

No. 71348

IN THE SUPREME COURT OF THE STATE OF NEVADA

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Elizabeth A. Brown
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EMILIA GARCIA,
Appellant,

v.

ANDREA AWERBACH,
Respondent.

**APPELLANT'S APPENDIX
VOLUME XII, BATES NUMBERS 2751 TO 3000**

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ALPHABETICAL INDEX

Vol	Page Numbers	Description	Date Filed
I	22 – 28	Amended Complaint	01/14/2013
V	1031 – 1282	Appendix of Exhibits to Plaintiff's Motion for New Trial or, in the Alternative, for Additur	05/26/2016
V, VI	1304 – 1486	Appendix of Exhibits to Plaintiff's Renewed Motion for Judgment as a Matter of Law	05/26/2016
I	1 – 6	Complaint	03/25/2011
III	642 – 646	Decision and Order Denying Defendant Andrea Awerbach's Motion for Relief from Final Court Order	04/27/2015
III	623 – 629	Decision and Order Denying Plaintiff's Motion to Strike Andrea Awerbach's Answer; Granting Plaintiff's Motion for Order to Show Cause; and Granting in Part and Denying in Part Plaintiff's Motion to Strike Supplemental Reports	02/25/2015
I	164 – 165	Defendant Andrea Awerbach's Correction to Her Responses to Plaintiff's First Set of Requests for Admission	10/20/2014
III	630 – 641	Defendant Andrea Awerbach's Motion for Relief from Final Court Order	03/13/2015
I	96 – 163	Defendant Andrea Awerbach's Motion for Summary Judgment	11/08/2013
I	13 – 21	Defendant Andrea Awerbach's Responses to Request for Admissions	06/05/2012
I	29 – 35	Defendants' Answer to Amended Complaint	02/07/2013
I	7 – 12	Defendants' Answer to Complaint	01/23/2012
I	36 – 60	Defendants' Second Supplement to List of Witnesses and Documents and Tangible Items Produced at Early Case Conference	07/22/2013
I	61 – 95	Deposition of Andrea Awerbach [Vol. 1]	09/12/2013
I, II	166 – 391	Deposition of Andrea Awerbach [Vol. 2]	10/24/2014

ALPHABETICAL INDEX

Vol	Page Numbers	Description	Date Filed
XXVI, XXVII	6441 – 6942	Deposition of Jared Awerbach	
III	581 – 616	Deposition of Teresa Meraz	01/08/2015
IV	948 – 997	Jury Instructions	03/08/2016
IV	998 – 1000	Jury Verdict	03/10/2016
VI, VII	1499 – 1502	Minute Order	08/22/2016
VII	1513 – 1554	Notice of Appeal	09/19/2017
III	647 – 649	Notice of Department Reassignment	08/27/2015
VII	1508 – 1512	Notice of Entry of Judgment Upon the Verdict	08/21/2017
III	617 – 622	Order Granting, in Part, and Denying, In Part, Plaintiff's Motion for Partial Summary Judgment that Defendant Jared Awerbach was Per Se Impaired Pursuant to NRS 484C.110(3); and Denying Defendant Jared Awerbach's Motion for Partial Summary Judgment on Punitive Damage Claims	01/28/2015
IV	946-947	Order Modifying Prior Order of Judge Allf	02/12/2016
VI	1487 – 1498	Order Re: Post –Trial Motions	08/12/2016
VII	1503 - 1507	Order Vacating Judgment as to Jared Awerbach only	08/21/2017
V	1001 – 1030	Plaintiff's Motion for New Trial or, in the Alternative, for Additur	05/26/2016
III, IV	650 – 900	Plaintiff's Motion to Disqualify Defendant Jared Awerbach's Counsel Randall Tindall and Motion For Reassignment to Department 27 on Order Shortening Time and Request for Leave to File Extended Memorandum of Points and Authorities	09/08/2015
II, III	392 – 580	Plaintiff's Motion to Strike Defendant Andrea Awerbach's Answer	12/02/2014
V	1283 – 1303	Plaintiff's Renewed Motion for Judgment as a Matter of Law	05/26/2016
IV	933 – 945	Plaintiff's Trial Brief Regarding	02/10/2016

ALPHABETICAL INDEX

Vol	Page Numbers	Description	Date Filed
		Permissive Use	
IV	901 – 932	Reporter’s Transcript of Proceedings	09/15/2015
VII, VIII	1555 – 1765	Trial Transcript – 02/08/2016	11/10/2017
VIII	1766 – 1996	Trial Transcript – 02/09/2016	11/10/2017
VIII, IX, X	1997 – 2290	Trial Transcript – 02/10/2016	11/10/2017
X	2291 – 2463	Trial Transcript – 02/11/2016	11/10/2017
X, XI	2464 – 2698	Trial Transcript – 02/12/2016	11/10/2017
XI, XII	2699 – 2924	Trial Transcript – 02/16/2016	11/10/2017
XII, XIII	2925 – 3177	Trial Transcript – 02/17/2016	11/10/2017
XIII, XIV	3178 – 3439	Trial Transcript – 02/18/2016	11/10/2017
XIV, XV	3440 – 3573	Trial Transcript – 02/19/2016	11/10/2017
XV, XVI	3574 – 3801	Trial Transcript – 02/22/2016	11/10/2017
XVI, XVII	3802 – 4038	Trial Transcript – 02/23/2016	11/10/2017
XVII, XVIII	4039 – 4346	Trial Transcript – 02/24/2016	11/10/2017
XVIII, XIX	4347 – 4586	Trial Transcript – 02/25/2016	11/10/2017
XIX, XX	4578 – 4819	Trial Transcript – 02/26/2016	11/10/2017
XX, XXI	4820 – 5045	Trial Transcript – 03/01/2016	11/10/2017
XXI, XXII	5046 – 5361	Trial Transcript – 03/02/2016	11/10/2017
XXII, XXIII	5362 – 5559	Trial Transcript – 03/03/2016	11/10/2017
XXIII, XXIV	5560 – 5802	Trial Transcript – 03/04/2016	11/10/2017

ALPHABETICAL INDEX

Vol	Page Numbers	Description	Date Filed
XXIV	5803 – 5977	Trial Transcript – 03/07/2016	11/10/2017
XXIV, XXV	5978 – 6203	Trial Transcript – 03/08/2016	08/23/2018
XXV, XXVI	6204 – 6422	Trial Transcript – 03/09/2016	08/23/2018
XXVI	6423 – 6440	Trial Transcript – 03/10/2016	08/23/2018

ALPHABETICAL INDEX

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X	2291 – 2463	Trial Transcript – 02/11/2016	11/10/2017
X, XI	2464 – 2698	Trial Transcript – 02/12/2016	11/10/2017
XI, XII	2699 – 2924	Trial Transcript – 02/16/2016	11/10/2017
XII, XIII	2925 – 3177	Trial Transcript – 02/17/2016	11/10/2017
XIII, XIV	3178 – 3439	Trial Transcript – 02/18/2016	11/10/2017
XIV, XV	3440 – 3573	Trial Transcript – 02/19/2016	11/10/2017
XV, XVI	3574 – 3801	Trial Transcript – 02/22/2016	11/10/2017
XVI, XVII	3802 – 4038	Trial Transcript – 02/23/2016	11/10/2017
XVII, XVIII	4039 – 4346	Trial Transcript – 02/24/2016	11/10/2017
XVIII, XIX	4347 – 4586	Trial Transcript – 02/25/2016	11/10/2017
XIX, XX	4578 – 4819	Trial Transcript – 02/26/2016	11/10/2017
XX, XXI	4820 – 5045	Trial Transcript – 03/01/2016	11/10/2017
XXI, XXII	5046 – 5361	Trial Transcript – 03/02/2016	11/10/2017
XXII, XXIII	5362 – 5559	Trial Transcript – 03/03/2016	11/10/2017
XXIII, XXIV	5560 – 5802	Trial Transcript – 03/04/2016	11/10/2017

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XXVI	6423 – 6440	Trial Transcript – 03/10/2016	08/23/2018

1 the two cars met.

2 Q. That would be the initial contact location?

3 A. Correct.

4 Q. And what are those coordinates that you have?

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

7 Q. And what are those numbers based on?

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

10 MR. ROBERTS: Page 38.

11 BY MR. ROBERTS:

12 Q. Moving down on the -- excuse me.

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

16 Do you see that?

17 A. Yes.

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

20 Do you see that?

21 A. Yes.

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

1 A. Well, it was a number of things. It was
2 based off the admission of the driver after I smelled
3 the strong odor consistent with marijuana when I
4 arrived coming from inside the vehicle of the driver.
5 He was then asked, Have you been smoking marijuana?
6 And he stated, Yes. So he admitted it at that point.

7 Q. And you had asked him this question?

8 A. I did.

9 Q. When you asked him that question, at any
10 point did you ask him when he had -- when he had smoked
11 the marijuana?

12 A. Yes.

13 Q. And what was the question that you asked him?

14 A. He gave an approximation of one hour prior to
15 the accident.

16 MR. ROBERTS: Page 43.

17 BY MR. ROBERTS:

18 Q. The area of damage done on Jared Awerbach's
19 vehicle -- by the way, he was -- the vehicle was a 2007
20 Suzuki Forenza; correct?

21 A. That's correct.

22 Q. And you identified the area of damage being
23 the front of the vehicle.

24 A. Yes.

25 Q. And can you tell us where he was coming from

1 prior to him entering Rainbow? Was it a private drive,
2 street, or something else?

3 A. A private drive.

4 Q. And can you tell us where the impact occurred
5 in relation to the private drive on Rainbow?

6 A. It happened in the first of two travel lanes
7 traveling northbound at Rainbow Boulevard --
8 southbound. Sorry.

9 Q. That's what I was going to ask you.

10 A. Southbound.

11 Q. And by the way, so Rainbow runs north and
12 south at this location; correct?

13 A. Yes.

14 Q. And how many lanes are there in each
15 direction?

16 A. There's two northbound lanes, two southbound
17 lanes, and a center travel lane.

18 Q. And it's your recollection or testimony that
19 the impact occurred in the far right southbound lane on
20 Rainbow?

21 A. The impact occurred in the far left
22 southbound lane on Rainbow Boulevard.

23 Q. And what was your understanding as to where
24 Ms. Garcia's vehicle was traveling at the time of the
25 impact?

1 A. She was traveling in the No. 1 travel lane,
2 the left lane of two, southbound Rainbow Boulevard.

3 Q. And how did you make your determination as to
4 the points of contact between the two vehicles?

5 A. Physical damage of the vehicles on both
6 vehicles.

7 Q. And how did you make the determination as to
8 the extent of damage on the '07 Suzuki as being
9 moderate damage?

10 A. Visual and from experience of taking
11 accidents, it was more than minor in my opinion.

12 Q. And so what does moderate damage reflect?
13 How does that translate in terms of dollars? What
14 figures do you use? Anything over 1,000 but less than
15 something else?

16 A. I don't know if I use a figure for the
17 ceiling, so to speak, of the dollar amount. But the
18 next level from moderate would be complete and totaled
19 pretty much.

20 Q. Do you take into consideration the make,
21 model, and year of the vehicle when you make a
22 determination as to whether the damage is minor,
23 moderate, or major?

24 A. Yes.

25 Q. So looking at Vehicle Information Sheet 2, it

1 starts on page 5.

2 That is the vehicle driven by Emilia Garcia;
3 correct?

4 A. Yes.

5 Q. What vehicle was she driving?

6 A. She was driving a 2001 Hyundai Santa Fe SUV.

7 Q. And how long did your entire investigation
8 take place? How long did it take to conduct your
9 investigation at the scene?

10 A. Start to finish?

11 Q. Yes.

12 A. Approximately an hour.

13 Q. And were both Jared Awerbach and Emilia
14 Garcia at the scene for that hour of your
15 investigation?

16 A. Yes. But I would like to add that the
17 investigation, if you're speaking of the booking
18 procedures, it exceeded an hour. But the actual
19 accident investigation approximately an hour. They
20 both were present.

21 MR. ROBERTS: Page 60.

22 BY MR. ROBERTS:

23 Q. Did you ever come to the conclusion that
24 Jared Awerbach was impaired in his driving due to
25 marijuana?

1 A. Yes.

2 Q. And that conclusion was based upon your
3 observation and training; true?

4 A. Yes. And the admissions that he gave.

5 Q. Now, have you had training in the
6 administration of standard field sobriety tests?

7 A. Yes.

8 Q. And do you recollect when you got that
9 training with LVMPD?

10 A. I do.

11 Q. When?

12 A. Oh, approximately 2008.

13 Q. At the time you investigated this accident,
14 did you have a current certification for the standard
15 field sobriety tests?

16 A. Yes. Yes, sir.

17 MR. ROBERTS: Page 64.

18 BY MR. ROBERTS:

19 Q. Officer, did you administer the three tests
20 recorded in this report?

21 A. Yes.

22 Q. And did you administer them in accordance
23 with your training?

24 A. I did.

25 Q. Now, did you find that in administering the

1 HGN test, there was a lack of smooth pursuit?

2 A. I did.

3 Q. And how did you keep time so that you knew

4 only two seconds had elapsed?

5 A. I used a mental count in my mind.

6 Q. The onset of nystagmus. Do you see that?

7 A. I do.

8 Q. You test time mentally for that as well?

9 A. Yes, sir.

10 Q. And you estimated the 45-degree angle

11 requirement?

12 A. I did.

13 Q. Can you look at that same page, physical

14 observations?

15 A. Yes.

16 Q. You found his eyes to be bloodshot.

17 A. Yes.

18 Q. Now, in assessing his balance, you noted that

19 he was wobbling.

20 Do you see that?

21 A. Yes.

22 Q. Now, you also -- did you check the box for

23 falling?

24 A. Yes.

25 Q. The walk-and-turn test, do you see that? I

1 think you have to turn the page.

2 A. Yes, sir.

3 Q. You found that he could -- where it says
4 "Cannot keep balance while listening."

5 Do you see that?

6 A. Yes.

7 Q. And did you require him to listen to all of
8 your instructions?

9 A. Yes.

10 Q. While standing in the starting position shown
11 below.

12 A. Yes.

13 MR. ROBERTS: Page 73.

14 BY MR. ROBERTS:

15 Q. You scored him as making an improper turn?

16 A. Yes.

17 Q. What was improper about his turn?

18 A. He did not turn as per the instructions that
19 were given. The exact movement that his body made, I
20 do not recall.

21 Q. And what is the exact movements that a
22 subject is supposed to make in executing a turn?

23 A. Well, he's supposed to keep his foot on the
24 line, imaginary line, and take as many steps as
25 necessary for him to make the turn or about face, if

1 you will.

2 MR. ROBERTS: Page 77.

3 BY MR. ROBERTS:

4 Q. The one-legged stand test, did you perform
5 that?

6 A. I performed that, yes.

7 Q. And the test lasts 30 seconds; true?

8 A. Approximate.

9 Q. And how do you keep time for that 30 seconds?

10 A. I use a watch, my wristwatch, sir.

11 MR. ROBERTS: Page 85.

12 BY MR. ROBERTS:

13 Q. I'm going to follow up with some questions
14 also with Exhibit B which is the Impaired Driving
15 Report, Officer. And at the bottom of the first page,
16 there's handwriting at the bottom of the page.

17 Whose handwriting is that?

18 A. That's mine.

19 MR. ROBERTS: Page 89.

20 BY MR. ROBERTS:

21 Q. All right. Moving on to the third heading
22 and section is Physical Observations of the Driver.

23 Do you see that?

24 A. I do.

25 Q. And in the first line for breath odor, you

1 have two boxes marked, one for "Other odor" and another
2 box marked for "Strong." And then you have the word
3 "marijuana" marked at the end.

4 A. Yes.

5 Q. Can you tell us what these two boxes refer
6 to?

7 A. Well, the first physical observation that
8 you're looking for is alcoholic beverage. It's pretty
9 common. And so the fact that I smelled an odor that
10 was consistent with marijuana is why "other" is checked
11 because it's other than alcohol. And strong for the
12 fact that it was a very overpowering scent. And then I
13 listed what I was smelling at the time.

14 Q. Now, what's your frame of reference for
15 characterizing the odor of marijuana as being strong?
16 What did you have as a comparison to say that that
17 would have been strong?

18 A. Something that indicated to me that marijuana
19 was recently smoked because the odor wasn't as if it
20 was coming off his clothes or light scent. It was a
21 very strong scent giving me the indication that it was
22 smoke very recently.

23 MR. ROBERTS: Page 92.

24 BY MR. ROBERTS:

25 Q. And do you know whether that strong odor of

1 marijuana was emanating from marijuana that was smoked
2 or unsmoked?

3 A. It was smoked.

4 MR. ROBERTS: Page 95.

5 BY MR. ROBERTS:

6 Q. And with respect to balance, you noted three
7 sections. You had marked three boxes under the section
8 Balance, Wobbling, Falling, and Swaying.

9 Do you see that?

10 A. Yes.

11 Q. And with respect to the falling, did Jared
12 fall at any time during your interaction with him?

13 A. I don't recall.

14 Q. So what does the word "falling" mean?

15 A. Falling is meaning if you need to grab them
16 to prevent them from hitting the ground, losing their
17 balance, taking a number of steps to regain their
18 balance -- regain their balance if their equilibrium
19 seems to be off.

20 Q. And do you have any independent recollection
21 as to whether Jared had to take a couple of steps and
22 where you believe that he might have fallen to the
23 ground?

24 A. I don't recall if he actually fell and hit
25 the ground or if he just displayed behavior that was

1 consistent with somebody about to fall.

2 MR. ROBERTS: Page 105.

3 BY MR. ROBERTS:

4 Q. I want to talk to you just briefly about your
5 training.

6 You did have specific training with respect
7 to investigating accidents; correct?

8 A. Yes.

9 Q. And where have you received that training?

10 A. At the traffic bureau within the Las Vegas
11 Las Vegas Metropolitan Police Department.

12 Q. Did you also receive training when you were
13 at the academy?

14 A. Yes, sir.

15 Q. And what was the training that you received
16 at the academy?

17 A. Training, various training, Nevada law,
18 investigative training, collection of evidence
19 training, defensive tactics, firearms training, things
20 of that nature.

21 Q. You have also received training regarding DUI
22 accidents; correct?

23 A. In the academy?

24 Q. Well, let's start with that.

25 Did you receive training regarding DUI

1 accidents in the academy?

2 A. No.

3 Q. Did you receive training regarding
4 investigation of DUI accidents after the academy?

5 A. Well, correction. We did receive basic DUI
6 investigative training, but it was more enhanced when I
7 went to the traffic bureau.

8 Q. And you did receive specific training
9 regarding investigation of DUI accidents at the traffic
10 bureau; correct?

11 A. Yes.

12 Q. You also received training regarding
13 administering field sobriety tests; correct?

14 A. Correct.

15 Q. And you believe that at the time of this
16 accident, January of 2011, you were qualified to
17 administer a field sobriety test to Mr. Awerbach;
18 correct?

19 A. I do.

20 Q. And what do you base that understanding on?

21 A. On the experience of multiple tests that I
22 gave prior on the training I received in doing those
23 type of tests.

24 Q. Did you receive some sort of certification at
25 Metro regarding investigation of accidents or

1 investigation of DUI accidents?

2 A. Yes.

3 Q. And what was that?

4 A. Traffic investigation class and field
5 sobriety test classes and DUI classes as well.

6 Q. You took all of those classes prior to the
7 January 2nd, 2011, accident; correct?

8 A. Yes, sir.

9 Q. All right. This accident in January of 2011
10 was not the first DUI accident you investigated;
11 correct?

12 A. Correct.

13 Q. Can you approximate how many DUI accidents
14 you've investigated during your time at Metro? And we
15 can do it the same way that Mr. Mazzeo was asking. If
16 you could just do it based upon how many you do per
17 week or per month or something along those lines.

18 A. The average varies for the obvious reasons.
19 At the time in 2011, I would say more than 75.

20 Q. In other words, prior to this accident, you
21 had investigated at least 75 DUI accidents; correct?

22 A. I would say that's a good approximation.

23 Q. Is it fair to say that prior to January 2nd,
24 2011, you had administered at least 75 field sobriety
25 tests?

1 A. Yes.

2 Q. I want to look back at Exhibit A, which is
3 the police report, the traffic accident report.

4 You marked off on here that the roadway was
5 dry; correct?

6 A. Yes.

7 Q. And the conditions were clear?

8 A. Yes.

9 Q. And if it was a rainy day, you would have
10 marked that down; right?

11 A. Yes.

12 Q. If there was, you know, something obstructing
13 view like fog, you would have marked that down;
14 correct?

15 A. Correct.

16 Q. And it was just a clear, regular, Las Vegas
17 day; right?

18 A. Correct.

19 Q. Mr. Mazzeo was asking you about the
20 description of the accident near the bottom of the
21 first page of the traffic accident report.

22 Do you see that?

23 A. I do.

24 Q. You said that the information came from your
25 discussions with Ms. Garcia and Mr. Awerbach; correct?

1 A. Along with physical evidence and the
2 statements that were made, yes.

3 Q. The first sentence here, V2 was traveling
4 southbound Rainbow Boulevard in the left of two travel
5 lanes approaching Peak Drive.

6 Do you see that?

7 A. Yes.

8 Q. If one of the drivers disputed the position
9 of one of the vehicles, you would have put that in
10 here; correct?

11 A. Correct.

12 Q. In other words, both drivers agreed that
13 Vehicle 2 was traveling southbound Rainbow Boulevard,
14 in the left of two travel lanes approaching Peak Drive;
15 correct?

16 A. Yes, sir.

17 Q. The next sentence says, Vehicle 1 was
18 traveling eastbound in a private drive north of Peak
19 Drive approaching Rainbow Boulevard.

20 Do you see that?

21 A. Yes.

22 Q. If either of the drivers disputed that
23 statement, would you have noted that in your report;
24 correct?

25 A. Yes.

1 Q. The next statement is, V1 stated that he
2 thought that Rainbow Boulevard was clear of traffic.

3 Do you see that?

4 A. Correct.

5 Q. What you're saying is Mr. Awerbach told you
6 he thought Rainbow Boulevard was clear of traffic;
7 correct?

8 A. That's a statement made by him.

9 Q. And the next one is, V1 then traveled onto
10 Rainbow Boulevard and entered the path of V2 causing V1
11 front to hit V2 right; correct?

12 A. Yes.

13 Q. Is that a statement that also came from
14 Mr. Awerbach?

15 A. That is a statement that was based off the
16 evidence of the damage to the vehicles. It was also
17 based off the statements made and part of it, to answer
18 your question, was their statements. But collectively
19 is where I drew that last sentence.

20 Q. If either of the drivers disputed that
21 analysis, you would have noted that in your report;
22 correct?

23 A. Correct.

24 MR. ROBERTS: Page 113.

25 /////

1 BY MR. ROBERTS:

2 Q. Let's talk about the right-of-way.

3 You've had training in Nevada law; correct?

4 A. Yes.

5 Q. You've been trained in how to determine
6 right-of-way on the roadway; correct?

7 A. Yes.

8 Q. In a situation where one car is pulling out
9 of a private drive onto a road and there is another car
10 traveling on the main road, who would have the
11 right-of-way?

12 A. The easiest way I could explain, and I
13 explained this out in the field, is that the person
14 traveling on the roadway, public roadway, basically,
15 that roadway belongs to them. And if you want to enter
16 their roadway, because it belongs to them and they have
17 established that you have the right-of-way, you have to
18 wait until it's clear to do so before you join their
19 roadway. And the fact that the male was driving from a
20 private drive onto a public roadway that the vehicle
21 that the female was driving had established already
22 prior to that -- to the fact, that was what I used as
23 my reasoning in determining who was at fault.

24 Q. It's your understanding Mr. Awerbach was
25 required to wait until Ms. Garcia passed before he left

1 a private drive to enter Rainbow Boulevard; correct?

2 A. Correct.

3 MR. ROBERTS: Page 117.

4 BY MR. ROBERTS:

5 Q. If you had spoken to his mother on the phone
6 and she told you that Mr. Awerbach stole her vehicle to
7 drive it that day, would you have put that in your
8 report?

9 A. Absolutely.

10 Q. If you spoke to Mr. Awerbach's mother on the
11 phone and she told you that the vehicle he was driving
12 was stolen, you would have also charged Mr. Awerbach
13 with stealing the vehicle; correct?

14 A. Yes. If I'm informed that a crime has taken
15 place, especially on the investigation that I'm on, he
16 would have been charged.

17 Q. If you spoke with Mr. Awerbach's mother and
18 she told you that she had not given him permission to
19 drive the car that day, you would have also put that in
20 your report; correct?

21 A. Yes.

22 Q. You said earlier that this is only one of a
23 couple times that you had taken a person into custody
24 and something was found on their person after you took
25 them into custody; right?

1 A. Yes.

2 Q. What did you mean by that?

3 A. Well, I take pride in officer safety. That's
4 the number one thing that I think allows you to go home
5 at the end of the shift. So conducting my
6 pat-down-and-search incident to an arrest on the
7 subject for any weapons or any type of contraband, I'm
8 usually really, really good at finding that, in my
9 opinion.

10 MR. ROBERTS: Page 121.

11 BY MR. ROBERTS:

12 Q. Let's turn to the field sobriety -- or,
13 excuse me, the Impaired Driving Report.

14 As a general question, after performing the
15 field sobriety tests and interacting with Mr. Awerbach,
16 your impression at the time was that he was impaired by
17 marijuana; correct?

18 A. Yes.

19 Q. And you said earlier you were at the scene of
20 the accident for approximately an hour; correct?

21 A. Correct. Yes, sir.

22 Q. You also took Mr. Awerbach somewhere
23 afterwards; correct?

24 A. Yes, sir.

25 Q. Where did you take him?

1 A. He was -- well, actually, I did not take him.
2 He was transported by a patrol officer. Because I have
3 a motorcycle, we call for patrol assistance to
4 transport him to city jail.

5 Q. And then you went to the city jail at the
6 same time?

7 A. Yes.

8 Q. And you also spent some time with
9 Mr. Awerbach at the city jail; correct?

10 A. Yes.

11 Q. If at any point during the time you spent
12 with Mr. Awerbach you changed your mind and thought
13 that he had not been impaired at the time of the
14 accident, you would have noted that in your reports;
15 correct?

16 A. Correct.

17 Q. And you understand that a charge for driving
18 under the influence can have serious consequences to a
19 person; correct?

20 A. Absolutely, yes.

21 Q. And you wouldn't charge a person with driving
22 under the influence unless you actually believed that
23 they were impaired while driving their vehicle;
24 correct?

25 A. Correct.

1 (Reading of the deposition of
2 Officer David Figueroa was suspended.)

3 MR. ROBERTS: Thank you, Officer.

4 Thank you, Your Honor.

5 THE COURT: Mr. Mazzeo.

6 MR. MAZZEO: Yes. May I proceed, Your Honor?

7 THE COURT: You may.

8 MR. MAZZEO: Thank you.

9 (The reading of the deposition of
10 Officer David Figueroa resumed.)

11 MR. MAZZEO: Starting on page 31.

12 BY MR. MAZZEO:

13 Q. Is it correct to say, as an investigating
14 officer, you are required to ask two questions
15 regardless of the answer? More specifically, the
16 question you're required to ask the parties involved in
17 the accident: Are you injured, number one question.

18 A. Yes, sir.

19 Q. And regardless of the answer, you're still
20 required to ask whether or not they might need medical
21 attention.

22 A. Yes, sir.

23 MR. MAZZEO: Page 37.

24 BY MR. MAZZEO:

25 Q. Do you know if -- at the time you arrived, if

1 the vehicles had been moved from the original resting
2 position following the accident?

3 A. It should say in the report. I believe so.
4 If I can find it for you, I will. The vehicles were
5 moved.

6 Q. They were?

7 A. Vehicle 1 was moved and Vehicle 2 was moved
8 as well.

9 Q. And how do you know that? What on the
10 traffic accident report indicates that?

11 A. Yes, sir. Oh, where?

12 Q. Yes.

13 A. Distance traveled after impact. That's
14 page 3, toward the bottom page.

15 Q. And it states -- it has No. 7 and the word
16 "moved" to the right of it.

17 A. Correct. So what that indicates is that
18 after the two vehicles met and the collision occurred,
19 some point from that time to the time I arrived when
20 they -- when they contacted the dispatcher, they either
21 were instructed to move by dispatch or they just pulled
22 to the side of the road.

23 Q. That's the same case, the same --

24 A. Vehicle 2 as well.

25 Q. -- determination made for Vehicle 2 on page 5

1 of the report.

2 A. Yes. And that reflects upon arrival of
3 myself.

4 Q. Okay. For speed estimate, there's a box in
5 the lower portion of the page that has three smaller
6 boxes, From, To, and Limit.

7 Do you see that?

8 A. The very bottom?

9 Q. No, just right here (indicating).

10 A. Okay. Yes.

11 Q. And what's the purpose for each of these
12 boxes under speed estimate?

13 A. To find out or estimate how fast the vehicles
14 were traveling.

15 Q. At the time of the impact?

16 A. Yes, sir.

17 Q. And there's nothing contained in the boxes
18 From and To.

19 Why is that?

20 A. This particular accident had moderate damage.
21 There was no injuries. There was no fatalities. There
22 was no pedestrians that were involved. So it was not
23 necessary to do speed workups. If -- if we was to do
24 speed workups on every accident, we just wouldn't have
25 the time to.

1 Q. And how did you make your determination as to
2 the points of contact between the two vehicles?

3 A. Physical damage of the vehicles, on both
4 vehicles.

5 Q. And is it correct that Ms. Garcia has told
6 you that she was not injured?

7 A. Yes.

8 Q. And tell us about your observations that you
9 made of Ms. Garcia at the time.

10 A. In reference to what? She had no physical or
11 visual injuries that I could tell. But they could be
12 internal that I can't see. That's where she would
13 provide that information to me.

14 Q. And that's where you would ask -- that's why
15 you follow up with visual observations with a question
16 asking the person whether they're injured.

17 A. Correct.

18 Q. And how did -- how long did your entire
19 investigation take place? How long did it take to
20 conduct your investigation at the scene?

21 A. Start to finish?

22 Q. Yes.

23 A. Approximately an hour.

24 Q. And were both Jared Awerbach and Emilia
25 Garcia at the scene for that hour of your

1 investigation?

2 A. Yes. But I would like to add that the
3 investigation, if you're speaking of the booking
4 procedures, it exceeded an hour. But the actual
5 accident investigation, approximately an hour. They
6 both were present.

7 Q. And so during that hour that you were
8 investigating this accident, is it correct to say that
9 you were able to observe both motorists throughout that
10 hour?

11 A. Yes.

12 Q. And at any time during that hour, did you at
13 any time observe Emilia Garcia sitting on the ground or
14 holding her neck or head or ...

15 A. I don't recall.

16 Q. And you had made -- and you had made any
17 observations that maybe if a motorist needed assistance
18 standing up or exiting a vehicle or if they were using
19 their hands to touch a part of their body which would
20 indicate a symptom or injury of some sort, would you
21 have noted that in the traffic accident report?

22 A. I probably would have notated it in the
23 narrative. But if it's -- the only thing that I can
24 provide to request medical or ask if you have any
25 injuries. In the event that it's -- you know,

1 sometimes if they're in shock and there's visual clues,
2 I would automatically request on my own. And so if in
3 the event she was, you know, holding her head or
4 something in that nature, I probably would have asked
5 again just to reassure because sometimes, you know,
6 there's injuries that exist, and it's best to have it
7 confirmed rather than just go home and leave this
8 accident scene.

9 Q. Fair enough.

10 And do you have any recollection as to
11 whether Ms. Garcia might have been in shock as a result
12 of this incident?

13 A. I don't recall, but based on the accident
14 report that I took at the time, no.

15 Q. And if you had witnessed Emilia Garcia --

16 (Clarification by the Reporter.)

17 BY MR. MAZZEO:

18 Q. And if you had witnessed Emilia Garcia or any
19 motorist in shock as you're investigating an accident,
20 is it fair to say that you would have documented that
21 in your report?

22 A. Absolutely.

23 Q. Can you turn to the Impaired Driving Report?

24 Okay.

25 Officer, did you administer the three tests

1 recorded in this report?

2 A. Yes.

3 Q. And did you administer them in accordance
4 with your training?

5 A. I did.

6 Q. Now, did you find that in administering the
7 HGN test, there was a lack of smooth pursuit?

8 A. I did.

9 Q. And how did you keep time so that you knew
10 only two seconds had elapsed?

11 A. I used a mental count in my mind.

12 Q. So you didn't use a stopwatch, you just kept
13 track mentally.

14 A. Yes, sir. It was only two seconds. I didn't
15 feel the need for a stopwatch.

16 Q. And what degree of lack of smooth pursuit did
17 Mr. Awerbach's eyes evidence to you? Was it minor,
18 moderate, or severe?

19 A. I don't recall.

20 Q. The onset of nystagmus.

21 Do you see that?

22 A. I do.

23 Q. Did you test time mentally for that as well.

24 A. Yes, sir.

25 Q. And you estimated the 45-degree angle

1 requirement.

2 A. Yes.

3 Q. There's no way to measure that in the field;
4 right?

5 A. For an accurate 45 degrees, I'm sure there
6 is. But I use a different method on every time I do
7 it.

8 Q. You eyeball it.

9 A. I eyeball it from the shoulder length of the
10 subject that I'm testing.

11 MR. MAZZEO: Moving on to 74.

12 BY MR. MAZZEO:

13 Q. And you are not able to recall what was
14 improper about Mr. Awerbach's turn; correct?

15 A. Correct.

16 Q. And what are the kinds of mistakes that
17 suspects can make that could be scored as an improper
18 turn?

19 A. Taking their foot off the line prior to
20 making the turn, jumping in the air, doing an
21 about-face. There's several factors that you would
22 record that.

23 Q. And how far off the line can a suspect move
24 his foot before you will score him as implicating a
25 foot?

1 A. Oh, I can't give you an exact measurement.
2 But the instructions are demonstrated. They're
3 explained to keep their foot on the line prior to
4 making the turn. But with that said, I mean, you
5 don't -- there has been times where the foot might have
6 come off the line. Not in this particular instance. I
7 don't recall. But when you're giving the test, there's
8 times that somebody's foot might come off the line and
9 you take that into consideration.

10 Q. Now, you administered these tests on a
11 sidewalk; right?

12 A. Yes, sir.

13 Q. And it was the sidewalk north of the
14 driveway; right?

15 A. Northwest corner.

16 Q. And did you draw a line in chalk on the
17 sidewalk?

18 A. I did not.

19 Q. What line did you use?

20 A. I don't recall if I used something on the --
21 a reference line that he may be able to use or if I
22 used an imaginary line.

23 MR. MAZZEO: Moving on to page 94.

24 BY MR. MAZZEO:

25 Q. Moving on to speech. Is it correct to say

1 that based on your experience and training as a Metro
2 police officer that you are trained to make
3 observations as to the person's speech to -- which will
4 help you make a determination as to whether a person
5 might be under the influence of alcohol or drugs?

6 A. Yes.

7 Q. Because it is a fact that marijuana and for
8 alcohol, when adjusted, do affect a person's ability to
9 speak clearly and coherently.

10 A. Yes.

11 Q. And yet you noted that when you spoke with
12 Jared at the time of the accident that his speech was
13 normal; correct?

14 A. Correct.

15 Q. And the other choices in the section would be
16 stuttering, incoherent, slurred or -- and confused
17 or -- and other; correct?

18 A. Correct.

19 Q. And is it fair to say that you did not detect
20 from speaking with Jared that he had stuttered, that he
21 was incoherent, that he had slurred his speech or
22 appeared confused; correct?

23 A. Correct.

24 Q. And with respect to attitude, would you agree
25 that a person who has consumed alcohol and/or

1 marijuana, that such person under the influence of a --
2 of an intoxicating substance like that, like marijuana
3 or alcohol, does affect a person's attitude?

4 A. Yes.

5 Q. And in what way might a person under the
6 influence of marijuana, how would that affect a
7 person's attitude?

8 A. Well, marijuana is a suppressant. They would
9 be more, if you will, mellowish, where alcohol is more
10 of an abrasing type of loud and combative and so forth.
11 Marijuana, my experience with these investigations is a
12 person who is more of a mellow tone type of subject.

13 Q. Some even might be indifferent or
14 unresponsive to the questioning.

15 A. Correct.

16 Q. And yet you had noted that Jared during your
17 investigation and -- and interaction with him, that he
18 was cooperative; correct?

19 A. Yes, sir.

20 Q. And with respect to balance, you noted three
21 sections. You had marked three boxes under the section
22 Balance, Wobbling, Falling, and Swaying.

23 Do you see that?

24 A. Yes.

25 Q. And with respect to falling, did you -- did

1 Jared fall at any time during your interaction with
2 him?

3 A. I don't recall.

4 Q. So what does the word "falling" mean?

5 A. Falling is -- meaning if you need to grab
6 them to prevent them from hitting the ground, losing
7 their balance, taking a number of steps to regain their
8 balance if their equilibrium seems to be off.

9 Q. And do you have any independent recollection
10 as to whether Jared had to take a couple of steps and
11 where you believe that he might have fallen to the
12 ground?

13 A. I don't recall if he actually fell and hit
14 the ground or if he just displayed behavior that was
15 consistent with somebody about to fall.

16 Q. And that's what I'm asking.

17 Do you have any independent recollection as
18 to whether Jared took a few steps to suggest to you
19 that he might be in the process of falling?

20 A. I do not.

21 Q. Do you have any recollection as to whether
22 you needed to grab on to him to assist him to prevent a
23 potential fall?

24 A. I do not.

25 Q. And so as you sit here today, is it fair to

1 say that, you -- it's not -- you're not testifying that
2 you actually assisted him in standing or in maintaining
3 his balance while -- while you investigated him;
4 correct?

5 A. Correct.

6 Q. And would you agree that a person who has
7 been involved in an accident where there's been a
8 collision, a motor vehicle accident where there's been
9 a collision that that person might be physically
10 charged up or withdrawn? Would you agree that a person
11 who's been in a motor vehicle accident might -- their
12 physical body might be affected to the extent that they
13 might be a little unsteady on their feet?

14 A. Yes.

15 Q. Would you agree that a person who is in a
16 jarring accident might have their equilibrium affected
17 for a period of time following the accident?

18 A. Yes.

19 Q. And do you agree that a person who is
20 within --

21 MR. MAZZEO: Start over.

22 BY MR. MAZZEO:

23 Q. And do you agree that a person who, within a
24 short time, let's say within an hour or two following a
25 motor vehicle accident, that if the person's

1 equilibrium is affected, that might cause them to be
2 wobbly or sway on their feet?

3 A. Yes.

4 Q. Moving down to Initial Field Interview over
5 to the right side of the page, you -- this is your
6 handwriting on this page; correct?

7 A. It is.

8 Q. And so the right side of the page, there's a
9 statement apparently attributed to Jared --
10 attributable to Jared, "My mom" -- sorry. These are
11 answers that Jared gave to questions, to the questions
12 to the left; correct?

13 A. Correct.

14 Q. And were they questions read by Jared or were
15 they spoken by you?

16 A. They were spoken by me and his response is
17 recorded.

18 Q. And he was -- and it appears that he was
19 responsive to each of the questions that are to the
20 left of the statements attributable to Jared; correct?

21 A. Correct.

22 Q. And he was able to tell you who owns the
23 vehicle; correct?

24 A. Yes.

25 Q. What his destination was; right?

1 A. Correct.

2 Q. And where he started from.

3 A. Yes.

4 Q. And the time he had left.

5 A. Yes.

6 Q. He also told you today's date.

7 A. Yes.

8 Q. And you had asked him if he had been drinking

9 and he answered no.

10 A. Correct.

11 Q. Moving on to the next page, which is the -- I

12 guess this is the first page for the standardized field

13 sobriety test. This would be --

14 A. Yes, sir.

15 Q. And this provides some of the preliminary

16 information for the location where the -- you performed

17 the field sobriety test; correct?

18 A. Yes.

19 Q. And you noted -- as we know, we've

20 established this accident occurred on January 2nd of

21 2011, and that the time you had started the field

22 sobriety test is indicated on the page; correct?

23 A. Yes, it is.

24 Q. What time is stated?

25 A. Military time of 1820 hours, which translates

1 to 6:20 p.m.

2 Q. And 6:20 p.m. on January 2nd, that was
3 nighttime.

4 Night would have already started at that
5 point; correct?

6 A. Yes.

7 Q. It would have been dark out.

8 A. Yes.

9 Q. And you agree that based on your training and
10 experience as a police officer that subjects use their
11 eyes to assist in coordination and balance.

12 A. Yes.

13 Q. And the reason for that is we use our eyes to
14 look at a frame of reference and our visual field to
15 help with our coordination and balance; correct?

16 A. I agree.

17 Q. And would you agree that, as you indicated
18 under lighting conditions, that there was a streetlight
19 on but it was nighttime; right?

20 A. Yes.

21 Q. And would you agree that one's ability to be
22 coordinated and balanced while performing particular
23 activities at night when it's dark out might be
24 different than during the day where there's a visual
25 field, where a person might have a better reference of

1 objects in the visual field during the daytime as
2 opposed to night?

3 A. I'd agree.

4 Q. And along the same line of questioning, would
5 you agree that balance can be affected by the lack of a
6 stationary object in our field of vision?

7 A. I agree.

8 Q. Moving on to the next page, and this would be
9 the walk-and-turn test, GJL1687.

10 A. Yes.

11 Q. And would you agree that the walk-and-turn
12 test, it requires -- it's also known as the heel-to-toe
13 test; correct?

14 A. Yes.

15 Q. And that's because it requires, as indicated
16 in the figure on this page, the heel of the forward
17 foot touches the toe of the foot behind.

18 A. Correct.

19 Q. And you're doing -- walking, I guess, nine or
20 ten steps forward.

21 A. Correct.

22 Q. And then you return and you walk those nine
23 or ten steps in the opposite direction; correct?

24 A. Correct.

25 Q. Would you agree that this activity, this

1 walk-and-turn test which requires the heel to be placed
2 at the toe with each step does not reflect the
3 movements of daily activities that we engage in on a
4 regular basis?

5 A. I agree.

6 Q. Do you agree that performing this test,
7 whether or not a person is intoxicated, it might be
8 hard for the average person to perform?

9 A. Yes.

10 Q. Moving on to the one-leg stand test which is
11 GJL1688.

12 Now, based on your testimony, this walk and
13 all of your field sobriety tests took place on the
14 sidewalk in the north -- northwest corner of Rainbow
15 and Peak Drive; correct?

16 A. Yes, sir.

17 Q. And you had indicated that on the first page
18 of the standard field sobriety test that Jared was
19 wearing blue jeans. He was in a sweatshirt, and he's
20 wearing tennis sneakers; correct?

21 A. What page are you referring to?

22 Q. That would be 1686.

23 A. Yes.

24 Q. And do you have any recollection as to
25 whether his tennis shoes were tied, the laces were tied

1 or untied?

2 A. I do not recall.

3 Q. Do you agree that if the laces had been
4 untied on his sneakers, that might affect or on the
5 tennis shoes, that might affect one's ability to --
6 one's ability to balance and be coordinated?

7 A. Yes.

8 Q. And with respect to the one-leg stand, you
9 also agree, similar to the walk-and-turn test, that
10 this one-leg stand does not reflect an activity that
11 people engage in on any day-to-day basis.

12 A. Yes.

13 Q. Would you agree that most people, whether
14 intoxicated or not, would have a problem performing the
15 one-leg stand?

16 A. Yes.

17 Q. And would you agree that Mr. -- or Jared's
18 failure to -- failure of his ability to perform the
19 one-leg stand is not dispositive of -- necessarily of
20 his impairment by marijuana?

21 A. Yes.

22 MR. MAZZEO: Thank you, Officer.

23 (The reading of the deposition of
24 Officer David Figueroa was completed.)

25 THE COURT: Does that take care of both of

1 you guys?

2 MR. MAZZEO: Yes, sir, Your Honor.

3 MR. STRASSBURG: Yes, Judge.

4 THE COURT: All right. Thank you.

5 Unfortunately, you don't get to ask questions
6 of this witness because he's not here.

7 Plaintiff's next witness.

8 MR. ROBERTS: Your Honor, for our next
9 witness we call Garelyn Marquez.

10 THE CLERK: Mr. Roberts, can I have her
11 deposition, please?

12 THE COURT: You published a deposition. Do
13 you have the original?

14 MR. ROBERTS: Actually, that's the -- the
15 defense indicated they -- they provided that to the
16 Court already. We both had some originals, and that
17 was on their list.

18 MR. MAZZEO: Is this for Figueroa?

19 MR. ROBERTS: Yes.

20 MR. MAZZEO: You should have that in your
21 box.

22 THE CLERK: Is there a box down there?

23 MR. ROBERTS: There is.

24 THE COURT: Come on up, ma'am. Once you get
25 there, I'm going to ask you to remain standing, please,

1 and raise your right hand to be sworn.

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

6 THE WITNESS: Yes.

7 THE CLERK: Please state your first and last
8 name and spell it for the record.

9 THE WITNESS: Garelyn, G-a-r-e-l-y-n, Marquez
10 M-a-r-q-u-e-z.

11 THE CLERK: M-a?

12 THE WITNESS: Q-u-e-z.

13 THE COURT: Go ahead and be seated. Thank
14 you, ma'am. There's a microphone there in front of
15 you. I'm just going to ask you to try to talk into
16 that so the jurors can hear you better.

17 THE WITNESS: Okay.

18 MR. ROBERTS: Thank you, Your Honor.

19

20 DIRECT EXAMINATION

21 BY MR. ROBERTS:

22 Q. Could you please identify yourself once again
23 to the jury?

24 A. My name's Geralyn Marquez. I work for the
25 State of Nevada Department of Motor Vehicles, and I'm a

1 supervisor.

2 Q. And are you here pursuant to a trial subpoena
3 which Emilia Garcia served upon the Department of Motor
4 Vehicles?

5 A. Yes, sir.

6 Q. Okay. Are you familiar with a prior subpoena
7 that was served upon the Department of Motor Vehicles
8 back in 2014?

9 A. Yes, sir.

10 Q. And that was requesting records for Mr. Jared
11 Awerbach?

12 A. Yes, sir.

13 Q. Okay. Did you bring those records with you
14 here today?

15 A. Yes.

16 Q. Okay. Very good.

17 Are you familiar with their contents?

18 A. Yes, sir.

19 Q. Did the Department of Motor Vehicles also
20 receive a supplemental subpoena requesting additional
21 records from 2014 up through current?

22 A. Yes, sir.

23 Q. And have you reviewed Mr. Awerbach's current
24 records?

25 A. Yes, sir.

1 Q. Could you explain to the jury, to what extent
2 you deal with the types of records you're about to
3 discuss in your day-to-day duties at your job?

4 A. Well, I have and still help with the
5 reinstatements over the driver's licenses. I go
6 through each application on a daily basis and make sure
7 that the reinstatements were done correctly.

8 Q. Are you familiar with the requirements of the
9 DMV to obtain a Nevada ID card?

10 A. Yes, sir.

11 Q. Are you familiar with the requirements of the
12 DMV to obtain a Nevada learner's permit? That's not
13 the right word, is it?

14 A. No.

15 Q. What's the --

16 A. Instruction permit.

17 Q. Instruction permit. Thank you. It was a
18 learner's permit where I grew up.

19 Are you familiar with requirements to obtain
20 a Nevada driver's license?

21 A. Yes, sir.

22 Q. There was an accident which the jury's heard
23 about on January 2nd, 2011. And I'm going to ask you
24 to use that date as a reference point for the jury.

25 At any time prior to January 2nd, 2011, did

1 Mr. Awerbach have a Nevada instruction permit?

2 A. No, sir.

3 Q. At any time prior to January 2nd, 2011, did
4 Jared Awerbach have a Nevada driver's license?

5 A. No, sir.

6 Q. At any time prior to January 11th, 2011,
7 [sic] did Mr. Awerbach apply for a Nevada instruction
8 permit or driver's license?

9 A. No, sir.

10 Q. At any time prior to January 2nd, 2011, did
11 Mr. Awerbach take a test a written test of any sort on
12 the computer or handwritten?

13 A. That's not within our records, but the
14 documents that have been presented down from Carson
15 City, it doesn't show.

16 Q. Would the records from Carson City show that
17 if Mr. Awerbach had taken a test?

18 A. If the test had been requested, yes.

19 Q. At any time prior to January 2nd, 2011, had
20 Mr. Awerbach either paid for a permit or a driver's
21 license?

22 A. No, sir.

23 Q. Had he ever applied for a permit or driver's
24 license?

25 A. Not according to the documents that were sent

1 down.

2 Q. Thank you.

3 I'm going to show you a couple of clips from
4 the sworn deposition testimony of Andrea Awerbach,
5 Jared Awerbach's mother, and then ask you a question.
6 Okay?

7 MR. ROBERTS: Audra, could we have Opening B?

8 (Video clip was played.)

9 "QUESTION: Did you ever see Jared take a
10 written test at the DMV?

11 "ANSWER: Yes.

12 "QUESTION: When was that?

13 "ANSWER: I don't remember.

14 "QUESTION: Was it before or after the
15 2011 accident?

16 "ANSWER: Before.

17 (Video clip was stopped.)

18 BY MR. ROBERTS:

19 Q. Did Jared ever take a written test at the DMV
20 before 2011?

21 A. Not according to the records that were sent.

22 Q. Thank you.

23 MR. ROBERTS: Opening A.

24 (Video clip was played.)

25 "QUESTION: Has Jared ever had a driving

1 permit?

2 "ANSWER: I thought he did.

3 "QUESTION: Has he ever actually had one?

4 "ANSWER: I don't know.

5 "QUESTION: When did you think he had one?

6 "ANSWER: Just before his 18th birthday.

7 I -- in fact, I took his 18th birthday off from
8 work to take him to the DMV to go for his
9 driver's license. He turned me down. The
10 times that I paid for it online. The times
11 that his grandmother paid for it. The times I
12 went online to sign him up.

13 "QUESTION: How many times did you
14 actually go to the DMV with him?

15 "ANSWER: I don't recall.

16 "QUESTION: More than once?

17 "ANSWER: I believe so.

18 "QUESTION: More than five times?

19 "ANSWER: I don't think so.

20 "QUESTION: What happened when you went to
21 the DMV?

22 "ANSWER: I don't recall. I -- I thought
23 that he got a permit one time. It was to get
24 an ID when twice -- at least twice it was to
25 Takira for her test. I don't remember each

1 time.

2 "QUESTION: What was it that you paid for
3 online?

4 "ANSWER: His permit.

5 "QUESTION: And how did you pay for it
6 online?

7 "ANSWER: You go online to the DMV. You
8 use your credit card to verify, and you pay
9 whatever the fee is.

10 "QUESTION: When did you do that?

11 "ANSWER: I don't recall exact -- exact
12 dates. But before his 18th birthday, once he
13 came home from Utah.

14 (Video clip was stopped.)

15 BY MR. ROBERTS:

16 Q. Do the records of the DMV show that a permit
17 was paid for prior to January 2nd, 2011?

18 A. Not according to the document.

19 Q. Is it possible to pay for a instruction
20 permit online?

21 A. No.

22 Q. Do the records of the DMV indicate whether
23 Mr. Jared Awerbach currently has a valid Nevada
24 driver's license?

25 A. Yes, they do.

1 Q. And do they indicate the date that that
2 driver's license was obtained?

3 A. Yes, sir.

4 Q. What is that date?

5 A. February 13th, 2016.

6 Q. Is that Saturday, just over the last weekend?

7 A. Yes, sir.

8 Q. On Friday, February 12th, 2016, did Mr. Jared
9 Awerbach have a valid Nevada driver's license?

10 A. No, sir.

11 Q. And finally, I just wanted to -- just to let
12 the jury know, did we -- did we meet prior to your
13 testimony today?

14 A. Yes.

15 Q. When that was?

16 A. I want to say probably a week and a half ago.

17 Q. Okay. And did you voluntarily agree to come
18 by my office to go over your records with me?

19 A. Yes.

20 Q. Okay. Thank you so much, ma'am.

21 A. You're welcome.

22 MR. ROBERTS: Thank you, Your Honor. That's
23 all I have.

24 THE COURT: Mr. Mazzeo, cross.

25 MR. MAZZEO: Yes, Your Honor. One minute,

1 please.

2 MR. ROBERTS: While we're waiting, Your
3 Honor, can I just ask one clarification question?

4 THE COURT: Sure.

5 BY MR. ROBERTS:

6 Q. I asked if he had a license on Friday,
7 February 12, 2016.

8 A. Yes, sir.

9 Q. Did he have a learner's permit or an
10 instruction permit on Friday, February 12th of 2016?

11 A. No, sir.

12 MR. ROBERTS: All right. Thank you.

13 THE COURT: Cross?

14 MR. MAZZEO: Yes, Your Honor. I'm going to
15 defer Mr. Strassburg. He'll go first.

16 THE COURT: Okay.

17 MR. STRASSBURG: Judge, I wonder if I could
18 have the screen. Okay. Judge, I have a document I'd
19 like to show to the witness and see if I can refresh
20 her recollection.

21 Do I put that on the screen and then you
22 control it?

23 THE COURT: Just show it to her.

24 MR. STRASSBURG: Can I show it to her
25 electronically?

1 THE COURT: No, not without showing the jury.

2 MR. STRASSBURG: Would it be possible to

3 just --

4 THE COURT: Is it already admitted?

5 MR. STRASSBURG: No, Judge.

6 MR. MAZZEO: Can we turn off the main screen,

7 Judge, so they don't see it?

8 THE COURT: Okay. You guys are going to have
9 to do that. I can't control the TV. Let me see if I
10 can do that.

11 MR. STRASSBURG: Sorry, Judge. I'm having a
12 Microsoft moment.

13 THE COURT: Do you have a hard copy? It's
14 probably easier.

15 MR. MAZZEO: Judge, I'd rather go second, but
16 while he's setting this up, just to save time, I can go
17 first.

18 THE COURT: Go ahead.

19 MR. MAZZEO: Thank you, Judge.

20

21 CROSS-EXAMINATION

22 BY MR. MAZZEO:

23 Q. Ms. Marquez, good afternoon.

24 A. Hi.

25 Q. Hi. Now, prior to or in anticipation of

1 trial, is it correct to say you received a subpoena,
2 actually a trial subpoena from plaintiff's counsel's
3 office?

4 A. It came through Carson City, yes.

5 Q. Okay. And did you actually have -- have --
6 do you have a copy of this trial subpoena?

7 A. Yes, I do.

8 Q. And this trial subpoena requires you to bring
9 documents to court regarding the file on Jared
10 Awerbach; correct?

11 A. Whatever was requested.

12 Q. Okay. And -- and then to give testimony with
13 regard to those documents.

14 A. Only those documents, correct.

15 Q. Okay. And you also realize that motorists
16 have a right to privacy of DMV information?

17 A. Correct.

18 Q. And there's limitations, as you know, on the
19 release and use of DMV information?

20 A. Correct.

21 Q. So you know, according to the law, you're not
22 just allowed to release DMV information to the general
23 public?

24 A. Correct.

25 Q. Okay. So -- but you told us a week and a

1 half ago you went to plaintiff's counsel's office to
2 have a conversation with him about the DMV records on
3 Jared Awerbach's file?

4 A. Which was approved by our administrators.

5 Q. Even though the subpoena you received was not
6 to have -- excuse me, was not to have any conversations
7 with third parties, it was to come to court here today
8 to bring records and testify on the stand; right?

9 A. This is the very first time that we as the
10 department have ever participated in a civil
11 litigation. So it's a new area for us. I'm only the
12 custodian of records. Alls I'm to do is bring the
13 documents forward and verify their authenticity.

14 Q. Authenticity. But you didn't just bring the
15 records forward. You actually went to plaintiff's
16 counsel's office about a week and a half ago.

17 A. Correct.

18 Q. Okay. So your subpoena was to bring them to
19 court and to testify as to those documents on the
20 stand --

21 A. Okay.

22 Q. -- right?

23 But you in fact had a conversation -- I'm
24 just -- I just want to be clear as to what your
25 understanding of the rules are with regard to speaking

1 with disclosing information to third parties.

2 MR. ROBERTS: Your Honor, I object. May we
3 approach?

4 THE COURT: Come on up.

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

7 THE COURT: Objection's overruled.

8 MR. MAZZEO: Thank you, Judge. Can we have
9 that question read back, please?

10 THE COURT: Right.

11 But you in fact had a conversation -- I'm
12 just -- I want to be clear as to what your
13 understanding of the rules are with regard to speaking
14 with disclosing information to third parties.

15 MR. MAZZEO: Okay. So it wasn't -- I didn't
16 complete the question, so I'll rephrase it, Judge.

17 BY MR. MAZZEO:

18 Q. Ms. Marquez, did the trial subpoena that you
19 have a copy of permit you to speak with third parties
20 outside of the courtroom with regard to disclosing DMV
21 information of motorists? Yes or no?

22 A. I would presume no. However, what -- the
23 only reason that I was over there is we needed to find
24 out what we were going to have to do because we have
25 never done anything in the trial like this before. We

1 needed to know what was going to be expected of us.
2 And our administrator explicitly told them the only
3 thing that we can do is verify the records because I'm
4 a custodian of records.

5 Q. Ms. Marquez, you said we needed to find out
6 what we were going to do --

7 A. Meaning the department.

8 Q. The department. Not you and plaintiff's
9 counsel, though; right?

10 A. No.

11 Q. So then your orders don't come from
12 Mr. Roberts or -- or the plaintiff's firm, do they?

13 A. No.

14 Q. They come from your department, the DMV.

15 A. Correct.

16 Q. Okay. So in any event, you have a copy of
17 the trial subpoena; yes?

18 A. Yes.

19 Q. And that -- as you have acknowledged, this
20 directed you to come to court during the course of the
21 trial, to -- to discuss with -- with a file on Jared
22 Awerbach and to discuss the file on the stand; correct?

23 A. Correct.

24 Q. Okay. And is it correct that this trial
25 subpoena did not give you permission to have a private

1 discussion with a third party outside of the courtroom
2 setting to disclose DMV information regarding
3 motorists?

4 A. Correct.

5 Q. Okay.

6 MR. MAZZEO: Thank you, Judge. Nothing
7 further. I will pass the witness.

8 THE COURT: Mr. Strassburg, you ready?

9 MR. STRASSBURG: Yes, sir.

10

11 CROSS-EXAMINATION

12 BY MR. STRASSBURG:

13 Q. Ma'am, thank you for coming today. I'm going
14 to show you a document. If you would look at your
15 screen --

16 THE COURT: Ladies and gentlemen, you don't
17 get to see this yet because you only get to see
18 documents after they've been admitted. Okay? So if
19 it's admitted, you get to see it. We'll see.

20 BY MR. STRASSBURG:

21 Q. It's giving me that hourglass thing.

22 Is that on your screen? Yes?

23 A. Yes.

24 Q. All right. Let me direct your attention to
25 document that's been Bates numbered in this case as

1 GJL2098.

2 Do you see that?

3 A. Yes, sir.

4 Q. Can you identify that document?

5 A. It's an application.

6 Q. For what?

7 A. For an identification card or a driver's
8 license. It's our general application. So you would
9 fill it out either for an identification card, an
10 instruction permit, non-CDL.

11 Q. Did that turn up in your records?

12 A. Yes, sir.

13 Q. All right. And you have it in front of you?

14 A. Yes, sir.

15 Q. And it bears the same number, GJL2098; right?

16 A. Yes, sir.

17 Q. And that's your number -- your department's
18 number; right?

19 A. No, sir.

20 Q. That's the number from the plaintiff's law
21 firm; right?

22 A. I don't know where it came from.

23 Q. Do you know if GJL stands for Glen J. Lerner?

24 A. I don't know.

25 Q. Okay. Fair enough.

1 So who was the applicant?

2 A. Jared Emanuel -- I don't want to mess up the
3 last name.

4 Q. Awerbach, ma'am; right?

5 A. Yes, sir.

6 Q. That's good. I'm good with that.

7 And can you tell us the date that
8 Mr. Awerbach made his application to the DMV for a
9 driver's license?

10 MR. ROBERTS: Objection. Misrepresents the
11 document.

12 BY MR. STRASSBURG:

13 Q. Can you tell us the date that he --

14 MR. STRASSBURG: Let me try again, Judge.

15 THE COURT: Okay.

16 BY MR. STRASSBURG:

17 Q. Can you tell us the date that Mr. Awerbach
18 provided the document -- the -- the department with
19 this noncommercial driver's license application
20 document?

21 A. April 30th. It looks like 2009.

22 Q. All right. Thank you, ma'am.

23 Can I look at that for a minute?

24 A. Uh-huh. That's the back of it.

25 Q. Right. And do you see here where it says

1 "validated"?

2 A. Correct.

3 Q. It's got a stamp?

4 A. They're validating his signature.

5 Q. Who's the "they"?

6 A. The technician that he presented his

7 documents to for his identification card.

8 Q. So that would be the technician at DMV.

9 A. Correct.

10 Q. All right. Now, are you familiar with this

11 form of document?

12 A. Yes.

13 Q. And can you tell us what it's effective?

14 A. Well, you -- you're -- it's primarily used

15 for your name, your date of birth, your Social, your

16 address. If you're going to apply for an instruction

17 permit, then the testing would go down, the scores

18 would also go down on the document. And your -- they

19 mark down the documents that you turn over to us --

20 will show us in order to obtain an IP or a driver's

21 license or an ID.

22 Q. Would it be fair to characterize it as the

23 first official document that you file with the Nevada

24 DMV to begin the process that leads to getting a

25 driver's license?

1 A. If that's what your goal is, yes.

2 Q. Okay. All right. And what would be the age
3 of the applicant?

4 A. Well, an ID card can be at ten years old.

5 Q. What was the age of Mr. Awerbach shown on the
6 application?

7 A. Oh, God, you want me to do math. '92.
8 Seventeen, 18. I can't add right now. '09. At this
9 time?

10 Q. Yes, ma'am.

11 A. So that would be nine and eight -- 17.
12 Approximately.

13 Q. Okay. Was he --

14 A. I'm not any good without my calculator.

15 Q. Was he eligible for an ID card?

16 A. Yes.

17 Q. Was he eligible for an instruction permit?

18 A. If he had taken the written test and passed.

19 Q. All right. Was he eligible for a driver's
20 license?

21 A. If he had taken the written test, passed
22 that, and then taken the drive test, yes --

23 Q. Okay.

24 A. -- and passed that.

25 Q. Now, when you met with the plaintiff's lawyer

1 in this case in preparation for coming here today, did
2 you tell them that your records reflected this
3 application for a driver's license that Mr. Awerbach
4 had made with the department in 2009?

5 MR. ROBERTS: Objection.

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

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

9 THE COURT: Objection is sustained.

10 BY MR. STRASSBURG:

11 Q. The application for an identification card,
12 did you discuss with the plaintiff's lawyers when you
13 met with them, in preparation for coming today that
14 your records had this document on file that was
15 submitted in 2009?

16 A. I'm trying to replay the whole thing into my
17 brain, because basically what we were doing is just
18 verifying the documents at that time as far as what I
19 could do and what I could not do. Because they even
20 had to talk to my administrator on the phone.

21 Q. So you went through all the documents with
22 them?

23 A. No, not all the documents, sir.

24 Q. Did you go through this one?

25 A. I -- honestly, I do not remember.

1 Q. Okay. Fair enough.

2 Now, do your documents also show that

3 Mr. Awerbach was issued an ID card?

4 A. Yes. That's on the printout.

5 Q. And what was the date of ID card?

6 A. The original ID card was March 31st, 2011.

7 Q. Do you know if there was an ID card issued to
8 him before January 2nd, 2011?

9 A. Let me see the other history because I have
10 two histories. It will take just a moment, please.

11 Q. Ma'am, that's all right. Take all the time
12 you need. And here, maybe I can help you.

13 A. They're actually only showing original issue
14 date of March 31st, 2011.

15 Q. Did that make it to the screen?

16 A. Yes. I have that.

17 Q. And by "that," you're talking about the ID
18 card?

19 A. It's a data card, correct.

20 Q. An ID card; right?

21 A. Correct.

22 Q. And the date of that ID card?

23 A. April 30th, 2011 -- I mean, excuse me, 2009.

24 Q. Thank you, ma'am.

25 A. Uh-huh.

1 Q. And would it be the department's expectation
2 that when a driver was asked by a police officer at an
3 accident scene to produce identification that he would
4 be within his rights to utilize this ID card?

5 A. The problem is -- I don't know what's going
6 on, but in this state, you're only allowed one valid
7 Nevada identification card or driver's license. So if
8 you have a Nevada driver's license, your ID card is
9 invalid.

10 Q. Okay.

11 A. And if you were issued an ID card after a
12 driver's license, the driver's license becomes invalid.

13 Q. And you don't know which was which here;
14 right?

15 A. This was an ID card.

16 Q. All right. And would you expect if that's
17 all a driver had at an accident scene when asked by an
18 officer for identification, he'd be within his rights
19 to present it?

20 A. If he had a Nevada driver's license, it would
21 be invalid.

22 Q. All right. And if he didn't, it would be
23 valid.

24 A. Correct.

25 Q. All right. Do you know when you talked with

1 the plaintiff's lawyers whether or not the police
2 report in this case shows that this was the ID card
3 that Jared presented to the officer?

4 A. I have no idea about any citations or police
5 documents.

6 Q. Fair enough, ma'am. Thank you.

7 A. Uh-huh.

8 THE COURT: Is that all you got, Mr. Awerbach
9 [sic]? That's it.

10 MR. STRASSBURG: Yeah, Your Honor. Yes, sir.

11 THE COURT: Redirect?

12 MR. ROBERTS: Yes. Thank you, Your Honor.

13 Your Honor, the -- the two-page application
14 which was shown to the witness Bates numbered GJL2098
15 and 2099 has been premarked as part of Trial Exhibit
16 46, pages 40 and 41. I'd move the admission of that
17 document.

18 MR. MAZZEO: Objection. No foundation.

19 Can we approach, Judge, or can I voir dire
20 the witness on this?

21 THE COURT: Come on up.

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

24 THE COURT: Okay. So I guess at this point
25 the objection is sustained. You can ask further

1 questions about it.

2 MR. ROBERTS: Thank you.

3

4 REDIRECT EXAMINATION

5 BY MR. ROBERTS:

6 Q. Ms. Marquez, the -- the application that you
7 were shown by Mr. Strassburg and asked some questions
8 about --

9 A. Uh-huh.

10 Q. -- is that one of the materials that is in
11 the response to the 2014 subpoena?

12 A. Yes, sir.

13 Q. Okay. And is there a Certificate of
14 Custodian of Records for the DMV attached to that
15 document?

16 A. To the whole -- the whole set of documents.

17 Q. Yes. And is this a true and accurate copy of
18 a document maintained by the department of motor
19 vehicle in the normal course of its business?

20 A. Yes, sir.

21 Q. Is this also maintained by the State of
22 Nevada in the normal course of business?

23 A. Yes, sir.

24 MR. MAZZEO: Judge, we have no objection to
25 this document coming into evidence.

1 MR. ROBERTS: Thanks. I move the document in
2 again.

3 THE COURT: What page was it?

4 MR. ROBERTS: Pages 40 and 41, and I'd ask
5 that be marked as Exhibit 46A. And --

6 THE COURT: So we don't have a 46A on the
7 list right now, do we?

8 MR. ROBERTS: It's 46, but it's part of a big
9 document, the entire amount that was produced.

10 THE COURT: You guys put together 46A
11 afterwards, make sure Alice gets it. 46A will be
12 admitted.

13 MR. ROBERTS: Thank you, Your Honor.

14 (Plaintiff's Exhibit 46A was admitted
15 into evidence.)

16 THE COURT: Mr. Strassburg, you didn't have
17 any objection to that either, did you?

18 MR. STRASSBURG: No, Judge.

19 BY MR. ROBERTS:

20 Q. And you have that document in front of you?

21 A. Yes, sir.

22 Q. And -- and since we've unplugged the TVs, I'm
23 not going to take the time to plug them back in now.

24 But the -- the document, although it says at the top
25 "Noncommercial Driver's License Application," does it

1 have boxes that can be checked which indicate what's
2 actually being applied for?

3 MR. ROBERTS: May I approach to make sure
4 we're on the same page?

5 THE COURT: I think she thought, as I did,
6 you were talking to the jurors as opposed to asking the
7 question.

8 MR. ROBERTS: That would make sense.

9 BY MR. ROBERTS:

10 Q. And I was actually talking to you even though
11 I was facing the jurors.

12 Do you see the boxes?

13 A. Yes.

14 Q. Yes. And which box is checked?

15 A. The identification card.

16 Q. And is driver's license box checked?

17 A. No, sir.

18 Q. Is instruction permit checked?

19 A. No, sir.

20 Q. And do you have to apply for an
21 identification card before you can apply for an
22 instruction permit or a driver's license?

23 A. No, sir.

24 Q. And at any time prior to February 13th, 2016,
25 did the records of the Department of Motor Vehicles

1 indicate that Mr. Awerbach ever had either an
2 instruction permit or driver's license?

3 A. No, sir.

4 Q. Thank you, ma'am.

5 THE COURT: Any recross from either one?

6 MR. MAZZEO: No, Your Honor.

7 THE COURT: Mr. Strassburg?

8 MR. STRASSBURG: No, Judge.

9 THE COURT: Ladies and gentlemen, this is
10 your first chance. Any questions for this witness,
11 raise your hand. Not seeing any hands. Oh, I got one.
12 Okay. You can't ask it. If you remember my
13 instructions before, you're going to write it down on a
14 clean sheet of paper, put your juror number, which is
15 No. 3, and you're going to hand that to the marshal.

16 Always seems to be a little while from --
17 he's over here -- from the time I give you those
18 instructions until the first question is asked, so
19 there's always a little bit of confusion.

20 Come on up, Counsel.

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

23 THE COURT: All right, ma'am. Does the
24 Nevada DMV have records if he had a permit or license
25 in another state?

1 THE WITNESS: When we run -- when they first
2 come in and we run PPS, it would have popped up, and it
3 would have been documented in the system that he had a
4 driver's license from another state.

5 THE COURT: Okay. Thank you. We'll mark
6 that Court's next in order.

7 Any follow-ups based on that question?

8 MR. ROBERTS: No, Your Honor.

9 MR. MAZZEO: No, Your Honor.

10 MR. STRASSBURG: No.

11 THE COURT: Mr. Strassburg? Okay.

12 Thank you, ma'am. You're excused.

13 Appreciate your time.

14 THE WITNESS: Thank you.

15 THE COURT: We can either go to the next
16 witness or we can take a break. Any votes from our
17 jurors?

18 Okay. Go ahead and take our break.

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

1 Internet, or radio. You are not to conduct any
2 research on your own, which means you cannot talk with
3 others, Tweet others, text others, Google issues, or
4 conduct any other kind of book or computer research
5 with regard to any issue, party, witness, or attorney
6 involved in this case. You're not to form or express
7 any opinion on any subject connected with this trial
8 until the case is finally submitted to you.

9 See you in ten minutes.

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

12 THE COURT: We're outside the presence of the
13 jury.

14 Anything we need to put on the record,
15 Counsel?

16 MR. MAZZEO: No, Your Honor.

17 MR. ROBERTS: No, Your Honor.

18 MR. STRASSBURG: No, Judge.

19 MR. MOTT: One thing real quick. Our next
20 witness is Cherise Killian, and I wanted to address
21 this outside the presence of the jury. She's dyslexic,
22 and instead of -- I have to refresh her recollection,
23 would it be okay if I just read it from the transcript
24 instead of embarrassing her, Your Honor?

25 MR. STRASSBURG: Judge, we'd object to that.

1 MR. ROBERTS: She said in her deposition, I
2 can't read.

3 MR. STRASSBURG: Judge, we'd object to that.

4 MR. MOTT: She's dyslexic, Your Honor.

5 MR. STRASSBURG: The whole point of the
6 cross-examination is that she was manipulated by
7 representatives of plaintiff's counsel into signing a
8 document under circumstances that intimidated her at
9 work, and that they shoved it in front of her and she
10 just signed it without reading to make them go away.
11 It is very relevant to show the jury that she does not
12 have the capability to read and, therefore, that the
13 plaintiff should be ashamed of this conduct.

14 MR. SMITH: Noted.

15 THE COURT: I don't know how I can allow you
16 to just refresh recollection by reading it to her.

17 MR. MOTT: I guess I'm just not sure how else
18 I can refresh recollection if she can't read it, Your
19 Honor.

20 MR. TINDALL: We don't know that she has
21 failed to remember at this point.

22 MR. ROBERTS: We just don't want to deal with
23 it in front of the --

24 THE COURT: I think we're going to have to do
25 it in front of the jury, so let's -- hopefully, she

1 doesn't fail to remember something.

2 MR. MOTT: Agreed.

3 THE COURT: And because -- I don't know how
4 we deal with that.

5 MR. TINDALL: It's not -- it's not even a
6 lack of recollection. Unless I'm missing something,
7 Mr. Mott's standing there holding a depo transcript.
8 What he's really talking about is impeachment. So they
9 can do whatever they want, unless they've got some
10 document they're willing to show her. It doesn't even
11 refresh recollection. Didn't you say this at your
12 deposition would be the way that would pop out.

13 THE COURT: Let's see how it plays out.

14 MR. MOTT: Sound good, Your Honor. Thank
15 you.

16 MR. ROBERTS: This doesn't need to be on the
17 record. We've got Cherise Killian, which is probably
18 going to be about 10 to 15 minutes on direct. And
19 Dr. -- if that. Then Dr. Cash, who's going to be maybe
20 15 to 20 minutes. We got Dr. Gross standing by because
21 we didn't want to have any downtime.

22 Would be it be safe at this point to release
23 Dr. Gross and have him return in the morning?

24 MR. MAZZEO: I would say yes.

25 MR. ROBERTS: We may end up ending 15 minutes

1 early.

2 THE COURT: That's fine.

3 MR. ROBERTS: Okay. Thank you. I just hate
4 to -- the clock's running.

5 THE COURT: That's fine. All right. Off the
6 record.

7 (Whereupon a short recess was taken.)

8 THE MARSHAL: Jury entering.

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

11 THE MARSHAL: Jury is present, Judge.

12 THE COURT: Go ahead and be seated, folks.

13 Welcome back. We're back on the record, Case
14 No. A637772.

15 Do the parties stipulate to the presence of
16 the jury?

17 MR. ROBERTS: Yes, Your Honor.

18 MR. MAZZEO: Yes.

19 THE COURT: All right. Plaintiffs may call
20 their next witness.

21 MR. MOTT: Your Honor, plaintiff would call
22 Cherise Killian.

23 THE COURT: Good afternoon, ma'am. Going to
24 have you step all the way up here on the witness stand,
25 if you would. Once you get up there, if you'd please

1 remain standing and raise your right hand to be sworn.

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

6 THE WITNESS: Yes, I do.

7 THE CLERK: Please state your name and spell
8 it for the record.

9 THE WITNESS: Cherise Killian, C-h-e-r-i-s-e
10 K-i-l-l-i-a-n.

11 THE COURT: Go ahead and be seated, ma'am.
12 Try to talk into that microphone there in front of you
13 so the jury can hear you.

14 THE WITNESS: Sorry. I had my teeth pulled.

15 DIRECT EXAMINATION

16 BY MR. MOTT:

17 Q. Good afternoon, Ms. Killian.

18 A. Good afternoon.

19 Q. Thank you for coming in. Thanks for waiting
20 out there with us.

21 Now, before we start, you just mentioned you
22 just had a tooth pulled; is that correct?

23 A. Wisdom tooth pulled.

24 Q. And when that was?

25 A. Friday.

1 Q. Okay. Are you in pain?
2 A. Yes.
3 Q. Are you still able to be here to testify?
4 A. Yeah. Uh-huh.
5 Q. And did you take any pain medications before
6 you came in here today?
7 A. No, none at all.
8 Q. Are you a resident of Las Vegas, Nevada?
9 A. I -- I am now. I had lived in New York. I
10 was born and raised in New York.
11 Q. And how long have you lived in Las Vegas?
12 A. Ten years now.
13 Q. Where at in Las Vegas do you live?
14 A. 2801 North Rainbow Villa Del Sol.
15 Q. That's the Villa Del Sol apartment complex?
16 A. Yes, condos.
17 Q. And on January 2nd, 2011, did you also reside
18 at Villa Del Sol apartment complex?
19 A. Yes.
20 Q. And we are here as a result of an accident
21 that occurred on January 2nd, 2011 --
22 A. Yes.
23 Q. -- between the defendant Mr. Jared Awerbach
24 and my client --
25 A. Yeah.

1 Q. -- Ms. Emilia Garcia.
2 Do you know my client, Ms. Emilia Garcia?
3 A. He's my doctor's sister baby daddy.
4 Q. Okay. And I should -- maybe I didn't
5 enunciate, but I guess I meant to ask: Do you know my
6 client, Ms. Emilia Garcia, the plaintiff?
7 A. The plaintiff?
8 Q. Yes.
9 A. Yeah. The -- are you talking about him? I
10 don't know which one you talking about.
11 Q. Let's talk about him first.
12 A. Sorry.
13 Q. Do you know -- no, you're okay.
14 Do you know Mr. Jared Awerbach?
15 A. Yes. He's my foster -- my mama adopted her
16 baby daddy.
17 Q. The January 2nd, 2011, the day of this
18 accident, do you recall talking to Mr. Awerbach?
19 A. Yeah. He had came to my house.
20 Q. Do you recall about what time he came to your
21 house?
22 A. No.
23 Q. Do you know why he came to your apartment?
24 A. He had came to see my -- me and my baby daddy
25 were there.

1 Q. He came --

2 A. Visit me and my baby daddy. He had stopped
3 by, came to seen us.

4 Q. Do you recall about how long he was at your
5 apartment for?

6 A. No. He was there for a little while, but I
7 don't know how long it was.

8 Q. What did he do while he was at your
9 apartment?

10 A. He was there talking to my baby daddy and his
11 friends, and as I come out the room, they was in the
12 living room smoking. And I was -- into the living
13 room. I'm in the kitchen. Then I went back inside the
14 room.

15 Q. So you were in your room and you came into
16 the kitchen and they were smoking?

17 A. Yeah. And then I went back inside my room.

18 Q. And what were they smoking?

19 A. Smoking weed.

20 Q. And how do you know that it was weed?

21 A. Because I smelt it.

22 Q. Have you smelt weed before?

23 A. Yeah.

24 Q. And what were they smoking weed out of?

25 A. A cigar.

1 Q. A cigar?

2 A. Yeah.

3 Q. Like, a joint or a blunt or --

4 A. A blunt.

5 Q. Okay. And did you actually see Mr. Awerbach
6 smoking the blunt?

7 A. Yeah.

8 Q. And you saw him actually put it to his mouth
9 and inhale it?

10 A. He smoke it, yeah.

11 Q. And I want to be 100 percent clear on this
12 question because -- do you recall when you were deposed
13 about a year ago?

14 A. Say that again.

15 Q. Do you recall that you were deposed about one
16 year ago for this case in December?

17 A. Yeah. Was I called for it?

18 Q. Yeah.

19 A. Yeah.

20 Q. And -- and during your deposition, you
21 waffled a little bit back and forth --

22 A. Yeah.

23 Q. -- when you were answering the questions
24 whether you actually saw him inhale the weed or not.

25 MR. STRASSBURG: Objection. Leading.

1 THE COURT: He hasn't asked a question yet.
2 I have to know what the question is first.

3 BY MR. MOTT:

4 Q. Do you recall that at your deposition?

5 A. Yeah.

6 Q. But as you're here today, the testimony you
7 just stated is that you did see Mr. Awerbach smoking
8 weed --

9 A. Yes.

10 Q. -- in your apartment, and you did see him
11 inhale; is that correct?

12 A. Yes.

13 Q. Once -- once Mr. Awerbach left your apartment
14 after he smoked weed -- I apologize. I don't know the
15 proper terminology.

16 Once Jared left your apartment after he did
17 smoke weed, did you see him again that day?

18 A. No. Talking about seeing him when somebody
19 ran to my house and knocked on the door and said he was
20 in a car accident and that's when I went up to the
21 front, but they let me go to him. So I just stood
22 there, and I just went back to my house.

23 Q. So somebody told you that he was in a car
24 accident?

25 A. Yeah.

1 Q. And this was on the same day that you saw him
2 smoking in your apartment; correct?
3 A. Yeah.
4 Q. And do you recall about how long afterwards
5 that --
6 A. No.
7 Q. -- that he got in the accident?
8 A. No.
9 Q. But it was that same day?
10 A. Yeah.
11 MR. MOTT: I have no further questions.
12 THE COURT: Cross?
13 MR. STRASSBURG: Yes, Judge.
14 MR. MOTT: Can I ask one more question I
15 started to ask and we transferred off it?
16 MR. STRASSBURG: Sure.
17 BY MR. MOTT:
18 Q. Do you know anyone named Emilia Garcia?
19 A. No.
20 MR. MOTT: Thank you.
21 THE WITNESS: You're welcome.
22 THE COURT: Mr. Strassburg?
23 MR. STRASSBURG: One moment.
24
25 /////

1 CROSS-EXAMINATION

2 BY MR. STRASSBURG:

3 Q. My name is Roger Strassburg, and I am the
4 lawyer for Jared Awerbach.

5 A. Okay. How you doing?

6 Q. Good. How are you?

7 A. Not good. This one here is hurting me.

8 Q. Sorry. Do you recollect about a year and a
9 half ago, you had a telephone conversation with
10 Mr. Awerbach --

11 A. No, I don't remember.

12 Q. -- do you remember that?

13 Do you remember that you had on one occasion,
14 said to Mr. Awerbach, The Feds came to my job?

15 A. My sister's job. My sister's job. They
16 had -- it was my sister's job.

17 Q. All right. And do you remember that the Feds
18 came to your sister's job --

19 A. Uh-huh.

20 Q. -- and you were there?

21 A. No. My sister was there. I was at home.

22 They had said the wrong name. They were saying my
23 daughter's name and my -- and when they said my

24 daughter's name, my sister had called me, and that's
25 how I found out it was about him.

1 Q. And did anyone ever say to you, The Feds came
2 to my job? Would that have been your sister?

3 A. Yes.

4 MR. ROBERTS: Objection. Hearsay, Your
5 Honor.

6 THE COURT: I don't know that it's offered
7 for the truth of the matter asserted. I don't know
8 where he's going yet.

9 BY MR. STRASSBURG:

10 Q. All right. So your sister said to you, The
11 Feds came to my job.

12 A. Yeah.

13 Q. And your -- your sister also said to you that
14 the Feds said to her, We know Jared was smoking; right?

15 A. No.

16 Q. Do you recollect?

17 A. No, I don't recollect. All she said was
18 somebody came to her job, and the Feds had come to her
19 job was looking for -- saying my daughter's name
20 instead of saying my name. And she called, and she
21 just told me somebody came to the job looking for you.

22 Q. Uh-huh. And did she tell you that they were
23 looking for you about Jared?

24 A. She didn't know who he was. She just told me
25 a number over the phone to call them and I called.

1 Q. And do you know who you spoke to?

2 A. No.

3 Q. Do you recollect the substance of the
4 conversation when you called these -- these people that
5 your sister thought were the Feds that came to her job?

6 A. No, not at all.

7 Q. And you do you recollect whether you took it
8 any further with them?

9 A. No.

10 Q. Do you make any arrangements to meet with
11 them?

12 A. Yeah.

13 Q. Tell me about that.

14 A. Made arrangements to meet them. I don't know
15 what place it was at. But I went to meet them, and we
16 were just talking about the case.

17 Q. Okay. And did anyone in that meeting tell
18 you that we knew Jared was smoking?

19 A. No.

20 Q. Okay. And in that meeting, were you
21 presented a paper to sign?

22 A. Yeah.

23 Q. Okay. And you weren't able to read that
24 paper?

25 A. No.

1 Q. And did you tell them that you weren't able
2 to read the paper because you were dyslexic?

3 A. Yes, I did.

4 Q. And did it come about that even though you
5 told them that, you ended up signing that paper?

6 A. No. They let me take it home to read it.
7 And then if anything changes, to let them know. Then I
8 signed it and sent it back to them.

9 Q. And did you do that?

10 A. Yes.

11 Q. All right. And did you sign the paper in the
12 presence of a notary?

13 A. No. I signed it at home.

14 Q. And you were the only one present?

15 A. Yeah.

16 Q. All right. Let me show you this document.

17 MR. STRASSBURG: And if you could black the
18 screen, Judge.

19 THE COURT: I can't black the screen. You
20 have to turn the TV off.

21 MR. STRASSBURG: Oh, I got to shut it off.
22 Where is the button?

23 MR. MAZZEO: Left-hand side, top.

24 JUROR NO. 1: This one here.

25 MR. STRASSBURG: Oh, yours is on. Thank you,

1 sir.

2 BY MR. STRASSBURG:

3 Q. Let me direct your attention on the screen,
4 to this document.

5 Can you identify it as a document that you've
6 seen before?

7 A. Yeah. I think yeah. Yes.

8 Q. And is that the document that -- that came to
9 you and -- and gave you this document and you wanted to
10 take it home and signed it?

11 A. Yeah. Yeah, they gave me a booklet for me to
12 read over and sign, yes.

13 Q. A booklet?

14 A. Yes. Well, yeah. They said -- gave me a
15 little book -- a little -- I think that's the one they
16 had sent me. Yeah, they gave me a little document like
17 that for me to take home for me.

18 Q. All right. And let me direct your attention
19 to the second page of that document.

20 Is that your signature?

21 A. Yes, it is.

22 Q. And do you see the signature of the notary?

23 A. Uh-huh.

24 Q. Where it says July 9, 2004?

25 A. Yes.

1 Q. Does this remind you when you signed it?

2 A. I guess so, yes.

3 Q. Now, the notary indicates it was subscribed
4 and sworn to before me, the notary.

5 You've indicated you signed it at home alone.

6 A. Okay.

7 Q. Think about that. Does that help you
8 recollect what really happened?

9 A. I don't remember. I don't know if I signed
10 it -- yeah, I know I signed it. But I don't know --
11 remember if I was at a notary or not. I don't
12 remember.

13 Q. Did you read it yourself, or did you have
14 someone read it to you?

15 A. My sister. I had my sister help me read it.

16 Q. All right. All right. Now, did you actually
17 see Jared pick up the joint, put it to his lips, and
18 take a hit?

19 A. Did I see him pick it up? No. But when I
20 came out the room, he was smoking.

21 Q. Did you actually see him with the marijuana
22 cigarette in his mouth taking a hit?

23 A. Yeah.

24 Q. Now, that's not what you said in your
25 deposition, is it?

1 A. That's -- that's what I said. I did see him
2 smoke.

3 Q. Let me direct your attention to your
4 deposition page 30, line 4.

5 Do you see that?

6 A. Yes.

7 Q. And you were asked:

8 "But did you actually see him pick up the
9 joint up to his lips and take a hit?"

10 And your answer was: "No."

11 A. I did see him smoke. When I came out the
12 room, I did see him smoke.

13 Q. Now, what room of the house did you see him
14 doing this, you say?

15 A. The living room.

16 Q. And who was present?

17 A. My baby daddy and his friends. My baby daddy
18 and his friends.

19 Q. And what is your baby daddy's name?

20 A. William Partridge.

21 Q. Okay. And how many friends were there?

22 A. I think it was -- it had to be -- I don't
23 remember, but I know it had to be about three or --
24 about three or four of them.

25 Q. You recollect any of the names?

1 A. No.

2 Q. And the -- to your recollection, the -- the
3 time that you saw Jared and Mr. Partridge and these
4 other friends, in your room --

5 A. Living room, yeah.

6 Q. -- your living room, that was the only
7 occasion that day that you saw Jared --

8 A. Yes.

9 Q. -- smoking; right?

10 A. Yes.

11 Q. Now, that's not what you said in your
12 deposition; right? Your deposition was taken
13 December 5, 2014; right?

14 A. I guess so.

15 Q. Would you say that your recollection was
16 better then or now?

17 A. It's been a while. So I can't remember
18 because it happened a long time ago.

19 Q. Ma'am, I totally get it, and I appreciate you
20 doing the best you can.

21 Isn't it so that back in December of 2014,
22 you said they were smoking outside your apartment?

23 A. I don't remember saying that.

24 Q. Let me direct your attention to -- you see it
25 on the screen?

1 A. Yes, I do.

2 Q. Can you read the -- what's on the screen?

3 A. Yes. I remember saying he was smoking

4 outside, but I don't remember me saying that. I know

5 they were smoking in the house in the living room.

6 Q. I'm sorry, ma'am. I didn't mean to

7 interrupt.

8 A. I said in the living room. I do remember

9 them smoking in the living room.

10 Q. So in your deposition, you were asked the

11 question:

12 "Where were they smoking weed?"

13 And your answer was:

14 "They was outside."

15 A. I don't remember saying that. I know I did

16 see them smoke in the living room.

17 Q. And you were also asked:

18 "And how many people were at your house

19 when Jared got there?"

20 And your answer was:

21 "They all was outside. It was just

22 everybody was outside."

23 A. I don't remember.

24 Q. Do you remember saying that?

25 A. No, I don't remember saying that.

1 Q. And you were also asked the numbers and you
2 said -- the question was:

3 "More than five?"

4 And you said:

5 "Yeah, you could say that."

6 A. I don't recall.

7 Q. Do you remember swearing to that in your
8 deposition?

9 A. No. It probably was that, then. Because I
10 know it's been so long ago, so I don't remember.

11 Q. All right. So as you think about it now,
12 under questioning --

13 A. Yes.

14 Q. -- you think it probably was outside.

15 A. No. I know -- I seem to remember the living
16 room. I don't remember me saying I seen them outside,
17 but I know they was in the living room.

18 Q. Okay. Now, do you recollect how long before
19 the accident or you first found out about the accident,
20 you -- you -- you -- saw Jared in the living room?

21 A. Not at all.

22 Q. Now, have you had occasion to talk to any of
23 the people working for the other lawyers in this case
24 before you came here today?

25 A. No.

1 Q. I saw you were sitting in the room back
2 there.

3 Did you have occasion to talk to any of the
4 people who work for the plaintiff in this case?

5 A. Not at all.

6 Q. But you have talked to one of the lawyers
7 that work for the plaintiff; true?

8 A. A long time ago. Are you talking about now?

9 Q. No. From the get-go.

10 A. Yeah, a long time ago.

11 Q. All right. And when you were first contacted
12 by the plaintiff's attorneys, you said you were pissed
13 off about that; right?

14 A. Yeah.

15 Q. And why was that?

16 A. Because there was -- I was upset with him
17 because I didn't want to have nothing to do with this
18 at all. That's what I was upset about. I did say I
19 wanted to have nothing to do with this.

20 Q. And it bothered you that these
21 representatives of the plaintiffs were showing up at
22 your -- the workplace of family members because it had
23 your family scared; correct?

24 A. Yeah, they was upset.

25 Q. And since they scared you, you were of a mind

1 to do whatever you had to do to get rid of them; right?

2 A. Yeah, because I never been in trouble before,
3 so I just wanted to know what was this about.

4 Q. And one of the people that you talked to was
5 Mr. Adam Smith, one of the attorneys for the plaintiff;
6 right?

7 A. I don't know his name.

8 Q. Let me see if I can remind you. Let me show
9 you this.

10 You see this on the screen?

11 A. Yes.

12 Q. And I'm directing your attention to page 14
13 of the deposition when you were asked:

14 "Just for the record, was it confirmed
15 that it was Mr. Smith, the plaintiff's
16 attorney, that you had spoken to previously?"

17 And your answer was:

18 "Yes. I just found out, yes."

19 A. Okay.

20 Q. And you were asked:

21 "Can you tell me what the substance of
22 your conversation with Mr. Smith entailed?"

23 And your answer was:

24 "Well, I don't remember so much of it, the
25 conversation. He just called me and asked me

1 about -- I don't know his real name. I guess
2 they -- the name that his name is because they
3 call him glasses or something like that."

4 Right?

5 A. Yes.

6 Q. All right. And Mr. Smith told you that he
7 would send a reporter out to see you; right?

8 A. Yes.

9 Q. Remember that?

10 A. Yes. Yes. I didn't know who the guy, but
11 yes, I did have that conversation.

12 Q. All right. And Mr. Smith you were asked in
13 your deposition:

14 "Did he ask you to sign anything?"

15 And your answer was:

16 "Yeah, he asked me for my thing over --
17 testimony over the phone."

18 Questioner said: "Okay."

19 And then you said:

20 "And he said that he would send a reporter
21 out and they came out."

22 "Do you see that?"

23 A. Yes.

24 Q. And by "reporter," who you really mean is a
25 notary public; right?

1 A. Yes.

2 Q. So Mr. Smith came out to see you with a
3 notary public; right?

4 A. Yes.

5 MR. MOTT: Objection, Your Honor, to
6 foundation. May we approach real quick, Your Honor?

7 THE COURT: Sure.

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

10 THE COURT: Objection's overruled.

11 BY MR. STRASSBURG:

12 Q. All right. And then Mr. Smith -- and oh, by
13 the way, do you recognize Mr. Smith sitting here?

14 A. Yeah.

15 Q. That's the man you saw who came out to you?

16 A. It was a notary man came out to me, yeah.

17 Q. With Mr. Smith?

18 A. It was just one person who came out.

19 Q. All right. Let me direct your attention to
20 your deposition, page 15, when you were asked:

21 "And did Mr. Smith ask you to sign
22 anything?"

23 Your answer was:

24 "Yeah, he asked me for my thing over --
25 the testimony over the phone."

1 Questioner said: "Okay."

2 And then your answer was:

3 "And he said that he would send a reporter
4 out and they came out."

5 Do you see that?

6 A. Yes.

7 Q. When you said "they," did you mean the
8 reporter, the notary, and Mr. Smith?

9 A. It was just one person.

10 Q. Just one?

11 A. Yes.

12 Q. Okay. And when the notary came out, did he
13 come to your house or someplace else?

14 A. Came to my house.

15 Q. And did you sign the document in his
16 presence?

17 A. Yes. He asked for my ID, and I gave him my
18 ID, and I signed and he stamped it.

19 Q. All right. So you weren't alone when you
20 signed the statement.

21 A. Yeah. I remember --

22 Q. You were with the notary.

23 A. Yes.

24 Q. All right. All right. Now that we -- we've
25 gone through this, let me just ask you once more.

1 Has anything that we have talked about
2 refresh your recollection that you did have a
3 conversation with Jared Awerbach, oh, about a year and
4 a half ago?

5 A. No. I don't remember. Not at all. I don't
6 remember a year -- because it's been so long. I
7 haven't talked to him in a long time.

8 Q. All right. Ma'am, I want to -- to thank you.
9 I realize you're in some pain because of your
10 operation. I appreciate you coming today --

11 A. Thank you.

12 Q. -- and answering questions. Thank you,
13 ma'am.

14 THE WITNESS: Thank you.

15 THE COURT: Mr. Mazzeo?

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

17

18 CROSS-EXAMINATION

19 BY MR. MAZZEO:

20 Q. Good afternoon, Ms. Killian.

21 A. Same to you.

22 Q. Ms. Killian, do you recall at the start of
23 your testimony today, Mr. Mott was asking you questions
24 initially about when Jared came to your house on
25 January 2nd?

1 A. Do I remember that?

2 Q. Yes.

3 A. No. I don't remember him asking me -- asking
4 me that.

5 Q. Today?

6 A. Yeah.

7 Q. Okay. Well, in any event, do you recall
8 testifying today that Jared had came -- came to your
9 house to visit you and your sister's baby's daddy --

10 A. No, my baby daddy.

11 Q. Your baby daddy on January 2nd of 2011?

12 A. Uh-huh.

13 Q. You recall saying that today?

14 A. Yeah.

15 Q. Okay. And do you recall -- I wrote this
16 down.

17 Do you recall saying that -- that you came
18 into the kitchen and that's where you saw them smoking
19 weed?

20 A. Yes.

21 Q. In the kitchen?

22 A. I came out of my room, went to the kitchen,
23 and they was in the living room smoking.

24 Q. So you saw them from the kitchen --

25 A. My room -- my -- it's like a condo. So my

1 living room is right here. My -- my room is like a
2 hallway. So you come out and you turn -- you got pass
3 the living room to get to the kitchen.

4 Q. So you're standing in the kitchen, and that's
5 what you meant by when you said you saw them smoking
6 weed in the living room.

7 A. Yes.

8 Q. Okay. And would you say that your memory
9 regarding the events that occurred on January 2nd of
10 2011 are better -- is better today --

11 A. No.

12 Q. -- or --

13 A. Because it --

14 Q. -- or was it better -- hold on -- or was it
15 better on January 2nd of 2011?

16 A. It been so long, so ...

17 Q. So would you say your memory's better on
18 January 2nd --

19 A. Yeah.

20 Q. -- or today?

21 A. No. Back then. Because it been so long.

22 Q. Okay. So would you say your memory regarding
23 the events of January 2nd, 2011, is better today or at
24 the time you gave your deposition on December 5th of
25 2014?

1 A. You could say that, yeah.

2 Q. Your memory's better today?

3 A. No. Back then.

4 Q. At the time you gave your deposition.

5 A. Yeah, yes.

6 Q. Okay. And if your memory was better at the
7 time you gave your deposition, as Mr. Strassburg had
8 asked you and refreshed your recollection, you recall
9 testifying at the time of your deposition that where
10 you saw Jared and others smoking was not in the living
11 room but outside; right?

12 A. Yeah, it was in the living room.

13 Q. No, I know that's what you're saying today.
14 But you also said today that your memory regarding the
15 events that occurred on January 2nd of 2011 --

16 A. Okay.

17 Q. -- was better at the time of your deposition
18 than it is today? Yes?

19 A. Yes.

20 Q. Okay. So if your memory was better at the
21 time of your deposition on December 5th, 2014, then is
22 it correct to say that what you said at -- at the time
23 of your deposition when you said that you observed
24 them -- Jared and others smoking outside, that that
25 would be correct as opposed to what you told us today?

1 A. No. I -- no. I didn't say they was outside.
2 If I said they was outside smoking, I was wrong. I
3 know they was in the living room smoking.

4 Q. Okay. And by the way, did you review
5 anything in preparation for your trial testimony today?

6 A. No.

7 Q. Okay. You also -- I believe you have a
8 condition known as dyslexia.

9 A. Yes, I do.

10 Q. Okay. And does that -- does that affect --
11 give you a problem, have any impact on your ability to
12 read?

13 A. Yes, it does.

14 Q. In what way?

15 A. I see things backwards instead of frontwards.

16 Q. Okay. Now, you also said today that what you
17 saw -- you were asked by Mr. Mott on direct examination
18 about what Jared was smoking, and he asked you was it
19 a -- I guess a joint or a blunt, cigar.

20 Do you recall that?

21 A. Yes.

22 Q. And what was your answer? Cigar?

23 A. Cigar, yes.

24 Q. Okay. Now, a cigar, you understand the
25 difference between a cigar and a joint?

1 A. Yes, I do.

2 Q. Okay. And you know that they sell cigars --

3 A. At stores, smoke shops.

4 Q. Yes.

5 A. Yes.

6 Q. Okay. And is it correct that a cigar is not

7 the same thing as a marijuana cigarette?

8 A. I don't know because I don't smoke. So I

9 don't know.

10 Q. You don't smoke anything?

11 A. No, I don't do nothing.

12 Q. You don't smoke cigars?

13 A. No.

14 Q. You don't smoke cigarettes?

15 A. No.

16 Q. You don't smoke marijuana cigarettes?

17 A. No.

18 Q. Okay. Have you ever seen -- do you know what

19 a marijuana cigarette looks like?

20 A. No. I just know what a cigar -- when they

21 smoking the cigar look like because my baby daddy, he

22 smokes it.

23 Q. Okay. And when we talk about your baby's

24 daddy smoking a cigar, we're talking about something

25 you can buy in the store; right --

1 A. Yes.

2 Q. -- that's offered to the public?

3 A. Yes.

4 Q. Okay. In your mind, there's nothing illegal
5 about smoking a cigar, is there?

6 A. Right.

7 Q. Okay. And as a matter of fact, so that's
8 what you saw Jared smoking when he came to your house
9 on January 2nd, a cigar? Yes?

10 A. Yeah.

11 Q. And isn't it a fact that you never actually
12 saw Jared Awerbach inhale or take a hit from a
13 marijuana cigarette?

14 A. No, not a cigarette.

15 Q. Okay. Just from a cigar?

16 A. Yes.

17 Q. With regard to -- Mr. Strassburg showed you
18 an affidavit on your screen.

19 Do you remember?

20 A. Yes.

21 Q. It was a two-page affidavit.

22 A. Yes.

23 Q. Okay. And that was an affidavit, the second
24 page it was signed yourself.

25 A. Yes.

1 Q. And you had -- you had indicated that -- on
2 cross-examination that you didn't read it yourself;
3 correct?

4 A. Yes.

5 Q. Today you said that someone read it for you.

6 A. My sister.

7 Q. Your sister.

8 A. She helped me with it, yes.

9 Q. She helped you read it. Okay.

10 Do you recall at the time of your deposition,
11 December of 2014, when you were asked a question about
12 this affidavit, do you recall saying that -- you were
13 asked whether you read what was on the statement or did
14 you just something else, and you said, No, I didn't. I
15 just signed it.

16 A. I just signed it, yes, I did.

17 Q. Okay.

18 A. Yes, I did.

19 Q. And do you recall that at the time of your
20 deposition, you never said that anyone read it to you?

21 A. Right.

22 Q. Okay. So -- and the indication at the time
23 of your deposition or the implication was that you just
24 signed a statement --

25 A. Yes.

1 Q. -- not -- you didn't read it and no one read
2 it to you.

3 A. Right.

4 Q. Okay. So is it fair to say -- and I'm just
5 asking you about your recollection because we're now
6 over five years since that event on January 2nd; right?

7 A. Right.

8 Q. Okay. So more likely than not, based on your
9 recollection as you sit here today, with regard to that
10 affidavit or the statement, you didn't -- you didn't
11 read it and no one read it to you.

12 You just signed that statement; correct?

13 A. Yes, because they had -- when I was there, I
14 signed one. But they sent me a booklet at home, and
15 that's the one I had read with my sister.

16 Q. Oh, the book -- so they sent you a booklet.

17 A. Yes.

18 Q. And the booklet that they sent you, do you
19 know what it was?

20 A. It was about everything that we talked about.

21 Q. In other words, would it have been a copy of
22 your deposition transcript?

23 A. Yeah, I think so.

24 Q. Okay. So -- so -- so what your sister read
25 to you was a copy of your deposition transcript; right?

1 A. Yes, yes.

2 Q. Okay. And just -- just for clarification,
3 your sister didn't actually read the affidavit to you
4 on -- on the date it was signed --

5 A. No.

6 Q. -- right?

7 Or any time before that.

8 A. No.

9 Q. Okay. So isn't it a fact that at the time
10 that you signed the affidavit, you had no idea what was
11 on that statement?

12 A. No, none at all. I just signed it.

13 Q. All right. Thank you.

14 MR. MAZZEO: Pass the witness.

15 THE WITNESS: You're welcome.

16 THE COURT: Redirect?

17 MR. MOTT: Yes, Your Honor.

18

19 REDIRECT EXAMINATION

20 BY MR. MOTT:

21 Q. Ms. Killian, the affidavit that counsel's
22 asked you about several times --

23 A. Yes.

24 Q. -- you said that you did not read that
25 affidavit; correct?

1 A. No.

2 Q. And as you're here today, do you recall what
3 that affidavit says?

4 A. No, I don't.

5 Q. If the affidavit says that you saw Jared
6 smoke weed at your apartment on the date of the
7 incident, is that accurate?

8 A. Yes. In my house, yes.

9 Q. So it wouldn't matter whether you read the
10 affidavit or not because the affidavit is correct.

11 A. Right.

12 Q. The affidavit is correct, Your Honor.

13 MR. MAZZEO: Objection. That's not the
14 entire contents of the affidavit.

15 THE COURT: That statement, we'll limit it to
16 that statement.

17 BY MR. MOTT:

18 Q. And just to clarify, when you -- when -- when
19 someone came to your house, a reporter, to draft the
20 affidavit with you --

21 A. Yes.

22 Q. -- Mr. Smith wasn't there?

23 A. No, he wasn't.

24 Q. Okay.

25 A. It was only one person. Because he was

1 talking about how beautiful my house was, and so there
2 was only one person.

3 Q. And have you ever met Mr. Smith before?

4 A. Well, we had to go talk. I did -- I met him
5 then. You know, they call you to come over to the
6 other thing to talk about the case. That's when I met
7 him.

8 Q. Was that at your deposition?

9 A. Yeah.

10 Q. So other than at your deposition, have you
11 ever met Mr. Smith at any other time?

12 A. No.

13 Q. Did you ever meet with another attorney at
14 your apartment regarding this case?

15 A. Yes, yes. A woman.

16 Q. A woman?

17 A. Yes.

18 Q. Do you recall what her name was?

19 A. No.

20 Q. If I say her name, tell me if it will refresh
21 your recollection.

22 Would it be Ms. Lilly Compton?

23 A. I'm not even going to lie. I don't remember
24 her.

25 Q. And do you know, did the attorney represent

1 Mr. Awerbach?

2 A. I think so. I think so.

3 Q. Do you recall what you talked about with

4 Ms. Compton?

5 A. We just talk --

6 MR. MAZZEO: Beyond the scope, Judge.

7 Objection.

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

9 THE WITNESS: We just talking about the case,
10 the same thing you asking me. It's the same thing she
11 was asking me.

12 BY MR. MOTT:

13 Q. And at that meeting, did she ask you whether
14 you saw Mr. Awerbach smoke weed?

15 A. Yes, she did.

16 Q. On the day of the incident?

17 A. Yes.

18 Q. And what did you tell her?

19 A. The same thing I'm telling you.

20 Q. And what's that?

21 A. Came out the room to go inside the kitchen.

22 He was in the living room smoking.

23 Q. Mr. Strassburg, Mr. Awerbach's counsel, he
24 asked you a question wherein he read you your
25 deposition testimony where you stated that you did not

1 see Mr. Awerbach actually inhale the marijuana.

2 Do you remember that just a moment ago?

3 A. Yes.

4 Q. And do you recall being asked later in your
5 deposition whether you saw him smoke weed?

6 A. I think so, yes.

7 Q. And do you recall what your response was
8 then?

9 A. Yes. I think I said yes.

10 Q. So did you clarify that you misspoke the
11 first time?

12 A. Yes. Like I said, when I came out, he had --
13 they were smoking.

14 Q. Mr. Mazzeo asked you whether was Mr. Awerbach
15 was smoking a marijuana cigarette or a cigar and you
16 said cigar; correct?

17 A. Yes.

18 Q. Can you -- do you know what a blunt is?

19 A. Yes.

20 Q. Can you explain to the jury what a blunt is.

21 A. It's a cigar that they cut open and they put
22 weed in it.

23 Q. So when you said "cigar," were you referring
24 to a blunt?

25 A. Yes.

1 Q. Because it was once a cigar, but you cut it
2 open and put marijuana in it.

3 A. Yes.

4 Q. And that's what Mr. Awerbach was smoking,
5 correct, not a cigar?

6 A. That's what my baby daddy and them smoke, so
7 yes.

8 MR. MOTT: I have no further questions.
9 Thank you.

10 THE WITNESS: Welcome.

11 THE COURT: Any more from the defense?

12 MR. MAZZEO: Yes, Your Honor.

13 Thank you.

14

15 RECROSS-EXAMINATION

16 BY MR. MAZZEO:

17 Q. Ms. Killian.

18 A. Yes.

19 Q. So you were asked a question by Mr. Mott on
20 redirect about something that you had -- something that
21 was in your affidavit. And so today you're saying that
22 you said you're saying that you saw Jared smoke weed.

23 A. Yeah.

24 Q. Do you remember that?

25 A. Yes.

1 Q. Okay. A few minutes ago, you were saying
2 that you saw him smoke a cigar; right?

3 A. Cigar, that's the same thing as smoking weed.
4 It's still in the -- in the cigar.

5 Q. Did you ever see Jared cut open a cigar at
6 your house?

7 A. No.

8 Q. Did you ever see Jared cut open a cigar at
9 your house on January 2nd and stick weed into it?

10 A. No.

11 Q. And -- and Mr. Mott had asked you if -- if --
12 that when -- when the reporter came to your house to
13 draft the affidavit, the affidavit wasn't drafted at
14 your house, was it?

15 A. What do you mean? The stamp?

16 Q. No, not the stamp. The actual statement, the
17 two-page statement you saw, that was already drafted
18 before the reporter got to your house.

19 A. Yes.

20 Q. Okay. And so that was not drafted at your
21 house.

22 A. No.

23 Q. Okay. And -- and you recall at the time
24 of -- at the time of your deposition in December of
25 2014, your recollection was that you didn't see Jared

1 actually inhale or take a hit from this thing.

2 A. Yes. When I walked past, they were smoking,
3 yeah.

4 Q. Okay. Well, do you recall -- do you have a
5 copy of the transcript?

6 A. No, baby.

7 Q. Okay.

8 MR. MAZZEO: Can we have that published to
9 this witness? Or published and shown to the witness.
10 Thank you. Thank you.

11 May I approach the witness, Your Honor?

12 THE COURT: You may.

13 MR. MAZZEO: Thank you.

14 BY MR. MAZZEO:

15 Q. Ms. Killian, would you please turn to
16 page 11.

17 A. (Witness complies.)

18 Q. Are you on page 11?

19 A. Yes.

20 Q. All right. Ms. Killian, I'm going to direct
21 your attention to line 7.

22 Do you recall being asked the following
23 question and giving the following answer:

24 "QUESTION: And did you actually see him
25 inhale or take a hit off of the --

1 "ANSWER: No. But I know he was out
2 there. I know he was out there smoking,
3 though, yeah."

4 Do you remember -- do you recall being asked
5 that question and giving that answer?

6 A. I don't recall that. But no, I don't recall
7 that. I don't remember that.

8 Q. Okay.

9 MR. MAZZEO: Thank you.

10 THE COURT: Mr. Strassburg, anything?

11 MR. STRASSBURG: Yes, Judge, briefly.

12

13 RECROSS-EXAMINATION

14 BY MR. STRASSBURG:

15 Q. So now, today, your testimony is inside the
16 living room and a blunt; right?

17 A. Yes.

18 Q. And in your deposition in December, your
19 testimony -- your sworn testimony was, do you recall,
20 it was outside and a joint? Remember?

21 A. No, I don't remember.

22 Q. Let me direct your attention to page 32. It
23 will come up on the screen there. You were asked:

24 "Okay. And you just told Ms. Compton that
25 you didn't see him smoking it. So what's the

1 difference now?"

2 And your answer was:

3 "Well, I'm sorry. Yes, I did see him
4 smoking. He was outside. When I went out, he
5 did have the joint in his hand. Like I said,
6 in, out, and I went about my business."

7 And then you were asked:

8 "And you did see him smoking the joint;
9 right?"

10 And you said:

11 "Yes. I'm sorry. Yes."

12 Now, does that refresh your recollection that
13 it's not inside and a blunt, but it's outside and a
14 joint?

15 A. I don't remember that.

16 Q. Thank you.

17 Now, to be fair to you, do you recollect your
18 testimony where you were asked on page 10, you were
19 asked:

20 "Okay. So you don't know exactly what --

21 "Right."

22 And the point was that, ma'am, you don't
23 really remember what you saw, blunt, joint, inside,
24 outside. It's just been too long ago.

25 A. Right.

1 MR. STRASSBURG: Thank you, ma'am.

2 THE COURT: Any redirect, Mr. Mott?

3

4 FURTHER REDIRECT EXAMINATION

5 BY MR. MOTT:

6 Q. Do you know that Mr. Awerbach was smoking a
7 blunt on the day of January 2nd, 2011, inside your
8 apartment?

9 MR. MAZZEO: Objection. Leading.

10 THE COURT: It was. Sustained.

11 BY MR. MOTT:

12 Q. Do you know if Mr. Awerbach smoked a blunt at
13 your apartment on January 2nd?

14 MR. MAZZEO: Asked and answered.

15 THE COURT: I will allow it.

16 THE WITNESS: Yes.

17 BY MR. MOTT:

18 Q. And did he?

19 A. Yes.

20 MR. MOTT: Thank you. No further questions,
21 Your Honor.

22 MR. MAZZEO: Nothing, Judge.

23 THE COURT: Mr. Strassburg?

24 MR. MAZZEO: One minute, Your Honor.

25 MR. STRASSBURG: Sorry, Judge.

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FURTHER RECROSS-EXAMINATION

BY MR. STRASSBURG:

Q. All right. So today, as best you can recall, you're saying that he -- it was a blunt and it was inside.

And how long do you recollect you observed him in this activity?

A. I don't know. I went back in the room.

Q. So it was a brief glance before you returned to the kitchen?

A. Yeah. I just went in and went back in the room.

Q. So you don't know how many puffs he took on what he was smoking?

A. No, I don't know how many.

Q. Thank you, ma'am.

A. Welcome.

MR. MOTT: No further questions, Your Honor.

THE COURT: All right. Ladies and gentlemen, any questions for this witness? Okay. Got at least one. Make sure you put your juror number on there.

Come on up, Counsel.

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

1 THE COURT: All right. Ms. Killian, is it
2 possible that the answers you gave in the statement may
3 have been given as a result of not wanting to be
4 involved and trying to get rid of lawyers because you
5 were scared and the testimony today is clearer in some
6 aspects?

7 THE WITNESS: No. I'm just telling you the
8 truth.

9 THE COURT: Okay. Mark that Court's next in
10 order.

11 Mr. Mott, any follow-ups based on that?

12 MR. MOTT: No, Your Honor.

13 THE COURT: Defense side?

14 MR. MAZZEO: No, Your Honor.

15 MR. STRASSBURG: No, sir.

16 THE COURT: All right. Thank you, ma'am.
17 You're excused.

18 THE WITNESS: Thank you.

19 THE COURT: Thanks for being here.

20 THE WITNESS: Thank you.

21 THE COURT: Plaintiff's next witness.

22 MR. MOTT: Your Honor, plaintiffs would call
23 Dr. Cash. And -- Dr. Andrew Cash.

24 THE COURT: Okay. Good afternoon, Doctor.
25 I'm going to ask you to step all the way up on the

1 witness stand, if you would. Once you get there,
2 please remain standing and raise your right hand to be
3 sworn.

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

8 THE WITNESS: I do.

9 THE CLERK: Please state your name and spell
10 it for the record.

11 THE WITNESS: My name is Dr. Andrew Cash,
12 C-a-s-h.

13 THE COURT: Go ahead and be seated. Thank
14 you, Doctor.

15 THE CLERK: Thank you.

16

17 DIRECT EXAMINATION

18 BY MR. MOTT:

19 Q. Sorry for the delay, Doctor. Took a little
20 longer than expected.

21 A. No problem.

22 Q. Do you mind laying out your educational
23 background for us, Doctor?

24 A. Yes, sure, my pleasure. So I started off my
25 career in medicine in North Carolina. Went to school

1 at the University of North Carolina Chapel Hill. I
2 attended college there, and I matriculated to medical
3 school there as well. I did an extra year of head,
4 neck surgery research, and then I decided I wanted to
5 do orthopedics for my life career. I was accepted to
6 Atlanta where I performed orthopedic residency,
7 internship, and chief residency for a total of five
8 years where I honed my skills at diagnosing patients
9 with orthopedic conditions -- that's the
10 musculoskeletal nervous system -- recommending
11 conservative care, nonsurgical, and performing surgery
12 when necessary. I did an additional year of training
13 in a fellowship with Bob Watkins in USC where I focused
14 primarily on degeneration and injuries of the spine.

15 Q. And do you have a specialty, Doctor?

16 A. Yes. So I'm board certified in orthopedic
17 surgery, and I have a fellowship training in spine
18 surgery.

19 Q. And I think that's the first time we've heard
20 board certified. Do you mind explaining to us what
21 board certified means?

22 A. Yeah, it's a very complicated testing system.
23 To be able to call yourself board certified, not only
24 do you have to go through the 13 or 14 years of
25 training that I did, you have to pass three steps of

1 United States medical licensing examinations. And then
2 particularly for board certification, you have to take
3 a written board and an oral board. These are
4 examinations that you go up against the top orthopedic
5 candidates in your class. There's hundreds across the
6 country. Every year they test you, and you have to
7 pass this examination to be able to say you're board
8 certified or you sit for the oral examination.

9 And what we had to do is I had to take about
10 a six-hour course with three different panels of
11 multiple doctors to kind of grill me orally on these
12 case presentations I gave them to see if essentially
13 I'm up to snuff to be called board certified by a group
14 of peers or orthopedic certified doctors already. So
15 it's a way that the orthopedic group as a nation, to
16 make sure that every orthopedic surgeon they say is
17 board certified has met the requirements they need to
18 be able to go out there and treat patients
19 appropriately.

20 Q. Very good. Thank you, Doctor.

21 Where do you practice at?

22 A. So I practice in pretty much the southwest
23 corner of Las Vegas. I've practiced in Arizona as a
24 satellite clinic for about three years. But over the
25 last ten years, my primary practice is focused in

1 Las Vegas.

2 Q. What's the name of your practice?

3 A. The name of my practice is the Desert
4 Institute of Spine Care.

5 Q. Do you hold any medical licenses, Doctor?

6 A. Yes. I'm licensed in several states,
7 including where I did my training in Georgia,
8 California, Nevada obviously. I did a satellite clinic
9 in Arizona. I got a license in Illinois and Florida
10 and New Mexico anticipating I was going to go there
11 after my training, but I decided to come to Nevada
12 instead. I'm just maintaining those licenses.

13 Q. And do you have any hospital privileges?

14 A. Yes. I started out with hospital privileges
15 at every center in town. And then as I honed my
16 practice in the southwest corner, I maintain privileges
17 at San Martin, which is a division of St. Rose,
18 Southern Hills Hospital, and Spring Valley. And I have
19 a few privileges at some surgery centers. I may have
20 some privileges at some other hospitals, but it's
21 probably a courtesy. I don't go to those routinely to
22 operate.

23 Q. And I should have been more clear because
24 we've never -- hospital privileges, that's the first
25 time we've heard this.

1 Can you explain to us what hospital
2 privileges is?

3 A. Yeah, absolutely. That's just another layer
4 of protection for patients to make sure that every
5 doctor that wants to perform services in the hospital
6 has met their standards. They look at your board
7 certifications. They look at your training. They look
8 at your reputation. They look at -- they look at your
9 malpractice, if you have any. I do not. They look at
10 just your track record. And they look at the kind of
11 cases you perform to see if you are able to do those
12 cases in their hospital.

13 So it's a good standard by which they make
14 sure -- and they do this -- they update this every year
15 or two for every doctor to make sure they reevaluate
16 every doctor in the hospital to make sure that they're
17 going to be treating patients appropriately.

18 Q. Are you involved in any associations?

19 A. Yes. On the local level, probably the Clark
20 County Medical Society. And then there's the Nevada
21 Orthopedic Association for the state. And then there's
22 the North American Spine Society, the International
23 Society of Spine Surgery, the minimally invasive
24 surgery spines. There's a lot of acronyms out there.
25 So I'm involved in local, state, and international

1 societies. I actually teach some of the international
2 courses for minimally invasive, cutting edge surgeries.

3 Q. And can you describe for us your clinical
4 practice as an orthopedic spinal surgeon?

5 A. Yes. So I divide my time between performing
6 surgeries on candidates for surgery and evaluating
7 patients in the clinic. Most of the time is evaluating
8 patients in the clinic. I'll send patients out for
9 physical therapy or chiropractic, maybe injections,
10 trying to get them better without surgery. And just a
11 minority of my time is devoted to actually making
12 people better that need the surgery because I feel most
13 people get better without the surgery.

14 And then some of my time is devoted to court
15 appearances or depositions, stuff related to an injury
16 case, wherein I have to opine on the treatments.

17 Q. And finally, how much of your practice is
18 dedicated to the treatment of specifically
19 spine-related issues?

20 A. So the majority of my practice is related to
21 spine conditions.

22 MR. MOTT: And, Your Honor, we would like to
23 offer Dr. Cash and request that the Court recognize him
24 as an expert in orthopedics and spine surgery.

25 THE COURT: Any objection?

1 MR. MAZZEO: No, Your Honor.

2 MR. STRASSBURG: No, sir.

3 THE COURT: He will be so recognized.

4 MR. MOTT: Thank you, Your Honor.

5 BY MR. MOTT:

6 Q. How did you prepare for your testimony here
7 today, Dr. Cash?

8 A. Well, I treated the patient years ago, and I
9 was deposed about a year ago. And in specific
10 preparation for the trial today, I reviewed all of my
11 deposition testimony and my clinical chart.

12 Q. And are you being paid to be here today?

13 A. I am being reimbursed for my time.

14 Q. How much and by who?

15 A. I believe it's about \$6,000 for a half day of
16 service by plaintiff's counsel.

17 Q. And you're a treating physician in this case,
18 but I believe you stated you also do expert work; is
19 that correct?

20 A. That's correct.

21 Q. And when you're retained as an expert
22 witness, in what field of expertise are you retained
23 in?

24 A. Orthopedic surgery with a fellowship in
25 spine.

1 Q. And how many cases are you retained by the
2 plaintiffs compared to being retained by the
3 defendants?

4 A. So when I'm asked to do forensics work or
5 just specifically expert where I'm a nontreater, I'd
6 say 80 to 90 percent of my time is spent on defense
7 files or retained by defense firm as opposed to a
8 plaintiff's firm.

9 Q. And last two background questions before we
10 actually get into Ms. Emilia Garcia.

11 Have you ever been retained by my cocounsel's
12 office, Glen Lerner's office?

13 A. Oh, yes.

14 Q. Do you recall about how many times in the
15 last few years?

16 A. I'd say that over the last couple of years,
17 I've probably only seen about a handful, maybe a dozen
18 patients that they are involved in. As far as being
19 retained as an expert also, I don't recall, but it
20 might be one or two.

21 Q. Okay. And everyone else over here works for
22 Weinberg, Wheeler, Hudgins, Gunn & Dial, a different
23 law firm.

24 Have you ever been retained by our firm?

25 A. I don't recall being retained by your firm.

1 Q. And when did you first have the opportunity
2 evaluate Emilia Garcia?

3 A. Exactly three years ago today.

4 Q. And was she referred to you?

5 A. I'm sorry. Is that three years? Maybe five.

6 Q. Five?

7 A. Yeah, five. Five. So yeah, she was referred
8 by Dr. Gulitz who's a local chiropractor, and the
9 patient had findings that were pretty severe on the
10 imaging studies, and had radicular findings that would
11 correspond with those. So he felt that although he had
12 only been seeing the patient for five or six weeks, it
13 was appropriate to send it over to me to see if there's
14 any stabilization needed to occur for the L5-S1
15 segment.

16 Q. And was this the only time you met with
17 Ms. Garcia?

18 A. One time I evaluated the patient was on that
19 date.

20 Q. And that's February 16th, 2011?

21 A. Right, actually five years ago today.

22 Q. Did Ms. Garcia receive any medical evaluation
23 or treatment for the injuries she sustained in the
24 January 2nd, 2011, accident before being referred to
25 you?

1 A. Oh, absolutely.

2 Q. And can you give us a brief background of
3 what that was?

4 A. Yes. So essentially, the pain started
5 developing from the accident. She went to MountainView
6 Hospital where she was evaluated by the emergency
7 nurses and -- and physician there. She was discharged
8 and followed up the next day with Neck and Back Clinic
9 where Dr. Gulitz worked. And then she also had an MRI
10 under his care, and I think that's about the time she
11 was referred over to me, five or six weeks into the
12 treatment.

13 Q. And I think you kind of asked -- answered
14 this, but I'll ask it again.

15 What was the purpose of your evaluation of
16 Ms. Garcia on February 16th, 2011?

17 A. Well, if you look at Dr. Gulitz's referral
18 notes or his -- he always sends his notes over, so it's
19 helpful why he's referring the patient over. They
20 usually send patients over for surgical consultation,
21 see if they need surgery, similar kind of treatment,
22 other than chiropractic or just need chiropractic. In
23 his note, specifically he outlined that he was worried
24 about the instability of L5-S1 and was wondering if
25 that segment needed to be stabilized. So he wants me

1 to evaluate the patient with a history, physical
2 examination, look at all the diagnostics, if I didn't
3 have enough, order more, and then give a treatment
4 paradigm or treatment options the patient might benefit
5 from.

6 Q. Now, looking at your actual evaluation, what
7 were your findings when you evaluated Ms. Garcia?

8 A. Well, her findings were severe on many
9 levels. Essentially, her historical account, she was
10 in a lot of pain. Pain ranged from 7 to 10, and she
11 had a disability index score of 64 percent which is
12 pretty severe. It was really affecting her way of life
13 or daily activities. And that's one of the most
14 important things is the historical consultation
15 provides.

16 Now, along with that, the physical
17 examination that I performed, which is very important
18 as well, showed that she had nerve root findings coming
19 from the L5 and S1 area that was consistent with --
20 with an injury there. And then -- I guess we'll get
21 into this. Then the diagnostic imaging, which is the
22 MRIs and the X rays, also all corroborated kind of the
23 same story. So the -- all three had findings that were
24 pretty severe. And if you want me to get -- break
25 those down for you, I can do that next.

1 Q. That was the next question. So go for it,
2 Doctor.

3 A. All right. So historically I mentioned she
4 has really high pain scores and is really affecting her
5 activities of daily living, affecting her life. The
6 physical examination findings, you have -- there's
7 subjective parts and objective. That means --
8 subjective is something they kind of tell you, like
9 there's pain or there's numbness and tingling. And
10 then there's objective findings which would be like how
11 strong, if there's any weakness, is there a difference
12 in their reflexes. And those are indications that a
13 nerve root is being irritated in the lumbar spine. So
14 it's not just them telling you information but you
15 actually being able to observe it. And those were, I
16 felt, were -- matched up with the severe findings at
17 L5-S1 on the imaging studies.

18 She also had some findings at L4-5 which were
19 not as severe, but I felt they were significant enough
20 that they would have to be included in any kind of
21 reconstruction or surgery at L5-S1.

22 Q. And now you mentioned surgery.

23 Can you specify the exact treatment that you
24 recommended for Ms. Garcia?

25 A. Absolutely. So when we talk about fusions,

1 we talk about taking two bones that -- actually, I have
2 a couple of models. Would that be helpful?

3 Q. Sure. Thank you, Doctor.

4 A. I don't know if you guys can see this from
5 there. Shall I -- can I approach the jury box or ...

6 THE COURT: If it will help you.

7 THE WITNESS: Is there a microphone mobile?

8 THE COURT: No.

9 THE WITNESS: Think I speak loud enough for
10 the Court?

11 THE COURT: You want to give him the mic,
12 Tom. I don't know how good it works. You have to put
13 it right up to your mouth.

14 THE WITNESS: Okay. Do you want me to try
15 without?

16 MR. MOTT: If he speaks loud enough, do you
17 think that would be all right, Your Honor?

18 THE COURT: It will make it easier for our
19 court reporter if you use the mic, but we can try it.

20 MR. MOTT: Come on out, Doctor. Thank you.

21 THE WITNESS: Yeah, no problem. Okay. Can
22 you hear this, Court reporter? It's not working.

23 THE COURT: You got it. Right there.

24 THE WITNESS: Right there. Okay. All right.

25 So I'm going to hold the spine up here too.

1 So essentially, you have to look -- this is the lumbar
2 spine. And I wish I had a really injured model like
3 she has because it doesn't quite show you all the
4 findings. But just for reference, you can see that
5 each level has a white bone here. And in between, you
6 have this little disk. Okay? That's where motion
7 occurs.

8 A fusion surgery, I don't know if you've
9 heard these before, that's where we make one bone grow
10 to the other one so there's no abnormal painful motion
11 there anymore. So a fusion literally means taking the
12 two things, forming them into one. Okay?

13 So the surgery I recommended was a
14 reconstruction because this was kind of a destructive
15 area, if you will, from L5 to S1. And I felt because
16 of the high slip angle and the -- probably the
17 inability to put the screws in the right places, that I
18 was going to need to include 4-5 for more stable
19 construct, and also had a tear there which is likely to
20 expand and worsen if I only fused the one level. So
21 for that reason, I recommended a two-level surgery.

22 If you look at this model, this shows --
23 these aren't the exact levels. This is just a
24 one-level illustration of what she needed double of.
25 So here, we take the disk out and we put this plastic

1 piece in. There's bone graft from a cadaver and a
2 little bit of bone marrow from the patient's hip. We
3 plug it right into the disk space. So we try to
4 re-create the height, the curve, and the disk that's
5 going to be fused. Okay?

6 And then the fact we have to stabilize it
7 because if there's any extra micromotion in the front,
8 the bone doesn't grow back together. It's like a bone
9 that doesn't mend. So you have to stabilize it with a
10 small screw and rod construct. So you have to put the
11 screws in there. They're about this deep because
12 they're going deep into the bone. So you can see the
13 tips here that actually go into the bone that deep,
14 both of these, and there's four at one level. There's
15 six screws at the two levels. That's the surgery I
16 recommended and why.

17 And then also interesting on this other model
18 is you can see between each vertebrae, there's a disk.
19 But there's a nerve going out to the right and left
20 side. So I could tell by the patient's symptoms of
21 pain, numbness, tingling on the back of the leg, that's
22 an L5-S1 problem, nerve right here. And the weakness
23 in the ankles and toes, that's a problem from this
24 nerve. And the reflexes of the Achilles, that's a
25 problem with this nerve. So everything pointed to

1 right where the problem was. So that's why I
2 recommended surgery in that area.

3 BY MR. MOTT:

4 Q. Thank you, Doctor.

5 A. Thank you.

6 Q. Now, this two-level fusion that you explained
7 to the jury, is the surgery you've actually performed
8 before?

9 A. Hundreds of times, yes, absolutely.

10 Q. Hundreds of times?

11 A. Hundreds of times.

12 Q. And at the point that you met with
13 Ms. Garcia, did you believe she needed immediate urgent
14 surgery at that point?

15 A. Yeah. I didn't believe it was urgent. So
16 I -- in my mind, there's three categories for when
17 somebody needs surgery. One is what I mostly see in my
18 clinic is elective and there's urgent and there's
19 emergent. So we'll start with the rarest, fortunately,
20 is emergent. Somebody comes in the hospital and
21 they've broken their back and they're paralyzed and
22 they have to be stabilized, take the pressure off the
23 nerves right then, that's emergent surgery.

24 Most of what I see is elective surgery.
25 Patients fail conservative measures, they might require

1 the surgery. Certainly if it affects their life
2 enough, they can undergo surgery when they feel like
3 it. If they feel like it, that's elective. And then a
4 subdivision of the elective is really urgent. Meaning
5 if they have a severe foot drop or they have something
6 that can wait on a couple of weeks but really need to
7 get done is urgent.

8 She falls in the elective category. She has
9 an instability of 5-1 that's going to continue to slip
10 and get worse. She's not your run-of-the-mill patient
11 that has a disk injury. Most of them don't have a
12 Grade 2 slip when they come in. They don't have a high
13 slip angle like she did. A high slip angle just means
14 that the angle that your disk has relative to the floor
15 or gravity is going to be -- it's usually like 35 to
16 40 degrees in most of us. But she had one that was
17 about 70 degrees, almost straight up and down. So the
18 shear forces of gravity pulling her body into her
19 pelvis are much higher because that angle is abnormally
20 sleek and high slope for her.

21 So because of all that, I recommended she
22 might benefit from surgery. She had some weakness. I
23 thought maybe she could go sooner than later. I
24 thought she would be wasting time to wait on it, but
25 certainly she could. And that's what she elected to

1 do, and she would be totally fine.

2 Q. And this two-level fusion surgery that you
3 recommended, is it your opinion that this surgery would
4 have completely resolved all of Ms. Garcia's symptoms
5 or pain?

6 A. No. It's not likely to resolve all of her
7 symptoms or pain. The goal of the surgery is to reduce
8 the symptoms and pain. So in that, I tell patients
9 that your -- your pain has to be intolerable, severe,
10 and debilitating so you have benefit from the surgery.
11 Because when we do the surgery, when you fuse a level
12 or two levels, you essentially have forced more stress
13 on all the surrounding tissue. That's just physics.
14 There's no way around that in the world. So she's
15 going to have some pain.

16 I usually see patients about 8 to 9 over 10
17 pain, maybe 7 to 10 like she had, get a reduction to 3,
18 4, maybe 5 over 10. So that's a good reduction because
19 we're trying to improve their quality of life which is
20 why they came in here in the first place. We're trying
21 to reduce their medication requirements, which is why
22 they came in the first place. So we're looking for a
23 relative improvement.

24 The unfortunate thing with an injury like
25 this is you have just your injured back which in her

1 case was going to get worse and worse, or you have your
2 reconstructed back which is going to be better. But
3 you don't have your pre -- prior back, which was the
4 best-case scenario. There's no way to do that. So you
5 have to pick the better of the two options that's on
6 the table.

7 Q. Now, you previously stated that you reviewed
8 the ER records from MountainView Hospital; is that
9 correct?

10 A. That's correct.

11 Q. And are you familiar with the fact that the
12 ER records diagnosed her with a sprain-strain of her
13 lower back?

14 A. I am.

15 Q. Does that have any impact on your clinical
16 findings?

17 A. No, not at all. So essentially, the
18 emergency department is -- their goal is to stabilize
19 life-threatening problems or, you know, limb
20 threatening. I mean their job is to make sure people
21 don't die on their watch, so when they come in and they
22 have back pain, they're probably almost -- God, say at
23 least 90 percent of the ER diagnosis related to low
24 backs are going to be back strains because they're
25 going to be correct. There's probably a sprain

1 associated, whether there's a structural problem also
2 or not, and they let the clinics in the world, like my
3 office and chiropractors, figure that out later.
4 Patient's not going to die. They don't have the
5 resources or the time or the necessities to order an
6 MRI on everybody that comes in with back pain for the
7 last couple days. That would be a waste of time
8 because most patients do have sprains.

9 So what they'll do is they'll say lumbar
10 sprain, follow up with your chiropractor or medical
11 doctor. If it turns out to be a sprain, you'll get
12 treatment for 6 to 12 weeks and you'll be back out of
13 the medical system. But if it turns out to be
14 something structural, those doctors will do the
15 appropriate steps, order the MRIs, and do the
16 injections or do surgery if you need to.

17 Q. And are you also aware that the ER records
18 indicate that she did not seek medical treatment until
19 three days -- about three days after the accident?

20 A. That's correct.

21 Q. And does that have any impact on your
22 clinical findings?

23 A. I would say a great majority of the patients
24 that have accident-related pain seek treatment within a
25 few days or sometimes a few weeks after an accident. A

1 minority of the patients probably get in an ambulance.
2 And some don't feel like they have pain right away.
3 They have endorphins going, adrenaline is pumping.
4 Some are in denial. Some think it's going to pass.
5 Some wait a few days and say, okay, the pain is so bad,
6 I need to be seen by an emergency physician to see
7 what's going on. So this is somebody that falls right
8 in line with what commonly is seen from injuries.

9 Q. Is it your opinion to a reasonable degree of
10 medical probability that all of the injuries we have
11 discussed here so far today were directly and causally
12 related to Ms. Garcia's motor vehicle accident on
13 January 2nd, 2011?

14 A. That's correct.

15 Q. And -- and how did you reach that opinion,
16 Doctor?

17 A. Okay. Well, there's a lot of information you
18 have to take into account. So a patient's historical
19 accounts was that they did not have any of these
20 problems, were not being treated for ahead of time. I
21 had no historical accounts to contradict her -- her
22 history. I had no medical records that would suggest
23 that she even had a sprain in the past, or treatment
24 rather, for the past or a prescription medication or
25 chiropractic visit or an X ray or anything to indicate

1 that she had pain in the past.

2 So along with not having anything to the
3 contrary -- contrary, her historical word, physical
4 examination findings that -- that she had in my -- my
5 observation matched up with the symptoms that she had.
6 And then I looked at the MRI and X rays and felt that
7 the most likely cause of her problems was the subject
8 accident.

9 Q. And was the medical care and treatment
10 rendered by you to Ms. Garcia reasonably and causally
11 related to the injury she sustained from the
12 January 2nd motor vehicle accident?

13 A. Yes.

14 Q. And was the billing associated with the care
15 that you provided Ms. Garcia customary and reasonable
16 for patients in Clark County, Nevada?

17 A. Yes.

18 MR. MOTT: And rather than try to use the
19 ELMO, 'cause I figure I'm going to butcher it, may I
20 approach, Your Honor, and show him Exhibit 43-001?

21 THE COURT: Go ahead.

22 BY MR. MOTT:

23 Q. And what I handed to you is a summary. It's
24 a medical summary of all the treatment that she's
25 received to date, Your Honor -- or Dr. Cash. And on

1 the sixth line down, it shows Desert Institute of Spine
2 Care.

3 Do you see that?

4 A. I do.

5 Q. And what's the amount listed there?

6 A. 4,120.

7 Q. And does that number accurately reflect your
8 billing for the care you provided to Ms. Garcia?

9 A. I believe so.

10 MR. MOTT: No further questions. Thank you,
11 Doctor.

12 THE WITNESS: Thank you.

13 THE COURT: Cross?

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

15

16 CROSS-EXAMINATION

17 BY MR. MAZZEO:

18 Q. Dr. Cash, good afternoon.

19 A. Good afternoon, Counselor.

20 Q. I've deposed you a number of times in the
21 past; right?

22 A. It's a pleasure.

23 Q. As well as cross-examined you at trial in a
24 case?

25 A. I believe so.

1 Q. Okay. And you were just asked about the --
2 you had a summary of charges that you just testified
3 to.

4 You -- you evaluated Ms. Garcia on
5 February 16th of 2011; correct?

6 A. That's correct.

7 Q. You didn't actually provide her any medical
8 treatment or care.

9 A. Well, in the -- just reviewing her chart,
10 evaluating her physically and making recommendations.
11 I mean, if you can call that not performing care, yes.
12 I didn't perform surgery on her. I didn't perform any
13 injections, but I provided care for her, made
14 recommendations.

15 Q. Fair enough.

16 In the form of -- as you're saying in the
17 form of an evaluation of her prior treatment, her
18 condition, and rendered a diagnosis and a treatment
19 plan.

20 A. Absolutely.

21 Q. Okay. And the -- you only met with her that
22 one day, which you said about five years ago from
23 today.

24 A. That's correct.

25 Q. And the consultation you had with her was for

1 approximately less than 30 minutes?

2 A. I'd probably say 45 to an hour. I don't
3 recall exactly at this time.

4 Q. And for that 45 -- 40 minutes to 45 -- or
5 45 minutes to an hour, you charged 4 -- \$4,200;
6 correct?

7 A. Well, I need to see the breakdown. I know my
8 charges have been accepted in this valley for the last
9 ten years. I know we keep them up to date. I don't
10 know if -- as we're sitting here, if that actually
11 reflects any kind of deposition time, something like
12 that. It might. So if you could just give me the
13 breakdown. It should be a one-time consultation.
14 Should be a four-view lumbar X ray, I believe, and then
15 it might be deposition time.

16 Q. Well, actually, Doctor, any deposition time
17 you would have been paid for separate and apart from
18 your evaluation that you charged for on 2/16 of 2011.

19 A. That's absolutely true, yeah. If you give me
20 the breakdown, I can just look at it really quickly.

21 Q. The breakdown is 4200 for your services
22 provided on 2 -- February 16, 2011.

23 A. Can you show me my billing ledger?

24 Q. You have the summary. One second.

25 MR. MAZZEO: Judge, may I approach the

1 witness?

2 THE COURT: You may.

3 BY MR. MAZZEO:

4 Q. Dr. Cash, I'm showing you what's been marked
5 into evidence as --

6 MR. MAZZEO: Actually, can we turn on the
7 ELMO, Judge?

8 THE COURT: It's admitted already?

9 MR. MAZZEO: It's admitted.

10 THE COURT: Is the TV on?

11 MR. MAZZEO: It is. And we -- we -- yeah,
12 we're good. Let me zoom in here.

13 BY MR. MAZZEO:

14 Q. So, Doctor, I'm just directing your attention
15 to -- it's -- and for the record, it's Plaintiff's 23,
16 page 15. And --

17 A. I'll explain to you.

18 Q. Well, no, my question -- I'm going to ask
19 you.

20 So you can see that the billing charge on
21 this document is for -- you have a balance of 4,120;
22 correct?

23 A. That's correct.

24 Q. And -- and that's the total services that
25 were provided in those lines 1 through 4 for date 2/16

1 of 2011; is that correct?

2 A. That's also correct.

3 Q. Okay. Thank you.

4 Now, Doctor, you first examined -- or the
5 only -- you first and only examined Ms. Garcia on --
6 approximately six weeks after the motor vehicle
7 accident; correct?

8 A. Yes, that's right.

9 Q. And -- and as you testified to, she had prior
10 treatment with a chiropractor, Dr. Gulitz; right?

11 A. That's correct.

12 Q. And prior to Dr. Gulitz, she was examined at
13 UMC emergency room and released; right?

14 A. I think MountainView Hospital.

15 Q. I'm sorry. Thank you. MountainView
16 Hospital.

17 A. And an MRI.

18 Q. And then -- and she also had an MRI.

19 A. That's correct.

20 Q. Which is an imaging study not actual
21 treatment.

22 A. That's correct.

23 Q. Okay. And as you sit here today, do you have
24 an independent recollection of Ms. Garcia?

25 A. No, I do not.

1 Q. Okay. So you couldn't tell us what she looks
2 like; right?

3 A. No, not at this time, I could not.

4 Q. Okay. And based on your -- in preparation
5 for your trial testimony, you -- you had -- I believe
6 you had told us that you had reviewed the medical
7 records in your chart; correct?

8 A. That is correct.

9 Q. Did you also review deposition testimony?

10 A. I reviewed my deposition testimony.

11 Q. And only yours?

12 A. Yes, in preparation for the trial today.

13 Q. Okay. And is it fair to say based on your --
14 or your review of the records that are in your chart,
15 that Ms. Garcia was -- when she came to see you on
16 February 16th of 2011, that she was in poor
17 conditioning?

18 A. Well, that's a little vague. What -- what
19 regard do you mean?

20 Q. Well, her overall physical condition. She
21 wasn't -- her muscle tone and her physical conditioning
22 was below average. Or if I can characterize it a
23 different way, she was in poor physical condition.

24 A. Well, I know from my evaluation, she was
25 around five foot or so and 170 pounds. Most patients

1 that come in with a lumbar injury undergoing treatment
2 are going to be -- I think of conditioning as their
3 lumbar spine, of course stabilization. And she
4 probably didn't have good core stabilization at that
5 time.

6 Q. And -- and you would consider that her height
7 and weight would be considered obese; right?

8 A. I would have to calculate. It's usually
9 defined by a body mass index, which is a calculation of
10 surface area by weight. But I would say there's a
11 component of obesity for those parameters.

12 Q. And is it fair to say that she was an active
13 smoker at the time of your evaluation?

14 A. That's what she admitted to when I saw her,
15 yeah.

16 Q. And do you agree that a patient's weight can
17 affect how a patient responds to chiropractic
18 treatment?

19 A. Well, a patient's weight can, theoretically.
20 But it may have no bearing at all how they respond to a
21 certain injury, whether it's being treated by a
22 chiropractor or some other method.

23 Q. And do you agree that treatment can be more
24 challenging when a patient is overweight?

25 A. Well, I mean, the possibility is, but doesn't

1 necessarily apply to every case.

2 Q. Now, Ms. Garcia, when she came to see you,
3 she had given to you or self-reported to you her
4 history of present illness; right?

5 A. That's correct.

6 Q. And also past medical history.

7 A. That's also correct.

8 Q. All right. And is it fair to say that you
9 typically rely on a patient's report, self-report of
10 history of present illness and past medical history?

11 A. Well, certainly have to rely on the patient's
12 self-reporting. And then if there's anything else
13 that's out there, like, maybe indirectly through
14 another provider's records, like Dr. Gulitz or maybe
15 MountainView Hospital, in this particular case,
16 sometimes an MRI may have a report, may even have some
17 historical accounts. Then you have ability to maybe
18 look at previous records if they exist. So there's a
19 lot of components to the historical accounts.

20 But almost always the patient is a big
21 component.

22 Q. Sure. And so the medical history is a
23 significant part in rendering a diagnosis; correct?

24 A. Yeah. It can play a good role in the
25 diagnosis. Not always required, but sure.

1 Q. And -- and also, to the extent that you
2 relied on -- and reviewed and relied on other medical
3 records such as Dr. Gulitz' medical record -- records
4 and MountainView records with regard to past medical
5 history and history of present illness, is it fair to
6 say that that information that's contained in those
7 records would have been provided by the patient
8 herself?

9 A. As far as the historical accounts taken at
10 MountainView Hospital, those of Dr. Gulitz, I would say
11 that most likely the significant, if not all, of that
12 account was from the patient.

13 Q. Thank you.

14 And -- and also, would you agree that it's
15 your custom and practice to carefully document a
16 patient's complaints in your record?

17 A. Yeah, absolutely.

18 Q. And -- and if you -- and if you -- if a
19 patient reports something that you think is important,
20 you'll record it in your record; right?

21 A. Yes, absolutely.

22 Q. Okay. And you do your best to accurately
23 document your medical record.

24 A. I do my best.

25 Q. Okay. And -- and one of the reasons is

1 because other medical providers will rely on the
2 accuracy of your record; right?

3 A. Absolutely.

4 Q. And is it also fair to say that a patient's
5 reporting, self-reporting of history, that's a
6 subjective account?

7 A. Well, I can't -- I can't -- I can't determine
8 if that's accurate or not by any other measure. So the
9 historical account is a subjective component from the
10 patient.

11 Q. And would you agree that if a self-report by
12 a patient regarding an incident is incorrect, that the
13 diagnosis and medical causation might be incorrect as
14 well?

15 A. Yeah. Either one or both could be incorrect
16 if the self-reporting isn't accurate. Sometimes it may
17 have no effect whatsoever on the diagnosis. And
18 sometimes it may not have effect on the causation.
19 Depends on how -- how inaccurate it might be.

20 Q. Okay. Now, you -- in your report -- and you
21 do have a -- well, actually --

22 A. I'd like one if you have it.

23 Q. Yeah. I'll put it -- I'll put it on the
24 screen. See if I can decrease this so you can see it.

25 So just showing you the -- your report

1 consists of two pages; right, Doctor?

2 A. That's correct.

3 Q. And I'm showing you the top -- the first --
4 top half of the first page of your report.

5 A. Yes, sir.

6 Q. Okay. Okay. Bring it down. Okay.

7 Now, in your -- just directing your
8 attention. You indicated under History of Present
9 Illness that motor vehicle occurred on 1/22 of 2011.

10 Do you see that?

11 A. I did. I do see that.

12 Q. Okay. And also, according to your report, it
13 indicates that the patient fought through pain for the
14 next four days after the accident.

15 A. I see that.

16 Q. Okay. And -- and then your -- your report
17 indicates that she went to MountainView Hospital on 1/6
18 of 2011.

19 Do you see that?

20 A. I do.

21 Q. When in fact she went to MountainView
22 Hospital on 1/12 -- I'm sorry, on 1/5 of 2011.

23 A. Yes. I see I messed that date up. So, I
24 mean, as far as these go, I mean, yeah, the patients --

25 Q. That was a yes?

1 A. Sure.

2 Q. That was a yes?

3 A. Yes, that's correct.

4 Q. Thank you.

5 And -- and then you indicate that she went to
6 Neck and Back Clinic on 1/7 of 2011.

7 Do you see that?

8 A. That's correct.

9 Q. When, in fact, she went to Neck and Back
10 Clinic for the first time on 1/12 of 2011.

11 A. Okay.

12 Q. Okay. And -- and then the MountainView
13 record, which is from 1/5 of 2011, do you recall from
14 reviewing the records in preparation for your trial
15 testimony that that record indicates that the pain
16 started earlier that morning?

17 A. I recall from the record there's a nurse's
18 note and a physician's record. And it looks like they
19 said that the patient had an accident two days ago and
20 three days ago. And then in -- and then in one line,
21 it said the patient's back pain started that day.

22 Q. Okay. Now I'm going to show you -- and this
23 is Plaintiff's 18, page 1. This is the record from
24 MountainView Hospital in the emergency room, Physician
25 Clinical Report.

1 Do you see this?

2 A. I do.

3 Q. And it states under Additional history that
4 "Felt fine after the accident. Patient was pain free
5 after the accident. Patient's symptoms started today,"
6 referring to the date of the evaluation on January 5th
7 of 2011; correct?

8 A. I see that.

9 Q. Okay. So based on -- based on this report,
10 would you agree that your reference in your report that
11 she fought through pain for -- over the next four days
12 because she did not want to miss work, that -- that the
13 symptoms didn't actually start on January 2nd, 2011,
14 based on the entry in the MountainView Hospital record;
15 is that right?

16 A. Based on what she highlighted indicates that
17 her symptoms started earlier that day.

18 Q. Right. So which would be inconsistent with
19 what she reported to you six weeks after the accident
20 where she's telling you that she fought through pain
21 over the next four days because she did not want to
22 miss work.

23 A. That would be -- yeah, that's pretty standard
24 for patients to come in and have some kind of -- be
25 inconsistent like that. She essentially six weeks

1 later was trying to recall events, and being off by a
2 day or so on some of these things, it's not a memory
3 test. They're just trying to give me a history. Said
4 she fought through pain. Doesn't match up exactly from
5 the ER record, but she does tell me that she has pain
6 from the accident and it's consistent in my mind.

7 Q. She's telling you she has pain from the
8 accident, but she's also indicating to you, Dr. Cash,
9 that the pain she has from the accident started the day
10 of the accident and that she had it pretty much
11 consistently from the day of the accident, January 2nd,
12 through January 6th; right?

13 A. Yeah, that's how my report reads.

14 Q. Okay. When in fact, three days after the
15 accident, she tells -- she's at the emergency room and
16 says the pain symptoms started that day; right?

17 A. In that particular line, she indicated that
18 her pain -- her low back pain started that day.

19 Q. Thank you.

20 Now, also at the time of your evaluation,
21 Ms. Garcia reported her pain, as you indicated on
22 direct exam, as 7 to 10 out of 10; right?

23 A. That's correct.

24 Q. Okay. And -- and 10 being the highest level
25 of pain that a patient can experience; right?

1 A. Yes. It's the highest rank that they can
2 assign to their pain.

3 Q. And you agree and acknowledge that pain is a
4 subjective component of your evaluation?

5 A. That's absolutely always been true. Pain is
6 subjective. You can't confirm it. You just have to
7 take the patient's account.

8 Q. Subjective means it can't be quantified or
9 verified; right?

10 A. That's correct.

11 Q. Your -- in looking at your report -- by the
12 way, did you bring any materials with you today?

13 A. I did.

14 Q. Did not?

15 A. I did.

16 Q. You did. Okay. So you have a copy of
17 your -- of your report, two-page report?

18 A. Yes, I do.

19 Q. And -- yeah, you can bring it up. You can
20 have that in front of you if you want.

21 A. All right.

22 Q. Okay. So now your report, it contains
23 various headings, and I will put it on the ELMO so that
24 the jury can see. This is in -- in evidence. So this
25 is -- again this is Plaintiff's 23, page 3.

1 So your report contains various headings,
2 History of Present Illness, Prior Injuries, Allergies,
3 Medications, Past Medical History, past Surgical
4 History, and so on.

5 Do you see that, Doctor?

6 A. I do.

7 Q. Okay. And -- and I believe, according to
8 your report, if we go to the bottom of this, it has a
9 section entitled Radiology/Lab; right?

10 A. That's correct.

11 Q. And according to what I'm reading here, you
12 had reviewed one X ray and one MRI of the lumbar spine.

13 A. I read -- reviewed the MRI of the lumbar
14 spine and the X ray of the lumbar spine, correct.

15 Q. And both of those were images that were taken
16 in January of 2011; correct?

17 A. I have to check the date on the MRI. I
18 didn't memorize that, but if you're relating it's
19 probably in January, it probably is. As far as the
20 X rays go, I performed those in my office. I reviewed
21 them right there at the time.

22 Q. Okay. And your -- your report -- is it
23 correct to say your -- this consultation report does
24 not identify any other medical records that you
25 reviewed in conjunction with this evaluation?

1 A. Well, I remarked that the MRI shows -- I
2 listed the findings. Had I only reviewed a report,
3 then I would have said a report. If I reviewed the
4 report and the images themselves, I phrase it like
5 this. So I looked at the actual images of the MRI. I
6 looked at the actual report for the -- for the MRI.
7 And I probably looked at Dr. Gulitz's records. I would
8 have looked at Dr. Gulitz from Neck and Back Clinic as
9 well. I don't think I had seen MountainView Hospital's
10 at the time.

11 Q. Did you actually identify in your report that
12 you had reviewed Dr. Gulitz's records?

13 A. No. It does not look like I did.

14 Q. And then at some point after you had
15 performed this evaluation, you appeared to a deposition
16 in this case; correct?

17 A. That's correct.

18 Q. And at the time that you -- or prior or to
19 the time you appeared for deposition, you had -- you
20 were given additional records from plaintiff's counsel
21 to review in preparation for the deposition; right?

22 A. That's correct.

23 Q. And those would have -- those would have
24 included additional medical records that you may not
25 have seen at the time of your evaluation on 2/16 of

1 2011.

2 A. I had to go back and look at that
3 specifically to see which records it would have, but
4 yes, that would be opinions or records I might not have
5 looked at at the time of the initial consultation.

6 Q. Okay. And so now, just looking at your
7 report that I have up here on the screen, starting from
8 the top, you've already testified that History of
9 Present Illness section is based on Ms. Garcia's
10 self-report; correct?

11 A. That's correct.

12 Q. Prior Injuries section, that would also be
13 based on Ms. Garcia's self-report?

14 A. That's what she told me.

15 Q. Allergies based on her self-report?

16 A. Self-reported.

17 Q. Medications, based on her self-report?

18 A. That's correct, although staff could
19 cross-check that or I could cross-check that with
20 Dr. Gulitz's record if they were contained therein.

21 Q. Past medical history, self-report?

22 A. Self-report.

23 Q. Past surgical history, self-report?

24 A. Self-report.

25 Q. Surgical history -- I'm sorry, social

1 history, self-report?

2 A. That's correct.

3 Q. Okay. A family history, self-report?

4 A. That would be self-report as well.

5 Q. Review of symptoms, self-report?

6 A. Those are self-report.

7 Q. Okay. And let's talk about the review of
8 systems for a moment. I know you have your record
9 there, Doctor.

10 So -- so on review of systems, what
11 Ms. Garcia told you when she came in for the evaluation
12 was she told you she had headaches, dizziness, chills,
13 swelling in legs, pain at night, shortness of breath
14 abdominal pain, nausea, vomiting, and constipation;
15 correct?

16 A. Yeah. Doesn't mean she had it right that
17 second, but she experienced these things.

18 Q. Okay. And other than identifying the -- the
19 self-report of the symptoms that Ms. Garcia was having
20 or -- or disclosing to you at the time of the
21 evaluation, you did not otherwise associate these
22 symptoms to the motor vehicle accident or to the
23 reason, the purpose for her evaluation on that date;
24 correct?

25 A. Well, if you look particularly at pain at

1 night and then corroborate it with the intake form she
2 filled out and her activities of daily living, I would
3 say that that pain at night was related to her injury
4 pain from her spine.

5 Q. Okay. Aside from pain at night, correct to
6 say that you can't state to a reasonable degree of
7 medical probability that dizziness arose from the motor
8 vehicle accident; correct?

9 A. Well, based on this record, no, I can't say
10 that dizziness arose from the subject accident.

11 Q. You can't say that the -- her reporting of
12 chills arose from the subject motor vehicle accident;
13 correct?

14 A. Just looking at this record, no, I wouldn't
15 able to say chills arose from the subject accident.

16 Q. You can't say shortness of breath arose from
17 the subject motor vehicle accident; correct?

18 A. Her shortness of breath didn't require any
19 further investigation. I didn't see that it was
20 necessarily related to the subject accident.

21 Q. You can't say the abdominal pain arose from
22 this motor vehicle accident; correct?

23 A. Abdominal pain, no, I can't say that occurred
24 from this specific accident.

25 Q. As well as nausea, vomiting, and

1 constipation, you can't say that those additional
2 symptoms that -- or conditions reported to you by
3 Ms. Garcia arose from the motor vehicle accident;
4 correct?

5 A. Well, for the abdominal pain, I need to go
6 back and look at the pain diagram, see if it's some
7 radicular kind of abdominal pain. Her nausea,
8 vomiting, constipation, those are oftentimes side
9 effects from medications prescribed, particularly the
10 ones she has listed there, like the narcotic, that can
11 cause any of those.

12 So as much as related to the medications that
13 are related to the subject accident, they could be.
14 But I don't think they just sprung de novo from the
15 subject accident.

16 Q. Okay. In other words, you can't say -- sit
17 here and say that -- that -- strike that.

18 You can't tell us with -- with this --
19 Ms. Garcia reporting nausea, vomiting, and
20 constipation, you can't tell us for how long she had
21 these conditions, whether it -- any of these conditions
22 preexisted the accident or when they arose after the
23 accident; correct?

24 A. No. I don't think I have an indication of
25 when they arose after, except further investigation

1 might have told me when the pain started and the pain
2 at night. She indicated she had a past medical history
3 of dizziness, so that probably started before the
4 subject accident.

5 Q. Now, Doctor, the radiology reports or, in
6 other words, diagnostic -- diagnostic imaging studies,
7 the X rays that you had taken in your office and the
8 MRI which was presumably from -- the one from January
9 of 2011, those would be considered objective medical
10 evidence; correct?

11 A. Yes. So those are things you don't require
12 the patient to tell you which would have been
13 subjective. These are things that are objective that I
14 can look at myself and determine what's there. So
15 those are objective evidence for the X rays and MRI.

16 Q. Doctor, did the -- do you recall -- do you
17 recall from reviewing your materials prior to -- to
18 trial testimony today or from your recollection if you
19 had reviewed the X ray of the lumbar spine that was
20 taken either on January 17th of 2011 or on February 8th
21 of 2011?

22 A. No, I don't recall. I just know I reviewed
23 my own X ray that was performed that day.

24 Q. Okay. Can you tell me if -- well, according
25 to your X ray that you -- that you had taken and

1 reviewed, it showed a 2/3 spondylotic spondylolisthesis
2 at L5-S1; correct?

3 A. With a high slip angle; correct.

4 Q. Okay. And spondylolisthesis is a slippage of
5 the vertebrae; correct?

6 A. That is correct.

7 Q. And in this case, it was a slippage of the L5
8 vertebrae over the S1; correct?

9 A. Yes, that's correct, 5 at 1.

10 Q. And did your review of your X ray also show a
11 pars defect at L5?

12 A. No, I couldn't detect a pars defect. The
13 X rays aren't the best way to detect that, X rays that
14 are performed in the office.

15 Q. Okay. And by the way, the term spondylotic
16 refers to a defect of the pars interarticularis that
17 affects one or more of the vertebrae?

18 A. That is correct.

19 Q. And -- and you had noted -- so you -- you had
20 noted from the X ray that she did have a spondylotic
21 spondylolisthesis; correct?

22 A. Yes, I did.

23 Q. And would you agree that the spondylotic, or
24 the defect of the pars interarticularis was a
25 longstanding, preexisting condition from childhood?

1 A. Yes. The pars defect was preexisting since
2 childhood.

3 Q. And would you agree that there were no
4 findings on the X ray that you had taken and reviewed
5 that showed any instability to the pars defect?

6 A. I didn't notice any gross instability at
7 L5-S1 as refers to changing and degrees or millimeters
8 with flex or extension.

9 Q. And would you agree that there were otherwise
10 no findings of any acute or traumatic injury noted on
11 the X ray?

12 A. There's usually not unless there's a
13 fracture, you know. So the X rays aren't the best to
14 try to determine if an accident happened from the
15 subject or not. But it does determine if, God forbid,
16 there are fractures or if there's any gross
17 instability.

18 Q. Okay. And then you had -- I'm referring to
19 the MRI of the lumbar spine that you had reviewed in
20 conjunction with your evaluation.

21 A. Yes.

22 Q. And so -- and you reviewed, from what you
23 said, both the report and the film?

24 A. That's correct.

25 Q. And did you -- was there a consistency in the

1 radiologist's impression as contained on the report
2 with your review of the film?

3 A. I felt there was.

4 Q. And -- and if you had noted that there was
5 something that the radiologist -- that you saw that the
6 radiologist didn't see or if something -- or if you
7 disagreed with the radiologist -- radiologist's
8 impression, you would have notated that on your report;
9 correct?

10 A. Yeah. If I thought it was substantial
11 enough. I mean, regardless, put in a lot of words,
12 difficult to regurgitate the same thing. I put what I
13 think is the most significant findings that I might act
14 on.

15 Q. Now, in your direct examination, and -- and I
16 may have missed this, so I may have to ask you to
17 repeat it. You said that you -- I think you made --
18 made a reference to an annular fissure?

19 A. That's correct.

20 Q. Okay. And that's something that you noted on
21 the MRI of the lumbar spine?

22 A. Yeah. I think I called it a tear. But in
23 this report it says "fissure." They're kind of
24 synonymous.

25 Q. Now, tear -- now, an annular fissure is a

1 tear of the annulus fibrosis of the disk?

2 A. That's correct.

3 Q. It's the outer portion of the disk that's
4 located between vertebrae.

5 A. Yes, the peripheral surface.

6 Q. Okay. I think you noted there was a annular
7 tear -- let me just get your report -- that there was
8 an annular fissure at L4-L5; correct?

9 A. That's correct.

10 Q. And an annular tear at the L4-L5 level is --
11 would you agree that's an extremely common form of
12 spinal degeneration?

13 A. Well, that's one of the findings that can be
14 found with spinal degeneration, sure.

15 Q. And so just because you noted an annular
16 fissure or tear at that level doesn't mean that it
17 was -- stemmed from an acute injury; correct?

18 A. Yeah. So just because you look at a static
19 MRI on one date and you find -- you find a lot of
20 findings, this annular fissure or tear, using
21 interchangeably, at L4-5, doesn't -- just seeing that
22 finding doesn't mean it was caused by any particular
23 trauma or the subject accident or degeneration. It by
24 itself on the MRI doesn't tell you when exactly it
25 occurred.

1 Q. Okay. Thank you. Thank you, Doctor.

2 And would you agree that as the spine ages,
3 as we age, you know, go from our teenage years into our
4 20s, then into the 30s and 40s, that the pressure of
5 increased body weight and years of repetitive motions
6 wear down the component parts of our spine, vertebrae,
7 the disks?

8 A. Yeah. So all of us are subjected to physics
9 like we talked about earlier. So we're all going to
10 have some kind of wear and tear. It's not predictable
11 how fast these things will happen. It's not really
12 predictable that if you have any wear and tear they're
13 going to be associated with symptoms. All of you guys
14 on the jury are going to have some findings on MRI, at
15 least one, in most probably several. But who knows if
16 you're symptomatic. That's why you don't just look at
17 an MRI by itself and start making treatment
18 recommendations. You have to put it in the context of
19 the patient's history and their care.

20 Q. And would you agree, Doctor, that the disk
21 between the L4 and L5 vertebrae is the most common
22 location for an annular tear?

23 A. Yeah. There's probably different sources for
24 that. Say between 4-5 or 501, those two. One of those
25 is probably the most common. The other one is probably

1 right behind it as the second most.

2 Q. Okay. And -- and one of the reasons for that
3 is because the lumbar spine is responsible for
4 supporting most of the body's weight; correct?

5 A. Yeah. So all the body weight, you know, it's
6 going to go through the spine. Most of it from the --
7 you know, the waist up is going to come through the
8 spine.

9 Q. Which means that compression and
10 deterioration that occur to the spine as a result of
11 age and weight gain is compounded in -- in the lumbar
12 spine as opposed to the cervical and thoracic area.

13 A. Yes. So the thoracic spine is the rib cage
14 spine is protected by the rib cage is a more solid
15 structure. As far as the cervical spine goes, it's
16 really supporting the weight of your 12-pound head. So
17 the lumbar spine does see more forces. That's why the
18 lumbar spine develops and is much bigger than the
19 cervical spine. The cervical spine is smaller than the
20 lumbar spine, has less weight to bear.

21 Q. When we refer to the term "disk bulge," we're
22 talking about pressure on the central core of the disk
23 that can cause a disk to bulge; right?

24 A. Yeah. Pretty accurate, yeah.

25 Q. And is it correct that about approximately

1 90 percent of bulging disks occur in the lower back?

2 A. Of all spine disks, 90 percent occur in the
3 lower back?

4 Q. Of all bulge -- of all bulges.

5 A. No. I'd -- there's the -- cervical spine has
6 bulges and frequently in the thoracic spine. I would
7 say of all bulges, might be fair to say that maybe the
8 lumbar edges out the cervical. But certainly both of
9 them have a high percentage of bulges. I would say
10 90 percent would be in lumbar and 10 the cervical is
11 totally inaccurate. So I'm not sure where you're
12 getting your numbers at.

13 Q. And in the lumbar spine, then, Doctor, would
14 you agree that most bulges -- bulging disks occur,
15 let's say, at the L4-L5 or L5-S1 levels?

16 A. Yeah. I would say the most likely bulges are
17 at 4-5 or 5-1, and then to a lesser extent 3-4 and then
18 lesser as they go higher.

19 MR. MAZZEO: Your Honor, did you want to --

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

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

23 THE COURT: All right. Okay, folks, we're
24 going to go ahead and take our evening break. We are
25 going to break up Dr. Cash's testimony. Hopefully he

1 can be back tomorrow afternoon. We're going to take
2 another doctor out of order in the morning. We can
3 start tomorrow morning at 9:00 o'clock. So I'm going
4 to ask you guys to be here at 9:00 o'clock. It will be
5 a long day. Bring a snack.

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

22 See you in the morning. Have a good night.

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

25 THE COURT: All right. We're outside the

1 presence of the jury.

2 Anything on the record, Counsel?

3 MR. MAZZEO: Yeah, just one thing, Judge.

4 I -- when Mr. Mott moved to move Dr. Cash in as an
5 expert, I forgot that he was just a treating physician
6 not an expert. So I withdraw my -- I now object to him
7 moving him as an expert. He's certainly an expert
8 orthopedic surgeon, but he's not here as an expert.
9 He's here as a treating physician on behalf of the
10 plaintiff.

11 THE COURT: I would have recognized him as an
12 expert anyway in orthopedic surgery. But his testimony
13 will be limited as -- as a treating physician.

14 MR. MAZZEO: Thank you.

15 MR. ROBERTS: We agree he's a treater, and
16 he's not a retained expert. But he certainly is an
17 expert and he's giving opinions as a nonqualified.

18 MR. MAZZEO: Yeah, I'm not saying he's not
19 qualified as an orthopedic surgeon.

20 THE COURT: Anything else?

21 MR. MAZZEO: No, Your Honor.

22 MR. ROBERTS: Exhibit 46A, we have that
23 marked and ready to submit. The first page, page 1,
24 we've redacted with Wite-Out the Social Security
25 number. I know normally we do that in black, but if

1 that's okay, there are no objections.

2 And on the second page, this is, then, the
3 answer that Mr. Awerbach filled out Question No. 5,
4 Have you had any moving violations in the last four
5 years? If yes, how many? And he checked "Yes," and
6 wrote in three. They've requested that that be
7 redacted. We believe it should stay in because it's an
8 admission of a party against interest.

9 The story is going to be from the defense
10 that he didn't drive the car that often. And we
11 believe how do you -- if you've admitted you had three
12 moving violations without a license, then obviously
13 you're driving the car. So we believe it's an
14 admission against interest and it should stay in.

15 MR. TINDALL: At this the point, Your Honor,
16 we believe it lacks foundation. It was in violation of
17 the previous motions in limine. There's no indication
18 on that form about when the three violations were. We
19 know they would have had to have been before he filled
20 out the form, but we don't know if he's referring to
21 any convictions which have already been excluded. And
22 if there weren't any convictions, then they're
23 irrelevant as a violation isn't going to be any piece
24 of relevant information.

25 MR. MAZZEO: I join in that. We also don't

1 know what car he was driving. Not necessarily Andrea
2 Awerbach's car, but the implication to have that put in
3 is -- is that it was -- he was driving Andrea
4 Awerbach's car. Not necessarily, though.

5 THE COURT: Let's take it out.

6 MR. MAZZEO: Thank you, Judge.

7 THE COURT: I've let you bring -- I told you
8 I -- I was going to let you bring up the 2008 accident.
9 I don't know that this is -- I don't know that there's
10 necessary foundation for it, so ...

11 We're going to let 46A in as redacted. Okay.
12 So just take that one section out. It's good to go.

13 MR. ROBERTS: We'll give that to the clerk
14 tomorrow.

15 MR. MAZZEO: You don't have calendar in the
16 morning; right?

17 THE COURT: No calendar in the morning.
18 We'll start at 9:00.

19 MR. ROBERTS: And we still need the
20 PowerPoint from opening from Mr. Mazzeo.

21 MR. MAZZEO: Well, you don't need it. The
22 Court needs it, and I'll have it to you by the end of
23 trial, Judge.

24 MR. ROBERTS: I think I'm entitled to the
25 Court's exhibits, Your Honor. We'd like a copy also.

1 MR. MAZZEO: Judge, that's attorney work
2 product.

3 THE COURT: Yeah. I've never made somebody
4 turn over there their disks to the other side.

5 MR. MAZZEO: Thank you, Judge.

6 MR. ROBERTS: It's not work product after
7 it's shown to the jury. It's now a Court record.

8 MR. MAZZEO: Well, they were just images.
9 But it's -- the images were not contained in any
10 record. The Court -- the official record is the
11 transcript.

12 THE COURT: It's part of the Court record.
13 I'm not going to make him give you a copy of his
14 PowerPoint. Sorry.

15 MR. MAZZEO: Thank you, Judge.

16 THE COURT: Off the record. See you in the
17 morning.

18 (Thereupon, the proceedings

19 concluded at 5:05 p.m.)
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CERTIFICATE OF REPORTER

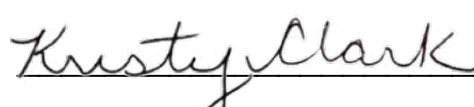
STATE OF NEVADA)
COUNTY OF CLARK) ss:

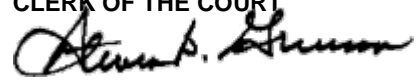
I, Kristy L. Clark, a duly commissioned
Notary Public, Clark County, State of Nevada, do hereby
certify: That I reported the proceedings commencing on
Tuesday, February 16, 2016, at 10:48 o'clock a.m.

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
16th 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 WEDNESDAY, FEBRUARY 17, 2016

23
24 REPORTED BY: KRISTY L. CLARK, RPR, NV CCR #708,
25 CA CSR #13529

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I N D E X

WITNESS:	PAGE
<u>JEFFREY D. GROSS, M.D.</u>	
Direct Examination by Mr. Roberts	6
Cross-Examination by Mr. Mazzeo	118

INDEX TO EXHIBITS

NUMBER	DESCRIPTION	PAGE
40A1	Printout of JPEG	42
40B1	Printout of JPEG	42

1 LAS VEGAS, NEVADA, WEDNESDAY, FEBRUARY 17, 2016;

2 9:12 A.M.

3

4 P R O C E E D I N G S

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6

7 THE MARSHAL: Jury entering.

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

10 THE MARSHAL: Jury is present, Judge.

11 THE COURT: Thank you. Go ahead and be
12 seated. Welcome back, ladies and gentlemen. We're
13 back on the record, Case No. A637772.

14 Do the parties stipulate to the presence of
15 the jury?

16 MR. MAZZEO: Yes, Your Honor.

17 MR. STRASSBURG: Yes.

18 MR. ROBERTS: Yes.

19 THE COURT: All right. I don't have anything
20 to tell you. I'm sorry for being late. It's my fault
21 this morning. I'll take total blame.

22 Plaintiff's next witness.

23 MR. ROBERTS: Thank you, Your Honor.

24 Plaintiffs -- plaintiff calls Dr. Jeff Gross.

25 THE COURT: Okay. Tom, can you get him or

1 somebody get him?

2 As I told you yesterday, folks, Dr. Cash is
3 not done. He'll be back. I don't know when. He'll be
4 back, and we'll finish him up whenever his schedule
5 allows. We'll take Dr. Gross out of order.

6 Good morning, Doctor. Have you step all the
7 way up on the witness stand, if you would. Once you
8 get there, if you'd please remain standing and raise
9 your right hand and be sworn.

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

14 THE WITNESS: I do.

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

17 THE WITNESS: My name is Jeffrey David
18 Gross, M.D. That's spelled J-e-f-f-r-e-y D-a-v-i-d
19 G-r-o-s-s.

20 THE COURT: Thank you, Doctor. Go ahead and
21 be seated.

22 THE WITNESS: Thank you.

23 THE COURT: There's a microphone there in
24 front of you. Try to talk into that as much you can.

25

1 DIRECT EXAMINATION

2 BY MR. ROBERTS:

3 Q. Good morning, Doctor.

4 A. Good morning.

5 Q. Before we get started in the detailed
6 examination, I'd like to do a little bit of
7 foreshadowing for the jury.

8 Did you perform surgery on Emilia Garcia?

9 A. I did.

10 Q. And what type of surgery was that?

11 A. It was a low back surgery called a lumbar
12 decompression open reduction and instrumented fusion.

13 Q. Thanks, Doctor.

14 Okay. So let's back up and talk a little bit
15 about you and your educational background, your work
16 experience.

17 Starting out with your education, can you
18 outline your educational background for the jury?

19 A. Sure. It's okay if I start with college? I
20 think anything before that's probably routine.

21 Q. Good place to start.

22 A. I have an undergraduate degree from the
23 University of California at Berkeley in biochemistry.
24 I then went right to medical school, and I went to the
25 George Washington University School of Medicine in

1 Washington, D.C. I then went into my residency after
2 medical school, and the residency first year is called
3 the internship. And I did an internship in general
4 surgery at the University of California at Irvine
5 which, oddly, is in Orange, California, not far from
6 Disneyland.

7 After the first year of the residency, I did
8 four more years of residency at UC Irvine Medical
9 Center and also the VA Hospital in Long Beach in
10 neurological surgery. My sixth year of postgraduate
11 training was a fellowship in spinal biomechanics at the
12 University of New Mexico in Albuquerque, New Mexico.
13 And finally, my chief resident year in neurosurgery was
14 also at University of New Mexico in Albuquerque, and
15 that finished in 1999.

16 Q. Very good.

17 Could you tell the jury a little bit about
18 neurosurgery, what -- what that specialty is and what
19 kind of things neurosurgeons do?

20 A. Sure. The field of neurosurgery is a
21 specialty of physicians that treat problems of the
22 nervous system and its coverings. So that includes the
23 brain, the spinal cord, the nerves. And we also deal
24 with certain pain disorders and movement disorders that
25 come from the brain and nerves.

1 Q. What do you do now? What type of practice do
2 you have?

3 A. Well, I have -- I have a practice that spans
4 two states. It's both in Orange County in California
5 and here in -- in Henderson, Nevada. I've been in
6 California for coming on 17 years doing this and here
7 in Nevada for 5 years. I practice the old-fashioned
8 way. I -- I don't have a volume practice. I see
9 patients with majority of spinal problems because I did
10 a spine fellowship, and that's my area of interest and
11 desire. So mainly neck and back problems. People come
12 to me mainly for second opinion. I do surgery on no
13 more than one in ten of the patients that come through
14 my office. The other nine, hopefully, we find another
15 way to get them treated, whether it's therapies,
16 injections, and other treatments. So I would say I'm a
17 conservative doctor.

18 I do a little bit of expert work which
19 sometimes brings me into a courtroom like this for a
20 patient of mine and sometimes not for a patient.
21 Sometimes as a consultant.

22 Q. What percentage of your current time in your
23 private practice do you spend treating people with
24 spine problems?

25 A. Probably close to 90 percent in some fashion.

1 Q. And how long has your practice focused to
2 that degree on spine problems?

3 A. All but the first two or three years of my
4 practice. Early on, I took emergency room call, and I
5 took care of head injuries and that kind of thing. But
6 probably about 2003 or 2004, I -- I was able to be busy
7 enough just to do what I wanted to do which was take
8 care of spine problems.

9 Q. Tell me a little bit about the spine
10 biomechanics and how that fits into your practice.

11 A. Well, I was lucky enough to work under one of
12 the fathers of spinal biomechanics in the country, a
13 mentor named Dr. Benzel who was at the University of
14 New Mexico. He's now the chairperson at Cleveland
15 Clinic. And he was one of the first to use physics
16 principles in the actual treatment of patients and
17 evaluation of patients with spinal problems. So just
18 like high school physics, we look at forces and
19 directions and -- applied to the spine and then use
20 that same information to sort of plan a surgery, let's
21 say so we can put the spine in its best physical
22 position and -- and take stress off disks and -- and do
23 the best job using those principles.

24 Q. You mentioned you had a two-state practice.

25 How long have you been practicing here in

1 Las Vegas?

2 A. It was spring of 2011, so I'm just coming up
3 on the five-year mark, I think, next month.

4 Q. And prior to that, you were full time in
5 California?

6 A. Yes.

7 Q. Tell us about hospital privileges.

8 Before you came to Las Vegas, did you have
9 hospital privileges in California?

10 A. Yes.

11 Q. And what hospitals did you hold privileges
12 at?

13 A. Around that time, 2010, 2011, was Hoag
14 Hospital, Pacific Hospital of Long Beach, I believe,
15 Tustin Hospital for a while. I think I held privileges
16 at those places for a few years.

17 Q. And do you currently hold hospital privileges
18 in Las Vegas?

19 A. I do.

20 Q. At the time you performed the surgery on
21 Ms. Garcia, did you hold hospital privileges in
22 Las Vegas?

23 A. No, not yet. I had not obtained those yet.

24 Q. Tell me, Doctor, why did you decide to open
25 up a practice in Las Vegas?

1 A. Well, there are multiple reasons. I had
2 always had multiple offices. I sort of think outside
3 the box from a business perspective. I had offices in
4 the San Francisco area at one point, and I was looking
5 to expand my practice. I was looking to consider
6 moving, which I now have, to Nevada. There are various
7 economic reasons that's useful. And it was -- it was
8 just a personal desire to do so.

9 Q. Thank you, Doctor.

10 The jury heard yesterday from Dr. Cash about
11 board certifications and what they are.

12 Do you hold any board certifications?

13 A. I do.

14 Q. Could you tell the jury in what areas?

15 A. I have a board certification in neurological
16 surgery.

17 Q. Are you involved in any professional
18 associations to, say, current?

19 A. Yes.

20 Q. Tell the jury a little bit about that.

21 A. There are four or five different
22 organizations I -- I spend time with both learning and
23 teaching, including the -- the two large national
24 neurosurgery organizations, and then something called
25 the "Joint Section on Spine" which is those two

1 organizations have a -- a group that we focus on the --
2 problems with the spine and we go to meetings and --
3 and write and read publications.

4 There's another group I'm involved in called
5 AO, which is a large orthopedic and spine educational
6 group where I've taught courses in the past, but also I
7 go to courses, and doctors are always learning as well.

8 Q. How many times would -- could you estimate
9 for us that you've done spine surgery of some type?

10 A. Well, you're awfully vague as to time, sir.
11 Two times this week.

12 Q. Okay. Just in -- in rough numbers for us.

13 A. I -- I must have done over 2,500 to 3,000
14 surgeries in my practice. And if you include my
15 residency, probably another 750 to 1,000 surgeries.

16 Q. And have you done the type of surgery that
17 the jury has heard about in this case, the two-level
18 lumbar fusion before?

19 A. Many times, yes.

20 Q. Could you give us an estimate of how many
21 times you've done that?

22 A. Probably 300 times.

23 Q. Thank you.

24 MR. ROBERTS: Your Honor, at this time, we
25 would offer Dr. Gross as an expert in neurosurgery and

1 spine surgery.

2 THE COURT: Any objection?

3 MR. MAZZEO: The scope of him as a treating
4 physician, no objection.

5 MR. STRASSBURG: We welcome him, Judge.

6 THE COURT: He will be so recognized.

7 BY MR. ROBERTS:

8 Q. Now, you've told the jury that you treated
9 Ms. Garcia.

10 A. Treated and am treating.

11 Q. Have you also acted as an expert for the
12 lawyers in these proceedings?

13 A. Yes.

14 Q. Tell us a little bit about what you've done
15 to assist the lawyers as an expert witness beyond the
16 scope of your treatment.

17 A. Well, simply put, I reviewed all the records,
18 not just mine and the other doctors, but also from some
19 persons hired by the -- the defense attorneys and other
20 people and -- and depositions that people have given as
21 a matter of -- of this lawsuit.

22 Q. And after reviewing opinions of the defense
23 experts, reviewing the depositions, did you prepare
24 periodic written reports advising everyone of your
25 findings?

1 A. Yes.

2 Q. And for the work that you did as an expert,
3 were you paid by the plaintiff?

4 A. Yes.

5 Q. Okay. And how much per hour do you charge
6 for that review and additional analysis time outside of
7 the treatment?

8 A. It's \$500 per hour.

9 Q. Okay. Thank you.

10 Could you give us an estimate of the
11 approximate amount of your total billings as an expert
12 on this case?

13 A. If I can look at my --

14 Q. Sure. That would be fine.

15 A. -- notebook, I can give you better than an
16 estimate.

17 I believe I have between 35 and 40 hours
18 invested over the years in this matter.

19 Q. Very good.

20 And those hours and your billing for that
21 time, are they included in the medical records that the
22 jury's going to see?

23 A. I don't believe so.

24 Q. Okay. Thank you.

25 Tell the jury what you did to prepare to come

1 in and testify here in court today.

2 A. I got up early and had some coffee. And over
3 the last week or so, I've reviewed this notebook, which
4 is my summary, and records of my care and treatment and
5 others' care and treatment of Ms. Emilia Garcia,
6 including some records that stem back before her injury
7 but also after her injury. Mostly after her injury.

8 Q. And did you meet with me?

9 A. I did.

10 Q. Okay. How many times did you meet with me?

11 A. Well, one time where we reviewed the file and
12 then just another time to tell me what time I need to
13 be here.

14 Q. Very good.

15 So let's get to your treatment of Ms. Garcia.

16 When was the first time you met Ms. Garcia?

17 A. You don't mind if I look at my file as I
18 answer you?

19 Q. No. Please do.

20 A. Thank you.

21 My first visit was on May 31st -- sorry, let
22 me correct myself, May 25th, 2011.

23 Q. Are those strong enough for you?

24 A. They're pretty good. I forgot my own, so
25 thank you for sharing.

1 Q. And what was the purpose of your initial
2 evaluation of Ms. Garcia?

3 A. It was a second opinion. She had already
4 seen another spine surgeon who I understand you
5 recently met and surgery was being contemplated, and
6 she was seeing me for a second look.

7 Q. At the time that you saw her, were you aware
8 that Dr. Cash had already recommended surgery?

9 A. It became evident during our discussion at
10 that visit. I don't know if I knew -- prior to her
11 walking in the exam room that I knew that.

12 Q. How long was this initial consultation with
13 Ms. Garcia?

14 A. Well, this occurred almost five years ago, so
15 I don't have an exact recollection. But it is still my
16 custom to set aside at least one hour for a new patient
17 visit, and I generally don't vary much from that unless
18 they're really, really brief or take a little extra
19 time. It's centered over an hour average.

20 Q. Are there certain questions that you
21 typically ask and topics you go into as part of your
22 standard --

23 A. Yes.

24 Q. -- examination?

25 A. Sorry to cut you off. Yes.

1 Q. Tell the jury about that.

2 A. Well, I start out from the 30,000-foot view.

3 And I say, What's wrong? Why are you here? What
4 happened? What's bothering you? And then I start to
5 filter it down by virtue of the patient's response. So
6 if they say, I have back pain and leg trouble, well,
7 tell me when that happened and when did it start. And
8 did you have it before? And lots of questions to hone
9 down on what's going on.

10 I also have a written questionnaire a patient
11 fills out that gives just some general idea of what's
12 going on, and we use that as a guide. Usually says
13 what's bothering them and what their medical history
14 is, that kind of thing.

15 Q. All right. What about with Ms. Garcia? Did
16 you also perform any type of physical examination on
17 that date?

18 A. Yes.

19 Q. Okay. Could you tell the jury about that?

20 A. Sure. So if a patient comes to me and
21 they're having, for example, neck and back trouble,
22 I'll focus my examinations on their neck and arms,
23 because the nerves from the neck go to the arms, and
24 then their low back and legs because the nerves from
25 the low back go to the legs. If they have any other

1 issues, I'll look at those specifically. And I'll
2 spend time going over the strength, the sensations,
3 sort of all the neurological features and then usually
4 provocative features, anything that can bring on the
5 pain to help me figure out where it's coming from.

6 Q. Could you tell the jury about how you
7 perceived Ms. Garcia's attitude and demeanor during
8 your interview with her?

9 A. Well, I don't have any notes on that date
10 that she had anything but a normal demeanor. But let
11 me look one second.

12 Well, that's not exactly correct because on
13 page 2 of my report, I noted that she was telling me
14 how her quality of life had declined since her injury,
15 that pain was depressing her, and she even cried while
16 telling me this. She was upset that she could not
17 exercise. And upset that she had gained weight since
18 the injury.

19 Q. Did she also describe her pain to you in some
20 detail?

21 A. Yes.

22 Q. In addition to her description of her pain
23 and problems, were there other things that you looked
24 at in connection with this initial evaluation in order
25 to reach a medical conclusion as to her diagnosis?

1 A. Yes.

2 Q. Tell me what those were.

3 A. Well, a physician like myself looks at tests,
4 and the only test we had at that point that was
5 available to me was the January 26th, 2011, low back
6 MRI scan. And in addition to the test, I looked at
7 some medical records that were available to me at that
8 point also, mostly from her chiropractor that was
9 treating her for the injury.

10 Q. Is that Dr. Gulitz?

11 A. It was.

12 The MRI report, some X-ray reports, emergency
13 room records, traffic accident report, and some others.

14 Q. Did you -- when you refer to emergency
15 records, did you have and review the records from
16 MountainView Hospital emergency department?

17 A. Yes.

18 Q. From January 5th, 2011?

19 A. Yes.

20 Q. And did you have records from her primary
21 care? I guess that was the physician's assistant.

22 What does PA-C stand for?

23 A. Physician assistant certified.

24 Q. Very good.

25 You had those records?

1 A. Yes. Is that Matt McGauran?

2 Q. Yes.

3 A. Then, yes, I do.

4 Q. And radiology reports, did you have not only
5 the MRI studies but also interpretations of those
6 studies?

7 A. That's right.

8 Q. And could you tell us the date and physician
9 of the radiological reports that you reviewed?

10 A. Sure. The first report is from Dr. Robinson
11 on January 17, 2011, specifically regarding low back
12 X-rays and other X-rays that were taken.

13 The second set would be the MRI report from
14 Las Vegas Radiology of the low back from January 26th,
15 2011, from Dr. Kittusamy.

16 And then the third item was Dr. Hake's X-ray
17 report of the lumbar spine from 2/8/11, also from
18 Las Vegas Radiology.

19 Q. After your consultation with Ms. Garcia, your
20 physical examination of her, your review of her medical
21 records and MRI, did you reach an impression?

22 A. I did.

23 Q. And could you tell the jury what your
24 conclusions were at that time?

25 A. Sure. My neurosurgical impression was that

1 Ms. Garcia suffered a motor vehicle accident related
2 injury resulting in three items: Number one,
3 discogenic and mechanical low back pain with
4 radiculopathy related to spondylolytic,
5 spondylolisthesis, disco protrusions, and neural
6 involvement and some secondary weight gain.

7 Q. Okay. When you say -- let's do the easy one
8 first.

9 When you say "secondary weight gain," what
10 does that mean opposed to weight gain?

11 A. Well, weight gain or primary weight gain
12 would be me going to McDonald's and eating there every
13 day, just putting on weight. Secondary weight gain
14 means it's due to something else.

15 Q. And in this case from your discussions with
16 her and your evaluation of her physical condition, what
17 was that "something else" that you contributed at least
18 part of her weight gain to?

19 A. It was her inactivity or reduced activity
20 related to her injury and its pain.

21 Q. You mentioned radiculopathy.

22 Can you explain what that is to the jury?
23 And they've heard radiculopathy and radiating pain, so
24 as you explain radiculopathy, could you also
25 distinguish between that and radiating pain?

1 A. Sure. As I mentioned earlier and how I
2 examine the spine and the extremities coming from the
3 spine, because we're really looking at the nerve
4 function coming from the spine because nerves come down
5 from the brain through the spinal cord and then go out
6 into the arms and legs and other parts. And we need
7 those nerves because they help us move and they help us
8 feel things. And if there's a problem with one of
9 those nerves, we might have weakness, we might have
10 pain, we might have tingling or numbness or some
11 combination of those things. Any problem with those
12 nerves is a nerve problem.

13 Well, as it turns out, these nerve problems
14 are sometimes right when the nerve is coming out the
15 spine, and that's called the root of the nerve. So if
16 you might remember from your elementary school math, if
17 you take the root of 4, you're taking the radical of 4.
18 Well, as it turns out, a nerve root is also a nerve
19 radical. And any problem -- or in medicine we call
20 that a patho or a pathy -- with a root or radical is a
21 radical pathy or a radiculopathy. So to bring that
22 full circle, any problem with a nerve going into an
23 extremity stemming from a spine issue, that nerve
24 problem is called radiculopathy.

25 Q. And does that have a different connotation as

1 you would use it from a radiating pain?

2 A. Well, radiating pain is a general sort of
3 vague thing. Radiculopathy is a specific type of pain
4 from a nerve root. Maybe I can make an operational
5 comparison to help explain that.

6 Q. That would be great. Thank you, Doctor.

7 A. If you had a irritated nerve root in your low
8 back causing pain down the butt, thigh, and leg, that's
9 a radiculopathy. If you fell on your bottom and you
10 had a bruise in your butt and the pain went down your
11 thigh a bit, sort of radiated down your thigh, that
12 might not be related to the nerve coming out of your
13 back. So that be radiating pain, but not necessarily
14 radiculopathy.

15 Q. Is it -- the jury heard has already heard a
16 little bit about how the nerves in the spine can
17 sometimes be compressed.

18 And that can cause radiculopathy?

19 A. It can possibly be one cause of
20 radiculopathy-like symptoms.

21 Q. Are there other causes?

22 A. Yes.

23 Q. Okay. Could you tell the jury about that?

24 A. Yes. Well, there's the myth that one has to
25 have a pinched nerve which is the layperson's term here

1 to have pain down the leg, let's say if it's a low back
2 issue. The actual majority of people with leg problems
3 coming out of their spine in the lower back is from an
4 irritated nerve. Doesn't have to be pinched.

5 When we have, for example, disk problems,
6 those disk tears and herniated disks leak fluids that
7 keep the disk moist. Those fluids are enzymes in the
8 body. As it turns out, they're great for keeping disks
9 cushiony and moist, but they irritate nerves. So as
10 these disks are leaking the fluid, nerves can be
11 irritated down the leg without physical compression.
12 So nerves can be irritated physically by compression,
13 by pressure, and also by this chemical irritation
14 process called radiculitis which is a form of
15 radiculopathy.

16 Q. Now, in your neurosurgical impression, you
17 indicated that you believe Ms. Garcia's radiculopathy
18 was related to spondylolytic spondylolisthesis. So
19 let's -- let's break that down. And -- and the jury's
20 heard a little bit about it from lawyers, but I'd like
21 to put up a chart and have you come down and just sort
22 of explain to the jury what spondylolisthesis is.

23 A. Sure.

24 THE WITNESS: Is that all right, Your Honor?

25 THE COURT: If that will help you, go ahead.

1 THE WITNESS: Thanks. May I?

2 MR. ROBERTS: Please.

3 THE WITNESS: You're seeing on this chart six
4 windows, we'll call them, of the lower back or part of
5 the lower back. You're seeing the last two lumbar
6 bones called vertebra. We call that L for Lumbar 4 and
7 L for Lumbar 5, and that's true for all six panels.
8 The ice cream cone bone below there is the sacrum or
9 the upper tailbone. The top of the sacrum is called
10 S1. There are spaces in between the bones where disks
11 are, but for demonstration purposes, the disks were
12 removed from this just to show the bone relationships.
13 But those disks have names -- have a name, and we'll --
14 I might be asked that later.

15 Nerves pass through here. They're not shown,
16 but we have to know about them. The normal
17 relationship of the lumbar bones to the sacral bone is
18 an alignment where the back of the vertebral bodies,
19 these rectangular lumbar bones, line up with the back
20 of the sacrum. And the front of the bones line up as
21 well. There is a gentle curve which is not well shown
22 here, but there should be a nice curve in the lower
23 back as part of that. But the -- but the alignment of
24 the bones should be together. That's a normal-looking
25 low back alignment. We can use the term "alignment."

1 Now, one thing spine doctors look for is
2 misalignment, and the most common misalignment in the
3 lower back is caused by a defect and/or fracture in the
4 lower back part of the bone called the pars, which is
5 ironically Latin for part. Of course it's a part.
6 It's part of the spine. But -- and maybe I'll have the
7 opportunity draw the part later and -- and it's shown
8 nicely on the X-rays and MRIs. But that part holds
9 things in alignment. And if the part is cut or
10 surgically cut, for example, or fractured or defective
11 from birth, that's called a cut in the spine. And the
12 Latin for cut is lysis or lytic. If you've ever taken
13 biology and a cell ruptures, it's called cell lysis.
14 And the Latin word for spine is spondylo. So a cut in
15 the spine is a spondylolysis. So the word out of my
16 impression was spondylolytic which is the adjective for
17 spondylolysis or cut in the spine.

18 So we saw that on the films, but the real
19 problem was the malalignment. But the malalignment
20 requires the cut, requires a spondylolysis. And a
21 malalignment that you show -- that are shown in these
22 pictures whereby the L4 and L5 vertebra are sliding
23 forward in relationship and off of the roof of S1
24 further and further and further in grade, which I'll
25 come back to in a second, is called spondylolisthesis.

1 And a listhesis is the Greek word for slippage.
2 Remember spondylo is for spine. So a spine slippage is
3 spondylolisthesis, or some people say, as counsel did,
4 spondylolisthesis. And both are correct.

5 Now, what's shown here are these red numbers
6 depicting how far the slippage can occur by a distance
7 of X in relationship to Y. Y is the top of the sacrum.
8 X is how far the lumbar bones move. If -- if the
9 distance of slippage or of spondylolisthesis is in that
10 first 25 percent of the distance of the top of the S1
11 bone, which would be depicted as Y, it's called Grade
12 Roman numeral I. If -- if the slip goes from 25 to
13 50 percent, as in this picture, it's Grade II, and so
14 forth. Fifty to 75 percent slippage is Grade III. 75
15 to 100 percent is Grade IV, and if the spine falls off
16 the roof, that's Grade V, also called spondyloptosis,
17 which is extremely uncommon.

18 Q. And the -- the pars is not shown on this
19 rendering; is that correct?

20 A. Correct.

21 Q. Now, if I gave you a spine, could you point
22 out to the jury where the pars is?

23 A. I would hope so. I'm a spine surgeon. May I
24 approach the jury and show them?

25 THE COURT: That's fine.

1 THE WITNESS: Okay.

2 MR. ROBERTS: Thank you, Your Honor.

3 THE WITNESS: So this is an entire spine.
4 The sacrum is the heart-shaped bone. The heart is
5 sacred, so now you won't forget that. L5 is the first
6 lumbar bone, and we were showing you -- these pictures
7 are side views, and this hip thing is in the way, but
8 this bone is the L5 bone, L4, L3, and so on up to the
9 neck. And the pars -- may I have a pencil because we
10 can write on this and then it can come off.

11 MR. ROBERTS: Will a pen do?

12 THE WITNESS: I don't want to ruin someone's
13 \$800 spine model here.

14 MR. ROBERTS: Thank you, Audra.

15 THE WITNESS: I had a volunteer. So I have
16 drawn two lines in the back funny-appearing aspect of
17 the vertebral bone that's not shown on the picture.
18 Because the spine anatomy is very strange looking.
19 Looks like a bird with its wings out. And the things
20 that stick out here, if you take a skinny person
21 bending over, you can see those little bones. But a
22 little bit deeper are -- are these two very sensitive
23 areas, and it's a stress point, and it's called the
24 pars. And there's one on either side. And if for some
25 reason that pars is cracked, cut, not there fully at

1 birth, that allows the L5 bone to slip forward on the
2 sacral bone. By the way, L5 and everything above it
3 slips forward. So the slip is at the L5-S1.

4 You might ask, Well, can I have a pars
5 problem at L4, L3? Yes, you can but because of the
6 biomechanics of the spine and because of the way the
7 spine meets the pelvis at the sacrum and transitions
8 force, that L5 is the most susceptible one. It's the
9 lowest one.

10 BY MR. ROBERTS:

11 Q. Did you diagnose what grade of
12 spondylolisthesis that Ms. Garcia had as evident upon
13 your first review of her films?

14 A. I did. May I go back to my --

15 Q. Please.

16 A. -- chart, though, to make sure I -- I didn't
17 put down two of them.

18 Well, to be fair, I don't think I said the
19 grade at that time.

20 Q. And that may have been at a later report.
21 Let me ask you to do one more thing before you go back
22 to your chair here.

23 A. Sure.

24 Q. You mentioned biomechanics of the spine.

25 Could you explain to the jury where the

1 forces go in a normal spine versus how that changes
2 once you have the -- the slippage as indicated in -- in
3 one of the slippage drawings.

4 A. I can. But I could do it even better if --
5 if we could put a copy of my last page of my report up,
6 or second-to-last page, where I have a diagram from my
7 chapter on the topic.

8 Q. Ah.

9 MR. ROBERTS: That would be, Audra,
10 Exhibit 24, page 29.

11 THE COURT: Is this admitted or no?

12 MR. ROBERTS: It is, Your Honor.

13 BY MR. ROBERTS:

14 Q. Okay. Have we found the drawing that you
15 were referencing, Doctor?

16 A. Yes. Thank you.

17 MR. ROBERTS: And does the touch screen here
18 work, Your Honor?

19 THE COURT: It should.

20 MR. ROBERTS: You should be able to draw
21 lines on that screen if everything's working with your
22 finger.

23 THE WITNESS: I believe you.

24 THE COURT: It's not working?

25 THE WITNESS: Well, could be me, but ...

1 THE COURT: It doesn't seem like it's working
2 for some reason.

3 MR. ROBERTS: Your Honor, may the witness
4 step to the screen to use his finger?

5 THE COURT: You may.

6 MR. ROBERTS: Thanks.

7 THE WITNESS: I'm allowed to reproduce this
8 diagram because I had it written -- drawn for a chapter
9 I wrote on this very topic in the late 1990s.

10 I have two pictures of a spine here, the
11 lower spine. Just for reference, though, it's pointing
12 the other way as in the diagram that's now on the
13 floor.

14 So the L5 bone, L4 bone, and L3 bone are
15 depicted on top of the sacrum. And a normal spine is
16 A, the force of the weight of the body to -- above the
17 waist is felt straight down through the middle of the
18 top of the sacrum. It's called the load. It's the
19 load or the weight. But because of the way the bones
20 are aligned and hold on each other, there's something
21 called the bony hook force which holds that back.

22 And can I borrow the model one additional
23 time, please --

24 MR. ROBERTS: Certainly.

25 THE WITNESS: -- to describe the hook force?

1 Thank you. You just gave this patient scoliosis.

2 The way these funny looking bones in the
3 back, which are called facet joints, line up is like
4 shingles on a roof where one is above the next is above
5 the next, and it provides a stop or a hook. And that
6 hook force keeps the spine from sliding forward at any
7 level. In physics when you're looking at vectors and
8 math, the resultant force is down towards the sacrum.
9 So the tailbone feels the real weight of the body.

10 Now, when there is a cut, depicted here in my
11 picture, in the pars, or a spondylolysis, a
12 spondylolytic defect, then the bony hook force is
13 overcome because there's no hook anymore, and the spine
14 and everything above it, L5 up, can slide, as I've
15 depicted here at about a Grade I, about 25 percent,
16 going forward because that vector starts to move and
17 the spine starts to slip forward and eventually down
18 and off.

19 BY MR. ROBERTS:

20 Q. Is it possible to have the slippage without
21 some pars defect?

22 A. Yes, but it's very, very mild if that occurs.

23 Q. Did you make any determination more likely
24 than not whether Ms. Garcia had a pars defect prior to
25 the accident?

1 A. I did.

2 Q. Okay. Tell the jury what your impression
3 was.

4 A. I believe that Ms. Garcia was born with a
5 defect, and she had the fibrous tissue holding it
6 together that we normally find in these patients. And
7 that was the nature of this text here.

8 Q. And the jury hasn't heard about that.

9 When you say "fibrous tissue holding it
10 together," could you explain what you mean?

11 A. Sure. Some people are born with, we'll call
12 them anomalies, things that aren't exactly normal, but
13 they're okay. For example, six fingers on a hand or a
14 mole on your cheek. They're fine, but we're born with
15 them. Well, some people are born without the pars
16 being a solid bone, and it's somewhere between perhaps
17 4 to 8 percent of the patients out there. Some of us
18 in this room may have it and not know it, just like
19 Ms. Garcia never knew it until their injury.

20 But when you have that defect, you're born
21 with a very tough fibrous tissue. It's the toughest
22 gristle you'll ever encounter. And believe me, I've
23 encountered it in surgery, and if you've ever carved a
24 turkey and you get down to that leg and just you can't
25 get that leg off and you're in there with the knife,

1 that's that tough gristle. And that tough gristle will
2 hold that spine together and prevent that slippage from
3 being anything significant unless it's disrupted.

4 Q. Did you make any determination as to whether
5 or not Ms. Garcia had a slippage between L5-S1 prior to
6 the accident?

7 A. Well, I don't think I can ever know that, but
8 I can say she either did not have a slippage or if she
9 did, it was insignificant. There were no X-rays or
10 even reasons for X-rays before the injury that could
11 give us a clue as to which one of those was going on.

12 Q. Is it medically possible for the slippage to
13 have existed yet for Ms. Garcia to have had no
14 symptoms?

15 A. Well, it's not only a possible, it's
16 potentially probable because she had no symptoms prior
17 to this injury in her lower back or legs. So whatever
18 pars defect she was born with didn't give her any
19 trouble for decades.

20 Q. Do most people with a spondylolisthesis have
21 symptoms or have no symptoms?

22 A. No symptoms. The vast majority of patients
23 with -- with spondylolisthesis don't know about them.

24 Q. So do you have the MRI study that you
25 reviewed at your initial visit with Ms. Garcia?

1 A. Yes.

2 Q. Okay.

3 MR. ROBERTS: Your Honor, this has been
4 premarked and preadmitted as Trial Exhibit 40, but I'd
5 ask that the doctor be allowed to put the disc in the
6 machine so he can show the jury the slides of interest.

7 Is that permissible?

8 THE COURT: That's fine.

9 MR. ROBERTS: Thank you. Could you move it
10 to the -- the ELMO switch, Your Honor?

11 And you can put it right in here, Doctor.

12 THE COURT: It's done.

13 MR. ROBERTS: And you have the self-loading
14 program?

15 THE WITNESS: I hope so.

16 MR. ROBERTS: Okay.

17 THE WITNESS: May need to put some code in
18 here.

19 MR. ROBERTS: They don't give me the
20 password.

21 BY MR. ROBERTS:

22 Q. While this is loading, perhaps you could just
23 explain to the jury how the MRI works and how it
24 creates the different slices.

25 A. Sure. An MRI is an imaging test whereby

1 someone lays in a tube and magnetic energy is applied
2 in bursts. And then as the -- the atoms in the cells
3 flip their magnetic poles, all in the same direction,
4 and then as the magnets turn off, they release energy
5 back to their happy state or their resting state. And
6 they release energy at different rates and amounts.
7 Those energy releases are actually picked up by a
8 radiofrequency antenna, and we know in space where
9 those energies come from, and we make images based on
10 that energy. And that's what you're looking at here.
11 There are no X-rays utilized when -- when making an
12 MRI.

13 Q. What is the difference between a T1 image and
14 a T2 image?

15 A. A -- a -- there are a couple different
16 techniques of MRI. T1 is called the first echo, the
17 first energy given off. The T2 is the second energy
18 given off. And the -- in T1 images of the spine -- on
19 the left of your screen is T1. On the right of your
20 screen is a T2, and these side views of the spine. You
21 can see the bones and the sacrum on both images, but
22 you can see that the disks or the tissue between the
23 bones is gray on T1 and either white or black on T2.

24 So it brings out -- the T1 and T2 are
25 different ways of looking at different tissues and

1 bringing them out to understand them better.

2 Q. Thank you, Doctor.

3 Okay. Have you got images pulled up from

4 Ms. Garcia's MRI from January 26th of 2011?

5 A. Just about.

6 Q. Okay.

7 A. These are from January 26th, 2011. On your
8 right of the screen is the side view. On your left of
9 the screen is the cross section view taken if you were
10 to have a slice through the spine at a different spot
11 and look up the spine, not down the spine, which is
12 just sort of a tradition among radiologists. And you
13 can see as I drag the mouse, on the cross sections,
14 there's an orange line going up and down on the side
15 view telling us where we get to take that slice from.
16 Okay?

17 Q. Okay. If you could use the MRI film to show
18 the jury the things that you saw which led you to your
19 neurosurgical impression and diagnosis of Ms. Garcia.

20 A. Sure. The first thing I'll address is the
21 alignment, and it is quite clear that the L5 bone which
22 I'm then circling or in rectangularizing --

23 Q. And just for the record, so we've got an idea
24 of what this is, could you give us an image number and
25 a view and T1, T2, just so we can know where this is on

1 the disk?

2 A. Sure. This is Image 8 out of 15 on Series 3
3 out of 6. It is a T2 side view. And one can clearly
4 see the back of the L5 bone does not line up with the
5 back of the S1 bone. There is a slippage of at least
6 25 percent. So it's at least a Grade I if not
7 bordering on a Grade II spondylolisthesis.

8 Also, on this particular image, you can see
9 that the disk between L5-S1, this dark-colored
10 substance is bowing out. And at the disk above, which
11 is called the L4 to L5 disk, there's this protruded or
12 herniated component and a white bright spot which is
13 synonymous with a tear in that disk. A tear in the
14 annular fibers. We call that an annular tear. And
15 then that is seen on various images if I go side to
16 side.

17 And if I get all the way out to the right
18 side, you have a demonstration of a --

19 Q. Are we at Image 4 of 15 now, Doctor?

20 A. Yes, sorry, you are. You can see the L4 pars
21 is solid.

22 But I'm going to go to another image to show
23 you the L5 pars. This is Image 3 out of 15. On the
24 right side, there's a cut or defect in the L5 pars
25 which is allowing the slippage. And then on the left

1 side of the spine, which would be Image, let's say, 11
2 out of 15, you can also see the L5 pars defect. So
3 what we now see here are two pars defects both at the
4 L5 bone on both sides. So clearly showing
5 spondylolysis, which is cut of the pars, and
6 spondylolisthesis, which is slip of the bone.

7 In addition we saw the two disk herniations.

8 Q. Doctor, what medical term is used if you have
9 the same anomaly on both sides?

10 A. Bilateral. It means both sides, right and
11 left.

12 Now, I want to point out the nerve for a
13 moment as part of my analysis. On Image 11 of 15, you
14 can see on the left side of the spine, for example,
15 nerves coming out at different levels. And we have
16 nerves at each disk level. This gray structure between
17 Lumbar 3 and Lumbar 4 is the nerve pipe coming at you.
18 And you can see it's got white fluid around it. It's
19 happy. There's nothing bothering it. The same goes
20 for L4-5 in this particular view, although we know in
21 the center of the spine, there's a herniated disk
22 there.

23 Q. Doctor, if -- if it's white, is that high
24 intensity or low intensity?

25 A. White is high intensity. Sometimes that's a

1 good thing. Sometimes it's not.

2 Q. Okay.

3 A. Here it's a good thing.

4 Q. T1 and T2, what is white or high intensity on
5 the T2? What does that indicate generally?

6 A. Fluid, water, things that are inflamed or
7 swollen.

8 Q. Thank you, Doctor.

9 A. Now, I was showing you the nerves coming out
10 at us happily, but the very last nerve of the lumbar
11 spine is this gray circle which is clearly being
12 flattened or bothered or pressed on by the disk
13 herniation. Oops, sorry. Also in Image 12 from L5-S1.
14 So it's part being part caught up in that foramen or
15 window where it comes out.

16 Q. Is the foramen the hole in the bone?

17 A. It is the window or hole where the nerve
18 comes out. There's one on either side at all levels.
19 And you can see that because the spine is slipping,
20 that hole gets narrowed. And because the disk
21 herniation is pushing up in there, the hole gets
22 narrowed. And that's why these nerves get involved.
23 And I don't -- I don't think you can make any mistake
24 that there's some -- some unhappy nerve here. In fact,
25 it's even flattened a bit on the bottom aspect. It

1 should be rounded like its neighbor here.

2 And on the other side of the spine, the right
3 side, you can see the same thing on Image 3 where the
4 nerve is almost oval and flattened out, and the one
5 above it at L4-5 has got plenty of room.

6 And then I think there might be one more
7 salient feature of the MRI, if I might take a closer
8 look. On this view, which is not T1 or T2, it's called
9 a STIR or inversion recovery image, there's a funny hue
10 in the bone at the top of the sacrum. And the bottom
11 of L5 is kind of grayish color.

12 And if we look at that same aspect in the
13 T2 -- well, I'll try to improve it for the jury so they
14 can see it. There's something going on in the bone
15 here above and below that disk. And that is something
16 I see when -- when the bone feels the stress, when the
17 cushion of the disk isn't doing its job anymore.

18 Q. And on the T2, that would be shown as a
19 slightly high intensity zone around the end plates?

20 A. Yes. So it's a little bit whiter just above
21 the bottom of L5 and just below the top of S1.

22 Q. And did you see that same type of stress on
23 the bones -- on any other level?

24 A. No.

25 Q. What does that tell you?

1 A. The stress in the bones means the disk at
2 L5-S1 is becoming incompetent as a cushion.

3 Q. Thank you, Doctor.

4 A. Sure. May I go back?

5 Q. Yes.

6 MR. ROBERTS: Your Honor, at this time, we
7 would like to mark two static JPEGs of this. They've
8 been preadmitted from a large number of slices. We'll
9 call them 40A and 40B, just so the jurors have
10 something they can view without the computer.

11 MR. STRASSBURG: Oh, thank you, sir.
12 Which one is which?

13 MR. ROBERTS: They're labeled at the bottom
14 40A1 and 40B1.

15 MR. STRASSBURG: Oh, I see. Sorry.

16 MR. MAZZEO: No objection.

17 THE COURT: You want to -- do you have a
18 separate --

19 MR. ROBERTS: I do.

20 THE COURT: They will be admitted.

21 (Whereupon, Plaintiff's Exhibits 40A1 &
22 40B1 were admitted into evidence.)

23 MR. ROBERTS: Thank you, Your Honor.

24 BY MR. ROBERTS:

25 Q. Based upon the impressions that you've just

1 described to the jury, what was your recommendation on
2 May 25th, 2011?

3 A. Well, it was clear to me because of the
4 instability in her spine that Ms. Garcia would
5 eventually come to have surgery to repair this. So my
6 actual recommendation says, She will clearly require
7 surgical decompression with fusion and attempted open
8 reduction L5-S1 with inclusion of L4-5. I also
9 recommended pain management for temporizing epidural
10 injections, however.

11 Q. So the jury is going to hear about injections
12 that Ms. Garcia received from some pain management
13 specialists, Dr. Lemper and Dr. Kidwell. Explain to
14 the jury what the difference is between a diagnostic
15 injection and a therapeutic injection.

16 A. Well, I'll be happy to explain the difference
17 as long as we know that sometimes we do both.

18 Q. Okay. Fair enough.

19 A. Okay? So injections to the spine can be for
20 two or both purposes. They can be to help confirm a
21 source of pain or figure out a source of pain. Just
22 like going to the fuse box at your house or apartment,
23 turning a fuse off turns off a certain room in the
24 house. So if you put some numbing agent or blocking
25 agent near a nerve or a part, like a joint, and you get

1 some temporary benefit, sometimes very temporary, you
2 can at least say, Ah-ha, that part is where some of
3 this pain is coming from. Sometimes all the pain. So
4 I call that the fuse box test. Start throwing fuses
5 until you find which room -- which switch controls the
6 kitchen.

7 The therapeutic part is sometimes the pain
8 reduction might last for a bit and buy somebody some
9 time. That's the treatment part or the therapeutic
10 part of an injection.

11 Q. So when you say that the -- you were
12 recommending injections for pain management, what were
13 you recommending?

14 A. Well, pain management was sort of a
15 palliative approach, and I might have to explain
16 palliative. It means not unlike taking a pain pill. A
17 pain pill is not going to cure the back problem here
18 since it's a structural injury. But it is going to
19 take the edge off and allow someone to, you know, keep
20 living at least for the few hours pain pill's working.
21 Well, sometimes the injections can last even longer
22 than a few hours and/or it can help reduce the need for
23 pain pills. Because the pain pills have side effects,
24 they make you sluggish and have addictive potential,
25 all kinds of things we try to observe for.

1 Q. The -- the type of surgery that you're
2 recommending here, is that a surgery you would do for a
3 cervical or -- or a lumbar, rather, sprain-strain?

4 A. Not if the diagnosis was -- diagnosis was
5 only sprain or strain, no.

6 Q. Okay. And did you need any further
7 diagnostic injections or studies done in order to make
8 your recommendation about what treatment she needed?

9 A. No. They weren't needed for the treatment
10 recommendations. Ultimately, Ms. Garcia would need
11 surgery. They were given for palliative or -- or
12 therapeutic benefit to buy some time. I mean, here we
13 are only months after her injury, and this young woman
14 is shocked with -- with the news she's going to need
15 back surgery.

16 So she didn't have to have it urgently that
17 day, and anything we can do to buy a little time and
18 let her get her -- her situation together before
19 surgery would be useful.

20 Q. Do you normally recommend conservative
21 treatment before considering a surgical option?

22 A. There are only a few times when I don't, yes.

23 Q. In this case, if the only injury she had was
24 a sprain-strain, would you have expected that to
25 resolve over the five months from the accident till she

1 saw you?

2 A. Most probably.

3 Q. Why did you not feel that additional time and
4 conservative treatment should be tried by Ms. Garcia
5 before she considered the surgery?

6 A. Well, my recommendation for pain management
7 was that additional treatment, although I did not
8 expect it to fully relieve her symptoms. She had
9 already had therapy for a number of months. That
10 wasn't doing much for her. So she had tried
11 conservative therapy. And because of the overt
12 structural problem in her spine, meaning the slippage
13 and the involvement of the nerves as I showed on the
14 MRI, I knew this was only going to go in one direction,
15 and that's worse.

16 Q. Well, we've talked about the fact that you
17 could have a spondylolisthesis and have it be totally
18 asymptomatic; right?

19 A. Right.

20 Q. Meaning no symptoms, no pain; right?

21 A. Correct.

22 Q. And if she had a spondylolisthesis before the
23 accident that was pain free, why didn't you think it
24 was possible that it could become pain free once again?

25 A. Well, because it had been a number of months

1 since her injury and she was getting worse instead of
2 getting better. There were no glimpses of adequate
3 improvement that would give me that concept. She was
4 developing more progressive leg symptoms, which
5 means -- means the slippage was probably progressing
6 and getting worse and that the nerve was getting more
7 pinched and more involved and more irritated or both.
8 It was just the ball was already rolling downhill. I
9 didn't think we could get the ball back up the hill.

10 Q. So just to make sure I get this out, did you
11 think her need for surgery was urgent when you saw her
12 in May of 2011?

13 A. Not urgent, no.

14 Q. Did you think it was inevitable?

15 A. Oh, yes.

16 Q. And did you reach any conclusions at this
17 time as to whether her need for surgery was causally
18 related to the January 2nd, 2011, accident?

19 A. I did.

20 Q. Okay. What was your opinion?

21 A. I said, and I'll say it again now, that the
22 need for any treatment to the lower back was due to the
23 stated injury, given the fact that she was susceptible
24 to the injury because she probably was born with a pars
25 defect, but that had she never had the injury, she

1 probably would have continued the rest of her life with
2 tough fibrous tissue holding her together and no
3 symptoms, just like she had done up until the injury
4 for the first three decades.

5 Q. And that's your opinion -- sometimes the
6 jury's going to hear to a reasonable degree of medical
7 probability. That's just more likely than not.

8 So it's your opinion that's more likely true
9 than not true?

10 A. I wouldn't say it so weakly, Counsel. I'm --
11 I'm reasonably certain that she needs surgery and this
12 treatment because of her injury and would not have
13 needed it without the injury.

14 Q. Thank you, Doctor.

15 Did you advise Ms. Garcia at that time,
16 May 25th, 2011, that she needed surgery?

17 A. I did.

18 Q. Did she want the surgery at that time?

19 A. She was scared. I think "want" is a
20 difficult way to say it. I think she wanted to be
21 better. I'm not sure she was ready at that moment to
22 have surgery to be better.

23 Q. And are you looking at your -- your notes
24 from that visit? You at page 15?

25 A. I'm looking at my notes.

1 Q. And that would be page 2 of 17. I'm sorry.
2 It's page 15 of the exhibit. You don't have the
3 exhibits marked on yours like we do in court.

4 A. Thank you for going with the page numbers.

5 She told me she was extremely fearful of
6 surgery and unsure how she would be able to work and
7 take care of her three kids a single mother. So that
8 was -- that was some factors that she was considering.

9 Q. Did you have any differences of opinion with
10 Dr. Cash's recommendation that she had received before
11 you?

12 A. No. I -- I believe he also knew that she
13 would need surgery at the first visit with him. Let me
14 take one look. And he also agreed that we should both
15 include the L4-5 level because it was also herniated.

16 Q. When was the next time that you saw
17 Ms. Garcia after May 25th, 2011?

18 A. November 1st, 2011. So -- so about five
19 months or so later.

20 Q. Had Ms. Garcia been receiving conservative
21 treatments in between the two visits?

22 A. Yes.

23 Q. Okay. Do your records indicate what
24 treatment she had been receiving?

25 A. Yes.

1 Q. Could you tell the jury a little bit about
2 that?

3 A. She tried a lumbar epidural injection which
4 occurred on August 30th of 2011. She also then had
5 facet joint injections to the lower back on
6 September 14th, 2011.

7 Q. Did you also perform a physical examination
8 of her on that day?

9 A. Yes.

10 Q. And what were your findings?

11 A. They were largely similar to the prior
12 examination with significant tenderness in the elements
13 of the lower back, increased tone of the muscles of the
14 lower back indicating muscles are working hard to keep
15 the spine from slipping. Or trying to. Limited
16 extension of the lower back, but full flexion, that
17 means going forward, in range-of-motion testing. Some
18 weakness of the knees with guarding of the lower back.
19 That means being careful because it hurts. A very
20 positive right and moderately positive left straight
21 leg raise test. Those were the abnormalities. I
22 didn't list all the normal things about ankles and hips
23 that were unrelated.

24 Q. Were those abnormalities all consistent with
25 your prior findings?

1 A. Yes.

2 Q. Did you have any additional recommendations
3 for Ms. Garcia at that time?

4 A. I don't think I had additional ones. I -- I
5 refined them a little bit, in part based upon some new
6 imaging she had.

7 Q. Okay. So you once again recommended surgery?

8 A. I did. In fact, at that time, I thought we
9 were going to go ahead with it.

10 Q. Okay. Did you discuss with Ms. Garcia what
11 the goals of the surgery were and how the surgery was
12 done?

13 A. Yes.

14 Q. What did you tell her the goal of the surgery
15 was?

16 A. Well, without specific recollection, I would
17 generally tell a patient like this the goals are really
18 three: One is to take pressure off the nerves,
19 especially the pinched ones. That's why we use the
20 term "decompression" when we talk about the surgery.

21 Second, I would try to realign her spine,
22 which is called a "reduction." Why is it called that?
23 Because we're reducing the deformity or the abnormality
24 back towards normal alignment.

25 And third goal would be a fusion or

1 stabilization of her mechanically loose spine. That's
2 with the screws and the rods and the fusion surgery.

3 Q. Did you tell Ms. Garcia that you hoped the
4 surgery would take away 100 percent of her pain?

5 A. No. That would not be advisable.

6 Q. More likely than not, is a patient going to
7 have remaining pain after the type of surgery that
8 you're describing here?

9 A. Yes.

10 Q. And does that mean the surgery's been a
11 failure?

12 A. No.

13 Q. Could you explain to the jury why you're
14 still going to have some remaining pain even if the
15 surgery is successful?

16 A. This type of surgery generally helps patients
17 significantly, in the 70 to 80 percent range as an
18 average. But they always have some residual because
19 it's such a remodeling of the lower back. It's a
20 reconstruction. And just having to go through all the
21 muscles in the back to do the surgery is a big surgery.
22 And it hurts those muscles. So sometimes we have to
23 create a little damage to make a lot of improvement.

24 Unfortunately, I don't think I have any
25 patients that have ever been 100 percent pain free, and

1 I don't think any spine surgeon would say that. Maybe
2 one or two patients that feel fantastic, but, it's,
3 just not the nature of the outcomes we expect as spine
4 surgeons.

5 Q. Would you expect it to stop the progression?

6 A. Yes. If -- a successful fusion would stop
7 the progression, and if we can get a good alignment, it
8 even improves the -- the slippage.

9 Q. Thank you, Doctor.

10 You said that you thought you were going to
11 proceed with the surgery at that point in November of
12 2011.

13 Did she actually indicate to you that she was
14 ready to proceed?

15 A. At that time, she was ready to do it. She
16 said that she wanted to proceed, and we didn't really
17 proceed right then.

18 Q. Okay. And was that your decision or hers?

19 A. It's hers. With my recommendation, it's her
20 decision.

21 Q. The decision to proceed or not to proceed?

22 A. Yes.

23 Q. Nothing changed from your side where you
24 decided not to go forward at that time?

25 A. No. My recommendations were still in place,

1 unchanged.

2 Q. Thank you, Doctor.

3 When did you see Ms. Garcia next?

4 A. November 23rd, 2011. Oh, sorry. Incorrect.
5 November 13th, 2012, so, like, a year later.

6 Q. Okay. And you had not seen her in between?

7 A. That's right.

8 Q. What was her clinical status when you
9 reevaluated her on November 13th of 2012?

10 A. She was worsening. She could no longer live
11 with the symptoms. The medications were not doing much
12 for her, and she was not enjoying the side effects from
13 the medications.

14 Q. What were the medications that she was on at
15 that time for pain?

16 A. At that time, I have her taking Lortab, which
17 is a narcotic pain pill, and tizanidine which is a
18 muscle relaxant which she was mainly using at night to
19 help her sleep. It has a side effect of making one
20 sleepy, so she was using it for that purpose.

21 She was developing pelvic pressure in the
22 groin, and these are symptoms that we can see with
23 spondylolisthesis that is progressing.

24 Q. Was she experiencing any symptoms in the legs
25 at that time?

1 A. Yes, not only pain but also numbness and
2 tingling on both sides.

3 Q. Was she having difficulty performing any
4 daily activities as indicated in your notes?

5 A. Well, she -- she had trouble and pain at
6 standing at work. She could not attempt exercise
7 because of pain. She would develop cramps if walking.

8 Q. Was her usage of the Lortab staying constant
9 from the year before?

10 A. Let me check.

11 Q. Okay. And I appreciate you being precise,
12 Doctor.

13 A. She moved up to the higher dose back in 2011,
14 because I noted it then in November. I don't say how
15 many she's taking until 2012, she's taking three to
16 four of them a day. So without me going back and
17 looking at all the pain records, I don't know the
18 answer immediately as to whether or not she was taking
19 more of them at that time or not.

20 Q. So at this time, November of 2012, she's
21 decided to move forward with the surgery?

22 A. Yes.

23 Q. Did you see her shortly thereafter for a
24 preoperative consultation?

25 A. Yes. Well, I did say we should get an

1 updated MRI before we proceed, and then, I did see her
2 back December 11th, so short of a month later, for her
3 preoperative visit.

4 Q. And in between these visits, you got another
5 MRI to see what was going on?

6 A. Correct.

7 Q. And did you receive a reading or
8 interpretation of that MRI from Dr. Hake, who we've
9 already talked about?

10 A. Yes.

11 Q. Did you find that for me?

12 A. I found it.

13 Q. Okay. What is the date of Dr. Hake's
14 evaluation?

15 A. I have November 19th, 2012.

16 Q. And tell me what, if anything, you saw that
17 was significant there as far as your decision to
18 proceed with the recommended surgery.

19 A. Well, what is important to note is the
20 progression of the slippage is now 1.02 centimeters or
21 10.2 millimeters. He said when compared with the prior
22 examination, since the same study was done at his
23 center where he could compare them, there is
24 continued -- I'm going to use his word, then explain
25 it -- "antero spondylolisthesis," which means spine

1 slippage to the front of L5 upon S1. The previous
2 slippage measures 7.5 millimeters and currently
3 measures 1.02 centimeters. There is increasing
4 foraminal encroachment, he said.

5 Q. And can you explain to the jury what that
6 means?

7 A. The foramen is the window where the nerve is
8 coming out the spine on either side. And it's further
9 encroached, meaning it's getting smaller because of the
10 slippage and the disk material. So the nerve now has
11 even less room which helps explain why she's having
12 more pain and more leg symptoms from the nerve or the
13 radiculopathy.

14 Q. Now, when you reviewed the MRI study from
15 January 26th of 2011 with the jury earlier and you
16 showed them how the one nerve was a little bit
17 compressed and flattened on the bottom --

18 A. Yes.

19 Q. -- is this the same place that Dr. Hake is
20 referring to?

21 A. It is.

22 Q. And it's becoming worse, according to him?

23 A. Yes.

24 Q. Did you take those films and independently
25 try to duplicate Dr. Hake's measurements?

1 A. No. I -- I don't have the high-resolution
2 ultra HG monitors that he as a radiologist has in his
3 office with -- with the software that can measure by
4 pixel the actual measurement. I would be
5 guesstimating, so I would generally rely on
6 measurements of the radiologist.

7 Q. Now, I want you to tell me, assume that there
8 is no continued slippage from the first film.

9 Would that have meant surgery was not
10 necessary?

11 A. No. The slippage is just a concept that it's
12 getting worse. The problem -- the instability was
13 already there, which was the source of her pain. It's
14 a mechanical instability, a structural injury.

15 Q. Thank you, Doctor.

16 On December 11th of 2012, did you explain to
17 Ms. Garcia the risks of the type of surgery you were
18 recommending?

19 A. Yes.

20 Q. And could you explain to the jury what the
21 risks were of this surgery as you explained them to
22 Ms. Garcia that day?

23 A. Sure. I would explain that this is a big
24 surgery, that there are always risks of surgery, and I
25 don't like to gloss over them. The risks include, but

1 are not limited to, bleeding; infection; leak of the
2 spinal fluid; injury to a nerve; incomplete
3 decompression of a nerve; incomplete removal of the
4 disk tissue; incomplete reduction back to normal
5 alignment; failed fusion, meaning it might not heal;
6 fracture of the hardware or failure of the hardware,
7 meaning the screws and rods; misplacement of the
8 hardware or screws, and that doesn't mean we lose them.
9 It means they're in the wrong place or wrong position,
10 weakness, pain, numbness, tingling, loss of the ability
11 to walk, loss of urine function, loss of sexual
12 sensation or pleasure, risks of positioning on the
13 table for a long period of time, visual loss, and risks
14 of anesthesia such as coma, stroke, seizure, heart
15 attack, and even death.

16 I would also say that no -- no list can be
17 fully comprehensive, and although I would list all
18 those risks, others do exist. I would ask if there are
19 any questions, and I would let her know I can't give
20 her any guarantees regarding the surgical outcome. And
21 I would want them to acknowledge that I can't do that.

22 Q. Okay. At that time, did you give Ms. Garcia
23 any opinion or recommendation as to whether you
24 believed that the potential benefits of the surgery
25 outweighed the risks that you described to them?

1 A. Yes.

2 Q. What did you tell her?

3 A. Well, I usually tell patients like her that I
4 would not be offering surgery if I didn't believe the
5 benefits outweighed the risks. And we would talk about
6 the benefits in terms of epidemiology, meaning looking
7 at the medical literature on this topic, if we had
8 100 patients have the same surgery, I expect 70 to
9 80 percent benefit based upon those outcome studies
10 once you're fully healed, not right away, because
11 it's -- it's a big and painful surgery.

12 Q. Thank you, Doctor.

13 At this time, were you aware that Ms. Garcia
14 had smoked in the past?

15 A. Yes. We were working on that.

16 Q. Okay. Did you discuss that with her again at
17 that time?

18 A. I believe so.

19 Q. What are the risks of someone continuing to
20 smoke after they've had a fusion surgery like the one
21 you're recommending?

22 A. After the surgery, the main risk, besides
23 general health reasons that smoking is inadvisable,
24 would be it would lower the chance of the fusion bone
25 healing and growing, which is an important part of the

1 surgery.

2 Q. In Ms. Garcia's case, did the fusion bone
3 grow?

4 A. Yes.

5 Q. And was there any problem with it adhering
6 and creating a solid fusion?

7 A. No. She healed.

8 MR. ROBERTS: So, Your Honor, at this time,
9 I'm going to ask the doctor to come down and explain to
10 the jury the surgery that he performed using the board.
11 I don't know -- if you were going to take a morning
12 break, this might be a good time for it, or we can just
13 plow forward.

14 THE COURT: Need a break? Anybody need a
15 break? I'm not seeing any break signs. Let's go ahead
16 and keep going. When you guys need a break, let me
17 know. If we can go through lunch -- or go up till
18 lunch, we'll go to that point. If you need a break, in
19 between we'll stop.

20 MR. ROBERTS: Thank you. Your Honor, may the
21 witness step down.

22 THE COURT: That's fine.

23 THE WITNESS: Thank you.

24 THE COURT: You guys are breaking now for
25 snacks?

1 MR. ROBERTS: So I'm going to put this one up
2 first.

3 BY MR. ROBERTS:

4 Q. Did you proceed with the surgery on
5 December 26th of 2012?

6 A. I did.

7 Q. And we had some illustrations prepared.

8 Had you reviewed this as they were being
9 prepared to verify their accuracy of your procedure?

10 A. I did. There were many renditions, and we
11 wanted to make sure they were correct.

12 Q. Okay.

13 A. These are correct.

14 Q. And so this is not a stock illustration.

15 This is intended to be an illustration of the
16 procedure you did on Ms. Garcia; correct?

17 A. That's right.

18 Q. Okay. Could you walk the jury through what
19 you did? And as you do each step, explain to the jury
20 why that was medically necessary.

21 A. Sure.

22 Q. Thank you.

23 A. All of these views on this board are showing
24 a view from the back.

25 MR. ROBERTS: Your Honor, may I provide a

1 smaller copy to one of the jurors?

2 THE COURT: This is a copy of the same thing?

3 MR. ROBERTS: It's the exact same board, yes,
4 Your Honor.

5 THE COURT: That's fine.

6 MR. ROBERTS: Thank you.

7 THE WITNESS: Ready?

8 MR. ROBERTS: Yes.

9 THE WITNESS: Okay. It does say Part 1 at
10 the top of the board. So on the small upper left-hand
11 inset picture, you can see the incision being made
12 which is required to do a surgery. Now, this -- this
13 depiction shows a left-handed surgeon, so that's not
14 accurate. I am right-handed. I would normally cut
15 with the right hand.

16 But the next large picture shows the opening
17 of the skin with a retractor that keeps the skin and
18 muscles apart and exposing the lower part of the spine
19 from L4 to L5 to S1, which is the area where the
20 surgery is taking place. So we don't need to expose
21 other parts. We just want to keep it in that zone.
22 And that is exactly where Ms. Garcia's scar is
23 presently. And she, of course, is lying down on her
24 tummy under anesthesia with a breathing tube, urinary
25 catheter, and all that.

1 The second large picture shows a close-up of
2 the bony elements of the spine. And now, if we can
3 have the model at the same time, which is right here,
4 you're seeing that same area of the lower back, the
5 funny shaped bones. And where I put the pencil marks
6 are -- are the pars here. So I suppose if I had spent
7 a little more time with this, I would have had the
8 defects drawn in. But this is showing the exposure.
9 This is a small drill, like a dentist drill we use.

10 One of the things I do is I expose the marrow
11 of parts of the bone because when I make a fusion, I
12 want the -- the healing cells to come out of the marrow
13 and knit together. And -- and where -- where two or
14 three bones were previously separate, a fusion grows
15 them together to make one.

16 So the board uses the word "decorticated."
17 That means we take the surface off the bone or the
18 cortex off the bone. Then --

19 Q. What about this, the facetectomy. I'll let
20 the doctor say it, but I'll spell it for you later.

21 A. Can I answer that when I get to this board?

22 Q. You may.

23 A. I know it says it under Board 2, but it's not
24 shown until Board 4.

25 On Board 3 -- or not Board 3 but Picture 3,

1 it shows removal of the bumps called the spinous
2 processes which I showed you earlier that stick out of
3 the spine and can sometimes be seen when we hunch over.
4 And exposing those.

5 And then we removed the back part of the bone
6 called the lamina, and then when you take it out, it's
7 called a laminectomy. When we take out the lamina, we
8 also take out the joints, because when you fuse it
9 together, you don't need the moveable joints. The
10 joints called facet joints, and we take them out
11 they're called facetectomies. So all these fancy terms
12 are just removal of the bones.

13 And why are we removing these bones? One is
14 I'm going to use the bone so I save it for the fusion
15 because no better bone than the patient's own bone.
16 And two, I got to free up these nerves. Because as you
17 may recall, my first goal in this type of surgery is
18 decompression of those irritated nerves.

19 So now you see more of the yellow spaghetti
20 coming down the spine and the nerve roots going out at
21 the various disks on both side, the new -- the nerve
22 radicals. So we can treat the radiculopathy. It also
23 exposes the disks which you now begin to see which --
24 which are on the front of spine, so we got -- got to
25 get down around to them.

1 This is Board Part 2. And the upper left
2 picture shows that screws are inserted through what are
3 called the pedicels. And these pedicels are the white
4 bone I'm showing you on the model now, which connect
5 the funny looking bones in the back to the vertebral
6 bone in the front. And they're thick. They're on both
7 sides. They're a great place to put a solid screw.
8 And I put three on the right side -- sorry, left side.
9 And I had trouble getting three on the right side. I
10 tried, but it -- it caught some of the cortex and kind
11 of ripped out. So I went without it.

12 And once we put these screws in, the screws
13 have a little slot in them which allows the rod to sit
14 down in there. And we put these rods in, allows us to
15 take some surgical crowbars and pop the spine back into
16 position or wrench it back into position. So it's a
17 little bit barbaric, and I hate to say this before
18 lunch, but we kind of have to do that to get it
19 realigned.

20 And then we can tighten down these screws
21 with the little locking nuts which holds it all
22 together. So it takes the -- the out-of-whack
23 alignment, also known as a spondylolisthesis, and I jar
24 it back into position with the screws and rods. So
25 I -- I think that's what this is showing here.

1 Then, since I like to make sure we do the
2 best fusion, we not only want a solid structure in the
3 back, we want to take out that herniated disk at L4-5
4 and at L5-S1 in the front. So I have to reach through
5 there. It's easier to do once it's in alignment, and
6 with little instruments, I can bite out the disk. This
7 particular instrument shows I make little cuts in the
8 disk and I pull it out in pieces. We actually send it
9 off to the lab. Hospitals require that. So they --
10 they say, Thanks, we got your disk. And then I put in
11 these spacers where the disk used to be.

12 So I rough up the bone edges where the disk
13 used to be so we can get some marrow exposed, get a
14 good fusion going, and we have these spacers made of
15 acrylic. The acrylic is called PEEK. And it's a
16 special acrylic plastic that -- that is very similar to
17 the density of bone, and that's why we use it. It's
18 also approved for medical use. It's got a little gap
19 in it, and I take that bone -- remember I removed her
20 bone? Well, we crunch it up and -- into little nice
21 crispy pieces and I pack it in there so it can be part
22 of her fusion and recycle it.

23 And then we --

24 Q. Now, the jury may hear some doctors refer to
25 cage that was used during surgery?

1 A. These are also called cages. That's right.
2 It's an older term when we used to use these metal
3 contraptions. These are technically FDA approved as
4 interbody spacers because they go between the body of
5 the bones. And they get tamped into position with a
6 little ball peen hammer and a little instrument just
7 like playing Don't Break the Ice, for those of you old
8 enough to remember that game. And we kind of wedge
9 them into position in the front of the bone.

10 So now you've got a fusion in the back.
11 We're going to put some bone out here in a minute. And
12 we've got a fusion in the front. That's called a
13 360-degree fusion. Some surgeons come from the front
14 of the body and do it, but you can do it all from the
15 back also. So I get those two spacers in, since we're
16 doing two disk levels.

17 And then lastly, I lay out some of that extra
18 bone that I have from her, and sometimes we use some
19 bone mineral putty to expand it. And -- and I want
20 to -- I want a good fusion growing all over this area.
21 But not over the nerves. I want those to be free. And
22 that's what it looks like at the very end of the
23 surgery.

24 Q. Okay. And now, before you step back to the
25 stand, we've got some artistically enhanced MRIs from

1 January of 2011, November of 2012, and then, a
2 postsurgical view from 2014.

3 Could you explain how you've attempted to fix
4 the problems that were going on in Ms. Garcia's spine?

5 A. Sure. So on the left, you can clearly see
6 the slippage. This is from the same MRI I showed the
7 jury a little while ago. It's the January 26th, 2011,
8 MRI.

9 MR. MAZZEO: Objection, Judge. May we
10 approach, please?

11 THE COURT: Come on up.

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

14 THE COURT: Objection is overruled.

15 MR. ROBERTS: Thank you, Your Honor.

16 And before you proceed, Doctor, here's a
17 small copy for you.

18 BY MR. ROBERTS:

19 Q. And before we proceed, just to clarify
20 something for -- for the jurors, the words and arrows
21 on here, are they part of the original MRIs?

22 A. No.

23 Q. Okay. And the -- the color part, is that
24 part of the original MRI?

25 A. No.

1 Q. Okay. Thank you, Doctor.

2 Okay. You can proceed.

3 A. Okay. Well, simply, the left panel is -- is
4 what we looked at earlier. It shows the Grade I to II
5 slippage of L5 on S1. Of course this was early on.
6 Then you showed the -- we'll call it just the
7 preoperative MRI, the one I ordered just before surgery
8 so we'd have an updated one. And it shows the slippage
9 again. Looks like to me it's progressed. The
10 radiologist certainly believed that.

11 Again, this is just one slice. It's not
12 showing the -- the -- the foramen slice where the nerve
13 comes out. But you can also see the herniated disks at
14 L4-5 and -- and the protrusion at L5-S1.

15 And then lastly, after the surgery, taken
16 from the X-ray in 2014, you can see the screws in place
17 on both sides, the two rods. And now the alignment is
18 restored. It's not perfect. Of course, as a surgeon,
19 I'm compulsive. You see I got a little offset, but
20 it's as good as I can get it. It certainly gives her
21 almost back to a normal alignment of the spine. And
22 you can see the -- you put cages, but spacers or
23 devices in there.

24 Q. And did you have any opinion when you
25 reviewed the MRI post surgery as to whether the MRI

1 had -- excuse me, whether the surgery had been
2 successful?

3 A. Well, that's one of the measures of success,
4 but not my important measure. By the way, this is an
5 X-ray not an MRI.

6 Q. Thank you.

7 A. But the surgery construct looks great. So
8 that was a success. But more importantly is how's my
9 patient? That's the important measure.

10 Q. And did you see your patient, Ms. Garcia,
11 after the surgery?

12 A. Yes, I did, many times.

13 Q. Okay. Tell -- tell us the date where you
14 first saw her after the surgery.

15 A. Well, of course I saw her in the -- in the
16 hospital while she was there. But the first office
17 visit --

18 Q. Before you move on, Doctor, how many days was
19 she in the hospital for the surgery?

20 A. Well, the surgery was only a one-day, but she
21 stayed, I think, over a week.

22 Q. And is that reasonable and customary for a
23 patient to say stay a week after this surgery?

24 A. There's a range depending on a patient's
25 need. It was reasonable for her.

1 Q. Okay. Thank you, Doctor.

2 A. So I saw her January 7th, 2013. It was the
3 first postoperative visit. "Post" being after.

4 Q. And did you make any note of her whether her
5 pain had improved?

6 A. I did.

7 Q. Okay. Tell the jury. What did you note?

8 A. I said, Amazingly, her lower back pain has
9 improved compared to prior to surgery. There is no
10 lumbar radicular symptoms any longer.

11 Q. Okay. And why did you find that amazing at
12 that time? How many days or weeks was that post
13 surgery?

14 A. Surgery was on 12/26, after Christmas sale
15 day. And this is what, 12 days later, perhaps? Why is
16 it amazing?

17 Q. Yes.

18 A. Because many patients are hating me within
19 the first month or six weeks after surgery because the
20 pain from the surgery's quite significant. So the
21 amazing part here is realigning her spine and giving
22 her some improvement was noted early enough because she
23 must have been so bad before surgery.

24 Q. Now, although her -- her pain is improved, is
25 she mopping the floors?

1 A. Oh, no.

2 Q. What is her physical condition at this time?

3 A. She was getting around with a walker. She
4 could bathe and feed herself and handle her own
5 hygiene. She said she even stood once and did dishes.
6 She was using a brace we had arranged for her. And
7 still taking medications, six pain pills a day.

8 Q. Is that still the Lortab or something
9 different?

10 A. Lortabs. And -- and also some muscle
11 relaxants in addition to that.

12 Q. Did you have any additional recommendations
13 for her at that time?

14 A. Not really. Just for complete accuracy, she
15 had a little skin loss on her chin from being
16 positioned on her front for the many hours of surgery,
17 so she had like a little abrasion, loss of skin. So I
18 had her putting some creams on it. Some Mederma scar
19 cream.

20 Q. Approximately, how many hours did the surgery
21 you described to the jury last?

22 A. I would have to go back and look at the
23 operative records, but something like this would
24 generally take me at least five hours.

25 Q. Thank you, Doctor.

1 Okay. Let's go to your next visit. Is that
2 in February?

3 A. February 8th, 2013, is what I have.

4 Q. Very good.

5 And what was Ms. Garcia's clinical status
6 that you noted at that time?

7 A. She is coming along well. Her low back pain
8 was improved compared to before surgery. She had
9 intermittent right leg pain with some numbness in the
10 thigh. Her feet were improved. She was down to taking
11 the pain pills two to three times a day. Still using
12 the brace. Walking better and faster. Her chin had
13 healed by then.

14 Q. Okay. Was she still using the walker to get
15 around?

16 A. I don't mention the walker. I don't think so
17 by then.

18 Q. What is a bone stimulator?

19 A. So a bone stimulator is an external device
20 that provides a small pulsed electromagnetic field to
21 part of the body. There is some evidence, some good
22 evidence actually, that using these devices in the
23 first months after surgery can enhance the fusion
24 growing. It stimulates the bone cells that lay down
25 the mineral in the bone. So I use them, particularly

1 in people with a history of smoking or other risk
2 factors, for a fusion to heal, like diabetes.

3 Q. And you recommended that she use that.

4 A. I did.

5 Q. At that point in time, were you recommending
6 that she continue with any other type of therapy or
7 pain management?

8 A. At that point, I instructed her to wean the
9 brace and continue the bone stimulator, and then she
10 would follow up with her pain specialist, Dr. Kidwell,
11 for medication management.

12 Q. Very good.

13 So the next appointment, was that in April,
14 Doctor?

15 A. April 3rd, 2010.

16 Q. Okay. What was her status at that time?

17 A. Her back pain was well managed. She was
18 happy with how she was doing after her surgery. She
19 reduced her pain pill dose to a lower dose. She had
20 some -- she would use the medicines more so when she
21 was active. She had some intermittent right leg pain
22 where it had been numb. The feet are still better.
23 She had missed some appointments because she had to
24 visit her sick mother in Texas, I noted. And I renewed
25 some meds to carry her over. She is no longer using

1 the brace much, and I encouraged her to complete the
2 weaning process of the brace. She's using the bone
3 stimulator. She was smoking a little bit, and I
4 strongly encouraged her not to it.

5 Q. Thank you, Doctor.

6 Do you have any opinion as to more likely
7 than not whether her lapses in smoking interfered with
8 her healing?

9 A. Well, it looks like she's healed nicely in
10 terms of her fusion. So I don't know if smoking slowed
11 it down, but the healing did occur.

12 Q. You mentioned a trip to Texas.

13 Did she tell you whether she flew or drove
14 or ...

15 A. I believe she told me she drove.

16 Q. Now, would a patient's physical activities at
17 this time potentially prevent her fusion from healing
18 properly or interfering with the outcome?

19 A. Well, there are two parts to the answer.

20 Q. Thank you.

21 A. Part 1 is she would have to jump off a
22 15-story building to break that hardware. So I would
23 say it won't really change the structure.

24 Part 2 to the answer is, the more she does,
25 the more she's going to pay for it, because part of the