

No. 71348

IN THE SUPREME COURT OF THE STATE OF NEVADA

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Elizabeth A. Brown
Clerk of Supreme Court

EMILIA GARCIA,
Appellant,

v.

ANDREA AWERBACH,
Respondent.

**APPELLANT'S APPENDIX
VOLUME XI, BATES NUMBERS 2501 TO 2750**

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1 exactly not what Your Honor said from the bench. We
2 sent up a different proposed order.

3 So what is the final ruling on that, I guess,
4 would be the issue?

5 THE COURT: I guess that's what the order
6 says. That's what you want it to say; right?

7 MR. TINDALL: No, we didn't want it to say
8 that.

9 MR. MAZZEO: Well, Judge, there was also
10 another order. Jared Awerbach's Motion in Limine
11 No. 23. I know you were reading from another one, but
12 that says, Results of blood test of Jared Awerbach,
13 until connected to causation of accident, denied.
14 However, defense may argue Jared had low level of
15 impairment but may not argue he was unimpaired at the
16 time of the accident. So that's 23.

17 THE COURT: Okay. It sounds to me like I
18 ruled that you can talk about the level of impairment.
19 So based on that, I think the sobriety test is probably
20 relevant. I'm going to allow it.

21 Let's go on to 138. Let's talk about prior
22 accidents prior to the date of the accident. He talks
23 about the 2008 accident. I think I already ruled
24 that's admissible.

25 Page 140 I think relates to the same

1 accident.

2 MR. TINDALL: There's no relevance to the
3 amount of damage in that accident. It's only the fact
4 that he was in one which would be useful to their
5 proving negligent entrustment.

6 THE COURT: I'm going to allow it. I think
7 it goes to the mom's knowledge.

8 141, the fact that he didn't have a license,
9 I'm going to allow it.

10 We already talked about consuming marijuana
11 at the Gowan apartment at 149 and 150, that's fine.
12 151 is fine. Everything that's in Jared's I'm going to
13 allow.

14 And Andrea's, it looks like there's only a
15 couple of things. Page 165, 166 is basically about
16 his -- whether he had a permit or not, whether she paid
17 for it or not.

18 MR. ROBERTS: That's correct. She -- the --
19 it goes to knowledge of whether he was unlicensed or
20 unsafe. And the -- our witness from the DMV is
21 expected to testify that you cannot pay for a permit
22 online. You have to come into the office. It's
23 impossible to do. And she says that she paid for it
24 and charged it on her credit card.

25 The DMV officer will also testify that

1 there's no record of Mr. Awerbach ever applying for a
2 permit or ever taking a written test, and that's why
3 it's relevant here. Goes to her credibility that she
4 says she took him to DMV for his written test and saw
5 him take it.

6 THE COURT: All right. I'm going to allow
7 all of that too. I think that's relevant.

8 What else?

9 MR. MAZZEO: Judge, you know, I would just
10 like a prior ruling from the Court. I have page and
11 line designations for -- not for opening statements,
12 for the reading into testimony the deposition of
13 Officer Figueroa, and if I could -- I have given copies
14 to the other counsel.

15 THE COURT: Come on up. Thanks.

16 MR. MAZZEO: So -- and what I'm asking the
17 Court to do with this is that plaintiff has also
18 provided page and line designations of the testimony
19 they seek to read in from Officer Figueroa. They
20 suggested in an email this morning that they combine
21 both their designations and my designations and read it
22 all at once. I'm opposed to that since, had
23 Officer Figueroa come to court -- there's going to be
24 some crossover. That's Mr. Roberts' argument, well,
25 there's going to be crossover with what he's saying and

1 what I'm saying. We do have different testimony,
2 though. And I want the jury to know that had
3 Officer Figueroa taken the stand, that we would be
4 eliciting cross-examining the officer on specific areas
5 that were not designated and were not intended to be
6 elicited from the plaintiff. And we know that because
7 they already told us their page designations.

8 So I don't want to commingle them. I want to
9 be able to read those portions in -- in a cross-examine
10 like setting -- cross-examination-like setting after
11 they read the, quote, direct examination portions.

12 THE COURT: Why don't we do this: Why don't
13 we just -- Mr. Roberts or whoever it is from his side
14 can ask the questions that plaintiff's counsel asked,
15 and you can ask the questions that you asked.

16 MR. MAZZEO: Well, actually, I -- I think the
17 ones that I'm designating happen to be the questions
18 that I asked. So I'm -- I'm fine with that.

19 THE COURT: That way, we can do it once. We
20 don't have to read things over and over.

21 MR. MAZZEO: I like that. Yeah, I agree with
22 that, Judge. They'll have to eliminate some of the
23 designations that they have, though, from their -- that
24 they've offered.

25 MR. ROBERTS: That's the problem, Judge.

1 That's why I objected. He wants to read the very same
2 answers again in his cross-examination that I'm reading
3 in my direct but just add something before or after.
4 So -- so the exact same testimony is going to be read
5 twice under his proposal, and then we'd be emphasizing
6 unduly the exact same answer.

7 THE COURT: That's --

8 MR. ROBERTS: That makes no sense.

9 THE COURT: I don't know that we have to do
10 that. What I'm saying is we have a reader that's
11 reading in the testimony. You guys combine what you
12 want to have read and what you want to have read. Any
13 questions that you asked during the deposition, you
14 ask. Any questions that you asked during the
15 deposition, you ask. So we know who asked the
16 questions. So if it was cross-examination of the
17 officer, because you're the one that asked the
18 questions on cross, it comes out as cross because
19 you're asking the questions.

20 MR. MAZZEO: Yeah, that's fine. I took the
21 officer's deposition, so I was first to go, so -- and I
22 think that they wanted to cover some areas --

23 THE COURT: Oh, I see what you're saying.

24 MR. MAZZEO: -- on -- on their -- in their
25 testimony or on their designation as well that -- of --

1 from my examination of Officer Figueroa.

2 So I just -- there's going -- what -- even if
3 Officer Figueroa came in here live and testified, they
4 would certainly be asking questions about field
5 sobriety and observation -- investigation and
6 observations and statements from witnesses. Well, I
7 wouldn't be precluded from then following up and doing
8 crossover when I'm -- when I'm -- when I'm seeking to
9 establish a certain point or an issue.

10 So I don't see an issue with he's -- he
11 doesn't have a long testimony. There's not a -- it's
12 not going to take up a lot of time. It would take up
13 more time to have the officer here live in court, I
14 think. So there's going to be some crossover, but I'm
15 making it more of a complete answer. They can read
16 what they want on their -- on their end. I'm just
17 asking that I be given the opportunity so that the jury
18 knows that I have different designations and different
19 testimony that I would -- I would elicit from the same
20 officer.

21 THE COURT: And you want to do at the same
22 time?

23 MR. MAZZEO: It would be like direct and then
24 cross, so at the same time.

25 MR. ROBERTS: Meaning after. Not at the same

1 time.

2 MR. MAZZEO: Right, right, right after
3 Mr. Roberts does his questions and -- and answers. I
4 don't mind if we use the same person who's taking the
5 place as Officer Figueroa.

6 THE COURT: How much of it's duplicative?

7 MR. MAZZEO: There's actually --

8 MR. ROBERTS: There are only two sections
9 that overlap, Judge. If you just want to let him do
10 his, I don't want to keep wasting time.

11 THE COURT: Let's just do it.

12 MR. MAZZEO: Thank you.

13 MR. ROBERTS: We're going to continue to read
14 everything that we had marked in our case.

15 THE COURT: There's no objections to that?

16 MR. MAZZEO: If there are, I'll let you know,
17 Judge.

18 THE COURT: Great. What else?

19 MR. SMITH: I think we would also like to
20 discuss the exhibits that Ms. Averbach has -- the
21 demonstratives that Ms. Averbach has proposed to use
22 for her opening because we have some objections to
23 those.

24 She has an exhibit which she sent to us that
25 was entitled "Chart F," and that exhibit includes an

1 allegation that Ms. Garcia was referred to three
2 medical providers by her attorneys. Those are
3 Dr. Gulitz, G-u-l-i-t-z, Dr. Gross, and Dr. Kidwell.
4 In the Court's order on Plaintiff's Motion in
5 Limine 41, the Court excluded any evidence of referral
6 by attorneys until a proper foundation is laid.

7 At least with respect to Dr. Gross and
8 Dr. Kidwell, there is no proper foundation. No one has
9 testified that her attorneys referred her to either of
10 those doctors. There's no reference in there -- in the
11 record. And before they say any of that in opening, I
12 would submit that at least the Court should find out
13 what their foundation is now, because it's been
14 excluded by the Court until they lay a foundation, and
15 there is no foundation. That's not what happened. So
16 they shouldn't be allowed to use that exhibit in
17 opening. That's the first one.

18 I don't know if you want me to go through all
19 of them or do each one one by one.

20 THE COURT: Let's do one at a time.

21 MR. MAZZEO: Just for the record, I don't
22 think that I disclosed that he said Ms. Awerbach the --

23 MR. SMITH: I meant Mr. Awerbach. If I said
24 Ms. Awerbach, that was a mistake. It was Mr. Awerbach.
25 Excuse me.

1 THE COURT: You guys have some foundation for
2 that?

3 MR. STRASSBURG: Yeah. Yeah.

4 THE COURT: Are you going to tell me what it
5 is?

6 MR. STRASSBURG: Oh, sure. I'm sorry, Judge.
7 Hold on. I just got booted up on this computer. Okay.
8 Okay. So the question is --

9 Do you mind if I sit, Judge?

10 THE COURT: That's fine.

11 MR. STRASSBURG: The question is the
12 referral -- the Lerner referral to Gulitz --

13 MR. SMITH: Gross and Kidwell.

14 MR. STRASSBURG: Oh, sorry. Gross ...

15 THE COURT: While he's looking at that,
16 anybody that's using PowerPoints for opening or
17 closing, make a copy on a disk and lodge it with the
18 Court so we have it as an exhibit to the trial
19 transcript, please.

20 MR. STRASSBURG: The foundation for the
21 Lerner referral to Kidwell is the deposition of Emilia
22 Garcia 7/10/2013, page 65, lines 20 and 21, question to
23 Ms. Garcia:

24 How -- how -- "How did you find Dr.

25 Kidwell and his office -- close office?"

1 And he said:

2 "I called somebody in my lawyer's office
3 to see if they knew of anybody closer to me."

4 And then the one was to Gross, referral to
5 Gross, that's by inference that Gross's first bill was
6 directly to the lawyer. So that's my foundation.

7 THE COURT: I'm going to let him say it. I
8 think there's enough that -- that they can at least --
9 I allow it during opening, something that they have a
10 reasonable basis that they're going to be able to
11 establish during trial with the evidence. I think
12 that's what the rule is. And based on what he's just
13 told me, at least with those two doctors, he's got
14 something that he can rely on to at least make an
15 inference, and you can argue to the jury at the end
16 based on what he's -- what he's brought out that there
17 was some kind of referral. He may be wrong. If he
18 can't prove it, then you make him look dumb in closing
19 when you say he didn't prove it; right?

20 MR. ROBERTS: We got a little bit of a
21 problem, though. If -- when I talked to her about
22 Gulitz, she told me a story about going to the
23 hospital, and they were going to do a bunch of scans
24 when she was in pain, and then the doctor said, We're
25 going to arrange for these tests because you shouldn't

1 be hurting this bad, and then the lady came in with the
2 financial cart and asked her for insurance information.
3 She said, I don't have insurance yet. I just started a
4 new employment. I won't have insurance for 90 days.
5 The doctor came back in and said, We've decided we
6 don't need to do the tests. Just take these scripts
7 and -- and leave. And so she needed someone who'd
8 treat her on a lien. So --

9 THE COURT: Okay.

10 MR. ROBERTS: So insurance has been excluded,
11 and in order to explain this, is she going to be able
12 to say, I didn't have insurance and I needed referrals
13 initially? And I needed someone who would treat me on
14 a lien?

15 THE COURT: You don't have to say, I didn't
16 have insurance. You can say, I didn't have a way to
17 pay for it, so I talked to my lawyer.

18 MR. ROBERTS: Okay.

19 THE COURT: Is this going to be a problem
20 with everybody trying to bring in a bunch of insurance
21 information?

22 MR. MAZZEO: I hope not.

23 MR. ROBERTS: I would prefer to exclude the
24 information that necessitates explaining.

25 MR. SMITH: The next one is -- is an exhibit

1 called "SHRT Chart." It's -- it's a list of medical
2 treatment and statements by the doctors. And there is
3 a statement in there that says, "Dr. Gross diagnosed
4 Ms. Garcia with failed back syndrome on April 2nd,
5 2014". He did not see her on April 2nd, 2014, and he
6 has not diagnosed her with failed back syndrome. We
7 would request that that exhibit be accurate.

8 MR. STRASSBURG: Yes, it was Kidwell that
9 diagnosed the failed back. If I missed that, I'll fix
10 that, Judge. I want it to be accurate 100 percent so
11 there's nothing they can challenge.

12 THE COURT: Okay. Fix it.

13 MR. STRASSBURG: Yes, sir.

14 MR. SMITH: The next issue is that
15 Mr. Awerbach intends to use two charts from his
16 biomechanical expert's report. The biomechanical
17 expert's reports, or any expert's reports, are not
18 admissible evidence. We asked during our 267
19 conference if we could use some things from our expert
20 reports in opening. We were told no by the defense.
21 So the defense should have the same thing. They should
22 not be allowed to use the expert reports in their
23 opening.

24 MR. STRASSBURG: I didn't tell him that, and
25 it's a demonstrative evidence. It's demonstrative from

1 the guy's report. It just summarizes what he's going
2 to say.

3 MR. SMITH: We have it recorded. I have
4 Mr. Tindall saying he joins in Mr. Mazzeo's objection
5 to that right here. So both sides said they object to
6 that. It's on page 37 of the transcript. It begins on
7 line 6 to line 16.

8 MR. MAZZEO: Well, I mean, the way they
9 phrased it is to use the expert reports, and expert
10 reports are not admissible as evidence. But if they
11 wanted to identify specific chart, diagram in a report,
12 that's demonstrative, I wouldn't have an objection --
13 objection to that. But that's not how it was phrased.
14 So I don't have any objection to Jared Awerbach's
15 counsel using demonstrative exhibits from an expert
16 report.

17 THE COURT: Sounds to me like there was a,
18 maybe, misunderstanding, but if the question is, Can we
19 use the report or portions of it and the answer is no,
20 I mean, I don't know that -- you can't tell him he
21 can't use them and then you guys use them.

22 MR. MAZZEO: Well, they didn't identify,
23 Judge. That's the problem. They have to identify
24 specific slides or -- or images or -- or diagrams, you
25 know, charts. They didn't do that. They said, We want

1 to admit these expert reports. That's the context of
2 it or portions of it, objection. If you want to
3 identify -- if you want to show us what you want to
4 present at trial and it's demonstrative, then of course
5 they can admit it. They can --

6 THE COURT: Show me what the chart is that
7 we're fighting about here.

8 MR. ROBERTS: And, Your Honor, I was going
9 off recollection. I didn't have the transcript when I
10 said that, so I'm not positive exactly what my words
11 were. I know I -- what I had in my mind when I asked
12 to use those demonstratives.

13 MR. STRASSBURG: Can you -- let's see. Can I
14 hook up?

15 THE COURT: Does someone have a copy, just a
16 hard copy?

17 MR. SMITH: I do, Your Honor. Can I
18 approach?

19 THE COURT: Yeah. You know what, I'm going
20 to allow them. These are -- they're things that he
21 could just as easily draw on the -- a chart as -- show
22 the preprepared chart, so ...

23 MR. ROBERTS: Judge, just for the record,
24 Your Honor, these particular exhibits as opposed to
25 something else, these are actually a number of

1 measurements of the subject accident, the lumbar spine
2 shear forces, the compressive forces, so this -- this
3 is the same thing as showing a page of conclusions from
4 the report. This is --

5 MR. SMITH: It is hearsay conclusions.

6 MR. ROBERTS: This is hearsay.

7 THE COURT: He's saying this is what I'm
8 going -- this is what my expert's going to show; right?

9 MR. ROBERTS: And then he's showing hearsay
10 before it's -- foundation is laid and before it's
11 admitted into evidence. That -- I mean, under that
12 logic, I could show any exhibit in my exhibit book
13 regardless of their consent, and all I have to do is
14 tell the jury, well, here's an exhibit I plan to ask to
15 have admitted, and I think I'm going to get it in;
16 right? So the whole book's game.

17 MR. MAZZEO: Well, I don't think Jared
18 Awerbach's seeking to admit that into evidence. I
19 think they're using it just to show the jury as a
20 demonstrative exhibit, not something that's admissible.
21 No foundation can be laid for that chart. Doesn't mean
22 that it's not demonstrative.

23 THE COURT: Did you say no foundation can be
24 laid for the chart?

25 MR. MAZZEO: No foundation -- yeah, it comes

1 from an expert report. The expert reports will never
2 be admitted at trial. They can never satisfy any
3 exclusion to the hearsay rule. However, there are --
4 as you know, there are charts and diagrams from expert
5 reports that can be used as demonstrative and evidence
6 that's demonstrative evidence, and that's
7 demonstrative. But will that chart or any portion of
8 their experts' reports or our expert reports be
9 admitted into evidence? Can we lay a foundation for
10 it? No.

11 THE COURT: I'm hoping that you can lay the
12 foundation for the information contained in it.

13 MR. MAZZEO: For the information contained,
14 but you're not going to admit this as an exhibit that
15 the jury can take into the deliberation room. It's an
16 expert report. It's not a business record.

17 THE COURT: I'm going to allow it for
18 demonstrative.

19 MR. MAZZEO: Thank you, Judge.

20 THE COURT: What else?

21 MR. SMITH: May I approach with the next one,
22 Your Honor?

23 THE COURT: Sure.

24 MR. SMITH: Your Honor, this exhibit starts
25 with medical treatment for the condition. Then it

1 distinguishes medical treatment discovered after the
2 collision. And as it reads from top to bottom, this
3 chart suggests that Ms. Garcia had medical treatment
4 prior -- for the condition prior to the accident.
5 That's the first thing on the sheet. She did not, and
6 any reference to that is excluded by Plaintiff's
7 Motions in Limine 3 and 21.

8 So this chart is misleading, and if it's put
9 up in front of the jury and left in front of the jury,
10 it's going to suggest to the jury that there will be
11 evidence presented to them that Ms. Garcia had medical
12 treatment for the medical condition prior to the crash
13 as distinguished from her medical treatment after the
14 crash.

15 MR. MAZZEO: Your Honor, there's no dispute
16 that -- that Ms. Garcia had a preexisting condition,
17 spondylolisthesis. And it was with a pars defect. And
18 both plaintiff's own treating doctors and plaintiff's
19 experts and defense experts all agree that this was --
20 I think with the exception of one Dr. Fisch at one
21 point. But all of them at one point agreed that these
22 are preexisting conditions. Not talking about
23 preexisting -- prior treatments to preexisting
24 conditions.

25 MR. SMITH: This says medical treatment.

1 That's not about the condition. It says medical
2 treatment. And it is also undisputed that she had no
3 medical treatment for her condition. I'm not sure
4 that's the right word, but for her condition prior to
5 the accident. That's what this suggests. It's the
6 first thing on the page.

7 MR. ROBERTS: Your Honor, we move to exclude
8 any reference to preexisting condition. The Affordable
9 Healthcare Act defines preexisting condition as a
10 preexisting condition that you don't get insurance
11 coverage for. They're trying to inject that by saying
12 preexisting condition. They want to invoke the
13 memories, lay knowledge of preexisting condition is
14 something that you've already gotten treatment for,
15 that's already a problem and, therefore, you don't get
16 paid. So they can call it something else, but not the
17 very words that are used by the Affordable Care Act.

18 MR. MAZZEO: Affordable Care Act? Wait. Why
19 are we even talking about -- we're talking about the
20 doctors in this case that identified it as a condition
21 that she had when she was young. It's preexisting to
22 this accident. That's a proper word for it in this
23 case -- in this context.

24 MR. ROBERTS: It's not a condition. It was
25 asymptomatic. She never received treatment for it a

1 single day prior to this accident.

2 MR. MAZZEO: Prior condition that was
3 asymptomatic.

4 MR. ROBERTS: Again, under the Obama care act
5 if you've never gotten treatment, it's not a
6 preexisting condition. So by calling it a preexisting
7 condition, they want to imply to the jury that there
8 was treatment.

9 MR. MAZZEO: Obama care act doesn't control
10 the rules of evidence in this case.

11 THE COURT: I've never heard argument about
12 the Affordable Care Act.

13 MR. MAZZEO: Especially in favor of it.

14 THE COURT: We're talking about a preexisting
15 condition for which there was no treatment before the
16 accident?

17 MR. SMITH: Preexisting anatomy.

18 MR. ROBERTS: Preexisting anatomical
19 structure. She had a pars defect which was a
20 developmental issue where the -- the pars
21 interarticulitem (sic) was not fully formed which made
22 her more vulnerable to the spondylolisthesis.

23 MR. SMITH: No treatment and no pain prior to
24 the accident.

25 MR. MAZZEO: It's still a condition.

1 MR. SMITH: Those are undisputed facts.

2 THE COURT: Yeah, but the way this thing
3 reads, it says medical treatment for the medical
4 condition before the medical condition is discovered
5 after the collision. And then the collision is down
6 here. Or does it go backwards? Does it start at the
7 bottom?

8 MR. STRASSBURG: Um, excuse me, Judge. May I
9 respond?

10 THE COURT: I guess I don't understand how
11 it's going to be used.

12 MR. STRASSBURG: Fine. And the purpose of
13 this chart is to discuss the causation issues in this
14 case and the need of the plaintiff to show that all of
15 the treatment that she's seeking to recover for is not
16 just related to the condition, the medical -- the
17 medical condition, but that it is connected to the
18 accident.

19 And so, therefore, if the -- if the
20 treatment -- we are not challenging -- I'm just trying
21 to make sure the jury understands that we're not saying
22 that the treatment was substandard or malpractice or
23 anything like that. But for the -- the treatment to be
24 recoverable, it has to be both related to the condition
25 and the collision.

1 THE COURT: My -- my bigger question is:
2 Does it go from top to bottom or bottom to top?

3 MR. STRASSBURG: Actually, it goes from
4 bottom to top.

5 THE COURT: Mr. Smith, the fact that it goes
6 from bottom to top, you don't have a problem with it,
7 do you?

8 MR. SMITH: I think it's confusing as it's
9 written. If -- if they had given us this exhibit and
10 it started with collision at the top, as any person
11 reads top to bottom, it might be less confusing.

12 THE COURT: I understand the -- the
13 confusion, but as long as it's going from bottom to
14 top, I'm going to allow it.

15 You can have it back.

16 What else?

17 MR. SMITH: The only other one was that some
18 of the demonstratives have Bates stamp numbers on them.
19 And those should be removed because they will not match
20 the trial exhibit.

21 THE COURT: Well, can we just tell them that?

22 MR. SMITH: Okay. And there's one more that
23 Mr. Mott just reminded me of. We got some additional
24 ones this morning.

25 There -- there was a motion recently by

1 Mr. Awerbach to exclude all of the photos that were
2 produced from his Facebook page, and then today, some
3 of those were given to us as potential demonstrative
4 exhibits. Mr. Awerbach should not be allowed to pick
5 and choose what gets -- what gets submitted after he
6 moved to exclude all of it. His motion didn't say, I
7 want to use these and exclude the rest. It said,
8 Exclude all these pictures. And then on the morning of
9 opening statements, he's now decided he wants to use
10 some of them and not the others, and we would be
11 precluded from using the others.

12 THE COURT: That doesn't seem fair.

13 MR. STRASSBURG: What are you talking about?

14 MR. SMITH: You sent a few pictures of
15 Mr. Awerbach with -- with one or both of his children.

16 MR. STRASSBURG: Oh, the kids? That's not
17 from the Facebook page. I took those.

18 MR. SMITH: They're on his Facebook page, and
19 they were part of what we disclosed.

20 MR. STRASSBURG: Well, they're just pictures
21 of the children. I don't want to be -- do anything
22 unfair. But I want them to see his kids, so I don't
23 know what the problem is.

24 THE COURT: How is that relevant?

25 MR. STRASSBURG: Well, it goes to punitive

1 damages, Judge. I mean, they're trying to crush his
2 financial future, and this is his financial future. He
3 has obligations to raise these children, and they're --
4 I mean, that's --

5 MR. SMITH: Your Honor, there's also another
6 motion --

7 MR. STRASSBURG: That's a financial burden on
8 him to do so, and he needs to be able to raise those
9 kids. So I mean, it goes right to his ability to pay
10 anything and the ability of any punitive award to deter
11 him from -- from that. And it's -- you know, it's -- I
12 mean, I could walk him in the courtroom, and they
13 could -- I could introduce them. I don't see what the
14 picture, why that's a problem.

15 MR. MAZZEO: I don't think it's -- it goes to
16 background information, as you allow all witnesses to
17 talk about background, family, children. So it's just
18 a picture of what he would be testifying to anyway.

19 MR. SMITH: Your Honor, maybe we can come up
20 with a compromise.

21 There is another motion in limine that was
22 filed that excludes Mr. Awerbach, whether he supports
23 his children or not. If they would like to use the
24 pictures and make these arguments, then we would ask
25 the Court to overturn that motion, and we can introduce

1 evidence of whether he provides or has provided support
2 for his children.

3 THE COURT: Is that an issue?

4 MR. STRASSBURG: Yeah.

5 MR. SMITH: You can't have it both ways.

6 MR. STRASSBURG: I'm not trying to have it --
7 I mean, I'm not trying to have it both ways. Look,
8 Judge, I mean the whole -- the whole defense of
9 Mr. Awerbach, it's the new man-old man thing; right?
10 The punitive damages take effect on the new man as well
11 as the old man. And all of the stuff about -- you
12 know, you've excluded all the domestic abuse litigation
13 between him and his mother. Why? Because that's
14 irrelevant and inflammatory. You've excluded -- or
15 Judge Allf has, you excluded the reliance on public
16 assistance and welfare for both of these parties
17 because that's irrelevant and inflammatory. Similarly,
18 you've included the criminal convictions unrelated to
19 the accident because that's irrelevant and
20 inflammatory. Similarly so, the failure of this
21 troubled delinquent youth to pay child support at a
22 time when he was struggling with his demons is
23 similarly irrelevant and inflammatory. So that's
24 appropriate.

25 The -- I mean, if I can bring the kids in on

1 opening and introduce them, say, Here are the children.
2 You know, he's not making this up. Then -- and that's
3 all I would do just so they could see them.

4 THE COURT: I tend to agree with Mr. Mazzeo,
5 that it's introductory stuff. I mean, if there's one
6 picture that shows this guy and his two kids, is it --
7 whether it is on Facebook or not, I mean, is it
8 objectionable otherwise?

9 MR. SMITH: It's objectionable because of the
10 other orders. So as Mr. Strassburg just said, the
11 Court has excluded various orders evidencing -- or
12 excluded various evidence regarding Mr. Awerbach's
13 character. What Mr. Strassburg is arguing to you is
14 that he gets to present evidence of Mr. Awerbach's
15 character, and the jury must accept that evidence, and
16 we don't have any opportunity to refute it with any
17 evidence at all.

18 THE COURT: No. If he gets up and he says,
19 Mr. Awerbach has to take care of these kids, then it
20 opens the door for what I've already excluded.

21 MR. SMITH: Okay.

22 THE COURT: But if he says, I just want to
23 let you know that he's a father and these are his two
24 kids, here's a picture of them, that's introductory
25 information, I think that's fine.

1 So I mean, if there's a picture of him and
2 his kids and you just want to introduce the fact that
3 he has kids, I don't have a problem with that.

4 MR. STRASSBURG: Thank you, sir.

5 THE COURT: What else?

6 MR. SMITH: That was the last one we had.

7 THE COURT: All right.

8 MR. ROBERTS: I do have one clarification. I
9 promise not an argument.

10 THE COURT: Go ahead.

11 MR. ROBERTS: Just since it's not in your
12 order, the motion in limine excluding the claims note
13 still stands, the motion in limine excluding the
14 adjustor's testimony still stands, and you did clarify
15 that the exclusion of insurance, any reference to
16 insurance still stands. But the first two is what I
17 really needed to --

18 THE COURT: Do you want them?

19 MR. ROBERTS: Well, I'm in a little bit of a
20 pinch. If they're going to come in, I'd like to talk
21 about them in opening, but I don't know if they're
22 going to come in because I don't know if Mr. Mazzeo is
23 going to stipulate. And I think if he doesn't
24 stipulate, then I absolutely want them in. But if he
25 is going to stipulate, then I don't know what I open

1 the door to by doing that.

2 MR. MAZZEO: I don't think there's a need to
3 bring that up in opening. And I have to confer with my
4 client about -- the content of the claims note. She
5 may very well stipulate to all of the content of it.
6 It's actually favorable to my client. So I don't see
7 why she wouldn't.

8 THE COURT: If she doesn't stipulate to the
9 contents of the claims note and the plaintiff wants to
10 bring up the claims note or bring as a witness the
11 claims adjustor, I probably will allow it.

12 MR. ROBERTS: Okay.

13 THE COURT: Fair enough?

14 Let's take a quick break. Come back. The
15 jury's already been sitting out there for a half hour.
16 Off the record.

17 (Whereupon a short recess was taken.)

18 THE MARSHAL: Jury entering.

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

21 THE COURT: Mr. Roberts. Mr. Roberts, can
22 you move this just for a couple of minutes?

23 MR. ROBERTS: Oh, sure.

24 THE MARSHAL: Jury is present, Judge.

25 THE COURT: Thank you. Go ahead and be

1 seated. Good morning, ladies and gentlemen.

2 IN UNISON: Good morning.

3 THE COURT: We are back on the record,
4 Case No. A637772. You all have your blue badges on.
5 Hopefully, you're able to park a little closer today.
6 You should have notebooks and pens on your seats.

7 So what's going to happen today, I'm going to
8 give you what's called the pretrial instructions first,
9 and then we're going to go into opening statements.
10 I'm going to apologize to Mr. Roberts already. I'm
11 going to have to break up his opening statement because
12 I have a meeting at noon. So I can't just let him keep
13 going. So we're going to break at noon for lunch.
14 Sorry for the delay this morning. We've actually been
15 here working since 9:00.

16 What I'm going to say to you now is intended
17 to serve as an introduction to the trial of the case.
18 It is not a substitute for the detailed instructions on
19 the law that I will give you at the close of the case,
20 and before you retire to consider your verdict.

21 Ladies and gentlemen, this is a civil case
22 commenced by a plaintiff against a defendant. It's
23 based on a complaint filed by the plaintiff to which
24 the defendant filed a response that we call an answer.

25 You have no way of knowing what facts will be

1 presented to you during the trial of this case. No
2 juror may discuss with any fellow juror any fact
3 related to this case of his or her own knowledge. If
4 you discover during the trial or after the jury has
5 retired that you or any other juror has personal
6 knowledge of any fact of controversy in the case, you
7 must disclose that fact to me in the absence of the
8 other jurors. This means that if you learn, during the
9 course of the trial, that you're acquainted with the
10 facts of the case or with a witness and you have not
11 previously told us of that relationship, you must
12 declare that fact to me. The way that you communicate
13 with the Court throughout the trial is through our
14 marshal, Tom, who's present at all times while we're in
15 session.

16 During the course of the trial, the attorneys
17 for both sides, the defendant, the court personnel, the
18 plaintiff, other -- everybody other than the bailiff
19 are not permitted to talk to you. It's not that we're
20 antisocial. It's simply that we're all bound by ethics
21 and the law not to speak with you because to do so
22 might contaminate your verdict. We're not even allowed
23 to say hi to you. So if we pass you in the hall or if
24 we're in the elevator together and we ignore you,
25 please don't be offended.

1 While you're here in the courthouse, please
2 always wear the badge that the marshal gave you and
3 which identifies you as a juror. During breaks during
4 the day, during lunch break, when you're in the
5 elevators or walking around in the hallways, please
6 only talk with the other jurors and never talk about
7 the case.

8 You may have noticed when you came in each
9 morning for the last week, some people have juror
10 badges on and some don't. You don't know if somebody's
11 not wearing a juror badge if they are a party or a
12 witness or a lawyer or who they are. So the reason I
13 ask you to only talk to other people that have juror
14 badges on because what we don't to have happen is we
15 don't want you to be sitting in the hall waiting for us
16 to call you back in and while you're sitting there, you
17 have a conversation with somebody else that's sitting
18 there and not wearing a juror badge, and you come in
19 and, lo and behold, the next person that comes and
20 testifies as a witness is a person that you were just
21 having a conversation with. That may result in a
22 mistrial and -- and make it so we've all wasted all of
23 our time. So please don't do that. Only talk to other
24 people that have juror badges, and we're safe that
25 you're not talking to any witnesses.

1 If you recognize a witness or you become
2 familiar with the facts of the case while a witness is
3 testifying, please make a little note on your jury pad
4 that you recognize that witness, how it is that you
5 know them, and when you have an opportunity, give that
6 note to the bailiff, and he'll give it to the Court.
7 Frequently, people do not recognize witnesses by name,
8 but they may recognize them when they come into the
9 courtroom to testify.

10 For example, you may have kids that have a
11 soccer coach or football coach or something like that,
12 and you refer to that person as Coach. Or may know
13 them by a first name. You don't realize that that
14 person might also have another vocation, and they may
15 come in and testify as a doctor or an expert or
16 something like that. If somebody comes in to testify,
17 and you didn't know that you knew that person, but once
18 they come in and you recognize the face, maybe it's
19 your next-door neighbor that you've had conversations
20 with but you never knew what their name was, if -- if
21 that happens, you need to let me know that you
22 recognize that person, this is how I recognize them,
23 they're my next-door neighbor or it's my kid's coach or
24 however it is that you recognize that person. At least
25 let us know how it is that you recognize them, and

1 we'll deal with it from there.

2 Additionally, I have to tell you you're not
3 to visit the scene of any of the acts or occurrences
4 made mention of during the trial unless you're
5 specifically told to do so by the Court. You're
6 prohibited from doing any investigation regarding this
7 case or with anyone having to do with the case on your
8 own. Seems like a simple instruction, but it's so
9 simple sometimes people overlook it or ignore it, maybe
10 they don't understand it.

11 It means that if something happens during the
12 trial, and somebody makes reference to a term or they
13 say something and you don't completely understand that,
14 you think that's okay because I have a good friend that
15 knows everything there is to know about this issue, I'm
16 going to go home and talk to that friend. You can't do
17 that. Okay?

18 I'm going to tell you a little horror story
19 that we had in here at one point. We had a -- went
20 through a trial, I think it was a week or two long, and
21 after the trial, the jury went back to the deliberation
22 room to -- to deliberate and decide the case. And
23 while they were back there, they had the jury
24 instructions that I'll give you at the end of the
25 trial. They had a specific set of jury instructions,

1 and the jurors didn't understand one word in one
2 instruction. Instead of asking the Court for
3 assistance, one of the jurors used their smartphone and
4 Googled the word and told everybody else what that word
5 meant. When we found that out, I had to declare a
6 mistrial. It wasted everybody's time for two weeks.
7 We had to start over. Okay? Please don't that.

8 I don't take away your smartphones. I know
9 some judges do while you're -- while a jury is
10 deliberating. I figure you're adults. You know how to
11 behave. Don't Google things that have anything to do
12 with this trial. All right? It will ruin -- it will
13 ruin the trial, and it makes everybody so we're just
14 all wasting our time and efforts. So don't do any kind
15 of investigation regarding this case or anything that
16 has to do with the case.

17 You're not to do any type of investigation,
18 including any computer-aided research. You're not to
19 discuss with any other person any issue relating to the
20 case in person, by Facebook, Twitter, email, texting,
21 telephone or any other means of communication. Other
22 than bringing with you your everyday common sense,
23 you're limited to the documents and evidence that are
24 presented to you during the trial.

25 The parties may sometimes make objections to

1 some of the testimony or evidence. At times, I might
2 sustain objections or direct you to disregard certain
3 testimony or exhibits. You must not consider any
4 evidence to which an objection is sustained or which I
5 instruct you to disregard. It's the duty of the
6 lawyers to object to evidence that they believe may not
7 be properly offered, and you should not be prejudiced
8 in any way against a lawyer who makes an objection on
9 behalf of the party they represent. Anything that you
10 may have seen or heard outside the courtroom is not
11 evidence and must also be disregarded.

12 Throughout the trial, if you cannot hear a
13 question asked by an attorney or an answer given by a
14 witness, please raise your hand, and let us know that
15 you didn't hear it. If I don't see your hand up,
16 interrupt us, say, Excuse me, Judge, I didn't hear that
17 answer. The witness is closer to me than -- than they
18 are to you. So sometimes I might hear the witness's
19 answer, but you may not. It doesn't matter,
20 necessarily, if I hear the answers. It's much more
21 important that you hear the answers. So if you don't
22 hear the answers, please let me know. We want to make
23 sure -- you folks are the judges the facts. So you
24 need to hear every question and every answer because
25 you're the ones that are going to be making the

1 ultimate decisions in the case.

2 Throughout the trial, if you need a break, I
3 told you use the universal break sign. If I don't see
4 it, hopefully Tom will see it, one of the attorneys
5 will see it, somebody will see your break sign. We'll
6 all know that you need a break. We're happy to give
7 you breaks whenever you need to.

8 I talked to you about bringing snacks if you
9 need to.

10 During the trial, I may take notes of a
11 witness's testimony. You're not to make any inference
12 from that action. I'm required to prepare for legal
13 arguments of counsel during the trial and for that
14 reason, I might take notes. Also, I don't want you to
15 infer anything from the fact that I'm either taking
16 notes or not taking notes. Sometimes you may think I'm
17 taking notes and I'm really just doodling or coloring
18 in the circles on a page or something like that. I do
19 that sometimes to just keep myself awake. Other times
20 I might not be taking notes, but it doesn't mean that
21 the witness's testimony is any less important than
22 somebody else's. Don't read anything into the fact
23 that I might be taking notes or might not.

24 If you wish, you may take notes to help you
25 remember what a witness has said. If you do take

1 notes, keep them to yourself until you and your fellow
2 jurors go to the jury room to decide the case at the
3 end of the trial. With regard to notes, you should
4 rely upon your own memory of what was said and not be
5 overly influenced by the notes of other jurors when you
6 go back to deliberate.

7 Don't be so concerned with the taking of a
8 note that you miss another question or answer asked of
9 a witness. Sometimes you get so enthralled in writing
10 down what you thought was an important answer that you
11 miss the next question and answer, and that might have
12 been even more important than what you're writing down.
13 So make sure you're listening to all the questions and
14 answers.

15 The case will proceed in the following
16 manner: First, the plaintiff has the opportunity to
17 make an opening statement outlining their case. After
18 the plaintiff opens, the defense has a right to make an
19 opening statement, if they so wish, or they may reserve
20 the right to make a statement after the plaintiff has
21 put on all of their evidence. Neither party is
22 required to make an opening statement, but it almost
23 always happens. Opening statements are a synopsis or
24 overview of what the attorneys believe the testimony
25 and evidence will be. Opening statements of attorneys

1 are not evidence. After all, the attorneys are not
2 witnesses to any of the facts of controversy in the
3 case.

4 After the opening statements, the plaintiff
5 will introduce evidence and call witnesses. At the
6 conclusion of the plaintiff's evidence, the defense has
7 a right to introduce evidence if they so desire. After
8 the defense rests, the plaintiff has a right to call
9 rebuttal witnesses if they so choose. At the
10 conclusion of all of the evidence, I will instruct you
11 on the law. You must not be concerned with the wisdom
12 of any rule of law stated in these instructions or in
13 the instructions that I will read to you at the close
14 of the evidence. Regardless of any opinion you may
15 have as to what the law ought to be, it would be a
16 violation of your oath to base a verdict upon any other
17 view of the law than that given to you by the Court.

18 Please understand, folks, that the law does
19 not -- the Court does not make up the laws. The laws
20 are written by the state legislature. Sometimes
21 they're modified by the -- by the state supreme court,
22 but I don't make up the laws. I read to you what laws
23 apply to the case.

24 After the instructions on the law are read to
25 you, each party has the opportunity to argue orally in

1 support of their case. This is called closing
2 argument. What is said in closing argument is not
3 evidence. The arguments are designed to summarize and
4 interpret the evidence for you and to show you how the
5 evidence and law relate to one another.

6 Since the plaintiff has the burden of proof,
7 the plaintiff gets to argue to you twice at the end of
8 the trial. Plaintiff will argue, defense will argue,
9 then the plaintiff has the opportunity to rebut the
10 defense arguments. After the attorneys have presented
11 their arguments, you will retire to select a
12 foreperson, deliberate, and arrive at your verdict.

13 Faithful performance by you of your duties is
14 vital to the administration of justice. It is your
15 duty to determine the facts and determine them from the
16 evidence and from the reasonable inferences arising
17 from such evidence. In so doing, you must not indulge
18 in guesswork or speculation. The evidence which you
19 will consider consists of the testimony of the
20 witnesses and exhibits admitted into evidence.

21 The term "witness" means anybody who
22 testifies in person or by way of a deposition, and it
23 may include the parties to the lawsuit. A deposition
24 is simply an examination of a witness on a prior date,
25 under oath, with the attorneys present where the

1 testimony was taken down in written format, and those
2 written questions and answers may be read to you during
3 the trial.

4 Admission of evidence in court is governed by
5 rules of law. From time to time, it will be the duty
6 of the attorneys to make objections and my duty as a
7 judge to rule on the objections and decide whether
8 certain questions may be answered or whether certain
9 evidence may be admitted. You are not to concern
10 yourself with the objections made by the attorneys or
11 with the Court's reasons for its rulings. You must not
12 consider testimony or exhibits to which an objection is
13 sustained or which is ordered stricken. You must not
14 consider anything which you may have seen or heard when
15 the Court is not in session, even if what you see or
16 hear is said or done by one of the parties or by one of
17 the witnesses.

18 In every case, there are two types of
19 evidence: Direct evidence and circumstantial evidence.
20 Direct evidence is the testimony by a witness about
21 what that person saw or heard or did. Circumstantial
22 evidence is testimony or exhibits which are proof of a
23 particular fact from which, if that fact is proven, you
24 can infer the existence of a second fact.

25 The example that I always give is this: If a

1 witness comes into trial and they testify that they
2 just came in from the rain, it's raining outside, that
3 is direct evidence that it's raining outside because
4 you were told that. On the other hand if that same
5 witness came in and they shook out their wet umbrella
6 by the door and they tracked water across the carpet as
7 they came up to the witness stand, you may be able to
8 infer from the circumstantial evidence that you saw
9 that it's raining outside. You may be wrong. There
10 may be a broken sprinkler pipe in the hallway. But
11 there's circumstantial evidence from which you can draw
12 an inference and conclude that it might be raining
13 outside. That's the difference between direct and
14 circumstantial evidence.

15 You may consider both direct and
16 circumstantial evidence in deciding this case. The law
17 permits you to give equal weight to both types of
18 evidence, but it is up to you to decide how much weight
19 to give any particular piece of evidence.

20 No statement, ruling, remark, or facial
21 expression that I might make during the course of the
22 trial is intended to indicate my opinion as to what the
23 facts are. I don't get to decide the facts. You are
24 the ones who determine the facts, and in that
25 determination, you alone must decide upon the

1 believability of the evidence and its weight and value.

2 In considering the weight and value of the
3 testimony of any witness, you may take into
4 consideration the appearance, attitude, and behavior of
5 a witness, the interest of the witness in the outcome
6 of the case, the relationship of the witness to any
7 party to the case, the inclination of a witness to
8 speak truthfully or not, the probability or
9 improbability of the witness's statements, and all
10 other facts and circumstances in evidence. Thus you
11 may give the testimony of any witness just that weight
12 and value that you believe that witness is entitled to
13 receive.

14 Let me remind you again, until the case is
15 submitted to you, do not talk to each other about the
16 case or about anyone who has anything to do with the
17 case until the end of the trial when you go to the jury
18 room to decide your verdict.

19 Do not let anyone else talk to you about the
20 case or about anyone who has anything to do with the
21 case. If someone should try to talk to you about the
22 case while you're serving as a juror, please report
23 that to me immediately through the marshal.

24 You may need to tell your boss, your spouse,
25 or significant other what's going on, but all you can

1 tell them is that you've been chosen as a juror in a
2 civil case, the judge has told you the trial is
3 probably going to last three to four weeks. And if the
4 trial ends earlier, you can let them know, and
5 you'll -- you can go back to work, but you won't know
6 that until I know that, and you can't tell your boss or
7 anybody when that's going to be until it gets closer.

8 Please do not make up your mind about what
9 the verdict should be until after you've gone to the
10 jury room to decide the case and you and your fellow
11 jurors have discussed the evidence. It's important
12 throughout the trial to keep an open mind. At the end
13 of the trial, you'll have to make your decision based
14 upon what you recall of the evidence. You will not
15 have a written transcript to review. Even though we
16 have a court reporter who takes down the testimony, it
17 is not typed up into a readable format right away, and
18 it's difficult and time consuming for her to locate and
19 read back lengthy testimony. Therefore, I would urge
20 you to pay close attention to the testimony and the
21 evidence as its presented.

22 Ladies and gentlemen, you will be given the
23 opportunity to ask written questions of any of the
24 witnesses called to testify in the case. Sometimes
25 that comes as a shock to jurors. They don't expect

1 that. You are not encouraged to ask large numbers of
2 questions because that's the primary role of the
3 attorneys. Questions may be asked only in the
4 following manner: After both lawyers or all lawyers
5 have finished questioning a witness, and only at that
6 time, if there are additional questions that you would
7 like to ask to a witness, you should write your
8 question down with your juror number on a full sheet of
9 clean paper and raise your hand.

10 Just so you know, the juror numbers that you
11 had before that we were referencing during jury
12 selection, those numbers are no longer meaningful. You
13 are now Jurors 1 through 10. It's 1 through 5 across
14 the back row, 6 through 10 across the front row. Okay?
15 So remember what number you are because if you're going
16 to write a question to a witness, you're going to tear
17 out a whole sheet of paper, okay, not just a little
18 corner. Sometimes people like to conserve paper so
19 they want to write a question on the little corner of
20 your paper. I'd rather you didn't do that. Use a
21 whole sheet of clean paper, put your juror number on
22 it, write the question.

23 All questions must be factual in nature and
24 designed to clarify information already presented. In
25 addition, jurors must not place undue weight on the

1 responses to their questions. The marshal will pick up
2 your questions and give them to me. All questions must
3 be directed to the witness, not to the lawyers, not to
4 the judge. After consulting with counsel, I will
5 decide if your question is legally proper. And if I
6 determine that your question is proper, I will ask it.
7 No adverse inference should be drawn against either
8 side if the Court does not allow a particular question.

9 Now, I ask that the questions be addressed to
10 the witness because if there's a proper question, I'm
11 going to ask it just as it's written. I don't have
12 discretion to modify your questions. If it's
13 illegible, it's difficult for me to read it. Okay? So
14 try to make it so I can read it. And if the grammar's
15 not proper, I'm going to read it just the way it is.
16 Okay?

17 One thing I need to make sure that you're
18 aware of. If I don't read a question -- and it happens
19 in every trial, that jurors will ask questions that I
20 don't read -- I don't want you to infer -- what I --
21 what I don't want you to do is this: If you write a
22 question and I don't read it, you think, Oh, I'm sure
23 it was one party or the other that didn't want that
24 question read because it would have been harmful to
25 their side, their client, or their witness. Okay. You

1 can't infer that. Because I will tell you probably
2 99 percent of the time all the attorneys want all the
3 questions read. Okay? If I don't read a question, you
4 can blame it on me, but you can't blame it on one side
5 or the other. You can't infer that. Because if a
6 question is not read, it's usually because I found that
7 it's not appropriate under the rules of evidence. And
8 I'm not going to explain to you why I'm not going to
9 read a question. You just need to understand that it's
10 not appropriate for some reason or another and don't
11 read anything into that. Okay?

12 That concludes the Court's pretrial
13 instructions. I will give you more detailed
14 instructions actually at the end of the trial that
15 takes longer. Sorry.

16 At this point it's five after 11:00. Going
17 to turn the time over to plaintiff for opening
18 statements. I understand you may not be done by 12:00,
19 but we're going to have to stop at 12:00.

20 MR. ROBERTS: Thank you, Your Honor.
21 12:00 o'clock.

22

23 OPENING STATEMENT

24 MR. ROBERTS: Good morning.

25 IN UNISON: Good morning.

1 MR. ROBERTS: A person must not drive while
2 impaired. If a person chooses to drive after choosing
3 to become impaired and hurts someone as a result, the
4 driver is responsible for the harms and losses they
5 cause. January 2nd, 2011, over six years ago,
6 Defendant Jared Awerbach chose to drive his mother's
7 car to a friend's apartment. Jared knows he is driving
8 back to his house. Jared chooses to smoke marijuana
9 while he's there. His friend Cherise Killian sees him
10 smoke the marijuana. Jared then chooses to get back in
11 the car and drive to his house.

12 He decides to turn left on Rainbow. We all
13 know what type of street Rainbow is. A white Hyundai
14 Santa Fe is driving southbound down Rainbow toward
15 Peak, approaching Peak. Jared pulls out and attempts
16 to occupy the same space the white Hyundai is in. He
17 strikes the rear of the Hyundai. The Hyundai spins all
18 the way around and comes to a rest facing oncoming
19 traffic. The Hyundai was going about 35 miles an hour.
20 Jared says he was going 20 to 30 miles an hour by the
21 time he struck the Hyundai Santa Fe.

22 It is undisputed and determined by the Court
23 that Jared Awerbach's blood contained 47 nanograms per
24 milliliter of marijuana metabolite which exceeds the
25 legal limit of 5 nanograms per liter; 47-5.

1 The Court has found, as a matter of law, that
2 Jared Awerbach was impaired and that Jared Awerbach is
3 responsible for any harms and losses caused by the
4 collision with the Hyundai.

5 As I'm sure you figured out, the driver of
6 the Hyundai is Emilia Garcia, and she's my client.

7 A car owner must never allow an unsafe driver
8 to drive her car. If she does and the unsafe driver
9 hurts someone, the owner of the car is also responsible
10 for the harm caused by the unsafe driver.

11 The story which establishes or from -- I
12 should say, from which you can find that Andrea
13 Awerbach knew that Jared was an unsafe driver, that
14 Jared was an incompetent driver, that Jared was an
15 inexperienced driver started long before January 2nd of
16 2011. It started when Jared Awerbach was 12 years old.
17 That's when Mr. Awerbach started smoking marijuana.

18 Audra, can you play Opening 1 for me?

19 (Video clip was played.)

20 "QUESTION: What age did you start smoking
21 weed?

22 "ANSWER: Twelve.

23 "QUESTION: Twelve?

24 "ANSWER: Yes, sir."

25 MR. ROBERTS: His mother, Andrea Awerbach,

1 knew that he was smoking marijuana.

2 Clip 2, Audra.

3 (Video clip was played.)

4 "QUESTION: Did your mom know that you
5 were smoking weed since you were 12?

6 "ANSWER: Yes, sir.

7 "QUESTION: How did she know that?

8 "ANSWER: From the multiple times that she
9 caught me.

10 "QUESTION: How -- how would she catch
11 you?

12 "ANSWER: She searched my room, drug test.

13 "QUESTION: Where would you hide your
14 weed?

15 "ANSWER: Different places in the house.

16 "QUESTION: And your mom drug tested you
17 or a drug test at school or ...

18 "ANSWER: My mother drug tested me.

19 "QUESTION: How often did your mom drug
20 test you within the ninth grade?

21 "ANSWER: Pretty often.

22 "QUESTION: Once a week? Once a month?

23 "ANSWER: Yeah, it was, like, a
24 once-a-week thing.

25 "QUESTION: How often did you fail those

1 tests?

2 "ANSWER: A lot.

3 "QUESTION: A lot?

4 "ANSWER: Yes, sir.

5 "QUESTION: More than 50 percent of the

6 time?

7 "UNIDENTIFIED SPEAKER: You can answer.

8 "QUESTION: You can go ahead.

9 "UNIDENTIFIED SPEAKER: You can answer.

10 "ANSWER: Yes, sir.

11 "QUESTION: More than 50 percent of the

12 time you failed?

13 "ANSWER: Yes.

14 "QUESTION: More than 75 percent of the

15 time?

16 "ANSWER: Yes, sir."

17 MR. ROBERTS: So Mom knows Jared Awerbach is

18 smoking marijuana. He failed the drug test she

19 administered to him more than 75 percent of the time.

20 There'll be testimony from her that she knew he was an

21 addict.

22 How often did Mr. Awerbach smoke marijuana as

23 we're approaching the date of this accident?

24 Audra, Clip No. 15.

25 (Video clip was played.)

1 "QUESTION: Did you ever consume marijuana
2 at the Gowan apartment?
3 "ANSWER: Yeah.
4 "QUESTION: Where at?
5 "ANSWER: Outside.
6 "QUESTION: How often?
7 "ANSWER: Often.
8 "QUESTION: Every day?
9 "ANSWER: (Witness nods head.)
10 "QUESTION: "Yes"?
11 "ANSWER: Yes, sir."
12 MR. ROBERTS: So Jared Awerbach admits while
13 he lived at the Gowan apartment, he smoked marijuana
14 outside. How often? Every day.
15 So what relevance of this -- is this to the
16 accident and the date of accident can be shown in
17 Clip 3.
18 Audra.
19 (Video clip was played.)
20 "QUESTION: How long did you live at the
21 Gowan Street apartment?
22 "ANSWER: Four years.
23 "QUESTION: That was a bad question.
24 Let's start when you left the Gowan Street
25 apartment.

1 "ANSWER: March 10th, 2011.

2 MR. ROBERTS: So this was at the beginning of
3 the deposition. The other part was at the end. It
4 turned out to be a good question because, as he left
5 the Gowan Street apartment March 10th, 2011, the
6 accident happened January 2nd, 2011. So a little less
7 than four years immediately preceding the accident, he
8 was in the Gowan Street apartment. So four years going
9 up to and just past the accident.

10 So we know that Jared admits that every day
11 for the four years leading up to this accident, he
12 smoked marijuana. And his mother knew he smoked
13 marijuana and knew he was an addict. With knowledge
14 that Jared was a marijuana addict, his mother let him
15 drive the car.

16 Opening 4.

17 (Video clip was played.)

18 "QUESTION: And how did your mom let you
19 know that it was okay for you to take the car
20 to work? Did she say, Yes, I know you're going
21 to work today, take the car, or did you just
22 take the keys?

23 "ANSWER: I asked her.

24 "QUESTION: And she said okay?

25 "ANSWER: She say yeah."

1 MR. ROBERTS: Opening 5, Audra.

2 (Video clip was played.)

3 "QUESTION: So when you -- well, let's
4 play this out. So you -- you would be in
5 the -- in the kitchen or in your bedroom, you'd
6 come out. You know the keys would be on the
7 counter or you'd take them and say, Mom, I'm
8 going to work --

9 "ANSWER: No, I'd ask.

10 "QUESTION: Okay. You'd say, Hey, Mom,
11 can I -- I'm going to take -- can I take the
12 car to work?

13 "ANSWER: Right, can I drive myself to
14 work.

15 "QUESTION: And she'd say yes?

16 "ANSWER: Yeah.

17 "QUESTION: And she'd always have to be
18 home when you took the car because you guys had
19 one car; right?

20 "ANSWER: Yes, sir. Sometimes her friend
21 would pick her up, and the car would stay at
22 home.

23 "QUESTION: And -- and you said that this
24 really wasn't an -- an errand that your -- your
25 mom would allow you to do, but in -- in the

1 past I think the paperwork said that your mom
2 also allowed you to -- to run errands as well
3 with the car.
4 "ANSWER: Occasionally.
5 "QUESTION: And what types of errands
6 would she allow you to run?
7 "ANSWER: To go pay bills.
8 "QUESTION: Grocery store?
9 "ANSWER: Occasionally.
10 "QUESTION: Take your kids somewhere?
11 "ANSWER: Yeah, like appointments."
12 MR. ROBERTS: And, Audra, continue to Clip 7,
13 where it says how often he was running errands for his
14 mother.
15 (Video clip was played.)
16 "QUESTION: How -- and in any given week,
17 how often were you running errands?
18 "ANSWER: Once or twice."
19 MR. ROBERTS: And Clip 9.
20 (Video clip was played.)
21 "QUESTION: Did -- was there any -- ever
22 instances where you were out running errands
23 and she'd call you and say, Hey, can you pick
24 up a gallon of milk from the grocery store?
25 "ANSWER: Oh, yeah, definitely.

1 "QUESTION: How often do you think that
2 happened?

3 "ANSWER: A lot."

4 MR. ROBERTS: And Clip 6.

5 (Video clip was played.)

6 "QUESTION: And would your mom know that
7 when you took the car, that the kids were also
8 going to be in the car?

9 "ANSWER: Oh, yeah."

10 MR. ROBERTS: So leading up to the accident,
11 Andrea Awerbach knows her son is smoking marijuana.
12 He's smoking every day. She lets him take the car. He
13 doesn't have a driver's license. He doesn't have a
14 learner's permit. And three years earlier, he had
15 taken the car and gotten in an accident. And she knew
16 that.

17 Audra, Clip 11, please.

18 (Video clip was played.)

19 "QUESTION: Any other accidents while you
20 were driving prior to this accident?

21 "ANSWER: There was an accident
22 previously, Saturn Vue.

23 "QUESTION: What do you mean?

24 "ANSWER: The make and model of the car.

25 "QUESTION: You were -- you were driving a

1 car that was involved in an accident?
2 "ANSWER: Yes, sir.
3 "QUESTION: What was the date of the
4 accident?
5 "ANSWER: I -- I don't recall.
6 "QUESTION: In 2010?
7 "ANSWER: 2008.
8 "QUESTION: 2008?
9 "ANSWER: Possibly.
10 "QUESTION: How old were you in 2008?
11 "ANSWER: Probably 15 or 16. Might have
12 been 17.
13 "QUESTION: Whose car were you driving?
14 "ANSWER: No, I was 15. Mom's.
15 "QUESTION: Did your mom know you were
16 driving?
17 "ANSWER: She had went into her classroom
18 at the school to go get something and left the
19 keys in her car, and I decided to go spin
20 around the block.
21 "QUESTION: And in that spin around the
22 block, you -- you hit another vehicle?
23 "ANSWER: Yes, sir. On Fuselier and
24 Alexander."
25 MR. ROBERTS: And now Clip 12.

1 (Video clip was played.)
2 "QUESTION: Was there any damage to your
3 car?
4 "ANSWER: Yes, sir.
5 "QUESTION: How much?
6 "ANSWER: Totaled.
7 "QUESTION: Total loss? How much damage
8 to the other car?
9 "ANSWER: Substantial."
10 MR. ROBERTS: Thirteen.
11 (Video clip was played.)
12 "QUESTION: Did you have to call your mom?
13 "ANSWER: Yes.
14 "QUESTION: Did she show up at the
15 accident?
16 "ANSWER: Yes."
17 MR. ROBERTS: And 14.
18 (Video clip was played.)
19 "QUESTION: You didn't have a license;
20 right?
21 "ANSWER: No, sir."
22 MR. ROBERTS: And, finally, 16 to confirm
23 once more that his mother Andrea Averbach knew of his
24 drug use.
25 (Video clip was played.)

1 "QUESTION: Prior to the accident that
2 we're here to talk about today, your mom was
3 aware of your drug use.

4 "ANSWER: She was aware of my drug
5 problem."

6 MR. ROBERTS: So this is the facts that you
7 can consider. Andrea Awerbach knew that Jared Awerbach
8 had been in a prior accident causing significant
9 damage. She knew he was a drug addict. She knew he
10 didn't have a license.

11 MR. MAZZEO: Objection, Your Honor. It's
12 argument.

13 THE COURT: The way you said it, it was.
14 Tell the jury what you're going to prove.

15 MR. ROBERTS: I'm going to prove that Andrea
16 Awerbach knew that Jared Awerbach had been in a prior
17 accident. I'm going to prove that Andrea Awerbach knew
18 that Jared Awerbach was a drug addict who smoked every
19 day and failed 75 percent or more of the drug tests she
20 had administered to him. I'm going to prove that
21 Andrea Awerbach knew Jared Awerbach did not have a
22 license. I'm going to prove that she knew Jared
23 Awerbach did not even have a learner's permit, and I'm
24 going to prove she lied about it. That's what I'm
25 going to prove.

1 So Jared is responsible as a matter of law.
2 Andrea Awerbach knew all of these things. Why are we
3 here? What's left?

4 We are here because the defendants continue
5 to refuse to take responsibility for the injuries that
6 were caused to our client, Emilia Garcia, in the
7 accident.

8 There -- there were comments made during voir
9 dire which indicate you may hear evidence that Jared
10 Awerbach is a new man, that Jared Awerbach is changed
11 and should not be punished for the actions that he took
12 on January 2nd, 2011. I would suggest that there's
13 evidence you're not going to hear that would support
14 that claim.

15 You will not hear evidence that he has
16 promptly admitted his faults --

17 MR. STRASSBURG: Judge --

18 MR. ROBERTS: -- to those he injured.

19 MR. STRASSBURG: -- objection. This is
20 beyond the scope of your order. It's not what he's
21 going to prove.

22 THE COURT: Come on up for a minute, guys.

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

25 THE COURT: Go ahead, Mr. Roberts.

1 MR. ROBERTS: Thank you, Your Honor.

2 THE COURT: There was an objection on the
3 record. The objection is overruled, in part anyway.
4 Part of it I did tell you where to go, where not to go.
5 So we can put it on the record later.

6 MR. ROBERTS: Thank you.

7 We believe that Andrea Awerbach will --
8 strike that.

9 Andrea Awerbach testified in her deposition
10 she did not give Jared actual authority to take the car
11 keys that day, that he took the keys without
12 permission. There are two kinds of permission.
13 Express permission: Yes, Jared you can take the car.
14 Or implied permission where the keys are left out on
15 the counter or the mantel, and the person who's driving
16 knows they can pick them up and go because they have
17 given permission so many times in the past.

18 I don't know whether permission that day was
19 express or implied. Only Jared Awerbach and Andrea
20 Awerbach know that. But the evidence will show that it
21 was at least implied because the evidence will show
22 that she left her keys out on the counter. And you
23 just heard Jared's testimony that he got to drive the
24 car all of those times. So the evidence will show he
25 had at least implied permission.

1 Andrea Awerbach is going to deny that, but
2 the evidence will show that not only did she give him
3 permission before the accident through Jared that you
4 just heard, but the evidence will also show that all
5 the way up until this week, she lets him drive the car,
6 even though --

7 MR. MAZZEO: Objection, Judge. Approach.

8 THE COURT: Come on up.

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

11 THE COURT: Objection is overruled.

12 MR. ROBERTS: Thank you, Your Honor.

13 So let me talk to you a little bit about
14 causation. Did the accident cause the losses and
15 injuries that we're claiming? And what those harms and
16 losses are. I will tell you now about the evidence
17 you're going to hear, and I'm going to explain, give
18 you a little bit of a roadmap so you'll understand when
19 it comes in.

20 I'm talking to you about this now because the
21 verdict form will ask how much money you will allow in
22 your verdict. So something bigger than zero, I'm going
23 to have to put on some proof during this trial.

24 In order to determine harms and losses, I'm
25 going to now talk about the only thing that you can

1 take into account. And that's the harms and losses and
2 the causation for the harms and losses and nothing else
3 at this point.

4 Is that is the ELMO working?

5 THE COURT: If you want it to work, I can
6 make it work for you.

7 MR. ROBERTS: Yes, thank you, Your Honor.

8 While the judge is doing that --

9 THE COURT: Something is messed up.

10 MR. ROBERTS: -- what the evidence is going
11 to show, and there will be no evidence to dispute, is
12 that prior to the accident, Emilia Garcia never went to
13 the doctor for lower back pain. The evidence will show
14 she never took medications for lower back pain. The
15 evidence will show that there was never a film or an
16 MRI or X-ray done of her lower back prior to the
17 incident. And she will tell you that she was
18 asymptomatic, which is a fancy word doctors say for
19 "doesn't hurt." Asymptomatic means you have no
20 symptoms. She will tell you she had no pain, and the
21 medical evidence will corroborate her statement. It
22 will agree with her statement.

23 After the accident, it was discovered when
24 films were taken that she had a condition in her lower
25 back. And I think Pete mentioned to you yesterday the

1 lower back is the lumbar, and the segments are numbered
2 from L1 to L5 moving down.

3 And I have got Bruce here. I didn't name
4 him, but this is Bruce. So -- so this is L5, the last
5 vertebrae. And this is the sacrum, sometimes referred
6 to as S1. There is a place in here in between the
7 joints called the pars articulum (sic), which is Latin
8 for the part between the joints. And because that's
9 kind of tough to say and wordy, doctors call it the
10 "pars" for short, and Emilia Garcia had what's known as
11 a pars defect.

12 Now, a pars defect can actually happen due to
13 trauma where the bones crack, or, as was the case with
14 Ms. Garcia, there can be a developmental issue where it
15 does not completely form and, therefore, there can be
16 slippage because the pars keeps the top vertebrae from
17 slipping back over the one underneath it. So the --
18 they keep -- and the one I'm referring to, the pars
19 defect would allow a slippage.

20 An asymptomatic pars defect, and because
21 there were never any films, there won't be any evidence
22 of how much slippage had occurred prior to the
23 accident. There won't be a single doctor who can tell
24 you that he can testify more likely than not how much
25 slippage was there or if there was slippage at all.

1 Are we set with the ELMO, Your Honor? No?
2 Okay.

3 THE COURT: I think by using the TV, it's
4 making it not work, so ...

5 MR. ROBERTS: And I had -- I wanted to use
6 the screen for you, sir, so, tell me if you can see.
7 But --

8 THE COURT: Mr. Blurton, are you able to see
9 the things that are on the TV screen when we show what?

10 JUROR NO. 1: Yes.

11 MR. ROBERTS: So it's
12 s-p-o-n-d-y-l-o-l-i-s-t-h-e-s-i-s. That's a word
13 you're going to hear a lot in this trial. And there
14 are other similar words that are easily get confused.
15 So I'd ask you to pay close attention.

16 The key to understanding it when you see it
17 is to look for the first part of the word which is
18 usually always the same in words like this. Spondylo
19 comes from the Greek for vertebrae. Listhesis just
20 means slippage. So spondylolisthesis means a slippage
21 of the vertebrae that I was just talking to you about.

22 There will be similar words that mean
23 different things, but have the same root, spondylosis,
24 which can be a degenerative change which has nothing to
25 do with -- with slippage. You might -- you'll hear the

1 doctors talk about spondylotic, and they'll probably
2 say some of these words differently than I'm saying
3 them now, but they'll spell them the same way.

4 Here's a little demonstrative to help you
5 understand the testimony you're going to hear from the
6 doctors. So this is -- this is the normal condition
7 with the L5 directly over the S1, and -- and this is
8 toward the stomach. So a Grade 1, Grade 2, Grade 3,
9 Grade 4, the way the physicians, you'll hear them refer
10 to -- one of the physicians at least refer to a
11 preexisting asymptomatic Grade 2 spondylolisthesis.

12 So the reason -- the way you determine the
13 grades is you divide up the S1 into four equal parts.
14 So if you've got slippage from 0 to 25 percent, that's
15 a Grade 1; 25 to 50 percent, Grade 2; 50 to 75 percent,
16 Grade 3. And it's possible for it to go all the way to
17 Grade 5 which is where it falls off. There will be
18 testimony that's not a good thing.

19 So a Grade 2 spondylolisthesis is what was
20 found on the very first films.

21 So I told you I'd do this. Anyone see where
22 I put my glasses? Sorry about that.

23 So let's go back to the chronological
24 timeline and talk about who Ms. Garcia went to see
25 after the accident. So the accident is on January 2nd,

1 2011. Her car spins around. A Metro officer showed
2 up, take a report, Officer Figueroa. Officer Figueroa
3 asked her if she was hurt. She said no. She didn't
4 think she was. She did not have immediate pain. So
5 she went home, and she'll tell you that later that day
6 she felt a little stiff and uncomfortable. Maybe
7 tingly, but she thought nothing of it.

8 The next morning when she woke up was Tuesday
9 morning. Tuesday morning was her Saturday. Because
10 where she worked at the casino, she had off Tuesdays
11 and Wednesdays. So Tuesday she didn't have to get up
12 and go into work. And she'll tell you that she felt
13 bad, and it was starting to begin to hurt, a lot of
14 stiffness and she felt crappy and she stayed in bed all
15 day.

16 It wasn't till the next day, Wednesday, that
17 the severe pain started. And she went to the emergency
18 room. So you'll see evidence that on January 5th she
19 went to the MountainView Hospital emergency department.
20 The records of that department will indicate that the
21 patient complains of moderate pain, neck pain, low back
22 pain, was in an MVA two days ago but felt fine after
23 the accident. The patient was pain free after the
24 accident. And there's -- there's a note that it's a
25 low back strain. There's something that's on the note

1 that she's going to tell you about.

2 She's told the doctor about her pain, and the
3 doctor said it shouldn't be that severe. We need to
4 take some films and some MRIs and do some studies. And
5 then the lady walks in after he leaves with the cart to
6 get her financial information, and she discloses she
7 doesn't know how she's going to have the ability to
8 pay. And the doctor comes back and says he's decided
9 he doesn't need to do the MRIs and the studies, and
10 here's some -- here's some drugs that will make you
11 feel better.

12 So after that, at a friend's advice, she
13 called up a lawyer, the Glen Lerner firm. And the
14 Lerner firm gave her a choice of some chiropractors who
15 would be willing to work with her with no assurance of
16 immediate payment. And she went to one of those
17 chiropractors, Mark Gulitz.

18 And, Audra, can you put up the -- the surgery
19 note.

20 It shuts itself off?

21 THE COURT: I can put it back on there.

22 MR. ROBERTS: I'm just going to leave this up
23 here. It should hopefully -- oh, your screen is down?

24 Okay. You can just blow up the front half,
25 the first -- the half to the left since that's what I'm

1 talking about now.

2 So as I'm talking, I thought this might help
3 you visualize it. So January 5th, she did the
4 emergency room visit. A week later she has her first
5 visit to the chiropractor, Dr. Gulitz.

6 So at this time, her pain is constant, 8 out
7 of 10. She's experiencing lower back pain. The back
8 pain is radiating to her legs. She has numbness and
9 tingling, and the initial diagnosis from the
10 chiropractor is strain-sprain of the cervical area,
11 strain-sprain of the thoracic, and sprain-strain of the
12 lumbosacral region.

13 He orders some X-rays. They do an X-ray on
14 the 17th, and then they do an MRI of the lumbar spine
15 at Las Vegas Radiology on January 26th. So they've now
16 got some films that they can look at. And this MRI of
17 January 26th, 2011, is where the spondylolisthesis was
18 first diagnosed, and there was also some disk
19 desiccation, which is drying out of the disks. There
20 was an annular bulge, which means the disk between
21 the -- between the vertebrae is bulging out. And the
22 measurement of the slippage at that time by the
23 radiologist was 4 centimeters.

24 Again, as you're listening to the testimony,
25 no doctor will tell you that they can determine to a

1 reasonable degree of medical certainty how much
2 slippage there was before the accident -- may have been
3 the total amount. May have been none -- to a
4 reasonable degree of medical certainty. But we do know
5 that whatever it was, there will be no evidence it was
6 causing her pain.

7 If there was any evidence, if there was any
8 medical record, if there was any drug that she had
9 taken of narcotic nature, you would -- you would be
10 seeing it.

11 MR. MAZZEO: Objection, Judge. That's not
12 true. Just because there's no evidence of any
13 preexisting records doesn't mean that none exists.

14 MR. ROBERTS: I'll attempt, again, Your
15 Honor. I'll rephrase.

16 THE COURT: Okay.

17 MR. ROBERTS: If they had any record after
18 the diligent search that they've done, they would show
19 it to you. They don't have anything to show you.

20 When we put the doctors on the stand that she
21 saw, we'll go over these things so you can see how
22 the -- how her pain progressed, got worse, got better.
23 You'll see the different doctors that she went to and
24 the treatments that she did.

25 And I'm not going to go day by day with you

1 through those records now because you're going to hear
2 all that evidence. But I'm going to give you an
3 overview of what you'll hear, and what you'll hear
4 about one of the most important issues as far as harms
5 and losses.

6 She went to Dr. Gulitz, and then Dr. Gulitz
7 saw the MRIs and said, I need to refer you to Dr. Cash.
8 Dr. Cash is a spine surgeon. Dr. Cash saw her one
9 time, looked at her films, and said, You need a spine
10 fusion. You need surgery. She did not get the surgery
11 at that time. She continued to do conservative and
12 aggressive conservative treatments through Dr. --
13 excuse me, conservative treatments through Dr. Gulitz,
14 the chiropractor. And things are not resolving.

15 This is why she goes to Dr. Gross. Dr. Gross
16 is asked for a second opinion, and she's going to tell
17 you, I didn't get the surgery because I didn't want to
18 believe I needed it. I didn't want the surgery. I
19 didn't want to have to go through that. I didn't want
20 those risks. I did not want to do it. So she didn't
21 follow Dr. Cash's recommendation.

22 She goes to see Dr. Gross, and Dr. Gross
23 almost immediately gives her a second opinion
24 recommending surgery. Dr. Cash was right, you're going
25 to need this surgery. But she didn't get the surgery

1 then because she still didn't want to believe she
2 needed it. She didn't want to have to go through that.

3 So she started seeing another doctor,
4 Dr. Lemper. Dr. Brian Lemper specializes in pain
5 management. So that's a more type of aggressive
6 conservative treatment. "Conservative" meaning short
7 of surgery, but he does different things like nerve
8 blocks and injections and things to try to make her
9 better and allow her to heal short of surgery.

10 Dr. Lemper treats her. When she went to
11 Dr. Lemper, Dr. Lemper told her, You know, I don't know
12 if I agree with Dr. Cash and Dr. Gross. I don't know
13 that you have to go to surgery. I think that more
14 conservative treatments are going to work for you.

15 So she went to Dr. Lemper for about a year,
16 and Dr. Lemper is going to tell you that, yes,
17 initially, I did not agree with the recommendation for
18 surgery, but what I was doing for her wasn't helping
19 her. He would do a procedure, and by way of example,
20 he would give her injections. She would have relief,
21 sometimes complete relief, sometimes 60, sometimes 40.
22 But she would get relief and she would feel better, but
23 the pain would return in one to two days. And he'll
24 tell you that I didn't want her to have surgery, but
25 what I was doing for her couldn't help her.

1 So ultimately on December 26th, 2002, easy
2 day to remember, the day right after Christmas, she
3 went in and got spine surgery, a fusion.

4 And I know the judge needs to break at 12:00,
5 but when we come back from lunch, I'm going to show you
6 the surgery that she had to have on December 26th,
7 2012.

8 And I'll try to get the monitor set up so you
9 can follow along, sir.

10 Is this a good time to break, Your Honor?

11 THE COURT: That's fine.

12 All right, folks, during our break, you're
13 instructed not to talk with each other or with anyone
14 else about any subject or issue connected with this
15 trial. You are not to read, watch, or listen to any
16 report of or commentary on the trial by any person
17 connected with this case or by any medium of
18 information, including, without limitation, newspapers,
19 television, the Internet, or radio. You are not to
20 conduct any research on your own, which means you
21 cannot talk with others, Tweet others, text others,
22 Google issues, or conduct any other kind of book or
23 computer research with regard to any issue, party,
24 witness, or attorney involved in this case. You're not
25 to form or express any opinion on any subject connected

1 with this trial until the case is finally submitted to
2 you.

3 Take till 1:15. See you back then.

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

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

8 Mr. Mazzeo, your objection was probably well
9 taken, but I would prefer if it's going to be more than
10 three words, say, Objection, can we approach?

11 MR. MAZZEO: Yes, Your Honor.

12 THE COURT: If it's something you want to
13 object to relevance, you want to object to foundation,
14 want to object to hearsay, those are things that you
15 can do in a couple of words, and then I -- I can rule
16 from the bench unless I want more explanation. But
17 usually if you're going to make a speaking objection,
18 I'd rather you do it at the bench.

19 MR. MAZZEO: I will, Your Honor.

20 MR. ROBERTS: And, Your Honor, there was a
21 purpose for the speaking objection in front of jury,
22 and he actually violated one of his own motions -- one
23 of the motions in limine, Motion in Limine No. 3 which
24 precludes defendants from suggesting to the jury that
25 there might be related medical records prior to the

1 crash that have not been disclosed. So when he made
2 that objection and he suggested in front of the jury on
3 the record that there might be undisclosed records, he
4 violated the motion.

5 MR. MAZZEO: I -- Your Honor -- actually,
6 Your Honor, I was correcting a -- a misstatement by
7 Mr. Roberts with what he was suggesting to the jury.
8 That -- that motion in limine does not give him license
9 to say that there -- that she essentially didn't have
10 any treatment whatsoever prior to the accident.
11 There's no evidence of it. Well -- and you're not
12 going to be shown any and she didn't. Well, we don't
13 know whether or not she didn't. We know that we don't
14 have records. That's all. So he opened the door,
15 that's all.

16 MR. ROBERTS: Well, we know that she's going
17 to say she didn't. We know they haven't found any. So
18 I think we ought to be entitled to summary judgment on
19 that issue. They don't have nothing other than asking
20 the jury to speculate that there are records. That's
21 why the motion was granted because the jury's not
22 allowed to speculate when you don't have any evidence.

23 THE COURT: We may have to address it with an
24 instruction at the end.

25 MR. ROBERTS: Thank you, Your Honor.

1 THE COURT: Anything else we need to put on
2 the record?

3 MR. MAZZEO: No, Your Honor.

4 THE COURT: All right. Off the record.

5 (Whereupon a lunch recess was taken.)

6 THE MARSHAL: Remain seated. Come to order.

7 THE COURT: Did we make the TV and the ELMO
8 work or not?

9 MR. ROBERTS: We did.

10 THE COURT: So I can switch back and forth
11 still, do you think?

12 MS. BONNEY: Yes.

13 MR. ROBERTS: You want to give it a shot?

14 THE COURT: You want to try it to see?

15 MR. ROBERTS: I'd love to.

16 THE COURT: Right now, you're on right law;
17 right?

18 MS. BONNEY: Uh-huh.

19 THE COURT: There's your document. Is it up
20 there?

21 MR. ROBERTS: It is.

22 THE COURT: Awesome.

23 MS. BONNEY: Now we're back.

24 MR. MAZZEO: Judge, I'll need a few minutes
25 to set up after Mr. Roberts is done with his opening.

1 THE COURT: Okay. We'll take a quick break.

2 MR. SMITH: We'll need some time to review
3 his demonstrative exhibits. We haven't seen them yet.

4 MR. STRASSBURG: Judge, does it make sense to
5 switch Mr. Blurton's seat so he can sit right close to
6 the screen?

7 THE COURT: I don't have a problem with that.

8 MR. MAZZEO: No objection.

9 THE COURT: That might be better to put him
10 in the front -- in the front seat.

11 MR. ROBERTS: Oh, yeah, yeah.

12 MR. STRASSBURG: Because he was reading stuff
13 like this (indicating). So he might --

14 THE COURT: You know what, I think that's a
15 good suggestion.

16 MR. ROBERTS: It is.

17 THE CLERK: Going to put him in Seat 7?

18 THE COURT: In Seat 6.

19 THE CLERK: It's not a big deal. Just put a
20 sticky note over it. I mean --

21 THE COURT: We're still going to keep him as
22 Juror No. 1. Actually, it doesn't really matter, does
23 it, if we keep him 1 or 6. He's still an alternate.
24 Okay.

25 We ready?

1 MR. MAZZEO: Yes, Judge.

2 THE COURT: Bring them back.

3 Okay. No more objections today; right? No
4 more objections and no statements today.

5 MR. ROBERTS: I told Pete I should have wore
6 my Fitbit.

7 MR. STRASSBURG: Judge, I'll make that deal
8 if Mr. Roberts would.

9 THE COURT: If he makes no more objectionable
10 statements, then you make no more objections?

11 MR. STRASSBURG: If I get as good as I give,
12 yeah, I'll make that deal.

13 MR. MAZZEO: I'll reserve my right --

14 MR. STRASSBURG: I just want to be fair.

15 THE MARSHAL: Jury entering.

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

18 THE MARSHAL: Jury is present, Judge.

19 THE COURT: Thank you. Go ahead and be
20 seated.

21 Mr. Blurton.

22 JUROR NO. 01: Yes, sir.

23 THE COURT: I'm going to ask you to switch
24 places with Ms. Bias.

25 JUROR NO. 01: All right. I can do that.

1 THE COURT: It's not going to change a lot.
2 But I think it might make it a little bit easier for
3 you to see things. We're going to do our best to try
4 to make it so you can see everything.

5 JUROR NO. 01: Thank you.

6 THE COURT: Because it looks like, at least
7 during opening statements, there's a lot of stuff being
8 put up there in front of you guys. So if you can't see
9 something, let us know.

10 MR. STRASSBURG: Maybe he can see better if
11 he moved over. He's got a seat between him and the
12 screen.

13 THE COURT: It's up to you. I'm going to let
14 you sit wherever you want in the front row, wherever it
15 makes it easier for you to see.

16 PROSPECTIVE JUROR NO. 01: Okay. I'm going
17 to scoot one to the left here.

18 THE COURT: That's fine. All right.

19 Mr. Roberts, time is still yours.

20 MR. ROBERTS: Thank you, Your Honor,
21 appreciate it.

22 Can everyone else see the timeline up here?
23 Should I move that a little out a little bit? So good
24 news is -- I apologize for the technological
25 difficulties there before lunch. The good news is I've

1 got everything working, I think. And -- and then the
2 bad news is I get to go back ten minutes to what I was
3 skipping because I couldn't get anything to work.

4 So before I -- I rush into the surgery, I'm
5 just going to go back a month into November and --
6 and -- and fill back in something that I was going to
7 rush through. And that is that the timeline was sort
8 of cut off here before. And now we've expanded the
9 timeline to December 26th, 2012. So we can now see
10 that surgery on here.

11 So we -- we talked about Dr. Lemper, and we
12 talked about the injections, the root blocks that he
13 gave which gave temporary relief, but in a couple days,
14 her symptoms returned to baseline. So that's November
15 of 2011.

16 She followed up with Dr. Gross, and she was
17 going to go ahead with the fusion in 2011. So
18 November 2011 back here. But she -- she didn't. She
19 told Dr. Gross that she was going to go through with
20 it. She didn't. She continued to have treatment with
21 Dr. Lemper. And she changed to another pain management
22 doctor. She asked for someone that might be closer to
23 her house. She lived up in North Las Vegas,
24 Dr. Lemper's office is over in Spring Valley on the
25 southwest side.

1 And she went to Dr. Kidwell. And she started
2 treating with Dr. Kidwell a little bit to try something
3 else to see if she could avoid surgery. And
4 Dr. Kidwell in August of 2012 writes that "The pain
5 radiates down her right greater than lower left
6 extremities. She gets numbness, tingling, weakness on
7 the right. The pain radiates to the outside of the
8 ankle and up to the top of the foot. Similar symptoms
9 on the left but less pronounced. She's unable to sit.
10 She's pacing the room. She's just miserable." And he
11 recommends selective blocks and facet injections.

12 And in September of 2012, he tries additional
13 injections -- injections, and he does a procedure with
14 selective nerve root blocks L5-S1. After the
15 procedure, she reported complete resolution of all of
16 her symptoms. That lasted for a couple of days and her
17 symptoms returned. That's when she went to Dr. Gross
18 in November and gave him another status update.

19 Pain, numbness, and tingling is back in both
20 legs. The back is worse than the legs. She has pain
21 at work as a cage cashier where she's stands but it is
22 tolerable. Walking is painful. She cannot exercise
23 because of pain. And she's taking Lortab and a muscle
24 relaxant at night.

25 One note which I'm going to mention a little

1 bit later is she agreed to fully quit smoking to
2 enhance the fusion rate. So she's going in for the
3 fusion now. She's committed to have it. She knows
4 there's no other option for her to really take. And
5 the doctor explained to her that there's evidence that
6 if you smoke, it lowers the success rate of a fusion.
7 And she agreed to stop smoking, and she did stop
8 smoking and has not smoked since November of 2012.

9 Another MRI spine was done prior to the
10 surgery. This went on November 19th of 2012.

11 And, Judge, could I try the ELMO?

12 THE COURT: You may.

13 MR. ROBERTS: This once again, demonstrated a
14 Grade 2 spondylolisthesis, L5-S1, but there is another
15 interesting note and this report was signed by Steven
16 Hake, H-a-k-e, M.D., interpreting the films.

17 Is that too much?

18 MR. MAZZEO: There's a light as well.

19 MR. ROBERTS: Thank you, Pete. That does
20 help. That helps a lot, doesn't it?

21 So this is Exhibit 19. It's already been
22 preadmitted into evidence, and you'll see this. The
23 L5-S1 disk is severely narrowed, desiccated, and
24 demonstrates a Grade 2 anterior spondylolisthesis of L5
25 upon S1. Slippage measures 1.02 centimeters. That's

1 10.2 millimeters.

2 As some of you may recall, the slippage that
3 was measured by the radiologist immediately after the
4 accident back in January was 4. So at least according
5 to this radiologist, comparing the first radiologist
6 report to the second one, it's a 4 to a 1.02. There's
7 this big degree of continued slippage from January of
8 '11 until November 2012.

9 Now, this radiologist was a different one
10 that took the original measurements back in January of
11 2011. And he went back and he reviewed the 2011, and
12 he measured the original at 2011 right after the
13 accident at 7.5. So even with that greater measurement
14 that he got from the films, interpreting the films,
15 there's a continued slippage of over 2 centimeters.

16 And this is something that you are going to
17 hear some disagreement, even among our doctors on.
18 This are lots of slices to an MRI, and you do the
19 measurements. And you have to measure the same place
20 in both films, and there is some -- some disagreement
21 here. But according to the radiologist who did his
22 report immediately prior to the surgery by Dr. Gross,
23 there's continued slippage. And the problem is if you
24 look at that rate of slippage from January '11 just
25 to -- to 2012, if it continues that rate, it could

1 cause real problems. And the way to stop that is to
2 put it back and fuse it. And that's what Dr. Gross
3 did.

4 And could I have the -- let's see. The
5 Part 1 surgery just so it's on the screen here also.
6 Do you have that?

7 THE COURT: I can't do both. I can give you
8 one or the other.

9 MR. ROBERTS: I don't need this anymore,
10 Judge. We can go back to the -- it's called Trial
11 Director. Okay.

12 So Dr. Gross is going to come in, and he's
13 going to go through these -- what -- what the procedure
14 was that he performed upon Ms. Garcia where he exposed
15 the spine from the back, and he then removes and
16 prepares some of the bone.

17 And the big thing that's going on here is
18 you'll see these are the lamina that cover where --
19 where the spinal canal is. And when you remove the
20 lamina, it's called a laminectomy. So he removed the
21 lamina and exposed and took the pressure off the
22 nerves. So you'll hear about the slippage had narrowed
23 the canal, put pressure on the nerves which was causing
24 part of her pain, and tingling and numbness. He
25 removed the lamina to relieve the pressure.

1 Part 2, Audra.

2 So then he began placing screws. And the
3 screws go into the bone, as you can see, and the screws
4 and the rods stabilize the joint. And then once the
5 joint is stabilized, he performed a diskectomy, which
6 is to remove the disk, to pull out the disk from
7 between the vertebrae. Then he takes cages with bone
8 graft material and slides those in where the disks
9 were. So what you're doing is you're -- where that
10 disk was and where it used to move, you're now putting
11 bone graft in so there's bone connecting the vertebrae
12 and it's solid and it's fused together. And the
13 hardware holds everything in place while it heals.

14 He'll tell you that he did a two-level
15 fusion, that there were some problems he believed that
16 were caused by -- at the L4-5 level and that he wanted
17 to minimize the chance for future surgery. And if
18 there was going to be another surgery, to have it take
19 as long as possible to get there.

20 And I'll explain, in part, why he chose to do
21 this was something called adjacent segmental breakdown.
22 So when you got your spine and it's normal and it's
23 flexing, you got a certain amount of bend and torque
24 that goes into each joint. If you fuse a joint and it
25 can't torque, you bend the same amount, and it's going

1 to put increased pressure on joints above and below
2 where the fusion are. They now got to -- there's more
3 strain and strain applied. So as there's more torque
4 and pressure than those joints were designed to
5 withstand, it speeds the degenerative process, and it
6 can lead to the need for another fusion.

7 And he saw a potential issue, he'll point
8 out, where the disks were dessicated, where there was
9 a -- a tear in the disk, an annular tear which is
10 allowing fluid to leak out and that he wanted to go
11 ahead and take care of both levels at this time.

12 There's actually a wonderful note two weeks
13 later by Dr. Gross. And he says that it's -- amazingly
14 only two weeks later, she has a significant decrease in
15 her pain. He's amazed.

16 She was absolutely miserable, she's going to
17 tell you, between the surgery and that two-week visit.
18 And she was mad at Dr. Gross, and she was mad that she
19 got the surgery. And this just made it worse. She was
20 very upset. But then things started getting better.
21 And as she stabilized, she had about 70 percent
22 betterment of her pain levels. Improved everything by
23 70 percent.

24 The -- the relief didn't last for as long as
25 she had hoped, and she started getting some other pains

1 and even some different pains than she had before the
2 surgery. In particular, she had a new kind of pain
3 that radiated down her leg. And this is something that
4 can happen as a risk of a fusion surgery. The
5 effectiveness of the surgery decreased her relief to
6 about 50 percent. And she continued to receive
7 treatments to help alleviate the remaining pain.

8 A number of different things were tried. And
9 I'm not going to go through all of them now. One of
10 the things is called a stimulator. A stimulator sort
11 of buzzes where the pain is and helps alleviate the
12 pain. The type of stimulator she had was called a
13 trial stimulator where they actually put in the leads,
14 but the rest of the stimulator is outside the body. A
15 permanent stimulator, everything is implanted. She did
16 get good relief, but she was scared of the surgery.
17 She's going to tell you that she was scared of doing
18 another surgery.

19 And even though she got relief, what she's
20 going to tell you is that she had no certainty that a
21 permanent stimulator would help because she was so
22 worried about the wires sticking out of her body that
23 she really didn't do anything. So she wasn't in as
24 much pain, but she was scared to move around. And she
25 was looking for other options.

1 And the doctors did come up with another
2 option, and Dr. Kidwell, her new pain management
3 specialist, performed in September of last year, very
4 recently, something called a rhizotomy, which is a
5 radiofrequency ablation of the nerve endings in the
6 area that are radiating the pain. They take the
7 radiofrequency waves and burn off the tips of the
8 nerves, and that helps with the pain. And she got
9 significant relief from that. Significant relief. It
10 was highly effective.

11 And, in fact, when -- right now, when she's
12 not moving, she usually has no pain at all. If she's
13 active, her pain goes up to 4 out of 10 as compared to
14 6, 8 before these procedures. And -- and she's back
15 active again doing a lot of the things that she
16 couldn't do. So there has been some success. And --
17 and that's the good news.

18 The cost of getting to where she is today
19 where she's able to resume a lot of her activities, do
20 housework, spend time with her kids, and these --
21 these -- this is a summary of the bills from all of the
22 people that she's seen. I think I misspoke and said
23 six years because it's '16, but obviously 2016 minus
24 2011 is five years. You probably already knew that.

25 So here are all her medical expenses which

1 her doctors have said is related to the motor vehicle
2 accident in the last five years. And they add up to
3 \$627,920. And she had no medical expenses related to
4 her back in the 30 years before the motor vehicle
5 accident.

6 Dr. David Oliveri is going to come and
7 testify. Dr. Oliveri is a specialist in physical and
8 rehabilitative medicine, sometimes called a
9 physiatrist, and he often coordinates care for someone
10 who's injured, helps them make decisions. In this
11 case, he's looking at all of the records. He's
12 independently verifying what is causally related to the
13 accident. He's looking to see if the charges appear
14 fair and reasonable to him for the work that was
15 performed. And he's going to tell you that he -- he
16 does have a problem with a few of these line items,
17 that they sound a little high to him. And there are
18 going to be other areas where it's a little gray, and
19 you're going to have to decide whether or not we meet
20 our burden of proving to you that the charges are fair
21 and reasonable. But this is the starting point. When
22 we come up at the end of the trial, I'll suggest a
23 number to you as to what the evidence shows.

24 Dr. Oliveri, another thing he does and he's
25 qualified to do is prepare life-care plans for the

1 future. So he looks at all the reports of all the
2 doctors, he looks at the treatment that she's needed to
3 date, and he comes up with a plan of what's likely to
4 happen in the future. What is she going to need in the
5 future to fix and to help the injury she sustained in
6 the motor vehicle accident? And he's going to present
7 that to you in great detail. And I'm not going to go
8 through that line by line with you now. We'll we get
9 to do that later. But the --

10 MR. ROBERTS: Could I have the ELMO, Judge?

11 THE COURT: You may.

12 MR. ROBERTS: But the life-care plan prepared
13 by Dr. Oliveri projects that about 1.9 million in
14 future care is going to be needed as a result of the
15 motor vehicle accident. The overwhelming majority of
16 that is in two-line items.

17 The doctors are going to tell you that the
18 problem with the rhizotomies is that you -- you burn
19 off the nerve endings and they grow back. So the
20 effectiveness as the nerve endings grow back goes away,
21 and you have to get it done again. And the medical
22 testimony is, more likely than not, she's going to need
23 a procedure about every six months to maintain her
24 relief. So a procedure is only \$15,000, but you do two
25 a year, that's 30,000. Doesn't sound that outrageous,

1 but if you're going to live 48 more years, that becomes
2 \$1.4 million projecting it out.

3 And there's another item here, and this is in
4 the year 2037, and this comes from an opinion by
5 Dr. Gross which Dr. Oliveri agrees with and he included
6 in his life-care plan. It goes back to what I was
7 telling you with the spine and the adjacent segmental
8 breakdown is she's more likely than not going to need
9 another fusion surgery. The statistics is a 2-plus
10 percent, maybe 2.6 percent per year of people who have
11 had the fusion that need an additional fusion at an
12 adjacent level.

13 And so what Dr. Gross has said, that as you
14 said add up that 2.6 per year, you get out to
15 22.22 years, and you're over 50 percent and it becomes
16 more likely than not that she's going to need it. And
17 that's well before her life expectancy. So she's going
18 to need an additional surgery. And we'll put on
19 evidence of the amount to allow in her -- allow her to
20 have that surgery when she needs it.

21 The number that we're going to finally put
22 into evidence to ask you for is a little different than
23 Dr. Oliveri's number, and here's how: We've got an
24 economist and his name is Stan Smith. And the law
25 requires that we give you evidence of what it costs

1 today, how much money do you need today to pay for this
2 life-care over a number years. In the old days when I
3 was growing up and you were earning 10 percent a year,
4 you would need less money now because you put it -- and
5 you've earned interest and you'd be able to pay for it
6 when it came. So it was called "reducing the present
7 value."

8 Dr. Smith is going to tell you that the
9 return on investment has gone down, that medical costs
10 are rising more than the return on investment, so you
11 actually need a little bit more money now to pay for
12 this treatment over her life. And he's going to come
13 up with a number of about 2.1 million to pay for that
14 1.9 million that Dr. Oliveri has projected over her
15 lifetime.

16 As you may have picked up when we were --
17 when we were talking in voir dire, it's not just
18 damages that are at issue. It's also causation. And
19 that's our burden to prove. We have to -- to prove
20 that these medical expenses were not only incurred, but
21 they were caused by the accident. More likely than not
22 caused by the accident.

23 So as to Mr. Awerbach, the Court has found
24 he's responsible for the accident. The Court has not
25 found that the injuries were caused by the accident.

1 That's something that you are going to have to
2 determine. All of Emilia's physicians are going to say
3 that, more likely than not, these costs and procedures
4 were caused by the motor vehicle accident. And the
5 overwhelming evidence that they cite to is the fact
6 that she was asymptomatic before the accident and all
7 these needs arose after the accident, and there's no
8 other explanation that they can find.

9 The defense has hired doctors who will
10 testify and present evidence to you that none of this
11 was caused by the accident. It was all caused by the
12 preexisting condition, that the accident and the onset
13 of symptoms is either coincidental or she's lying about
14 not having any symptoms before the accident.

15 MR. MAZZEO: Objection to the
16 characterization, Your Honor. It's not accurate.

17 THE COURT: I'll sustain it. I doubt
18 somebody's going to say she's lying.

19 MR. ROBERTS: They'll say they don't believe
20 her. I imagine that you will hear someone say today
21 they don't believe her.

22 So what are the reasons that the defense is
23 going to give you why all of these expenses were not
24 caused by the accident? They'll have experts tell you
25 that this was a low-impact, low-energy collision and,

1 therefore, didn't cause it.

2 Remember the testimony. Emilia's doing 35.
3 She gets hit at 20 to 30. She gets spun all the way
4 around, but they'll have people tell you that more
5 likely than not, that's not enough to cause this type
6 of injury.

7 Our doctors will obviously disagree with
8 that. They'll present that evidence and give you their
9 reason, and it's significant that none of the doctors
10 that are hired by the defendants will tell you that
11 it's impossible for this accident with these
12 injuries -- this accident with these energies to cause
13 these injuries. That it's possible. They just don't
14 think it did.

15 The defendants will say that since she
16 reported no pain at the scene of the accident, she
17 wasn't injured. And she did say she wasn't injured.
18 Our experts will explain to you that in this type of
19 accident, with these type of back injuries, it is not
20 unusual for the symptoms to grow and show themselves
21 over a number of days, and that you really don't learn
22 anything from the fact that she was not in immediate
23 and significant pain and reported no injury.

24 The defendants will tell you that she must
25 not been injured because she waited three days to seek

1 medical treatment. I may have misspoke. The accident
2 happened Sunday --

3 MR. STRASSBURG: Objection. Argument.

4 MR. MAZZEO: Join.

5 THE COURT: I'm going to allow it.
6 Overruled.

7 MR. ROBERTS: Thank you.

8 If you remember, she's going to testify that
9 Tuesday and Wednesday was her weekend. The accident
10 happened Sunday. So Monday she went to work. And
11 their experts will say, Well, she went to work, she
12 must not have been that hurt. Well, Tuesday, the next
13 day, as I told you, she couldn't get out of bed.

14 She's also going to explain to you that she
15 didn't miss much work at all other than immediately
16 after the surgery, and she's going to tell you it
17 wasn't because she was not in pain, but it was because
18 she could not afford to miss work. At the time, she
19 was a single mom raising three kids, and with a
20 paycheck to paycheck, her pay every two weeks was \$850,
21 her rent every month was 1,000, she couldn't afford to
22 take a day off.

23 And she's also going to tell you that during
24 this time period when she was in so much pain, that
25 when she got home from work, she would go get in bed,

1 and she would stay in bed until it was time to get up
2 and do it again. She had no choice but to support her
3 family. And because she pushed through the pain to
4 support her family, they're going to tell you that she
5 must not have really been hurt.

6 I mentioned before they're going to call this
7 a preexisting condition. Code word for something that
8 was already wrong, so they didn't cause it. The
9 spondylolisthesis, the pars defect, if they were there,
10 they were asymptomatic. And if you cause an
11 asymptomatic condition to become symptomatic, that's
12 still causation. And it's still something that she
13 wouldn't have experienced but for the motor vehicle
14 accident.

15 You might hear them talk about secondary
16 gain. This is a term which means that a person who is
17 going to be financially rewarded for exaggerating the
18 pain will exaggerate their pain. All of her doctors
19 are going to tell you that her pain was real and, in
20 their opinion, she wasn't exaggerating anything.

21 And I would -- and Dr. Gross is going to tell
22 you that he would have never performed this drastic a
23 procedure if he did not believe her pain was real and
24 that she needed this type of intervention. If she was
25 motivated by secondary gain, if she wanted to increase

1 the numbers, why did she wait two years to do the
2 surgery after two different doctors recommended it?

3 They'll talk about smoking. We already
4 talked about that. She quit. There will be no
5 evidence she smoked after her fusion surgery.

6 They're going to say she asked for no
7 accommodation at work. She stood all day. She didn't.
8 She pushed through.

9 They'll say that her pain and her need for
10 treatment is because she's fat. Five-foot, 170. One
11 of their doctors will say she's morbidly obese, and
12 that won't match up with the medical tables according
13 to her doctors. She is obese, but our doctors will say
14 that that level of overweight more likely than not
15 would never have led to these types of complications
16 and this type of pain and the need for these procedures
17 that she never experienced before.

18 And the other thing that is probably going to
19 be raised is something called "failed back surgery
20 syndrome." One of her doctors, Dr. Nathan, Dr. Lemper,
21 I don't remember which one, might have had a note that
22 he thought that there were signs of failed back surgery
23 syndrome. This is also called failed back syndrome or
24 post laminectomy syndrome.

25 And in the broadest sense, it's you had a

1 surgery to fix something, and there's a new pain that
2 was caused by the surgery. So the -- in some sense the
3 back surgery has failed. And she did have a new pain.
4 Dr. Gross will testify and tell you that there's no
5 evidence of failed back surgery syndrome here because,
6 overall, the degree of improvement from the surgery was
7 significant and helpful.

8 But let's get back to causation. The doctors
9 will tell you that even if she has pain caused by the
10 surgery, it doesn't break the medical chain of
11 causation. Because if the accident caused the need for
12 the first surgery and the first surgery causes
13 additional pain and discomfort or even procedures, the
14 causal connection is still there. First, surgery never
15 happens if not for the motor vehicle accident and,
16 therefore, the failed back syndrome doesn't happen
17 either.

18 And failed back syndrome, if it exists, could
19 be devastating. Failed back surgery syndrome could
20 lead to lifelong addiction to narcotics and ultimately
21 crippling. Luckily, Dr. Gross doesn't think that's
22 happening, that with continued rhizotomies, other than
23 the potential need for another surgery, that she's
24 going to maintain an ability to have somewhat of an
25 active life, even though she's still going to have some

1 level of pain for her entire life.

2 So let me talk to you briefly -- I'm getting
3 close to being done -- about what you're going to hear
4 about the person that Emilia was before all of these
5 surgeries and all of this pain. She -- she was a
6 positive person, and she tried to remain positive
7 throughout this. Dr. Gross said that she sounded
8 positive even when she was complaining.

9 The thing that she was most proud of was the
10 fact that she was a strong single mother who had the
11 ability to take care of her family, who took care her
12 family, who was the leader, who never felt vulnerable,
13 who always felt that she could be the protector of her
14 family. And that the -- the most painful part of this
15 experience has been the loss of her self-image, the
16 loss of the feeling of being someone that her loved
17 ones could count on, and the pain and embarrassment of
18 becoming a burden on her children.

19 Her children had to take care of her when she
20 was going through these issues. She was lying in bed.
21 She was in pain. And she had to stop doing things for
22 her kids, and they had to start doing things for her.
23 And she had to stop taking them to Circus Circus and
24 stop taking them to the park and stop taking them to
25 the movies and stop taking them out to do things and to

1 be active with them. And she lost that to some extent.
2 She lost it to a great extent.

3 And even now that she's feeling better and
4 she's got a lot of that back and she's trying to be
5 positive, she'll tell you that it's still in her mind
6 what the doctors are telling her. It's still in her
7 mind that, more likely than not at some point in the
8 next 22 years, she's likely to start deteriorating and
9 need another surgery.

10 And that doesn't just mean another surgery
11 and the pain of another surgery and the rehabilitation
12 and the fear of the risks of the surgery. But
13 remember, this is degeneration caused by the fusion and
14 it's going to come on slow, and it's going to increase
15 the pain, and she's going to be back on the treatments
16 and back on the narcotics and being fuzzy again, until
17 ultimately it gets to the point where she has to have
18 it done.

19 So she's not only experienced this for the
20 last five years, she'll tell you that the fear of
21 having to do this all over again for a five-year period
22 at some point in the future terrifies her. And it
23 makes her feel weak and vulnerable.

24 MR. MAZZEO: Objection. Argument, Your
25 Honor. Can we approach?

1 THE COURT: Sure.

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

4 THE COURT: Overruled.

5 MR. ROBERTS: The things I've been talking
6 about and more, I'm going to show you so that you can
7 see what has caused Emilia's harms and losses and so
8 that you have some context and understanding of exactly
9 what she's been through medically and emotionally so
10 that you can decide how much it will take to fix what
11 can be fixed and to compensate and make up for what
12 can't be fixed.

13 By the end of the trial, you will see why
14 this is the kind of case where I have to come back and
15 ask for an amount which will sound very high to you
16 right now. I've already talked about 627,000, 600,000,
17 in past expenses reasonable and necessarily caused by
18 the incident. I've talked to you about \$2.1 million in
19 future care costs. That's 2.7 million. Not even
20 including the cost of the stimulator, we're up to
21 2.7 million. And the 2.7 million goes to the people
22 who are taking care of Emilia. None of that is for
23 her. None of it. So I'm going to ask you for an
24 amount that is going to sound high, but which you will
25 later see is the proper amount for a case like this. I

1 will ask you for an award of 16.2 million.

2 Thank you.

3 THE COURT: Come on up for a second, Counsel.

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

6 THE COURT: I'm going to give you folks a
7 break for a few minutes.

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

16 I don't remember where I left off.

17 You are not to conduct any research on your
18 own, which means you cannot talk with others, Tweet
19 others, text others, Google issues, or conduct any
20 other kind of book or computer research with regard to
21 any issue, party, witness, or attorney involved in this
22 case. You're not to form or express any opinion on any
23 subject connected with this trial until the case is
24 finally submitted to you.

25 Probably ten or 15 minutes. We'll see.

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

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

5 Go ahead.

6 MR. TINDALL: We have the ruling up. It's
7 Jared Awerbach's Motion in Limine 15 to permit
8 reference to liens, and it was granted in part, denied
9 in part. And the bottom part of that is the defense
10 may not inquire as to the willingness of particular
11 witnesses to compromise liens or whether liens have
12 been sold or reduced. So with Mr. Roberts' comments
13 where he said, that's all going to the providers, well,
14 everyone in this room knows that that's a complete
15 misstatement of what the reality is. It was out
16 before, but now that he's injected it, we get to ask
17 any witness on the stand who has a lien, what their
18 history is with Lerner's office compromising liens,
19 what the breakout is. It is all now completely
20 relevant based on that comment, so that it --

21 MR. ROBERTS: Your Honor, I said all the
22 money was for the doctors. It is. I'm asking for it
23 for the medical treatment not for her pain and
24 suffering, for the treatment.

25 The problem with Mr. Tindall's argument is

1 he's saying that because the doctors might provide a
2 collateral source in the form of a reduction of their
3 bills, he's entitled to bring in the collateral source.
4 And the supreme court has said no over and over and
5 over again. California, you can only get the amount
6 that's paid. In Nevada, the entire amount comes in
7 regardless of whether it's been reduced by a collateral
8 source.

9 MR. TINDALL: Pulling up the realtime, Your
10 Honor.

11 MR. MAZZEO: Judge, as we're doing this, can
12 I test my equipment?

13 (Record read by the reporter.)

14 MR. TINDALL: Submitted.

15 THE COURT: It's part of the reason I don't
16 like to allow anything about liens, but ...

17 MR. SMITH: They are making their lien
18 argument again. In other words, what the argument is
19 on allowing the liens is that it shows bias because the
20 doctors don't get paid unless the jury awards the money
21 to pay the doctors. So what Mr. Roberts said is
22 exactly what they are saying during that argument.
23 He's saying that you need to award this money in order
24 to pay the doctors. And that is accurate, and that is
25 what each one of those liens says, that -- that we are

1 owed the entire amount of the bill. And as Mr. Roberts
2 said, to allow any other evidence as the collateral
3 source, it's somebody else paying money towards their
4 medical liens -- or their medical bills. Excuse me.

5 MR. ROBERTS: And our contrary evidence would
6 be that all of this pattern and practice they're
7 talking about is in the context of a settlement where
8 someone's willing to pay some money, or in the case of
9 a verdict, that's not enough. So I just need to tell
10 the jury once the doctors get all their money, they
11 have to make sure the verdict's big enough, then we
12 won't have to compromise the lien. And I'm happy to
13 make that argument.

14 THE COURT: I don't think it opens the door.
15 Sorry.

16 MR. TINDALL: Little more for the record,
17 Your Honor, briefly.

18 THE COURT: If there are doctors that don't
19 have liens, then the statement was incorrect. And I
20 don't know -- if the doctors all have liens, then I
21 think his statement's correct.

22 MR. STRASSBURG: There are doctors who have
23 sold their liens.

24 THE COURT: That's the same, though.

25 MR. STRASSBURG: They have sold them. They

1 don't have them.

2 THE COURT: Okay. There's still a lien out
3 there.

4 MR. STRASSBURG: Yeah. But the money's not
5 for the doctor. The money is for the debt buying
6 company.

7 THE COURT: That's the same thing.

8 MR. STRASSBURG: Judge.

9 MR. TINDALL: No, no, no.

10 MR. ROBERTS: Other than that eliminates the
11 bias.

12 MR. TINDALL: What Your Honor said, doesn't
13 your Honor mean the opposite, that with the lien still
14 out there, this is a false statement? Not all of them
15 have been sold. So any doctor still under a lien, we
16 get -- we should be able to -- I'm -- I understand your
17 ruling. I'm just trying to build a record a little
18 further.

19 Any witness on the stand who still has a
20 lien, we should be able to ask them about that because,
21 number one, with Mr. Roberts' comment, it cannot
22 possibly be a collateral source. If -- if he's saying
23 that it all goes to her, which is what he said --
24 excuse me, all goes to the providers, none of it is for
25 her, then it can't be a collateral source in the first

1 place. So that argument's out the window.

2 Secondly, we all know that if she doesn't
3 recover as much as she would like, there's going to be
4 a breakout -- there will be. I mean, I don't --
5 everybody in the room knows who's ever practiced
6 personal injury law. So for them to get the --

7 THE COURT: Hold on. Hold on, guys. We're
8 on the record. She's trying to take it down. You guys
9 can't keep talking.

10 MR. MAZZEO: Sorry, Judge.

11 MR. TINDALL: They should not get the benefit
12 of the collateral source rule and then violate it by
13 telling what is in reality a blatant falsehood about
14 how the money will get divvied up in the event of -- of
15 a ruling that doesn't come out the way they would like.

16 Submitted.

17 THE COURT: Sorry. It's part of the reason I
18 don't allow evidence about liens in. Judge Allf
19 previously made that ruling, so I'm allowing the
20 evidence of liens in. There's lot of rulings in this
21 case that I don't necessarily agree with, but I'm --

22 MR. STRASSBURG: Welcome to our world, Judge.

23 THE COURT: The way it is, liens come in. I
24 mean, we can't talk about where the money's going other
25 than the fact it's going to pay a lien. Sorry.

1 MR. TINDALL: But then why did he talk about
2 it? Can we at least get a motion to strike granted
3 telling the jury to disregard his comment?

4 THE COURT: No, because based on the fact
5 that the liens are coming in, what he said is true.

6 MR. TINDALL: How -- can Your Honor please
7 explain what -- what your Honor means by that? It's
8 not true. We know that's not true.

9 THE COURT: You say we know that's not true
10 as if -- as if you know what's going to happen at the
11 end of this trial. And you don't.

12 MR. TINDALL: But I do know what's going to
13 happen with the breakout of the lien. So let me tell
14 you what I think Your Honor means.

15 Since there are liens, you would be
16 suggesting that a care provider would testify, well,
17 yes, I have this lien and she has to pay me regardless
18 of -- of how it comes out. Even if she loses.

19 THE COURT: That's how they usually testify;
20 right?

21 MR. TINDALL: That's how they usually
22 testify, but that does not preclude us from
23 cross-examining them on that. That's what I'm
24 suggesting the door is open to with Mr. Roberts'
25 comment. Not that it's going to shake out in our

1 favor, but we now get to open the door, we now get to
2 ask the witnesses on cross-examination about that
3 concept rather than them just getting to say that
4 without any challenge.

5 As it stands now, we don't get to challenge
6 their -- their statement that we all know as personal
7 injury litigants -- or counsel that is just false.
8 It's just false. And --

9 THE COURT: There's already a ruling on that,
10 though; right?

11 MR. TINDALL: Well, as the Court has said
12 many times, when there's already a ruling on it, if
13 somebody opens the door, that ruling can be altered,
14 and this is the perfect example of when that should be
15 altered.

16 THE COURT: I don't think it opened the door
17 this time. Next time, ask me again.

18 MR. TINDALL: Thank you, Your Honor.

19 MR. STRASSBURG: Thank you for your
20 consideration, Judge.

21 THE COURT: Mr. Mazzeo, all set up? Let's go
22 off for a minute.

23 (Whereupon a short recess was taken.)

24 THE COURT: Back on the record. We're
25 outside the presence of the jury still.

1 Go ahead.

2 MR. MAZZEO: We have an objection to a
3 statement made by Mr. Roberts during his opening
4 statement with regard to purportedly trying to attempt
5 to define implied permission. And --

6 MS. ESTANISLAO: He stated there are two
7 kinds of permission, express and implied: Yes, Jared
8 you can take the car. Or implied permission where the
9 keys are left out on the counter or on the mantel and
10 the person who's driving knows they can pick them up
11 and go because they have been given permission so many
12 times in the past.

13 I think it's giving a legal definition.
14 Should be an instruction, and we haven't even, you
15 know, addressed this in jury instructions. It's not
16 even the right legal definition. Only thing I can find
17 in case law it just says implied is by conduct.
18 Otherwise, there's no express definition of implied in
19 any of the case law or statute.

20 THE COURT: I think it was a pretty good
21 example.

22 MS. ESTANISLAO: Well, it's -- I -- it's a
23 great example, but only because they can pick for this
24 case. But it's not an example that is statutory or
25 case law. It is not a legal definition.

1 THE COURT: Well, if -- if we can find a
2 definition and instruct the jury on the law regarding
3 that at the end, that's fine. I mean, I don't think
4 it's objectionable that he used the facts of this case
5 to try to explain it. I mean, he wasn't saying, This
6 is what the law is.

7 MS. ESTANISLAO: Well, he says there's two
8 kinds of permission, he says express and implied, and
9 he defined both of them. I --

10 THE COURT: I -- I guess I interpreted it as
11 examples of both not a definition. So I mean, the
12 Court will instruct the jury on the law at the end, so
13 I mean, so you guys need to battle out what a good jury
14 instruction is on permissive use or --

15 MR. MAZZEO: Which we'll do at the
16 appropriate time, but no instructions have been settled
17 at this point, so ...

18 THE COURT: That's a problem.

19 MR. MAZZEO: That is a problem. So that's
20 why we're raising it, making the objection on the
21 record.

22 THE COURT: I can tell you I have one trial
23 in the past where I couldn't get the attorneys to meet
24 together to come up with instructions, so I just did my
25 own. And I didn't let them have a say.

1 MR. MAZZEO: There you go.

2 THE COURT: So --

3 MR. MAZZEO: Well, as you know, we met and we
4 agreed, we stipulated to a number of instructions in
5 this case, so ...

6 MS. ESTANISLAO: But negligent -- but
7 negligent -- sorry, permissive use wasn't in there
8 because we didn't ...

9 MR. ROBERTS: So, Your Honor, if I can just
10 say, you know, just so it's clear for the rest of the
11 trial, they -- they said -- this is not a timely
12 objection. You know, the supreme court has said that
13 there are two different standards on appeal. An
14 objection now is the same thing as if it's raised in
15 their appellate briefs in -- in six months. It's same
16 standard where they have to prove it materially
17 affected the outcome of the case because they didn't
18 timely preserve it when I made that statement.

19 And I was just intending to give examples of
20 the type of facts which I thought could prove the two
21 different types of permission.

22 THE COURT: Okay. I know that there was
23 reference in the opening to exhibits that have been
24 admitted by stipulation. We're not aware of any
25 exhibits that were admitted by stipulation. So you may

1 want to fill the Court in on what those exhibits are.

2 MR. ROBERTS: That was attached to our
3 pretrial order. And I apologize. I will give the
4 Court a separate copy of that. It's Exhibit C, maybe.
5 This came from Exhibit 4 to plaintiff's pretrial
6 memorandum.

7 THE COURT: Yeah, I can't even understand
8 that.

9 MR. ROBERTS: Starting at Exhibit 15, in the
10 Note section, The parties stipulate to admissibility of
11 medical records from Exhibits 15 to 39. Defendants are
12 not waiving objections to usual and customary billing
13 charges. In other words, they agreed it all comes in,
14 but they're not stipulating it's fair and reasonable --

15 THE COURT: Okay.

16 MR. ROBERTS: -- or caused by the accident.

17 THE COURT: Fifteen to 39?

18 MR. ROBERTS: Fifteen to 39, yes, Your Honor.

19 THE COURT: You guys agree?

20 MR. MAZZEO: Yes, that's correct. We've
21 stipulated to all the medical bills and treatment
22 records into evidence, not stipulating to the
23 relatedness to the accident or the usual and customary
24 reasonableness of the bills.

25 THE CLERK: So 15 through 39, and the other

1 ones you just mentioned, are those separate exhibit
2 numbers?

3 MR. ROBERTS: Yes. Exhibits 40, 41, 43,
4 which is the summary of medical bills that was on the
5 board I was showing the jury.

6 THE CLERK: 40, 41, and 43?

7 MR. ROBERTS: Yes. And let me see. There
8 may be a few more that are outside the medical bills.

9 THE COURT: You guys agree to all of those so
10 far?

11 MR. TINDALL: Yes, Your Honor.

12 MR. MAZZEO: They had a summary of the
13 computation of damages. We stipulated to that as well.

14 THE COURT: Okay.

15 MR. MAZZEO: And that was shown on the board.

16 MR. ROBERTS: We've stipulated to Exhibit 4,
17 the 911, otherwise known as the 311 call and
18 transcript.

19 THE CLERK: Exhibit 4?

20 MR. ROBERTS: Exhibit 4. Exhibit 5, which
21 are -- is a photograph that Peter intends to show in
22 his opening. Exhibit 6, Exhibit 7, Exhibit 8, but
23 we've agreed to move the last page, GJL229, which was a
24 fax transmission. We've agreed to move that in the
25 remaining. So it should already be removed in the

1 Court's set, but it was entered at the 267.

2 THE CLERK: Okay. I will have to
3 double-check mine at the end.

4 MR. ROBERTS: And Exhibit 9, which is the
5 salvage title for the Hyundai. And that's it for now.

6 THE COURT: Okay. Everybody agrees?
7 Mr. Tindall?

8 MR. TINDALL: Yes, Your Honor.

9 THE COURT: Mr. Mazzeo?

10 MR. MAZZEO: Yes.

11 THE COURT: All right. You ready to go?

12 MR. SMITH: Your Honor, we just got his
13 PowerPoint which by order was to be given to us before
14 he gives it. It's 965. As I told you, we might need
15 some time to review things, and I'm less than halfway
16 through.

17 MR. MAZZEO: Otherwise, I am ready to go. I
18 also provided to them, the demonstrative exhibits that
19 are -- are in the PowerPoint. I gave them those slides
20 as well which are of diagrams of body structures.

21 THE COURT: Okay. So you need more time to
22 look at it? Is that what you're saying?

23 MR. SMITH: A few minutes, please.

24 THE COURT: All right. Off the record. Give
25 them a few minutes.

1 (Whereupon a short recess was taken.)

2 THE COURT: All right. We're back on the
3 record. We're still outside the presence.

4 Go ahead, Mr. Smith.

5 MR. SMITH: Mr. Mazzeo has a slide entitled
6 "Claim for Punitive Damages." It's Slide No. 94 in the
7 slides that he gave me, although he's told me that some
8 of the slides that are in here are not in his
9 presentation so the number of them may be different.
10 The bullet points in his slide under claim for punitive
11 damages are "Asserts Andrea guilty of oppression or
12 malice for JA's use of car. Knowledge of probable
13 harmful consequences of wrongful act. Conduct so vile,
14 base, or contemptible, it is despised by ordinary
15 people. Claim is absurd, based in greed."

16 MR. MAZZEO: That's what I believe the
17 evidence will show.

18 MR. SMITH: Well, some of that is instructing
19 the jury on the law. And then claim is absurd, based
20 in greed is clearly a closing argument not an opening
21 argument.

22 MR. MAZZEO: Judge, it's what I believe the
23 evidence will show.

24 MR. SMITH: It's his opinion of the evidence.
25 It's not the evidence itself. It's not what the

1 evidence will show and what the jury's opinion of the
2 evidence should be. It's what evidence are we going to
3 present. That's opening statement. This is closing
4 statement in his PowerPoint.

5 MR. MAZZEO: It's the opinion of what both
6 attorneys believe the evidence will show. We're not
7 arguing, but what I believe it will show. That's what
8 it's going to show. It's permissible.

9 THE COURT: I'm going to allow it.

10 MR. MAZZEO: Thanks, Judge. I'm ready to
11 proceed.

12 THE COURT: Ninety something slides?

13 MR. MAZZEO: Ninety --

14 MR. SMITH: 96.

15 THE COURT: All right.

16 MR. MAZZEO: Can we turn the -- we need the
17 monitor back on.

18 THE COURT: Make sure you phrase it that way.

19 MR. MAZZEO: I will.

20 THE COURT: It is likely that you guys will
21 be called up to the bench when the computer does freeze
22 this afternoon also. I apologize in advance for
23 interrupting your opening.

24 THE MARSHAL: Jury entering.

25 (The following proceedings were held in

1 the presence of the jury.)

2 THE MARSHAL: Jury is present, Judge.

3 THE COURT: Thank you. Go ahead and be
4 seated. Welcome back. Sorry for the delay. Back on
5 the record, Case No. A637772.

6 Do the parties stipulate to the presence of
7 the jury?

8 MR. MAZZEO: Yes, Your Honor.

9 MR. ROBERTS: Yes, Your Honor.

10 MR. TINDALL: Yes, Your Honor.

11 THE COURT: I don't think I did that earlier.
12 Should have.

13 Anybody think that any member of the jury was
14 absent earlier?

15 MR. MAZZEO: No, Your Honor.

16 THE COURT: Okay.

17 MR. ROBERTS: All physically present, Judge.

18 THE COURT: All right. Mr. Mazzeo, opening
19 statement.

20 MR. MAZZEO: Yes, Your Honor. Thank you.

21

22 OPENING STATEMENT

23 MR. MAZZEO: May it please the Court,
24 counsel, members of the jury. Good afternoon.

25 IN UNISON: Good afternoon.

1 MR. MAZZEO: Ladies and gentlemen, first and
2 foremost, I want to thank you for participating in this
3 case. And I'm saying that because I believe you have
4 the most important role in this courtroom because after
5 all of the evidence is in, you're going to -- after all
6 the evidence is in for the next few weeks from the
7 witnesses and from -- from whatever exhibits, you're
8 going to view the evidence, you're going to go into the
9 deliberation room, and you're going to render a
10 decision that is fair and just not only to the
11 plaintiff, Emilia Garcia, but also to my client, Andrea
12 Awerbach, and to Defendant Jared Awerbach. And for
13 that, ladies and gentlemen, I'm grateful and I thank
14 you.

15 Now, the opening -- you just heard from
16 plaintiff's opening statement. Mr. Roberts gave that
17 to you for the last couple of hours. And as the judge
18 told you, the opening statement of the attorneys is not
19 evidence. You haven't received any evidence in this
20 case. It's Mr. Roberts' take on what the evidence will
21 show. And I am allowed now to give you my opening
22 statement based on my take on what I believe the
23 evidence will show. So I ask you to withhold any
24 opinions -- opinions you have about what the evidence
25 will show until you actually hear evidence from the

1 witness stand, until you see exhibits that have been
2 marked into evidence and shown to you and published.

3 The benefit of an opening statement, ladies
4 and gentlemen, for -- for one thing, we attorneys have
5 been dealing with this case for many, many years. So
6 we have -- there's a lot of witnesses in the case,
7 treating physicians, a lot of documents that we have to
8 go through. The benefit of the opening statement is to
9 give you an opportunity to hear the names of the
10 witnesses that we're going to call to trial so that you
11 can anticipate when a judge says to an attorney, okay,
12 Mr. Roberts, next witness, you won't be surprised by
13 the name of that witness when that person is called to
14 the stand or on the defense side as well.

15 You'll have -- you'll -- you'll have a
16 reference point, actually, for what that witness -- who
17 the witness is, what their relationship is to the case
18 and what their testimony is likely going to be. And
19 that gives you an advantage because, otherwise, it
20 would be overwhelming for you to just have all these --
21 parade all these witnesses in and the documents before
22 you for the next couple of weeks. It would be
23 overwhelming for you, and we don't want you to miss out
24 on the significant evidence that's presented in this
25 case. So -- so it's -- it's a real benefit and very

1 important part of the trial process to give you an
2 opening statement.

3 And I'll tell you from the start, from the
4 outset, that I believe the evidence will overwhelmingly
5 prove that --

6 MR. ROBERTS: Objection, Your Honor.

7 THE COURT: No. It's overruled.

8 MR. MAZZEO: Thanks, Judge. I believe that
9 the evidence will overwhelmingly prove that Ms. Garcia
10 sustained -- she did sustain injuries, and that's
11 not -- our position wasn't that she didn't sustain
12 injuries as a result of this accident. She did. But
13 what the evidence will prove is that she sustained
14 sprain and strains to her neck, mid back, and low back,
15 and that she had some radiating pain into her lower
16 extremities. That's what the evidence will prove.

17 The evidence will prove, also, that
18 Ms. Garcia overtreated in this case and that treatment
19 after September 1st, 2011, was not necessary, was not
20 reasonable, and wasn't related to the January 2nd, 2011
21 accident.

22 Now, as I get into it -- and I ask you to
23 bear with me. I know it's late on a Friday afternoon.
24 It seems to happen this way, where my opening statement
25 is -- comes after the plaintiffs and it's on a Friday

1 afternoon. I ask you to bear with me because it's
2 going to take some time. I'm going to go through in
3 detail what these witnesses will say and what the
4 evidence will show in this case. So I ask you to -- to
5 stay awake and try to follow me as I do this. I know
6 it's going to get late and later into the afternoon,
7 but I'll try to -- I'll try to move along as quickly as
8 possible.

9 So to start with, and I'm going to point --
10 point your attention to three significant dates in this
11 case. Now, are there only three dates that are
12 relevant? No. There's a bunch of dates, treatment
13 dates, the accident date. You're going to see and hear
14 from witnesses that Ms. Garcia had numerous treatment
15 dates. But -- but I want to focus your attention on
16 three dates that I believe are significant with respect
17 to her claim.

18 First date, January 2nd, 2011. Ms. Garcia
19 claims she had -- she was not injured and she had no
20 symptoms. That is significant, and we'll tie it into
21 the evidence later on as to why that's very
22 significant.

23 Second significant date is January 5th, 2011.
24 She went to MountainView Hospital and was diagnosed
25 with low back strain.

1 Third date, January 26th of 2011, she had an
2 MRI. MRI is a diagnostic imaging study. We'll get
3 into more details of that later on. And that MRI
4 proves that she had no traumatic or acute injury to the
5 spondylolisthesis. And you've heard Mr. Roberts talk
6 about it. The spondylolisthesis is simply a slipped
7 vertebrae. That's a fancy term, long term for a
8 slipped vertebrae. We have vertebrae in our back, and
9 I'll show you a diagram later on. And it's where
10 there's -- there's slippage. One -- the vertebrae on
11 top slips forward anteriorly with respect to the one on
12 the bottom -- on the bottom.

13 So let's now talk about the accident -- the
14 accident of January 2nd of 2011. And that occurred --
15 the accident, by the way, as we know, January 2nd,
16 that's wintertime. So at the time of the accident,
17 5:57 p.m., it's dark out. It's night. And the
18 accident occurred on -- on Rainbow Boulevard going --
19 Ms. Garcia was in her Hyundai, Santa Fe, and she was
20 going southbound on Rainbow in the left lane. And at
21 the same time Jared was driving a Suzuki, and he was
22 coming from a side, a private drive, and -- and he had
23 pulled -- and actually, at the time that he pulled out
24 there was a bus also southbound on Rainbow which had
25 stopped near the curb picking up passengers. In any

1 event, Jared misjudged Ms. Garcia's vehicle as she was
2 coming down, misjudged the distance. He pulled out.
3 In any event he struck her on the passenger side, in
4 the rear passenger door on the passenger side of her
5 vehicle.

6 And as a result -- he didn't strike her
7 directly in the middle of her car. Because he struck
8 her in the back portion of her car, it caused her car
9 to spin 180 degrees. And now it's facing northbound in
10 the -- still in the southbound lane. So she's spun
11 halfway around and is facing northbound on the street.

12 After the accident, Ms. Garcia exited her
13 vehicle of her own -- of her own -- of her own
14 volition. She didn't need any assistance. She opened
15 her door, got out. And then she called 311. 311 is
16 for information. Call 911 for injuries. She called
17 311. And they then transferred her call from 311 to
18 911. For some reason, that's who recorded the call.
19 And you'll hear a recording of the call in this case as
20 well, Ms. Garcia's own voice as she's calling.

21 And -- and -- and you would think that she
22 was a bystander because there is no -- no shock in her
23 voice. There's no -- there's total equilibrium when
24 she's making this call describing where she was, what
25 location. I think there was a disconnection. She

1 called back and then relayed the rest of the
2 information. And then said -- it's only 45 minutes
3 long. And then she said, Oh, the police are here. You
4 may hear that on the recording as well.

5 So the police officer arrives after the
6 accident. Police Officer Figueroa. And she tells him
7 that she's not injured. He had asked her, Are you
8 injured? She says, No. And then she is -- then she
9 goes home after the accident, after the investigation
10 takes place.

11 The -- this is her car, by the way, ladies
12 and gentlemen. A picture of her car, and this is after
13 the accident, not before. And the -- the damage
14 occurred -- you can't see it from this light, but I'll
15 point to it. This is the rear of the vehicle, so the
16 rear passenger door with -- where the impact occurred
17 from the front of the Suzuki. And a close-up of this
18 shot is right here. So this is the damage that
19 occurred to Ms. Garcia's car. It's a 2001 older car,
20 ten years old in 2011. So 2001 Santa Fe Hyundai.

21 And -- and I want to show you -- I'm going to
22 show you the -- a breakdown of the repair cost to her
23 vehicle. And what I'm going to do is just show you
24 what the parts cost. Not labor. Because I want to
25 show you what the actual parts are for the damage

1 that -- that occurred to her car. And that's what this
2 illustration is for.

3 So we have all of these figures are below
4 \$400. We have a rocker panel, 369; a door assembly,
5 front and back, 375 and 325; quarter panel, 375; paint,
6 382; line item markup, 250; other parts, miscellaneous,
7 763. Her total parts for the damage to her vehicle,
8 \$2,840. And the evidence will be that her car was
9 deemed totaled as a result of this accident.

10 Day 2, the other -- the next significant
11 date, January 5th of 2011. So she went to MountainView
12 Hospital, and based on -- she's a historian at
13 MountainView Hospital, and I'm going to show you some
14 quotes that are in the record. She's the historian,
15 she self-reported this, she felt fine after the
16 accident. Her symptoms started today pain free after
17 the accident, and her the impression is low back pain.
18 And I'm going to show you the actual medical record,
19 and the medical record, this -- this is merely a
20 demonstrative exhibit. This consists of two pages.
21 And for the record, I have to reference what it is.
22 This -- this record has already been stipulated into
23 evidence. Not this -- this board but the actual
24 records. And this is Plaintiff's 18, pages 1 and 2.

25 And -- and just before I start to go over it,

1 this is not the complete -- this does not have all of
2 the information from the actual exhibit so this board
3 will not be admitted into evidence. But this does
4 contain portions of pages 1 and 2. I wanted to fit it
5 on one board rather than have two boards come in here
6 and highlight some significant relevant information for
7 you. And I can bring it up because I know the wording
8 is kind of small.

9 So what we have here is at the top
10 MountainView Hospital, Garcia, Emilia Aurora. She came
11 in in the afternoon around 2:07 p.m. and January 5th.
12 Historian is the patient. And it says Additional
13 History, "Felt fine after the accident. No head
14 injury. No loss of consciousness. Wearing seat belt.
15 Patient was pain free after the accident. Patient's
16 symptoms started today." They didn't start Sunday
17 night. They didn't start Monday when she went to work,
18 carried out all her full duties. They started today,
19 "today" being January 5th, three days after the
20 accident. Medications, Advil oral 800 milligrams three
21 times a day as needed. She's taking that in the
22 morning prior to her going to the hospital. Nonsmoker.
23 Neck: No muscle spasm in the neck. Painless range of
24 motion. Nontender. No vertebral tenderness. Back:
25 No back tenderness. No vertebral point tenderness or

1 muscle spasm. Neuro: No motor deficit. No sensory
2 deficit. Condition: Stable. Discharge with low back
3 strain. So that's the record from MountainView
4 Hospital.

5 Moving on to -- to the third day, third day
6 that I believe is -- is very significant and relevant
7 with respect to this case, and that is -- that was the
8 day when she had the -- she had the MRI on -- the MRI
9 on January 26th, 2011. And I also have a board of --
10 the board that I'm using also is Plaintiff's
11 Exhibit 19, pages 5 and 6. Doesn't have all of the
12 information on it of the two pages. I condensed it
13 onto one board so it has the relevant information.
14 However, since this is in evidence, you can certainly
15 view the entire record.

16 So since I have the board here for you, but
17 on the PowerPoint, I want to point out some things.
18 MRI are imaging studies used in diagnosing spinal
19 conditions as well as other conditions of the body, of
20 course, including the vertebrae and disks.

21 What's interesting about the MRI, it shows no
22 evidence of acute or traumatic injury. No evidence of
23 nerve root impingement. And only evidence of a
24 preexisting degenerative condition. These findings,
25 the fact that it doesn't show these things is

1 significant in terms of the spondylolisthesis and the
2 pars defect. The spondylitic referring to the pars
3 defect at L5. What's significant is -- is that --
4 well, we'll get to that. And here's the actual
5 radiologist's report taken after or after she had this
6 film done. Talk about the vertebral body is normal in
7 height and morphology. No significant posterior disk
8 abnormalities at L1-2, L2-3, and L3-4. That will be
9 significant, and I'll tell you why in a few minutes,
10 the fact there were no disk abnormalities or at L1-2,
11 2-3, 3-4. But let's move on to the other findings.

12 No significant neuro foraminal narrowing.
13 The AP diameter of the spinal canal is 1.4 centimeters.
14 What does that mean? That means it's normal. There's
15 no -- there would be no pain because there's no
16 pressure on the -- on the spinal cord and the spinal
17 canal. The AP diameter at L5-S1, 1.3 centimeters.
18 Doctors will tell you, normal. There's no -- there's
19 no encroachment on the spinal cord and the spinal
20 canal.

21 Impression: L4-5, disk desiccation,
22 2 millimeter posterior annular bulge, et cetera. We're
23 going to talk about these findings in a little while.

24 But before I do that, let's talk about some
25 of the key witnesses to -- to this case. We have

1 Andrea Awerbach. At the time of this accident, ladies
2 and gentlemen, Andrea Awerbach was 47 years old. She
3 was a school teacher in the Clark County School
4 District. Since 2013, she has been disabled, and --
5 and there -- and for reasons related to general
6 anxiety, depression. But in any event, she's no longer
7 working in the school district.

8 She's had a number of challenges raising
9 Jared Awerbach, Jared, her teenage son. There were
10 many times when he was defiant. And there was a time
11 during his earlier years when he was an active addict
12 where he smoked marijuana, and -- and an active addict,
13 what you'll learn from the testimony in this case is
14 that this person, Jared, is relentless in manipulating
15 his mom in this case. So there was a constant battle
16 of power -- power struggle going on between the mom and
17 the son.

18 And -- and by the way, I know you've had a
19 chance to observe both Andrea and Jared this week in
20 the courtroom. And whatever you've observed with
21 respect to their relationship, that didn't exist five
22 years ago. It didn't exist 17 months ago. But what
23 the evidence will show is that Jared graduated from
24 Las Vegas Rescue Mission, I'll talk about that in a
25 minute, in January, after a very successful treatment,

1 rehabilitation -- spiritual treatment program.

2 In any event, so there's an issue of
3 permissive use regarding, as Mr. Roberts brought up in
4 his opening statement, and you heard about this, talked
5 about implied and -- and express permission. It simply
6 doesn't exist in this case.

7 Andrea Awerbach is the owner of this 2007
8 Suzuki. She was not the operator of it on the day of
9 the -- on the day of the incident. Excuse me. She was
10 not a passenger in the car. She was -- this was not a
11 family car. This was for her use and for her use with
12 driving others around, including Jared.

13 And at the time on -- at the time that the
14 accident occurred, Andrea -- or at the time, actually,
15 that Jared took the car, Andrea was in her bathroom.
16 In her bedroom bathroom. And she was -- she was -- she
17 was in the shower, I believe, at the time that -- that
18 he took the keys to the car. And he took the car
19 without her knowing it, without her permission.

20 As a matter of fact, she had earlier in the
21 day had him go out to the car to get something from it,
22 but did not give permission to use the car whatsoever.
23 So there was certainly no implied or express permission
24 for him to use the car on the day of the incident.

25 And the first time that she learned he had

1 taken the car was when she received a phone call from
2 the officer who investigated this accident and called
3 Andrea on her phone at home. And that's when she
4 learned that her car was taken by Jared. That's when
5 she learned that he had taken her car without
6 permission and was involved in an accident. That's
7 what the evidence will show in this case.

8 We have Jared Awerbach, who's a -- a key
9 witness to the -- in this case and to the accident,
10 because he was the -- he was the operator of one of the
11 vehicles in this case. He was the son of a single mom.
12 He grew up without a father, without a male role model.
13 He was a troubled teen, grew up in a tough area, tough
14 neighborhood. He had emotional problems. He had -- he
15 had issues -- no secret he had issues with marijuana.
16 He had issues with -- with smoking it, so -- and that
17 created a problem for himself and for his mom.

18 And it's not related to this case except
19 that -- except with respect to -- to having consumed
20 marijuana, causing an accident. That's the
21 relationship to this case. But otherwise, his prior
22 history is not relevant to this case. She -- Jared had
23 taken the keys to her Suzuki, and he took them without
24 permission to use her car. He caused the motor vehicle
25 accident because the evidence will show that he

1 misjudged the distance. As simple as that. Whether or
2 not he was given -- given the circumstances and -- and
3 the location of where this accident took place going
4 southbound on Rainbow with a bus parked to the --
5 parked to the side picking up passengers, whether
6 you're intoxicated or impaired or not, you can --
7 anyone can cause an accident. There's -- most
8 accidents are caused not by DUI people, but by
9 individuals who are not under the influence of
10 anything. It's a matter of perception and
11 misperception.

12 And then you'll learn, as I said, that he
13 graduated from Las Vegas Rescue Mission, and -- and
14 has -- has come a long way from -- from five years ago
15 from when this accident occurred.

16 Police Officer Figueroa is a key witness.
17 Because Officer Figueroa is unavailable -- we had taken
18 his deposition. That was one of the individuals we
19 took a deposition of prior to -- prior -- during the
20 course of litigation. Because he's unavailable during
21 this time period for trial, the parties are going to
22 use his deposition testimony. And we're going to read
23 some portions of his deposition testimony into
24 evidence. So we've captured some of what he said.

25 And he will tell you what I mentioned earlier

1 that -- that when he came and investigated the scene,
2 he was -- he made observations of the individuals at
3 the location, including Jared and Emilia Garcia, and
4 that had he -- had he noticed that if any of the
5 motorists involved in the accident were in shock or if
6 they were holding a body part or if they were limping
7 or had a noticeable physical injury, he would have
8 noted it in -- in the traffic accident report. He
9 didn't. And he said he didn't note any. He did say
10 that he -- it's in the course of his duty to ask
11 motorists and occupants of vehicles if they are
12 injured. Whether or not he notices an injury, he asks
13 them whether they're injured. So he asked Ms. Garcia
14 in this case whether she was injured. She said no. If
15 she needed medical treatment. She said no. So that's
16 the significance of Police Officer Figueroa. There
17 will be other testimony from him as well.

18 And we have Emilia Garcia -- oh, before I
19 move on, to -- to -- before I move on to Emilia Garcia,
20 I want to backtrack a little bit and read some
21 deposition testimony from Jared Awerbach. And I'm not
22 going to show you it on the screen, but the testimony
23 at page 183, line 4, and this is what he is asked:

24 "QUESTION: And on the day of the
25 accident, your mom didn't actually tell you no,

1 you couldn't take the car; is that correct?

2 "She did.

3 "She did?

4 "ANSWER: Yes, sir.

5 "QUESTION: I thought you said that she
6 was in the shower.

7 "She was.

8 "So did you -- did you ask her if you --

9 "We asked. We had. I had asked her
10 to -- to take us to the location. She said no.
11 I said, Can I take it myself, and she said no."

12 And then moving to page 200. Moving to
13 page 200, line -- line 11:

14 "QUESTION: All right. You had -- Jared,
15 you had testified earlier about there being a
16 spare key in the house and -- earlier this
17 morning, and then after that, you said that
18 your mom knew that -- I guess on a prior
19 occasion prior to the motor vehicle accident,
20 that you had taken the key two or -- two to
21 three times.

22 "When you had taken the key two to three
23 times prior to the accident, I'm assuming that
24 the mom didn't know about it until after you
25 had driven the car.

1 "ANSWER: Yes, sir.

2 "Is that correct?

3 "ANSWER: Yes, sir.

4 "QUESTION: All right."

5 Moving on to the next page, 202, at line 1:

6 "There were times before the accident when
7 you had asked your mom for permission to use
8 the car, and you had testified earlier today
9 your mom indeed gave you permission to use the
10 car at various times.

11 "Occasionally --

12 "ANSWER: Occasionally.

13 "QUESTION: Occasionally? And just so I
14 understand, was that -- were you given
15 permission to use the car with an adult
16 licensed driver?

17 "ANSWER: Yes, sir.

18 "Or by yourself?

19 "ANSWER: A licensed driver.

20 "Okay. Each and every time that your mom
21 gave you permission, was it with the
22 understanding that you were going to use it
23 with a licensed driver?

24 "ANSWER: Yes, sir. Or she was under the
25 impression that I'd be driving with a licensed

1 driver.

2 "QUESTION: And she was under the
3 impression, based on the conversation you had
4 with her at the time, that you had asked for
5 permission?

6 "ANSWER: Based on the rules of the
7 household.

8 "QUESTION: Okay."

9 MR. ROBERTS: Your Honor, objection.
10 Hearsay.

11 MR. MAZZEO: He's a party.

12 THE COURT: Come on up.

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

15 THE COURT: Objection's overruled.

16 MR. ROBERTS: Thank you, Judge.

17 MR. MAZZEO: May I proceed, Your Honor?

18 THE COURT: You may.

19 MR. MAZZEO: Thank you.

20 And just continuing from that point, ladies
21 and gentlemen, page 203, line 3:

22 "Okay. And that was that you were not
23 permitted to drive the car unless you were
24 driving with a licensed adult driver?

25 "ANSWER: Yeah."

1 So now let's move on to Emilia Garcia who was
2 the other key witness, obviously, party in this case,
3 key witness to the accident. At the time of this
4 accident, she was working full time at Aliante as a
5 cage cashier from around March of 20 -- 2010 to April
6 of 2014. And her job duties at Aliante included
7 standing for long periods, lifting, carrying, pushing
8 up to 50 pounds, stooping, bending, gripping objects,
9 and kneeling.

10 Now, the evidence will show that at the time
11 of this accident, prior to the accident, that
12 Ms. Garcia had a spondylolisthesis with a pars defect.
13 And that is considered a preexisting condition. She
14 worked on the day of the accident. So that was a
15 Sunday. That was one of her workdays. Her days off
16 were Tuesday and Wednesday. So she works Sunday after
17 getting off of work. She was driving home. That's
18 when the accident occurred. She goes home. Next
19 morning, she gets up. She goes to work. Completes all
20 of her -- her full duties. No limitations at work.
21 She completes her duties, comes home, she's now --
22 she's now -- now it's Monday night. The next day she
23 gets up, she's off all day, doesn't go to the hospital,
24 doesn't go until the following day on Wednesday.

25 And what the evidence will show, ladies and

1 gentlemen, is that had the spondylolisthesis sustained
2 an acute injury, meaning had it become -- become
3 unstable as a result of this accident, where there's
4 compression on a -- on a nerve root, she would have
5 not -- not been able to engage in her activities the
6 next day. She would have had immediate onset of pain.
7 She would not have been able to engage in her
8 activities -- her activities of -- well, let's say her
9 work -- her work duties for the next three years and
10 three months, with the exception of time she took off
11 after her surgery in 2012.

12 So she had -- she continued with all her
13 activities of daily living. She continued -- she
14 didn't have immediate onset of pain, which is -- which
15 the evidence will show is proof of a sprain and strain,
16 a myofascial injury as opposed to a -- an injury to a
17 disk, an injury to the -- to the spinal cord.

18 Aliante has what's called "reasonable
19 accommodations." So that means the employees there can
20 say -- can put in a request for reasonable
21 accommodation based on a physical condition. Meaning I
22 can't do this or I have difficulty bending or I have
23 difficulty walking or pushing or lifting. So they can
24 make that request, and they will be accommodated.
25 That's what the -- that's what that casino had allowed.

1 The evidence will show that Andrea in the three years
2 and three months that she worked at Aliante after this
3 accident never put a request in for reasonable
4 accommodations. She never put a request in to
5 accommodate any so-called, alleged, physical disability
6 that she might have had and that she continued working
7 until April of 2014 when she was terminated for reasons
8 not related to any physical condition.

9 MR. ROBERTS: Objection, Your Honor.
10 Violating motions. Violating the orders in limine.

11 MR. MAZZEO: Judge, sidebar, please. That's
12 not correct.

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

15 THE COURT: The objection is sustained.
16 Going to rephrase that, what you just said; right?

17 MR. MAZZEO: Yes, Judge. Thank you.

18 Ladies and gentlemen, so the evidence will
19 show that in April of 2014, that Emilia Garcia, which
20 is when -- she worked up until that month, and that she
21 had separated from Aliante for reasons not related to a
22 physical condition.

23 The evidence will also show that,
24 subsequently, she had gainful employment at Fiesta
25 Rancho Casino where she worked as an assistant cage

1 supervisor, cage cashier supervisor, which is along the
2 lines of a promotion. And that was in September of
3 2014. And that a month or two later that she had
4 separated for reasons unrelated to any physical
5 condition. That's what the evidence will show.

6 Ladies and gentlemen, also what -- in the
7 evidence, in the records and statements made by
8 Ms. Garcia to various treating providers to -- at
9 various times throughout the course of the litigation,
10 you're going to -- I'm going to point out some
11 statements made by Ms. Garcia. Specifically, there are
12 two areas I want to talk about.

13 The first area is her -- her reporting of the
14 impact after this accident. And I want to highlight to
15 the -- to the officer that she had not reported the
16 speeds of the vehicles after the accident. At
17 MountainView Hospital on 1/5 of 2011, she advised she
18 was in a motor vehicle accident that involved two
19 vehicle, moderate impact. In a recorded statement on
20 1/6, she said that she was driving about 30 miles per
21 hour at impact. Dr. Gross, four months later, she said
22 she's going 35 miles per hour at impact. We go to the
23 next, three months later, now she's going 40 miles per
24 hour at the time of the impact. And for the first time
25 she says that Jared was going 30 miles per hour.

1 Pointing this out to you, ladies and
2 gentlemen, to show that the evidence will show that
3 there are inconsistencies in statements made by
4 Ms. Garcia following this accident. Specifically in
5 this case with respect to reporting the impact after
6 the accident to Dr. Kidwell, a year later, in 2012 that
7 she was going 35 miles per hour when she was struck by
8 the other car. In her deposition now in 2013, she says
9 that she cannot estimate the speed of Jared Awerbach's
10 vehicle when she could earlier. So she's giving you
11 variations on -- on her speed at impact, on whether she
12 knew Jared's at impact. At one point she says no, and
13 at another point, she gives an estimate. Matt Smith
14 Physical Therapy in 2014, now she's says she was going
15 35 miles per hour and that Jared Awerbach's car was
16 going 30 miles per hour at impact.

17 Another -- another -- another area that I
18 want to focus your attention on is -- is her reporting
19 of smoking, that in and of itself is not important,
20 except there are some inconsistencies. To highlight
21 the accuracy of her reporting, MountainView Hospital,
22 all right, she reports she's a nonsmoker, no alcohol
23 use. Seven days later, she doesn't smoke. Okay.
24 That's consistent. But does drink alcohol beverages
25 socially. Same day, Primary Care Consultants also. So

1 she went to see Dr. Gulitz from Neck and Back on
2 January 12th of 2011, same day she went to Primary Care
3 Consultants. She says -- tells Dr. Gulitz does not
4 smoke. She tells Primary Care positive for occasional
5 tobacco use and alcohol use. Dr. Cash says she smokes
6 a pack a month in February of 2011. Doctor gross,
7 smokes six cigarettes a week and four beers a week.
8 Dr. Lemper, now this is in June, month later. Smokes
9 less than a pack per day. That's more than six
10 cigarettes a day, less than a pack. There's
11 20 cigarettes in a pack.

12 Dr. Kidwell. Now, this is significant.
13 Dr. Kidwell on 11/7 of 2012, she says, to him I do not
14 smoke. Do not drink. Six days later, Dr. Gross,
15 Agreed to fully quit smoking to enhance the fusion
16 rate. She's telling one doctor one thing, another
17 doctor something else. It's not that she gave it up
18 for Dr. Kidwell on that day. It's because inconsistent
19 statements. And because of the importance of not
20 smoking for the fusion that's upcoming in December, she
21 tells Dr. Gross something else.

22 She tells Dr. Mortillaro on March 7th of 2013
23 that she started smoking at the age of 13, averages two
24 cigarettes a day, she stopped smoking four months ago
25 which would have been back in December -- or November,

1 so ...

2 Now, what is this case about, ladies and
3 gentlemen? This case is about no immediate onset of
4 symptoms, a preexisting spondylolisthesis with a pars
5 defect that was stable. Defense experts are going to
6 come here and say there's nothing on the MRI imaging
7 studies or the X-ray films that show that it was
8 unstable after this accident. And had it been, she had
9 a continuation of functionality post motor vehicle
10 accident. The diagnosis and what she sustained is not
11 an injury to the spondylolisthesis or to a disk at
12 L5-S1, but soft tissue sprain-strain to her neck and
13 back. That's what she sustained.

14 The diagnosis and treatment plan. So Mr. --
15 Mr. Roberts said during his opening, very telling
16 statement as to how the doctors treated in this case.
17 Mr. Roberts said she was asymptomatic before and that
18 she was symptomatic afterwards, so it had to have been
19 they treated her -- if she was asymptomatic before, no
20 symptoms, and then she had symptoms afterwards, then
21 they're saying it had to have been the
22 spondylolisthesis. Except if they looked at the films,
23 they would have seen that it was not unstable after the
24 accident, so that wasn't it. Mr. Roberts says there
25 there's no other explanation.

1 Well, no, there is. There is another
2 explanation. Myofascial sprain and strain to her -- to
3 the muscles in her -- in her neck and her thoracic
4 spine and her mid back and her low back. So what the
5 doctors did in this case, Dr. Gulitz, Dr. Cash,
6 Dr. Gross, Dr. Lemper, and Dr. Kidwell, they're -- they
7 did a treatment plan based on two things: Ms. Garcia's
8 self-reporting which is subjective, her self-report, I
9 have pain. She's not saying, I have pain at this disk.
10 She said, I have pain in my back. So she has pain in
11 her back with pain going into the lower extremities.
12 And then the doctors, what else did they use? They
13 looked at the MRI -- they looked at the MRI report
14 and/or study, the actual film, and they said, Oh, here
15 we have a spondylolisthesis.

16 Well, if she's complaining of pain and she
17 has a -- this preexisting condition, it must be
18 related. In fact, there's no acute traumatic injury to
19 the spondylolisthesis. So their treatment plan was
20 incorrect. It was -- it was faulty. It was wrong.
21 Her continued pain is related to age, obesity, poor
22 conditioning, and failed surgery. That's what her
23 continued pain is related to.

24 The evidence, ladies and gentlemen, will --
25 will prove four things with regard to Ms. Garcia's

1 testimony in this case. The evidence will show that
2 her reporting and complaints of pain can't be
3 quantified or verified, number one. It's a subjective
4 self-report; that her subjective complaints of pain are
5 not supported by objective medical evidence. That's
6 not to say she doesn't have pain, but it's not
7 supported by any objective evidence, MRIs or X-rays,
8 any other imaging studies. And that her continued
9 complaints of pain are related to age-related changes.
10 And we're going to see that in a film in a couple of
11 minutes. Obesity, poor conditioning, failed surgery.
12 And at one point Dr. Kidwell -- and you'll see it.
13 I'll show it to you in a little while. Even
14 Dr. Kidwell notes in 2015 the poor conditioning that
15 she's in, which he believes is related -- it has some
16 impact on her pain.

17 So this case is not about sympathy for the
18 plaintiff. We -- we -- we talked about that in voir
19 dire. So it's not about sympathy for the plaintiff,
20 oh, she was in an accident, she has this pain, and she
21 posted \$627,000 in past meds related -- they're
22 alleging related to this case.

23 It's not about anger or prejudice against
24 Jared Awerbach or Andrea Awerbach. That's not what the
25 case is about with regard to compensatory damages. And

1 it shouldn't be at all anger or prejudice. That should
2 not be any part of the equation.

3 It's not about the amount of medical
4 treatment. It's not about coming in here and posting
5 all this medical treatment for 627,000, various
6 providers. It's not about that. And the subjective
7 complaints of pain, you'll see that the evidence does
8 not -- will not prove the nature and severity of the
9 injuries or the necessity for treatment.

10 Ladies and gentlemen, the -- the -- the
11 evidence in this case will come in two forms: witnesses
12 and documents. So you're going to have witnesses.
13 You're going to have experts, medical providers, lay
14 witnesses. Parties are lay -- are the percipient
15 witnesses in this case as well. So you're going to
16 have a bunch of witnesses in this case.

17 The other form of evidence are documents.
18 And those -- those consist of medical records,
19 photographs. You've seen some in this PowerPoint. And
20 objective evidence, ladies and gentlemen, you're going
21 to see that some is objective, some is subjective.
22 Objective evidence is information and facts, proof
23 through analysis, measurement, and observations such as
24 MRIs, X-rays, physical examination, medical testing.
25 Subjective evidence cannot be quantified or verified.

1 So what are we talking about, complaints of pain,
2 symptoms, limitations, decrease in -- in activities of
3 daily living. That would be subjective evidence.

4 And -- and one thing you will learn is that
5 prior to trial, the parties stipulated to allow the
6 medical records into evidence. So we agree, let all
7 this -- you don't have to call a custodian of record,
8 to come here, lay a foundation for the admissibility.
9 Let all the medical records in. We're not stipulating
10 to the relatedness, the necessity, or the
11 reasonableness of the medical treatment to this
12 accident. Keep that in mind. So we stipulated only
13 for those records to come into evidence. We're not
14 stipulating that they're reasonable, necessary, or
15 related to this accident.

16 Plaintiff has an obligation to prove their
17 damages by preponderance of the evidence. In other
18 words, is it more likely than not that what she says is
19 related to this accident? More likely than not,
20 preponderance of the evidence. She's entitled to
21 reasonable compensation based on the damages that are
22 related to this accident that's reliable and credible.
23 That's for your determination, not for us to tell you
24 in opening statement what's reliable and credible. You
25 make that determination and you alone.

1 Ladies and gentlemen, the evidence will show
2 that nearly everyone has back pain in their life.
3 Second most common cause of missed days from work.
4 Ranges from dull constant ache to sudden sharp pain
5 primarily associated with myofascial sprain and strain.
6 The cause of pain is spasms, tense muscles, and it's
7 associated with getting older. Generally occurs in 30-
8 to 40-year-olds and older, poor physical fitness, and
9 being overweight. It's a fact.

10 Now, what I have -- what I want to show you,
11 and I designed this -- this flowchart to make it easy.
12 By showing you this now, every doctor that comes in
13 here and talks about how they evaluated, spoke to
14 Ms. Garcia, evaluated her condition either by reviewing
15 medical records or actually treating her, consulting
16 with her in person. What we have is a -- well, let's
17 put it this way: Every doctor is -- is trained in
18 this -- trained and has experience in this universal
19 methodology for evaluating and diagnosing injuries.

20 So we want to get from the complaint, from
21 this initial walking in the door with -- with an ache
22 or a pain or a symptom of some sort to what? Diagnosis
23 and a treatment plan. So they go through this process.
24 Plaintiff comes in, gives -- talks about subjective
25 reporting of past medical history and history of

1 present illness. That's subjective from the patient,
2 not what did the doctor do. He'll look at the records
3 if there are any records from other treatment
4 providers, what have you. He'll order radio diagnostic
5 imaging studies, and then he will perform a physical
6 examination.

7 From these things, he will then render a
8 diagnosis or a differential diagnosis. May not be
9 certain where the source of pain is from. So a
10 differential diagnosis, he might have two or three
11 alternative reasons for -- for the for the pain or the
12 symptoms. And then the treatment plan.

13 Primary goal of treatment providers, ladies
14 and gentlemen, is to diagnose and treat a patient's
15 symptoms. That's what they're focused on. That's what
16 a treatment provider does. So the treatment providers,
17 Dr. Kidwell, Dr. Lemper, Dr. Gulitz, when they -- when
18 looking at the patient, Ms. Garcia when she comes in,
19 they're looking to diagnose her pain and treat her.
20 Not to ascertain causation. Primary goal of forensic
21 medical experts, the evidence will show, is to evaluate
22 the totality of a patient's condition, including injury
23 causation and treatment, and accident-related
24 treatment.

25 So let's look at the first part of this

1 flowchart. We have -- the first box we have complaints
2 and history, which is subjective. That's the patient
3 self-reporting. And what do we have in this case? She
4 felt fine after the accident, no head injury, no loss
5 of consciousness. Symptoms started on 1/5 of 2011.
6 Neck pain, sacral -- low back pain, headache, and then
7 radiating pain -- as opposed to radicular pain,
8 radiating pain down the lower extremity. And that's on
9 1/12. So that's sometime after the accident. History
10 of depression, anxiety, antidepressants. And then we
11 have radio diagnostic or radiographic tests that are
12 performed and physical examinations. We're going to
13 look at the diagnostic imaging of the X-ray of the
14 lumbar spine on 1/17. As opposed to an MRI, this is an
15 X-ray. And it shows a preexisting Grade 2-3
16 spondylolisthesis and L5 spined bifida. Vertebral
17 bodies, normal height and width. Moderate L5-S1 disk
18 disease. This is evidence of -- the L5-S1 disk disease
19 is evidence of something that preexisted. Not an acute
20 finding but something that preexisted the accident,
21 15 days earlier.

22 And then we have the MRI of the lumbar spine
23 which -- which I have up here, which this is what I --
24 has the same findings. What it shows is no acute or
25 traumatic injury. These are all -- these are all

1 age-related changes to the body, and there's no acute
2 traumatic injury. There's nothing on the film. And --
3 and none of the doctors identified anything on the film
4 of any acute or traumatic finding such as edema or
5 swelling in the location of the L5-S1 -- L4-L5, L5-S1.

6 Moving on from that, we have -- not going to
7 go through all the physical exams. This is just an
8 illustration. We have the diagnosis, strain and sprain
9 neck and back. Treatment: Conservative chiropractic
10 treatment, physical therapy, hot and cold packs,
11 muscular electrical stimulation, things of that nature.
12 And that's basically the format for the way a doctor
13 evaluates a patient and then comes up with a treatment
14 plan.

15 So some of the initial medical impressions in
16 this case, we have -- not going to include every single
17 impression, but some of the initial ones, we have a
18 motor vehicle accident, no treatment, no claimed
19 injuries. MountainView Hospital, low back strain.
20 Dr. Gulitz on 1/12 of 2011, muscle spasm, cervical,
21 thoracic, lumbar strains and sprains, headaches.
22 Primary Care, cervical, thoracic, lumbar sprain --
23 sprain and strain.

24 And then, looking at some of the medical
25 diagnoses, these are the defense medical experts,

1 Dr. Michael Klein, orthopedic surgeon, diagnosed her
2 with acute cervical, thoracic, lumbar, and myofascial
3 sprain and strains. Sustained 1/2 of 2011. Resolved.
4 According to Mr. Michael Klein, she shouldn't have
5 receive any treatment after September 1st, 2011.

6 Dr. Robert Odell, physiatrist, physical
7 medicine and rehab physician, significant preexisting
8 conditions, temporary sprain and strain, appropriate
9 care, chiropractic. I'm sorry. Dr. Robert Odell, my
10 mistake, he's a pain -- anesthesiologist pain medicine
11 doctor.

12 And then Dr. Curtis Poindexter is a
13 physiatrist, a physical medicine rehab doctor. No
14 evidence of acute injury to the lumbar spine, no
15 aggravation of the preexisting significant degenerative
16 changes.

17 Let me just -- because you're going to get a
18 lot of terms during the course of the trial, let me
19 just go over some of the terms with you. We have
20 reference to myofascial tissues, fibrous connective
21 tissue for support and protection to muscles and bones.
22 Strain is an injury to a muscle or tendon as opposed to
23 a sprain, stretching or tearing of a ligament.
24 Ligaments, of course, connect bones to bones. So you
25 hear the term sprain and strain, there's a distinction

1 between the two. Symptoms of a sprain, pain in the
2 neck and back that radiate into the arm, shoulders,
3 buttocks, depending on where the pain -- you know,
4 where the sprain is in the back.

5 So now let's get -- let's move forward to
6 the -- talking about the vertebrae. And we'll talk
7 about the disks, the disk conditions at this point. So
8 Mr. Roberts had a model that he had here, showed --
9 showed it to you. Seventh cervical vertebrae is 12
10 through thoracic vertebrae, 5 -- says lumber. It's
11 actually lumbar. That's not my misspelling, but 5
12 lumbar vertebrae. And then sacral. It's actually one
13 but it's -- it's a fusion of the sacral bone.

14 And let's look at the disks, because
15 that's -- that's an issue in contention in this case,
16 the issue of the disk at L5-S1. Even at L3-L4, L4-5,
17 and L5-S1. What you will see -- and as I continue with
18 this -- my opening statement, you're going to see that
19 they never -- Dr. Lemper, Dr. Kidwell, Dr. Gross never
20 identified the pain generator for Ms. Garcia. She
21 continued to complain, continued complaining,
22 continued -- none of their procedures identified a pain
23 generator.

24 So the vertebral -- the disks, what are they?
25 They're shock absorbers between adjacent vertebrae.

1 There's 23 in our column, and these disks sit between
2 the -- the bony -- these bony vertebrae, the bony
3 protrusions. Why? Well, let's talk about what it is.
4 We have an annulus fibrous. It's the tough outer part
5 of the -- of the disk, the tissue part. The inside,
6 the nucleus pulposus, is a mucoprotein. It's really a
7 gelatinous material inside. About 85 percent of it is
8 water. But there is a chemical in it so -- as well.
9 But -- but these two -- this -- this gel that's inside
10 and this disk allows flexibility, rotation, and
11 movement. And we all have it when we're sitting, when
12 we're moving, when we're bent over, extension and
13 flexion and -- and move our -- we rotate. We can do
14 that with our neck. It's a wonderful thing, these
15 disks that we have.

16 The facet joint, I'll show you a diagram of
17 that in a minute. We'll look at it, definition for it.
18 But the facet joint, here we go. So we have -- we have
19 the vertebrae. And then you see this bone -- the bony
20 protrusion. Well, the intra-articular, the bony
21 protrusions articulate with -- between the one on top
22 and the one on the bottom. And it's called the
23 intra-articular process. And here you see extension is
24 bending backward. And then flexion you're -- going to
25 hear these terms because there were physical

1 examinations that were done, and so you're going to
2 hear reference to this. Flexion is -- is bending
3 forward. And that's what is shown in these two disks.

4 Disk conditions, you're going to hear about
5 those. You've seen it on some of these MRI reports,
6 bulges, herniations. They can -- can cause pain and
7 reduce flexibility. Not necessarily, though. The disk
8 bulge extends beyond the edge of the vertebrae. A disk
9 herniation is a tear in the annulus fibrous and the
10 nucleus pulposus, that gel -- that gel-like material on
11 the inside leaks out, and I'll show you a picture of it
12 in a minute.

13 Internal disk disruption, some of the doctors
14 use this term, and it can refer to anything, bulge,
15 herniation, fissure, degeneration. Often referred to a
16 preexisting condition. Lumbar spondylolysis, that's
17 another term you'll hear or spondylitic. It's a defect
18 of the pars interarticularis involving fracture.

19 So let's look -- show you a disk. This is a
20 herniation. So here you have a disk, vertebrae, it's
21 sitting on top it. And there's a tear in the annulus
22 fibrosis. And if the chemical in this gel-like
23 material comes in contact with a -- with a nerve, it
24 can be irritating. It can cause pain. And that's what
25 it's showing in this diagram here.

1 This next diagram is -- it shows a number of
2 different disks. Shows a normal disk, the one on top.
3 Shows a degenerated disk, the second one. Bulging
4 disk, and you can see the bulge is in the back part of
5 the -- it's in the back part, posterior. Herniated
6 disk, you have the -- the tear in the annulus fibrosis.
7 A thinning disk, and then disk degeneration with
8 osteophyte formation.

9 So we have the X-ray -- this -- I didn't
10 discuss this earlier. She also had an X-ray of the
11 cervical spine because she did go to a doctor,
12 complained of neck pain. And it shows that range of
13 motion was adequate with flexion and extension,
14 alignment was maintained. Impression: Loss of
15 cervical lordosis in neutral position. Suggest
16 muscular strain. No evidence of nerve root
17 impingement. No acute injury or trauma to the cervical
18 spine.

19 And the X-ray of the lumbar spine, we went
20 over this earlier, so I'll go through it quickly.

21 Now, this is the diagram of the spondylolysis
22 which is the pars interarticularis fracture. You can
23 see this here. So we have the sacrum and then we have
24 the L5. Lumbar. Lumbar 5. So we have the fracture
25 there.

1 And in -- in the next diagram on the right
2 shows a spondylolisthesis. And you can see that the L5
3 is slipped forward. And -- and it's -- there's a
4 relationship with the fracture back there.

5 We went through -- I went through -- I have
6 this board up, so I kind of went through it, so I'll go
7 through this next slide fairly quickly. The AP
8 diameters of the spinal canals, the 1.4 millimeter at
9 L4-5 and the 1.3 millimeter at L5-S1 are normal. No
10 evidence of nerve -- no evidence of any pressure on any
11 exiting nerve. Again, no acute trauma.

12 Now, this -- this next MRI, I told you
13 earlier, the earlier MRI showed no problems with the
14 L1-2, L2-3, L3-L4 disks. What do we have now?
15 Eighteen months, is it? Twenty months? Could be
16 close -- it's over 20 months actually from the first
17 MRI in January of 2011. Now we're in November of 2012.
18 And it shows posterior bulges at these three levels.
19 These are new, ladies and gentlemen. That's what the
20 evidence shows. Not from an acute injury. Age-related
21 changes. That's what it's from. That's what this
22 shows. No evidence of any acute trauma to those.
23 L4-L5 and L5-S1 shows desiccation now on this film and
24 annular bulges.

25 L4-L5 shows a Grade 2 spondylolisthesis, same

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

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

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

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

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

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

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

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

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

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

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

1 to determine the totality of the condition, the
2 relatedness of the treatment, and causation. The MRI,
3 Dr. Klein will -- will come in and say that it shows no
4 injury to the nerve root or -- or the preexisting
5 Grade 2 spondylolisthesis. The pri -- and he will
6 testify that the primary feature of an unstable
7 spondylolisthesis, immediate onset of pain. Now, when
8 we say "immediate," it may not be simultaneous with the
9 accident, but it's going to be the same day. It's
10 going to be within hours after the accident, four hours
11 maybe at the onset, or six at the most. It's going to
12 be that day. It's a primary feature. And that she
13 only sustained sprain-strain to her neck, mid back, and
14 low back, required only conservative care from 1/5 of
15 2011 to 9/1 of 2011. And her continued complaints are
16 related to obesity, poor conditioning, age-related
17 changes, and the failed back surgery by Dr. Gross.

18 There's no basis and no necessity for
19 Dr. Kidwell's injections or for Dr. Gross's fusion
20 surgery. Dr. Lemper, Dr. Kidwell, and Dr. Gross
21 treated her subjective complaints and the MRI showing
22 the preexisting condition. And that was the basis for
23 her treatment modality or the model of treatment that
24 she was given in this case, and that they made wrong
25 assumptions about the stability of the

1 spondylolisthesis after the motor vehicle accident.
2 And Dr. Klein's opinion is that these injections and
3 surgery were aggressive, not medically necessary, not
4 reasonable and not related to the motor vehicle
5 accident.

6 Dr. Robert Odell, pain medicine and
7 anesthesiologist, diagnosis and treatment of range --
8 this is -- a pain management medicine doctor is
9 different from a physiatrist and a physical medicine
10 rehab doctor. Pain medicine deals strictly with pain,
11 and -- and diagnosing a treating -- treating a range of
12 painful disorders, including spinal injuries.

13 He reviewed the reports. He -- he -- his
14 opinion is that she sustained only temporary strain and
15 sprain, only conservative treatment would be
16 appropriate as related to the accident. Reviewed the
17 billing charges of Drs. Lemper and Kidwell and
18 determined that the procedure and surgical center
19 charges were excessive, and that Dr. Lemper and
20 Kidwell's treatment was not related to the motor
21 vehicle accident.

22 Dr. Curtis Poindexter. It's what a physical
23 medicine rehab doctor does, treats a wide variety of
24 conditions. So we're not just talking pain, but
25 different conditions affecting the brain, spinal cord,

1 nerves, bones. It's really the entire body is what a
2 physiatrist treats. And they design comprehensive pain
3 centered treatment plans. And so we hired
4 Dr. Poindexter to come in and look at the life-care
5 plan proposed by Dr. Oliveri. And he performed a
6 medical records review to determine the nature of the
7 injuries, diagnosis, treatment, and Dr. Oliveri's
8 life-care plan. And -- and he reviewed, of course, the
9 reports. He has to review all the records to -- to
10 come to a -- a conclusion about whether she needs
11 future medical treatment.

12 He's consistent with the other experts in the
13 case, the defense, and that her presentation of
14 symptoms proved that she sustained only -- only soft
15 tissue sprain and strain, that obesity and smoking
16 predated the motor vehicle accident was significant
17 for -- for progression of the lumbar spine degeneration
18 and inability to heal. So he determined -- and he'll
19 testify that Dr. Oliveri's life-care plan is moot
20 because there was no objective medical reason she would
21 require any medical treatment related to this accident
22 into the future.

23 Dr. Thomas Ireland is -- has a PhD in
24 economics. Evaluated Dr. Smith's calculation for lost
25 household services, life-care plan, and hedonic

1 damages. Hedonic damages is another word, used
2 interchangeably with loss of the enjoyment of life.
3 Dr. Smith made false -- Dr. Ireland will say that
4 Dr. Smith made false assumptions regarding the
5 household services loss, and that Dr. Smith relied on
6 Ms. Garcia's self-report to conclude that she had an
7 80 percent loss in household services. Not any
8 objective evidence. He relied on -- on Ms. Garcia's
9 own self-report regarding that.

10 The -- Dr. Ireland will tell you that
11 household services decline as one ages. But Dr. Smith
12 did not take this into consideration when he performed
13 this future loss of household services for Ms. Garcia,
14 that Dr. Smith had no opinion or -- regarding the
15 adequacy or necessity for Dr. Oliveri's life-care plan,
16 and that's because -- fair enough. I mean, Dr. Smith
17 is not a medical specialist. He was just taking
18 whatever Dr. Oliveri gave him and said -- came up with
19 a future value or a present value for this life-care
20 plan proposed by Dr. Oliveri.

21 Hedonic damages is the diminishment in the
22 value of the -- of the enjoyment of life. There are no
23 uniformity in studies for determining the value of
24 life. And he'll say that Dr. Smith's methods are not
25 reliable or accurate, that he doesn't separate the

1 value of pain and suffering from the loss of enjoyment
2 of life. Dr. Smith relies on plaintiff's subjective
3 self-statements regarding her diminishment in her value
4 of life. So, again, there's no objective criteria,
5 that Dr. Smith relies on to -- to say that -- that she
6 has a diminished enjoyment of life.

7 Basically, he had Ms. Garcia, who knew she
8 was coming in to see this expert related to her
9 medical-legal claim, and he says, So what do you think?
10 What's your opinion, Ms. Garcia? And it wasn't even
11 Dr. Smith, by the way. It was an assistant of his.
12 What do you think is your diminishment of loss of
13 enjoyment of life? Well, let's think about this for a
14 second. Okay. Eighty percent. Okay. Then he plugs
15 that into the equation. It's not -- that's not an
16 objective -- that's not an objective factor that -- and
17 Dr. Ireland criticizes it for that. There are no
18 standards or controls for Dr. Smith's methodology.

19 So those are some of the defense experts
20 that -- that we're going to present.

21 Now, we have plaintiff's experts, and -- and
22 they -- they were retained -- in addition to her own
23 medical doctors, she retained some medical experts
24 and -- and other experts, accident reconstructionist --
25 accident reconstructionist, and -- and economist

1 Dr. Smith to support her claim in this case.

2 And one doctor is Dr. Michael Freeman you'll
3 be hearing from. He's a chiropractor. He became a
4 chiropractor in 1987. He has multiple degrees in
5 philosophy, public health. He's a medical scientist in
6 psychiatry, has a degree in epidemiology. He's
7 retained to rebut the opinions of Dr. Scher and medical
8 doctors. He's not certified and has no degrees in
9 accident reconstructionist or biomechanical
10 engineering, but he was retained to rebut a doctor,
11 Dr. Scher's opinion who is -- who has degrees and who
12 is qualified -- and specialize -- specializes in
13 accident reconstruction and biomechanical engineering.

14 Dr. Freeman also doesn't have any
15 qualifications or license to practice medicine, even
16 though he obtained a license from Umea University in
17 Sweden. I think it was an online course, but he
18 doesn't have a license to practice medicine in this
19 country. And he was suspended, you'll learn, for
20 falsifying records when he was at Western State
21 Chiropractic College. That's on -- that's one of --
22 that's in his background.

23 And so what -- what did Dr. Freeman do? He
24 searched -- he's an epidemiologist, basically, I guess.
25 That's the -- that's what he brings into this case, and

1 he searched the statistical premise of
2 spondylolisthesis in the general population. And he
3 assumed that if the plaintiff had surgery to the
4 spondylolisthesis that it had to have been from the
5 traumatic event. He'll contend that surgery to the
6 spondylolisthesis was related to the motor vehicle
7 accident because most nontraumatic preexisting
8 spondylolisthesis do not need surgery.

9 Problem is, is that Dr. Freeman didn't make
10 any determination as to whether her spondylolisthesis
11 was traumatic. He just assumed that she had one that
12 was preexisting, she had surgery on it by Dr. Gross;
13 ergo, oh, well, then she needed the surgery in this
14 case. That's -- there's a disconnect there from
15 Dr. Freeman.

16 No treatment provider has ever identified the
17 pain generator in this case. They identified a
18 preexisting condition. That's it. And they want --
19 the evidence will show that they want the defendants to
20 pay for it. They never considered that plaintiff's --
21 he never considered plaintiff's pain is not related to
22 the spine. He just assumed that it was.

23 Dr. Gross. Now, Dr. Gross is not only a
24 treating physician, he was hired to do some expert
25 reports in this case as well. So he did a medical

1 records review, you know, for the plaintiff of her --
2 of her records in addition to doing surgery. And 9/9
3 of '13, he did three or four reports regarding the
4 opinion, care, and treatment of plaintiff related to
5 the accident. He reviewed Dr. Oliveri's comprehensive
6 medical evaluation and life-care plan and Dr. Smith's
7 economic losses.

8 Why -- why a neurosurgeon would review an
9 economic loss package, it's not -- the evidence will
10 show that he really wouldn't have any -- he has no
11 skill or expertise to review an economic loss report,
12 but he reviewed it nonetheless. And that his opinion
13 was that he was largely in agreement. But he gave no
14 analysis. He just said, Yeah, all of the medical
15 treatment was related but gave absolutely no analysis
16 in his report.

17 And on 1/16 of '14, he reviewed Dr. Oliveri's
18 supplemental report regarding surgery and nurse
19 assistant bills, his own surgery bill, and he actually
20 disputed Oliveri's opinion, where Dr. Oliveri opined
21 that his bills were excessive for the surgery that he
22 performed.

23 Now, we have Dr. David Oliveri. He was hired
24 to do a medical records review or a comprehensive
25 medical evaluation, however you word it, and life-care

1 plan on 6/4 of '13. Now, he performs between four and
2 nine of these forensic evaluations per year for Glen
3 Lerner & Associates. He primarily does these forensic
4 evaluations for plaintiffs -- plaintiff litigants.

5 So -- and his conclusions regarding the
6 mechanism of injury are based on Ms. Garcia's
7 self-report. And he'll tell you that on the stand
8 because I'll ask him about that. His medical causation
9 opinion is based on Ms. Garcia's report of no prior
10 injuries, based on her report of symptoms, no -- I'm
11 sorry, no -- reported no prior injuries, symptoms, or
12 treatment. So because of that, he said, Okay, well,
13 she's telling me she had no prior injuries, symptoms,
14 or treatment, that automatically the causation had to
15 have been related to this accident.

16 He administers a pain questionnaire to her.
17 Those pain questionnaires are very subjective. And she
18 knew that when she went to him that she was coming to
19 him for an evaluation related to her medical-legal
20 claim. He's hired as an expert not as a treater.

21 He has a diagnosis of motion segment injury
22 with an aggravation of a previously asymptomatic
23 spondylitic spondylolisthesis. But there's no medical
24 evidence, again. And you'll hear this over and over
25 during the trial that the previously asymptomatic

1 spondylolisthesis ever became symptomatic. Because
2 there is no immediate onset of symptoms and she -- she
3 continued with her functionality after this accident.
4 If you had a symptomatic spondylolisthesis, you would
5 have immediate onset of pain and you could not function
6 the same way afterwards if it became unstable. It --
7 it's -- the doctor will explain to you the pain that's
8 associated with this and how it encumbers or inhibits
9 and -- and -- and impairs your ability to actually
10 move.

11 Neither Dr. Cash nor Gross -- Dr. Gross ever
12 identified any objective finding of acute injury on
13 any. So these are their own doctors now. Never
14 identified any objective injury of acute finding on the
15 study.

16 And then she continued working full time at
17 Aliante until April of 2014. Then got a full-time job
18 at Fiesta Rancho 9/14 with no restrictions.

19 The evidence with Dr. Oliveri's life-care
20 plan will prove that it's random, it's subjective, not
21 related to the motor vehicle accident, and not
22 supported by objective medical evidence.

23 So yeah, the defense evidence are -- are
24 saying that the evidence will prove that she doesn't
25 need any 1.2 -- I'll look at the figure -- we'll look

1 at the figures together in a minute because I have it
2 in a slide, that 1.18 million or whatever it is, not
3 related to this accident. She's not entitled to it.

4 This is Dr. Oliveri's. Now, he did three
5 life-care plans. We're going to look at this for a
6 moment. There's a couple of things that we need to
7 look at. So we can't see the -- okay. The left side,
8 the numbers are cut off on this page because it doesn't
9 fit the screen. But in any event, you see Life-Care
10 Plan No. 1 is 2013. I don't know if you can see that
11 in this first column. Second column 2014, third column
12 2015. I'll just refer to them as 2013, '14 and '15,
13 okay, first, second, and third. So they're one year
14 apart.

15 And -- and the first life-care plan, there's
16 no need for -- he said -- he doesn't talk about the --
17 the bottom line, the repeat radiofrequency ablation,
18 the rhizotomies, the burning by radiofrequency. By the
19 way, doctors will tell you, you burn a nerve -- because
20 Mr. Roberts brought this up. You burn a nerve, the
21 nerve regenerates, but not in the course of a week.
22 And the evidence will show -- and I'll show you in a
23 few minutes -- that she complained -- after she had
24 this radiofrequency last year down on her hip in her
25 lower -- or the sacroiliac joint in the lower spine,

1 that she complained of pain returning in a week. It's
2 impossible if that's -- if that was the pain generator,
3 for pain to return -- for the nerves to regenerate in a
4 week. It's impossible. Generally, 6 to 9 to 12 months
5 before the nerves regenerate enough to send a signal of
6 pain. But she complained. We'll see it. We'll look
7 at her response.

8 In any event, let's look at page 2. So here
9 we have -- it's just a continuation. He recommends
10 lumbar reconstructive surgery, and I don't have the
11 ranges -- ranges for the reconstructive surgery and for
12 the -- and for the neuro stimulator rechargeable
13 implant. With this chart, I'm going with the lower
14 figures. But in any event, I give you the full ranges
15 on the bottom. So this is just demonstrative. It
16 doesn't have exactly every figure in Dr. Oliveri's
17 report.

18 But in any event, 2013, he recommended that
19 she needs 384- to 436,000 for the rest of her life.
20 One year later, he more than doubles it and says, Well,
21 no, she needs a neuro -- you know, a spinal cord
22 stimulator, 116,000. That's not in Chart 2013. Now
23 she's going to need a rechargeable implant pulse
24 generator for 322,000, minimum charge. And that the
25 reconstructive surgery, still recommended that 20, 30

1 years down the road. So now, year later, now his
2 life-care plan -- this is the randomness -- the
3 evidence will prove the randomness of his -- of his --
4 of his treatment recommendations. 811,000 to
5 1,077,000. That's -- he doesn't stop there.

6 2015, he did a repeat RFA, radiofrequency
7 ablations, and he recommends two a year, 15,000 each.
8 Two a year, 30,000 times the rest of her life, 1.4 --
9 sorry, 1.440 thousand -- I'm sorry, 1,440,000. So
10 they're recommending that she -- grand total of 1 --
11 now they double it again. 1,963,000 to 1,983,000. But
12 then it doesn't stop there.

13 Then he says, Well, if -- if the
14 radiofrequency ablation doesn't work, okay, then we'll
15 scratch that and we'll go on with the optional spinal
16 cord stimulator. And now that is -- figure has changed
17 again from 2014 of 116,221. Okay. Initial implant is
18 the same. But the nerve stimulator rechargeable
19 implant goes up from 322,000 to 524,000. If we waited
20 until 2016, who knows what would show on the chart. So
21 that's Dr. Oliveri.

22 Dr. Stan Smith. He was hired to calculate
23 value of losses, household services, future medical
24 care, and hedonic damages. Hired to calculate the
25 value -- I'm sorry, 75 percent of his forensic work is

1 for plaintiff's personal injury cases, personal injury
2 cases. And Dr. Smith made the unsupported assumption
3 that Ms. Garcia had a decrease in household services
4 and enjoyment of life based on her self-report. Not
5 based on any objective criteria. Dr. Smith never
6 verified her self-serving statements regarding her
7 decrease in the value in the household services.

8 The -- for the life-care plan, all his
9 figures that Dr. Smith refers to are based on figures
10 provided by Dr. Oliveri. So they weren't verified by
11 Dr. Smith. He's just crunching numbers for you, giving
12 you a present value.

13 No objective criteria was applied to validate
14 plaintiff's, Ms. Garcia's subjective self-measure. No
15 objective criteria. There was no objective finding of
16 her baseline prior physical functioning level for
17 household services or for enjoyment of life. And --
18 and Dr. -- I wanted to just say one other thing. What
19 Dr. Smith does is that Dr. Smith -- this is Dr. Ireland
20 will come in and explain this. Dr. Smith assigns a
21 dollar value of \$131,119, 131,000 for your enjoyment of
22 life each year of your life. That's what he assigns.
23 That's a dollar value. It's not based on any -- on any
24 figure recognized in any literature. That's his own
25 number that he came up with.

1 So let's move on to the -- the actual -- some
2 of the treatment. We have 12/26 we -- we -- the
3 defense contends this was unrelated and unnecessary.
4 For this one-day surgery, Dr. Gross earned 77,000,
5 Pacific Hospital 281,000. So I'm breaking down some of
6 this. This is on -- this was on plaintiff's board.
7 11,000 for this intraoperative monitoring company. For
8 the RN, surgeon assistant, Ronald Filmore, \$33,000 for
9 this surgery. Total 411,000. Of the 627,000, 411,000
10 is from this one-day surgical procedure. She was in
11 the hospital for several days. The evidence will show
12 that, but not getting operated on for several days.
13 Operated on on December 26th of 2012.

14 Dr. -- the evidence will show that
15 Dr. Gross's surgery never relieved Ms. Garcia's alleged
16 pain complaints and it was deemed a failed back
17 surgery. Never medically necessary because the
18 spondylolisthesis was not unstable from the accident,
19 not related to the accident, and it was related to a
20 preexisting degenerative condition. That's what the
21 evidence will show. Not the responsibility -- not
22 derivative from this accident, not the responsibility
23 of the defendants in this case.

24 Dr. Gross, then, in addition to this one-day
25 surgery, he had 17 appointments. He had a couple

1 before the surgery. Most of his appointments, 17 in
2 all, follow-up appointments, as well as the four
3 litigation expert reports, he had 17 appointments with
4 Ms. Garcia. And the evidence will show he didn't treat
5 her. He's a neurosurgeon. He's a technician. He did
6 a surgery and now he's out. But he's doing his
7 follow-up with her.

8 And what does he do in -- in his reports
9 after the surgery? Continue your medication management
10 with Dr. Kidwell. That's what the records will show.
11 We contend that she didn't need any of these continued
12 consultations with Dr. Gross after the surgery. Not
13 necessary.

14 Dr. Lemper, he had two procedures, 9
15 consults, 21,421. His surgery center that he owns,
16 Center for Surgical Intervention for the two
17 procedures, 21,081. Not only is it excessive,
18 unreasonable, but it's not related to this accident.

19 Dr. Kidwell, 45 visits. 42 of the visits
20 were for prescription refills. \$64,000. And then, for
21 Medical District Surgery Center, we have other charges
22 and Surgery Art Center.

23 I know -- ladies and gentlemen, I know this
24 is a lot of information. It's going to be overwhelming
25 during the next couple of weeks with trial with these

1 witnesses, direct exam, cross-examination. I know it's
2 late on a Friday afternoon. I know it's a lot of
3 information. I still believe that it's important to --
4 for me to -- to go over this information with you so
5 that come next week and the week after, you have an
6 appreciation for what you're going to be hit with --
7 with within terms of treatment providers and experts.
8 And I know it's late, and you're getting tired, so I
9 ask you to please -- please stick with me.

10 I'm going to go quickly through the spinal
11 injections, what they are. These -- this is going to
12 come out. This is what you're going to hear. So we
13 have selective nerve root blocks, primarily used to
14 diagnose the specific source of the nerve root. So we
15 have these injections that can be both diagnostic and
16 therapeutic. So if it can give relief to symptoms, but
17 also diagnostic in terms of identifying the pain
18 generator.

19 The problem which we'll see in a few minutes
20 is that Dr. Lemper and Dr. Kidwell performed a number
21 of procedures bilaterally at multiple levels. So even
22 if she gained some relief, minor relief for a short
23 period of time, there is absolutely no way he could
24 identify what the pain generator was.

25 But what we learn over all is that these

1 procedures basically didn't work, and that's why
2 they're now pushing her for spinal cord stimulator and
3 she -- or radiofrequency ablations.

4 Medial branch block, just keep in mind when
5 we talk about medial branch block we're talking about
6 the facet joints as opposed to a disk -- discogenic
7 pain.

8 Transforaminal epidural steroid injection.
9 I'm going to go through some of these quickly at this
10 point. I know it's a lot of information. It's
11 probably overload at this point, and I thank you for
12 sticking with me still.

13 Spinal cord stimulator. You heard something
14 about that. It's used with patients with chronic and
15 severe neuropathic pain. It takes -- it's a 20-minute
16 procedure to place the stimulator leads in.
17 Neuropathic pain is pain due to damaged nerve tissue.
18 It's not used for myofascial sprain-strain. We contend
19 it's not necessary to even give her a trial spinal cord
20 stimulator in this case. The permanent is not
21 necessary at all. There's no evidence that plaintiff
22 damaged any nerve tissue.

23 I'm going to go quickly through some of
24 the -- the dates and consultation -- the consultation
25 dates that Ms. Garcia had with Dr. Lemper and

1 Dr. Kidwell. So he saw -- Ms. Garcia saw Dr. Lemper.
2 I know the dates are cut off, but it's 6/29. So a
3 month after seeing Dr. Gross, she went to Dr. Lemper.
4 That's in 6/29. And then monthly 7/14, and so on. I'm
5 not sure why it's cut off like this.

6 Well, in any event, so we're in 2012. And
7 she's basically getting muscle relaxers, pain
8 medications from -- from Dr. Lemper. She goes to
9 Dr. Kidwell in March -- sorry, July -- I'm sorry,
10 august of 2012. So that's where she starts with
11 Dr. Kidwell. And I apologize that's cut off. So
12 that's -- that's August of 2012. And then so on.

13 Is there a -- sorry. Is there a reason why
14 it's not on the full screen?

15 THE COURT: I don't know.

16 MR. MAZZEO: Okay. It is what it is.

17 THE COURT: I'm seeing the dates on my
18 screen.

19 MR. MAZZEO: You are? It's just not on this
20 screen for some reason. Okay.

21 But the month is cut off on the left-hand
22 side, ladies and gentlemen. I apologize for that, but
23 basically she's going every month to Dr. Kidwell, and
24 she's continuing her -- we know that her fusion surgery
25 was December of 2012. And if it worked so well, the

1 evidence will show that she's continuing to get value
2 in Zanaflex and Prozac and Norco and all these
3 medications from Dr. Kidwell who continues to treat her
4 with pain meds for a surgery that should have
5 corrected -- supposedly corrected her pain.

6 And then in 2014, 2015, all the way to the
7 end. And I defined -- I showed what some of these
8 medications are. We have pain medication, Lortab
9 Ultram, Norco. Anti-inflammatories, Naproxen,
10 Zanaflex, Relaxin, Soma. Notwithstanding the fact that
11 Dr. Kidwell did not give her any oxycodone she tested
12 positive for oxycodone, and I will tell you the date in
13 a second.

14 MR. ROBERTS: Objection.

15 THE COURT: Come on up.

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

18 MR. MAZZEO: Judge, I withdraw the last
19 statement.

20 THE COURT: About the oxycodone?

21 MR. MAZZEO: Yes.

22 THE COURT: Okay.

23 MR. MAZZEO: Ladies and gentlemen, let me
24 correct something. I made a reference -- I forget the
25 date, 10/14 of '15, drug screen, positive for oxycodone

1 Dr. Kidwell, at the Norco and Lortab, that
2 apparently -- Norco is oxycodone. So that -- that is.
3 So it's -- it's an accurate reference to what she --
4 that she's taking the medication, so -- and then.

5 So I was giving definition -- sorry. Sorry.
6 I was giving you definitions for some of the
7 medications also on the bottom of the screen. The very
8 last date is 12/9 of 2015. So she's still on this
9 medication.

10 And now what I want to show you -- oh, I --
11 the dates are important. So we know that 8/30, the top
12 date for the selective nerve root block, that's
13 actually 8/30. So on 9/6 -- so I have the procedures
14 on the left side of the page, the responses on the
15 right. She had initial 60 percent relief to the low
16 back. Leg pain, 30 percent relief and the hip pain.
17 Then on 9/14, so we're about two weeks after the
18 procedure, and she said that the low back pain and pain
19 and numbness radiating to both legs over the last week
20 had increased. So it increased about a week after the
21 procedure.

22 Typically, selective nerve root blocks,
23 you're going to have relief -- there's an expectation
24 of relief for at least several weeks. Didn't even last
25 that long. So the question as to whether that actually

1 identified any pain generator or was used in -- in an
2 area where there's a pain generator.

3 And then she reported to Dr. Lemper she bent
4 to wash her legs last night and it increased the low
5 back pain radiating into both legs.

6 She had a procedure, then, on -- on 9/14, I
7 know it's cut off, but this next date is 9/14, medial
8 branch facet blocks bilaterally. Bilaterally, three
9 levels. He's not identifying a pain generator. So --
10 and -- and then on -- later on, she says, Pain
11 persistent in back radiating into the tailbone.

12 These are the procedures done by -- the first
13 two are done by Dr. Lemper. And then the selective
14 nerve root block, the date's cut off, that's the start
15 of the procedures done by Dr. -- by Dr. Kidwell.
16 That's on 9/27 of 2012. Okay. And then so 9/27, about
17 two weeks later. Complete relief for one to two days
18 but symptoms returned. That's not a positive response
19 for a diagnostic test, one to two days. When they're
20 injected with a selective nerve root block, they
21 receive a local anesthetic which could account for some
22 of the relief in pain, so, but -- that's not a positive
23 indicator for a therapeutic response.

24 Given a spinal cord stimulator on 8/25,
25 returned three days later. Self-report, 70 percent

1 improvement. There's variation in the literature. But
2 typically it should be in five days. He kept it in for
3 three days. We contend that that was not a valid test
4 to determine whether she -- that would assist her by
5 having a permanent spinal cord stimulator.

6 Let's keep going on. These -- the sacroiliac
7 joint injection in December of -- I think it's December
8 of 2014. Yeah, December of 2014. Doesn't identify the
9 source of the pain as the facet joints because he's
10 doing both a sacroiliac joint injection and -- and
11 facet joint injection bilaterally. Facet joint
12 injection for the pain stemming from the facets.
13 Doesn't identify whether -- where the pain's coming
14 from.

15 And let's go -- I'm going to move quickly
16 now. We're going to go down to the RFA, radiofrequency
17 ablation. That was -- that was done on September of
18 last year. September 24th of 2015. So she reports a
19 60 percent decrease in low back pain and a right
20 sacroiliac joint pain, and low -- lower extremity pain
21 mostly resolved. Okay. That's fine. Okay? So
22 that's -- that's one week after.

23 But then she reports on 10/14 that her
24 improvement from that injection on 9/24 was for one
25 week. Radiofrequency ablation, you burn the nerves,

1 you cut the telephone cord. There's no communication.
2 There's no pain signal being sent. Pain can't return
3 if he did a successful radiofrequency ablation.

4 What does Dr. Kidwell say? She's really
5 deconditioned. Her own treatment doctor. Then she has
6 a flare-up and the usual pain since last office visit.
7 So that's on 10/14.

8 So what does the plaintiff do on 10/15? She
9 goes to Dr. Oliveri, give me a new life-care plan for
10 the radiofrequency ablations. Even though it doesn't
11 work, give me give me a life-care plan. He recommends
12 two of these a year for life for \$1,440,000. It's
13 random. It's arbitrary. It's not supported by medical
14 evidence, by any diagnostic positive outcome from the
15 radiofrequency ablation that she had.

16 Dr. Lemper and Kidwell's procedures were not
17 diagnostic of any pain generator or therapeutic. They
18 never identified a pain generator in the back.

19 Medical specials comparison. You saw the
20 plaintiff's chart earlier. I'm going to -- I hesitate
21 sometimes because I have to slow down for the court
22 reporter. I'm going too fast, so I have to be mindful
23 of that, be mindful of the time of the day that it is
24 as well.

25 So we have related medical specials

1 comparison. We say yes, she did sustain injuries from
2 this accident, and that the evidence will show that she
3 went to MountainView Hospital. Okay. That's
4 appropriate. Pay her for it. The evidence will show
5 the Fremont emergency services. Okay. Neck and Back
6 with Dr. Gulitz. Give her all of it. Primary Care
7 Consultants, fine. Las Vegas Radiology for the initial
8 films. Not for all of the films that she had, just for
9 the initial films in January and then February. It's
10 2000 [sic].

11 Not for Dr. Cash. Not for the Millennium
12 Laboratories, not for Dr. Gross. Benefit of the doubt.
13 Did he even give her -- the evidence will show that,
14 okay, an accident-related medical cost would be 7,000
15 for one of Dr. Lemper's procedures. It wasn't
16 diagnostic but, okay, was it appropriate? Fine. Give
17 it to her.

18 Some physical therapy, but not for any of the
19 other costs.

20 We go to the second page, and there's a
21 disparity.

22 So the defense will prove that -- that the
23 accident-related medical treatment is \$20,000.
24 Eight -- \$20,018.52. Not \$627,000.

25 Let's talk about medical liens for a minute.

1 Most doctors rendered medical treatment on a lien.
2 UMC, Dr. Gulitz, Cash, Gross, Pacific Hospital, Lemper,
3 Kidwell, Select PT, Matt Smith PT. Each doctor agreed
4 to defer payment pending the outcome of the case. What
5 does that mean? That means that each doctor has to
6 say -- has an interest in the outcome of the
7 litigation. They're saying everything's related. So
8 now they have an interest. When they come in here and
9 testify, the evidence will show that they have to tell
10 you it's related to the accident. That's what the
11 medical lien does.

12 The accident-related medical treatment,
13 again, this is another further refined breakdown of
14 that related treatment, \$20,000 that we think is
15 related.

16 Ladies and gentlemen, before we get to the
17 next screen, the -- well, we'll move on. I know it's
18 cut off on -- on the left side of the screen for you on
19 this big screen. But past medical costs we say is
20 \$20,018.52.

21 Alleged future medical cost is 0.

22 Alleged lost household services, past and
23 future, we say she's not entitled to any. She
24 continued with her functionality. She continued
25 working full time. She worked with no reasonable

1 accommodations, no limitations at work at either job,
2 at Aliante or Fiesta Rancho. She should get 0.

3 Pain and suffering, past and future. So we
4 say, okay, she's entitled to past pain and suffering,
5 not future. This is five years since the accident.
6 Our doctors say she should be cut off September 1st of
7 2011. So she should only be awarded money at the end
8 for past pain and suffering.

9 And in relation to the actual damages she
10 suffered related to -- to this accident, \$10,000 would
11 be more than appropriate for total damages of
12 \$30,018.52.

13 And now, just -- in just summing up in my
14 opening statement what all the evidence will prove is
15 that she claimed and this kind of ties it all together
16 now that I'm at the end of my -- my opening statement.
17 She claims she was not injured at the scene, no medical
18 treatment.

19 Number 2, she had a preexisting
20 spondylolisthesis with pars defect. There was no
21 traumatic -- a traumatic injury to this condition would
22 cause an immediate onset of pain. First onset of
23 symptoms was three days. Her diagnoses were sprain and
24 strain of the neck. No evidence of acute traumatic
25 injury on the imaging studies. That's objective

1 evidence in this case. No evidence of an unstable pars
2 defect or nerve root impingement.

3 She continued another -- significant factor,
4 with all postaccident activities of daily living, which
5 is proof the pars defect is not impinging on any nerve
6 root, proof that there's no pushing or compression on
7 the nerve root. The MRI of 2012 shows age-related
8 bulges not traumatically induced. Normal age-related
9 bulges. And that her continued complaints of pain are
10 related to the things identified earlier.

11 No interventional treatment. The injections
12 and fusion were necessary, didn't resolve her symptoms.

13 And they have a claim for punitive damages
14 against my client, Andrea. And -- and the claim is
15 that they're claiming that Andrea gave Jared applied
16 implied or express permission to use the vehicle. What
17 they have to prove is oppression or malice.

18 And there's terms in your -- you're going to
19 receive instructions on this, with conscious disregard,
20 and despicable conduct. So they -- they say that she's
21 guilty of this, for his use of the car on the day of
22 the accident. Where to have a conscious disregard, you
23 have to have knowledge of the probable harmful
24 consequences and conduct that's so vile, base, or
25 contemptible, it's despised by ordinary people.

1 Ladies and gentlemen, the evidence will prove
2 that this claim for punitive damages against Andrea is
3 absurd, and it's not to punish Andrea. It's for money.
4 Plaintiff has a financial interest. It's a fact. With
5 the medical-legal claim, she has a financial interest
6 in the outcome of the compensatory damages claim. She
7 has a financial interest in the punitive damages claim.

8 MR. ROBERTS: Objection, Your Honor.
9 Speaking. I'll come up, if you like.

10 THE COURT: Sustained. We already talked
11 about it once.

12 MR. MAZZEO: Thank you, Judge. Okay.

13 And, ladies and gentlemen, the verdict that
14 you render, okay, after all the evidence is in, I
15 appreciate you sticking with me at this -- you know, up
16 to this point. I know it's a lot of information to
17 digest. It's late on a Friday. It's based on -- the
18 verdict you give is based on your discussion with --
19 with the eight of you in that deliberation room.
20 You're going to talk about it amongst yourselves. It's
21 based on what the plaintiff can prove. Not what the
22 effectiveness defendant can prove. It's what the
23 plaintiff can prove. They're bringing the claim of
24 prosecuting this claim.

25 And you have to ask yourselves: Did the

1 plaintiff prove her limitations, her injuries by
2 objective medical evidence? By what evidence did she
3 prove it by? And you have to hold her to a burden to
4 prove her case by a preponderance of the evidence. And
5 compensate her, by all means. We're not saying she
6 wasn't injured, but compensate her for the actual
7 verifiable physical, mental, emotional, anguish, and
8 pain that she sustained related to this accident.

9 We contend that this accident caused minor
10 physical injuries which required very little medical
11 treatment after the accident.

12 Ladies and gentlemen, I want to thank you for
13 your time in listening to me this afternoon. And have
14 a great weekend.

15 THE COURT: All right. You guys want to
16 listen to Mr. Strassburg too? I'm just kidding.

17 MR. STRASSBURG: Judge, I don't want to
18 listen to me right now.

19 THE COURT: Been a long day. Plan on
20 10:00 o'clock on Monday. Or not Monday. Monday's a
21 holiday. You get a three-day weekend. So do we. I
22 don't know what the calendar is like on Tuesday. So
23 let's plan on 10:00 o'clock on Tuesday.

24 During our break over the weekend, you're
25 instructed not to talk with each other or with anyone

1 else about any subject or issue connected with this
2 trial. You are not to read, watch, or listen to any
3 report of or commentary on the trial by any person
4 connected with this case or by any medium of
5 information, including, without limitation, newspapers,
6 television, the Internet, or radio. You are not to
7 conduct any research on your own, which means you
8 cannot talk with others, Tweet others, text others,
9 Google issues, or conduct any other kind of book or
10 computer research with regard to any issue, party,
11 witness, or attorney involved in this case. You're not
12 to form or express any opinion on any subject connected
13 with this trial until the case is finally submitted to
14 you.

15 We'll see you Tuesday at 10:00. Have a good
16 weekend.

17 You know what, let's make it 10:30, folks.
18 Make it 10:30. I just thought of other things I have
19 on the calendar to do Tuesday morning. 10:30 on
20 Tuesday.

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

23 THE COURT: We're outside the presence of the
24 jury.

25 Anything we need to put on the record,

1 Counsel?

2 MR. SMITH: Couple things, Your Honor. I'll
3 be brief. The first is I didn't see it happen, it may
4 have. I just want to make sure that Mr. Mazzeo's
5 PowerPoint was given to the clerk and is put into the
6 record.

7 THE COURT: I'm sure it will be if it hasn't
8 been.

9 MR. SMITH: Did you have something?

10 MR. MAZZEO: I just -- does it have to be?
11 I'm -- generally, I just put it on -- I just show it on
12 the screen. I don't put an actual copy of my
13 PowerPoint into the record.

14 THE COURT: I asked everybody earlier. Maybe
15 you missed that.

16 MR. MAZZEO: Maybe, Judge.

17 THE COURT: Any PowerPoint that anybody uses
18 for opening or closing, you have to have a disk or a
19 flash drive, make it part of the Court record.

20 MR. MAZZEO: I will provide it to Court, an
21 accurate copy. The paper copy I have is not.

22 MR. SMITH: The second one is we would like
23 to make a record of the bench conference regarding
24 Mr. Mazzeo's comment about Ms. Garcia being terminated
25 from Aliante. The comment that he made to the jury was

1 regarding Ms. Garcia being terminated not because of
2 injury or pain. Any evidence regarding Ms. Garcia's
3 termination from Aliante was excluded by Plaintiff's
4 Motion in Limine No. 44. That was even prior to
5 Ms. Garcia abandoning her wage loss claim which means
6 at this point that discussion is even more irrelevant.

7 In addition, Ms. Garcia did not get
8 terminated. She was offered the opportunity to resign,
9 which she did. A false statement was made to the jury.
10 And in addition, it was a statement about evidence that
11 has been excluded by the Court.

12 The only cure that we got was that the jury
13 was instructed that Ms. Garcia separated employment not
14 related to her injuries, and that may require
15 introduction of evidence that we sought to exclude.
16 And even if we don't introduce that evidence, now the
17 jury has been given information about evidence that has
18 been excluded and should never be a part of the trial.

19 MR. MAZZEO: Done?

20 THE COURT: Go ahead.

21 MR. MAZZEO: Okay. So this was -- this --
22 this issue, this Motion in Limine No. 44, is to exclude
23 or to exclude evidence pertaining to her termination
24 from Aliante. This was a highly contested issue,
25 Judge, because it involved Ms. Garcia violating the

1 Aliante's anti-harassment policy. First, she made a
2 sexually inappropriate comment to another female
3 employee in January of 2014. And then in April of
4 2014, she -- she berated and cursed out another
5 employee who was ending her shift for approximately --
6 I think we have her on video doing this for
7 approximately 20 minutes. They were -- there were
8 termination papers -- we have them. That's part of the
9 record -- from Aliante. But she -- she asked about
10 voluntarily resigning.

11 But the basis -- when we deposed Heidi Heath
12 from Aliante, the basis for her termination was not her
13 voluntary resignation. It was because she violated the
14 anti-harassment policy. She was gone from the company.

15 So -- so with regard to this motion that
16 Mr. Smith is referring to, evidence to exclude -- to
17 exclude evidence pertaining to her termination. Is
18 evidence pertaining to her violation the real basis,
19 the underlying basis her -- for her violating the
20 anti-harassment policy. I didn't -- I didn't breach --
21 I didn't cross those bounds. I didn't talk about that.

22 But these records were not excluded.
23 Plaintiff actually moved Motion in Limine No. 54 to
24 exclude irrelevant employment records. Judge Allf
25 denied that. And that's because these records --

1 notwithstanding that they subsequently withdraw their
2 claim for lost -- past -- past and future lost wages
3 and lost earning capacity, that doesn't preclude the
4 defense, and neither of these rulings preclude the
5 defense from discussing her functionality at her
6 employment of Aliante and Fiesta Rancho. Nor does it
7 preclude the defense from referencing that she -- there
8 was a termination from these facilities for reasons not
9 related to physical condition. That is not in the
10 record.

11 So there's no -- been no, as Mr. Roberts
12 referred to it at the bench, misconduct. Disagree.
13 It's not in the order. I did not conduct -- engage in
14 misconduct. Because I didn't talk about the basis for
15 the termination which was violating the anti-harassment
16 policy which is the basis for the motion that Mr. Smith
17 brought.

18 So we were not precluded, and it is relevant
19 to plaintiff's claim for future -- future loss of
20 household services, for her life-care plan, and -- and
21 not for future wages anymore, but -- but for the
22 life-care plan -- loss of enjoyment of life -- sorry, I
23 meant to include that as well -- that we show her
24 functionality, and that she was able to engage in her
25 work-related duties at Aliante for three years three

1 months, and then at Fiesta Rancho later that year in
2 2014.

3 That's very relevant to the defense to defend
4 this case and to defend these claims that they're
5 making that she's entitled to all these future damages
6 which has otherwise not been precluded. Reference to
7 her being -- separating or terminating from these
8 businesses is not -- is -- is not precluded by any
9 order. So that's my response to this allegation.

10 THE COURT: Okay.

11 MR. TINDALL: Nothing, Your Honor.

12 MR. SMITH: I just want to comment on a
13 couple things, and I'll definitely limit it to what
14 Mr. Mazzeo said. But the Motion in Limine No. 54 was a
15 broad motion about a variety of employment records not
16 just related to Aliante. That's irrelevant to this
17 discussion. It didn't deal with whether her
18 termination was -- was part of this proceeding or not.
19 And -- and that motion was denied but deferred until
20 trial to see if those records were something that was
21 relevant to the case.

22 Since then, as I -- as I mentioned before,
23 the wage loss claim has been abandoned. Those records
24 are not relevant. It doesn't matter. The Order No. 44
25 is extremely clear. There is to be no evidence

1 regarding her termination from Aliante. That means
2 counsel can't talk about her termination from Aliante
3 in opening which is designed to instruct or to explain
4 to the jury what the evidence is going to show them.
5 There can be no evidence regarding that.

6 So counsel should not have told the jury that
7 she was terminated, and -- and she wasn't terminated.
8 And while she was going to be terminated, she
9 ultimately was given the option to resign, and that's
10 what she did. So it -- the information was not
11 accurate, and it had been excluded from trial.

12 THE COURT: Okay. I allowed the question
13 with regard to separation. I thought termination was
14 the inappropriate word to use, especially in light of
15 the prior rulings. I think functionality is an issue
16 that can be explored.

17 Mr. Mazzeo, I would suggest in the future, as
18 you ask questions of other witnesses, don't use the
19 word "termination."

20 MR. MAZZEO: I won't.

21 THE COURT: She wasn't terminated. She
22 separated.

23 MR. MAZZEO: I'll -- I'll use that reference.

24 THE COURT: There's a very different
25 connotation that goes with those two words.

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MR. MAZZEO: Yes, Your Honor.

THE COURT: Anything else?

MR. MAZZEO: No, Your Honor.

THE COURT: Okay. Off the record.

(Thereupon, the proceedings
concluded at 4:52 p.m.)

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CERTIFICATE OF REPORTER

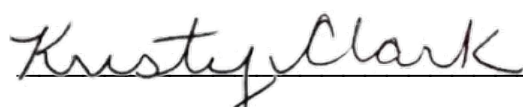
STATE OF NEVADA)
COUNTY OF CLARK) ss:

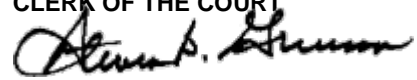
I, Kristy L. Clark, a duly commissioned
Notary Public, Clark County, State of Nevada, do hereby
certify: That I reported the proceedings commencing on
Friday, February 12, 2016, at 9:10 o'clock a.m.

That I thereafter transcribed my said
shorthand notes into typewriting and that the
typewritten transcript is a complete, true, and
accurate transcription of my said shorthand notes.

I further certify that I am not a relative or
employee of counsel of any of the parties, nor a
relative or employee of the parties involved in said
action, nor a person financially interested in the
action.

IN WITNESS WHEREOF, I have set my hand in my
office in the County of Clark, State of Nevada, this
13th day of February, 2016.


KRISTY L. CLARK, CCR #708



1 CASE NO. A-11-637772-C
2 DEPT. NO. 30
3 DOCKET U
4

5 DISTRICT COURT
6 CLARK COUNTY, NEVADA

7 * * * * *

8
9 EMILIA GARCIA, individually,)
10 Plaintiff,)
11 vs.)
12 JARED AWERBACH, individually;)
13 ANDREA AWERBACH, individually;)
14 DOES I-X, and ROE CORPORATIONS)
15 I-X, inclusive,)
Defendants.)
16

17 REPORTER'S TRANSCRIPT
18 OF
19 PROCEEDINGS
20 BEFORE THE HONORABLE JERRY A. WIESE, II
21 DEPARTMENT XXX
22 DATED TUESDAY, FEBRUARY 16, 2016
23

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

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1 LAS VEGAS, NEVADA, TUESDAY, FEBRUARY 16, 2016;

2 10:48 A.M.

3
4 P R O C E E D I N G S

5 * * * * *

6
7 THE COURT: All right. We're back on the
8 record, Case No. A637772. We're outside the presence
9 of the jury.

10 What do you got, Mr. Smith?

11 MR. SMITH: I'm going to be brief. But we
12 got some additional exhibits that Mr. Strassburg said
13 he intends to use in his opening over the weekend. The
14 first two are a picture and a video that are from
15 Mr. Strassburg's expert. As we discussed last week,
16 you know, we had a discussion before the -- or at the
17 267 conference about not using the expert reports. You
18 allowed him to use a couple of charts that -- that
19 defined his expert ultimate conclusions. But a picture
20 and a video made by the expert are not ultimate
21 conclusions, have nothing to do with the ultimate
22 conclusions, and are part of the expert report and
23 opinions that should not be used during opening.

24 THE COURT: Okay. Mr. Strassburg?

25 MR. STRASSBURG: Thank you, Judge. The video

1 is the -- it's essentially the expert's opinion of what
2 the accident reconstruction analysis shows. They --
3 they take all this information, and they run it through
4 a computer, and the computer gives the -- the analysis
5 and -- that he will describe at -- at when he
6 testifies. So basically, it -- it is a pictorial
7 representation of what his testimony is going to be.

8 THE COURT: Yeah, that's -- that's usually --
9 usually beyond what I would allow for demonstrative. I
10 mean, you can -- you can say what you expect the expert
11 to testify to, but to show something that he's going to
12 show is like showing a report; right?

13 MR. STRASSBURG: Well, I don't see them as
14 the same. It's an illustration for demonstrative
15 purposes of what his testimony is going to be. If I
16 can draw it on a blackboard and sketch out, you know,
17 how this software conveys the information and he can
18 describe it, then it seems to me it's just a
19 demonstrative piece of illustration. That's
20 entirely --

21 I mean, they showed pictures of the surgery
22 that some expert had colored in on the MRI to show what
23 their doctor is going to be describing. Judge, this is
24 the same thing. This is just a video that shows what a
25 biomechanical engineer is going to be describing.

1 What's sauce for the goose is sauce for the gander.

2 THE COURT: I hear goose and gander a lot in
3 here.

4 MR. STRASSBURG: You get tired of it?

5 THE COURT: Yeah, I'm going to say no.

6 Let's -- let's take that out. Can you take it out
7 quick?

8 MR. STRASSBURG: Sure.

9 THE COURT: Why don't you take that out, and
10 you can talk about what your expert's going to say --

11 MR. STRASSBURG: Sure.

12 THE COURT: -- you can say that there's a
13 video that your expert's going to play, and this is
14 essentially what it's going to show. That's fine. I'm
15 not comfortable with you showing it.

16 MR. STRASSBURG: Well, I'm glad we got that
17 straight. Thank you, Judge.

18 MR. SMITH: The next is this picture which is
19 a picture of a woman's face that is blurred out. And I
20 understand the allegation to be --

21 MR. STRASSBURG: I'll withdraw it, Judge.

22 MR. SMITH: Okay.

23 THE COURT: Okay. That's a weird picture. I
24 don't know what it's going to be used for, but okay.

25 MR. SMITH: And then there's two more issues

1 that we want to address before the opening begins. One
2 of them was in conjunction with that picture, and I
3 want to advise the Court of two motions in limine that
4 had been entered, and based upon the voir dire, I want
5 to make sure that they get followed today.

6 One of them is that any evidence or argument
7 or discussion of Mr. Awerbach's alleged traumatic brain
8 injury has been excluded. That cannot be discussed.
9 And the second is that defendants cannot suggest to the
10 jury that they would have to pay any award out of their
11 own pockets. And, you know, we would just ask the
12 Court to keep those in mind as Mr. Strassburg's opening
13 proceeds.

14 THE COURT: Okay.

15 MR. SMITH: And that was all I had.

16 THE COURT: Anybody else have anything?

17 MR. MAZZEO: No, Your Honor.

18 THE COURT: You ready to go, Mr. Strassburg?
19 Bring the jury in?

20 MR. STRASSBURG: Let me just delete that
21 video so I don't stray.

22 MR. MAZZEO: Judge, seems like you expected
23 more argument this morning based on what happened last
24 week.

25 THE COURT: No.

1 MR. MAZZEO: No? Okay. Good.

2 MR. STRASSBURG: Okay. Judge, can -- can I
3 set up first before they come in?

4 THE COURT: Yeah, go ahead. Off the record.
5 (Whereupon a short recess was taken.)

6 THE MARSHAL: Jury entering.

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

9 THE MARSHAL: Jury's present, Judge.

10 THE COURT: Thank you. Go ahead and be
11 seated, folks. Good morning, ladies and gentlemen.
12 Welcome back. You all came back. That's a good thing.
13 We're back on the record, Case No. A637772.

14 Do the parties stipulate to the presence of
15 the jury?

16 MR. STRASSBURG: So stipulated.

17 MR. MAZZEO: Yes, Your Honor.

18 MR. ROBERTS: Yes, Your Honor.

19 THE COURT: All right. So, ladies and
20 gentlemen, we are to the point where Mr. Strassburg
21 will give his opening statement. He'll probably end
22 somewhere around noon. It might be a little shorter, a
23 little longer. When he's done, we'll take our lunch
24 break, and then my understanding is we'll start with
25 some witnesses this afternoon.

1 Mr. Strassburg, time is yours.

2 MR. STRASSBURG: Thank you.

3

4 OPENING STATEMENT

5 MR. STRASSBURG: Good morning.

6 IN UNISON: Good morning.

7 MR. STRASSBURG: I join and thank you for
8 returning.

9 I'll be talking for Jared Awerbach in this
10 case. As you -- as you -- you may remember, he just
11 turned 24. He's a single parent of two little girls.
12 On the left is Mecca, and she is age three. And on the
13 right is Talia. And she is age four.

14 Again, as I've said, Mr. Awerbach is very
15 sorry for this accident. And he -- as a result of this
16 accident, Ms. Garcia should receive compensation for
17 what he caused. But only for what he caused. That's
18 the law in this state. That's the law in every state.
19 And not only that, it's fair.

20 \$16.2 million? I will prove to you with --
21 with my colleague, Mr. Tindall's able help that it
22 shouldn't be more than \$50,000.

23 Regarding punitive damages, I'll prove to you
24 that Mr. Awerbach, he shouldn't be punished yet again
25 for this accident. He did his jail time, 6 days for

1 the DUI, 25 days for cutting the classes, for being a
2 knucklehead. He served every day of it in lockup. And
3 not only that, as I'm sure you probably gathered,
4 Mr. Awerbach has done more. In a way, he's punished
5 himself. And let me tell you the story about that.

6 Fifteen months ago, young man, 19 years old,
7 at the end of his rope with no other place to go.
8 Family wouldn't take him in. Friends wouldn't take him
9 in. 'Cause of his lying and misbehaving ways, he was
10 on the outs with everybody. And so he stood in front
11 of the Las Vegas Rescue Mission down on Bonanza Street,
12 and he looked at the walls and the gates and he knew
13 that this was his last chance. And so he entered that
14 facility. It's 4 acres down by the freeway. He walked
15 in past the steel gates, behind those walls. And on
16 those walls are written the Ten Commandments because it
17 is a facility that rehabilitates with discipline, work,
18 and religious instruction.

19 MR. ROBERTS: Objection, Your Honor.

20 THE COURT: Going to tell me what it is?

21 MR. ROBERTS: Bolstering credibility through
22 religion. It's excluded by the rules of evidence.

23 THE COURT: As long as you don't go any
24 further, I'm going to overrule the objection.

25 MR. STRASSBURG: Thank you, Judge.

1 In that facility, Mr. Awerbach put him
2 through -- put himself through the program. First six
3 weeks, they call it blackout. No contact with the
4 outside world. No contact with the temptations that
5 had run his life into the ground for years. He slept
6 on a little twin bed. He was with other
7 down-and-outers just like him and they put him to work.

8 And you know what's interesting, at 9:00 p.m.
9 every night, those steel gates slam shut, and they
10 don't open again until 4:00 a.m. And you can leave.
11 If you give up, you can leave. It's like the SEALs
12 in -- in basic, when they ring the bell, they quit.
13 Every day you have to decide whether you're going to
14 tough it out or ring that bell. And Awerbach here
15 toughed it out every day. He worked on the hardest nut
16 there is to crack: Yourself. And he stuck with the
17 program. He did the 12 steps. Every one of them.
18 Perfectly? No. We're all fallible. He did the
19 Genesis project, which is to learn the life skills that
20 he didn't get taught in his family of origin. No
21 father. His father was a petty crook who lammed out on
22 him when he was a kid. A mother fighting her own
23 addiction again. The only thing there for him growing
24 up was the street, the hard streets of the Naked City
25 neighborhood and the environs around it in Las Vegas.

1 That's where he grew up, where you learn to talk fast
2 and fight hard with your fists. You learn to say what
3 you have to say to get where you need to go. And it's
4 all a fight. That was then.

5 After the mission, he changed himself.
6 Fifteen months, day in, day out. He lived there. He
7 ate there. He stayed there. He worked there. They
8 made him work security where you got show up on time,
9 stand the post, don't quit, and go home when you're
10 supposed to. They taught him discipline. Because he
11 wanted to learn this. It wasn't being forced on him.
12 He knew this was his last chance.

13 At the end of the program, the mission staff,
14 they picked three most improved, the people who had
15 come the farthest. He was one of them. And they had
16 him stand up in front of all the other inmates
17 graduating, as they call them, and say what this meant
18 to him because the mission recognized that in this man,
19 something had happened.

20 Now, the plaintiff wants him punished again.
21 After the jail, after the mission, they want more. And
22 there is a ruling in this court that I've asked the
23 Court's permission to read to you and Mr. Roberts, to
24 his credit, has agreed. This is the language -- this
25 is what the Court ruled in January 2015.

1 "The Court ruled in its order" -- and the
2 words matter because they're legal words -- "Defendant
3 Jared Awerbach was per se impaired. Defendant Awerbach
4 is deemed per se impaired as a matter of law based on
5 the undisputed level of marijuana metabolite in his
6 blood at the time of the crash. This fact is
7 conclusively established for purposes of trial." So
8 he's deemed per se impaired as a matter of law. And I
9 will prove to you that what's fair and just is that you
10 should deem him per se punished enough as a matter of
11 fact.

12 Now, there's one other thing that we need to
13 talk about. And it's this word "causation," because
14 the law says that you only pay for what you caused.
15 That's the law and that's fair. And we will prove to
16 you that what the plaintiff says he caused is not so.
17 He didn't cause all that. He caused some of it, and
18 he's responsible for it. And you should make him pay
19 for it to compensate her. But he didn't cause all of
20 it.

21 Now, how's that going to work? And here I --
22 I just want to give you a flavor of what the -- the
23 evidence -- the proofs will be, you know, just so
24 it's -- you get a sense of what's going to develop so
25 you can watch for things. Let's talk about what do we

1 mean by the word "cause"? Okay? There's cause and
2 there's effects, and that's what we're talking about.
3 What are the effects of a particular cause? And causes
4 are connected to effects. They're connected physically
5 to effects. There's a mechanism that can be shown to
6 you for effects.

7 Now, you know, after living with this for two
8 years, I kind of -- there's some things that -- that
9 have dawned on me that might be helpful and here's one
10 of them: There is -- we start with the collision.

11 Mr. Blurton, can you see okay?

12 JUROR NO. 1: Yes, sir.

13 MR. STRASSBURG: Good.

14 We start with the collision and the causal
15 chain, the mechanism that this trial is about, we will
16 prove to you that the collision does not connect to all
17 of these medical conditions discovered after the crash,
18 and even though the medical treatment for those
19 conditions does connect. Okay?

20 Ms. Klein, I see that look. My wife gives me
21 that look. I know what that means.

22 MR. ROBERTS: Objection, Your Honor.

23 MR. STRASSBURG: Here's what I mean. I'm
24 sorry.

25 THE COURT: It's sustained. You can't relate

1 to any of the jurors.

2 MR. STRASSBURG: You're right. And I
3 apologize, Mr. Roberts. I apologize to you and your
4 team.

5 For example, the surgery, the surgery was
6 necessary medically to correct the crook in her back,
7 the displaced vertebra.

8 Randy, could you hand me a model? I forgot
9 the model.

10 Because the only way you could straighten out
11 that crook was surgically, and -- and that's what was
12 done. So I got this model of how this all works, how
13 the mechanism works. Because you see what we're
14 talking about here is this vertebra slips forward;
15 right? And the way you slip it back is you -- the
16 surgeon pulls it back and he puts rods in there to hold
17 it in place. Okay? So that treatment is necessary for
18 that condition. Okay? I mean, nobody is saying the
19 surgery was untoward or -- right? But that condition
20 was not connected to the collision. And because the
21 condition is not connected to the collision, it's not
22 recoverable under the law. That's what this is about.

23 Now, we'll prove to you that this crook in
24 her back, the displaced vertebra, the
25 spondylolisthesis, was preexisting to the accident.

1 And the proof of that will be from MRIs, X-rays,
2 medical imaging that use high technology to peer inside
3 the human body. And they show that her spine has a
4 number of degenerate conditions. We'll prove to you
5 that these spinal conditions, they don't just happen
6 singly. They happen as a constellation of symptoms.
7 Because some people are just by genetics unlucky enough
8 to have spines that experience that.

9 For example, you're going to see X-rays.
10 You're going to see MRI reports. Here's one from
11 January 17th, 2011. And these are all in the -- the
12 exhibits, the trial exhibits. But there's 4,000 pages
13 of this stuff. So we're trying to simplify it to give
14 you an overview so you can see how it lines up.

15 So you see here, the radiologist, he's a
16 specialist. He reads it, and he says moderate L5-S1
17 disk disease. Now, that's a chronic condition. We'll
18 prove to you it wasn't caused by the accident. And,
19 you know, I think Mr. Roberts told you this, but it --
20 maybe it bears repeating, that these vertebra, they're
21 referred to by numbers. S1 is here. L5, L4, L3, 2,
22 and 1. So where the surgery took place was L4-L5 and
23 L5-S1. Right here. So what the radiologist is saying
24 is that I see chronic disease here. And we'll prove to
25 you that that was before the accident.

1 We talked about spina bifida on -- in voir
2 dire. And -- and so you can see that the evidence
3 shows that there was a small L5 spina bifida that was
4 actually seen on the -- on the MRI. And what that is
5 is -- you see this is a vertebra. These are the bones.
6 This is one of the bones in your back. And this is
7 called the posterior arch. I mean, it looks like an
8 arch. All right? And this is where the disk and
9 the -- the weight goes, you know, the loading is right
10 here. The nerves go through this hole here. And spina
11 bifida involves how this arch forms. And you're going
12 to hear something called a pars interarticularis defect.
13 That's right here. On the -- on the feet of the arch;
14 right? And it's where the bone doesn't form all the
15 way. It takes a hard set as a cartilage and it's not
16 bone.

17 We'll also prove to you that there was
18 preexisting disease in the facets. And it's called
19 moderate facet arthropathy. Arthropathy is doctor talk
20 for a disease condition. It's like arthritis, but it's
21 different. All right. And a facet is one of the
22 joints in the spine. And you know how when you lean
23 over like this, you can only go so far? Okay. So
24 that's what the facets do. And here they are. They're
25 these joints -- these joints right here. Can you all

1 see them? Can you all see them? It's these joints
2 right here. And so you see when you move like this,
3 these joints arrest the motion. You see and they --
4 they enable the spine to move in a -- in a slot. All
5 right? So this is one of the -- just the fantastic
6 engineering of the spine. And in her case, these facet
7 joints were experiencing degeneration from disease,
8 spinal disease.

9 Now, also there was found spondylosis in the
10 spine. Mr. Roberts talked about that. Spondylosis
11 is -- it's a disease condition of the spine. And it's
12 at T11-T12. That's right on top of the vertebra before
13 the -- I showed you in the model. So you see, we'll
14 prove to you that her spine was experiencing spine
15 disease before the accident.

16 We'll also prove she had bulging disks and
17 desiccation of the disks. And this is important. You
18 see another radiological report saying the L3-L4 disk
19 is dessicated. L4-L5 disk is dessicated. And what
20 that means is the disks are drying out, and these are
21 the disks right here. There's a disk between each
22 vertebra. And the disks are tough. I mean, they're
23 tougher than the bone. But they have fluid in them,
24 and if they dry out, they shrink and that causes the
25 spine to adjust. And that caused this crook in her

1 back at L5-S1, L4-L5.

2 And we'll also prove to you -- here's another
3 report. Again, the radiologist found that the L5-S1
4 disk was severely narrowed and dessicated. And I'm
5 going to show you -- I have a video. I'm going to show
6 you how that caused this spondylolisthesis, this crook
7 in her back that the plaintiffs plan to blame on the
8 accident.

9 Now, let me show you one of the issues, one
10 the factual issues that you -- you may need to
11 consider. This is the so-called -- you'll hear it --
12 you'll hear this ad nauseam. This is called the Hake
13 report, and that's because it was done by a radiologist
14 named Dr. Hake. And what he said in -- in reading the
15 November 20th, 2012, films, he said that, The slippage
16 at L5 upon S1 is continuing to move. That's
17 essentially saying that her spine remained unstable;
18 right? So you can see why an unstable spine, it would
19 make sense to anchor it with surgical rods to stop its
20 movement. We will prove to you that this is incorrect.
21 That it might be fine for the hurly-burly of a
22 fast-paced clinical practice. But for a court of law,
23 when you really take the images and you rectify them
24 and you measure them and you sit them side by side,
25 there's no movement. We will prove that to you from

1 the films themselves.

2 Now, here is -- this is what I've been
3 talking about, the crook in the back, from one of the
4 MRI films, excuse me, taken January 26th, 2011, 24 days
5 after the accident. And this is L5 and L4 just like I
6 showed you on the model. Except this is a model -- a
7 normal spine. C5, 4. And you see here, this is S1,
8 and here is the -- the slippage, the displacement where
9 L5 has displaced itself forward -- this is the front --
10 forward on S1. All right? That's what the films show.
11 We'll prove to you that was not caused by the accident,
12 and it wasn't aggravated by the accident.

13 Now, one of the issues -- here's the --
14 here's the whole spine. This is her spine. One of the
15 issues is going to be nerves.

16 You see now, the surgeon, Dr. Gross, he named
17 his procedure very descriptive. He named it
18 decompression instrumented spinal fusion. We've
19 already talked about the instrument and the spinal
20 fusion. That's the realigned -- realign the spine. By
21 the way, all spines have curves. They curve to be
22 stronger. They're like dams in that regard. You never
23 saw a straight dam. Well, they curve just like the
24 spine.

25 So the first word Dr. Gross named his surgery

1 is decompression. Decompression. And what that means
2 is you do decompression on nerves that have been
3 compressed. And what you're going to find out -- and
4 Mr. Roberts, he showed you a really cool picture of how
5 that all worked. But you see, passing through the hole
6 in the vertebra is -- are nerves. And what the
7 surgeons do is they remove bone. They take the bone
8 out. And that is so none of the bone is compressing
9 the nerves.

10 Have you ever hit your funny bone? Well, you
11 just compressed a nerve. That's nerve pain.

12 Now, let me show you a couple of anatomical
13 landmarks. Okay? And I'm not going to bore you. And
14 I'm not going to, you know, teach you medicine. Far be
15 it for me to do that. We got doctors coming in up the
16 wazoo to do that for you. But there's a couple of
17 landmarks, goalposts you might say, that I think will
18 help you assess the proof in this case. And the first
19 one is the thecal sac and spinal fluid.

20 You see, running down your -- your back,
21 there's this canal, this spinal canal, and in the
22 spinal canal at the top, right, is the spinal cord;
23 right? This -- I'm not telling you don't already know.
24 What you may not know is the spinal cord ends at about
25 the middle your back. It ends about here. Up here.

1 And below the spinal cord are called nerve rootlets,
2 like the roots of a tree. In fact, the doctors call it
3 the "cauda equina." That's Latin for horse's tail,
4 because they kind of look like a horse's tail. And you
5 can think to that image, that's what it is, a whole
6 bunch of nerve roots, and they're coming down here
7 through the spinal canal.

8 Now, this is an MRI that shows fluid as white
9 called a T2. There are MRIs that show it dark, a T1.
10 And between those contrasts, the radiologists figure
11 out what's going on. So here, this is the spinal fluid
12 in the spinal canal right through here. And these --
13 can you see this -- well, it looks kind of like a hair
14 or roots. These are the nerve rootlets, and they're
15 going down through the spinal canal.

16 Another landmark -- oh, wait. I think I
17 already said that. Okay.

18 And I brought you a picture -- actually, I
19 brought you two pictures just to make sure you
20 understand, and you'll see I'm going someplace with
21 this. You'll see is, for example, the nerve rootlets.
22 And here's what they look like. You see they end about
23 here. You know, a little bit above the waist, the
24 spinal cord ends, and then the nerve roots branch out,
25 and they go down through the rest of the body. And you

1 can see here they go through a hole in the vertebra.
2 That's how they get to the rest of the body. And the
3 model shows it probably better than I can.

4 These here, you see the -- comes down through
5 here. And see the model is kind of -- it's a little
6 misleading because they make it look like it's cord,
7 but it's not. As you can see from the picture, these
8 are individual little rootlets. And in places, they
9 exit through holes in the vertebra. All right?

10 Now, if the vertebra -- I mean, you can see.
11 I mean, it's not rocket science or I wouldn't be doing
12 this. But you see this vertebra -- if any vertebra
13 moves forward, right, it can pinch the nerve in the
14 spinal canal; right? It just pinches it. Or if these
15 holes where the nerve roots come out, if they close up,
16 that can pinch a nerve. And -- and you can see that
17 if -- you have to be wondering, you know, if the L5 --
18 if that vertebra slid forward like that, oh, my God, I
19 wonder if it pinched a nerve that's going down through
20 the center. And we'll prove to you that it did not.

21 Now, to show you this proof, I want to show
22 you how a vertebra displaces with no accident, no
23 trauma, no impact because -- remember we were
24 talking -- well, I was talking, about desiccation of
25 the disks, when a disk dries out? Well, when a disk

1 dries out, it can make the spinal vertebra move even if
2 there's no accident.

3 So let me play you this. Oh, I hate that. I
4 just want you to see how this works. Now, we're going
5 to zoom in on the spine. This is the disk, L5-S1. You
6 see how it moves. All right? This is the nerve root
7 coming out between the hole. The -- the nerve in there
8 are shown. And you see as this disk shrinks and
9 desiccates, this moves forward.

10 And here's a cross section. We'll look
11 inside. You see as this disk desiccates and gets
12 smaller, this vertebra moves forward, and if it moves
13 too far, it pinches a nerve. And we'll prove to you
14 that that didn't happen here.

15 And how am I going to do that? Well, the
16 proof is we're going to show you what are called axial
17 MRIs. MRIs are categorized three ways based upon how
18 they slice. I mean, the machine uses radio waves and
19 magnetism to -- to do slices through the body. They
20 can slice it this way. They can slice it this way.
21 They can slice it front to back. And depending on how
22 they slice it, you get a different look.

23 In this case, I'm going to show you the
24 vertebra from the top this way. And -- and the MRI is
25 going to be slicing like this right down here. I mean,

1 it's a metaphorical slicing. It's just magnetism
2 and -- I mean, I don't understand it. Everybody having
3 anything to do with it got a Nobel prize for it. That
4 shows you how high tech it is. But you slice down
5 through here, and you can see where the nerve rootlets
6 are in the spinal canal. And you can see that we go
7 all the way down, and there's no impingement.

8 Now, let me -- I'm going to do it this way, I
9 think. All right. Now, this is a slice and you see --
10 I'm just going to orient you. You can see where the
11 disk is. Like here. And then this is the thecal sac
12 that we talked about in white. I mean, this is,
13 basically, the canal where all the nerve roots go, and
14 you can see all these little black things here. Those
15 are cross sections of the nerve rootlets as they go
16 down through the spine. Okay? And all the white
17 stuff, that's the cerebral spinal fluid that's in the
18 spine, essentially water.

19 All right. Let's begin. All right. I'll
20 take you through a quick trip through the spine, right
21 down through the spine all the way to the bottom. Keep
22 your eye on the black dots. And you see if a piece of
23 bone -- I mean, this -- see is this is the vertebra
24 here, a cross section of the vertebra right here. And
25 you see if that slides over and pinches anything. Wait

1 a minute. Okay. Here we go.

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

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

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

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

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

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

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

16 So that's the logic. I mean, it's just
17 common sense. But that's the logic of the
18 biomechanical engineer's proof to you that this
19 accident didn't cause what she says it did. Because
20 this impact which you can see, it was right here.
21 That's the impact. That was not great enough to cause
22 \$16.2 millions in damages.

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

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

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

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

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

1 ones in yellow are treatment. All right? So the
2 chiropractor, the physical therapist. Down here. All
3 right? Then there's the surgery here. And then there
4 are all these injections; right? All these other
5 visits are just office visits to get more drugs. So
6 when we're talking about her treatment, there's
7 interventional treatment, these five injections, and
8 we'll show you where they are. We'll prove to you they
9 didn't work. They're injecting the same thing over and
10 over again. The surgery, which is down here, hundreds
11 of thousands of dollars, didn't work. And then the
12 conservative stuff, didn't cost very much, but that's
13 where she showed some improvement.

14 I said I was going to show you -- I mean,
15 it's repetitive. These injections, they're repetitive.
16 The circles here show the injection sites, facets, and
17 nerve roots. Without effect. And let me show you what
18 the proof will be of that.

19 I made a chart of all those procedures I just
20 showed you and how effective they were because this is
21 what the proof will be. The first injection by Lemper
22 are nerve roots. Nerve roots and hips. No response
23 according to the patient. Temporary response according
24 to the doctor. That's doctor talk for it didn't work.
25 September 14th, 2011, Lemper, facet blocks. We talked

1 about the facets. Remember this thing? He injected
2 cortisone in there along with anesthesia in case you're
3 wondering why she showed temporary relief. After a
4 couple of days, she reports her symptoms returned to
5 baseline. That means she didn't get any better. Cost
6 42,005.

7 September 27th, 2012, these are nerve root
8 blocks, kind of like the first one. Two or three days
9 of benefit.

10 December 26th, 2012, this is the
11 decompression surgery I told you about. Seven months
12 later, her pain is 5/10, 5 out of 10. When she goes
13 into the ER, her pain's 6 out of 10. Still radicular
14 to the right leg.

15 On April 14th, Dr. Kidwell -- who you're
16 going to probably meet. He's a pain management
17 specialist -- he diagnosed her as failed low back
18 surgery syndrome. I mean, this is so -- this surgery
19 fails so often, they have a CPT code so that the
20 doctors can bill it on the government guidelines as a
21 failed --

22 MR. ROBERTS: Objection, Your Honor.

23 THE COURT: Sustained.

24 MR. STRASSBURG: Again, I apologize.

25 August 25th, there is a spinal cord

1 stimulation trial. Again, September, pain's back. Now
2 they take it out. But that didn't cause the pain to go
3 away.

4 December 1st, 2014, Kidwell injects the
5 facets again. Significant improvement he says, but
6 only for one month.

7 March 16, 2015, he injects the facets again.
8 Few weeks with only.

9 September 24th, we do this radiofrequency
10 procedure where they stick a needle in there. They use
11 microwaves to essentially cook the nerve to desensitize
12 it. I mean, it comes back. And here it was -- the
13 procedure's done September 24th. By November 18th,
14 she's at 7 out of 10 with activity.

15 Total billings for Kidwell, \$124,000. It
16 didn't work. So it wasn't treating the pain generator.
17 Otherwise, it would have worked.

18 The surgery by Gross, \$419,161. Took them a
19 day. And it didn't work. And that's because they were
20 treating stuff that wasn't caused by this collision.

21 So let me show you what's really going on.
22 This is a chart -- and you'll see this again. You'll
23 see this again. This is a chart of the treatment, the
24 cost. All this stuff in green, that's the
25 interventional costs for this stuff that didn't work.

1 We'll prove to you that before Ms. Garcia
2 sought treatment after the ER, she sought treatment
3 first with a lawyer, the Lerner firm. And the Lerner
4 firm referred her to the chiropractor, Gulitz. Gulitz
5 referred her to the first spine surgeon, Cash. Cash
6 said, You need an operation. She didn't buy it.
7 Gulitz then referred them -- referred her to Lemper,
8 the first pain doctor. Not only did Lemper's
9 injections not work, but he said in his medical records
10 that he didn't think she needed surgery.

11 So we will prove to you that Ms. Garcia's
12 lawyers referred her to Dr. Kidwell, the second pain
13 management doctor. And then we will prove to you that
14 her lawyers referred her to the surgeon, Dr. Gross.
15 And that's the rest of the story.

16 Thank you, Judge. I realize I run a little
17 bit over, but thank you very much. I'm finished.

18 THE COURT: All right. Thank you,
19 Mr. Strassburg.

20 Ladies and gentlemen, let's go ahead and take
21 our lunch break, we'll go till 1:15.

22 During our break you're instructed not to
23 talk with each other or with anyone else about any
24 subject or issue connected with this trial. You are
25 not to read, watch, or listen to any report of or

1 commentary on the trial by any person connected with
2 this case or by any medium of information, including,
3 without limitation, newspapers, television, the
4 Internet, or radio. You are not to conduct any
5 research on your own, which means you cannot talk with
6 others, Tweet others, text others, Google issues, or
7 conduct any other kind of book or computer research
8 with regard to any issue, party, witness, or attorney
9 involved in this case. You're not to form or express
10 any opinion on any subject connected with this trial
11 until the case is finally submitted to you.

12 See you back at 1:15. Thank you.

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

15 THE COURT: All right. We're outside the
16 presence of the jury. You actually came really close
17 to noon. So you did good.

18 Is there anything we need to put on the
19 record?

20 MR. ROBERTS: There is, but if the Court
21 would prefer, I can do it after lunch.

22 THE COURT: Going to take a long time?

23 MR. ROBERTS: Maybe five minutes.

24 THE COURT: Go ahead.

25 MR. ROBERTS: Thank you, Your Honor. I had

1 made an objection, and I just wanted to put the statute
2 I was citing to on the record, NRS 50.105, Religious
3 beliefs or opinions. Evidence of the beliefs or
4 opinions of a witness on matters of religion is
5 inadmissible for the purpose of showing that, by reason
6 of their nature, the witness's credibility is enhanced
7 or impaired -- impaired or enhanced rather.

8 And the -- the point I think that was being
9 conveyed to the jury was this is a religious
10 institution, that he had said the Ten Commandments were
11 on the walls. He then cites the religious purpose, and
12 he wants the jury to believe that Mr. Awerbach's
13 credibility when he says he's sorry and when he says
14 he's changed should be enhanced by the fact that
15 religion had something to do with his conversion to a
16 new person. So I do think he was citing the religious
17 aspects of the organization for an improper purpose.

18 In the -- on -- on a separate or related
19 topic, in *Grosjean v. the Imperial Palace*, the Court,
20 under the heading of attorney misconduct, explained,
21 Attorney misconduct occurred throughout the underlying
22 proceeding and the cumulative effect of that conduct on
23 the jury's verdict is irrelevant in analyzing whether a
24 new trial is warranted.

25 As the Court probably noted, Mr. Strassburg

1 started crying during this early segment when he was
2 talking about how his client had been already punished
3 enough and was sorry and had changed. So he's crying.
4 At the time he's crying, still up on the screen are the
5 three- and four-, five-year-old daughters which have
6 been up there for ten minutes in connection with the
7 religious theme. So we're talking about an appeal to
8 emotion through combined elements presented together
9 intentionally intended to -- to appeal to the emotion
10 of the jury.

11 And I don't know the cumulative effect at
12 this point is there, but I believe that if this conduct
13 continues, I'm going to note it for the record. I will
14 be objecting to him crying in the future because this
15 type of appeal to emotion cannot be allowed to
16 continue.

17 Thank you, Your Honor.

18 THE COURT: I can tell you that the reason I
19 overturned or overruled your objection as it related to
20 the religious comment is because when he made the
21 comment, it was a statement as if he was describing the
22 Las Vegas Rescue Mission and their goals and bases, and
23 that was fine. That's why I think I made the specific
24 statement "as long as you don't get any further the
25 objection is overruled," because I think the way he

1 used it was a factual statement. If he had made the
2 further arguments like you had just indicated, I
3 probably would have sustained the objection.

4 Just be careful. I think it was fine, but we
5 can't pander to the emotions of the jurors. Neither
6 side can. I understand.

7 MR. STRASSBURG: And, Judge, just for the
8 record, my -- of course I'm inside, so I couldn't see
9 what my face looked like, but I was not aware that I
10 was shedding tears. I don't think I did. And so I --

11 THE COURT: I just heard you sniff a couple
12 of times, but I heard you sniff again afterwards when I
13 didn't think that you were anywhere near crying either,
14 so ...

15 MR. STRASSBURG: Would you like to see my
16 bottle of fluticasone in my bag here, Judge?

17 THE COURT: No, I didn't -- I didn't -- I
18 couldn't tell if you were crying or not, so we'll put
19 that on the record.

20 MR. MAZZEO: And from my observation --
21 Judge, from my observation, I don't think Grosjean
22 applies to this case or to -- to Mr. Roberts' reference
23 to Mr. Strassburg's opening when he was talking about
24 punitive damages. Grosjean is a case that I believe
25 Bob Nersesian was involved with, and it was only with

1 compensatory damages. I don't think there were
2 punitive damages in that case, number one. So I don't
3 think that case applies.

4 And secondly, from my observations of
5 Mr. Strassburg, I didn't notice any -- that there was
6 any -- that he was acting or -- or playing up to the
7 jury when he was making a reference to his client.
8 It's -- he was talking about he's worked with the case
9 for a number of years, and he's talking about a
10 transformation. So I -- I disagree with Mr. Roberts'
11 take on an assessment of Mr. Strassburg.

12 THE COURT: Okay. Anything else?

13 MR. ROBERTS: You sustained the objection.
14 So I'll be quick. The objection was to the reference
15 to the CPT codes being disallowed by the government.
16 The only place CPT codes are disallowed is Medicare.
17 Medicare is not relevant to this action. To the extent
18 that Medicare doesn't pay for some things, that's an
19 argument of a collateral source or a discount which is
20 irrelevant. The Court sustained it.

21 THE COURT: I think reference to CPT codes as
22 it relates to defining the treatment is fine, but
23 referencing CPT codes as it relates to payment is
24 probably out of bounds.

25 MR. STRASSBURG: Judge, the medical records

1 that we have stipulated into evidence, I mean, all the
2 diagnoses by Kidwell -- I think Kidwell -- well,
3 Kidwell I'm sure of. He gives a CPT code for every
4 diagnosis that's in the medical record. It's how the
5 doctors describe these treatments.

6 THE COURT: That's why I said that's fine.
7 You just can't reference the fact that CPT codes are
8 used to disallow payment by a governmental entity. And
9 that's -- I think that's the portion of the statement
10 that plaintiff's counsel was objecting to and why I
11 sustained it. Because -- yeah, you can reference CPT
12 codes as it relates to how that defines the diagnosis.

13 MR. STRASSBURG: Well, Judge, and I apologize
14 for my inartful phrasing of my intent which was merely
15 to describe the treatment.

16 THE COURT: That's fine.

17 MR. STRASSBURG: Thank you.

18 THE COURT: Sometimes say things we don't
19 mean to.

20 MR. STRASSBURG: You too?

21 THE COURT: Anything else on the record,
22 guys?

23 MR. ROBERTS: Nothing else, Your Honor.

24 THE COURT: All right. Off the record.

25 (Whereupon a lunch recess was taken.)

1 THE COURT: Go ahead. Go back on the record.
2 We're outside the presence of the jury. Go ahead.

3 MR. ROBERTS: We're going to start with a
4 reading from Officer David Figueroa. And one of the
5 cross designations I -- I was reading again this
6 morning, and actually, to be fair, it was afternoon
7 during lunch. The question was about the one-legged
8 stand test, and the question that defendants have cross
9 designated is:

10 "And would you agree that Mr. -- or
11 Jared's failure of his ability to perform the
12 one-leg stand is not dispositive of necessarily
13 of his impairment by marijuana?"

14 And as I read it a second time, it sounded
15 like they're -- the question implies that he may not
16 have been impaired. And the Court has excluded any
17 argument that he wasn't impaired, only the degree of
18 impairment. And I think maybe the question crosses the
19 line by asking -- the officer agrees, yes. But this
20 jury can't determine he wasn't impaired. They can only
21 determine his level of impairment. So I would ask the
22 Court exclude that question.

23 MR. MAZZEO: Your Honor, what page --
24 page/line?

25 MR. ROBERTS: 104. It's in the deposition --

1 the designations that Roger sent over on Friday.

2 MR. MAZZEO: Right.

3 MR. ROBERTS: 104, lines 1 through 10.

4 MR. MAZZEO: I think that was our designation
5 as well. Your Honor, that's when -- when we were
6 deposing Police Officer Figueroa, we were just asking
7 him about these field sobriety tests, and essentially,
8 that a person who is -- these aren't tests that are
9 given that -- that do not -- that people --

10 THE COURT: Don't worry about it. I'm going
11 to allow it because I think it's one test, and I think
12 the way that it's asked, if you read it correctly, asks
13 if -- if the failure of this test by itself is
14 conclusive of marijuana impairment. And I think
15 probably any officer in response to a question about
16 any specific sobriety test would say the same thing.
17 It's -- it's the -- the totality of the sobriety tests
18 that causes them to -- to conclude whether or not
19 there's impairment. And -- and I don't think that this
20 is going to confuse the jury. We can instruct them as
21 part of the instructions that the Court has determined
22 as a matter of law that there was impairment. So I
23 don't think it will be an issue. I'm going to allow
24 it.

25 MR. MAZZEO: Thank you, Judge.

1 THE COURT: How are we doing this? Since
2 Mr. Mazzeo is the one that took the deposition, are you
3 asking the questions that you asked?

4 MR. MAZZEO: Well, not --

5 THE COURT: How we doing it?

6 MR. MAZZEO: Well, not necessarily. So we
7 have plaintiff who has their designations, and -- and
8 then I have mine and Jared has theirs. But both
9 Andrea's and Jared's are going to be asked at the same
10 time. So I'm going to be asking -- Tim is the
11 designated officer on the stand reading from the --
12 reading the answers. So after Mr. Roberts is done with
13 his questions from his designations, I'm going to stand
14 up and question Tim regarding our designations for both
15 Jared and Andrea. I'm going to cover both. And I have
16 it highlighted already in a transcript. I've given it
17 to Tim. I've given all the parties a copy of it.

18 THE COURT: Great.

19 MR. ROBERTS: There will be a couple of
20 things that overlap, they'll be read twice, but we
21 waive the objection to that.

22 THE COURT: That's fine. All right. We
23 ready?

24 MR. MAZZEO: Yes.

25 MR. ROBERTS: Yes.

1 THE COURT: Bring them in. Only ten minutes
2 late.

3 THE MARSHAL: Jury entering.

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

6 THE MARSHAL: Jury is present, Judge.

7 THE COURT: Thank you. Go ahead and be
8 seated. Welcome back, folks. We're back on the
9 record, Case No. A637772.

10 Do the parties stipulate to the presence of
11 the jury?

12 MR. MAZZEO: Yes, Your Honor.

13 MR. ROBERTS: Yes, Your Honor.

14 THE COURT: All right. Ladies and gentlemen,
15 you've heard opening statements. Now we're to the
16 point where you're going to actually start hearing
17 evidence. I believe the first thing that we're going
18 to hear is testimony through a deposition. Just so you
19 understand --

20 It's Officer Figueroa?

21 MR. ROBERTS: Officer David Figueroa, yes,
22 Your Honor.

23 THE COURT: It's not going to be
24 Officer Figueroa sitting on the witness stand, but
25 we're going to have -- it's an attorney that -- from

1 plaintiff's counsel's office. He's going to be sitting
2 up here reading the answers as if he was doctor -- or
3 Officer Figueroa. Okay? Attorneys are going to ask
4 questions. Just so you understand who we have on the
5 stand. And that's kind of how it happens. Usually
6 when we're reading a deposition in, it's not the person
7 who -- who was deposed, but it is that person's answers
8 in response to the questions and it's just as if -- if
9 it was -- as if it was that person on the stand because
10 they're the questions and answers that were asked of
11 that person on a previous date. Okay? Everybody
12 understand that? Any questions?

13 All right. You may proceed.

14 MR. ROBERTS: Thank you, Your Honor.

15 THE COURT: Call your first.

16 MR. ROBERTS: Your Honor, we call
17 Officer David Figueroa. The parties have stipulated
18 that Officer Figueroa is unavailable for trial and,
19 therefore, I would ask to publish his deposition.

20 THE COURT: It will be published.

21 MR. ROBERTS: Thank you, Your Honor.

22 And if I could also now ask Mr. Tim Mott of
23 the my office to take the witness stand. He'll be
24 playing the role of Officer Figueroa.

25 THE COURT: And you actually have to remain

1 standing and raise your right hand and be sworn.

2 THE CLERK: You do solemnly swear that you
3 will well and truly read the answers of the deponent as
4 set forth in the deposition in response to the
5 questions therein asked by counsel, so help you God?

6 THE WITNESS: Yes.

7 THE COURT: Go ahead and state your name.
8 Spell it for the record, please. Not his, yours.

9 THE WITNESS: Tim Mott, T-i-m M-o-t-t.

10 THE COURT: All right.

11 MR. ROBERTS: Beginning at page 11, line 2.

12 (The deposition of Officer David
13 Figueroa was read into the records as
14 follows:)

15 BY MR. ROBERTS:

16 Q. Are you currently employed with the Las Vegas
17 Metro Police Department?

18 A. I am.

19 Q. In what capacity?

20 A. As a police officer assigned to the traffic
21 bureau.

22 Q. And what's your specific title?

23 A. Police Officer 2.

24 MR. ROBERTS: Going to line 15.

25 /////

1 BY MR. ROBERTS:

2 Q. What is your highest level of education?

3 A. Bachelor's of science degree.

4 Q. From what college?

5 A. Nyack College in New York.

6 Q. Rockland County?

7 A. Correct.

8 MR. ROBERTS: Line 23.

9 BY MR. ROBERTS:

10 Q. How long have you been employed by the
11 Las Vegas Metro Police Department?

12 A. Approximately eight years.

13 MR. ROBERTS: Going to page 12, line 1.

14 BY MR. ROBERTS:

15 Q. And I'm not going to keep saying that name,
16 you know, spell it out. I may say LVMPD.

17 A. That's fine.

18 Q. Have you always been a Police Officer 2?

19 A. Yes.

20 Q. What are the scope of your duties that go
21 along with that title?

22 A. Investigate accidents, do proactive
23 enforcement, calls for service reference motorists, any
24 hazards on the roadway.

25 Q. How many years have you worked in the traffic

1 bureau?

2 A. Approximately just over five years.

3 Q. What other bureaus have you worked for at
4 LVMPD?

5 A. The names, I worked for South Central Area
6 Command as patrol officer. I was then transferred to
7 Convention Center Area Command, and then transferred to
8 traffic bureau, so three.

9 Q. And how long did you work for South Central
10 Area Command?

11 A. Approximately two years.

12 Q. Did you start with the LVMPD at South Central
13 Area Command?

14 A. When I graduated the academy, I was
15 transferred to South Central Area Command first
16 assignment.

17 Q. What does that assignment encompass?

18 A. Patrol.

19 Q. Is that a squad patrol, motorcycle?

20 A. Squad patrol, bicycle patrol, bicycle units
21 and indoor units, as in indoor motorcycle units as
22 well.

23 Q. And can you describe the experience you have
24 in investigating motor vehicle accidents?

25 A. Five years' experience, you know, with the

1 exception of the time I've been out. The necessary
2 classes related to investigations. I've taken several
3 accidents.

4 MR. ROBERTS: All right. Moving to page 15.

5 BY MR. ROBERTS:

6 Q. And of the time, the entire time that you've
7 been a Police Officer 2 with the LVMPD, can you
8 estimate the approximate number of accidents you have
9 investigated?

10 A. In general, I can't put a number on it, but
11 it's numerous.

12 Q. Fair enough. And generally, what I do when I
13 ask this question of officers is I break it down to
14 what does it come out to, let's say per month or per
15 year. Can you estimate?

16 A. Well, you average. At the time, we were
17 averaging three, four shift.

18 Q. All right. So, Officer, about 10 to 12 --
19 about 10 to 12 a week would be 40 to 50 a month
20 approximately; correct?

21 A. Correct.

22 MR. ROBERTS: Moving to page 18.

23 BY MR. ROBERTS:

24 Q. All right. And then, as an investigating
25 officer, you are required to fill out what's called a

1 "traffic accident report."

2 A. Yes.

3 MR. ROBERTS: Page 20, line 20.

4 BY MR. ROBERTS:

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

8 A. I do.

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

15 A. Okay.

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

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

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

25 A. Yes, sir.

1 Q. What was the approximate time of the
2 accident?

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

5 MR. ROBERTS: Page 22.

6 BY MR. ROBERTS:

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

9 A. The time of the accident report reflects
10 5:57 p.m., military time 1757.

11 Q. And the location of the accident?

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

14 MR. ROBERTS: Page 28.

15 BY MR. ROBERTS:

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

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

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

14 MR. ROBERTS: Page 30.

15 BY MR. ROBERTS:

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

18 A. Yes, sir.

19 MR. ROBERTS: Page 32.

20 BY MR. ROBERTS:

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

24 What were your initial observations?

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

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

7 Q. And how long after --

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

9 BY MR. ROBERTS:

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

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

14 Q. And just for the record, it states on the
15 bottom of the first page of Exhibit A, time noted as
16 1759 which would be 5:59 p.m.; correct?

17 A. Yes, sir.

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

20 A. Yes.

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

24 What does that stand for?

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