR A NEW TRIAL

A motion for new trial must be filed within ten (10) days after service of written notice of the entry of the judgment. NRCP 59(b). As the judgment has not yet been entered in this case, and,

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instead, a briefing schedule was set for post-trial motions wherein opening briefs are due on May 26, 2016, the instant Motion is timely.

Pursuant to NRCP 59(a):

> A new trial may be granted to all or any of the parties and on all or part of the issues for an of the following causes or grounds materially affecting the substantial rights of an aggrieved party: (1) . . . abuse of discretion by which either party was prevented from having a fair trial; (2) Misconduct of the jury or prevailing party; (3) Accident or surprise which ordinary prudence could not have guarded against; (4) Newly discovered evidence material for the party making the motion which the party could not, with reasonable diligence, have discovered and produced at the trial; (5) Manifest disregard by the jury of the instructions of the court; (6) Excessive damages appearing to have been given under the influence of passion or prejudice; or, (7) Error in law occurring at the trial and objected to by the party making the motion.

The court may also grant a motion for a new trial for a reason not stated in the motion, but must specify the reason in the order. *Id.* at 59(d).

The decision to grant or deny a motion for new trial rests within the sound discretion of the trial court and will not be disturbed on appeal absent palpable abuse. *S. Pac. Transp. Co. v. Fitzgerald,* 94 Nev. 241, 244, 577 P.2d 1234, 1236 (1978). In 1969, the Nevada Supreme Court amended NRCP 59 to eliminate, as a ground for granting a new trial, insufficiency of the evidence that supports the verdict, but carved out a strictly construed exception where there is plain error or manifest injustice. *Kroeger Properties & Dev. v. Silver State Title Co.,* 102 Nev. 112, 114-15, 715 P.2d 1328, 1330 (1986) (citing *Price v. Sinnott,* 85 Nev. 600, 607, 460 P.2d 837, 841 (1969); *Rees v. Roderiques,* 101 Nev. 302, 701 P.2d 1017 (1985)). In order to find manifest injustice, a case must be presented where "the verdict or decision strikes the mind, at first blush, as manifestly and palpably contrary to the evidence . . . ." *Id.; Holderer v. Aetna Cas. & Sur. Co.,* 114 Nev. 845, 853, 963 P.2d 459, 464-65 (1998); *Cathcart v. Robison, Lyle, Belaustegui & Robb,* 106 Nev. 477, 479, 795 P.2d 986, 987 (1990); *Meyer v. Estate of Swain,* 104 Nev. 595, 598, 763 P.2d 337, 339 (1988).

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ARGUMENT

I. Juror Misconduct during Deliberations Requires the Ordering of a New Trial for Ms. Garcia.

In addressing the issue of improper jury experimentation, the Nevada Supreme Court has stated, "[i]t is well established that jurors may not receive evidence out of court." *Krause Inc. v. Little*, 117 Nev. 929, 935, (2001) (internal quotation and citation omitted). In the same breath, the Court expressed that experiments carried out by the jury during deliberations can have the effect of introducing new evidence into trial. *Id.* at 936. The rule exists because "[f]or a jury to consider independent facts, unsifted as to their accuracy by cross-examination, and unsupported by the solemnity attending their presentation on oath, before a judge, jury, parties and bystanders, and without an opportunity to contradict or explain them can never be countenanced." *Id.* (internal quotation and citation omitted). The court went on to explain, "insofar as tests or experiments carried out by the jury during deliberations have the effect of introducing new evidence out of the presence of the court and parties, such tests and experiments are improper and, if the new evidence . . . has a substantial effect on the verdict, prejudicial." *Id.* (internal quotation and citation omitted).

The Ninth Circuit also addressed the problem with introducing information outside the regular proceedings of trial into evidence. The Ninth Circuit stated, "[t]he introduction of outside influences into the deliberative process of the jury is inimical to our system of justice. The jury's consideration of extraneous information deprives defendants of the opportunity to conduct cross-examination, offer evidence in rebuttal, argue the significance of the information to the jury, or request a curative instruction." *U.S. v. Navarro-Garcia*, 926 F.2d 818, 823 (Ninth Cir. 1991) (internal quotation and citation omitted).

Where there is potential juror misconduct, two elements must be satisfied through admissible evidence before a new trial is given: "(1) the occurrence of juror misconduct, and (2) a showing that the misconduct was prejudicial." *Meyer v. State*, 119 Nev. 554, 563-64, (2003). "Prejudice is shown whenever there is a reasonable probability or likelihood that the juror misconduct affected the verdict." *Id.* at 564. In some instances, when the misconduct is egregious, prejudice to warrant a new trial is presumed. *Id.* However, a "[j]uror's exposure to extraneous information via independent research or

improper experiment is . . . unlikely to raise a presumption of prejudice. *Id.* at 565. Rather, in cases where the jury has conducted independent research or improper experiments, "the extrinsic information must be analyzed in the context of the trial as a whole to determine if there is a reasonable probability that the information affected the verdict." *Id.* There are a number of factors to consider when trying to determine whether there is a reasonable probability that juror misconduct affected a verdict. *Id.* at 566. These are the factors that the Nevada Supreme Court has given:

> [A] court may look at how the material was introduced to the jury (third-party contact, media source, independent research, etc.), the length of time it was discussed by the jury, and the timing of its introduction (beginning, shortly before verdict, after verdict, etc.). Other factors include whether the information was ambiguous, vague, or specific in content; whether it was cumulative of other evidence adduced at trial; whether it involved a material or collateral issue; or whether it involved inadmissible evidence (background of the parties, insurance, prior bad acts, etc.). In addition, a court must consider the extrinsic influence in light of the trial as a whole and the weight of the evidence. These factors are instructive only and not dispositive.

Id. (internal quotation and citation omitted).

When applying these factors, the Nevada Supreme Court emphasized that "[t]he district court must apply an objective test in evaluating the impact of the extrinsic material or intrinsic misconduct on the verdict and should not investigate the subjective effects of any extrinsic evidence or misconduct on the jurors." *Id.* It is the duty of the court to determine "whether the average, hypothetical juror would be influenced by the juror misconduct." *Id.* And while affidavits or statements by jurors can be used to establish that extraneous evidence existed, or to illustrate "objective facts of extrinsic evidence", affidavits may not be used to establish the actual effect of the misconduct on the deliberations. *Id.*; *see also Smith v. Pitman Mfg. Co.*, 952 F.2d 1400, 1 (9th Cir. 1992) (internal citation omitted).

The following cases illustrate instances "in which the jury took it upon itself to devise its own experiment on the admitted evidence, or considered objects or expert opinions not admitted into evidence." *Krause*, 117 Nev. at 937. In *Russell v. State*, during a recess in the trial proceedings, a juror drove from Reno to Carson City to determine if the evidence of the time it took to travel between those places was valid. 99 Nev. 265, 266 (1983). The Nevada Supreme Court found that such conduct by the juror was an improper experiment and thus a new trial was necessary. *Id.* In so holding, the court stated:

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> [J]uror misconduct is particularly egregious where, as here, the juror has engaged in independent "research" of the facts. Moreover, the information disclosed by the juror related to a crucial aspect of appellant's defense. Appellant's case was therefore significantly harmed by his inability to cross-examine the juror, during the trial, concerning the many variables which may have affected his driving time.

Id. (internal citation omitted); *see also e.g., People v. Baker*, 31 Cal.App. 4th 1156 (Cal.App. 2nd Dist. 1995) (finding that trial court erred in robbery prosecution by allowing bailiff to perform experiment for deliberating jury wherein the bailiff removed the defendant's gun from his holster as it generated new evidence); *People v. Andrew*, 549 N.Y.S. 2d. 268 (1989) (finding new trial necessary when jurors test-fired handgun during deliberation to determine amount of pressure necessary to pull trigger); *Smoketree-Lake Murray, Ltd. V. Mills Concrete Construction Co.*, 234 Cal.App. 3d. 1724 (Cal.App. 4th Dist. 1991) (finding juror experiment involving a box of cat litter and crayons depicting concrete construction forms with rough plumbing before concrete is poured was improper as it created new evidence and, as a result, a new trial was necessary); *Carter v. State*, 753 S.W.2d 432 (Tex.App. 1988) (finding that trial court properly granted new trial where jurors experimented by throwing cups of water while one juror lay under a table to determine the credibility of defendant's claim that he tripped and accidentally splashed gasoline on the victim who was working under the vehicle, and where several jurors testified that they based their verdict partially on results of experiments); *Barker v. State*, 95 Nev. 309, 312, 594 P.2d 719, 721 (1979) (finding misconduct where juror introduced outside research on the effects of heroin); *State v. Thacker*, 95 Nev. 500, 502, 596 P.2d 508, 509 (1979) (finding misconduct where juror offered expert opinion on cattle weight); *People v. Castro*, 184 Cal.App.3d 849, 229 Cal.Rptr. 280, 281-82 (1986) (finding misconduct where juror conducted visibility experiment at crime scene); *Ex Parte Thomas*, 666 So.2d 855, 857-58 (Ala. 1995).

Here, the jury engaged in improper experimentation during deliberations on a critical issue that materially effected Ms. Garcia's credibility in the eyes of the jury and, as a result, substantially prejudiced Ms. Garcia and substantially affected the verdict. According to deliberating juror number 5, Mr. Keith Burkery, he witnessed Ms. Garcia, during the course of the trial, while sitting in the front row of the audience chairs directly behind her lawyers, lean over the wood hand-rail/divider behind her

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lawyers and grab a water bottle off what he believes was the top of a box on the other side of the wood hand-rail/divider. (*See* Declaration of Keith Burkery, Ex. 2, at ¶ 6)[3]. Based on Mr. Burkery's observation, the task did not appear to hurt Ms. Garcia. (*See id.*, Ex. 2, at ¶ 7). As a result of witnessing Ms. Garcia lean over the wood hand-rail/divider and pick up the bottle of water and with the desire to determine how difficult it was to lean over the wood hand-rail/divider to pick up a bottle of water, during deliberations, and just shortly prior to inquiring with the Court whether it was permitted to award past medical expenses and no future medical expenses, the jury inquired with the Court whether it was permitted to "see the courtroom to see the stairs in the witness area and the attorney area." (*See id.* at ¶¶ 8-9; *see also* Transcript 3/10/16 at 3:7-13, Ex. 3). The Court allowed the jury to enter the courtroom, but was unaware of "what they looked at and what they did." (*See* Declaration of Keith Burkery, Ex. 2, at ¶ 9; *see also* Transcript 3/10/16 at 3:18-22, Ex. 3).

Once the jury entered the courtroom during deliberations, the jury decided to conduct an experiment by reenacting Ms. Garcia leaning over the wood hand-rail/divider to determine the difficulty of the action. (*See* Declaration of Keith Burkery, Ex. 2, at ¶¶ 8, 10). The jury selected a juror (Ms. Jessica Bias—Juror Number 6) that it believed was similar in size and stature to Plaintiff. (*Id.* at ¶ 10). Of note, Ms. Bias communicated to Mr. Burkery, and the rest of the jurors, that she has "a hole in her back", as a result of having spina bifida, which has caused her pain in her back throughout her life. (*Id.* at ¶ 10). Ms. Bias assumed her position behind the wood hand-rail/guardrail where Ms. Garcia was located and she leaned over the wood hand-rail/guardrail and picked up a bottle of water placed on the ground on the other side of the wood hand-rail/divider. (*See id.* at ¶ 12).

The jury conducted this experiment to determine the difficulty of leaning over the wood hand-rail/divider. (*Id.* at ¶ 8). Upon completion of the experiment, Ms. Bias communicated to Mr. Burkery, as well as the rest of the jury, that she found the task more difficult to complete than she originally thought it would be. (*Id.* at ¶ 13). The jury shortly thereafter decided to not award Ms. Garcia any future medical care.[4]

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[3] Ms. Garcia's Counsel attempted to contact all of the jurors during the drafting of this Motion (including via social media) in an effort to obtain affidavits attesting to the facts surrounding the subject experiment, but was only able to make contact with Mr. Burkery.

[4] Mr. Burkery also expressed to Mr. Mott how great of an impact the experiment had on a majority of the jurors' opinions, but the case law indicates that the actual effect of the experiment should be considered against the mythical

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The improper experimentation conducted by the jury created new evidence and was done at its own doing unbeknownst to Ms. Garcia and her Counsel, Ms. Awerbach and her Counsel, Mr. Awerbach and his Counsel, and the Court. At no point did any Counsel have an opportunity to examine the authenticity of the experiment, examine the juror acting as Ms. Garcia during the experiment (e.g., Ms. Bias has spina bifida, has had back pain throughout her life, her functionality and degree of pain levels are unknown, and her height, weight, size, reach, and flexibility in comparison to Ms. Garcia are unknown), examine the controlled factors and many variables relevant to the experiment (e.g., the water bottled retrieved by Ms. Garcia was on a box, not on the ground like it was during the experiment), cross-examine the jury as to the viability of the examination, present evidence from medical experts as to Ms. Garcia's ability to lean over hand-rails/dividers, examine Ms. Garcia as to her ability lean over hand-rails/dividers, or present evidence of any medications Ms. Garcia was taking to mask her pain. It cannot be disputed that the jury's consideration of the new evidence derived from the improper experimentation deprived Ms. Garcia from the opportunity to conduct cross-examination, offer evidence in rebuttal, argue the significance of the information to the jury, or request a curative instruction.

The timing of the improper experimentation is also critical as it occurred just shortly prior to the jury inquiring with the Court whether it was permitted to award all past medical expenses but no future medical expenses. (*See* Transcript 3/10/16, Ex. 3, at 4:5-10 ("Based on Instruction 25, would it [be] possible to award the plaintiff [the] entire amount of past medical expenses without awarding anything for future medical expenses?")). This is persuasive evidence of the actual prejudice suffered by Ms. Garcia as a result of the improper experimentation. In fact, this experiment may be the only "evidence" from which they could have drawn the conclusion that Ms. Garcia needed no future care and would have no future pain and suffering, despite the undisputed evidence and the concessions of the defense experts.

The credibility of Plaintiff was assaulted repeatedly throughout the course of the trial and was Defendants' primary defense. In fact, by the time of closing arguments, Ms. Awerbach's Counsel did not even hide the fact that he was accusing Ms. Garcia of being a liar:

"reasonable jury", and the effect of the experiment on the actual jury should not be considered by the court. As a result, Mr. Burkery's testimony as to the actual impact of the experiment on the jury was omitted from his Declaration.

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> Ladies and gentlemen, I submit that she did exaggerate because the evidence is there in the record, the onset of symptoms, the nature of her activities of daily living before and after the accident. Her work limitations. That is not credible and you're allowed to consider that. There's a jury instruction that allows you to consider that, ladies and gentlemen.

(*See* Transcript 3/8/16, Ex. 4, at 174:7-13). Ms. Awerbach's Counsel further acknowledged his position during argument on an objection from Ms. Garcia's Counsel regarding Ms. Awerbach's Counsel arguing to the jury that Ms. Garcia is dishonest:

> The Court: Well, he didn't – he didn't use the word "liar" but he did –
>
> Mr. Mazzeo: I didn't.
>
> The Court: -- imply that she was being dishonest, I agree.
>
> Mr. Mazzeo: Well, yes, about her antics on the stand when we had side bars. That's correct. I definitely did. Absolutely.

(*Id.* at 191:24-193:1-8). Thus, the improper experimentation addressed one of the most key issues litigated during the five week long trial.

The jury's improper experimentation had the effect of introducing new evidence into trial that prejudiced Ms. Garcia and had an impact on the jury's verdict. As explained by the Nevada Supreme Court, "[f]or a jury to consider independent facts, unsifted as to their accuracy by cross-examination, and unsupported by the solemnity attending their presentation on oath, before a judge, jury, parties and bystanders, and without an opportunity to contradict or explain them **can never be countenanced**." *Krause Inc*, 117 Nev. at 935 (emphasis added). Likewise, deliberations were tainted by an improper experiment by the jury addressing a critical issue litigated over the course of the five week trial. As demanded by the Nevada Supreme Court, this is never acceptable. A new trial is required to cure the improper experimentation conducted by the jury.

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II. The Jury was Improperly Advised that it May Award all Past Medical Expenses and No Future Medical Expenses, which Resulted in a Verdict that Contradicts the Undisputed Evidence.

During deliberations, the jury was improperly advised that it may award Ms. Garcia all of her past medical expenses and none of her future medical expenses. The advisement was improper because Ms. Garcia's future medical expenses were either undisputed or disputed on the exact same grounds as her past care and treatment. The Court should not have given the jury permission to reach an inconsistent verdict not supported by the evidence. Based on this advisement, the jury returned a verdict awarding Ms. Garcia all of her past medical expenses (i.e., $574,846.01) and none of her future medical expenses.

More specifically, during deliberations, the jury sent the following question to the Court:

> Based on Instruction 25, would it [be] possible to award the plaintiff [the] entire amount of past medical expenses without awarding anything for future medical expenses?

(*See* Transcript 3/10/16, Ex. 3, at 4:5-10). After the Court inquired with Counsel for all parties in regards to their positions, the Court responded to the jury with a "yes". (*Id.*). Ms. Garcia's Counsel strongly opposed the answering of this question with a "yes" and restated its objection on the record prior to the reading of the verdict:

> [Court:] Anybody want to make a record on any of those?
>
> Mr. Smith: We do on the third question about whether the jury could award only past medical expenses and not future medical expenses. Under Jury Instruction Number 25, and when we had a discussion we asked the Court either not to answer that question or to answer that question no.
>
> As we explained, there is no evidence put on by the defense that the future damages are unnecessary. That wasn't their argument. The defense's argument was that the injury and the treatment past a muscle sprain or ligament strain is not related to the crash.
>
> So if the jury determines that any treatment beyond that is related to the crash, then, the undisputed future medical treatment is also related to the crash, and the jury has to order future damages in addition to the past medical specials that lead up to that.

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> If the Court had disagreed with that, then the Court's other option would have been to not answer the question because answering the question – if the Court can answer – cannot answer the question no, then the Court also should not have answered the question yes and explained it further to the jury in a way that it is contrary to the evidence that was put on in the case.

(*Id.* at 5:2-25). The Court explained its position by stating:

> I thought that there was – there's always a choice and I didn't want to take that choice away. So whether it was based on a doctor's testimony or a party's testimony or whatever it was, I think they still have the choice. I told them they have a choice.

(*Id.* at 6:18-23).

Jury Instruction Number 25 reads as follows:

> If you find that a Defendant is liable for the original injury to the Plaintiff, that Defendant is also liable for any aggravation of the original injury caused by negligent medical or hospital treatment or care of the original injury, or for any additional injury caused by negligent medical or hospital treatment or care of the original injury.

(Jury Instructions, Ex. 5, at p. 26).

It was improper for the Court to instruct the jury that it may award Ms. Garcia all of her past medical expenses but none of her future medical expenses under Instruction 25. At trial, Ms. Garcia presented evidence and argued to the jury that she is entitled to $574,846.01 in past medical expenses, all of which were directly and causally related to the subject collision. Defendants argued that Ms. Garcia only suffered a muscle sprain and/or ligament strain as a result of the subject collision and anything beyond treatment for a sprain and/or strain was not directly and causally related to the subject collision and, as a result, Ms. Garcia should only be awarded $30,018.52 (Ms. Awerbach) or $50,000 (Mr. Awerbach). (*See* Transcript 3/8/16, Ex. 4, at 188:2-13 (Ms. Awerbach's Counsel requesting a verdict of $20,018.52 for past medical expenses and $10,000 for past pain and suffering); Transcript 3/9/16, Ex. 6, at 121:5-122:2 (Mr. Awerbach's Counsel requesting a verdict of $50,000)). The jury agreed with Ms. Garcia and found that all of Ms. Garcia's past medical expenses totaling $574,846.01 were directly and causally related to the subject collision, and, as a result, awarded her every penny.

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Because the jury determined that all of Ms. Garcia's past medical expenses were directly and causally related to the subject collision, the jury had no choice but to award Ms. Garcia future medical expenses that were supported by the exact same causation arguments. In fact, even Defendants' expert orthopedic surgeon, Dr. Klein, opined that Ms. Garcia will need a future spine surgery as a result of her first surgery. (*See* Trial Transcript 3/2/16, Ex. 7, at 218:10-220:18). There were no defense arguments related to causation or need for future treatment which did not apply equally to the past treatment that was awarded in whole. Thus, an award of nothing for Ms. Garcia's future medical expenses is not only unsupported by the evidence, it is also inconsistent with the evidence presented by both parties (i.e., Ms. Garcia will need a future spine surgery).

It is well established that a verdict unsupported by the undisputed evidence is improper and must be overturned. *See e.g., Arnold v. Mt. Wheeler Power*, 101 Nev. 612, 614, 707 P.2d 1137, 1139 (1985) (granting additur on appeal where plaintiff lost a limb and the awarded damages did not include pain and suffering or loss of earnings); *Fillmore v. Hill*, 665 A.2d 514 (Pa. Super. 1995) (plaintiff was entitled to a new trial in a negligence action for injuries suffered in an automobile accident where the jury awarded the plaintiff zero damages despite undisputed evidence of damages); *Clark v. Viniard by and through Viniard*, 548 So. 2d 987 (Miss. 1989) (trial court did not abuse its discretion in ordering a new trial on all issues where the jury awarded no damages despite finding for the plaintiff and hearing uncontroverted proof of substantial damages); *Skelly v. Hartford Cas. Ins. Co.*, 445 So. 2d 415 (Fla. Dist. Ct. App. 4th Dist. 1984) (where there was undisputable evidence that the plaintiff suffered pain and a permanent partial disability from a demonstrable injury, a zero damage award for those items was grossly inadequate, requiring a new trial).

The jury cannot award a verdict that is contrary to the undisputed evidence and that contradicts itself. A finding that Ms. Garcia's past medical expenses were directly and causally related to the subject collision necessitates a finding that Ms. Garcia's future treatment is also directly and causally related to the subject collision as this point is undisputed. The jury cannot disregard the undisputed evidence to issue an inconsistent verdict and advising the jury that it may

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do the same was improper. A new trial is necessary to cure the improper advisement and inconsistent verdict.[5]

III. Biomechanical Engineering Opinions of a Stricken Expert Pertaining to Forces of Impact were Presented and Argued to the Jury Creating Great Prejudice to Ms. Garcia.

During opening statements, Defendants discussed and previewed in detail their biomechanical engineer's (Dr. Scher) opinions (while using slides from Dr. Scher's report), including opinions that the forces of impact from activities of daily living are greater than the forces of impact from the subject collision. (*See* Transcript 2/12/16, Ex. 8, at 194:19-196:8 (e.g. from Ms. Awerbach's Counsel: "[Dr. Scher] determined that the lumbar loads during activities of daily living that we engage in were greater on Ms. Garcia than the motor vehicle accident and concluded that it was not scientifically probable that the motor vehicle accident causes damage to the lumbar spine or exacerbated any preexisting condition of the lumbar spine"); Transcript 2/16/16, Ex. 9, at 26:14-29:21 (e.g. from Mr. Awerbach's Counsel: "And what [Dr. Scher] will prove to you is that the forces on [Ms. Garcia's] spine from the collision were less than the forces on her spine from the activities of daily living that she had gotten used to for years before the accident."). For example, Counsel for Mr. Awerbach explained to the jury:

> So whatever forces she was subjecting her spine to before the accident, climbing stairs, walking, running, whatever, they were not enough to move the spinal bones to cause her pain. So if the force of the collision was even less than that, that's going to prove that the forces of the collision aren't responsible for her pain because they're so much less than the forces of daily living.

(Transcript 2/16/16, Ex. 9, at 28:4-12).

Knowing that Dr. Scher's opinions lacked a foundation, Ms. Garcia's Counsel vehemently objected—prior to Ms. Awerbach's opening statements—to the use of slides from Dr. Scher's

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[5] Of note, the fact that the jury awarded no future medical expenses while contemplating Jury Instruction Number 25 related to medical negligence is highly questionable as it was undisputed by the parties that there was no medical negligence in this case. (*See* Transcript 3/8/16, Ex. 4, at 93:12-24 (e.g., "Mr. Mazzeo: Objection, Your Honor. There's no evidence of negligent medical treatment in this case."). Thus, the fact the jury considered Jury Instruction Number 25 related to medical negligence and decided to award no future medical expenses is also contrary to the undisputed evidence.

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report and to the presentation of Dr. Scher's opinion contained within the slides as the slides are hearsay and there is no foundation for Dr. Scher's opinions. (*See* Transcript 2/16/16, Ex. 9, at 49:14-53:18). The Court allowed the slides and the presentation of Dr. Scher's opinions contained within the slides based, in part, on Ms. Awerbach's Counsel's representation that a foundation can be laid for Dr. Scher's opinions. (*Id.* at 53:11-18 ("The Court: I'm hoping that you can lay the foundation for the information contained in it. Mr. Mazzeo: For the information contained, but you're not going to admit this as an exhibit . . . . The Court: I'm going to allow it for demonstrative.").

Mr. Awerbach's Counsel called Dr. Scher to testify on February 25, 2016. (*See* Transcript 2/25/16, Ex. 10). While attempting to lay a foundation for his biomechanical engineering opinions, Dr. Scher discussed in great length biomechanical engineering principles generally and specifically in relation to this case. (*See generally id.* at 5:23-67:21). Dr. Scher further discussed the facts of this case and repeatedly attempted to introduce his opinions as to force of impact from the subject collision in comparison to the force of impact from Ms. Garcia's activities of daily living over repeated objections from Ms. Garcia's Counsel. (*See id.*). Despite numerous sustained foundation objections from Ms. Garcia's Counsel, Dr. Scher was still able to slide his opinion in by sneaking it into an answer to a question clearly not calling for such an opinion:

> Q. All right. And, then, how did you get from the comparison of forces to checking the national databases?
>
> A. Sure. So my result for 2D, the comparison of forces, said that the likelihood for injury was very low. The forces from the subject accident – well, we'll get into that. But I then wanted to check with the NASS?CDS database – that's the NHTSA database – **to see if, in fact, accidents like this would be likely to create this damage. And the answer was no, it's not likely**.

(*Id.* at 31:12-25 (emphasis added)). Ms. Garcia's Counsel quickly objected and the Court sustained. (*Id.*) On repeated other occasions, Dr. Scher also previewed his ultimate opinion without tying it directly to the case. For example:

> Q. All right. And so, then, of what relevance is it to you, the forces on her spine from the accident?

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> A. Well, if the forces from the accident are lower than the forces that can be resisted by the spine, then it would not create damage to the spine.

(*See e.g.*, *id.* at 34:7-12).

As a result of Dr. Scher lacking a foundation for his opinions, Ms. Garcia's Counsel was permitted to voir dire Dr. Scher to establish his lack of foundation. (*See id.* at 67:23-79:25; 177:3-194:10). After lengthy voir dire from all parties and great consideration from the Court, Dr. Scher was ultimately stricken in full as he lacked a proper foundation for his opinions. (*See id.* at 134:11-140:2; 196:21-197:11). The jury was "instructed to disregard [Dr. Scher's] testimony." (*See* Transcript 2/26/16, Ex. 11, at 8:11-15 ("I'm going to tell you that the Court concluded yesterday that there was inadequate foundation for Dr. Scher's testimony. So you're instructed to disregard his testimony that you heard yesterday.").

During closing arguments, Mr. Awerbach's Counsel, over constant objections from Ms. Garcia's Counsel, repeatedly referenced forces of impact on Ms. Garcia's spine from the car collision compared to activities of daily living, despite having no evidence in the record to support the arguments as a result of Dr. Scher being stricken in full. (*See* Transcript 3/9/16, Ex. 6, at 7:17-21:10). In fact, Mr. Awerbach's Counsel's first argument to the jury addressed forces of impact and, as a result, the Court was forced to remind the jury that Dr. Scher's testimony was stricken in full:

> Let's talk about the first assumptions they want you to make and that is that the physical forces on her spine from the collision had to be greater than the physical forces on her spine from all those 30-odd year of the activities of daily living.
>
> Mr. Roberts: Objection, Your Honor. No argument based on all the evidence.
>
> Mr. Strassburg: I get to point out what's not been proven too.
>
> The Court: Come on up.
>
> (A discussion was held at the bench, not reported.)
>
> The Court: Okay, folks. I'm just going to reinstruct you again. I'm going to let Mr. Strassburg talk about the forces of – as he said so far, anyway, but you need to remember that Dr. Scher came

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> and testified about forces of impact, and I struck that testimony and instructed you to disregard it, so you're not to consider any testimony by Dr. Scher as it relates to this argument that is being made.

(*See id.* at 7:17-8:11).

Mr. Awerbach's Counsel, during closing arguments, side stepped the Court's striking of Dr. Scher by drawing on the testimony he was able to sneak in over objection and by drawing on the testimony that was previewed to the jury multiple times during opening statements by arguing that "*Plaintiff failed to show* that the force of impact from the collision was greater than the force of impact from her activities of daily living." In other words, Mr. Awerbach's Counsel, knowing the jury has improperly heard Dr. Scher's ultimate opinion on multiple occasions, based his closing around this fact and repeatedly rang the bell on improper arguments by claiming to reference what Plaintiff did not prove by directly referencing the substance of Dr. Scher's ultimate opinion and by claiming to be appealing to the jury's commonsense. For example, Mr. Awerbach's Counsel argued:

> Now, let me show you the Plaintiff's logic that I'll prove to you it's wrong. Here's what they want to show you. They want you to assume that the force of the collision was greater than the strength of her spinal structure, and that's this and all the ligaments and the muscles that support it. The force of the collision was greater than the strength of her spine to resist it, and the strength of her spine, that was greater than all the forces of the activities of daily living before the accident. Because we know that those forces of daily living, those didn't cause her any pain because she was pain free before the accident.
>
> So, however strong her spine was, it was strong enough for the vertebra not to move during her activities of daily living before the accident. What did those involve? Well, you've heard her say she rode the roller coasters. She rode the roller coasters at New York-New York. She road them at Circus Circus. And that didn't hurt her spine one bit.
>
> And the spondylolisthesis, the offset, was present for all those roller coaster rides, didn't cause her any pain. And they want you to assume that the forces from this fender-bender, you've seen the pictures of the vehicle, those forces caused her spine to move, and those forces were greater than the forces of the roller coasters that she rode before the accident that didn't cause her any pain. They haven't

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> proven it. They want you to make that assumption. You should not do that.

(*Id.* at 9:17-10:23; *see also e.g., id.* at 10:24-16:25 (argument pertaining to forces of impact, including argument based on Dr. Scher's demonstrative exhibits pertaining to forces of impact); 19:6-20:16 (argument pertaining to forces of impact from crash compared to roller coasters); 20:17-21:10 (argument that force of impact not enough to deploy airbags)).[6]

In fact, Mr. Awerbach's Counsel specifically argued, with no supporting evidence in the record, that the forces of impact from the roller coasters Ms. Garcia rode were greater than the forces of impact from the subject crash. Ms. Garcia's Counsel's objection was overruled:

> No edema, no bruising. **No physical forces greater than the roller coasters she rode before.** No causation. Unless you're willing to make an assumption and that you should not do.
>
> Mr. Roberts: Objection. Move to strike there the reference of physical forces greater than the roller coaster.
>
> The Court: He's not relying on Dr. Scher. He's just using common sense. I'll allow it.

(*Id.* at 19:6-14 (emphasis added)).

Although the Court overruled Ms. Garcia's Counsel's objection, when revisited out of the presence of the jury, the Court made it clear, without reviewing the objectionable statement, that "I think if the statement was made that the forces of this impact were less than forces of a roller coaster, I would have sustained that objection because that's a conclusion that doesn't have a basis in evidence . . . ." (*See* Transcript 3/8/16, Ex. 4, at 65:10-24). As quoted above, it is clear that Mr. Awerbach's Counsel stated that the forces of impact from the subject collision were less than the forces of impact from a roller coaster.

As a result of Mr. Awerbach's Counsel's *testimony* in closing arguments pertaining to forces of impact from the subject collision compared to forces of impact from Ms. Garcia's activities of daily living, Ms. Garcia's Counsel was forced to argue forces of impact in rebuttal, and

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[6] Ms. Garcia's Counsel lodged a lengthy objection to Mr. Awerbach's Counsel's closing arguments addressing forces of impact outside of the presence of the jury. (*See* Transcript 3/9/16, Ex. 6, at 63:14-66:15).

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even had to try to explain how the forces of impact from the subject collision are different than forces of impact from Ms. Garcia's activities of daily living. (*Id.* at 149:18-152:22).

Dr. Scher was properly excluded under *Hallmark* as he lacked a foundation to opine as to forces of impact on Ms. Garcia's spine. *See Hallmark v. Eldridge*, 189 P.3d 646 (Nev. 2008). (*See also* Transcript 2/25/16, Ex. 10, at 134:11-140:2; 196:21-197:11). There is no authority to support argument from counsel regarding comparisons of forces of impact without corroborating expert testimony. Such arguments contain sophisticated mathematical calculations and considerations far beyond lay persons' common knowledge. A biomechanical engineer must opine as to forces of impact prior to Counsel making any arguments regarding the same. The Nevada Supreme Court recently released a decision addressing (1) its holdings in *Hallmark* and (2) the necessity of biomechanical engineering expert testimony for low impact defenses. *See Rish v. Simao*, 132 Nev. Adv. Op. 17, 368 P.3d 1203 (March 17, 2016). The Court reaffirmed its holdings in *Hallmark* concerning the striking of a biomechanical engineer expert that lacks the foundation to opine as to forces of impact. *Id.* The Court further held that expert testimony from a biomechanical engineer is not necessary to address the nature of an accident for purposes of a low impact defense. *Id.* at 368 P.3d at 1208. Of great significance, though, the Court **did not hold** that counsel may compare the forces of impact in a collision to the forces of impact from an activity of daily living without corroborating biomechanical engineering expert testimony. Such a position would not stand to reason.

Defendants inappropriately previewed Dr. Scher's foundationless opinions pertaining to forces of impact several times during opening statements, inappropriately rung the bell on his foundationless testimony pertaining to forces of impact during his direct examination over repeated sustained objections from Ms. Garcia's Counsel, and then, even after Dr. Scher was stricken in full and the jury was admonished to disregard his testimony, Mr. Awerbach's Counsel inappropriately drew (as the testimony had already been previewed several times and the bell had already been rung) on the stricken testimony, over constant objection by Ms. Garcia's Counsel, by comparing the forces of the subject collision to Ms. Garcia's activities of daily living. Mr. Awerbach's Counsel then took it even further and *testified* as a biomechanical engineer in closing that the forces of

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impact from riding a roller coaster were greater on Ms. Garcia's lumbar spine than the subject collision.

The bell was rung on Dr. Scher's foundationless opinions and Mr. Awerbach's Counsel's antics (i.e., misconduct) of repeatedly re-ringing the bell and setting forth his own biomechanical engineering opinions in closing arguments tainted the jury and without question prejudiced Ms. Garcia and prevented her from having a fair trial. The tainting of the jury and the ensuing prejudice to Ms. Garcia cannot be countenanced and must be cured by the ordering of a new trial.

IV. The Accumulation of Juror Misconduct, Error, and Improper Presentation of Biomechanical Engineering Testimony, in Addition to Repeated Violations of Pre-Trial Orders by Defendants' Counsel Prejudiced Ms. Garcia and Affected the Verdict.

In addition to the aforementioned, which Ms. Garcia believes each individually necessitate the granting of a new trial, they, along with the myriad violations of motions in limine by Defendants' Counsel throughout the course of trial, collectively prejudiced Ms. Garcia and substantially affected the jury's verdict. Defendants' Counsel violated, at a minimum, 15 Pre-Trial Orders, many of which were violated multiple times. The list of Pre-Trial Orders violated by Defendants' Counsel includes the following:

- Suggested pre-accident medical records exist;
- Asked hypothetical question based on facts that are not present in this case;
- Asked question about Dr. Lemper accepting less on liens;
- Asked Dr. Lemper about his settlement with the government;
- Suggested Ms. Garcia was terminated from Aliante;
- Asked the jury if it would award zero dollars during voir dire;
- Asked about Pacific Hospital's billing practices;
- Inaccurately told the jury Ms. Garcia failed a drug screen;
- Talked about a pre-crash MRI that did not exist;
- Dr. Klein offered opinions outside the scope of his report and offered new opinions during trial;
- Provided personal opinions by indicating that they do not trust Dr. Gross and by referring to Select Physical Therapy as a mill;
- Argued that loss of enjoyment of life damages cannot be calculated;
- Inquired about Ms. Garcia's trip to California;
- Suggested that Defendants will have to pay the verdict out of their own pocket; and
- Did not limit closing argument to evidence at trial, including Mr. Awerbach's Counsel's statement that the forces of impact from riding a roller coaster are greater on Ms. Garcia's spine than the subject collision.

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While Defendants' Counsel repeatedly represented at trial that their violations of Rules and Orders were unintentional, their repeated conduct contradicts those claims. For example, Ms. Awerbach's Counsel was instructed by the Court, at the bench, to not inquire into the selling of Dr. Lemper's medical liens at a discount, and seconds later, Ms. Awerbach's Counsel asked Dr. Lemper specifically about the selling of his liens at a discount, in direct defiance to the Court's order. (*See* Transcript 2/18/16, Ex. 12, at 84:23-94:15 (improper questioning of Dr. Lemper concerning liens and argument on Ms. Awerbach's Counsel's misconduct outside of the presence of the jury)). As another example, through the admitted assistance of Defendants' Counsel, Dr. Klein set forth new opinions on critical issues during re-direct examination based on a June 2014 x-ray that he had not reviewed prior to the day of his re-direct examination, and that he was specifically precluded from discussing since he had not previously reviewed. (*See* Transcript 3/2/16, Ex. 7, at 213:3-218:9). Dr. Klein admitted that he had not seen the June 2014 x-ray prior to trial and was only shown a demonstrative, not the actual x-ray, in the hall during a break in his testimony. (*See id.*).

The accumulation of juror misconduct, advisement to the jury that it may award all past medical expenses and no future medical expenses, the improper presentation of biomechanical engineering opinions, and repeated violations of Pre-Trial Orders (some of which being blatantly intentional), in the aggregate, prejudiced Ms. Garcia and substantially affected the jury's verdict. A new trial is warranted as a result.

V. In the Alternative to a New Trial, Additur is Appropriate.

Additur, in its simplest form, allows trial judges to add additional damages to an inadequate jury verdict. The leading case on additur in Nevada is *Drummond v. Mid-West Growers*, 91 Nev. 698 (1975). In *Drummond*, the Court discussed at length the long standing acceptance of remitter and, based on sound logic, adopted additur:

> The issue of additur was not presented until modern times, but it is a logical step in the growth of the law relating to unliquidated damages as remittitur was at an earlier date. Its acceptance, though still somewhat retarded, is growing. It should not be treated any differently from other modern devices aimed at making the relationship between judge and jury as to damages as well as to other matters, one that preserves the essentials of the right to jury trial

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> without shackling modern procedure to outmoded precedents. Additur does not detract from the substance of the common law trial by jury. Like its fraternal twin remittitur, now over 100 years old in this state, it promotes economy and efficiency in judicial proceedings.

Id. at 710-711.

Consistent with the adoption of additur as an approved practice in Nevada, the Nevada Supreme Court set forth a two-prong test to assist trial courts in determining whether additur is appropriate: "(1) whether the damages are clearly inadequate, and (2) whether the case would be a proper one for granting a motion for a new trial limited to damages." *Lee v. Ball*, 121 Nev. 391, 393-94 (2005) (quoting *Drummond*, 91 Nev. at 708 (internal quotation marks omitted)). "If both prongs are met, then the district court has discretion to grant a new trial, unless the defendant consents to the court's additur." *Id.* "The district court has broad discretion in determining motions for additur, and we will not disturb the court's determination unless that discretion has been abused." *Id.*

It is important to note that "[a]lthough *Drummond* articulates two threshold determinants before additur is available (clearly inadequate and ripe for new trial), in practical application there is only one primary consideration. In essence, if damages are clearly inadequate or 'shocking' to the court's conscience, additur is a proper form of appellate relief." *See, e.g., Arnold v. Mt. Wheeler Power*, 101 Nev. 612, 614 707 P.2d 1137, 1139 (1985) (granting additur on appeal where damages did not include pain and suffering or loss of earnings attributable to loss of limb); *see also Truckee-Carson Irr. Dist. v. Barber*, 80 Nev. 263, 268, 392 P.2d 46, 48 (1964); *Shere v. Davis*, 95 Nev. 491, 596 P.2d 499 (1979) (where damages are clearly inadequate, new trial is warranted under NRCP 59(a)(5) because jury failed to follow court instructions).

Since additur's adoption by the Nevada Supreme Court in 1975, the Court has revisited additur numerous times and has repeatedly affirmed its use and role. *See e.g., Jacobson v. Manfredi*, 100 Nev. 226 (1984) (holding that additur does not violate the State constitution as long as the lower court properly follows the *Drummond* test, while affirming an additur of $650,000 to a $200,000 jury verdict); *Arnold*, 101 Nev. 612 (granting additur on appeal where damages for loss of limb were inadequate); *Donaldson v. Anderson*, 109 Nev. 1039 (1993) (reversing trial court and holding that trial court judge abused his discretion in not granting an additur where jury did not

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reward compensation for grief, sorrow, and loss of consortium); *Lee*, 121 Nev. 391 (affirming trial court judge's additur but finding the district court judge errored in not offering the defendant a new trial instead of the additur).

Here, in the alternative to a new trial, additur is appropriate in the amount of $2,166,715 for Ms. Garcia's future medical expenses and $250,000 for her future pain and suffering.

Ms. Garcia is entitled to an additur of $2,166,715 for her future medical expenses. At trial, Ms. Garcia presented evidence and argued to the jury that she is entitled to $574,846.01 in past medical expenses, all of which were directly and causally related to the subject collision. Defendants argued that Ms. Garcia only suffered a muscle sprain and/or ligament strain as a result of the subject collision and anything beyond treatment for a sprain and/or strain was not directly and causally related to the subject collision. The jury agreed with Ms. Garcia and found that all of Ms. Garcia's past medical expenses totaling $574,846.01 were directly and causally related to the subject collision, and, as a result, awarded her the same. Because the jury determined that all of Ms. Garcia's past medical expenses were directly and causally related to the subject collision, Ms. Garcia is entitled to an additur to include all of her future medical treatment amounting to $2,166,715, as her future medical treatment is undisputed in light of the jury's finding on causation of her injuries. In fact, even Defendants' expert orthopedic surgeon, Dr. Klein, opined that Ms. Garcia will need a future spine surgery as a result of her first surgery. (*See* Trial Transcript 3/2/16, Ex. 7, at 218:10-220:18). Thus, an award of nothing for Ms. Garcia's future medical expenses is not only inconsistent with the jury's award of all past medical expenses as well as the undisputed evidence presented at trial, it is also inconsistent with the evidence presented by both parties (i.e., Ms. Garcia will need a future spine surgery). The jury's award of all past medical expenses in addition to the undisputed evidence in this case and the evidence presented by both parties establishing that Ms. Garcia will need an additional spine surgery in the future establishes that Ms. Garcia is entitled to an additur of $2,166,715 for her future medical expenses.

Ms. Garcia is also entitled to an additur of $250,000 for her future pain and suffering. Consistent with the arguments set forth above establishing that Ms. Garcia is entitled to $2,166,715 in future medical expenses, which includes annual rhizotomies and a future spine surgery, it was

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improper for the jury to award nothing to Ms. Garcia for her future pain and suffering. *See Arnold*, 101 Nev. at 614 (finding an abuse of discretion and granting additur on appeal where plaintiff suffered a compensable injury and the awarded damages did not include pain and suffering or loss of earnings); *Drummond*, 91 Nev. 698 (trial court is reversed for denying motion for new trial or additur when jury did not award damages for past pain and suffering or future medical expenses and pain and suffering). $250,000 in future pain and suffering (which covers the remainder of Ms. Garcia's life) is conservative considering the undisputed future treatment Ms. Garcia will require and in light of the fact that the jury awarded her $250,000 for the past five years of pain and suffering. Thus, Ms. Garcia is entitled to an additur of $250,000 for her future pain and suffering.

In summary, the damages awarded to Ms. Garcia are clearly inadequate and require the Court to order a new trial or, in the alternative, an additur in the amount of $2,166,715 for Ms. Garcia's future medical expenses and $250,000 for her future pain and suffering.

RELIEF REQUESTED

For the aforementioned reasons, Ms. Garcia respectfully requests that the Court order a new trial or, in the alternative, an additur in the amount of $2,166,715 for Ms. Garcia's future medical expenses and $250,000 for her future pain and suffering..

DATED this 20th day of May, 2016.

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Marisa Rodriguez-Shapoval, Esq.
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CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of May, 2016, a true and correct copy of the foregoing **PLAINTIFF'S MOTION FOR A NEW TRIAL OR, IN THE ALTERNATIVE, FOR ADDITUR** was electronically filed and served on counsel through the Court's electronic service system pursuant to Administrative Order 14-2 and N.E.F.C.R. 9, via the electronic mail addresses noted below, unless service by another method is stated or noted:

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Emilia Garcia

DISTRICT COURT

CLARK COUNTY, NEVADA

EMILIA GARCIA, individually,

Plaintiff,

v.

JARED AWERBACH, individually; ANDREA AWERBACH, individually; DOES I – X, and ROE CORPORATIONS I – X, inclusive,

Defendants.

Case No.: A-11-637772-c
Dept. No.: 30

APPENDIX OF EXHIBITS: PLAINTIFF'S MOTION FOR A NEW TRIAL OR, IN THE ALATERNATIVE, FOR ADDITUR

Marisa Rodriguez-Shapoval, Esq., a resident of the State of Nevada, declares as follows:

1. I am a licensed attorney currently in good standing to practice law in the state of Nevada and before this Court.

2. I am an attorney in the law firm of WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC, 6385 South Rainbow Boulevard, Suite 400, Las Vegas, Nevada 89118, and I am one of the counsel representing Emilia Garcia, in this action.

3. I have personal knowledge of the matters contained in this declaration and am competent to testify regarding them.

4. The exhibits below are true and correct copies as noted:

Exhibit	Description
1.	Jury Verdict, 03/10/2016
2.	Affidavit of Keith Berkery
3.	Trial Transcript, 03/10/2016
4.	Trial Transcript, 03/08/2016
5.	Jury Instructions, 03/08/2016
6.	Trial Transcript, 03/09/2016
7.	Trial Transcript, 03/02/2016
8.	Trial Transcript, 02/12/2016
9.	Trial Transcript, 02/16/2016
10.	Trial Transcript, 02/25/2016
11.	Trial Transcript, 02/26/2016
12.	Trial Transcript, 02/18/2016

I declare under penalty of perjury that the foregoing is true and correct.

DATED this 26th day of May, 2016.

D. Lee Roberts, Jr., Esq.
Timothy A. Mott, Esq.
Marisa Rodriguez-Shapoval, Esq.
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CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of May, 2016, a true and correct copy of the foregoing **APPENDIX OF EXHIBITS: PLAINTIFF'S MOTION FOR A NEW TRIAL OR, IN THE ALATERNATIVE, FOR ADDITUR** was electronically filed and served on counsel through the Court's electronic service system pursuant to Administrative Order 14-2 and N.E.F.C.R. 9, via the electronic mail addresses noted below, unless service by another method is stated or noted:

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Attorneys for Plaintiff
Emilia Garcia

An Employee of WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC

EXHIBIT 1

EXHIBIT 1

ORIGINAL

FILED IN OPEN COURT
STEVEN D. GRIERSON
CLERK OF THE COURT
MAR 10 2016
BY, ALICE JACOBSON, DEPUTY

VER

DISTRICT COURT

CLARK COUNTY, NEVADA

EMILIA GARCIA, individually,

Plaintiff,

v.

JARED AWERBACH, individually; ANDREA AWERBACH, individually; DOES I – X, and ROE CORPORATIONS I – X, inclusive,

Defendants.

Case No.: A-11-637772-c
Dept. No.: 30

JURY VERDICT

A-11-637772-C
JV
Jury Verdict
4530909

On the questions submitted, the jury finds as follows:

1. What amount of damages do you find were sustained by Emilia Garcia (excluding any punitive damages) as a proximate result of the auto collision on January 2, 2011.

Past medical expenses ..... $ 574,846.01

Future medical expenses ..... $ 0

Past Loss of household services ..... $ 0

Future Loss of household services ..... $ 0

Past pain, suffering and loss of enjoyment of life ..... $ 250,000.00

Future pain, suffering and loss of enjoyment of life ..... $ 0

TOTAL ..... $ 824,846.01

3

2. Do you find that Plaintiff proved, by clear and convincing evidence, that Jared Awerbach willfully consumed marijuana, knowing that he would thereafter operate a motor vehicle?

YES ✓ NO _____

If you answered "YES," answer question 3. If you answered "NO," please skip to question 5.

3. Should punitive damages be assessed against Defendant Jared Awerbach for the sake of example and by way of punishing the defendant?

YES ✓ NO _____

If you answered "YES," answer question 4. If you answered "NO," please skip to question 5.

4. We assess punitive damages against Jared Awerbach in the amount of:

$ 2,000,000.00 .

5. Did Defendant Andrea Awerbach give express or implied permission to Defendant Jared Awerbach to use her vehicle on January 2, 2011?

YES _____ NO ✓

If you answered "YES" to question 5, answer question 6. If you answered "NO", please skip to the end of the form and have the Jury Foreperson sign where indicated

6. Did Defendant Andrea Awerbach negligently entrust her vehicle to an inexperienced or incompetent person on January 2, 2011?

YES _____ NO ✓

If you answered "YES" to question 6, answer question 7. If you answered "NO", please skip to the end of the form and have the Jury Foreperson sign where indicated.

7. Was that negligence a proximate cause of harm to Emilia Garcia?

YES _____ NO _____

If you answered "YES" to question 7, answer question 8. If you answered "NO", please skip to the end of the form and have the Jury Foreperson sign where indicated.

8. Did Plaintiff prove by clear and convincing evidence that Andrea Awerbach acted with oppression or malice (express or implied) in negligently causing harm to Emilia Garcia?

YES _____ NO _____

If you answered "YES", answer question 9. If you answered "NO", please skip to the end of the form and have the Jury Foreperson sign where indicated.

9. Should punitive damages be assessed against Defendant Andrea Awerbach for the sake of example and by way of punishing the defendant?

YES _____ NO _____

DATED this 10th day of March, 2016.

FOREPERSON

EXHIBIT 2

EXHIBIT 2

Weinberg, Wheeler, Hudgins, Gunn & Dial, LLC
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DECLARATION OF KEITH BERKERY

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

Keith Berkery, being first duly sworn, deposes and says:

1) I am over the age of eighteen, of sound mind, and give the following affidavit based on my personal knowledge.

2) I was a deliberating juror in the matter of *Garcia v. Awerbach*, Case Number A637772, in Department 30 wherein voir dire started on February 8, 2016 and a verdict was returned on March 10, 2016.

3) On March 10, 2016, I, along with many of the other jurors, conversed with the attorneys for the parties after the verdict was returned to discuss my thoughts and opinions on the case as well as explain the deliberation process.

4) On May 24, 2016, on or about 5:45 p.m., I was contacted telephonically by attorney Timothy Andrew Mott, Esq. and his fellow associate attorney Nathan Quist, Esq., attorneys for Plaintiff Emilia Garcia.

5) During this telephonic conversation, Mr. Quist took notes while Mr. Mott inquired about the deliberation process and specifically about the experiment conducted by me and the other jurors in the courtroom during the deliberation process.

6) As I told Mr. Mott over the telephone, during the course of the trial, I witnessed Plaintiff Ms. Garcia bend over the wood hand-rail/divider which is located directly behind her attorneys' table to grab a water bottle which was located (to the best of my recollection) on top of a box on the other side of the wood hand-rail/divider. The water bottle was not located on the ground.

7) When I witnessed Ms. Garcia bend over the wood hand-rail/divider to grab the bottle of water, it did not appear to hurt her.

8) I mentioned this incident during the deliberation process and, as a result, we (the jury) decided to return to the courtroom to see for ourselves how difficult it was to lean over the

wood hand-rail/divider to pick up a bottle of water.

9) We wrote a letter to Judge Wiese requesting to see the stairs leading up to the witness stand and the attorney area and Judge Wiese granted us access.

10) To conduct the experiment, we decided to have a juror with what we guessed was a similar size and body type to Ms. Garcia attempt to reach over the hand-rail/divider to pick up a bottle of water. As a result, we selected Juror Number 6, Jessica Bias.

11) Ms. Bias communicated to myself and the rest of the jurors that she has "a hole in her back" as a result of having spina bifida. She also communicated to myself and the rest of the jurors that her spina bifida has caused her pain in her back throughout her life.

12) Ms. Bias positioned herself on the audience side of the wood hand-rail/divider and reached over the wood hand-rail/divider to pick up a water bottle placed on the ground on the other side of the wood hand-rail/divider.

13) After doing so, Ms. Bias informed myself and the rest of the jurors that it was more difficult to grab the water bottle off the ground by reaching over the wood hand-rail/divider than she originally thought it would be.

14) Mr. Mott drafted this Affidavit based on my telephonic conversation with him and he e-mailed it to me for my review and revisions.

15) I have reviewed the Affidavit and it precisely reflects my testimony.

16) I agree under the penalty of perjury that the foregoing testimony is true and accurate to the best of my beliefs.

17) Although I have a busy schedule, I am happy to assist the Court as needed, so long as I am available.

I declare under penalty of perjury that the foregoing is true and correct.

Dated this 25th day of May, 2016

Keith Berkery

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EXHIBIT 3

EXHIBIT 3

CASE NO. A-11-637772-C

DEPT. NO. 30

DOCKET U

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

EMILIA GARCIA, individually,

Plaintiff,

vs.

JARED AWERBACH, individually; ANDREA AWERBACH, individually; DOES I-X, and ROE CORPORATIONS I-X, inclusive,

Defendants.

REPORTER'S TRANSCRIPT

OF

PROCEEDINGS

BEFORE THE HONORABLE JERRY A. WIESE, II

DEPARTMENT XXX

DATED THURSDAY, MARCH 10, 2016

REPORTED BY: LEAH ARMENDARIZ, RPR, CRR, CCR 921

LAS VEGAS, NEVADA, THURSDAY, MARCH 10, 2016;
4:26 P.M.

P R O C E E D I N G S

* * * * * * *

THE COURT: We're back on the record. We're outside the presence of the jury. Just for the record, I got several questions. We talked about them on the phone.

First one was:

"We would like to see the poster exhibits and see the courtroom to see the stairs in the witness area and the attorney area."

I sent Kirk back and told them that they couldn't see the posters that they only got the exhibits that had been admitted into the evidence. So they crossed that part off.

I did allow them to come back into the courtroom. I told Kirk that there were posters in here, that they were not to look at those posters. I wasn't here. I don't know what they looked at and what they did. But that's first question.

Second one was the MRI disk does not appear to be included in the evidence provided. I asked Tatiana to get ahold of the attorneys to figure out what exhibit

number it was to refer them to. Before she did that, they apparently said that they had located the evidence that they were looking for, so that became moot.

Next question was:

"Based on Instruction 25, would it possible to award the plaintiff entire amount of past medical expenses without awarding anything for future medical expenses?"

I responded with a "yes."

The next question:

"We would like some clarification on Instruction Number 25 as it pertains to the original injury influencing continued past medical treatment."

The response after talking to you guys on the phone was:

"We don't have enough information to answer the question as posed. Please be more specific as far as what you need."

I never received another question. So apparently the question that I answered with a yes answered this question as well somehow. So those are

the questions.

Anybody want to make a record on any of those?

MR. SMITH: We do on the third question about whether the jury could award only past medical expenses and not future medical expenses. Under Jury Instruction Number 25, and when we had a discussion we asked the Court either not to answer that question or to answer that question no.

As we explained, there is no evidence put on by the defense that the future damages are unnecessary. That wasn't their argument. The defense's argument was that the injury and the treatment past a muscle sprain or ligament strain is not related to the crash.

So if the jury determines that any treatment beyond that is related to the crash, then the undisputed future medical treatment is also related to the crash, and the jury has to order future damages in addition to the past medical specials that lead up to that.

If the Court had disagreed with that, then the Court's other option would have been to not answer the question because answering the question -- if the Court can answer -- cannot answer the question no, then the Court also should not have answered the question yes and explained it further to the jury in a way that it is contrary to the evidence that was put on in the case.

THE COURT: Do you guys want to say anything?

MR. TINDALL: The Court's decision was completely appropriate because the jury is free to disregard any evidence, any testimony, any document that they do not believe is truthful. You have a jury instruction on that and they very easily could have believed that any future treatment was not reasonable regardless of whether the defense had an expert saying whatever Mr. Smith would like it to say. So that was a sound decision.

MS. ESTANISLAO: And I just want to add to what Mr. Tindal said that they also mentioned about a preexisting condition. If they believe the preexisting condition was aggravated by something else unrelated to the accident, they can also choose not to award future medical specialties on that and that's my understanding of what their question was based on.

THE COURT: I thought that there was -- there's always a choice and I didn't want to take that choice away. So whether it was based on a doctor's testimony or a party's testimony or whatever it was, I think they still have the choice. I told them they have a choice.

MR. MAZZEO: Judge, can you read the fourth note regarding the clarification of Jury Instruction

EXHIBIT 4

EXHIBIT 4

CASE NO. A-11-637772-C

DEPT. NO. 30

DOCKET U

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

EMILIA GARCIA, individually,

Plaintiff,

vs.

JARED AWERBACH, individually; ANDREA AWERBACH, individually; DOES I-X, and ROE CORPORATIONS I-X, inclusive,

Defendants.

REPORTER'S TRANSCRIPT

OF

PROCEEDINGS

BEFORE THE HONORABLE JERRY A. WIESE, II

DEPARTMENT XXX

DATED TUESDAY, MARCH 8, 2016

REPORTED BY: LEAH ARMENDARIZ, RPR, CCR #921

is a violation of your oath to base a verdict upon any other view of the law than that given in the instructions.

So your second job when you go back in the deliberation room is to make sure that everyone in the jury room follows the law when you answer the questions and that you answer the questions based on the law the judge has given you.

Your third job can be found in Instruction Number 43. It is your duty as jurors to consult with one another and deliberate with the idea of reaching an agreement if you can do so without violation of your individual judgment. Each of you must decide the case for yourself, but should only do so after consideration of the case with your fellow jurors.

So your third job is -- before you answer any of the questions on the verdict form is to explain to each other why you feel you should be answering the questions each way. So you have to look at the law. You have to make sure everyone follows it, and each of you has to deliberate and explain to the other jurors why you feel that way about the questions. This is the way the process works, and this is the way that justice is ensured.

During the case -- and you've been here for a

explanation for why, to a reasonable degree of medical probability.

So what have they done instead? They've criticized the treatment. They've criticized the fact that the doctors can't find the pain generators. They've criticized Dr. Gross and Dr. Cash for recommending surgery.

They've talked about failed back surgery syndrome and claimed that the back surgery made things worse instead of better and that part of the current pain is caused by the surgery and not the accident.

This is where Instruction Number 25 comes in. If you find that a defendant is liable for the original injury, the sprain/strain, the original need to go to the doctor, then that defendant is also liable for any aggravation of the original injury caused by negligent medical or hospital treatment or care or for any additional injury caused by medical injury or care.

MR. MAZZEO: Objection, Your Honor. There's no evidence of negligent medical treatment in this case.

THE COURT: Overruled.

MR. ROBERTS: Thank you, Your Honor.

And I agree with Mr. Mazzeo. There is no evidence of negligent medical treatment. Dr. Klein, although he disagreed with the decision, said it wasn't

Because, while they want to isolate one note where she said she had a recurrence of pain and where the physician assistant wrote something down about her usual pain taken out of context, remember we showed you the previous visit where Dr. Kidwell said the pain was above and below the rhizotomy site, and she has resumed a lot more activity.

And Dr. Kidwell told you he didn't think her pain indicated the rhizotomies didn't work because it was above and below. And then it was the natural result of her being so limited for so long, that the rhizotomies were so effective, she started doing more things and got sore above and below the site.

So there is no competent medical evidence that the rhizotomies didn't work. The unrebutted medical testimony from her treating physicians is that the rhizotomies are reasonable, they're necessary, and they're causally related to the collision.

So past loss of household services. You've heard testimony from Ms. Garcia. You've heard testimony from Dr. Stan Smith, the economist, which has given you the tools to calculate a number to put in this blank.

Dr. Smith gave you a number of $19 an hour, based on his market research, and said that was for service such as Merry Maids, to have someone come in

your house to perform household services.

He then said, based upon tables that economists have studies and created, someone in her demographic would spend about 24 hours a week doing household services. So that's 52 weeks a year. That's 1,248 hours a year. So if there was a full 100 percent loss of household services, that would be a loss of $23,712.

And he says he interviewed Ms. Garcia and he asked her about how much time she spent. She said that 24 hours sounded about right. She has told you that herself on the stand.

And then there's some numbers where she told Dr. Smith that she had lost about 70 percent of her ability to do those household services before the fusion. After the fusion, it got better and went up to 50 percent, and that it's currently at only a 30 percent loss after the rhizotomy.

So if you just do the math based on the numbers Mr. Smith gave you and the testimony of Ms. Garcia, it's about 16,000 a year before the fusion, 11,000 a year after the fusion before the rhizotomies, and then just 1,700 for the partial year since then.

You add those up, and this is the number we would ask to put in the blank, $67,579 for past loss of

household services.

Mr. Smith also talked to you about future loss of household services through her life expectancy. And one of the numbers that he gave you -- and he told you that he's not telling you what the percentage is; he's just looking at what she said, he's looking at what Dr. Mortillaro said, and he's coming up with some examples to give you based on what you find to be her probable loss of her ability to do household services into the future.

And, remember, what she can do today and how she appears today is not going to be consistent. There are going to be times that she's worse and times that she's better. She's at one of her best times right now. And right now she's testified she's at about a 30 percent loss.

So if you were to find that that's probably going to be her condition based on her testimony and the medical evidence, there would be 263,000 for loss of household services.

If, due to these periods of time when things were going to be worse, especially that five years approaching her next fusion, 40 percent would be 439,666. If you think that's a little bit high based on what you've seen, 20 percent would be 219,833.

subjective, and it's nonspecific.

We'll get to what the treatment protocol was -- actually, we're going to that in a minute. Why the treatment protocol and what the treatment protocol of these doctors was based on. So here you have pictures that are worth thousands of words right here. This is the evidence.

As you're sitting back there and you're listening to Mr. Roberts put up all these numbers and the pain and suffering she's gone through, Ms. Garcia who would have no reason, no medical condition that would prevent her from coming to court. But she's here for money day, she's sitting there. But for the first three and a half weeks she was here for three half days, that's what she said. Three half days as of last Wednesday. And then she was here Thursday and Friday for cross-examination. So for a total of three and a half days up until today. Three and a half days out of the more than four weeks that you all have been here every single day, and that's her interest in this litigation.

So there's no objective evidence that the spondylolisthesis ever became unstable from the motor vehicle accident. They simply did not prove it. Dr. Klein proved that it did not become unstable and

that it wasn't the pain generator. They never proved that it was. And so you're wondering, Well, why would they keep giving her this treatment? Why didn't the doctors then make this determination that they were treating this condition that was symptomatic?

Let's finish with this. So the diagnosis, based on this medical model of care, there's no nerve root impingement. There's no medical necessity or treatment for any facet joints or nerve roots in the spine because they're fine. They never identify those as a pain generator.

So what was Ms. Garcia's treatment based on? It's based on three things. Her subjective complaints, nonspecific. Then an MRI showing a preexisting condition. So, Ms. Garcia goes to Dr. Cash and then goes to Dr. Gross.

By the way, plaintiff's counsel made a big deal that, Dr. Klein, you only saw the plaintiff once and you're rendering a decision, an opinion with regard to treatment and injuries and diagnosis.

What's interesting is that all of his doctors did the same thing. Dr. Cash, one time. January 16th of 2011. Saw her one time and made an opinion that, oh, previously asymptomatic spondylolisthesis became symptomatic as a result of the accident, notwithstanding

his flexion and extension x-rays that said, no, it did not.

Notwithstanding the MRIs that said there's nothing wrong with nerve roots. No impingement, no compression of any nerve root. They didn't prove their case. It's as simple as that. I don't have to stand up here for three hours and convince you. They didn't prove their case. The evidence is right here.

No doctor -- no doctor ever confirmed -- her treating doctor -- Lemper, Kidwell, Cash, and Gross -- ever confirmed that the spondylolisthesis, L4-L5 or L5-S1, was the source of pain.

We'll get to the injections in a little bit. They were not confirmatory. They were not diagnostic.

They all admitted that the spondylolisthesis preexisted the motor vehicle accident. They agreed that the MRI findings showed only preexisting -- this is all of the plaintiff's doctors. That it showed preexisting and degenerative conditions. And that there's no objective evidence of an unstable, pars defect, spondylolisthesis, or a never root impingement.

The problem is that these doctors -- Dr. Lemper, Kidwell, Cash, and Gross -- all made a false assumption this pain was coming from this L5-S1, the slipped vertebrae.

Now, it's interesting -- what Kidwell told us was very interesting, very enlightening. I mean, I wasn't surprised. I think it would be enlightening for you jurors because what he said was whenever he gets a medical-legal claim, a patient with a medical-legal claim. He said he always -- what did he say from the stand? He always makes a causation determination. Based on what? Based on the patient telling me, subjective self-report, telling me she was in an accident. He or she, whoever it is. The plaintiff said he was in an accident. He puts that finding in each and every report that he drafts. He doesn't make an independent causation determination. He just got a subjective self-report from the patient and, oh, it's a third party that you're alleging the claim against. Okay. It stems from that. All the treatment I render stems from that. That's not scientific.

And the other doctors I submit to you did the same thing.

So, ladies and gentlemen, her excessive treatment. Another area we have to touch upon and you should discuss in deliberation. Ms. Garcia's excessive treatment is not proof of the source of pain or a necessity, and so I'm sitting back there. I'm listening to the evidence as it comes in. And they parade these

MR. ROBERTS: Objection.

THE COURT: Sustained. We already talked about this.

MR. MAZZEO: Ladies and gentlemen, you can see for yourselves that -- how she appeared after the accident in 2011, 2012, 2013 after the surgery.

Ladies and gentlemen, I submit that she did exaggerate because the evidence is there in the record, the onset of symptoms, the nature of her activities of daily living before and after the accident. Her work limitations. That is not credible and you're allowed to consider that. There's a jury instruction that allows you to consider that, ladies and gentlemen.

You're allowed to consider the credibility of any witness. Ladies and gentlemen, that's in one of the instructions that's given to you, which is relevant in the case. And it's not just of Ms. Garcia. It's of any witness in the case. You're allowed to consider that.

Now, let's -- let's continue. Let's talk about Andrea Awerbach for a few minutes. We know that she did not give Jared Awerbach permission to use the car on the day of the accident. How do we know that? Well, she testified to that. She testified as to when she found out. When she learned about the accident. She learned when she got the call from the police

not proved by other evidence."

So that's one thing I was referring to. Now I want to show you the jury verdict form. And I'm going to give you some suggestions as to how to fill it out. What's appropriate in this case. And I've already filled it out. Past medical expenses $20,018.52. Future medical expenses, zero. This is based on the medical evidence in this case. Past loss of household services, zero. Future loss of household services, zero. Past pain and suffering, loss of enjoyment of life, $10,000 is appropriate for the injuries that are related to this accident. For a total amount of $30,018.52.

Number 3 -- we'll move on to Number 5.

"Did Defendant Andrea Awerbach give express or implied permission to Defendant Jared Awerbach to use her vehicle?"

No.

"Did Defendant Andrea Awerbach negligently entrust her vehicle to an inexperienced or incompetent person?"

She never gave it to him on January 2nd, so the answer has to be -- it has to be no.

"Did plaintiff prove by clear

it. Thank you.

THE COURT: I think we need a break. Take a quick break.

(Jury exited.)

(The following proceedings were held outside the presence of the jury.)

THE COURT: Outside the presence of the jury. Anybody need to make a record on anything that happened during the closings so far?

MR. MAZZEO: No, Judge.

THE COURT: You've got a half hour. Do you want to get started?

MR. STRASSBURG: No. Would it be okay if we just start tomorrow morning when everybody is fresh, including Mr. Roberts who has the last word?

MR. MAZZEO: They look like they're dragging, Judge. They look --

THE COURT: I agree.

MR. MAZZEO: -- foggy in the eyes.

THE COURT: So start at 9:00?

MR. STRASSBURG: Yeah, that would be great.

THE COURT: You're closing. You finish your rebuttal and give it to them tomorrow.

MR. MOTT: I do have one thing, Your Honor.

THE COURT: Okay.

MR. MOTT: I would request reconsideration. You sustained their objection during my opening. When I said during my opening they were going to call Ms. Garcia a liar. You sustained the objection and stated to the jury you don't think anyone was going to do that. I think that has just happened about a dozen times.

THE COURT: I don't remember sustaining that and saying that nobody was going to do that.

MR. MAZZEO: And I didn't call her a liar. I said she was not.

MR. MOTT: He said she feigned it. She feigned her pain and exaggerated her symptoms.

MR. STRASSBURG: Judge, there's a jury instruction on credibility.

THE COURT: And, Mr. Roberts, I think you may misremember how that happened because I don't think I sustained the objection.

MR. ROBERTS: I may --

THE COURT: I did?

MR. ROBERTS: I may misremember it, Your Honor, but I think you did, and you told the jury you didn't think that was going to happen.

MR. MAZZEO: I don't. I don't think so. Did he --

THE COURT: Well, he didn't -- he didn't use the word "liar" but he did --

MR. MAZZEO: I didn't.

THE COURT: -- imply that she was being dishonest, I agree.

MR. MAZZEO: Well, yes, about her antics on the stand when we had side bars. That's correct. I definitely did. Absolutely.

THE COURT: So you can talk about it in your rebuttal.

MR. ROBERTS: Thank you, Your Honor.

THE COURT: Does that fix it? Anything else? How about I have Kirk send everybody home and we'll just tell them to come back tomorrow at 9:00, okay?

MR. MAZZEO: Okay.

THE COURT: All right. Off the record.

(The proceedings was concluded at 4:28 p.m.)

EXHIBIT 5

EXHIBIT 5

JI

ORIGINAL

FILED IN OPEN COURT
STEVEN D. GRIERSON
CLERK OF THE COURT
MAR 08 2016
BY, ALICE JACOBSON, DEPUTY

DISTRICT COURT

CLARK COUNTY, NEVADA

EMILIA GARCIA, individually,

Plaintiff,

v.

JARED AWERBACH, individually; ANDREA AWERBACH, individually; DOES I – X, and ROE CORPORATIONS I – X, inclusive,

Defendants.

Case No.: A-11-637772-C
Dept. No.: 30

JURY INSTRUCTIONS

A-11-637772-C
JI
Jury Instructions
4533115

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INSTRUCTION NO. 1

LADIES AND GENTLEMEN OF THE JURY:

It is my duty as judge to instruct you in the law that applies to this case. It is your duty as jurors to follow these instructions and to apply the rules of law to the facts as you find them from the evidence.

You must not be concerned with the wisdom of any rule of law stated in these instructions. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your oath to base a verdict upon any other view of the law than that given in the instructions of the court.

INSTRUCTION NO. 2

The purpose of the trial is to ascertain the truth.

INSTRUCTION NO. 3

If, in these instructions, any rule, direction or idea is repeated or stated in different ways, no emphasis thereon is intended by me and none may be inferred by you. For that reason, you are not to single out any certain sentence or any individual point or instruction and ignore the others, but you are to consider all the instructions as a whole and regard each in the light of all the others.

The order in which the instructions are given has no significance as to their relative importance.

INSTRUCTION NO. 4

The masculine form as used in these instructions, if applicable as shown by the text of the instruction and the evidence, applies to a male person or a female person.

INSTRUCTION NO. 5

The evidence which you are to consider in this case consists of the testimony of the witnesses, the exhibits, and any facts admitted or agreed to by counsel.

Statements, arguments and opinions of counsel are not evidence in the case. However, if the attorneys stipulate as to the existence of a fact, you must accept the stipulation as evidence and regard that fact as proved.

You must not speculate to be true any insinuations suggested by a question asked of a witness. A question is not evidence and may be considered only as it supplies meaning to the answer.

You must disregard any evidence to which an objection was sustained by the court and any evidence ordered stricken by the court.

Anything you may have seen or heard outside the courtroom is not evidence and must also be disregarded.

INSTRUCTION NO. 6

You must decide all questions of fact in this case from the evidence received in this trial and not from any other source. You must not make any independent investigation of the facts or the law or consider or discuss facts as to which there is no evidence. This means, for example, that you must not on your own visit the scene, conduct experiments, or consult referenced works for additional information.

INSTRUCTION NO. 7

Although you are to consider only the evidence in the case in reaching a verdict, you must bring to the consideration of the evidence your everyday common sense and judgment as reasonable men and women. Thus, you are not limited solely to what you see and hear as the witnesses testify. You may draw reasonable inferences from the evidence which you feel are justified in the light of common experience, keeping in mind that such inferences should not be based on speculation or guess.

A verdict may never be influenced by sympathy, prejudice or public opinion. Your decision should be the product of sincere judgment and sound discretion in accordance with these rules of law.

INSTRUCTION NO. 8

You are not to discuss or even consider whether or not the Plaintiff was carrying insurance to cover medical bills, loss of earnings, or any other damages she claims to have sustained.

You are not to discuss or even consider whether or not the Defendants were carrying insurance that would reimburse them for whatever sum of money they may be called upon to pay to the Plaintiff.

Whether or not any party was insured is immaterial, and should make no difference in any verdict you may render in this case.

INSTRUCTION NO. 9

If, during this trial, I have said or done anything which has suggested to you that I am inclined to favor the claims or position of any party, you will not be influenced by any such suggestion.

I have not expressed, nor intended to express, nor have I intended to intimate, any opinion as to which witnesses are or are not worthy of belief, what facts are or are not established, or what inference should be drawn from the evidence. If any expression of mine has seemed to indicate an opinion relating to any of these matters, I instruct you to disregard it.

INSTRUCTION NO. 10

There are two kinds of evidence; direct and circumstantial. Direct evidence is direct proof of a fact, such as testimony of an eyewitness. Circumstantial evidence is indirect evidence, that is, proof of a chain of facts from which you could find that another fact exists, even though it has not been proved directly. You are entitled to consider both kinds of evidence. The law permits you to give equal weight to both, but it is for you to decide how much weight to give to any evidence. It is for you to decide whether a fact has been proved by circumstantial evidence.

INSTRUCTION NO. 11

In determining whether any proposition has been proved, you should consider all of the evidence bearing on the question without regard to which party produced it.

INSTRUCTION NO. 12

Certain testimony has been read into evidence from a deposition. A deposition is testimony taken under oath before the trial and preserved in writing. You are to consider that testimony as if it had been given in court.

INSTRUCTION NO. 13

During the course of the trial you have heard reference made to the word "interrogatory". An interrogatory is a written question asked by one party of another, who must answer it under oath in writing. You are to consider interrogatories and the answers thereto the same as if the questions had been asked and answered here in court.

INSTRUCTION NO. 14

In this case, as permitted by law, Plaintiff, Emilia Garcia, served on the Defendant, Andrea Awerbach, a written request for the admission of the truth of certain matters of fact. You will regard as being conclusively proved all such matters of fact which were expressly admitted by the Defendant, Andrea Awerbach, or which Defendant, Andrea Awerbach, failed to deny.

INSTRUCTION NO. 15

The credibility or "believability" of a witness should be determined by his or her manner upon the stand, his or her relationship to the parties, his or her fears, motives, interests or feelings, his or her opportunity to have observed the matter to which he or she testified, the reasonableness of his or her statements and the strength or weakness of his or her recollections.

If you believe that a witness has lied about any material fact in the case, you may disregard the entire testimony of that witness or any portion of this testimony which is not proved by other evidence.

INSTRUCTION NO. 16

Discrepancies in a witness's testimony or between his testimony and that of others, if there were any discrepancies, do not necessarily mean that the witness should be discredited. Failure of recollection is a common experience, and innocent misrecollection is not uncommon. It is a fact, also, that two persons witnessing an incident or transaction often will see or hear it differently. Whether a discrepancy pertains to a fact of importance or only to a trivial detail should be considered in weighing its significance.

INSTRUCTION NO. 17

An attorney has a right to interview a witness for the purpose of learning what testimony the witness will give. The fact that the witness has talked to an attorney and told him what he would testify to does not, by itself, reflect adversely on the truth of the testimony of the witness.

INSTRUCTION NO. 18

A witness who has special knowledge, skill, experience, training or education in a particular science, profession or occupation is an expert witness. An expert witness may give his or her opinion as to any matter in which he or she is skilled.

You should consider such expert opinion and weigh the reasons, if any, given for it. You are not bound, however, by such an opinion. Give it the weight to which you deem it entitled, whether that be great or slight, and you may reject it, if, in your judgment, the reasons given for it are unsound.

INSTRUCTION NO. 19

A question has been asked in which an expert witness was told to assume that certain facts were true and to give an opinion based upon that assumption. This is called a hypothetical question. If any fact assumed in the question has not been established by the evidence, you should determine the effect of that omission upon the value of the opinion.

INSTRUCTION NO. 20

Whenever in these instructions I state that the burden, or the burden of proof, rests upon a certain party to prove a certain allegation made by him, the meaning of such an instruction is this: That unless the truth of the allegation is proved by a preponderance of the evidence, you shall find the same to be not true.

The term "preponderance of the evidence" means such evidence as, when weighed with that opposed to it, has more convincing force, and from which it appears that the greater probability of truth lies therein.

INSTRUCTION NO. 21

The preponderance, or weight of evidence, is not necessarily with the greater number of witnesses.

The testimony of one witness worthy of belief is sufficient for the proof of any fact and would justify a verdict in accordance with such testimony, even if a number of witnesses have testified to the contrary. If, from the whole case, considering the credibility of witnesses, and after weighing the various factors of evidence, you believe that there is a balance of probability pointing to the accuracy and honesty of the one witness, you should accept his testimony.

INSTRUCTION NO. 22

As to Defendant Jared Awerbach, the Plaintiff has the burden of proving by a preponderance of the evidence all of the facts necessary to establish the following:

1. That the Plaintiff sustained damages; and
2. That Jared Awerbach's negligence, which has been established by the Court, was a proximate cause of the damage sustained by the Plaintiff.

INSTRUCTION NO. 23

When I use the expression "proximate cause," I mean any cause which, in natural, foreseeable, and continuous sequence, unbroken by any efficient intervening cause, produces the injury complained of and without which the result would not have occurred. It need not be the only cause, nor the last or nearest cause. It is sufficient if it concurs with some other cause acting at the same time, which in combination with it, causes the injury.

INSTRUCTION NO. 24

There may be more than one proximate cause of an injury. When negligent conduct of two or more persons contributes concurrently as proximate causes of an injury, the conduct of each of said persons is a proximate cause of the injury regardless of the extent to which each contributes to the injury. A cause is concurrent if it was operative at the moment of injury and acted with another cause to produce the injury.

INSTRUCTION NO. 25

If you find that a Defendant is liable for the original injury to the Plaintiff, that Defendant is also liable for any aggravation of the original injury caused by negligent medical or hospital treatment or care of the original injury, or for any additional injury caused by negligent medical or hospital treatment or care of the original injury.

INSTRUCTION NO. 26

The court has taken judicial notice that sunset on January 2, 2011, the date of the accident that is the subject of this lawsuit, occurred at 4:46 p.m., Pacific Standard Time. You are to accept this fact as true and give it the weight you deem it deserves.