

No. 71348

IN THE SUPREME COURT OF THE STATE OF NEVADA

Electronically Filed
Oct 15 2018 01:13 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

EMILIA GARCIA,
Appellant,

v.

ANDREA AWERBACH,
Respondent.

**APPELLANT'S APPENDIX
VOLUME XVI, BATES NUMBERS 3751 TO 4000**

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1 Q. And would you agree that there are some
2 plaintiff litigants who are prescribed certain braces
3 or items that are not necessary for -- not -- not
4 actually necessary for treatment?

5 A. I -- I think -- I don't know about plaintiff
6 litigants. I think that patients sometimes are
7 prescribed things that they could potentially do
8 without or that are items that they may not necessarily
9 use all of the time. There's some things that are
10 given with good intention that may not end up being
11 used.

12 So there's a full spectrum of what can
13 potentially happen after a person is prescribed a
14 particular item or device or treatment.

15 Q. Okay. And then just -- just reiterating some
16 of what you had discussed earlier regarding some of the
17 billing in this case.

18 You agree that Dr. Lemper's bills are higher
19 than normal in the community?

20 A. Yes.

21 Q. And you agree that his bills are on the
22 higher end for physiatrists?

23 A. Physiatrists or pain management?

24 Q. Pain management.

25 A. Yes. And specifically it's his -- it's his

1 office charges that are primarily what is higher than
2 typical.

3 Q. Okay. And you also testify about
4 Dr. Gross's -- that his surgical assistant bills were
5 about 100 percent higher than what is typically
6 charged?

7 A. In my opinion, yes.

8 Q. Okay. Now, in the course of your
9 evaluation --

10 MR. MAZZEO: Your Honor, I may need a
11 preliminary ruling from you.

12 Can we approach?

13 THE COURT: Come on up.

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

16 THE COURT: Go ahead.

17 MR. MAZZEO: Okay. Thanks, Judge.

18 BY MR. MAZZEO:

19 Q. So, Doctor, in the course of your
20 comprehensive medical evaluation and your interview of
21 Ms. Garcia during this evaluation, you also spoke with
22 her with regard to her duties and employment at
23 Aliante, which was where she was working at the time of
24 this incident; correct?

25 A. Yes.

1 Q. And also that's where she was working at the
2 time of your evaluation --

3 A. Yes.

4 Q. -- right? Okay.

5 And you -- you have an understanding of --
6 you had an understanding of her requirements for her
7 job that came -- for her job description. So let me
8 rephrase this in a clearer sentence.

9 During your interview with Ms. Garcia, she
10 told you what -- basically what her job requirements
11 were that came with her position as an assistant cage
12 cashier; correct?

13 A. Right.

14 Q. And -- now, as a result of this, even though
15 you were retained as an expert in this case, you didn't
16 impose any restrictions in her job duties as a cage
17 cashier; correct?

18 A. I -- I had some opinions about what I thought
19 would be appropriate physical abilities for her, but I
20 did not set forth limitations that would preclude her
21 from doing her work.

22 Q. And -- and so, as we discussed, I think,
23 earlier, that -- she continued working full-time at
24 Aliante until April of 2014 performing all of her
25 duties; correct?

1 A. I'm not sure about the dates, but I know that
2 she continued. And I would have to defer to somebody
3 that has that information.

4 Q. And -- now, during the course of your expert
5 services for Plaintiff and her counsel, did you learn
6 that she subsequently obtained a job -- it's almost
7 like a promotion -- as an assistant cage cashier
8 supervisor at Fiesta Rancho?

9 A. I don't think I was aware of that.

10 Q. Okay. Well, in September of 2014 -- so she
11 stopped working at Aliante in April of 2014.

12 Come September of 2014, she got a job as an
13 assistant cage cashier supervisor at Fiesta Rancho.
14 Okay?

15 A. Okay.

16 Q. And -- but you're saying that you weren't --
17 at no time you became familiar with the fact that she
18 got a job --

19 A. Correct.

20 Q. -- there? Okay.

21 Would it surprise you if I told you that,
22 when she obtained the job there, that she was working
23 full-time -- in full-time capacity in September of
24 2014?

25 A. No, I don't think so. Because I think my

1 recollection is that she was working full-time hours at
2 the other place of employment as well.

3 Q. Okay. And would it surprise you that she
4 had -- she was working in this full-time capacity with
5 no restrictions whatsoever?

6 A. Again, it probably wouldn't surprise me for
7 the same reason.

8 Q. And -- okay. And would it surprise you that
9 she was not only working full-time with no
10 restrictions, but she was actually working overtime on
11 various occasions?

12 A. I suppose I'd have to look at how much
13 overtime.

14 Here's my impression. I got the impression
15 that she was working, but she was working with
16 difficulties or having increased pain associated with
17 her work duties. That was my impression.

18 Q. Okay. And notwithstanding the fact that she
19 didn't put in any request for -- to have reasonable
20 accommodations made for her position either at Aliante
21 or Fiesta Rancho?

22 A. And, again, I wasn't aware of -- of that
23 particular issue being an option for her, and I didn't
24 have any discussion with her about it.

25 Q. Fair enough.

1 And -- and also, during the course of your
2 evaluation, it's correct to say that you did not
3 perform any functional capacity testing to determine
4 her actual limitations, if any?

5 A. Correct.

6 Q. Okay. Now, moving on to the prognosis in
7 your report. So you noted that she had reported a
8 50 percent improvement in her symptoms but still
9 remained significantly symptomatic in her low back and
10 lower extremity symptoms?

11 A. Yes.

12 Q. And would you agree that that would not be a
13 good result expected from this two-level fusion
14 surgery?

15 A. No. As I said earlier, good would be
16 50 percent reduction. Excellent would be probably
17 80 percent reduction.

18 Q. Well, do you -- do you agree -- and I know I
19 asked you about percentage before, but I found the
20 numbers. For a two-level fusion, statistically there's
21 an 88 to 92 percent success rate for that type of
22 fusion.

23 MR. ROBERTS: Objection to form. Foundation.
24 Testimony by counsel.

25 THE COURT: I don't know if there was a

1 question attached.

2 MR. MAZZEO: Let me rephrase it, and I'll
3 make sure I have a question mark at the end.

4 BY MR. MAZZEO:

5 Q. So, Doctor, isn't it a fact that
6 statistically there's an 88 to 92 percent success rate
7 for a two-level fusion, question mark?

8 A. So if I may, there -- there isn't -- I'm not
9 aware of any one study that is universally accepted as
10 far as identifying success rates for fusion.

11 If -- I will tell you that what I do think is
12 universally accepted is the definition of success
13 following fusion. And it's usually taking patients
14 reporting subjectively what they -- how they feel
15 they've done after a fusion. And a success is a good
16 or excellent outcome.

17 And good usually is a 50 percent reduction in
18 pain. Excellent is higher, usually 80 percent.

19 So she would still be considered a success.

20 Q. So you think she'd be -- still be considered
21 a success with the 50 -- assuming that -- that that
22 number is accurate, a 50 percent reduction in pain?

23 A. I think that she would be considered in a
24 good category, a good outcome. And that would be
25 counted as a successful outcome.

1 Q. So let's use the word "good," your good
2 category for a success rate for two-level fusion
3 surgery patients.

4 Now, would you agree that patients who
5 have -- that -- that most two-level fusion patients
6 will not require radio-frequency ablations, one a year
7 for life?

8 A. Agreed.

9 Q. Okay. And I'm talking about -- not the
10 excellent. I'm talking about the good result for --
11 for a two-level fusion.

12 A. I would still probably agree with that.

13 Q. Okay. Would you agree that a -- a patient
14 who had a two-level -- a good result from a two-level
15 fusion surgery will not need a lifetime of the
16 medications that -- that you had showed in your summary
17 of \$52,479 for analgesic medications and 45,000 -- an
18 additional 45,000 for antispasm class of medications?

19 A. I would not agree with that. I think that
20 patients that have a 50 percent reduction in pain
21 following fusion commonly require some sort of
22 supportive medications, and those two classes of
23 medications are relatively mild and consistent with
24 what they might need.

25 Q. Now, I know that in your practice that you do

1 life-care plans for private patients who do not have
2 medical-legal claims; correct?

3 A. Most of what I do has to do with litigation.

4 Q. Okay.

5 A. Maybe I've -- I've done or have been
6 requested to do this on occasion. When I have treated
7 patients over the years, it's common to be involved in
8 their care plans. But a formal typewritten plan is
9 almost exclusively in patients involved in litigation.

10 Q. Okay. So generally when you treat patients
11 in your private practice who are, let's say, cash-pay
12 or patients who do not have a -- a claim against a
13 third party, you generally will not generate a
14 life-care plan as you did for Ms. Garcia in this case?

15 A. Correct.

16 Q. Okay. Unless the patient is -- has a severe
17 physical disability such as a -- a person who might be
18 quadraplegic might require a life-care plan of some
19 sort?

20 A. You're talking about some -- someone
21 uninvolved in litigation?

22 Q. Correct.

23 A. There are individuals that do this type of
24 work that put together life-care plans for people that
25 are not involved in litigation. It's just not

1 something that I -- that I personally have done.

2 Q. Okay. Now, but for a number of years, you
3 were seeing private patients, right, through the
4 south -- HealthSouth facility --

5 A. Sure.

6 Q. -- over on Valley View; correct?

7 A. Yes.

8 Q. Okay. And -- and -- but in that -- in that
9 setting, you didn't do any life-care plans for where
10 you had -- were making recommendations that these
11 particular private patients would need care for the
12 remaining time of their life; correct?

13 A. Correct. Nothing that would be a lifelong
14 recommendation in writing.

15 Q. Okay. So typically -- or not typically.
16 You've -- you've always done -- whenever you have done
17 a life-care plan, it has always been in the context of
18 a medical-legal claim that's been brought by a patient
19 against a third party?

20 A. Either requested by defendant or plaintiff.

21 Q. Okay. And in this case, Glen Lerner's office
22 asked you to do a medical evaluation and life-care
23 plan; correct?

24 A. Yes.

25 Q. And as you told the jurors earlier today, the

1 life-care plan is to -- where you propose future
2 medical treatment needs and costs relative -- or for
3 Ms. Garcia relative -- or related to the motor vehicle
4 accident?

5 A. Yes.

6 Q. Now, other than -- I know you said today you
7 had spoken with Dr. Gross about adjacent segment
8 breakdown or pathology; correct?

9 A. Yes.

10 Q. And I believe you also spoke with
11 Dr. Mortillaro in connection with pain counseling?

12 A. Yes.

13 Q. Okay. And other than Drs. Gross and
14 Dr. Mortillaro, I didn't hear you say that you spoke
15 with any other treatment doctors in connection with
16 Ms. Garcia's claim; correct?

17 A. I don't think I did.

18 Q. And also is it fair to say you didn't speak
19 with any of the other experts that Ms. Garcia retained
20 and hired for the purposes of this litigation; correct?

21 A. Correct. I don't think I did.

22 Q. Now, just because you made certain
23 recommendations for Ms. Garcia's future care and
24 treatment, and you went through the list earlier, isn't
25 it a fact, Doctor, you can't say -- oh, here, I have a

1 summary of the list.

2 So you made -- let's go through some of those
3 items -- a recommendation for palliative physical
4 therapy which amounts to \$99,000.900 -- \$99,960.
5 Correct?

6 A. Yes.

7 Q. So -- and as you sit here today, you can't
8 say that Ms. Garcia will actually need palliative
9 physical therapy for the rest of her life in the -- in
10 the -- based on the recommendation that you provided in
11 your life-care plan; is that correct?

12 MR. ROBERTS: Objection. Form.

13 THE COURT: Overruled.

14 THE WITNESS: That's what I'm saying. I
15 think that she will need it. And that's why I put it
16 in the plan.

17 BY MR. MAZZEO:

18 Q. Okay. I know that you're saying you
19 recommended it. But you cannot sit here today and say
20 definitively that she will more likely than not need it
21 for the rest of her life in this -- based on the -- in
22 the -- in the -- not that I have to look at your
23 life-care plan, but how many times a -- how many times
24 a year are you recommending it for life?

25 A. Twelve visits.

1 Q. Twelve visits. Okay.

2 So -- but you don't actually know if she'll
3 need it for 10 years, 20 years, 30 years, or 45 years,
4 do you?

5 A. All right. So your question had two parts to
6 it. You said I can't say definitively that she'll need
7 it to a reasonable degree of medical probability, so
8 those things contradict each other.

9 I can't say definitively -- definitively that
10 she will because that implies 100 percent. Everything
11 that I told the jury today was to a reasonable degree
12 of probability. And I am saying that for that item and
13 for all those items, and I'm saying it lifelong,
14 because her problem isn't going away. It's not going
15 to go away, you know, in 5 years or 10 years or 20
16 years. It's going to be a lifelong problem for her,
17 and that's why I didn't put a stop date on that item or
18 the other items, because they're -- they are likely to
19 continue for the rest of her life.

20 Q. So -- but as you sit here today, if she goes
21 for physical therapy for the next ten years and doesn't
22 get it for the rest of her life -- well, that -- that's
23 not something that she would actually need if she
24 doesn't actually get the service down the road;
25 correct?

1 A. Okay. I think I understand. So that's a
2 different issue altogether. Physical therapy, as
3 with -- as with many of these items, are things that
4 she could choose to not do. And if she chooses not to
5 do them, then I suppose they wouldn't occur, but
6 that's -- my job isn't to -- to say that she's going to
7 make a willful decision at some point to stop getting
8 necessary medical care. I'm just saying what -- what
9 is reasonably necessary medically and what's
10 appropriate medically.

11 Q. And your recommendations in this life-care
12 plan, the summary that you showed to the jury, strictly
13 for litigation services, litigation purposes?

14 A. It was -- it was requested by a law office
15 for a person involved in litigation.

16 Q. Okay. And the opinions regarding future
17 surgery, you also offered an opinion that she'll need
18 future surgery for this adjacent segment pathology
19 assumes that she'll actually develop symptoms from the
20 adjacent segment at L3-4; correct?

21 A. Yes.

22 Q. Okay. Now, if for some reason -- because
23 we're talking about statistical prevalence of -- or the
24 statistical possibility or probability of developing
25 symptoms, if she developed -- if she doesn't develop

1 symptoms from this adjacent segment at L3-L4, then more
2 likely than not she won't need the lumbar fusion
3 surgery 25 years down the road?

4 A. Agreed.

5 Q. Okay. And you're not offering any opinions
6 today whether any interventional treatment will
7 actually benefit Ms. Garcia or that she'll actually
8 undergo the treatment that you've recommended in your
9 report?

10 A. I think this gets back to that issue that I
11 mentioned earlier where I suppose she could choose not
12 to undergo some or potentially all of the treatment
13 that I have in the report. And that would be something
14 beyond my control.

15 Q. Okay. So most of the treatment -- just --
16 just so I understand this with the life-care plan, the
17 treatment that you have -- that you have outlined in
18 your report that you believe that she'll need for the
19 remainder of her life, that's based on her
20 self-reported symptoms to you and to other providers;
21 correct?

22 A. I think that her self-reporting is a
23 significant part of my -- my conclusions about her
24 ongoing diagnosis and her need for future care.

25 Q. Okay. And -- and, otherwise, your opinion

1 that Ms. Garcia will need -- that she will need a
2 lifetime of medical treatment, would you agree it's not
3 based on any statistical data or studies other than
4 what you had mentioned with regard to this adjacent
5 segment breakdown?

6 A. No, I wouldn't agree with that. So, for
7 example, I mentioned that there is research that
8 discusses the frequency that people have repeat
9 rhizotomies performed. So part of my future plan
10 relies on that information. I don't know that research
11 would be applicable for physician visits or
12 medications. And then there's really not much left.
13 There's nothing else in the life-care plan really.

14 Q. Okay. So the -- your opinions with regard to
15 her need for rhizotomies and the lumbar fusion surgery,
16 you're saying, is based on some statistical criteria?

17 A. In part, yes.

18 Q. Okay. But all the other treatment that you
19 have identified is not based on any statistical data
20 or -- it's not based on any statistical data; correct?

21 A. I don't think such exists, so I would have to
22 agree with you.

23 Q. Okay. By the way, as of -- as of -- and I
24 know you didn't examine and evaluate Ms. Garcia in
25 2011, and you first evaluated her in June of 2013; but

1 based on your review of all the medical records, would
2 you contend that she would have needed a life-care plan
3 from the date of the accident -- for any treatment from
4 the date of the accident to December 31st of 2011?

5 A. I don't know that I would -- let me back up.

6 Life-care plans are typically done when a
7 person has reached a plateau in their care. So they're
8 not -- where we think they have sort of plateaued in
9 terms of response to treatment, and then we're either
10 on a maintenance -- maintenance level or we're
11 exploring some more advanced treatment options.

12 So I don't think she was at a plateau in her
13 treatment in 2011, so it probably wouldn't have even
14 been a discussion item.

15 Q. Now, with regard to -- you had offered and
16 authored three life-care plans in this case; correct?

17 A. I think so.

18 Q. And in your July 4th, 2013, life-care plan,
19 you had suggested and offered an opinion that the
20 lumbar reconstructive surgery would have been anywhere
21 from \$138,685 to \$189,885 --

22 A. Right.

23 Q. -- is that correct?

24 A. Yes.

25 Q. And then, comment -- two years later, come

1 October 15 of 2015, you're suggesting that the lumbar
2 reconstructive surgery would be \$289 -- I'm sorry,
3 \$289,426 to \$309,526. Do you see that?

4 A. Yes.

5 Q. That's a -- that's about a -- more than a
6 100 percent increase from -- for that same procedure
7 two years earlier; correct?

8 A. It is.

9 MR. MAZZEO: Your Honor, I need a moment to
10 look at my notes.

11 THE COURT: Everybody still good to go
12 another half hour? Stand up and stretch, if you would
13 like.

14 MR. MAZZEO: Your Honor, I'm going to pass
15 the witness at this time.

16 THE COURT: Okay. Mr. Strassburg?

17 MR. STRASSBURG: Judge, my partner
18 Mr. Tindall will handle this witness. Thank you.

19 THE COURT: Okay.

20 MR. TINDALL: I'm going to handle you.

21 CROSS-EXAMINATION

22 BY MR. TINDALL:

23 Q. Good afternoon, Doctor.

24 A. Good afternoon.

25 Q. So this is going to be a little scattershot

1 because I heard a lot of information, so I'm just going
2 to kind of jump around a little bit to start off.

3 Regarding Dr. Cash's findings about flexion
4 and extension, if he had found instability in the low
5 back, you would have expected him to note that; right?

6 A. Yes.

7 Q. The life expectancy table he talked about,
8 when counsel was asking you about that, he phrased his
9 questions in terms of it's more likely than not that
10 she's going to live to a certain age. And you answered
11 yes.

12 But that's really not an accurate statement
13 of that situation, is it? It's not more likely than
14 not she will live to a certain age; it's that the table
15 shows the average life expectancy. Fair?

16 A. Agreed. And by the way, I wasn't intending
17 to give an answer of her -- I think I phrased it
18 saying, I don't know her life expectancy. And there
19 were a lot of back-and-forth questions. So it's
20 certainly not my testimony that I know her age or that
21 that number reflects her age. It is a statistical
22 average for females of her current age.

23 Q. All right. Thank you.

24 Could you please look at your very first
25 report.

1 A. Yes.

2 Q. Go to page 2.

3 A. Okay.

4 Q. The very last sentence of your first
5 paragraph, you have a little discussion about the
6 dollar value of damage to the plaintiff's vehicle. You
7 see that?

8 A. What page?

9 Q. Page 2.

10 A. I'm --

11 Q. This is your 7/4/13 report.

12 A. Oh, I'm seeing -- I'm sorry. I thought you
13 said bottom of the page.

14 Q. No. The bottom of the first paragraph, last
15 sentence of the first paragraph.

16 A. Yes. Thank you. I see it.

17 Q. Okay. Can you walk us through a little bit
18 about how it was she came to you. And what I mean by
19 that is, an appointment's been made for her to come see
20 you; right?

21 A. Yes.

22 Q. She shows up to your office?

23 A. Yes.

24 Q. And you start asking her questions about her
25 history. Fair?

1 A. No. There's one step in between. She's
2 given a set of intake forms that have some questions
3 about when was the accident or was there an accident,
4 what was it. What are your symptoms. What's your
5 history, what's your past medical history, social
6 history. It's about 11 pages long. And she fills that
7 out. And then she comes into the exam room. And then
8 I sit down with her face-to-face and start clarifying
9 her answers and taking notes.

10 Q. Do you have that form she filled out in your
11 documents there?

12 A. Yes.

13 Q. May I take a look at it?

14 A. Sure.

15 Q. So it was the lawyer who referred her to you;
16 right?

17 A. Yes.

18 Q. Okay. She estimated the speed of the other
19 vehicle to be 35 miles per hour?

20 A. Yes.

21 Q. This is all her handwriting; correct?

22 A. The legible handwriting is hers. The part
23 that you can't read is mine.

24 Q. I reckon.

25 Do you know how far my client's car -- that

1 would be Mr. Awerbach, who's not here today -- had to
2 travel in order to make contact with hers?

3 A. I have no idea.

4 Q. Now, this is a form that you created;
5 correct?

6 A. Yes.

7 Q. There's a -- you see how this part here is
8 offset? It reads, "If this occurred during a car
9 accident, please answer the following." And then you
10 got an indentation for several things. Does that mean
11 that all these indented things are related to this
12 first overall issue of did it happen in a car accident?

13 A. Yes.

14 Q. All right. So one of your questions is,
15 "What was the dollar amount of damage to your car?"

16 A. Yes.

17 Q. That's important to you to know that; right?

18 A. Well, there's some importance. Obviously,
19 I'm not a -- as I said, I'm not an accident
20 reconstruction specialist, but it's one little data
21 piece of information that I look at.

22 Q. She's got a dollar amount listed there, and
23 I'm not going to say what it is, but what's the
24 significance of that dollar amount to her injuries?

25 A. As a physician, the way I look at dollar

1 amount of damage is if there is no damage, I might be a
2 little bit more skeptical about whether a person is
3 injured.

4 If there's a lot of damage to a vehicle or
5 the vehicle is totaled, I as a physician am going to be
6 more concerned that there might be more severe injuries
7 to a person, something that might be internal organ
8 damage, something I need to be more concerned about
9 that could be life threatening.

10 Q. Okay. So that would be in the case -- I
11 reckon you would also be interested in seeing the
12 photographs of damage too; right?

13 A. I don't do a great job of requesting
14 photographs of vehicles. Sometimes they're sent to me.
15 It's not something I -- I regularly review.

16 Q. Okay. You didn't ask for any in this case;
17 right?

18 A. I don't remember if I saw them or not.

19 Q. Well, that's kind of a different question.
20 You didn't ask for any, did you?

21 A. I don't -- I don't know if I did, and I don't
22 recall. Actually, I just don't know.

23 Q. If I can sum that up, you're essentially
24 saying the harder you get hit, the more likely you are
25 to be injured. Fair?

1 A. No. That's not -- and -- and that's where
2 I -- I tend not to get involved in that argument or
3 discussion, because I think that's more of a
4 biomechanic assessment. I'm just talking about
5 probably the two extremes that I mentioned.

6 If it's way over here with a lot of damage,
7 I'm going to be a little bit more concerned that
8 there's injury. If it's way over here with no damage,
9 I'm going to be maybe a little concerned that there
10 maybe wasn't injury at all. In between those two
11 extremes, I -- I think it's probably not my -- not my
12 wheelhouse.

13 Q. When you're talking about concern, tell me if
14 I'm right about this, but what you're talking about is
15 you want to make sure you're making the right call.

16 A. I think that's a fair characterization.

17 Q. You want to know is someone telling you the
18 truth or is someone in it to win it. Fair?

19 A. Well, for -- for that one piece of
20 information. I have lots of data points I look at, but
21 for that piece of information, I -- I -- of course I
22 want to try to -- I want to try to have the correct
23 answer. I want to make the right call with each piece
24 of information I'm looking at.

25 Q. So that being the case, why didn't you ask

1 for the photographs?

2 A. Well, for -- the main reason is, I'm not an
3 expert in looking at photographs. So I look at a
4 photograph, and I don't know how to analyze
5 photographs. And then I'm going to get a very bright
6 attorney asking me what I considered on that photograph
7 and what was important about it, and I'm not going to
8 have a good answer. So that's why I'll look at them if
9 they're provided to me, but they don't really make a
10 big difference to me.

11 Q. And your -- I mean, you just said, I can't
12 look at a photograph and make heads or tails out of it
13 essentially. It's the same testimony for the property
14 damage, though, isn't it? You are not a body shop guy.
15 You don't know how that translates to anything, do you?

16 A. Just those two extremes I mentioned. And
17 it's -- it's simply that.

18 Q. Can we please turn to page 3 of your report.
19 And in the bottom, the last full paragraph there where
20 it starts "because of the above symptoms." If we go
21 down a few lines, she's talking about -- well, she uses
22 the -- you use the words here "she states." Is it fair
23 that wherever you've written in here "she states," that
24 is her affirmatively having words come out of her mouth
25 telling you what's going on?

1 A. Yes.

2 Q. Okay. "She states her children actually will
3 bring their homework to her while she lies in bed." I
4 mean, that was important enough for you to write down.
5 What did you make of that?

6 A. This was in reference to the time frame of
7 after she got home from work, telling me that she felt
8 like she was spent and basically didn't have enough
9 energy to be out of bed and tend to her family. So she
10 felt more comfortable, I got the impression, being in
11 bed, having them come to her, bring their -- their
12 homework to her, and she was doing it or helping them
13 while she was in bed.

14 Q. You must have followed up on that; right?
15 You got details about that?

16 A. The only details are what I have listed and
17 what we have talked about.

18 Q. I mean, I would have -- tell me if I'm wrong
19 about this, but if I was a doctor, I would have said,
20 hey, how long has this been going on? Did you ask her
21 that?

22 A. No.

23 Q. Why not?

24 A. I had a lot of things to cover, and they were
25 more medical in terms of my priority, so that's all I

1 asked.

2 Q. She had depression before the accident;
3 right?

4 A. Yes, I believe so.

5 Q. Taking medication for it even; right?

6 A. Yes.

7 Q. What was she taking?

8 A. I think it was Prozac.

9 Q. Okay. How long before the accident had she
10 been taking the Prozac?

11 A. I don't know.

12 Q. Fatigue, feelings of being lethargic, laying
13 in bed, those are all symptoms of depression, aren't
14 they?

15 A. They could be.

16 Q. Can we go to page 4 of your Social History
17 section.

18 A. Okay.

19 Q. The last sentence, "She currently does not
20 consider herself psychologically stable." What did you
21 ask her that caused her to come up with whatever
22 comments that are reflected in that sentence you wrote?

23 A. It's actually a question on the intake form
24 that asks if you feel psychologically stable, and she
25 wrote "no."

1 Q. Okay. You must have followed up on that;
2 right?

3 A. I followed up in terms of a -- an inventory
4 questionnaire that she completed, and I followed up in
5 terms of a recommendation for counseling.

6 Q. So what was her psychological instability she
7 was referencing?

8 A. I don't know.

9 Q. But you followed up on it. How would you not
10 know?

11 A. Well, I followed up in terms of making a
12 recommendation for a psychologist to evaluate her. I'm
13 not a psychologist.

14 Q. So for all you know, what she's referencing
15 has nothing to do with the accident. Fair?

16 A. Correct.

17 Q. Now, could we fast-forward here to page 18 of
18 your first report. Very bottom question -- or not --
19 not question, but you got in bold here "numeric pain
20 scale."

21 A. Okay.

22 Q. Then you give some pain scales, and they're
23 all a number, slash, out of ten; right?

24 A. Yes.

25 Q. You got here 4 out of 10. Thirty-day best is

1 4 out of 10. On your scale, does your scale start at
2 zero?

3 A. It does.

4 Q. That means no pain; right?

5 A. Yes.

6 Q. We all know what "no pain" means. You ain't
7 hurt; right?

8 A. Yes.

9 Q. Would you agree with me that a 10 is going to
10 be different for everybody?

11 A. Sure.

12 Q. What's a 10 represent in your mind when you
13 are using this scale?

14 A. For me personally, it would be pain bad
15 enough to go to the emergency department.

16 Q. Okay. When you are -- I mean, is this --
17 this is a question on the form?

18 A. I'm sorry?

19 Q. Is this a question on the form about the
20 numeric pain scale?

21 A. I'm -- I'm missing the question.

22 Q. Sure. Let me slow down a little bit.

23 You've got the form she filled out, and I
24 didn't go through the whole thing.

25 But is this numeric pain scale section

1 something she fills out and hands to you?

2 A. Yes.

3 Q. Okay. Is there an explanation on that form
4 about what a 10 means?

5 A. Yes. It's defined as worst pain -- I'm
6 sorry -- worst possible pain imaginable.

7 Q. Okay. So what was her worst possible pain
8 imaginable?

9 A. I don't know.

10 Q. Okay. Do you know if you explained to her
11 what that meant?

12 A. I did not.

13 Q. Did she ask you any questions about how to
14 fill out the form?

15 And let me rephrase that.

16 Did she come to you and say anything to the
17 effect of "Hey, you know, I really don't understand
18 this question. Can you give me some clarification?"

19 Did that ever happen?

20 A. There's no indication that that ever
21 happened.

22 Q. Okay. Did you explain to her or have staff
23 explain to her before she started filling out the form
24 anything to the effect of "If you have a question about
25 what a question means, come ask somebody"?

1 A. I'm not sure if my staff does that. I think
2 they just hand the intake packet to the patient and ask
3 them to complete it to the best of their ability.

4 Q. So the worst pain imaginable -- I mean, would
5 you agree with me that could be, you know, burning up
6 in a atomic bomb blast or whatever? It could be bad,
7 real bad; right?

8 A. It could be.

9 Q. Did you ever ask it in terms of "What's the
10 worst pain that you, Ms. Garcia, ever experienced
11 before this accident?"

12 A. I did not.

13 Q. Okay. Do you think that would be a better
14 way to determine what a 10 is and give a baseline for a
15 person?

16 A. It might be. I -- it's not something that
17 I've considered. This is a typical way that physicians
18 obtain information, but the way you're describing it
19 may be a great way as well.

20 Q. This -- this scale, it's not logarithmic, is
21 it?

22 A. No.

23 Q. In other words -- you know what I'm talking
24 about logarithmic; right? For example, the pH scale, a
25 1 is 10 times more acidic than 2 --

1 A. Right.

2 Q. -- or 100 times more than 3?

3 A. Uh-huh.

4 Q. That's not this type of scale, is it?

5 A. No. I think this is meant to be linear.

6 Q. Before the accident, what were her daily
7 activities?

8 A. I don't know.

9 Q. Why not?

10 A. I did not ask her.

11 Q. Well, can you tell me how you not asking her
12 about that squares with your desire to be correct in
13 this critical situation? Because you're making a plan
14 about what she can and can't do in the future and how
15 she should be compensated for that.

16 Why am I wrong about that?

17 A. I'm not making a plan about what she can and
18 can't do in the future.

19 If you're referring to the life-care plan,
20 I'm making a plan about medical needs for her, and I'm
21 making recommendations about medical treatments that I
22 have concluded medically are related to this accident.

23 I obtained information from her about her
24 medical status before the accident to conclude that she
25 likely would not have needed those medical items absent

1 this accident and the injuries caused by it. And
2 that -- those pieces of information came from asking
3 her about the presence of any prior pain, injuries, or
4 symptoms to her spine or extremities before this
5 accident.

6 Q. So what she could or couldn't do before the
7 accident is of no importance to you?

8 A. It wouldn't be of no importance. I think
9 there may have been important information gleaned from
10 that.

11 But medically asking her about the presence
12 of prior pain, injury, or symptoms was appropriate.
13 And that's what I would do for any type of individual
14 in this situation.

15 Q. Mr. Mazzeo was asking you questions about
16 spondylolisthesis and was that -- could you use the
17 term "slipped vertebrae."

18 And you said something to the effect
19 of -- well, it's kind of a layperson term, but what you
20 could -- what you really ought to call it in this case
21 is "offset."

22 Remember that testimony?

23 A. I said that's what I call it is an offset.

24 Q. Okay.

25 A. You can call it whatever you want. I'm not

1 saying that you need to call it anything.

2 Q. Okay. Why are you choosing "offset"?

3 A. Because I don't think that her
4 spondylolisthesis is unstable. I don't think that
5 there was any indication that I saw that there was an
6 instability.

7 Q. Okay.

8 A. And so -- and specifically to answer, the
9 term "slip" implies that -- to me, implies that there's
10 some movement.

11 Q. Okay. So that being the case, we've
12 established -- and you tell me if I'm wrong about
13 this -- that you don't know the degree of offset before
14 the accident.

15 A. Right.

16 Q. You don't know if, during the accident or
17 because of the accident, the offset increased any, do
18 you?

19 A. Correct.

20 Q. True or false -- well, let me -- before I do
21 that, I have been sitting in the trial quite a while
22 now, just as long as everybody else. And I learned, I
23 think, that one of the reasons -- the reason she's
24 claiming she has low back pain is because a vertebra
25 moved. Is that fair?

1 MR. ROBERTS: Objection. Foundation.

2 THE COURT: I'm going to let him testify to
3 what he knows, what he understands.

4 MR. ROBERTS: He hasn't been in the trial.

5 THE COURT: That's true. I mean, you have to
6 rephrase it.

7 BY MR. TINDALL:

8 Q. Sure. What's your understanding of why she
9 claims her low back hurts?

10 A. I don't know. From a -- a layperson or an
11 attorney claim perspective, I don't know. I just know
12 my medical opinions.

13 Q. Where is the offset? Can you --

14 A. Between L5 and S1.

15 Q. True or false? In order for plaintiff to
16 have experienced low back pain due to a slipped
17 vertebrae or an offset, the vertebrae at L5-S1 would
18 have had to move?

19 A. True, if you're talking about a slipped or
20 moved vertebrae by definition.

21 Q. Doctor, I don't have any other questions.
22 Thank you.

23 THE WITNESS: Thank you, sir.

24 THE COURT: Mr. Roberts?

25 MR. ROBERTS: Thank you, Your Honor.

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REDIRECT EXAMINATION

BY MR. ROBERTS:

Q. Home stretch, I hope.

When you told the jury that "most of what I do involves litigation," were you talking about your entire practice or the life-care planning portion of your practice?

A. I think, as Mr. Mazzeo said, probably 50 or 60 percent of my -- my week is spent doing medical-legal work. And so that's -- that's most, 50 or 60 percent.

Q. And the lawyers asked you to clarify the life expectancy tables and what your testimony was with regard to that. And -- and, in fact, they're right.

Ms. Garcia could live longer than the life expectancy tables would indicate; right?

A. Could live longer; could live shorter. Sure.

Q. And if she lives longer, is she still going to need care and treatment?

A. Of course.

Q. You testified --

THE COURT: Hold on, Mr. Roberts.

Can I have everybody come up for a second?

/////

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

3 THE COURT: Sorry, Mr. Roberts. Go ahead.

4 MR. ROBERTS: Thank you, Your Honor.

5 BY MR. ROBERTS:

6 Q. You mentioned the cost of -- of the same
7 procedure had gone up significantly from one report to
8 the other.

9 Why did that happen?

10 A. The database that I utilized to look at my
11 estimates for the spinal surgery increased essentially
12 100 percent in the time frame between doing the
13 assessment in 2013 and in 2015. And sometimes that
14 information changes. Sometimes it changes
15 dramatically.

16 Q. So the actual cost of the medical care in the
17 community went up over time?

18 A. Correct.

19 Q. Did the database that you were using -- the
20 type of database change? Was it just updated by year,
21 or did you switch to a different methodology?

22 A. No. It was updated by year.

23 Q. You mentioned the number of cases that you
24 were working on where you were retained by Glen Lerner
25 at the time of your deposition back in 2014.

1 How has that changed over the last two years,
2 if at all?

3 A. I think since deposition time, I -- I've
4 worked on less cases with Mr. Lerner's office. I think
5 the last case I worked with their office on was
6 probably last summer, and I haven't had any this year
7 from their office.

8 Q. So it's been decreasing over time?

9 A. Just from their office.

10 Q. Okay.

11 A. I mean, I still have many referral sources,
12 and this is a very important part of my practice. But
13 just that particular referral source has been less.

14 Q. You were asked questions about motion segment
15 injury and whether treating physicians also -- there's
16 any indication they agreed.

17 A. Right.

18 Q. Again, for the jury, what is a motion segment
19 injury?

20 A. Injury to disk and facet joints. Simple as
21 that.

22 Q. And we saw that the pain management
23 physicians did nerve root blocks.

24 What would that be targeting?

25 A. Disks.

1 Q. And were those diagnostic that there was a
2 disk injury?

3 A. Yes.

4 Q. And the facet injections, what would those be
5 targeting?

6 A. Facet joints.

7 Q. Okay. And were those diagnostic?

8 A. They were.

9 Q. Okay. So the test done by the treating
10 physician confirmed that both parts of the motion
11 segment were generating pain; is that correct?

12 A. Yes.

13 Q. And that's consistent with your findings?

14 A. Yes.

15 Q. As part of your medical training, are you
16 taught how to recognize and look for symptom
17 magnification in patients?

18 A. Yes.

19 Q. And are you taught to look for inconsistent
20 reporting?

21 A. Yes.

22 Q. And did you see any indication that
23 Ms. Garcia was magnifying her symptoms?

24 A. I did not.

25 Q. Did you see any indication she was reporting

1 symptoms that you found to be inconsistent with the
2 objective medical evidence?

3 A. No.

4 Q. You were asked some questions about the
5 diagnostic value of nerve root blocks and facet
6 injections to identify pain generators and the fact
7 that injections were done at multiple levels by the
8 pain management doctors.

9 Could you explain to the jury whether or not
10 the injections can be as diagnostic in the lumbar
11 region as they are, say, above in the thoracic or
12 cervical region?

13 A. Sure. So the -- with the facet injections,
14 that's where the doctor actually injects into the
15 little tiny joints in the back of the spine. Those
16 actually can be done one level at a time. The value is
17 very similar in the lower back as with the neck.

18 Nerve root blocks, though, are -- excuse me.
19 Nerve root blocks in the lower back don't give us as
20 specific of information in the lower back because
21 the -- the nerve roots that exit, they actually exit
22 starting at the end of the spinal cord. The spinal
23 cord ends at about L1, so around where my finger is
24 located.

25 And then the nerve roots exit in a diagonal

1 fashion out each individual hole or foramen through the
2 lower back. They come out at an angle.

3 And so when the doctor puts the medicine at
4 the nerve level, the medicine goes up at an angle. But
5 the disk is horizontal. So the medicine doesn't really
6 go exactly at one disk level, and it can actually
7 affect the disk level where it's being injected as well
8 as the level above. And sometimes the medicine flows
9 down to the next nerve root.

10 So they aren't really specific. We call them
11 selective nerve root blocks because we're selecting
12 one, but the affect is up and down perhaps two,
13 sometimes three, disk levels. So they're not as
14 selective as they could be, for example, up in the neck
15 compared to in the lower back.

16 Q. With regard to the rhizotomy and its
17 effectiveness -- and I do want to --

18 Audra, could you put up Exhibit 26,
19 page 694 -- I'm sorry, page 702. Let's just skip
20 directly to that one.

21 You pointed out to Mr. Mazzeo that there was
22 a missing office visit in the records he was showing
23 you.

24 A. Yes.

25 Q. Let's see if we can get this up.

1 And if you'll look at the "history of present
2 illness" where Dr. Kidwell writes, "The pain is really
3 above and below the radio-frequency sites" when she
4 reports back to the flare-up of pain.

5 What significance did that have for you in
6 determining the effectiveness of the rhizotomy?

7 A. It had a lot of significance. She had the
8 rhizotomy done. She comes back, and she's got a
9 flare-up of pain. And, actually, Ms. Garcia told me
10 that she had the flare-up after feeling pretty good
11 from the radio-frequency, and for the first time in six
12 months, she mopped and swept her house. And then she
13 ends up with this increased pain.

14 Dr. Kidwell here in this note is saying that
15 she's got increased pain but it's really above and
16 below where he did this procedure, which tells me that
17 the radio-frequency is still working but she probably
18 strained some muscles associated with feeling better
19 and doing some housework.

20 So it doesn't imply that the radio-frequency
21 didn't do the job. It doesn't imply that the
22 radio-frequency is ineffective. It implies that she's
23 got some sore muscles from doing some extra work.

24 Q. Okay. And, Audra, if you go all the way to
25 the bottom of the page and blow that up as big as you

1 can, that last note.

2 We see here, a postinjection -- I'm sorry.

3 Let's -- I'm trying, Your Honor.

4 Let's just skip to a couple of pictures here.

5 Could you show the jury and Dr. Oliveri

6 Exhibit 5, page 4. And this is something that the

7 jury's seen before.

8 This is a picture of the damage to

9 Ms. Garcia's vehicle.

10 A. Okay.

11 Q. Okay. There you go.

12 And, Audra, Exhibit 6, page 1.

13 And this is the damage to Mr. Awerbach's

14 vehicle, which I don't believe the jury has seen

15 before.

16 A. Okay.

17 Q. Is there anything about these pictures, now

18 that you've seen them, that would cause you to change

19 your conclusions?

20 A. No.

21 Q. Is there anything about any of the

22 cross-examination by counsel that would cause you to

23 change the opinions and conclusions you shared with the

24 jury on direct?

25 A. No. I still feel comfortable with everything

1 that I've stated today.

2 Q. Okay. Two more, then we're done.

3 Exhibit 18, page 18.

4 Mr. Mazzeo implied that Ms. Garcia had a
5 CT scan and an X ray done at MountainView Hospital.

6 A. Yes. It was in my summary.

7 Q. Okay. The hospital sometimes misfiles
8 records?

9 A. Yes.

10 Q. All right. Here is a record of a CT brain
11 without contrast from the medical records provided by
12 the hospital.

13 And could you blow up the patient name at the
14 top, Audra?

15 Okay. And we can also see that at the
16 bottom -- it's a little clearer -- the patient name is
17 Elvia Garcia Elvira.

18 Is that Emilia Garcia?

19 A. No.

20 Q. Is that her CT scan?

21 A. No.

22 Q. Page 19, Audra.

23 The chest X ray from the MountainView
24 records, dated January 5th, 2011. Patient name at the
25 top and bottom.

1 Is that Emilia Garcia or is that Elvia again?

2 A. It's the wrong patient.

3 Q. Okay. Okay. Wrong patient, wrong age?

4 A. Correct.

5 MR. ROBERTS: And, Your Honor, that is it.

6 Thank you. I'll pass the witness.

7 THE COURT: Mr. Mazzeo?

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

9 CROSS-EXAMINATION

10 BY MR. MAZZEO:

11 Q. Dr. Oliveri, on redirect examination by
12 Mr. Roberts, he asked you some questions about symptom
13 magnification and the reporting of symptoms that are
14 inconsistent with objective medical evidence; right?
15 Do you recall that?

16 A. Yes.

17 Q. And you testified earlier that you perform
18 approximately 40 to 50 life-care plans per year?

19 A. I think so, yes.

20 Q. About one a week?

21 A. Oh, I think so, yes.

22 Q. Okay. And isn't it fair to say that you have
23 never authored any report for a plaintiff's attorney in
24 Las Vegas which indicated that you believe the
25 plaintiff engaged in symptom magnification; is that

1 correct?

2 A. Well, that's not correct. I have authored
3 many reports suggesting that a plaintiff who was
4 injured has symptoms that are higher than expected,
5 that are magnifying symptoms.

6 Q. Okay. More specifically, is it correct to
7 say that you have never authored a report for a client
8 of Glen Lerner's office that one of their clients had
9 ever engaged in symptom magnification, those specific
10 words?

11 A. I don't know if I've used those words, but I
12 can tell you that I have indicated that in plaintiff
13 reports. And I've probably indicated that with a
14 client of Mr. Lerner's.

15 Q. Can you identify the name of any patient
16 where you've indicated that?

17 A. Well, I wouldn't be able to. It would be a
18 HIPAA violation, but I would -- and a second thing is I
19 can't remember a patient's name that I have done such
20 an evaluation on as I sit here.

21 Q. Fair enough. And isn't it a fact that you've
22 never authored a report for one of Glen Lerner's
23 clients where you've said that the patient's reporting
24 to me is inconsistent with the objective medical
25 evidence?

1 A. Again, I think that that's not a true
2 statement. I think that I have had many instances
3 where reporting about aspects of claimed injuries is
4 inconsistent with my analysis of objective information
5 and ultimate conclusions.

6 I do a unique analysis on every patient for
7 every particular file that I review.

8 MR. MAZZEO: Nothing further. Pass the
9 witness.

10 MR. TINDALL: Nothing, Your Honor.

11 THE COURT: Anything else?

12 MR. ROBERTS: Nothing, Your Honor.

13 THE COURT: Ladies and gentlemen, any
14 questions for Dr. Oliveri? Raise your hand.

15 Was there a hand there? Okay.

16 Tom, can you get the question for us. Come
17 on up, Counsel.

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

20 THE COURT: Doctor, could the pain in the
21 right leg of the plaintiff affect the bending of her
22 leg at the knee joint regarding the nerve root? If so,
23 to what extent?

24 THE WITNESS: It could. If she had pain that
25 came from the lower back from injury to a nerve root

1 and it went all the way down to the leg, that might be
2 called a -- such as a sciatic problem, it could
3 potentially affect a person's ability to comfortably
4 bend -- bend the leg.

5 It would not necessarily be a -- a major or a
6 common problem. And let me explain why.

7 Normally, if a nerve is irritated in the
8 lower back, the position that causes increased problems
9 with the leg is when the leg is straight and it's --
10 the whole thing is flexed. That puts additional -- if
11 I'm looking at the spine here and we have the sciatic
12 nerve, the leg is straight and then it's raised upward.
13 It puts additional stress and pull on the sciatic
14 nerve, and that can cause problems with pain increasing
15 down the leg.

16 If the knee is bent, there's actually a
17 little bit less stress on the sciatic nerve. The nerve
18 sort of buckles a little bit. So while it could affect
19 just movement of the leg at the hip and the knee, could
20 cause the -- the nerve in the lower back to flare up,
21 it probably wouldn't be a major factor in flaring up,
22 if that makes sense.

23 THE COURT: Thank you, Doctor.

24 THE WITNESS: Thank you.

25 THE COURT: Follow-ups, Mr. Roberts?

1 MR. ROBERTS: No, Your Honor.

2 MR. MAZZEO: No, Your Honor.

3 THE COURT: Mr. Tindall?

4 MR. TINDALL: No, Your Honor.

5 THE COURT: Thank you, Doctor. You're
6 excused. Appreciate your time.

7 THE WITNESS: Thank you very much.

8 THE COURT: Ladies and gentlemen, we're going
9 to go ahead and take our break for the evening and have
10 you come back at 10:00 o'clock tomorrow.

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

1 See you tomorrow at 10:00. Have a good
2 night.

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

5 THE COURT: Okay. We're going to mark that
6 juror's question our next in order. Anything we need
7 to do on the record outside the presence, counsel?

8 MR. MAZZEO: One minute, Your Honor.

9 No, Your Honor.

10 THE COURT: All right. Off the record.

11 (Thereupon, the proceedings
12 concluded at 5:11 p.m.)

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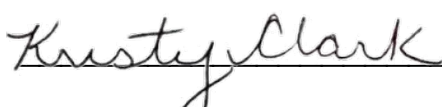
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COUNTY OF CLARK) ss:

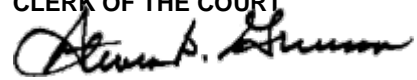
I, Kristy L. Clark, a duly commissioned
Notary Public, Clark County, State of Nevada, do hereby
certify: That I reported the proceedings commencing on
Monday, February 22, 2016, at 10:28 o'clock a.m.

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
22nd 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 JURY TRIAL

20 BEFORE THE HONORABLE JERRY A. WIESE, II

21 DEPARTMENT XXX

22 DATED TUESDAY, FEBRUARY 23, 2016

23
24 REPORTED BY: KRISTY L. CLARK, RPR, NV CCR #708,
25 CA CSR #13529

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2 9:59 A.M.

3

4 P R O C E E D I N G S

5 * * * * *

6

7 THE COURT: All right. Back on the record.
8 Case No. A637772. We're outside the presence of the
9 jury. What do you got, Mr. Tindall?

10 MR. TINDALL: So we've given counsel Jared
11 Awerbach's exhibit binder. But I think we --
12 obviously, we didn't give to the Court yesterday. So
13 those -- I mean, none of them are stipulated.

14 THE CLERK: You know, I do have a copy, but I
15 will take this copy and make it a better copy.

16 MR. TINDALL: And then to add to that, we
17 have -- losing my mind this morning. Where did the
18 sheets go?

19 MR. STRASSBURG: They're right here.

20 MR. TINDALL: There we go. To be added next
21 in line, we have the blowups of some MRIs that were
22 stipulated.

23 MR. ROBERTS: No objection, Your Honor.

24 THE CLERK: Is this going to be a new
25 exhibit, then?

1 MR. TINDALL: Exhibit next in line.

2 THE CLERK: So this will be Exhibit F.

3 THE COURT: F is admitted by stipulation; is
4 that right?

5 MR. ROBERTS: Yes, Your Honor.

6 THE COURT: Okay.

7 (Whereupon, Plaintiff's Exhibit F was
8 admitted into evidence.)

9 THE COURT: What else? Is that it,
10 Mr. Tindall?

11 MR. TINDALL: Yes, Your Honor.

12 THE COURT: Anything else outside the
13 presence?

14 MR. ROBERTS: One thing, Your Honor, and it
15 deals with a clarification of the motion in limine on
16 Dr. Smith. And essentially, the Court said that they
17 can introduce evidence and cross-examine them on the
18 ability -- on the reliability of his methodology,
19 similar subjects, but they can't question whether or
20 not it's possible to calculate hedonic damages
21 economically because the Supreme Court has found that
22 you can't.

23 So one of the questions they were asking him
24 about in his deposition dealt with a nonscientific
25 survey of economists and whether or not they calculated

1 hedonic damages. Some of the comments to that -- most
2 of them said they didn't, just as if you would say, you
3 know, doctors are surveyed, how many of you perform
4 spine surgery, very few doctors would say they do.

5 But the comments to the questionnaires, there
6 were a lot of people who, in their comment section, put
7 we don't think it's possible to calculate hedonic
8 damages; that's why we don't do it.

9 Well, that's part of what is excluded. So
10 since the survey includes all this excluded opinion, we
11 believe that Dr. Smith should not be questioned about
12 the survey.

13 THE COURT: Okay.

14 MR. MAZZEO: Judge, that makes sense.

15 MR. STRASSBURG: What?

16 MR. MAZZEO: Yeah.

17 MR. STRASSBURG: Wait a minute.

18 MR. MAZZEO: We're -- I'm not going to
19 contest whether or not Nevada allows compensation for
20 punitive damages. Obviously --

21 THE COURT: Hedonic damages.

22 MR. MAZZEO: What did I say?

23 MS. ESTANISLAO: Punitive.

24 MR. MAZZEO: Sorry. Yeah, hedonic. I'm a
25 little tired. Hedonic damages; right. We're

1 contesting that Nevada law allows that, so ...

2 THE COURT: Until -- until the Supreme Court
3 overrules the Banks case, we allow it, so ...

4 MR. MAZZEO: So I'm not going to ask him any
5 questions with regard to whether or not they're
6 allowed. They are.

7 MR. TINDALL: So our position on that would
8 be since we can't challenge it, Dr. Smith also doesn't
9 get to sit up there and say, hey, I get to do this
10 because of Nevada law. Banks. He doesn't get to
11 mention that. It's a moot issue. Completely
12 irrelevant.

13 MR. MAZZEO: Right. We can certainly
14 question -- we can question methodology that he
15 employed to arrive at the figures that he came up with
16 in his reports. That's not excluded.

17 THE COURT: Agreed.

18 MR. ROBERTS: I have not planned to elicit
19 the Banks opinion, but since there's no motion in
20 limine, I had not instructed he couldn't mention it. I
21 don't think it's going to come up, but ...

22 THE COURT: Tell him not to talk about it.
23 It doesn't need to come up.

24 MR. ROBERTS: Okay. I will go talk to him.

25 THE COURT: I'm going to allow him to

1 testify, it's based on the Banks case, but we don't
2 need to discuss it.

3 We ready for the jury?

4 MR. MAZZEO: Yes.

5 MR. ROBERTS: We are, Your Honor.

6 THE COURT: What I like to hear.

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.

13 Good morning, folks. We're back on the
14 record in Case No. A637772. Do the parties stipulate
15 to the presence of the jury?

16 MR. ROBERTS: Yes, Your Honor.

17 MR. MAZZEO: Yes, Your Honor.

18 THE COURT: Thanks for coming back. I think
19 we finished the doctor yesterday. We're going to start
20 with a different witness today. I think we still have
21 two coming back that we haven't finished. But who do
22 we have this morning?

23 MR. ROBERTS: We have Dr. Stan Smith, but not
24 a medical doctor this time.

25 THE COURT: All right. Get Dr. Smith for us.

1 Good morning, Doctor. Come all the way up on
2 the witness stand, if you would. Once you get there,
3 please remain standing and raise your right hand to be
4 sworn.

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

9 THE WITNESS: I do.

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

12 THE WITNESS: Stan V. Smith, S-M-I-T-H.

13 THE COURT: Thank you, sir.

14 DIRECT EXAMINATION

15 BY MR. ROBERTS:

16 Q. Good morning, Dr. Smith.

17 A. Good morning.

18 Q. Could you tell the jury where you're from.

19 A. Sure. I'm from downtown Chicago, Illinois.

20 Q. When did you fly in?

21 A. Early this morning.

22 Q. What is your profession, Dr. Smith?

23 A. So I am an economist by training. Don't hold
24 that against me. But ...

25 Q. And who is your current employer?

1 A. It's a firm I founded about 30 years ago
2 called Smith Economics. So I and a staff of 15
3 full-time and a handful of part-time people, we work
4 downtown Chicago; we do our work there.

5 Q. What does Smith Economics do for people?

6 A. We do economic and financial consulting. Our
7 clients are all over the country in every state. Most
8 of the work is in connection with litigation support,
9 or another way of saying that is economic analysis for
10 lawsuits.

11 Many of them are commercial damages,
12 companies suing companies for breach of contract,
13 companies suing banks for failure to loan, all sorts of
14 commercial disputes. We do credit damage disputes.
15 We've helped analyze issues for people who have been
16 defamed or wrongfully discharged. Patent infringement,
17 a lot of losses for people who have been injured, a
18 personal injury, in a case such as this.

19 We've worked on all sorts of cases, even, you
20 know, poor little victims of child porn who have had
21 their futures impaired by virtue of the problems that
22 arise, you know, from that kind of a -- of a
23 background, so ...

24 Q. So have the lawyers for Ms. Garcia retained
25 you to assist us in providing economic calculations for

1 some of the economic losses that Ms. Garcia's claiming
2 in -- in this lawsuit?

3 A. Yes.

4 Q. Do you charge for your services when you help
5 people do these calculations?

6 A. Sure, yes.

7 Q. What's your current hourly rate?

8 A. The hourly rate is 395 an hour. The report
9 was a flat fee of just around -- just under 4,000, I
10 think.

11 Q. What about your time to come to court today
12 to testify?

13 A. It's -- it's the same. It's a long day. We
14 don't -- it will be about a 20-hour day by the time I
15 get home tonight. But we stop charging after 10 hours.
16 I figure I have made a good rate for the day, and a lot
17 of it is travel, so -- but we don't charge after 10
18 hours.

19 Q. Do you testify in court in deposition as a
20 regular part of your --

21 A. Absolutely.

22 Q. -- practice of economics?

23 A. Absolutely. I think I have covered every
24 state.

25 Q. You've testified in Nevada before?

1 A. Oh, many times.

2 Q. Have you been qualified as an economist in
3 Nevada before?

4 A. Many times.

5 Q. Do you testify for both plaintiffs and
6 defense firms?

7 A. I do.

8 Q. What -- what percentage would you say you
9 testify on the plaintiffs' side?

10 A. Well, in commercial cases where it's
11 businesses suing businesses, it's probably about 50/50.
12 In personal injury, it's more for the plaintiffs' side.
13 There is in this case. But usually there is not
14 somebody on the other side of the plaintiff case.
15 Sometimes there is, and this is one of the instances.
16 I think the jury will see there's a defense economist.
17 But usually there isn't. So there's more work on the
18 plaintiffs' side. But it's about three quarters
19 perhaps.

20 Q. Could you share your economic background --
21 your educational background in economics with the jury
22 starting with college.

23 A. Okay. So I went to Cornell University in
24 upstate New York. I graduated with a bachelor of
25 science in operations research. That's a lot of math,

1 statistics, computer science. I came to Chicago. I
2 was originally from Milwaukee. Came to Chicago, which
3 was my mother's hometown, and went to the University of
4 Chicago. And I got a master's and PhD in economics
5 from the University of Chicago.

6 MR. ROBERTS: Your Honor, I would ask the
7 Court to recognize Dr. Smith as an expert in economics
8 and forensic economic analysis.

9 MR. MAZZEO: No objection.

10 MR. STRASSBURG: We welcome a fellow
11 Cornellian, Judge.

12 THE COURT: He will be so recognized.

13 THE WITNESS: I assume there's no cross?

14 MR. MAZZEO: Wrong assumption.

15 MR. STRASSBURG: I didn't say that.

16 BY MR. ROBERTS:

17 Q. Dr. Smith, is that a word, Cornellian?

18 A. Cornellian? Yes, for those of us from --
19 proud to be from Cornell University. Learn something
20 every day.

21 Q. Dr. Smith, have you taught at the college
22 level?

23 A. Yes. I -- so in 1990, I coauthored the first
24 textbook in the field of forensic economics. That's
25 this fairly narrow specialty of analyzing damages in

1 litigation. It's called forensic economics. And I
2 coauthored the first textbook with Dr. Michael
3 Brookshire, who teaches in Virginia. And that year
4 DePaul University, which is the nation's largest
5 Catholic university, called me up, downtown Chicago,
6 and said, would you please create and teach the first
7 course in the nation in the field of forensic
8 economics, which I did.

9 And then my textbook was used. And other
10 professors created courses or parts of their course in
11 forensic economics. So my textbook was used at
12 University of Wisconsin, Penn State, Bellarmine
13 University, which is a private college in Louisville,
14 and a few other places. As I say, it's a narrow
15 specialty.

16 Q. How long ago was that when the -- you taught
17 the first course in forensic economics?

18 A. Eighteen -- no, excuse me. It was -- I
19 taught there as an adjunct professor in the -- for
20 about -- 1990 to '95, about five years. In the early
21 '90s.

22 Q. Have you authored any peer-review
23 publications?

24 A. A good handful, yes. I have never been an
25 academic. I've never sought to teach anywhere. I

1 never tried out to become a faculty member. I always
2 was in one sort of consulting practice or another, but
3 I have a handful of peer-reviewed publications in some
4 high-quality journals.

5 Q. Can you explain to the jury what peer review
6 is and what significance that is to you in your
7 profession?

8 A. Sure. Sure. So, you know, we read in the
9 paper there's this health study that said you should --
10 you know, maybe now we can eat more cholesterol than
11 they used to think. Or there's a study that says 20
12 minutes of exercise a day is better, this kind of
13 exercise is better than the other. Those studies are
14 usually published in specific journals for their field.
15 Or a journal of psychology that says, you know, if
16 you -- it's true, if you smile more, you will actually
17 report that you feel better. So anyway ...

18 The peer review means that somebody just
19 didn't write an article that got published, which is
20 what happens in the newspaper. And there's nothing
21 wrong with that, but somebody writes it and the editor
22 says, yeah, it looks pretty good, they'll publish it.

23 In peer review in science, a peer-reviewed
24 journal has an editor and it has a board of editors.
25 And I was on the board of editors of the primary

1 peer-reviewed journal in our field called the Journal
2 of Forensic Economics for 11 years.

3 And so when we get -- or when any
4 peer-reviewed journal gets an article of research that
5 says, here, publish this; this is a study on interest
6 rates in, you know -- or interest rate behavior or
7 something like that, the article will be sent to two
8 experts in the field to make sure that its methodology
9 is proper, its mathematics is proper. They will tear
10 it apart, look at it and send it back to the editor
11 saying, there's some problems here, or there's some
12 errors, or it's off here, or didn't recognize this or
13 that. Or they will send it back saying, it's pretty
14 good, you know, we think it's okay for publication. Or
15 they might say, there's some problems which we think
16 can be corrected. And if the authors correct it, then
17 it will have met the minimum standards of that journal.

18 All of this is done without the two reviewers
19 knowing who wrote it, so they strip the name off when
20 they send it to the reviewer, so they don't know who
21 wrote it so that the author's name or who the author is
22 doesn't matter. And the reviewers' comments, when they
23 go back to the author, those are also unanimous. So
24 it's a blind process in the sense that the person
25 writing the article is unknown to the reviewers; the

1 reviewers' comments are unknown to the author.

2 And once an article is published, it has met
3 the minimum standards of scientific quality for that
4 journal. So it's not -- it goes through a filter.

5 Q. You -- you told the jury you have written a
6 few peer-reviewed publications.

7 A. Yes.

8 Q. Do you rely on peer-reviewed publications
9 written by others as a foundation for part of what
10 you're going to share with the jury today?

11 A. Correct. In fact, I don't rely on my own
12 research. I think that would be self-serving, although
13 others do. But I rely on -- there's a huge body of
14 literature for the work that I've done today. I
15 wouldn't -- even if I hadn't written anything, I -- it
16 wouldn't matter. I do -- I have written on the
17 subjects in which I will be talking about today, but so
18 have many, many, many others. And I have cited a good
19 part of that literature in my report. So I do rely on
20 peer-review literature. I need not rely on any of my
21 own.

22 Q. You've told the jury a little bit about the
23 teaching you did at the college level.

24 A. Right.

25 Q. When did you first get into legal work in --

1 into helping parties as experts in litigation?

2 A. Well, it's a -- it's a familiar story. A
3 white policeman shot and killed a black youth who was
4 innocent of doing anything and actually just driving
5 his car. Mistake -- it was a bad act and an
6 unfortunate act. And I was involved in that first case
7 because this kid was a worker in an automotive repair
8 shop, and I was asked to analyze his lost wages
9 initially. And then I was asked to analyze his loss of
10 value of life subsequently.

11 And that, I thought, would be the first and
12 last time, but that work wound up on the front page of
13 the *Wall Street Journal*. And then I got picked up --

14 MR. TINDALL: Can we approach, Your Honor?

15 THE COURT: Sure. Come on up.

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

18 THE COURT: Go ahead and ask the next
19 question, Mr. Roberts.

20 MR. ROBERTS: Thank you, Your Honor.

21 BY MR. ROBERTS:

22 Q. So, Dr. Smith, you were retained on this case
23 with Emilia Garcia?

24 A. Yes.

25 Q. Could you share with the jury the types of

1 documents that you reviewed in order to provide your
2 opinions?

3 A. I have a list. Let me just pull out my
4 report.

5 MR. ROBERTS: May the witness refresh his
6 recollection, Your Honor?

7 THE COURT: We have done this once before.
8 If it's necessary for you to look at your report to
9 refresh your recollection, that's fine. You refresh
10 your recollection and then put the report aside, see if
11 you can answer the question.

12 THE WITNESS: Oh, okay. So I would say the
13 most important documents that I reviewed were the
14 deposition of -- of Ms. Garcia. For the purposes of my
15 work, we conducted an interview with Garcia. In fact,
16 I spoke to her again very briefly last night just to
17 confirm some information.

18 And then also Dr. Oliveri wrote a life-care
19 plan. And I was given that life-care plan. And
20 that's -- those are the three key pieces of
21 information.

22 BY MR. ROBERTS:

23 Q. In addition to that case-specific
24 information, what did you review generally to help you
25 with your opinions?

1 A. Well, sure. I mean, we look at interest
2 rates and growth rates regarding the value of services
3 that Ms. Garcia did perform in the household that she
4 has difficulty performing now, the growth rates of
5 medical costs over the past 20 years. Those are
6 probably the two primary things I needed to review.
7 Those are published by the U.S. government.

8 Q. Thank you.

9 Dr. Smith, have you prepared a calculation of
10 the present value of the life-care plan that
11 Dr. Oliveri presented to the jury yesterday?

12 A. Yes. Yes, I did.

13 Q. And did you also provide a calculation of
14 the --

15 MR. MAZZEO: Objection, Your Honor. The
16 doctor's looking at his report while he's being asked
17 this question. Object to him reading his report.

18 THE COURT: You can't really read your report
19 in response to the questions, so ...

20 THE WITNESS: Right. I haven't looked at it
21 yet. If I was going to be asked a number, I didn't
22 memorize the number, Your Honor.

23 THE COURT: Okay.

24 BY MR. ROBERTS:

25 Q. Have you performed calculations with regard

1 to loss of household services?

2 A. Also, yes, I did.

3 Q. And have you performed calculations regarding
4 the loss of enjoyment of life?

5 A. Yes. Yes. The loss of quality of life, yes.
6 The loss of -- or, neutrally, the loss of the utility,
7 economists would say. But when we say -- you buy a
8 car, you get utility from it. Of course, you would say
9 you get pleasure, satisfaction. We try to use a more
10 neutral term.

11 Q. So I'd like to discuss each one of these
12 areas in which you provided your work separately.

13 A. Sure. But I caution you, I haven't memorized
14 the results that are printed in my report. So at some
15 point, if you say what conclusions did you come to,
16 I'll have to look at my report.

17 Q. Okay. Just if I ask you a question and you
18 need to refresh your recollection, just -- just let me
19 know.

20 A. Sure. And Dr. Oliveri has many items in his
21 life-care plan. Half of them I probably can't
22 pronounce correctly, and I certainly didn't memorize
23 all those items in the life-care plan.

24 Q. Okay. Thank you.

25 So let's start out with the life-care plan.

1 And did you perform a present value calculation?

2 A. Yes.

3 Q. Could you explain to the jury what a present
4 value calculation is.

5 A. Sure. I'll give a very simple example. If
6 someone says we will give you \$1,000 a year for ten
7 years, which means \$10,000 over time, present value is
8 what is that worth today. So the money you receive
9 today is worth \$1,000. But then you wait a year to get
10 the second thousand, and that second thousand is not
11 worth a thousand dollars today; it's worth a little bit
12 less.

13 Its present value is maybe \$975, because you
14 could take that amount of money, invest it in a CD or
15 safe government security, and that 975 would then grow
16 to be the thousand dollars in a year.

17 So we say the thousand dollars a year from
18 now is worth a little bit less today. A thousand
19 dollars two years from now could have two years' worth
20 of interest on it, so it would be worth less than the
21 975 -- \$175 that the money one year from now is worth.

22 The money ten years from now, the thousand
23 dollars you get in the tenth year, that might only be
24 worth eight or nine, you know, whatever the mathematics
25 show. But might only be worth \$900.

1 So the \$10,000 that you would receive over
2 the course of time, if you asked an economist what is
3 the fair present value of that today, might only be
4 worth a total of now maybe perhaps \$9,500 or something
5 like that. It's -- it's whatever you would invest
6 today that would pay 1,000 a year and continue to earn
7 interest until the tenth year when the thousand -- when
8 the last thousand dollars is paid out.

9 So present cash value means subtracting the
10 interest that could be earned; it means taking into
11 account that interest; it means reducing future numbers
12 to today's value. And it's the only complicated part
13 of the math, really.

14 Q. Could you tell the jury a little bit about
15 some of the growth rates that you assumed in performing
16 your calculations and how you arrived at those numbers.

17 A. Sure. So, now, are we speaking of
18 Dr. Oliveri's plan, for example? Is that where we're
19 starting for growth rates or more general?

20 Q. Why don't you start more generally and then
21 move into how that changes for medical areas.

22 A. Okay. So the growth rate that I looked at
23 for housekeeping services. When I value the services
24 of a housekeeper, we look at what kind of a cost you
25 might pay on the market for someone to come into your

1 house to provide housekeeping. What kind of an hourly
2 rate. We look at how those wages would change over
3 time. And we assume that there will be growth in the
4 next 20, 30 years, just as there was growth in the last
5 20 years on wages.

6 And the actual wages in the last 20 years,
7 nationwide in this country, have been about 1 percent
8 above inflation. So you'll see when I get into the
9 details that, in terms of housekeeping, we've assumed
10 that whatever you would have to pay a service to have a
11 housekeeper sent to you, that that would grow at
12 1 percent per year above inflation. So that's the
13 growth rate for housekeeping.

14 For the medical care plan, there's four
15 different kinds of growth rate. One of them is similar
16 to the housekeeping rate; it's ordinary wages. The
17 wages of people with M.D. degrees, people who, with
18 medical degrees, grows a little faster -- I think
19 that's 1.65. I didn't memorize it, but when permitted
20 to look at my report, I will give you the exact number,
21 but I think it's 1.65 percent. These numbers change
22 every year so -- and I deal in thousands of numbers, so
23 I don't memorize all my reports.

24 The third item in the life-care plan is there
25 are some medical commodities. If there's a

1 prescription drug, we assume that that will grow at a
2 half a percent a year above inflation as medical
3 commodities, on average, have grown about a half a
4 percent a year above inflation. And then the fourth
5 thing in the plan, there may be items that are
6 nonmedical commodities, and those grow at ordinary
7 inflation. So I have four different growth rates in
8 the medical care plan.

9 Q. Do you break those out and analyze each one
10 separately?

11 A. Right. So Dr. Oliveri's list is sorted into
12 four buckets, and each bucket, the -- grows at a
13 slightly -- each cost grows at a slightly different
14 rate. They're all discounted in the same way.

15 Q. Okay. When you say, "They're all discounted
16 in the same way," explain that again?

17 A. Well, so, just an example, if someone says,
18 well, there's \$100 of this prescription drug this year.
19 We know that it will grow with inflation -- we assume
20 it will grow with inflation plus a half a percent next
21 year and inflation plus half a percent the following
22 year. And if we project that out and if she needs that
23 till the end of her life expectancy, then each of those
24 years into the future has to be discounted back to
25 present cash value.

1 Q. How much money does it take today to have
2 that money available in the future?

3 A. Right. So if you invest it in safe
4 government security, it will generate a little
5 interest; you'll buy it the first year, generate some
6 more interest; you'll buy it the second year, it's
7 worth -- it tries to generate more interest. And at
8 the end of life if half a percent has been the
9 correct -- approximately correct inflation rate for
10 that drug, then you should have just enough money in
11 the last year to buy that last years' worth.

12 Q. Very good. So the number you're going to
13 give the jury is actually less than what you would get
14 if you added up how much you think it's going to cost
15 to buy those services throughout the life-care plan?

16 A. It is for everything except the medical care
17 cost because the medical care growth rate is greater
18 than the discount rate. So you need less money than
19 the actual physical sum of -- of it for all things
20 except the medical services.

21 Q. Tell --

22 A. You need a little bit more money.

23 Q. Tell the jury how you determine that, that
24 the medical growth rate is exceeding the growth rate of
25 the economy.

1 A. U.S. government publishes, you all hear about
2 inflation or the consumer price index. The consumer
3 price index, you know, we'll learn in a month that --
4 or might even now know that inflation last year was,
5 say, 1.2 percent. I -- I haven't looked at the number,
6 but let's say that's it.

7 What that means is the government collected
8 the prices of hundreds and hundreds of items in dozens
9 and dozens of categories. We've got an energy
10 category, we've got a food category, you've got a
11 housing category. And the food category is probably
12 dozens of food items in there. There's many different
13 categories. There's -- there's a medical category.

14 And all those categories are then -- are
15 then -- so there's many prices sampled every single
16 month. They're all put together, crunched together.
17 Every month there's an inflation index component. So
18 when you hear that inflation last year, let's say it
19 was 1.2 percent, part of that was because medical
20 services costs went up a little bit. Actually some
21 things went down, probably energy, I think. But food
22 prices probably went up a little.

23 So there's a -- a component or a bucket
24 called medical services. So if we look and see what
25 medical services have grown over the last 20 years,

1 that's about 1.65 percent, thereabouts, above
2 inflation.

3 Q. And in performing your calculations of
4 present value, did you just do one lump sum or did you
5 do a calculation for each year moving forward for the
6 life expectancy of Ms. Garcia?

7 A. My table breaks up each item, each year, into
8 the future. But then it summarizes it all at the end.

9 Q. Okay.

10 A. So you could look up in any year and say, if
11 there's \$100 of aspirin one year and what does that
12 cost 20 years from now and what's its value today, you
13 can break it all apart.

14 Q. And about how many years did you do a
15 calculation for?

16 A. Well, to life expectancy. So we have life
17 expectancy here for another -- from date of trial,
18 about 48 years.

19 Q. And you mentioned --

20 A. Forty-six years, actually, because this
21 report was written last year.

22 Q. And you mentioned that you did those
23 calculations, you put them in a table. Is that
24 Table 13? 13A?

25 A. That is 13 -- Table 13A. Yes.

1 Q. Okay. And you said that you summarized them.
2 Is that the summary of all those years contained on
3 page 25 of Table 13A?

4 A. Yes. The last page is the summary page of
5 all the components; and in this case, there actually
6 weren't any nonmedical services.

7 MR. ROBERTS: Your Honor, permission to show
8 just the summary page of the table to the jury.

9 THE COURT: Any objection?

10 MR. TINDALL: No objection, Your Honor.

11 MR. MAZZEO: No objection.

12 THE COURT: You want the ELMO?

13 MR. ROBERTS: Yes. Thank you. Okay. That
14 would be easiest. Yes, thank you.

15 BY MR. ROBERTS:

16 Q. There we go. We'll move this out of the way.
17 And a little light.

18 Okay. I have got the summary numbers
19 displayed from your Table 13A, Dr. Smith.

20 A. Right.

21 Q. Could you run through these with the jury.
22 And I take it we're looking in the last column to the
23 right under age 84.

24 A. Sure. The -- the amounts here -- sometimes
25 this is interactive, so -- okay, so -- oops. So

1 that --

2 Q. You should be able to circle. If you tap the
3 screen, it goes away.

4 A. Maybe I'll just -- oops. Okay. Oops. Okay.
5 I'm tapping.

6 THE COURT: Use the bottom right corner.
7 Just push in the bottom right corner, it should erase
8 it.

9 THE WITNESS: Well, this first number we see
10 of 1,986,850, that is the present value of all the
11 medical services.

12 The second number you see -- I won't try and
13 touch the screen again -- of 78,126, that is the value
14 of all the medical commodities. I do have a list, and
15 I can give you some of the details, if you want.

16 The third item you see is 91,739. That's the
17 value of all the nonmedical services. People who don't
18 have doctor -- M.D. degrees to do things. I'm sure
19 Dr. Oliveri went into these in detail.

20 And adding all that up -- and you will see
21 age 84 at the top. And she actually turns 83-point
22 something. She turned 84 that year, in 2063. Adding
23 those three things up is \$2,166,715.

24 There's another number on here, but it's for
25 a -- an item I understand is not being considered. And

1 so I did put that in if the -- somebody was asked to
2 consider it, but I'm told we're not going to be
3 considering that \$593,000 item.

4 Q. And the 593,462 is the present value of the
5 spinal cord stimulator item?

6 A. Yes. So it -- without looking at that, we're
7 at \$2,166,715.

8 Q. Okay. So -- I'm blocking you here. Let the
9 jury see. I shouldn't have done that.

10 So just so the jury understands the scope of
11 your economic analysis, are you offering any opinion as
12 to whether or not these medical items are necessary for
13 Ms. Garcia?

14 A. No, I really would not know.

15 Q. Okay. So you're just calculating the present
16 value of the items recommended by Dr. Oliveri; is that
17 correct?

18 A. Correct.

19 Q. Okay. Let's move on to "Household Services."
20 Could you explain to the jury the -- the scope of your
21 assignment in connection with the household services
22 item?

23 A. Sure. So the assignment with household
24 services involved a little more economics. With the
25 life-care plan of Dr. Oliveri, it's like, here's the

1 plan. Well, the government says what medical services
2 grow at; I don't determine that. The government says
3 what medical commodities grow at; I don't determine
4 that. The government says what nonmedical commodities
5 grow at; I don't determine that. And we know that for
6 the last 20 years you could earn about one and a half
7 percent above inflation on a safe government security.
8 I didn't determine that.

9 Those are all numbers in the spreadsheet. So
10 I had, actually, very little to do on the issue of
11 determining the present value of the life-care plan.

12 For services, the standard process in
13 economics is, and this is in the economic textbooks,
14 what was the person doing in terms of housekeeping? So
15 the primary activities are: Cleaning, cooking, and
16 household, you know, laundry care, and all that kind of
17 stuff. So how many hours a day was being spent -- you
18 actually have some tables that show that on average.
19 You interview the person. How many hours a day were
20 you spending -- actually Ms. Garcia said she was
21 spending about 24 hours a week, which is fairly
22 consistent with the standard tables.

23 And the purpose of the interview is to say,
24 well, in the time you used to spend, then, what -- what
25 percent can you now do? So what happens when someone

1 is injured is two things can happen. Some things can't
2 be done at all. If it's a very bad leg or back injury,
3 you can't get up and change a light bulb or, if you're
4 a male, clean the gutters of your house. There's some
5 things you can't do. And other things simply take
6 longer because of you're working slower or it's more
7 pain or, you know, you don't want to stress your body.

8 So there's a -- so the question is, is in
9 the --

10 Q. And, Dr. Smith, just so the jury understands
11 the context of what you're about to discuss with
12 them -- and I apologize for interrupting, sir.

13 A. No, go right ahead.

14 Q. Could you tell us, are you going to give an
15 opinion as to what the actual loss of household
16 services is for Ms. Garcia, or are you going to provide
17 a framework from which the jury can do their own
18 calculation based on the evidence they're going to hear
19 in the trial?

20 A. I'm going to give them what I call the tool,
21 the aid, the guide, the framework, the method. I'm
22 going to give --

23 MR. TINDALL: May we approach, Your Honor?

24 THE WITNESS: I'm going to give them an
25 answer.

1 THE COURT: Hold on. Come on up.

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

4 THE COURT: We're going to have to take a
5 break, folks, so we can put some -- have a little
6 argument outside your presence.

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

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

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

24 I'm guessing 15 minutes. But it's a guess.

25 (The following proceedings were held

1 outside the presence of the jury.)

2 THE COURT: Okay. We're outside the presence
3 of the jury.

4 Should we excuse Dr. Smith for our argument
5 or no?

6 MR. MAZZEO: Yes, Judge.

7 MR. ROBERTS: Well, Your Honor, since the
8 objection was made before Dr. Smith laid out his
9 analysis, I think it might be helpful to have
10 Dr. Smith, outside the presence of the jury, briefly
11 say his methodology and how he's going to present it to
12 the jury so that we're not arguing about what he might
13 do. But Dr. Smith can tell you what he is going to do,
14 and then he can leave, and we'll argue about it.

15 THE COURT: Okay.

16 MR. MAZZEO: Judge, I'm not sure we need
17 that. We already have sworn testimony from the doctor
18 today, a minute ago, that he's -- he's not going to
19 actually calculate the losses for household services --

20 THE WITNESS: That's not true.

21 MR. MAZZEO: -- he's going to present a
22 framework, tool, aid for the jury.

23 THE WITNESS: Both.

24 MR. MAZZEO: So I would like this argument
25 outside the presence with Dr. Smith outside of the

1 courtroom.

2 THE COURT: Sorry. Sit down, please.

3 THE WITNESS: Thank you, Your Honor.

4 THE COURT: You're bringing up Hallmark. He
5 wants to talk about methodology, I'm going to let him
6 talk about methodology.

7 BY MR. ROBERTS::

8 Q. All right. Dr. Smith, could you explain to
9 the Court your methodology, the economic calculations
10 that you do and which part of the calculation you leave
11 to the jury?

12 A. Sure.

13 Q. We're talking, first, about loss of household
14 services?

15 A. Yes.

16 Q. I know this methodology is similar when you
17 talked about loss of value of life.

18 A. Can be.

19 Q. And I know that an objection was also raised
20 at the bench with regard to that, so --

21 A. Right.

22 Q. -- but let's just deal with loss of household
23 services first.

24 A. So the standard textbook methodology for
25 services is very simple. How many hours were spent per

1 week and what is that hourly rate worth? You multiply
2 those two together and you project out with a growth
3 rate and a discount rate.

4 How many hours a week the standard economic
5 textbooks and forensic economics say? Ask the
6 plaintiff what did they do? How many hours were they
7 spending? There's also tables to compare. So if
8 someone says I was spending 25 hours a week, and the
9 tables show a woman with three children normally spends
10 about 22, 23 hours, you know that that person's fairly
11 close to average. They may not be, but you can also
12 say they're close to average or they're above or below
13 average.

14 So the methodology is take what the plaintiff
15 said; in this case she said 24 hours a week. Take what
16 she says what she can't do anymore, that she at the
17 time of the initial interview said she was about
18 80 percent disabled, in other words, she only do about
19 one fifth of what she used to do. Now, she can do more
20 because of some additional operations because the
21 initial interview was a couple of years ago, so ...

22 Q. So let's talk about --

23 A. So I took 80 percent loss, and I give that to
24 the jury and also tell the jury, using seventh grade
25 math --

1 Q. Hold on. Hold on.

2 A. Okay.

3 Q. What calculations did you do to come up with
4 an example for the jury as to what the number would be
5 for loss of household services if they found that she
6 used to do -- what did you say? 24 hours a week?

7 A. She used to do 24 hours a week, she said.
8 It's not an example. It's based on her actual
9 testimony at the time of the interview.

10 Q. Okay.

11 A. She said 24 hours a week. We know the hourly
12 rate, which was around \$19 an hour at the time she was
13 first injured, and we multiply that out. The tables
14 tell us that when her two children would leave the
15 household, the numbers fall to about 16 hours a week.
16 And when she turns 67 and would no longer be working
17 full-time, the numbers go up to about 18 hours a week.

18 So this is straight out of the textbook to
19 use that progression of numbers, to use a market wage,
20 which is what I did, to grow it and to discount it. I
21 don't know of any economist who has done anything
22 different. Some economists use a minimum wage. That's
23 a very conservative approach. I use a market wage.
24 The jury can decide whether they want to use minimum
25 wage or a market wage, but once you give a number to

1 the jury --

2 Q. Did the defense economist do something
3 similar to what you did?

4 A. Very similar. Came up with a slightly lower
5 number, not using minimum wage, but not using market.
6 He used something in between.

7 Q. But did he do the same thing you did with
8 regard to --

9 A. He looked up numbers in the tables, yes, the
10 standard tables on hours.

11 Q. How did he -- he just used standard table on
12 hours --

13 A. Yes.

14 Q. -- or did he use Ms. Garcia's testimony?

15 A. Didn't memorize his report, but I believe he
16 used the tables. He referred to them as Tables 10A and
17 13A. I didn't cross-check every sentence he wrote, but
18 I believe those were the numbers of the tables from
19 which the American Time Use Survey, government research
20 shows, that a woman would spend so many hours a week in
21 those services. And he came up with, you know, because
22 his wage rate was different, he came up with a lower
23 number. But, essentially, he did the same thing.

24 Q. And did you do a calculation of the total
25 number to present to the jury?

1 A. Based on her statement of 80 percent, yes.
2 And my report says if a jury believes this is -- should
3 only be a 40 percent loss, you take half my numbers.
4 So I'm giving an opinion based on what she told me and
5 giving them the simple seventh-grade instruction that
6 if you think because of her operation she's now better
7 and can do -- and has lost only 40 percent of her
8 ability, instead of 80 percent, as she said two years
9 ago, and she said she has improved, if you think it's
10 only 40 percent, then take half my number. If you
11 think it's 30 percent loss, take three eighths of the
12 number. It's the math we learn in fifth grade, we're
13 pretty good at it in seventh grade, it's automatic by
14 freshman in high school, and most people can do it on a
15 hand calculator in about two seconds.

16 Q. So the percentage that they find over eight
17 and multiply it by your number?

18 A. Right. Right. It's not my percentage, it
19 was her number initially. I know it's a new number
20 today, you know, these days after the surgery. She, in
21 fact, told me what she believed it was now, and I can
22 discuss that if you wish. But if the jury thinks,
23 given the 80 number, that that 80 percent number they
24 have, that they want to use 30 percent, they would take
25 three eighths of my number.

1 In that sense, my report is a tool, an aid, a
2 guide because they're not stuck with 80. But I have
3 the number; I have an opinion based on what she
4 initially said, which I was deposed on.

5 MR. ROBERTS: Thank you, Dr. Smith.

6 THE COURT: Do you guys have any questions
7 for him based on what he said?

8 MR. TINDALL: No. I have no questions for
9 him.

10 MR. MAZZEO: All right. Yes, Your Honor. I
11 have -- I have a question or two.

12

13 VOIR DIRE EXAMINATION

14 BY MR. MAZZEO:

15 Q. Dr. Smith, in your calculation for loss of
16 household services, did you include also a category for
17 loss of home management services?

18 A. It's what she reported she did in the
19 household. It's called "household family management
20 services." It's working in the household. So when you
21 work in the household, you have to kind of plan your
22 day. I'll do the laundry now, I'll do the floor
23 tomorrow, I'll clean the kids' room Thursday. That's
24 the management as you're -- as you're thinking, but
25 you're not managing somebody else; you're managing

1 yourself.

2 Q. And how did you determine that Ms. Garcia
3 was -- fell within the statistically average woman for
4 the -- where the woman -- where the statistically
5 average woman performs about 24 hours of household
6 services per week?

7 A. I said she performed 24 hours, and that is
8 similar to what a woman with several children in the
9 household would do, which is in that dimension of
10 around 20 hours a week. I didn't memorize that number,
11 but when the children are out of the household, it
12 falls down to 16 hours a week.

13 Q. Doctor, in what way did you take into
14 consideration, in your calculation for the loss of
15 household services, that other family members actually
16 act as a companion to other family members?

17 A. I didn't analyze any issue of companionship.

18 Q. Okay. And, but that's -- that issue of
19 companionship falls within your category of home
20 management services?

21 A. Not -- not the housekeeping that I did.
22 There are times when people are injured, and they're in
23 hospitals, and they can't spend time with family, and
24 they don't spend the time that they used to. But I
25 didn't analyze -- it wasn't something I was asked to

1 look at in this case at all. It's a completely
2 different type of service that I did not look at.

3 Q. And you didn't take into consideration the --
4 of those 24 hours, how many of those 24 hours of
5 household services might have been performed by other
6 family members, including Ms. Garcia's children?

7 A. Well, she did 24, but she's not the only
8 worker. In my household we have my wife doing
9 services, and I do services, but what I do is
10 independent of what my wife does. So what other people
11 did, separate and apart from what Ms. Garcia did, is
12 not relevant to the fact that Ms. Garcia could no
13 longer do at that time 80 percent, now she says
14 30 percent of what she used to do.

15 MR. MAZZEO: I have no more questions for
16 this witness.

17 THE COURT: Okay. Thank you, Doctor.

18 Can you -- you want -- you guys might want to
19 move that easel so he can get down.

20 MR. ROBERTS: Yeah, so we don't trip up
21 anyone.

22 THE WITNESS: Did you want me to leave the
23 courtroom, Your Honor?

24 THE COURT: Yeah, let's excuse you for a
25 minute, let these guys argue.

1 THE WITNESS: Sure.

2 THE COURT: Okay. Witness has now been
3 excused.

4 MR. TINDALL: So this will be very brief,
5 Your Honor, just two-points. Number 1, Mr. Smith has
6 testified that people with a fifth-grade education or a
7 seventh-grade education can do what he's about to do.
8 Most people can do it on a handheld calculator in about
9 two seconds.

10 So he doesn't meet the Hallmark standard of
11 being helpful to the jury. If the Court determines
12 that that's kind of hyperbole and that what -- it isn't
13 so much about the math skills involved or the time it
14 takes and that what he's really doing is putting this
15 process out there as an overarching process, then what
16 is not allowed to happen is what he suggested would
17 happen, which is, "I'm going to say my number, but if
18 the jury doesn't believe me, then the jury can take my
19 framework and, like, say, oh, it was only 30 percent."

20 That's doing nothing but inviting the jury to
21 speculate. So my position is, if he's allowed to
22 testify to this, which I say he should not be, all he
23 can do is give his number. There cannot be any
24 testimony from him, "Hey, if the jury don't believe me,
25 they can figure it out themselves." That cannot

1 happen. It's his number and that's it, and he doesn't
2 get to invite them to apply any math of their own.
3 Submitted.

4 MS. ESTANISLAO: Your Honor, I'm going to --
5 the facts are not particularized. He takes a number,
6 the 24 hours or whatever that Ms. Garcia gives him, he
7 gets a wage. Again, that's not particularized to
8 Ms. Garcia. That's whatever his -- you know, from
9 other stuff that's -- he doesn't take into account what
10 she has -- how much she earns. It's a statistical
11 average. He says what other people may earn, minimum
12 wage or whatnot, it is market wage.

13 It is not particularized to how she would
14 value her time or her household services. And it's not
15 particularized to her. The only thing he takes is 24
16 hours that's particularized to the case. Everything
17 else is not -- is just -- it's not from here. It's not
18 from here. It doesn't take into account Ms. Garcia's
19 abilities or anything like that or what she would
20 herself value, you know, for the household services she
21 provides. It's not particularized. That's average.

22 That has been criticized because what one
23 person values for household is not the same as
24 someone -- how someone else would. It's the same thing
25 with loss of enjoyment of life; he's taking an average.

1 And all he's providing is -- he's not even -- is the
2 calculation. He's just providing the math. It is like
3 providing them with a textbook; here, calculate --
4 here's -- here's what an average person does. She says
5 24 hours. Calculate it yourself.

6 I mean, it's not particularized. He's not
7 doing -- he cannot assist -- an expert cannot assist
8 the jury if it's not particularized to the case. And I
9 think that's what Hallmark stands for.

10 And, like I said, Banks was decided well
11 before Hallmark, and the Supreme Court has been a lot
12 more stringent with expert testimony.

13 MR. ROBERTS: The reason -- oh, okay.

14 MR. MAZZEO: Hold on.

15 MR. ROBERTS: Sorry. I thought you were
16 done. I apologize, Your Honor.

17 MS. ESTANISLAO: And then I'm also concerned.
18 He was -- he did indicate in his report that he was
19 told to calculate the loss of housekeeping and
20 household management services.

21 Like I said, and we -- in my brief, I had
22 quoted that he defined household management services
23 that included apparently companionship, companionship
24 she provided, which I don't know how that's household
25 services. I mean, it's double -- and he says, oh, I

1 didn't calculate it. But that's how he defined it in
2 his report, that it is -- you know, and that is a
3 component of her pain and suffering or somebody else's
4 loss of consortium, her family members' loss of
5 consortium, which they have not made in this case. So,
6 you know, I'm concerned that it's included, and he's
7 double calculating.

8 THE COURT: He just -- he explained when he
9 testified just now that it wasn't that --

10 MS. ESTANISLAO: That's what he says, but in
11 his report, he says that's how he defined loss of
12 household services, that it included that.

13 THE COURT: Okay. Did you want to say
14 anything?

15 MR. ROBERTS: Yes. What he said is
16 Ms. Garcia has difficulty in performing housekeeping
17 and household management services.

18 I don't know that I have seen any calculation
19 where he added household management services to the
20 number that he calculated. If he did, I missed it.

21 The -- the reason he uses a wage is he's not
22 trying to hypothetically value how much money
23 Ms. Garcia's services she used to perform were worth in
24 the past. He is saying if she can't do it, if she
25 can't do what she used to do, then what would be the

1 cost of her hiring someone to do what she used to do.
2 And then he uses a wage for -- for a maid because the
3 maid is doing household services.

4 So this is a replacement cost. What would
5 Ms. Garcia have to spend to hire someone to do what she
6 used to be able to do. That's his methodology. That's
7 why he uses his wage rate, and -- and that's a valid
8 and accepted peer-reviewed methodology for calculating
9 a loss of household services.

10 The -- with regard to the helpfulness to the
11 jury in the lay opinion, I think there's a
12 misunderstanding of what he's leaving to the jury. His
13 calculations can't be done by a fifth grader on a
14 calculator. They're -- they require economic
15 expertise. It is the conversion of his total number to
16 a different number, if the jury believes the evidence
17 shows something less than an 80 percent loss, that he
18 says a lay juror can easily do. And that's why it's
19 appropriate to leave that part to the jury.

20 Expert testimony comes in if it's helpful to
21 the jury in reaching the decisions they're going to
22 need to reach. He doesn't need to tell them exactly
23 what the number is and what Ms. Garcia's actual loss is
24 in order for him to be helpful to the jury, and these
25 opinions are helpful in that manner.

1 MR. TINDALL: Nothing, Your Honor.

2 MS. ESTANISLAO: Can I add one more thing,
3 Your Honor?

4 THE COURT: Sure.

5 MS. ESTANISLAO: Okay. He said he's using a
6 market wage, what someone -- what an average person
7 would pay to replace what they can do at the home. But
8 again, there's no indicating that Ms. Garcia is an
9 average person. She's got kids in the house who could
10 have done it. Now, apparently she -- I believe in her
11 last testimony, deposition testimony, she has a
12 boyfriend. It doesn't -- there's no indication she's
13 an average person, but they are still using an average
14 figure. I mean, there's no tying in her specific case
15 that's what she would have paid.

16 She also moved from an apartment to a house.
17 I don't know where she lives now, but, again, that's --
18 you won't pay the same amount. You would not -- a
19 person living in an apartment may not choose to pay the
20 same amount as someone living in a house. It's too --
21 it's not particularized.

22 Yes, Banks permitted it, but in Banks, the
23 guy was paralyzed. I mean, he can't do anything,
24 totally paralyzed. So, I mean, that's a totally
25 different thing.

1 In a situation like this, I mean, like I
2 said, there's no -- nothing particularized to
3 Ms. Garcia saying that's how much she would pay. No
4 specific whatsoever. It is an average statistic based
5 on an average person without even regards to age other
6 than the hourly -- how many hours she works at home.

7 THE COURT: Okay. I think most of what you
8 guys have problems with I think you can address on
9 cross. Under Hallmark, a witness has to satisfy three
10 requirements: Qualification requirement, which I think
11 nobody had a problem with him being qualified as an
12 economist -- forensic economist, so I think that's
13 already admitted to; specialized knowledge must assist
14 the trier of fact to understand the evidence or
15 determine a fact in issue. This is the assistance
16 requirement.

17 I understand your argument that he's not
18 providing assistance because he's telling them
19 something that a fifth grader can do, that it doesn't
20 have specific -- there's no specificity. I think there
21 is. I think he's testified that the numbers that he
22 does are economists' numbers. He's going to come up
23 with a number that a fifth grader couldn't come up
24 with. He's going to come up with a methodology that
25 the jury can use to change that number, if they so

1 desire, that a fifth grader wouldn't be able to come up
2 with, but they're going to be able to use his
3 methodology to modify the number, if they so desire.

4 So I think it is -- I think it does meet the
5 assistance requirement. And his testimony has to be
6 limited to matters within his specialized knowledge,
7 which I think they will be.

8 Qualifications, we don't have to worry about.
9 As far as the -- Hallmark talks about reliable
10 methodology. District court should consider whether
11 the opinions within a recognized field of expertise --
12 economics is -- is it testable and has been tested.
13 He's talking about the numbers and the calculations
14 that he's doing are based on textbooks and
15 peer-reviewed economic literature.

16 The third requirement is published and
17 subjected to peer review, generally accepted in the
18 scientific community, and based on particularized facts
19 rather than assumptions.

20 Now, I understand the argument with regard to
21 the lack of particularized facts, and the argument is
22 all he's using that is specific to Ms. Garcia is the 24
23 hours that she told him. I don't know what other
24 particularized facts there are, other than the fact
25 that based on what he's testified to, I think he is

1 calculating this based not only on 24 hours but on a
2 woman -- employed woman or an unemployed woman. I
3 don't remember what he testified to as far as that is
4 concerned. And if we look at the average or
5 statistical average of what it's going to cost to hire
6 somebody to do the things that she otherwise would have
7 done, I think that's particularized to her and the
8 facts of this case. So I think it meets that
9 requirement.

10 MR. MAZZEO: And, Your Honor, if I may, I
11 would disagree with that. I think what --

12 THE COURT: I know. You don't get a chance.
13 Sorry.

14 MR. MAZZEO: Fair enough.

15 MR. TINDALL: Does he then get to -- the
16 second part of my argument, does he get to tell the
17 jury, hey, do what you want to do?

18 THE COURT: Yeah. Yeah, because I think it's
19 helpful.

20 MR. TINDALL: I would submit that that can't
21 happen simply because it's not in his report.

22 THE COURT: Well, if it's not in his report,
23 then you might be able to keep it out.

24 MR. TINDALL: It's not in his report, so
25 we're asking it be kept out for that reason alone.

1 THE COURT: Is it -- he didn't say anything
2 about the methodology in his report, guys? Come on.

3 MS. ESTANISLAO: No, he said --

4 MR. TINDALL: Talking about telling the
5 jury --

6 MS. ESTANISLAO: He only did two
7 calculations. He came up with one figure. That's it.
8 I mean, he didn't come up with a charge -- you know,
9 move up and down this charge or anything like that,
10 which is what he's now planning to testify to.

11 MR. SMITH: He explains the entire
12 methodology, including detailed tables on how he
13 arrives at the numbers, of how he calculates the
14 numbers and what they're based on. It's all detailed
15 and in his report exactly how he does it.

16 MR. ROBERTS: Page 9 of his original report
17 dated July 11th, 2013. "A trier of fact may weigh
18 other factors to determine if these estimated losses
19 for Emilia Garcia should be adjusted because of special
20 qualities or circumstances that economists do not as
21 yet have a methodology for analysis."

22 That sounds like that's exactly -- oh, and
23 then he says, "these estimates are provided as an aid,
24 tool, and guide for the trier of fact."

25 MR. TINDALL: Speculation.

1 THE COURT: I'm going to let him testify to
2 it, guys. Under Hallmark, "If the expert formed his
3 opinion based on the results of technique, experiment,
4 or calculation, district court should consider whether
5 the testimony will assist the trier of fact and
6 consider the technique or experiment or calculation,
7 whether it's controlled by known standards; the testing
8 conditions, if they're similar to the conditions at the
9 time of the incident; technique, experiment, or
10 calculation has a known error rate; and if it's
11 developed by a proper expert for purposes of the
12 present dispute."

13 I think, based on his testimony so far, he
14 meets the -- he meets the requirements under that as
15 well. I think he meets it. I think he meets Hallmark.
16 I understand you guys don't want him in; for some
17 reason, this is a big deal. But seems to me that he's
18 going to testify to the same opinions that were offered
19 and allowed in Banks. He's -- seems that he's offered
20 a valid foundation for his testimony. You can cross
21 him on it, if you want.

22 MS. ESTANISLAO: Are you allowing him to
23 testify with a whole new chart that he has never
24 produced, if he's never produced this chart, whatever,
25 he's going to go up and down?

1 THE COURT: What are you talking about?

2 MS. ESTANISLAO: Are you providing a
3 calculation with, he said, between 0 to 100 percent?

4 MR. ROBERTS: No, he's going to provide the
5 calculation provided in his report, and he's going to
6 tell the jury how to change it if they -- based upon
7 their findings.

8 THE COURT: He's going to tell them how he
9 found it, how he got to it, and how it can be modified.

10 MS. ESTANISLAO: Is he going to provide other
11 figures that he's never provided in his report?

12 THE COURT: He offers an opinion that's not
13 in his report, and it's -- if you think you need to
14 object, go ahead and object. At this point, I'm going
15 to allow him.

16 MR. ROBERTS: Thank you, Your Honor.

17 THE COURT: You got 40 more minutes before
18 lunch. Let's bring the jury back.

19 THE MARSHAL: Bring Mr. Smith in first?
20 Bring the witness first?

21 THE COURT: That's fine. You can bring him
22 back.

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

25 THE MARSHAL: Jury is present, Judge.

1 THE COURT: Thank you. Go ahead and be
2 seated, folks. Back on the record, Case No. A637772.
3 Do the parties stipulate to the presence of the jury?

4 MR. ROBERTS: Yes, Your Honor.

5 MR. MAZZEO: Yes, Your Honor.

6 THE COURT: All right. Go ahead,
7 Mr. Roberts.

8

9 REDIRECT EXAMINATION (Continued)

10 BY MR. ROBERTS:

11 Q. Thank you. And, Dr. Smith, my apologies.
12 I've forgotten exactly what my last question was, so
13 let's --

14 THE COURT: I don't know if there was an
15 objection on the record before we broke either, but if
16 there was an objection, the objection has been
17 overruled.

18 MR. ROBERTS: Thank you, Your Honor.

19 BY MR. ROBERTS:

20 Q. Let's -- let's just go back and have you tell
21 the jury what you did to calculate a number for loss of
22 household services for Ms. Garcia. So start out, what
23 assumptions did you make in your calculation?

24 A. Okay. Well, I'm just noticing we're getting
25 a whole group of school children in the --

1 THE COURT: We're getting a whole group of
2 kids, and they're going to be excited to hear all this
3 math. We're going to learn a lot of math, guys.

4 THE WITNESS: Well --

5 MR. ROBERTS: Is this your biggest audience
6 ever now in court?

7 THE WITNESS: So I calculate -- I --

8 MR. ROBERTS: Should we wait, Your Honor?

9 THE WITNESS: Your Honor, do you want to say
10 a sentence or two to them?

11 THE COURT: Sure. Come on in and get seated,
12 guys. You're fifth-graders from what school? All
13 right. Welcome. We're in the middle of a trial. We
14 have got a witness on the stand who is an economist.
15 He's going to be testifying about some numbers. Listen
16 carefully so you can go back and do the math in school.
17 Test next Monday.

18 Thanks for being here. Go ahead.

19 THE WITNESS: All right. So Ms. Garcia said
20 she couldn't do as much housekeeping as she did before.
21 She said she used to do 24 hours a week. And at the
22 time I talked to her, two years ago, she said she had
23 lost 80 percent of the ability to do services.

24 BY MR. ROBERTS:

25 Q. Okay. Now, did you do anything to confirm

1 that the 24-hours-a-week estimate Ms. Garcia gave you
2 was within the reasonable, customary range?

3 A. It is within the range of what the tables
4 say, which I didn't memorize them, but it's around 20,
5 21 hours, 23 hours. It's going to be three-point
6 something per day.

7 Q. Is the table the same for every person, or
8 does it vary by factors?

9 A. It is -- it is for a woman who has two --
10 children, who has children in the household. Once the
11 children leave, the number falls to about 16 hours a
12 week. And then once the person stops working, at age
13 67, I assume, then it goes up to about 18 hours a week.
14 So I took that progression into account.

15 Q. So you took the number Ms. Garcia gave you --

16 A. Yes.

17 Q. -- and then you reduced it as the children
18 left the house and she got older?

19 A. To -- to 16 hours, yes. And then I increased
20 it to 18 hours, assuming she would no longer be working
21 at age 67. So that's the number of hours. And the
22 textbooks in economics tell you, ask the person what
23 they were doing and how much time they spent, so I did
24 that.

25 Q. What did you use to calculate the -- the cost

1 of a lost hour?

2 A. So the two real components here is how much
3 time was spent and how many hours and -- and what's
4 that worth per hour.

5 So if you look at market wages for people who
6 do laundry work and household cooking and cleaning --
7 and there's a whole list of services in my report,
8 about nine different services -- that comes out to
9 about \$19 an hour.

10 Q. Is that the cost -- if Ms. Garcia wanted to
11 hire someone to perform the services she could no
12 longer perform, would that be a -- a cost of doing
13 that?

14 A. I think that's a -- that's a conservative
15 estimate, yes.

16 Q. Okay.

17 A. Now, let me clear that up. It's a cost of
18 someone coming in who is insured, bonded, trained.
19 You're not hiring the neighbor's, you know, 16-year-old
20 kid. It's a person who's responsible, who is -- has
21 experience, who has insurance, bonding. Because if
22 they're injured in the -- in the home, you know,
23 they're -- they have to be bonded. It is -- and
24 there's Social Security paid. So it's really the cost
25 of -- of someone coming into your home, not just

1 anybody off the street, but from a responsible place.

2 And -- and \$19 an hour I think is
3 conservative based on the surveys that we have done.
4 So it's simple math.

5 It's fifth grade? Is that what they said,
6 Your Honor? It's fifth graders.

7 It's fifth grade math. It's 24 hours a week
8 times \$19 an hour. I know that's a good word problem
9 in fifth grade. And then that's what it is each week.
10 You multiply that by 52. And we're still at fifth
11 grade math.

12 And then what we do is we grow it by
13 1 percent, so now we are at seventh grade math. And we
14 grow that each year until we get -- drop it down to 16
15 hours, which is when her two children -- which is when
16 her youngest child would turn 22.

17 And then we keep growing it at 1 percent
18 until age 67, where we bump it up to 18 hours when she
19 would presumably no longer be working, because women
20 who don't work, work a few more hours in the household
21 than women who do. And all of that is then discounted
22 and reduced to present value. So now we're in freshman
23 year or sophomore year, high school math. Not to say
24 that you don't have to have a PhD to be credible about
25 all this, but you only need tenth grade math to do it

1 all.

2 Q. And did you come up with a total present
3 value for a loss of household services over
4 Ms. Garcia's lifetime, assuming the assumptions that
5 you have already given to the jury?

6 A. Yes. If you -- if you do the math, you put
7 it into an Excel spreadsheet, it just comes out to
8 \$879,332.

9 Q. 879,332?

10 A. Yes. That's assuming an 80 percent loss. So
11 this is also the framework that you spoke about
12 earlier.

13 Q. Okay. And if you will give me just a second.
14 Okay. So did I write that down correctly, Doctor?

15 A. Yes.

16 Q. Okay. Before we move on to the framework,
17 the methodology that you used to make this calculation,
18 is that something that other economists use similar
19 methodologies?

20 A. It's -- this is straight out of the
21 textbooks. You find out how many hours was being done,
22 you find -- you find out a proper rate for the service,
23 whether it's housekeeping or, you know, different --
24 different kinds of people do different things. So
25 this -- one of the things she did was housekeeping.

1 You -- you find out what has been the reduced ability
2 to do it.

3 So let's say we had a real estate agent, she
4 was, you know, selling homes and she could only show
5 five homes a day, and she used to show ten homes a day.
6 We would expect her income to fall in half,
7 approximately 50 percent, because she says that,
8 because of the injury to my leg, I've got about
9 50 percent of my ability to walk and show homes as I
10 used to.

11 So it's a standard economic methodology.
12 This is one of the -- one of the areas where there's
13 not much wiggle room.

14 Q. And, in fact, you have already mentioned to
15 the jury that the defense hired an economist in this
16 case. Dr. Ireland?

17 A. Right.

18 Q. And have you read his reports?

19 A. I did. Yes.

20 Q. And does he also provide a calculation for
21 his estimate of loss of household services?

22 A. He does. He uses a lower hourly rate, but I
23 think everything else is more or less the same.

24 Q. Do you recall approximately what his
25 calculation was?

1 A. His calculation was 519,000.

2 Q. Okay.

3 A. Because he uses a -- he doesn't use the
4 market rate; he uses the wage rate. So I can explain
5 the difference.

6 Q. Sure. So how did he come up with a different
7 number than you?

8 A. Okay. So let's assume there's a law firm in
9 town, and they have a paralegal that makes \$25 an hour.

10 MR. TINDALL: Objection. Exceeds the scope
11 of his report.

12 THE WITNESS: Just an example.

13 THE COURT: Come on up for a minute.

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

16 THE COURT: Objection sustained.

17 MR. ROBERTS: Thank you, Your Honor. I'll
18 move on.

19 BY MR. ROBERTS:

20 Q. So let's move on to the framework now.

21 A. Okay.

22 Q. Explain how you believe that the jury can use
23 your calculation of 879,332 as a tool to determine loss
24 of household services based on the other evidence they
25 may hear.

1 A. So that's the number in an 80 percent loss.

2 Q. That was in 2013, did you say?

3 A. It was 2015. 2015.

4 Q. Okay.

5 A. It was last year. We had about a year

6 inflation to bring it to this year. Maybe just a

7 couple of percent.

8 Q. The foundation, the numbers?

9 A. That's at 80 percent, what she told us two

10 years ago.

11 Q. Two years ago. Thank you.

12 A. And, now, she has had a couple operations,

13 and I believe the last one was what's called a

14 rhizotomy, but she's had some improvement in her pain.

15 And if she comes in -- and I did talk to her, but if

16 she comes in and says, I am no longer as bad as

17 80 percent, I'm only at a 30 percent loss, if she says

18 that, then you would take three eighths of the

19 80 percent. And that then would be \$263,800.

20 Q. So you would multiply that by three eighths?

21 A. Yes.

22 Q. So basically 30 over 80, so 30 --

23 A. Yes.

24 Q. So whatever percentage they found, you would

25 put over 80, do the calculation, and that's your

1 number?

2 A. Right. So if she says 30, then it's 30 over
3 80. If the trier of fact -- may say, well, she, yeah,
4 said 30, but, well, we're -- we're thinking more like
5 25 or we're thinking more like 35 or whatever they --
6 whatever they think is the right number, they could put
7 something else other than 30 in there even though she
8 says 30.

9 So my 80 was based on what she said a couple
10 years ago. 30 is my understanding of what she may say
11 now. But any number can be put in there for the fact
12 finder to say, this is what we actually think is the
13 right number.

14 Q. Thank you, Dr. Smith. Let's talk about
15 the --

16 A. And I want to emphasize I used a market wage,
17 not a -- not the hourly rate paid to the housekeeper,
18 but the market wage of getting the housekeeper to the
19 house. And those are two very different things. And I
20 can explain, if you want.

21 Q. Sure. Can you explain that to us, please.
22 And -- and why -- why you use that.

23 A. Well, if you have a -- so people hire home
24 companions, for example, elderly people or licensed
25 practical nurses or whatever. So the service who sends

1 that person to your house may pay for the -- actually
2 the home companion, it's around \$11 an hour. But they
3 charge you about -- depending on what city or whatever,
4 anywhere from 50 to 100 percent more than that, because
5 they're paying that person \$11 an hour, but they have
6 to -- that person has to be bonded, trained, vetted,
7 insured, hired, and they have to have some sort of a
8 retirement plan for them. Maybe they cover them with
9 health, their Social Security.

10 There's -- the agency itself has to make a
11 penny or two profit. So any service firm will charge
12 you more for the service than they pay the employee to
13 provide that service, whether they're mowing your lawn,
14 whether they're sending you a housekeeper, whether
15 you're hiring a paralegal and you're a client of a law
16 firm.

17 Paralegal does an hour of research. The law
18 firm has to bill not what they pay the paralegal for
19 the hour, but there's heat, rent, electric,
20 supervision, computer costs. So the service has a wage
21 cost and a nonwage cost. Some economists use just the
22 wage cost. That's not the market cost. The market
23 cost is wage plus nonwage. I use both. That's the
24 market wage.

25 Some economists use only the wage cost, and

1 you would come up with a lower number if you don't
2 include the full market cost but only the wage and/or
3 the nonwage cost. And some economists even go down to
4 minimum wage, which, you know, it's not my belief you
5 are going to get a competent housekeeper in for minimum
6 wage, but some people say, well, we like to give a very
7 conservative estimate. So some people do that too.
8 That's very rare.

9 Q. And that's the methodology you used in coming
10 up with the \$19 per hour?

11 A. By using the market wage. By looking at the
12 wage -- I'm not using the market cost. I'm looking at
13 the wage and the nonwage component.

14 Q. Okay. Dr. Smith, let's now look at the third
15 area in which you provided economic analysis.

16 A. Yes.

17 Q. The reduction in the value of the quality of
18 life. Is this that how you put it?

19 A. Yes.

20 Q. All right. Could you explain to the jury
21 just a little bit of background regarding how you, as
22 an economist, go about calculating something like the
23 value of life.

24 A. Sure. I will take the four-hour version and
25 try to narrow it down to the four-minute version.

1 So there's a 60-year literature that
2 economists have been studying household services, we
3 have been studying wages, we have been studying the
4 value of a statistical life. We know life
5 expectancies, for example, that's statistics on how
6 long people live. But people say, well, the value of
7 life itself, how do you do that? So we have been doing
8 it for 60 years. It is probably one of the very, very
9 well-researched area. It's done all over the country.
10 It's published by authors of -- at famous economists,
11 in top-rank universities all over the country. And
12 this broad field called "Value of Statistical Life" is
13 well-accepted in the field of economics.

14 They first began doing it by looking at a
15 very simple concept, because it's all called
16 willingness to pay.

17 Q. Willingness to pay?

18 A. Sorry. Yeah.

19 Firstly, by looking at, if you buy a carbon
20 monoxide detector, and it will reduce your risk of
21 death somewhat. Not each one, but if you buy 100,000
22 of them. Let's say you do buy 100,000 of them and
23 let's say one life is saved, and you spend 40 bucks a
24 piece, you have now spent \$4 million, you've installed
25 100,000 carbon monoxide detectors, and you saved some

1 random life. Or you administer 100,000 flu shots, at
2 \$40 a shot, and you save one random life.

3 We can look at what we pay. With a high
4 degree of precision, we know the life-saving statistics
5 of spending money on life saving. Dozens of studies in
6 that area, and those studies concluded, back in the
7 middle '80s, when I was first reviewing them, that you
8 could save a life at around \$2.8 million.

9 Q. So when you say you could save a life, do the
10 studies indicate how much people have been willing to
11 pay to save a life?

12 A. Well, you never save a life for sure.

13 Q. Right.

14 A. Because -- unless you are grabbing a kid from
15 running out into traffic. But when you buy a carbon
16 monoxide detector or when you get a flu shot and when
17 you spend money on reducing the risk of death, we know
18 how much is spent per life saved.

19 Every smoke detector will not save a life.
20 In fact, almost none of them will save a life. But if
21 on average 1 in 100,000 does or one flu shot in 100,000
22 does, 'cause most -- you know, if you put on a seat
23 belt, 90 -- most of us have never experienced the need
24 to have worn our seat belt, but it occasionally,
25 rarely, will help.

1 And we know the total amount of money spent
2 for a program, safety program, whether it's flu shots
3 or carbon monoxide detectors or seat belts, we know the
4 total price for each statistical life saved, and that
5 was the research done in the early 1980s. Later we
6 began to look at how much is paid to people who work in
7 risky professions? How much extra pay is for the
8 riskiness of death in that profession?

9 Large number of studies. It's a very fertile
10 area of research. And recently we begin reading in the
11 headlines, the EPA, Environmental Protection Agency,
12 the FAA, they are using standards of value of life now
13 in the 6, 7, \$8 million range, which means that if they
14 can institute a program, like making a car safer or
15 making an airplane safer, that will cost 6, 7,
16 \$8 million per life saved, they will adopt that
17 standard. They won't ask industry to pay more than
18 that, so they'll set the hurdle. They'll say, if you
19 can implement programs that will save lives up to 6, 7,
20 \$8 million a life, per life saved, then you should --
21 you should implement that safety program.

22 For example, we have airplanes that now have
23 signals when they fly close enough. Didn't have them
24 about ten years ago. They'll start beeping. It's
25 called a transponder. I think they cost about a half a

1 million bucks per airplane. There's thousands of
2 airplanes flying. The FAA mandated the use of
3 transponders because it can save lives at a cost saving
4 of less than \$7 million per life saved, their standard.

5 So this is -- this methodology has been
6 adopted by the industry, by government, it's grounded
7 in academics, it is without question fully accepted
8 universally in the field of economics. That's just the
9 academic side, step one. What's the value of a
10 statistical life?

11 It turns out that's in the -- that that is in
12 the 4 to \$6 million dimension, the value of a life. If
13 we look at what the value of a life is, separate and
14 apart from the value of a person's earnings. Because a
15 person not only has a value to what they produce, they
16 have a value to their being. So just like, you know,
17 an ox might plow a field or -- well, there's a value to
18 the -- to the productive component of a person, there's
19 a value to the being of a person. So ...

20 Q. And --

21 A. And the average productive component is
22 not -- is a part of the total value of life, because
23 when you save a life, you're also saving that person's
24 economic contribution.

25 Q. When you tell the jury that the value of the

1 life itself is 4 to 6 million --

2 A. That's net of the -- about -- about another
3 couple million for the -- not for the economic
4 components. So the -- what's called the whole value of
5 life is more in the 6 to \$8 million range.

6 If we subtract out the economic component,
7 the wage earning component, we're in the 4 to
8 \$6 million component for the -- for the net enjoyment
9 as opposed to the productive capacity of a human being.

10 So we take out what's called the human
11 capital, we're left with the value of being.

12 Q. Now, is that just your opinion or is --

13 A. No, that -- that is also in the peer-reviewed
14 economic literature. The statistically average human
15 capital of a person is close to a third of the total
16 value of a statistically average value.

17 So if we look at the nonhuman capital,
18 because human -- we are human beings and we are
19 human -- we do human doings. So if the total value of
20 everything is around 6 to 8 million, the value of our
21 beings, if we subtract out about a third of that to the
22 value of our doing, is in the 4 to \$6 million range.
23 And that's the starting point for calculating anybody's
24 loss of enjoyment of life when they have been injured.
25 If you've been killed, which is my first case, you lost

1 all of it.

2 But if someone has been injured and they lost
3 a portion of their ability to enjoy life, then they've
4 lost some percentage of that 4 -- I say \$4.5 million
5 value. And that's not pain and suffering; it's just
6 simply the reduction of what you used to be able to do.
7 You can't engage in the occupation you used to enjoy;
8 you can't play with the children the way you used to;
9 you can't go jogging or whatever it is that you like to
10 do. Some people have a injury that is not a painful
11 one, it's just that they can't do stuff like they used
12 to.

13 Q. Before you move on to that --

14 THE COURT: Hold up. Hold up.

15 Counsel, you need to start writing notes to
16 each other. Because you, obviously, can't whisper.

17 MR. STRASSBURG: Oh, sorry.

18 THE COURT: It's districting me; I'm sure
19 it's distracting the jury.

20 MR. STRASSBURG: I apologize.

21 THE COURT: Thank you.

22 BY MR. ROBERTS::

23 Q. So before you move on to explaining that,
24 Doctor, you gave the jury a 4 to \$6 million range, but
25 then you said the number you used was 4.5.

1 How did you come to use that number for your
2 calculations?

3 A. Well, there's dozens and dozens of results
4 published in the literature and they -- they average
5 too, I believe, well over 5 million. They are -- most
6 of them are in the 4 to \$6 million range. They average
7 well over 5 million -- I use 4 1/2 million to be
8 slightly conservative because I think we want a
9 conservative number here. And so the number I have
10 been using -- I didn't memorize -- every year because
11 of inflation it goes up a little bit in this report, I
12 believe I said the value of a statistical life was --
13 this is back a year and a half ago -- was 4.5 million.

14 Q. Okay. Continue --

15 A. So if somebody's lost half of their ability
16 to enjoy life because of they can't, you know, they
17 have -- they have a leg injury or whatever, and they
18 can't jog, they used to like jogging. They can't do
19 the occupation they used to do. They used to be a real
20 estate agent showing ten homes a day, now they are
21 making half the income.

22 It's not the financial loss, but they're
23 not -- or they were basketball -- I have done, you
24 know, pro ball players. They do other things, but they
25 are not with the team anymore. So, it's not the income

1 loss; it's the loss from the enjoyment you used to get
2 from your profession.

3 You used to be an over-the-road truck driver,
4 now you're stocking parts at an auto store. You used
5 to love driving; now you can't because you can't sit
6 for eight hours a day.

7 So it's not the economic loss; it's the loss
8 of enjoying what you used to do in your work. It's the
9 loss of the jogging or the hiking or the climbing or
10 the walking or the tennis you used to play.

11 And if you have, you know, headaches, maybe
12 you used to read or do other things like that. So it's
13 the social leisure activities that have changed. It's
14 the loss of -- some people have difficulty just in
15 their daily practical living. They can't, literally,
16 bathe or wash as easily as they used to. And then
17 there's the, you know, the impact on the emotional
18 self. You lose -- you know, so your -- your emotional
19 state can be reduced.

20 So people, when they look at all those areas
21 of life, which we asked Ms. Garcia to do, what
22 percentage has been lost? You know, she reported a
23 70 percent loss of the quality of her life.

24 Q. And --

25 A. From --

1 Q. -- when was that report made to you?

2 A. That was a couple of years ago. And, again,
3 we talked to her last night and she said it's -- it's
4 better now because of the surgery and -- and she -- she
5 has more freedom to do things. Just like she can do
6 more services now, so part of what she had lost before
7 has been restored. Not all, but part.

8 Q. Did you do calculations as part of your
9 report applying the loss of value-of-life economics
10 that you have explained to the jury to Ms. Garcia's
11 specific situation?

12 A. Yes. I did. And, again, based on the
13 70 percent figure that she indicated, we did the
14 calculation of 70 percent. Now, she will say that
15 things are better now --

16 Q. So --

17 A. -- as she said services are better.

18 Q. So before you -- before you move on, what --
19 could you tell the jury what the number you came up
20 with applying a 70 percent reduction in the quality of
21 life?

22 A. That was \$2,436,238.

23 Q. Could you double-check that for me. I know
24 you did two calculations.

25 A. Oh, I'm sorry. I also did it at a much lower

1 value. Three million -- let's start again. 3,789,000.

2 Q. Three million seven eighty-nine?

3 A. 679. So we've adjusted for the fact that at
4 the date of her injury, she had more life to live than
5 the average person. The average person had 45 years
6 left to live in which to enjoy their life. She had
7 more years left, so there's a larger future for her
8 than the average person.

9 The 4.5 million would be proportionately
10 larger for her. For young people, they have a lot more
11 enjoyment of life to look forward to. Just like a
12 union carpenter who is injured at 20, it's a lot more
13 lost earnings than a union carpenter injured at age 50.

14 So taking into account her age and her
15 70 percent, we were at 3,789,000.

16 Q. Now, similar to the calculations you did for
17 the present value of the life-care plan, did you
18 actually do tables assigning a lost quality of life for
19 each year that Ms. Garcia has left in her average life
20 expectancy?

21 A. Yes.

22 Q. And approximately how many dollars per year
23 did you come up with when you're doing these
24 calculations which led you to that total?

25 A. The annualized value, projected out for her,

1 was at the -- at the 70 percent loss, probably over the
2 years was averaging around 70,000 or so. It started
3 higher and then because of discounting goes down.

4 MR. MAZZEO: Doctor, what record are you
5 referring to?

6 THE WITNESS: Table 19U. Table 19U of the
7 October 14th report.

8 BY MR. ROBERTS:

9 Q. Okay. Now, you -- you initially gave me a
10 different number. Did you do two calculations in your
11 report? One at 70, and did you do another calculation?

12 A. Right. To -- to help educate the jury, we --
13 we put in another percentage, and now she will say it's
14 a different percentage.

15 Q. What percentage did you use in your report
16 for an alternative calculation?

17 A. The earlier number I gave you was at the
18 45 percent loss, and that's close to what she reports
19 now, actually.

20 Q. 45 percent loss?

21 A. Right.

22 Q. And what was that number again?

23 A. That number was 2,436,238. But if she
24 reports now her loss is only 40 percent, I have that
25 figure for you.

1 Q. Okay. And what about the annualized cost
2 approximately for the second number?

3 A. At the 45 percent, that annual number is
4 running -- excuse me. It's probably averaging in the
5 \$40,000 range. It starts out higher and goes down to
6 30,000. Probably averaging around 40. Roughly.

7 Q. Because you're reducing it to present value?

8 A. Yeah. That's a very rough -- the 70,000 and
9 the 30,000 very rough numbers, but ...

10 Q. Okay. So you were -- and I cut you off, but
11 now you were about to explain how the jury --

12 A. You're welcome.

13 Q. -- could use this as a tool if they find a
14 different reduction in the quality of life than you
15 have used in your calculations.

16 A. Of course. I was going to say my wife cuts
17 me off all the time, but that's not fair, because I cut
18 her off, too.

19 So the 70 percent figure, if we take that
20 down to 40 percent, so we divide that three million
21 seven eighty nine by 7, and we multiply by 4, I believe
22 we'll get 2,170,673.

23 Again, the fifth grade math that we will test
24 these folks on on Monday.

25 Q. Okay. Thank you, Doctor.

1 A. So it's a fairly simple methodology. Now it
2 does assume that she has the average ability to enjoy
3 life as the average person. And it does take into
4 account her number, but if a trier of fact were to say
5 that, well, we think it's 35 percent, they can take,
6 like we did before, 35 over 70, which would be half of
7 the 70 number.

8 Q. Doctor, in opening statements the jury heard
9 from defense counsel that your numbers and your
10 calculations include compensation for pain and
11 suffering associated with the injury; is that correct?

12 A. Well, not only they're not correct,
13 Dr. Ireland's deposition said that my numbers don't
14 either, and he knows that. I don't know where they got
15 that from, but it does not.

16 Q. Could you explain to the jury why -- why this
17 would not capture pain and suffering?

18 A. Well, sure. Because when you look at the
19 total value --

20 MR. TINDALL: Objection. Exceeds the scope
21 of his report.

22 THE COURT: I'm going to allow this based on
23 the statement at opening.

24 THE WITNESS: The numbers look at the total
25 value of life. They don't include pain and suffering.

1 They look at the value of an average, normal life.
2 Yes, they include a stubbed toe here and there, but
3 they don't include injury from a very severe type of
4 accident.

5 So I can read you the page of the deposition
6 where Dr. Ireland said he knows my figures don't
7 include pain and suffering.

8 BY MR. ROBERTS:

9 Q. Could you tell the jury just a little bit
10 more about your credentials as -- as an economist, some
11 of the recognitions you've had and some of the -- the
12 honors that you've received, the positions you've held.

13 MR. TINDALL: Objection. He's been accepted
14 as an expert. Improper bolstering.

15 MR. ROBERTS: The defense is going to
16 question the reliability of his methodology and him as
17 an economist, and I believe -- I shouldn't have to call
18 him back in my rebuttal case to get this in.

19 THE COURT: But you may be able to address it
20 on redirect, if necessary.

21 MR. ROBERTS: Okay. Thank you, Your Honor.

22 THE COURT: The objection is sustained.

23 BY MR. ROBERTS:

24 Q. Dr. Smith, have all of the opinions and the
25 calculations that you have shared with the jury been

1 done to a reasonable degree of economic probability?

2 A. They have.

3 Q. So you have -- the standard the jury has
4 heard, more likely than not, is that what you
5 understand that standard to mean?

6 A. Well, I understand the standards to be using
7 the -- using the standard methods and principles of
8 economics, using the standard tests and theories and
9 statistics. Yes.

10 Q. More likely than not, all of these things are
11 expressed to a reasonable degree of --

12 A. Yeah. We are at the 95 percent confidence
13 interval here.

14 Q. Much higher than that.

15 A. Oh, yeah, it's much higher than that.

16 MR. ROBERTS: Okay. Thank you very much,
17 Dr. Smith.

18 Thank you, Your Honor. I'll pass the
19 witness.

20 THE COURT: All right, folks. Let's go ahead
21 and take our lunch break.

22 During our break you're instructed not to
23 talk with each other or with anyone else about any
24 subject or issue connected with this trial. You are
25 not to read, watch, or listen to any report of or

1 commentary on the trial by any person connected with
2 this case or by any medium of information, including,
3 without limitation, newspapers, television, the
4 Internet, or radio. You are not to conduct any
5 research on your own, which means you cannot talk with
6 others, Tweet others, text others, Google issues, or
7 conduct any other kind of book or computer research
8 with regard to any issue, party, witness, or attorney
9 involved in this case. You're not to form or express
10 any opinion on any subject connected with this trial
11 until the case is finally submitted to you.

12 Come back at 1:15.

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

15 THE COURT: All right. We're outside the
16 presence. Anything we need to put on the record, guys?

17 MR. SMITH: One thing, Your Honor.

18 THE COURT: Can we do it now or can we wait
19 till 1:00?

20 MR. SMITH: I'll be very quick.

21 THE COURT: Okay.

22 MR. SMITH: Prior to you asking Mr. Mazzeo
23 and Mr. Strassburg to be quiet, I heard
24 Mr. Strassburg --

25 MR. MAZZEO: Excuse me. I wasn't -- he

1 wasn't talking to me.

2 MR. SMITH: I'm sorry. Mr. Strassburg and
3 Mr. Tindall. Mr. Mazzeo is correct. And I was going
4 to explain what they said, so I was going to leave
5 you -- I heard Mr. Strassburg say, very loud, "who
6 cares." And I heard Mr. Tindall say very loud "this is
7 stupid." And if I could hear it, I'm sure that the
8 jury could hear it. And they shouldn't be saying
9 anything so that the jury could hear, much less those
10 comments.

11 MR. MAZZEO: Judge, I was sitting over here.
12 I did not hear it, so...

13 MS. ESTANISLAO: I just heard ruffling of
14 papers.

15 THE COURT: I heard it, and I let it go on
16 for a few minutes, but that's why I had to say
17 something. So just -- just write notes to each other
18 if you need to communicate. It's easier.

19 MR. STRASSBURG: Thank you, Judge.

20 THE COURT: All right. Off the record.

21 (Whereupon a short recess was taken.)

22 THE COURT: Let's bring them back. Let's get
23 going.

24 THE MARSHAL: Jury entering.

25 (The following proceedings were held in

1 the presence of the jury.)

2 THE MARSHAL: Jury is present, Judge.

3 THE COURT: Thank you. Go ahead and be
4 seated. Welcome back, ladies and gentlemen. We're
5 back on the record, Case No. A637772.

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

8 MR. ROBERTS: Yes, Your Honor.

9 MR. MAZZEO: Yes, Your Honor.

10 THE COURT: All right. Mr. Roberts has
11 concluded his direct, so we're to cross-examination.

12 Mr. Mazzeo.

13 MR. MAZZEO: Thank you, Judge.

14 CROSS-EXAMINATION

15 BY MR. MAZZEO:

16 Q. Good afternoon, Dr. Smith.

17 A. Good afternoon.

18 Q. Now, you were -- you were hired -- you
19 testified on direct examination and it's in your
20 reports, you were hired to calculate the past and
21 future lost household services, cost of future medical
22 care, and the reduction in the value of life for
23 Ms. Garcia; correct?

24 A. Yes.

25 Q. Now, it's a fact that you did not speak with

1 Ms. Garcia, personally, in preparation for the expert
2 reports you prepared in this case?

3 A. The interview was conducted at my direction
4 by one my staff members, yes.

5 Q. All right. Because earlier today you
6 testified that you spoke with her directly, but that
7 wasn't the case. Someone from your office spoke with
8 her directly?

9 A. Both were the cases. Someone from my office
10 spoke with her directly and I spoke with her.

11 Q. When you spoke with her about --

12 A. But not before the report.

13 Q. Was that last night when you indicated
14 that --

15 A. Yes.

16 Q. -- she had -- you had spoken with her?

17 A. Yes, I wanted to review what she had said in
18 the past and see how it had changed.

19 Q. Okay. And -- and when your assistant spoke
20 with her, she spoke with her to get information for the
21 topics that are included in your expert report; is that
22 correct?

23 I don't think that's a question that
24 requires --

25 A. Well, the assistant was not a female --

1 Why did you refer to my assistant as "she"?

2 Q. I think I was referring to the plaintiff as
3 "she." My mistake if I did.

4 A. Oh, I'm sorry. I misunderstood.

5 Q. Yeah. When your assistant spoke with her,
6 meaning spoke with the plaintiff.

7 A. Correct.

8 Q. She spoke with her to get topics for the --
9 or information for the topics for your expert report?

10 A. In those three areas, yes.

11 Q. Okay. Now, is it correct that about 75
12 percent of your expert -- forensic expert services is
13 performed in PI, or personal injury, cases?

14 A. I would say about two thirds, actually,
15 but ...

16 Q. Okay. When you -- do you recall when you
17 previously testified in 2013, I think you indicated it
18 was about 75 percent back then?

19 A. Yes. I have been relooking at it because
20 we're doing more commercial and credit damage, so it's
21 maybe two thirds.

22 Q. Okay. And now, today, you said that with
23 respect to the forensic work you perform in personal
24 injury cases, you perform about 75 percent for
25 plaintiff litigants and about 25 percent for defense

1 litigants; correct?

2 A. About three quarters to one quarter, yes.

3 Q. Okay. But back in 2013, was it the case that
4 you were performing -- or at that time that you gave
5 your deposition, you testified previously that you were
6 performing work -- your forensic expert services was
7 performed only for plaintiffs litigants at that time.

8 A. I don't think you'll find anywhere in the
9 last 20 years where that ever would have been the case.

10 Q. Okay. Well -- okay.

11 A. We have my deposition. If you ask the
12 question, we can read the answer.

13 Q. Yeah, we will.

14 And do you recall testifying back then that
15 you hadn't performed services for defendants for at
16 least five years? That was in 2013.

17 A. You must be reading somebody else's
18 deposition, sir.

19 Q. Oh, okay. So can we have the deposition for
20 Dr. Smith published and shown to the witness.

21 THE COURT: You have to find it. In that
22 box?

23 MR. MAZZEO: I don't think it's -- these were
24 provided by my office.

25 Your Honor, at the 267 we did, I believe,

1 reach a stipulation that a certified copy could be used
2 if a sealed original was not able to be located for any
3 deposition.

4 THE COURT: That's fine.

5 MR. ROBERTS: So we have no objection to the
6 use of a certified copy.

7 THE COURT: If you want to publish a copy,
8 that's fine.

9 MR. MAZZEO: Thank you.

10 THE COURT: Do you have a copy?

11 MR. MAZZEO: I have a copy.

12 THE WITNESS: I have a copy.

13 MR. MAZZEO: You have a copy of your
14 transcript? Okay.

15 Doctor, before I ask you about -- before we
16 go to your transcript --

17 THE COURT: Well, hold on.

18 For the record, there needs to be a copy
19 published. Whether it's the original or certified
20 copy, I don't care, but somebody's got to find it so
21 it's part of the record.

22 MR. MAZZEO: Okay. We'll need a minute,
23 Judge.

24 BY MR. MAZZEO:

25 Q. Doctor, please don't read anything at your

1 table there. Thank you.

2 Judge, at this time, I'm going to move on
3 with my questioning, and I'm --

4 THE WITNESS: I think I can explain your
5 error, if you want.

6 BY MR. MAZZEO:

7 Q. You think you --

8 A. I can explain your mistake.

9 Q. No, you don't have to. You can just wait for
10 a question.

11 A. Sure.

12 Q. Thank you.

13 THE COURT: As long as everybody's in
14 agreement, you can ask him questions about a deposition
15 since you have a copy and he has a copy. Just make
16 sure that a copy is provided and published with the
17 Court.

18 MR. MAZZEO: Will do. Thank you, Judge.

19 THE COURT: Is that okay with everybody?

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

21 MR. STRASSBURG: Thank you, Judge.

22 THE COURT: Go ahead.

23 BY MR. MAZZEO::

24 Q. So, Doctor, no, I'm not asking you about your
25 depo right now. Doctor.

1 A. You don't want to find your error?

2 Q. Doctor, just wait for the question, would
3 you?

4 A. Okay.

5 Q. Okay. Thank you.

6 So let me -- let me restate my question to
7 you, because I believe what you were asked at the time
8 of your deposition was, "Have you done any defense
9 work, defense economic work, for any law firms or
10 attorneys in Las Vegas area?"

11 So, specifically, in Las Vegas area.

12 A. So that's the big difference because I work
13 in 50 states and 100 cities, et cetera. But in
14 Las Vegas -- most of my defense work is more in the
15 Midwest because defense budgets sometimes are more
16 limited. We do some defense work, a little bit
17 everywhere, and we've had some --

18 Q. My question to you, Doctor, is Las Vegas.

19 A. But you were right. In Las Vegas, it had
20 been about five years --

21 Q. Okay.

22 A. -- since I had a defense case.

23 Q. Okay. Thank you. That's what I was
24 clarifying. Thank you.

25 THE COURT: Just so you guys know, the

1 purpose of the trial, or part of the purpose of a trial
2 is to make a good record, and you're both making that
3 difficult.

4 MR. MAZZEO: Okay.

5 THE COURT: You're both screwing up the
6 record. So as long as you realize that. Kristy is
7 doing the best she can.

8 You talk over each other, it's not going to
9 be in the record.

10 MR. MAZZEO: Thank you, Judge.

11 BY MR. MAZZEO:

12 Q. And you had -- at least at the time of your
13 deposition, you testified you had about 4 to 500 open
14 cases at the time?

15 A. Back then that's probably about right. It's
16 more now, but ...

17 Q. Okay. And what is the number now?

18 A. I think we have some 6 to 700, 650 open
19 cases.

20 Q. Okay. And -- 650. And of that number,
21 75 percent of that number would be cases pertaining
22 to -- or where you are retained to -- by the plaintiff
23 litigant; correct?

24 A. No. In commercial cases it's about 50/50.
25 In the -- in the personal injury cases, it's more three

1 quarters for plaintiff.

2 Q. Now, earlier you testified that you were paid
3 for your expert report, I believe you said, \$4,000?

4 A. We did the report, the initial report in
5 2013. I think the fee then -- I don't remember
6 exactly. It was around 4,000.

7 Q. Sure.

8 A. Couple hundred dollars more or less. I
9 can't --

10 Q. Right. So that -- that's the initial fee
11 that you were paid for your services for that first
12 report; correct?

13 A. Yes.

14 Q. And then, since then you've done two
15 additional reports; is that correct?

16 A. Yes.

17 Q. I'm sorry?

18 A. Yes. Those are charged probably about an
19 hour and a half each.

20 Q. Okay. So --

21 A. A small amount each.

22 Q. Thank you.

23 So the total that you have been paid for your
24 services, to date as you sit here in this courtroom,
25 has been approximately how much?

1 A. So if it was around 4,000 for the first one
2 and maybe 5, 600 for each subsequent. Roughly 5,000,
3 plus or minus a couple hundred.

4 Q. Okay. Thank you.

5 And as you testified to on direct, you're
6 getting paid, from my calculations, \$3,500 for your
7 trial testimony today?

8 A. Well, it's 395 an hour, and for this 20-hour
9 day, it will be ten hours charged.

10 Q. So close to 4,000?

11 A. 3950, to be precise.

12 Q. To be precise. Okay.

13 A. That's the fifth grade math we expect those
14 guys to do.

15 Q. Now, you were hired to provide this economic
16 loss calculation strictly for litigation purposes;
17 correct?

18 A. You mean -- are you asking if the plaintiffs
19 hired me for any other reason?

20 Q. No, I -- no, I didn't ask you that.

21 I asked you that you were hired to provide
22 this economic loss calculation strictly for litigation
23 purposes. Is that correct?

24 A. The plaintiffs hired me for this case. Is
25 that your question?

1 Q. Which is in litigation, Doctor; correct?

2 A. Well, of course.

3 Q. Yes. Thank you.

4 And is it correct to say that you have not
5 spoken to any of Ms. Garcia's treatment providers in
6 connection with your economic loss report?

7 A. I would not need to, and I have not.

8 Q. And is it correct to say that you have not
9 independently confirmed any physical conditions or
10 disabilities Ms. Garcia claims to have?

11 A. No economist, including myself, ever would,
12 and I did not.

13 Q. Thank you.

14 And you have not independently evaluated
15 Ms. Garcia with respect to any alleged -- with respect
16 to the damages she's alleged to have sustained; is that
17 correct?

18 A. It's a very broad question. You mean
19 physical injuries? Have I verified her physical
20 injuries? Because I have done the damages --

21 Q. Right.

22 A. -- the economic damages.

23 Q. So let's say physical injuries.

24 A. I have -- I wouldn't -- no economist would
25 evaluate physical injuries.

1 Q. Okay. And -- and, also, neither yourself nor
2 anyone from your staff personally interviewed the
3 children in connection with this report?

4 A. We did not; it would not be necessary.

5 Q. Okay. And is it fair to say that you have
6 not independently performed any objective standardized
7 testing to verify the nature and extent of Ms. Garcia's
8 reported limitations?

9 A. There are no such standards in the field of
10 economics to --

11 Q. So the answer is you have not?

12 A. -- do that. And so, therefore, we don't do
13 that, no.

14 Q. Okay. Thank you.

15 A. Rehabilitation experts might, but we do not.

16 Q. All right. And is it fair so say you have
17 not independently performed any objective standardized
18 testing to establish a baseline physical functioning
19 level of Ms. Garcia prior to the motor vehicle
20 accident?

21 A. Right. No, we're not doctors, and we
22 don't --

23 Q. Thank you.

24 A. -- measure people's physical capacities.

25 Q. And is it fair to say you have not

1 independently performed any objective standardized
2 testing to establish a baseline for Ms. Garcia's
3 performance of household services prior to the motor
4 vehicle accident?

5 A. Right. We don't do -- economists don't do
6 physical analysis.

7 Q. Thank you. And is it correct to say that you
8 have not independently performed any objective
9 standardized testing to establish a baseline for the
10 diminishment of household services for Ms. Garcia after
11 the motor vehicle accident?

12 A. Correct. We don't do analysis of physical
13 injuries.

14 Q. Okay. And is it correct to say you have
15 not -- you have not independently performed any
16 objective standardized testing to establish the
17 baseline for Ms. Garcia's enjoyment of life prior to
18 the motor vehicle accident?

19 A. Well, it's her objective statement, and so
20 that's what we -- our assignment was to take into
21 account what she will say here. There is nobody else
22 who's going to talk about her quality of life. Nobody
23 knows her as she knows herself.

24 Q. You referred to her statements as being
25 objective?

1 A. Her own statements, yes.

2 Q. Well, wouldn't that be subjective if it's
3 coming from Ms. Garcia's self-report to you?

4 A. Well, you can debate the word. It's her
5 statements.

6 Q. Okay. And in response to the question that I
7 asked you, "You have not performed any objective
8 standardized testing to establish a baseline for her
9 enjoyment of life prior to the motor vehicle accident,"
10 was that a "yes" to that question?

11 A. It's, again, her statements. Nothing beyond
12 that. That was the assignment was to take into account
13 what her testimony would be.

14 Q. Okay. And you have not independently
15 performed any objective standardized testing to
16 establish a baseline for Ms. Garcia's ability to enjoy
17 life after the motor vehicle accident; is that correct?

18 A. Same answer. This is her statements we take
19 into account.

20 Q. Now, do you know, Doctor, in the course of
21 your evaluation and the evaluation -- and the interview
22 that your assistant did with Ms. Garcia in connection
23 with your services you provided in this case that
24 Ms. Garcia was employed at Aliante Casino sometime in
25 2010?

1 A. I know she had some prior employment, yes.

2 Q. Okay. And -- and do you also know that she
3 was working at Aliante Casino at the time of this
4 accident on January 2nd, 2011?

5 A. Yes.

6 Q. And do you know that she stopped working at
7 Aliante Casino in April of 2014?

8 A. I know she continued work for a time but no
9 longer does.

10 Q. Okay. You don't know when she separated from
11 Aliante?

12 A. Not without refreshing my records, and I'm
13 not sure it's all in there.

14 Q. Fair enough. And if I was to tell you that
15 she separated and left employment at Aliante in April
16 of 2014, would you have any reason to dispute that?

17 A. Let me look at my notes.

18 Q. Go ahead.

19 A. Thank you.

20 Q. Just let us know what you're looking at.

21 A. The work notes that were available at the
22 deposition.

23 Q. Thank you.

24 A. (Witness reviewing document.)

25 She was working at the time of the interview,

1 and then thereafter, I wouldn't have any --

2 Q. I'm sorry. I didn't catch the answer.

3 A. She was working at the time of the interview,
4 in summer of 2013. So I don't know what would have
5 happened thereafter, so I have no -- I have no
6 indication about what happened after that.

7 Q. Fair enough. And you have no reason,
8 meaning -- you have no reason to dispute the fact
9 that -- if I represent that she left employment at
10 Aliante in April of 2014, you are not going to dispute
11 that; correct?

12 A. I have no comment about --

13 MR. ROBERTS: Objection. Relevance.

14 MR. MAZZEO: Thank you.

15 THE COURT: It's overruled.

16 BY MR. MAZZEO:

17 Q. And -- and did you subsequently learn in the
18 course of -- strike that.

19 Just for the jury's understanding, I have --
20 the three reports that you had provided and drafted in
21 this case, were -- the first one was July 11th of 2013,
22 the second was October 14th of 2014, and the third one
23 was October 16th of 2015. Is that correct?

24 A. Yes. There weren't all the same type of
25 thing. There were -- the third report was just the

1 life-care.

2 Q. Sure. Okay. Now, do you know that -- at the
3 time of -- that you had drafted the second report in
4 October of 2014, did you -- did anyone from your office
5 interview Ms. Garcia in connection with that report?

6 A. Let me just check the dates of the interview.

7 Q. Certainly. Feel free.

8 A. Yes. She was interviewed after she -- yeah.
9 She testified about her difficulty working and was no
10 longer working.

11 Q. Oh, okay. Well, testified at a deposition or
12 did someone from -- my question was, did someone from
13 your office speak with her or interview her at the time
14 that you created that second report in October --

15 A. Yes.

16 Q. -- of 2014?

17 A. Yes, in -- in October, she had already
18 indicated that she had difficulty with her injuries and
19 was no longer working.

20 Q. Okay. And so at that point, Doctor -- next
21 question. So at that point, you knew that she had been
22 hired after leaving Aliante in April -- well, you don't
23 know when she left, but I'll represent she left in
24 April of 2014.

25 At the time that you spoke with her -- your

1 office spoke with her in October of 2014, she had been
2 hired at Fiesta Rancho Casino in September of 2014?

3 A. I think the notes say that, yes.

4 Q. Okay. And she was hired as an assistant cage
5 cashier supervisor. Do the notes say that as well?

6 A. Yes.

7 Q. And would you agree that this title as an
8 assistant -- as an assistant cage cashier supervisor
9 would have been, for all intents and purposes, a
10 promotion from her previous employment at Aliante?

11 A. I -- I don't think the hourly rate of pay was
12 the same, so you can call it what you want.

13 Q. Okay. And --

14 A. I think it was a nickel an hour. She went
15 from 14.45 to 14.50. If you tell an employee that they
16 have just been promoted and give them a nickel an hour,
17 I don't know how far you will get with that.

18 Q. But in any event, you know she was working in
19 a full-time capacity in 2014 when she started
20 employment at Fiesta Rancho?

21 A. It was a full-time job. She was saying she
22 was doing her best not to miss work because of the
23 pain.

24 Q. And, Doctor, you agree that -- or do you have
25 any reason to dispute that she was not able to meet all

1 the physical requirements of the job?

2 A. I didn't analyze that. She was taking pain
3 medication --

4 Q. I'm not asking about pain medication. I'm
5 asking whether she -- you knew that she was able to
6 meet all the job requirements at Fiesta Rancho. That's
7 a simple yes or no.

8 A. For the short time she had been there, she
9 said she found it difficult. So I don't know exactly.

10 Q. I'm not sure we're connecting --

11 A. I don't know exactly whether she was able to
12 or not.

13 Q. Okay. You don't know. Fair enough.

14 Did you know that she sometimes worked
15 overtime during that time that she worked at Fiesta
16 Rancho?

17 A. She said it was a 40-hour-a-week job and she
18 did it because she needed the money.

19 Q. Doctor, are you not understanding my
20 question?

21 A. Well, she -- she was -- she said 40 hour --
22 you asked if it was full-time, and I said she was
23 seeking to do that --

24 Q. Doctor --

25 A. -- forty hours a week.

1 Q. Doctor, listen to the question. Okay? That
2 was not my question. Okay. You can answer it, though.

3 Did you know -- and I don't need you to
4 parrot back information from your report that's not
5 responsive to my question. Do you understand?

6 A. Say -- your question is what, then?

7 Q. Do you understand, Doctor?

8 A. Well, I didn't understand. I thought I
9 answered your question, yes.

10 Q. So my question to you was, did you know that
11 she sometimes did overtime? Not asking about pain
12 medications or whether she worked a 40-hour week. Do
13 you know if she worked overtime?

14 A. I don't.

15 Q. Okay. Thank you. And did you know that
16 Ms. Garcia had a prior employment at Sam's Town, prior
17 to this accident in January of 2011?

18 A. While she was working at Aliante?

19 Q. No. Not while she was working at Aliante.
20 But prior to the accident, prior to her employment in
21 2010 at Aliante, she had employment at Sam's Town?

22 A. I don't think I knew about the previous --
23 her previous work history. I mean, she's mid career.
24 I didn't ask about jobs before the one she had.

25 Q. And so is it fair to say that you probably

1 didn't know, then, that she was let go from Sam's
2 Town --

3 MR. ROBERTS: Objection.

4 BY MR. MAZZEO:

5 Q. -- related to --

6 MR. ROBERTS: Objection, Your Honor.

7 Irrelevant. Prejudicial.

8 This has nothing to do with the case.

9 MR. MAZZEO: Can we approach, Judge?

10 THE COURT: Sure.

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

13 THE COURT: I guess the objection is
14 overruled.

15 MR. MAZZEO: Thank you, Judge.

16 BY MR. MAZZEO:

17 Q. Dr. Smith, so back to the question that I was
18 asking you before. Did you know that Ms. Garcia was
19 fired from Sam's Town prior to this accident, prior to
20 her work at Aliante, related to poor work performance?

21 A. No.

22 Q. Okay. And did you know that her separation
23 from Aliante had nothing to do with any alleged
24 physical condition?

25 A. Not according to her. She had very

1 significant difficulties at Aliante and the subsequent
2 job, was taking pain medication, had to take rests, and
3 had trouble performing her job.

4 Q. Okay. And I'm glad you brought that up,
5 Doctor. So you're saying that when Ms. Garcia spoke
6 not to yourself, but to your assistant, that she had
7 reported to your office that the reason why she
8 departed, separated from Aliante was due to physical
9 disabilities?

10 A. I did not say that. Those are not words I
11 used. I said she reported very significant
12 difficulties in performing her job at Aliante. She
13 took pain medication. She reported very significant
14 difficulties in doing her subsequent job. The job was
15 a little bit easier, the tasks were a little bit
16 easier. She made every effort to show up to work and
17 to earn her keep, but she had trouble keeping up. I do
18 not have a reason as to why she left Aliante.

19 Q. Okay. And that's what I was asking you.
20 Okay. Great. Thank you.

21 And -- and if you don't have a reason as to
22 why she left Aliante, then you can't say that -- or --
23 well, strike that. I will move on.

24 And did you know that she was fired from
25 Fiesta Rancho related to poor work performance? Yes or

1 no?

2 MR. ROBERTS: Mischaracterizes the record.

3 THE WITNESS: It wouldn't surprise me that
4 her work performance was below par, given what she told
5 us about the physical difficulty she had and the pain
6 management that she was engaged in. But I don't know
7 the details.

8 MR. MAZZEO: Well --

9 THE COURT: Okay. Hold on. Next time
10 there's an objection, let me rule on it before you
11 answer.

12 THE WITNESS: I apologize, Your Honor.

13 THE COURT: I guess at this point the
14 objection is overruled because he answered without
15 giving a chance.

16 BY MR. MAZZEO:

17 Q. Well, Doctor, then let me ask you, did you
18 know that she was let go from Fiesta Rancho in the fall
19 of 2014 not as a result of physical condition but
20 because her computer skills were not to up to snuff?

21 MR. ROBERTS: Objection. Nothing in the
22 record. Counsel can't testify. Mischaracterizes the
23 record. Irrelevant.

24 MR. MAZZEO: Does not.

25 THE WITNESS: Did too.

1 THE COURT: You're going to have to address
2 it on redirect.

3 MR. MAZZEO: Thank you, Judge.

4 THE WITNESS: I don't know what excuse they
5 gave in letting her go. She said she was not up to
6 par.

7 BY MR. MAZZEO:

8 Q. And you, Doctor -- neither yourself nor
9 anyone from your office had reviewed heir personnel
10 file or work records from Sam's Town; correct?

11 A. Correct.

12 Q. Neither you nor anyone else from your office
13 reviewed any personnel work records from Aliante
14 Casino?

15 A. We don't -- we didn't have them. It would be
16 unusual to get them.

17 Q. Fair enough. And neither you nor anyone else
18 from your office reviewed any personnel or employment
19 records from Fiesta Rancho?

20 A. Correct.

21 Q. Thank you. By the way, is it fair to say
22 that in -- nowhere in your -- nowhere in your
23 July 11th, 2013, report that consists of -- the primary
24 main report is 20 pages long -- do you ever address
25 Ms. Garcia's job performance, after the subject

1 accident, either at Aliante or Fiesta Rancho?

2 A. You know that we did not talk about wage loss
3 on my direct examination. So, therefore, her job
4 performance and her difficulty performing job -- her
5 job has nothing to do -- I did not calculate any and
6 present any losses for wages --

7 Q. Very good.

8 A. -- due to her injuries.

9 Q. Okay. And -- and your report does not speak
10 to her ability to perform her job requirements after
11 the motor vehicle accident, yes or no?

12 A. It doesn't --

13 Q. It doesn't?

14 A. -- address the physical difficulty she has,
15 no.

16 Q. Thank you. Now, with respect to loss of
17 household services, you have -- you indicated that she
18 had a -- and correct me if I'm wrong, an 80 percent --
19 she was at an 80 -- 80 percent of her capacity to
20 perform her household services after the subject
21 accident?

22 A. 20 percent of her capacity.

23 Q. I'm sorry?

24 A. 20 percent.

25 Q. 20 percent of her capacity to perform

1 household services after the accident.

2 A. Yes. And even as late as the October '14
3 interview, although I think that was, again, before the
4 operation called rhizotomy that I am told has helped
5 her a lot.

6 Q. So just so I understand this, so I'm clear
7 with what you're saying about the percentage, so she
8 reported to you that she had an 80 percent diminishment
9 in her ability to perform household services after the
10 accident --

11 A. Yes.

12 Q. -- correct?

13 Okay. And -- and that was based on her
14 self-report regarding what her current capacity was at
15 the time of your evaluation -- your office's
16 evaluation; correct?

17 A. That was her statement.

18 Q. And I guess her self-report was with respect
19 to that her current capacity was between 15 and
20 25 percent, or let's say 20 percent.

21 A. Same question. She -- she said an 80 percent
22 loss. You asked three questions about it. It's an
23 80 percent loss. That's what she said.

24 Q. Right. But her own words, what I was asking
25 you for -- it wasn't a trick question or anything.

1 A. Okay. Her own statements.

2 Q. I think her own words was she was telling her
3 what her ability was, the percentage she could perform
4 household services after the motor vehicle accident.
5 She might have given you a figure of 20 percent.
6 That's what I was getting at.

7 A. Let me just cite from the report. She
8 estimates her capacity at 15 to 20 percent. That was
9 the first interview, she reiterated 20 percent. The
10 same, she said, at the second interview.

11 Q. And -- now, and in order to obtain this
12 information, your assistant merely asked Ms. Garcia
13 questions about what household services she can no
14 longer do?

15 A. Well, what did she used to do and where does
16 she have activity difficulty. That's the typical line
17 of questioning.

18 Q. Okay. And is it correct to say that your
19 assistant -- by the way, what is your assistant's name
20 who interviewed her?

21 A. Brian Ebling, E-b-l-i-n-g.

22 Q. Now, Brian, is it correct to say, did not
23 ascertain the frequency with which she performed
24 household duties or services prior to the motor vehicle
25 accident?

1 A. Twenty-four hours a week. I assume -- I have
2 never met anybody who doesn't do something every day.
3 She's got children. She couldn't avoid doing something
4 every day, but obviously usually more on weekends,
5 somewhat less on weekdays.

6 Q. That wasn't my question, Doctor. I'm asking
7 you about the frequency of specific household duties
8 that she performed prior to the accident. Your -- your
9 assistant, Brian, did not ask her about the frequency?

10 A. I don't even understand the question. What
11 does frequency of household services mean when you have
12 two children living in the household? When you're
13 home, you're taking care of your children, you're
14 taking care of your house.

15 Q. Okay. Let me explain it to you.

16 A. You mean how many times an hour did she do
17 something?

18 Q. Doctor, let me explain it to you. So
19 household services will include cooking, yes?

20 A. I had said earlier cooking, cleaning, laundry
21 care, et cetera.

22 Q. Yes. So my question to you is, is it correct
23 to say that Brian, your assistant, did not ascertain
24 from her the frequency with which she cleaned each week
25 or each month, the frequency with which she cooked,

1 whether 7 meals a week, 14 meals a week, or 21 meals,
2 or something else; is that correct?

3 A. We wanted to know the amount of time she
4 spent. We don't care if she did one load a day or
5 three loads once -- three loads on Saturday or one load
6 every day. Those are irrelevant, so we don't badger
7 people with questions that are irrelevant to us.
8 Therefore, he would never inquire. We never made such
9 inquiries, no.

10 Q. Okay. Thank you.

11 A. If she cooked breakfast and dinner and never
12 lunch because she worked, that's possible, but she
13 worked different shifts, so I don't really know. I'm
14 sure it changed, because she went from second shift to
15 first shift. So when she was home for a shift, she
16 might have prepared some meals when she's -- more meals
17 than when she's not working first shift, and she might
18 have prepared fewer meals. I'm sure it changed.

19 Q. Okay, Doctor. Thank you for answering the
20 question.

21 Is it correct that Brian, your assistant, did
22 not ascertain the nature and scope of what household
23 activities she couldn't do after the motor vehicle
24 accident?

25 A. She does talk about that.

1 Q. The nature and scope of each household
2 activity that she can and can't do after the accident?

3 A. Would you like to know what she said?

4 Q. Tell us, please.

5 A. Okay. She does not cook and, instead, her
6 17-year-old cooks or they eat fast food. The children
7 have taken on much of the chores, including cleaning,
8 laundry, walking the dogs. Bending down into the dryer
9 is torture on Emilia's back.

10 Q. What are you reading from, Doctor? Tell me
11 the page.

12 A. It was page 9 of the work notes. "She is
13 totally exhausted and in pain from work and cannot
14 handle chores. She still tries to clean her own
15 bathroom and wipe down her bedroom, but it takes her
16 much longer."

17 So some things she can't do, some things are
18 longer. I said on direct she estimates her capacity at
19 15 to 20 percent. She gets help with some friends.
20 But, in general, things do not get done as often or as
21 well.

22 Q. Okay. So -- so -- so -- okay. So isn't it
23 correct that Brian, your assistant, did not ascertain
24 the nature and scope of her ability to do any laundry,
25 mopping --

1 A. I just read --

2 Q. -- vacuuming --

3 A. I just read laundry.

4 Q. Okay.

5 A. You got to listen.

6 Q. And she couldn't -- you're saying that she

7 couldn't do it at all?

8 A. I'm not saying it.

9 Q. Okay. Did you know that Ms. Garcia's

10 daughter was in cooking school prior to the accident

11 and that her daughter actually cooked prior to the

12 accident?

13 A. Good for them.

14 Q. Did you know that? I asked -- I didn't say

15 good for them. Did you know that, Dr. Smith?

16 A. Well, good for them. No, I didn't know that,

17 but fortunately she's got somebody who can pitch in a

18 little bit.

19 Q. Okay. You didn't take that into

20 consideration when you did your evaluation as to

21 whether or not someone else in the household actually

22 cooked prior to the accident?

23 A. I don't care if Mother Teresa came in and

24 cleaned prior to the accident. She spent 24 hours a

25 week doing work. It doesn't matter what other people

1 did. Of course children pitch in. You expect that.
2 But it doesn't matter how much everybody else pitched
3 in. What mattered was, what did she do.

4 Q. What matters, Dr. Smith, is -- is not your
5 opinion; it's what the jury thinks matters.

6 A. No, what matters in my analysis --

7 MR. ROBERTS: Objection. Form.

8 THE WITNESS: -- I will tell you. You won't
9 tell me.

10 BY MR. MAZZEO:

11 Q. And when you spoke with Ms. Garcia last
12 night, approximately how long did you speak with her?

13 A. Very brief.

14 Q. About how long?

15 A. It was minutes. A handful of minutes.

16 Q. Okay. And is it -- is it correct to say that
17 when you spoke with her last night, you were -- as you
18 sit -- strike that.

19 As you sit here today, is it correct to say
20 you're not aware of what household activities she can
21 presently perform currently?

22 A. She said she's improved in many ways. And
23 when -- since I wasn't doing a new report, it wasn't a
24 thorough interview, but the percentages that she had
25 given us the prior year and a half, she said, were now

1 significantly different.

2 Q. And your response was that she said "improved
3 in many ways"; right?

4 A. She was able to do much more in services, and
5 she was feeling better overall about her life, although
6 still significant loss.

7 Q. Did you ever ascertain, you or your office,
8 your assistant, Brian, ever ascertain whether -- or
9 what duties the daughters could do to assist her either
10 before or after the accident?

11 Yes or no?

12 A. It wouldn't matter. It would be completely
13 irrelevant. There's no economic textbook that says
14 that counts. That does not count.

15 Q. Doctor, please answer my question. Did you
16 ascertain, from the daughters or from Ms. Garcia, what
17 duties her daughters could do to assist prior to the
18 accident, yes or no?

19 A. No.

20 MR. ROBERTS: Objection. Irrelevant
21 collateral source.

22 THE COURT: I'm going to allow the question.

23 MR. MAZZEO: Thank you, Judge.

24 THE WITNESS: No, it's not relevant because
25 what she used to do is what she used to do, and what

1 she could do now is what she does now, and what her
2 daughters did or do now doesn't matter.

3 MR. MAZZEO: Excuse me, doctor.

4 I move to strike the nonresponsive portion,
5 and I ask the Court to direct --

6 THE COURT: It will be stricken.

7 MR. MAZZEO: Thank you, Judge. And I ask the
8 Court to direct this witness, Dr. Smith, to be
9 responsive to the questions that are being asked and
10 not to give gratuitous answers favorable to the
11 plaintiff.

12 THE COURT: Doctor, if he asks a question
13 that can be answered with a yes or no, please answer it
14 that way.

15 THE WITNESS: No, we did not.

16 THE COURT: Please -- please stop. If you
17 can't answer it with a yes or no, tell him, "I can't
18 answer it with a yes or no."

19 THE WITNESS: I will do that.

20 MR. MAZZEO: Thank you, Judge.

21 BY MR. MAZZEO:

22 Q. At any time in conjunction with any of the
23 reports you had created in this case, are you aware of
24 any medical opinion stating that Ms. Garcia's unable to
25 provide any household services post accident?

1 A. I don't have any medical records, so I don't
2 know.

3 Q. With respect to -- I believe you testified
4 earlier you talked about receiving a life-care plan
5 from Dr. Oliveri; correct?

6 A. Yes.

7 Q. In conjunction with a life-care plan, did he
8 also provide you with the comprehensive medical
9 evaluation?

10 A. Can I look at the plan?

11 Q. Please do.

12 A. Because I -- I wouldn't care, but it may be
13 in there.

14 Q. You can look. Yeah, please let us know if
15 you have it. I'm not asking for any information from
16 it, just whether you have it.

17 A. I'm not sure I know what one is, but I know
18 what the life-care plan is.

19 Q. Thank you.

20 A. I mean, do you want to look at it and tell
21 me, because I'm --

22 Q. I have to look at your records, Doctor.

23 A. I mean, I can show you the reports I
24 received. There was a comprehensive medical -- it says
25 so, so that makes it easy.

1 Q. Okay. So -- and that comprehensive medical
2 evaluation has a summary of all the medical records
3 that Dr. Oliveri had summarized; correct?

4 A. I don't know. I can look.

5 Q. Take a look.

6 A. We got this after I did my report, though.

7 Oh, I'm sorry. Before we did the --

8 Q. The summary, I believe, starts around page 6
9 or thereabouts.

10 A. I don't have -- I only go to page 4.

11 Q. Okay.

12 A. So...

13 That's the ninth supplemental report. Do you
14 have a later one?

15 Q. Fair -- no, I'm just asking whether you have
16 the -- well, if you had the initial comprehensive
17 medical evaluation performed by Dr. Oliveri.

18 A. What's the date?

19 Q. Dated July of 20 -- June or July of 2013.

20 A. Yes. There was a medical records review.

21 Q. There was. Okay.

22 A. Yes.

23 Q. Okay. So you would be aware from the
24 comprehensive medical evaluation by Dr. Oliveri that he
25 may -- he summarized the findings -- findings from the

1 medical records that he reviewed; correct?

2 A. He made some statements about them, yes.

3 Q. And is it correct that you're not aware of
4 any medical opinions that Ms. Garcia's unable to
5 provide any household services for the remainder of her
6 life?

7 A. I don't know of any opinions one way or the
8 other about that.

9 Q. Thank you.

10 And -- and is it correct to say that your
11 understanding of Ms. Garcia's inability to perform
12 household services is based entirely upon what
13 Ms. Garcia told you?

14 A. Her percentage is exactly what she said. And
15 the fact that she is slower is what she said. And some
16 things she can't do, but I can't imagine a doctor
17 writing down that she is slower in washing dishes,
18 because that wouldn't be a doctor's...

19 Q. Doctor, please respond to the question only.

20 A. Yeah.

21 Q. Okay? You understood the directive from the
22 Court?

23 A. Right.

24 Q. Thank you.

25 Other than what Ms. Garcia told you about her

1 alleged diminishment in her ability to perform
2 household services, is it correct that you cannot
3 testify to what she can or cannot do with respect to
4 household services -- her ability to perform household
5 services after the accident?

6 A. Correct. I would only know what she said.

7 Q. Thank you.

8 Now, let's move on to your testimony today
9 about the life-care plan. And you had calculated the
10 present value of future -- of the future life-care plan
11 for Ms. Garcia. Yes?

12 A. Right. Right.

13 Q. And that was based on -- that was based on
14 your interview with Ms. Garcia as well as the life-care
15 plan that was drafted by Dr. Oliveri?

16 A. No, just on Oliveri.

17 Q. Just -- oh, just on what Dr. Oliveri --

18 A. I wouldn't -- what she would -- she would --
19 well, we wouldn't ask her about Dr. Oliveri's plan.

20 Q. Okay. And that makes sense. You just --
21 just based your present value of the life-care plan on
22 what Dr. David Oliveri provided to you.

23 A. Correct.

24 Q. And -- now, it's correct to say -- well, at
25 the time of your first report, you had determined that

1 the average cost of the future life-care plan was
2 \$406,000 -- 970 -- \$406,979; correct?

3 That would be the July 2013 report.

4 A. Yes.

5 Q. Okay.

6 A. Based on his July 4th, 2013, report.

7 Q. And, then, you had changed the cost of the
8 future life-care present value of the future life-care
9 based on Dr. Oliveri's October 3rd, 2014, report?

10 A. When we evaluated -- we evaluated his second
11 report, yes.

12 Q. Right. And that -- that increased the
13 average cost of the future life-care, according to your
14 calculations, to \$983,335; correct?

15 A. I didn't memorize the number, but if you are
16 reading from the report, then I will just say yes.

17 Q. Well, it's page 9 of your -- page 9 of your
18 October 14th, 2014, report.

19 A. Put my hands on it quickly. But, I'm sorry,
20 just evaporated from view.

21 Q. Take your time. We have all day.

22 A. It's easy for you to say. Just a moment.

23 If you can show me a copy of the report, I
24 don't see my July --

25 /////

1 MR. MAZZEO: May I approach, Judge?

2 THE COURT: You may.

3 MR. MAZZEO: Thank you.

4 BY MR. MAZZEO:

5 Q. Page on the top.

6 A. Sure. Let me just get to the summary table.

7 Yes.

8 Q. Thank you.

9 Now, also, you have not expressed any medical
10 opinions in this case; correct?

11 A. Correct.

12 Q. Okay. And -- and any medical opinions
13 regarding Ms. Garcia's medical condition would be
14 outside the scope of your expertise; correct?

15 A. Correct.

16 Q. And the figures for the medical expenses that
17 were provided to you were provided entirely from
18 Dr. Oliveri; you didn't research your own figures.
19 Correct?

20 A. Correct.

21 Q. And -- and is it your understanding that
22 Dr. Oliveri's not a treatment provider in this case?

23 A. I'm -- I'm not going to speak to what he is
24 and isn't.

25 Q. You don't know?

1 A. I just know about the plan, that's all.

2 Q. Fair enough. Okay.

3 And it's correct to say that you have no
4 direct knowledge of the injuries sustained by
5 Ms. Garcia from this January 2nd, 2011, accident?

6 A. No.

7 Q. And your -- the -- the figures you've
8 provided to -- to the jury today, with regard to your
9 life-care plan, is -- is -- you have merely taken the
10 medical figures provided by Dr. Oliveri at face value.

11 A. I have incorporated them into my report, yes.

12 Q. Okay. And you have not otherwise confirmed
13 the reliability of the medical figures provided by
14 Dr. Oliveri; correct?

15 A. I would not do that; correct.

16 Q. Okay. And is it correct that you have no
17 independent knowledge whether Ms. Garcia will actually
18 need medical treatment in the future?

19 A. Correct.

20 Q. And is it correct that you have no
21 independent knowledge whether any care that Ms. Garcia
22 might need in the future, as per Dr. Oliveri's
23 life-care plan, is actually related to the motor
24 vehicle accident?

25 A. Correct.

1 Q. Thank you.

2 Now, you testified also with regard to the
3 loss of enjoyment of life, and you provided a
4 calculation to us prior to lunch or -- I guess you
5 provided us a -- a high and a low range for what you
6 believe to be the loss of enjoyment of life pertaining
7 to Ms. Garcia.

8 A. Well, I think there were three figures: A
9 figure at 70 percent, one at 45, and then a calculation
10 at 40 percent. Yes.

11 Q. Okay. And you contend, and just correct me
12 if I'm wrong, to arrive at -- to arrive at the
13 impairment rating that's applied to this reduction in
14 the value of life, you based it on the interview of
15 Ms. Garcia where she indicated -- and I know you
16 testified to this; I just want to be clear with this --
17 that she had a 45 to 70 percent reduction in her
18 ability to lead a normal life?

19 A. I believe she said she was at 30 percent
20 remaining ability. I can look at the notes.

21 Q. Yeah, and when did she say the 30 percent?

22 A. Both interviews, but the first one was --
23 just read you the statement.

24 She had said "quality of life at 30 percent."

25 Q. Okay. So that would be a 70 percent loss?

1 A. Yes.

2 Q. Okay. And, now, is it -- is fair to say --
3 just so I understand the way this -- this loss of
4 enjoyment of life works, is it fair to say that a loss
5 of ability to lead a normal life is not equated to the
6 loss of the enjoyment of life?

7 A. The economists regard that as synonymous. I
8 said earlier on direct, we call it utility. If you
9 buy -- if you pay \$20,000 for a car, we say you're
10 going to get \$20,000 worth of utility from it; but you
11 can also say you can get \$20,000 worth of pleasure,
12 value, satisfaction, usefulness. If you pay \$20,000
13 for a car, you value what that car is going to give you
14 at \$20,000. So it's the value of life, the enjoyment
15 of life, the quality of life, we would say the utility
16 of life. All intended to be synonymous.

17 Q. And so let me -- let me see if I can apply
18 some examples to both leading a normal life and the
19 enjoyment of life.

20 So when we talk about the ability to engage
21 in -- the ability to lead a normal life, we're talking
22 about activities of daily living, such as grooming,
23 house -- grooming, cooking, walking, dressing,
24 showering, things of that nature?

25 A. If you can do those, yeah. Normal people can

1 manage their own activities of daily living. Yes.

2 Q. And that is distinguished -- the ability to
3 lead, engage in these activities of normal life, can be
4 distinguished from enjoying life where -- when we talk
5 about the loss of enjoyment of life, we're talking
6 about smelling roses, walking, socializing, laughing?

7 A. You're getting way too esoteric.

8 When you are, let's say, in the last mile of
9 a marathon, no one would say you are enjoying life.
10 And if somebody said, How you doing? you'd probably
11 say, That's a heck of a deal, it's a heck of a
12 challenge, get out of my way, I'm trying to beat my
13 personal record, or something.

14 I mean, you're -- you can be -- you can be in
15 challenging, you know, pain -- you could have pain in
16 your feet from the marathon. But when you cross the
17 finish line, you meet your record, you look back at
18 your training, you look back at your year, your running
19 year and you say, Oh, I have really enjoyed my running
20 year. Now, were you in pain at times? You were
21 because you were doing something challenging.

22 You can take on a challenging job. I'm sure
23 you've had challenges on your job where your colleagues
24 would say, Man, that must be a terrifically difficult
25 thing. You say, Yes, it's giving me headaches and

1 then --

2 Q. Sometimes questioning a witness.

3 A. Yeah. Right. Me.

4 So -- you -- you say, You know what? I
5 succeeded at that. And while it was difficult and --
6 it was immensely satisfying and challenging. And
7 sometimes we fail, and only years later do we learn
8 from those failures.

9 So it's -- the pleasure of life is not about
10 smelling roses; it's about the entire symphony of
11 everyday experience.

12 Q. So would you agree that diminishment value
13 for the enjoyment of life is, in large respect, an
14 intangible-type factor?

15 A. Well, it's an intangible, definitely, because
16 we can put the Chevrolet on the market and we'll get,
17 you know, we'll find out what it's worth.

18 Q. So my next question, then, to you, Doctor,
19 is, is it correct to say that you have no objective
20 tool for measuring the diminishment in the value of a
21 person's life, which is why you ask the person, tell
22 me, how much has your life diminished in value?

23 A. It's her report.

24 Q. Thank you.

25 And -- okay. So -- and from reading your

1 report, your finding in your report, Doctor, you had --
2 you had provided that the calculation for the loss of
3 enjoyment of life of -- I think you arrived at a figure
4 for what the enjoyment of life is for a person on an
5 annual basis.

6 A. We spoke about her at the 70 percent level
7 ranging from --

8 Q. Let me be more specific. In your report, you
9 referred to a figure that a person's enjoyment of life
10 on an annual basis is \$131,000 per year.

11 A. It's actually in the work notes, it's part of
12 a mathematic calculation, that if we take the total
13 value of life and we put it on a 45-year basis, it was
14 about \$130,000 a year. And that's what the
15 4 1/2 million would come from if you said, how much
16 would each year for 45 years be worth.

17 Q. And that's for the statistically average
18 person; correct?

19 A. Yes.

20 Q. Okay. That's not geared -- that \$131,000 is
21 not a value you came up with strictly for Ms. Garcia;
22 correct?

23 A. No, it's -- no. It's just like a life
24 expectancy number. It's a statistically average
25 number.

1 Q. And so the assumption -- you had to make
2 several assumptions in -- in your calculations;
3 correct?

4 A. We did make some.

5 Q. And one assumption you made is that she has
6 the capacity to enjoy life equal to that of the
7 statistically average person.

8 A. That she falls in the same broad range of
9 average, as most people would, yes.

10 Q. Now, first, you have to assume that she
11 suffered from -- well, strike that.

12 I would say that you did not assume that she
13 suffered from a permanent loss of -- let me rephrase it
14 again so I will get this right.

15 One assumption you made is that she suffers
16 from a permanent loss of enjoyment of life, not
17 100 percent, but she suffers from a permanent loss of
18 enjoyment of life for the rest of her life.

19 A. It's not a necessary assumption, but the
20 tables show that loss of 80 percent, not getting better
21 or worse over time. It did get better, we know, from
22 the surgery.

23 Q. But from what Ms. Garcia told you back in
24 2013, she self-reported to you that she had -- she was
25 70 percent permanently deprived of the ability to enjoy

1 life.

2 A. At that time, yes.

3 Q. Thank you.

4 And Ms. Garcia's self-reporting to you,
5 that's when I was talking before about it's not
6 objective, you can't measure or quantify that, what
7 Ms. Garcia's saying to you?

8 A. It's her statement.

9 Q. Okay. And the reason why I referred to it as
10 your -- your assumption was that it was permanent was
11 because you calculated it and you carried it that --
12 you carried that at the same percentage for 49 years.

13 A. Through her life expectancy, yes.

14 Q. Right. And that was not based on any
15 independent objective criteria.

16 A. Well, we didn't assume things would get worse
17 or better; we just assumed constancy. It wasn't -- it
18 was -- nobody knows, or at least we can't know, we
19 can't ask her, what's your life going to be like 25
20 years from now. So it's our standard process to show
21 it. And unless there's some medical evidence that
22 things will necessarily get better or worse -- and
23 sometimes people do forecast things may get better.
24 But in this case, there was no such forecast that
25 things would get better or worse --

1 Q. You're --

2 A. -- but the tool and the aid and the guide
3 that I give the jury, the jury can take that and make
4 some assumption about things getting better or worse.

5 Q. Okay. Let's -- let me ask you something
6 else.

7 Is it -- now, you're an economist. You've
8 been doing this for a long time, so you know that, as
9 we age, the -- the enjoyment of life declines.

10 A. Really? I thought spiritual practices were
11 about gaining wisdom, increasing challenge and
12 satisfaction. Your -- your back may hurt a little
13 more, but most people look to lead more fulfilling and
14 satisfying lives. We enter into a lot of challenge and
15 turmoil in our teenage years and lot of career
16 challenge in our 20s and 30s, but most people look
17 forward to having -- you know, isn't all of life about
18 learning and growing?

19 Q. And a lot of that depends on -- now, and I
20 may have said that backwards. What I meant was the
21 loss of enjoyment of life, the loss of enjoyment of
22 life declines as we age.

23 A. I'm not sure what that --

24 Q. That means you have -- like you're saying --
25 like you were saying, you have -- actually as you

1 increase in age, you're going to have more enjoyment.

2 A. Well, let's speak about an annual basis. My
3 model assumes the same value each year prospectively.
4 Some years may be better; some years may be worse. You
5 may enter some difficulties in your 40s and some
6 thrills in your 50s. It's very hard to tell.

7 I mean, I look back on some years and -- for
8 example, when I was about 28, things were much more
9 difficult then, but I learned so much that I would say
10 those years were very valuable to me even though I
11 wasn't feeling so great about them.

12 Q. Now, another assumption you made, Doctor,
13 correct me if I'm wrong, is that -- is that at the time
14 of the accident, just prior to the accident, that
15 Ms. Garcia would have been enjoying life to -- up to
16 100 percent.

17 A. That she had the -- no. The assumption is is
18 that, looking forward into the rest of her life, she
19 would have been able to lead a normal life. But for
20 the injury, she would have had the same value and
21 satisfaction as the average person.

22 Q. And Ms. Garcia's enjoyment of life, what she
23 might consider to be 100 percent prior to this
24 accident, that might -- that -- that's going to
25 certainly vary from one person to another. That will

1 vary from -- from everyone in this room. Would you
2 agree?

3 A. I'm not even sure what you mean by that. We
4 only assume that she had the same ability to derive
5 value as the average person.

6 Q. Well --

7 A. We assume she's normal.

8 Q. But -- but to -- to assume that she derives
9 value as equal or comparable to that of the average
10 person, you have to assume that there's a certain
11 baseline that we all enjoy life at.

12 A. No. That we have the same prospect on
13 average for our future remaining life expectancy as the
14 next person. You know, she wasn't clinically
15 depressed; she wasn't in poverty. We do know that
16 poverty does affect people's ability to enjoy life.
17 Grave medical circumstances, grave psychological
18 circumstances. But she did not appear to have any
19 significantly different problems from the ordinary
20 person in this country.

21 Q. Well -- and you said that she -- in your
22 estimation or from your records, that she was not
23 clinically depressed.

24 A. I didn't say she wasn't; I said I see no
25 evidence that she wasn't living the kind of life the

1 average person in this country leads. That doesn't
2 mean problem-free, but she had a job, she had some
3 children, she was doing stuff. She had a normal life
4 to look forward to so far as I can see, but ...

5 Q. Well, you did not establish a baseline for --
6 baseline measure for whether she was enjoying life at
7 the time -- prior to the accident equal to that of the
8 statistical person; is that correct?

9 A. Well, it's not establishing a baseline. I
10 have no reason to think that she wasn't leading a
11 normal life. She had a job, she had children, she was
12 going to work, she did stuff, she was jogging, she did
13 her laundry, her housekeeping. I mean, not everybody
14 lives like the Queen of England, and not everybody
15 lives a terrible, terrible life of poverty and
16 depression and illness. She was in the broad range of
17 the middle. If you read -- read the notes, the things
18 she was doing, and she had --

19 Q. No, don't read from your report, Doctor. I
20 have another question.

21 A. She had hobbies. She had leisure activities.

22 Q. Doctor, after -- from reading your reports,
23 all three of them, it didn't look like you excluded all
24 factors which might prevent her from enjoying life
25 to -- of that -- that of the average statistical

1 person.

2 A. Such as? We saw no reason to think she
3 wouldn't have the prospect of leading a normal life.
4 Now, somebody might disagree with me. That's fine.
5 Tell that person. I mean, educate the jury. I am
6 saying I saw no reason to think she wouldn't be leading
7 a normal life. If you do, I won't argue that with you.
8 If you see some black cloud in her future that I didn't
9 see, I'm not going to debate you that it may not be
10 there. I just -- I assume -- this model assumes she
11 had the normal ability to lead a normal life. That's
12 all.

13 Q. And so what objective criteria or evaluation
14 did you perform in this case to support your hypothesis
15 that she was leading a life of the average statistical
16 person?

17 A. It's not a hypothesis. She was, she says,
18 enjoying her job, enjoying her children, leading a
19 normal life. So if she wasn't, that's for somebody
20 else to prove up. I just took that she said she was
21 doing well, she was doing fine, she was doing average,
22 and now she was in difficulty. So those are -- that's
23 my understanding of what she'll say.

24 If somebody has evidence to the contrary, I
25 am not the one to debate that with. You can present --

1 you know, you can bring in a psychiatrist to say, no,
2 she was in misery. I -- I wouldn't say that. But I'm
3 not the one to -- to value that.

4 She said she was doing fine, leading a normal
5 life, then the injury happened. So, that's -- I have
6 just taken -- because my assignment by her -- you know,
7 my assignment by the attorneys was to --

8 Q. Sure.

9 A. -- take what she would say and what she did
10 say.

11 Q. Fair enough. So I want to ask you about in
12 the field of forensic economics, the standard
13 assumption is that death equals a 100 percent loss of
14 enjoyment of life. True?

15 A. I don't think you need to have a fancy-pants
16 degree in economics to come to that conclusion. I
17 think the fifth graders back there would have said if
18 you die, you've lost your enjoyment of life.

19 Q. So 100 percent; right?

20 A. I think they know what 100 percent means,
21 yes.

22 Q. And so you're not contending that she
23 sustained a -- anywhere close to 100 percent loss of
24 enjoyment of life; you're just basing it on -- and I
25 have asked you about this -- based on her self-report

1 only?

2 A. I'm not contending any percentage.

3 Q. Okay. Now, you don't know whether -- whether
4 any percentage of her loss of enjoyment of life might
5 have related to a preexisting condition, such as
6 depression or anxiety?

7 A. She did not report that.

8 Q. She did not. Okay. And -- and if I was to
9 tell you that she was actually actively seeking and
10 treating for depression prior to the motor vehicle
11 accident, you wouldn't have any reason to dispute that,
12 would you?

13 MR. ROBERTS: Objection, Your Honor. Facts
14 not in evidence. Excluded by Court order.

15 THE COURT: Come on up.

16 MR. MAZZEO: Well --

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

19 THE COURT: Objection sustained.

20 MR. MAZZEO: May I proceed, Judge?

21 THE COURT: Yep.

22 MR. MAZZEO: Thank you.

23 BY MR. MAZZEO:

24 Q. Dr. Smith, do you know that Ms. Garcia had
25 treated for depression prior to this accident?

1 A. I don't know her medical history.

2 Q. Okay. And, Dr. Smith, do you know that
3 following this accident that Ms. Garcia was treat --
4 was diagnosed with depression and treating with
5 antidepressants after this accident but not related to
6 the motor vehicle accident?

7 A. Who said not related? She reported extreme
8 problems related to the accident. How could that not
9 be related?

10 Q. Okay. Let me ask the question. Did you
11 understand my question, Doctor?

12 A. Whoever gave the diagnosis, you'd have to ask
13 them. I don't have access to her medical records. So
14 let's just say that is somebody else's argument. Okay?
15 I can tell you what she reported to me. It's difficult
16 to think that somebody has difficulty raising two young
17 children and financial problems doesn't have stress.

18 Q. Doctor --

19 MR. MAZZEO: Move to strike the nonresponsive
20 continuing narrative from this doctor, Judge.

21 THE COURT: Sustained.

22 MR. MAZZEO: Thank you, Judge.

23 BY MR. MAZZEO:

24 Q. Can you tell us, Dr. Smith, what Ms. Garcia's
25 physical condition was at the time of this accident?

1 Prior. Prior to the accident.

2 A. Jogged, biked, liked to dance.

3 Q. No, her -- not -- not activities that she
4 wanted to engage in or did engage in. I'm asking you
5 her physical condition, overall --

6 A. Can't you understand the physical condition
7 of someone who likes to bike, jog, and dance? She's in
8 decent shape. She's probably in --

9 MR. MAZZEO: Move to strike the gratuitous
10 comments by this witness who's trying to curry favor
11 with the jury, Judge.

12 THE COURT: Overruled. I think that was --
13 that answer was in response to the question that you
14 asked.

15 MR. MAZZEO: Okay.

16 BY MR. MAZZEO:

17 Q. Can you tell us about whether or not
18 Ms. Garcia was in a deconditioned state and/or obese
19 prior to this accident? Yes or no?

20 A. I don't know. She said she gained weight
21 afterward, but I don't know what she weighed before,
22 but you don't have --

23 Q. Please don't look at your report, Doctor.

24 A. Define obese. Are you saying clinically past
25 the body mass index of 30? Is that your statement?

1 You have documentation of that? Is that what you're
2 telling me?

3 Q. Doctor, you know what? I get to ask the
4 questions here.

5 A. I know. You have to define your question.
6 What do you mean by obese? Body mass index of 30 or
7 more --

8 Q. Doctor, there's no question right now.
9 Please stop talking.

10 MR. ROBERTS: Your Honor, giving instructions
11 to the witness should come from the Court, not from
12 counsel.

13 THE COURT: Agreed.

14 MR. MAZZEO: Your Honor, please direct the
15 witness to stop going off on these tangents.

16 THE COURT: I'm going to suggest again,
17 Doctor, if it can be answered with a yes or no, answer
18 it that way. If it can't, just say it can't be
19 answered with a yes or no.

20 THE WITNESS: Thank you, Your Honor.

21 BY MR. MAZZEO:

22 Q. And, Doctor, do you know if -- whether or not
23 Ms. Garcia was actively smoking, was -- was a smoker, I
24 should say, at the time of this accident?

25 A. I don't know.

1 Q. Okay. By the way, your -- your calculation
2 in your assessment regarding the loss of enjoyment of
3 life, that was not related to any particular body part
4 or mental dysfunction; is that correct?

5 A. To her -- not to any single piece, to the
6 whole.

7 Q. And you have no idea what body part, if any,
8 was deemed to be injured permanently or --

9 A. Kind of.

10 Q. -- otherwise?

11 A. I mean, I'm not a medical doctor, but I
12 understand it's the back, at least the back.

13 Q. But -- but we already talked about this. You
14 don't have any independent knowledge whether or not --
15 whether her back was permanently injured for the rest
16 of her life? Right?

17 A. I don't. I'm not -- I haven't memorized
18 it -- well, even if I had read it, I'm not here to
19 testify to her medical condition.

20 Q. And -- and in any event, you did not apply
21 any percentage of loss of enjoyment of life to any
22 particular body part; correct?

23 A. Certainly not.

24 Q. Okay. And do you recognize the Journal of
25 Forensic Economics as an authoritative publication?

1 A. Well, you can't say that. I have to look at
2 each article. There's like hundreds of articles that
3 have been published. Some have stood well the test of
4 time; others have -- over time, we've seen, have not
5 been so great.

6 Q. Okay. And in your report, you actually
7 reference and cite to the economic inquiry article
8 drafted and written by Kip Viscusi, where he estimates
9 the value of life to be approximately so many dollars.
10 Do you know that? On page 8 of your report.

11 A. I reference some work by Kip Viscusi, yes.
12 He's one of the -- one of the dozens and dozens of
13 people who have authored on the value of life.

14 Q. And do you recognize Kip Viscusi as
15 authoritative on the topic of the value of -- the value
16 of statistical life?

17 A. He's -- as I just said, he's one of the
18 dozens of people who have published on the value of
19 life, as have I. He's much -- he's published much more
20 than I have. I have published one research article.
21 He and other people have published more.

22 Q. And he's not just one of the dozens. He's
23 actually the preeminent expert, would you say, on the
24 value of statistical life?

25 A. I would say he's probably the guy who's

1 published more than most, but there are many who've
2 published a lot.

3 Q. Now, would you agree, Doctor, that Viscusi
4 had implemented the use of the value of statistical
5 life levels to value the benefits from fatalities that
6 would be prevented by government regulation rather than
7 valuing loss of enjoyment of life?

8 A. Well, he did value loss of enjoyment of life
9 in a personal injury case where I and Dr. Ireland were
10 on the defense side and he was testifying for the
11 plaintiff. But he normally would use it for government
12 research and government consulting, yes.

13 Q. Right. And -- and do you know that
14 Dr. Viscusi had stated that, "It is dishonest for
15 plaintiffs experts to suggest that the use of the value
16 of statistical life for compensation in hedonic damage
17 cases simply reflects government practices"?

18 MR. ROBERTS: Objection. Hearsay. Hearsay
19 and not disclosed under 16.1.

20 THE COURT: Hold on. Is this something that
21 was in his report?

22 MR. MAZZEO: He refers to Dr. Viscusi in his
23 report.

24 THE WITNESS: But not that way.

25 MR. MAZZEO: I will withdraw the question.

1 THE COURT: Okay.

2 BY MR. MAZZEO:

3 Q. Now, is it correct to say that your
4 methodology does not contemplate using sympathy and
5 likability factors to determine the value of loss of
6 enjoyment of life?

7 A. No, you don't have to be likeable to enjoy
8 your life.

9 Q. Okay.

10 A. Sometimes I'm not very likeable.

11 Q. So whether jurors feel sympathy for the
12 plaintiff or whether juror likes the plaintiff are not
13 factors that should be used in determining the loss of
14 enjoyment of life; correct?

15 A. No, certainly not. A -- a person has value
16 whether other people -- I mean, you could have a very
17 recluse person who sits home and reads the -- and plays
18 chess and another person who's very outgoing, they
19 might enjoy life differently than you might suppose.
20 The recluse might have a very satisfying life, and the
21 person who's very outgoing might be more troubled.
22 It's hard to say.

23 Q. Okay.

24 MR. MAZZEO: One second, Your Honor.

25 Your Honor, I will pass this witness.

1 THE WITNESS: Thank you.

2 THE COURT: Mr. Strassburg? Or Mr. Tindall?

3 CROSS-EXAMINATION

4 BY MR. TINDALL:

5 Q. Good afternoon, Doctor.

6 A. Good afternoon.

7 Q. What is the dollar amount that the plaintiff
8 paid for the household services that she told you she
9 couldn't do?

10 A. Wouldn't be relevant to my analysis, and I
11 don't know. If she paid any. She didn't sound like
12 she had money to hire people.

13 Q. Thank you.

14 THE COURT: That's the only question you had?

15 MR. TINDALL: That's it.

16 THE COURT: Plaintiff have any more redirect?

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

18

19 REDIRECT EXAMINATION

20 BY MR. ROBERTS:

21 Q. Dr. Smith, I want you to assume a couple of
22 things for me. Assume that the plaintiff had been
23 fired at Sam's Town years before this accident and was
24 sad about that. Assume that she had suffered some
25 depression over a year before the evidence [sic] and --

1 and was struggling with some personal issues.

2 What adjustments should the jury make to your
3 calculations of loss of value of life for Ms. Garcia
4 under those assumptions?

5 MR. MAZZEO: Objection. Incomplete
6 hypothetical.

7 THE COURT: Overruled.

8 THE WITNESS: If they thought that would be a
9 permanent factor, significantly reducing her ability to
10 lead a normal life, if they thought -- I mean, she's --
11 what? -- 28 when that happened or so -- that that would
12 last the rest of her life, they could say, well, maybe
13 she wouldn't lead a normal life, maybe the -- maybe the
14 \$4.5 million value doesn't apply to her, maybe she
15 falls outside the range.

16 If they think that, they could -- they could
17 take off 5 percent or 10 percent from my number if they
18 thought that whatever happened age 28 would still
19 affect her at age 78.

20 MR. ROBERTS: Thank you. That's all I have,
21 Your Honor.

22 THE COURT: Any more?

23 MR. MAZZEO: Nothing further.

24 THE COURT: Nobody?

25 Ladies and gentlemen, any questions from our

1 jurors? We got at least one.

2 Come on up, Counsel.

3 (A discussion was held at the bench,

4 not reported.)

5 THE COURT: All right. Doctor, couple of
6 questions for you. First one, it says, did you
7 calculate dropoff items? Spinal stimulator appears to
8 be calculated to 84 but estimated at 22 years from now.

9 THE WITNESS: The spinal stimulator was not
10 in the life-care plan number I gave. It was in the
11 plan, but the plan had everything but the spinal
12 stimulator, and that's the number we wrote down there.
13 The spinal stimulator was an additional roughly half a
14 million, but it wasn't in the number we -- we showed it
15 without spinal stimulator.

16 THE COURT: Okay.

17 THE WITNESS: So everything else was the
18 plan -- was in Dr. Oliveri's plan. So that 2 million
19 whatever number we wrote down did not include the
20 spinal stimulator.

21 THE COURT: Okay. Next question: Are there
22 other items calculated lifelong that should drop off in
23 any of the areas -- medical, life services, life
24 quality -- and what might they be?

25 THE WITNESS: Okay. That's a good question.

1 On medical, I don't know. I took Dr. Oliveri's plan.
2 And I have no comment on his plan. I used exactly his
3 numbers.

4 On services, we do show services dropping
5 once the children leave the household from 24 hours to
6 16 hours. And then assuming a retirement at age 67, an
7 increase from 16 to 18 hours. And then it stays -- the
8 tables just show it stays constant after age 67.

9 Quality of life, that's a hard thing to
10 assess. I have assumed the same quality year after
11 year after year. It may be some people go through ups
12 and downs of different sorts, but the model assumes the
13 totality of the -- of the 4 1/2 million, for whatever
14 ups and downs there may be, we've given the same amount
15 per year.

16 THE COURT: Thank you, Doctor. There's
17 another question that I'm not going to ask. We'll mark
18 that Court's next in order.

19 Mr. Roberts, any follow-ups?

20 MR. ROBERTS: Yes. Just for further
21 clarification with regard to the first question.

22

23 REDIRECT EXAMINATION

24 BY MR. ROBERTS:

25 Q. When we looked at the totals under age 84 in

1 the summary chart --

2 A. Yes.

3 Q. -- and we looked at those numbers, are those
4 the costs you expect to be incurred in that year, or is
5 that the cumulative total from the date of your report
6 all the way up to age 84?

7 A. Right. That's a good question because it
8 showed the total under age 84, but it's the complete
9 amount year by year added up, and at the end of age --
10 at age 84, that's the total that year.

11 It's -- it's several thousands per year. I
12 guess a couple of thousand for medical commodities and
13 maybe -- maybe 30, 40,000 for medical services, and --
14 but it adds up to the 2,156,000 without the spinal
15 stimulator at age 84, it looks like roughly even
16 amounts per year.

17 Q. Okay. Thank you. Thank you, Your Honor.

18 THE COURT: Any more?

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

20

21 RECROSS-EXAMINATION

22 BY MR. MAZZEO:

23 Q. This is -- Doctor, this is a summary table,
24 Table 13A, that you talked about earlier today.

25 A. Yes.

1 Q. It's in your life-care plan. And this is in
2 your third life-care plan; correct?

3 A. Well, it's -- it's the third -- it's the last
4 valuation of Dr. Oliveri. October 16th, 2015. Yes.

5 Q. Thank you. That's what I meant, because you
6 didn't do a life-care plan. I meant in your third
7 report. And so --

8 A. Yes.

9 Q. -- the question --

10 A. Yes.

11 Q. Yeah. The question that I have for you, so
12 you have a total -- grand total column of 2,156,000 --
13 \$156,715 grand total and --

14 A. Before the stimulator.

15 Q. Yeah, before. That's without the option.
16 And then you have one with the option, which adds
17 another 593,000. Correct? Et cetera.

18 A. If -- if the stimulator is an option, yes.

19 Q. So if the -- is it -- is it your
20 understanding that if the stimulator is an option,
21 your -- well, strike that.

22 What you're doing is you're adding the
23 stimulator option to the grand total of 2,156,000;
24 correct?

25 A. That was my understanding of the plan that I

1 evaluated, yes.

2 Q. Okay. And so -- but if the stimulator is an
3 option, do you have any understanding as to whether
4 other medical -- projected medical services will drop
5 off from above?

6 A. Not from reading the plan that we looked at
7 then. Dr. Oliveri said differently then.

8 Q. Thank you. Nothing further.

9 MR. TINDALL: No questions, Your Honor.

10 THE COURT: Anything?

11 MR. ROBERTS: Nothing further, Your Honor.

12 THE COURT: Thank you, Doctor. Appreciate
13 your time. You're excused.

14 THE WITNESS: Thank you, Your Honor.

15 THE COURT: You need a break? Yep? All
16 right. Let's go ahead and take an afternoon break.

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

25 You are not to conduct any research on your

1 own, which means you cannot talk with others, Tweet
2 others, text others, Google issues, or perform any
3 other kind of book or computer research with regard to
4 any issue, party, witness, or attorney involved in this
5 case.

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

9 Plan on ten minutes.

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

12 THE COURT: All right. We're outside the
13 presence of the jury. Anything we need on the record?

14 MR. SMITH: Yes, Your Honor.

15 THE COURT: Okay.

16 MR. SMITH: We'd like to address the
17 questions -- or some of the statements by counsel to
18 Dr. Smith about Ms. Garcia's employment and her
19 termination of employment. We had a bench conference,
20 and I would like to put some of the bench conference on
21 the record and then provide Your Honor with the
22 evidence that we were referencing at the bench
23 conference that contradicts the questions that were
24 asked.

25 So the -- the bench conference began with a

1 question about Ms. Garcia being terminated from Sam's
2 Town. And what we objected to and explained to the
3 Court is that the question is irrelevant and there's no
4 foundation for it. There's no wage loss claim -- as
5 just foundation, there's no wage loss claim; it's not
6 relevant to the case.

7 Your Honor overruled that objection and
8 allowed Mr. Mazzeo to make the statement about it as
9 opposed to asking a question about it because of a
10 representation that Ms. Garcia testified about in her
11 deposition.

12 After that, there was a question about
13 Ms. Garcia being terminated from Fiesta Rancho. And
14 the specific statement that Mr. Mazzeo made was that
15 Ms. Garcia was terminated from Fiesta Rancho because,
16 quote, her computer skills were not up to snuff.

17 Ms. Garcia has never -- and we objected to
18 that question and said it's irrelevant and
19 misrepresents the testimony. And -- and the Court
20 allowed it to go forward.

21 Ms. Garcia has not ever been asked in a
22 deposition about her separation of employment from
23 Fiesta Rancho. Instead, where Mr. Mazzeo gets that
24 testimony from is a supervisor of hers. Which I'm
25 going to get to in a minute that he misrepresented what

1 the supervisor says, but even more important than that,
2 the supervisor has not been listed as a trial witness
3 in any of the pretrial disclosures.

4 So they cannot bring this evidence from the
5 supervisor into the court, yet counsel represented it
6 to the jury that this is what you're going to hear by
7 telling Dr. Smith this is what she said. And he
8 represented it after Dr. Smith had already said he
9 doesn't know what happened with her employment at
10 Fiesta Rancho.

11 In other words, Mr. Mazzeo knows he's going
12 to say he doesn't know, and then provided evidence to
13 the witness and the jury that is never going to come
14 in.

15 And, in addition, the supervisor did not say
16 that she was terminated for her -- because her computer
17 skills were not up to snuff. It's pages 47 and 48 of
18 his deposition where he talks about that she had an
19 introductory period, and she did not meet the
20 introductory period.

21 They did follow up on the reasons why she
22 didn't meet it, and -- and the reasons were numerous,
23 one of which had something to do with computer skills.
24 But that's only one of the things, and it is not the
25 only thing, and there's no evidence that that was the

1 most of it.

2 And regardless, as I said, none of this
3 evidence has been established in any way that it's
4 going to be presented to the jury.

5 And Your Honor had already told Mr. Mazzeo
6 during our bench conference that he cannot make a
7 representation to the jury that's not in evidence. And
8 the only reason you allowed the prior representation is
9 because of a statement that she had testified to that
10 in her deposition.

11 Knowing that he wasn't supposed to make a
12 representation to the witness and the jury, he then
13 went ahead and did it when it's not based upon the
14 deposition of a party, which I understand Your Honor's
15 ruling to be he could have asked a prior question
16 because it was based on the deposition of a party and
17 he could use the deposition to ask the question. Can't
18 do that in this instance, and the jury should be
19 instructed that that statement is inaccurate and should
20 be stricken from the record and shouldn't have been
21 said in the first place.

22 MR. MAZZEO: Okay. We disagree. For one
23 thing, Jared Awerbach's -- Jared Awerbach did identify
24 Jonathan Davis, who is the supervisor at Fiesta Rancho,
25 as a witness to be called at trial. So -- and based on

1 what Mr. Smith just advised the Court -- and I think
2 that I should be able to certainly cross-examine the
3 plaintiff. I'm not limited to the scope of their
4 direct. I can cross-examine her with regard to issues
5 and topics that are relevant to impeaching her.

6 And based on what Mr. Smith just advised the
7 Court about what Mr. Davis said, well, I wasn't
8 inaccurate; I was indeed accurate. Accurate because
9 that was one of the things that -- that was one of the
10 findings made by Mr. Davis as to why she was not
11 qualified to continue working at Fiesta Rancho because
12 of her computer skills.

13 So that was not a misrepresentation. It may
14 not have been the only reason, but that was a reason
15 that I elicited from Mr. Davis at the time of his
16 deposition.

17 So his argument is -- is moot. It doesn't --
18 there's no basis for his argument now. And -- and I
19 would object to you instructing the jury, in light of
20 what Mr. Smith just advised the Court about Mr. Davis's
21 deposition testimony.

22 MR. SMITH: And I will say, I was looking at
23 an older pretrial disclosure. So Mr. Awerbach didn't
24 disclose him, but I don't want to make a
25 misrepresentation to the Court. I was looking at his

1 prior pretrial disclosure, and I just got handed a more
2 recent one.

3 So Mr. Mazzeo is correct about that, but he
4 still misrepresented what the witness is going to say,
5 and he can't use the statement of a third-party witness
6 to give to this witness. It didn't come from the
7 deposition of a party that he could have used to
8 provide to -- to -- to Dr. Smith and you had already
9 told him not to do that.

10 MR. MAZZEO: Judge, the question is whether I
11 have a good-faith basis for making that statement, and
12 I did. So that's why I am allowed to make that
13 statement in a question to this doctor.

14 So there is no -- there's no wrongdoing in
15 asking that question of this doctor, and there's no
16 need for any -- curative instruction to the jury.

17 THE COURT: I think at this point I'm not
18 going to give a curative instruction. But I'm going to
19 caution you, because I think Mr. Smith is right as far
20 as I did allow you to make a representation about what
21 somebody was going to say based on the party's
22 deposition. If it's not a party, you can't make
23 representations about what somebody's going to say.
24 You can ask a witness what they know, you can ask them
25 what they have heard, what they understand, but you

1 can't tell them, this is what -- it's like -- here's
2 the problem. You may not call that person. And if you
3 don't call that person, it's as if you were testifying
4 to the jury. And that's the problem.

5 MR. MAZZEO: The -- but the issue, Judge, is
6 whether I have a good-faith basis to make that. I'm
7 not just making it up; I actually had a good-faith
8 basis to make that. And I wanted to know, before this
9 witness left the stand, whether he was aware of the
10 reason for her termination from Fiesta Rancho, which
11 was good-faith basis based on what this witness
12 testified to. So I --

13 THE COURT: I'm allowing it.

14 MR. MAZZEO: Thank you.

15 THE COURT: I'm just asking you to be careful
16 in the future and please don't do it again.

17 MR. MAZZEO: Okay. I won't.

18 THE COURT: If you're going to make a
19 representation that something is as -- as you say it
20 is, it better be based on a party's deposition.

21 MR. MAZZEO: Okay. Yes.

22 THE COURT: Okay?

23 MR. SMITH: In the future, if the question is
24 asked, "Do you know about her termination?" the answer
25 is no, then there should not be allowed a follow-up

1 question explaining what the termination is based upon
2 a witness who may not testify and has not been
3 subpoenaed.

4 MR. MAZZEO: Your Honor, that requires a
5 contemporaneous objection. I wouldn't -- I -- I would
6 request you don't make any advanced rulings on this
7 issue.

8 THE COURT: I agree.

9 MR. MAZZEO: Thank you.

10 THE COURT: Make the objection if it happens
11 again.

12 THE CLERK: Mr. Mazzeo, can I get a copy of
13 the depo, please?

14 MR. MAZZEO: Yes, you'll get a copy.

15 THE COURT: I'm going to also ask that --
16 especially with you, Mr. Mazzeo, you get on a roll with
17 a witness, and you and the witness, neither one of you
18 let's me rule on objections. I hate to object or
19 to -- to interrupt, but I'm going to start doing that.

20 MR. MAZZEO: Okay. I will --

21 THE COURT: It makes it very difficult on
22 Kristy trying to type three of us talking at once, but
23 I guarantee you, she will get what I say and not what
24 you and the witness say.

25 MR. MAZZEO: That's true. I -- I understand

1 that, Judge. I think I have tunnel vision sometimes
2 and it takes a few seconds for the objection to
3 register.

4 THE COURT: I know. I know.

5 MR. MAZZEO: Okay.

6 THE COURT: Anything else outside the
7 presence on the record?

8 MR. ROBERTS: No, Your Honor.

9 MR. MAZZEO: No, Judge.

10 MR. TINDALL: No, Your Honor.

11 THE COURT: All right. Off the record.

12 (Whereupon a short recess was taken.)

13 THE COURT: Let's get going, guys.

14 THE MARSHAL: Jury entering.

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

17 THE MARSHAL: Jury is present, Judge.

18 THE COURT: Thank you.

19 Go ahead and be seated. Welcome back folks.
20 We're back on the record, Case No. A637772.

21 Do the parties stipulate to the presence of
22 the jury?

23 MR. ROBERTS: Yes, Your Honor.

24 MR. MAZZEO: Yes, Your Honor.

25 THE COURT: All right. I understand our next

1 witness, we're going to recall Dr. Gross?

2 MR. ROBERTS: Yes, we have Dr. Jeff Gross
3 back on.

4 THE COURT: Can you get Dr. Gross for us,
5 Tom?

6 MR. STRASSBURG: Can I have the TV, Judge?

7 THE COURT: Is it your turn? We are in
8 Mr. Strassburg's cross; is that right?

9 MR. STRASSBURG: Well, yeah, we started and I
10 haven't finished yet.

11 THE COURT: Welcome back, Doctor.

12 THE WITNESS: Thank you.

13 THE COURT: Even though I had you sworn in
14 before, because it's been a while, I'm going to have
15 you sworn again. If you remain standing, raise your
16 right hand.

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

21 THE WITNESS: I do.

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

24 THE WITNESS: Jeffrey David Gross, M.D.
25 That's spelled J-e-f-f-r-e-y. D-a-v-i-d. G-r-o-s-s.

1 THE COURT: Thank you.

2 MR. STRASSBURG: Judge, how far can I pull
3 this over?

4 THE COURT: Until it pulls the plug out of
5 the wall. Depends if you want the jury to see the
6 witness or not. Now some of them cannot.

7 MR. STRASSBURG: Okay. Can you now? Oh,
8 he's not -- he's not that good looking.

9 Can you? Can you -- you can? Okay.

10 CROSS-EXAMINATION

11 BY MR. STRASSBURG:

12 Q. All right. Doctor, thank you for returning.

13 We want to complete you today. Doctor, I
14 want to be entirely fair to you in my questioning, so
15 if you don't understand a question, or it's a dumb
16 lawyer's question, and you're a smart doctor, then just
17 tell me and we'll fix it so everything is a fair --
18 okay.

19 A. Thank you.

20 Q. Now, in this case you have given an opinion
21 about medical causation as an expert witness; right?

22 A. Yes, in part.

23 Q. Okay. And your opinion was -- I mean, just
24 to speed this along, I'll show it to you here while I'm
25 reading it.

1 Your opinion is that "Ms. Garcia suffered a
2 motor vehicle accident-related injury resulting in
3 three items: number one, discogenic and mechanical
4 low back pain with radiculopathy related to
5 spondylolytic spondylolisthesis disco protrusions and
6 neural involvement and some secondary weight gain."

7 Do you remember giving that testimony?

8 A. Yes.

9 Q. Okay. All right. Is that on your screen,
10 too, Doctor?

11 A. It is now. Thank you.

12 Q. No problem. Okay.

13 So "discogenic," that means something to do
14 with the disk --

15 Could I have the model, Randy?

16 -- something to do with the disks between the
17 bones of the spine; right?

18 A. Right.

19 Q. "Mechanical" means something to do with
20 motion; right?

21 A. Right.

22 Q. Okay. "Radiculopathy" means something having
23 to do --

24 Thank you, Randy.

25 -- something having to do with nerves; right?

1 A. The nerves coming out of the spine
2 specifically, yes.

3 Q. So that would be these nerves here?

4 A. Correct.

5 Q. Okay. And -- and these are the nerve roots;
6 right?

7 A. That's right.

8 Q. Got it. Okay.

9 Now -- so your opinion is is that the
10 accident caused L5 vertebra to displace forward and
11 cause the -- the symptoms that you treated; right?

12 A. Yes, in part.

13 Q. Okay. Thank you.

14 And in your medical opinion, a disk between
15 these vertebra, right here, protruded in such a way to
16 mechanically impinge upon one of the nerve roots;
17 right?

18 A. There are some incorrect portions of your
19 question.

20 Q. Okay. Let me try again.

21 A. Sure.

22 Q. So when you say it's "discogenic," you mean a
23 disk; right?

24 A. A rising of a disk, yes.

25 Q. When you say it's "mechanical," you mean a

1 motion?

2 A. A pain from a motion, yes.

3 Q. And when you say "radiculopathy," you mean
4 one of these nerve roots; right?

5 A. Involving a nerve root, correct.

6 Q. Okay. Thank you, sir.

7 Now, you also testified that -- let me show
8 you this, and that's on your screen, too.

9 "Did you make any determination as to whether
10 or not Ms. Garcia's slippage between L5-S1 prior to the
11 accident?"

12 And you said, "Well, I don't think I can ever
13 know that, but I can say she either did not have a
14 slippage or, if she did, it was insignificant. There
15 were no X rays or even reasons for X rays before the
16 injury that could give us a clue as to which one of
17 these things was going on"; right?

18 A. Yes.

19 Q. So to be fair to you, you admit or agree that
20 unless we knew, with a radiograph, the condition of her
21 spine before the accident, right, we can't really be
22 sure what the radiographs afterwards are telling us;
23 right?

24 A. Just looking at radiographs before and after
25 and ignoring all of the other important information,

1 then I would have to agree based upon what you --
2 you -- your hypothetical situation provides.

3 Q. Okay. Now, have you had occasion to consult
4 with Dr. David Oliveri?

5 A. In this matter?

6 Q. Yeah, in this case.

7 A. I haven't spoken with him, but I reviewed his
8 records and reports.

9 Q. Okay. And have you had occasion to consult
10 with Dr. Kidwell in this matter?

11 A. I don't know that I spoke to Dr. Kidwell, but
12 I certainly was coordinating care with him by virtue of
13 sharing reports and providing prescriptions and
14 requests for different injections along the way.

15 Q. Okay. And so you've also testified that, in
16 your expert opinion, she had no prior back pain; right?

17 A. Correct.

18 Q. Okay. Now, we have also had testimony here
19 from Dr. David Oliveri, and here's the picture I took
20 of him testifying to this jury, as you can see. And
21 you know that he's holding in his hand his model of a
22 disk; right?

23 A. I don't know that.

24 Q. Okay.

25 A. But perhaps.

1 Q. Can -- huh?

2 A. Perhaps it is a disk.

3 Q. Okay. So we can agree that's his -- that's a
4 model of a disk; right?

5 A. I wasn't here for his testimony, Counsel.

6 Q. I know. That's why I'm showing you the
7 picture.

8 A. It could be a disk. I don't know what it is.

9 Q. Fair enough.

10 A. It could be a scallop.

11 Q. All right. Okay. I don't just take terrible
12 pictures.

13 So this is a picture of what Oliveri was
14 showing them. And can you -- can you at least agree on
15 one thing that -- that this is a model of a herniated
16 disk?

17 A. This looks like a model of a herniated disk.
18 I would agree with that.

19 Q. You'll give me that one? Okay.

20 Now, when you were treating Ms. Garcia,
21 you -- and when you were coming to your expert opinion,
22 you also had some clinical information that she
23 provided you; right?

24 A. Yes.

25 Q. And -- and, again, to be fair to you, you

1 really weren't in a position to check some of that
2 history; right?

3 A. By "checking," what do you mean?

4 Q. What do you mean? Yes. Okay. Another one
5 of those questions.

6 So, for example, she told you her speed is 30
7 to 35 miles an hour; right?

8 A. Oh. I have no way of checking that.

9 Q. Okay. I can.

10 Do you recognize this document?

11 A. Well, I have a big notebook. I don't -- I
12 can't tell you where I saw that, but perhaps --

13 Q. Right. And that's why I'm doing it for you,
14 so you don't have to hunt for it.

15 A. Thank you.

16 Q. And you, as an expert witness, you read all
17 the medical records in this file; right?

18 A. Yes. Medical records.

19 MR. ROBERTS: Mr. Strassburg, could we have a
20 citation in the record what you're displaying?

21 MR. STRASSBURG: Oh, that one? Sure. Yeah,
22 yeah, yeah. Uh-huh.

23 All right. This is -- it's Bates
24 No. JACA00016. It also appears in the Lerner firm
25 records, and it is at -- it's the intake record, which

1 I can show you all here.

2 Recollect that one?

3 MR. ROBERTS: Your Honor, I would just
4 request an exhibit number and page for the jury and
5 also for the record -- court record from the Bates
6 number.

7 THE COURT: Do you have that?

8 MR. STRASSBURG: Yeah, we do.

9 THE COURT: He kind of makes sense.

10 MR. STRASSBURG: No, we do. We got it.

11 Yeah, that's -- that's our numbering, but
12 it's in their records as their number. It's one of the
13 intake records.

14 Well, I can give JACA00016, and it is a
15 record. It comes right after the X ray consent form,
16 and it's your -- here, it's this thing. It's -- it's
17 this intake form.

18 THE COURT: You do kind of have to give us an
19 exhibit -- exhibit number or letter or something. I
20 think we have seen it before, but we need to be able to
21 find it to ask him.

22 MR. STRASSBURG: Can I come back to that?
23 Can I come back to that?

24 THE COURT: Okay.

25 /////

1 BY MR. STRASSBURG:

2 Q. Okay. We'll provide it to you. Thank you
3 for ...

4 Okay. And then you also reviewed the
5 August 17th, 2011, initial evaluation of Ms. Garcia by
6 Select Physical Therapy. True?

7 MR. ROBERTS: I would object until an exhibit
8 number and page is given. We're displaying things
9 without referencing a record.

10 THE COURT: We don't know if they're admitted
11 yet, Mr. Strassburg.

12 MR. STRASSBURG: It's one of the medical
13 records of the treatment from Select Physical Therapy.
14 It's Bates numbered JALM00249.

15 MR. ROBERTS: Same objection, Your Honor.

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

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

19 MR. STRASSBURG: Okay. I will withdraw the
20 question and go on.

21 BY MR. STRASSBURG:

22 Q. Do you recollect there was a time when the
23 plaintiff represented that she was going 40 miles an
24 hour before the accident?

25 A. I don't know.

1 MR. ROBERTS: Your Honor, could we have the
2 exhibit now or the page. I'm not saying -- I don't
3 know if it's an exhibit or not.

4 MR. STRASSBURG: I'm not referring to a
5 document, Judge. I'm just trying to move this along.

6 THE COURT: It's on the screen.

7 MR. STRASSBURG: Yeah. I mean, but I don't
8 have his number to it. I can show it to him.

9 THE COURT: You know, that's the problem.
10 You're not going to show it to him unless there's an
11 exhibit, so ...

12 MR. STRASSBURG: Fair enough.

13 MR. SMITH: I think the point is ...

14 MR. STRASSBURG: I'll go on.

15 BY MR. STRASSBURG:

16 Q. As part of your clinical record, you noted
17 that she was wearing her seat belt and shoulder strap
18 at the time of the accident. True?

19 A. I'm taking a look. I believe so, but I want
20 to give you an accurate answer.

21 I said, "She had her seat belt on." I wasn't
22 more specific.

23 Q. And you reviewed the ER records; right?

24 A. Yes.

25 Q. So if I direct your attention to what's been

1 Bates numbered as GJL76, from the emergency room
2 record, does that refresh your recollection?

3 A. I'm sorry. You're referring to Dr. Sandrup
4 of 1/5/11 at MountainView Hospital?

5 Q. Yes.

6 A. Refresh my recollection regarding the seat
7 belt?

8 Q. Correct.

9 A. Well, what Dr. Sandrup said, first of all,
10 would not be the basis for what the patient said to me
11 personally. But I have what Dr. Sandrup said, "The
12 patient was wearing a lap belt and shoulder harness."

13 Q. Thank you, sir.

14 The plaintiff experienced no secondary impact
15 inside the vehicle during the accident. True?

16 So far as you know.

17 A. One second, please.

18 Q. Just tell me if you recollect, Judge--
19 Doctor. And if you don't, I'll just go on, unless I
20 want you to look it up.

21 You don't know, do you?

22 A. Well, no, no, that's -- knowing and
23 recollecting are two different things, I believe.

24 Q. Oh, absolutely right. Thank you for
25 splitting that hair.

1 You don't recollect; right?

2 A. Well, Counsel, I don't mean to argue with
3 you.

4 Q. You don't recollect? Yeah. You don't
5 recollect; right?

6 A. I can't memorize this overnight. So I'm
7 happy to look at my records to see what I know or knew
8 or both. I'm sorry. I don't have it memorized.

9 Q. Fair enough.

10 A. I didn't anticipate your specific question or
11 I would have reviewed that specific entry while sitting
12 in the hallway waiting to testify.

13 Q. Now, you believe that the motions in the
14 accident caused movement of her spinal vertebra and
15 disks that impacted on a nerve root; right?

16 A. Involve. I don't think I said impacted at
17 any time during my testimony.

18 Q. Well, what do you think?

19 A. Well, I think I explained to the jury last
20 week how one does not have to have impingement, impact,
21 or compression to have nerve symptoms because of the
22 chemicals leaking out of the injured disk. However, we
23 did see on the MRI that I shared with the jury where
24 there is physical compression of the nerve.

25 Q. Okay. Let me show you an MRI from November

1 19th -- I'll tell you what. Let me show you the MRI
2 from January 26th, 2011.

3 Hearing no objection, I ask it be published
4 to the witness.

5 THE COURT: Do you have an exhibit number for
6 us?

7 MR. STRASSBURG: It is one of the MRIs that
8 we have been referring to. It's the January 26th,
9 2011, MRI.

10 THE COURT: You okay with him showing it to
11 the jury?

12 MR. ROBERTS: I have no objection to him
13 showing the admitted exhibit to the jury. If he's got
14 a graphic that he prepared with boards and notes, I
15 would object to that.

16 MR. STRASSBURG: Great. I will cut out
17 everything except the MRI.

18 BY MR. STRASSBURG:

19 Q. Okay. This is an MRI for a side -- for a
20 slice at L5-S1. Do you see that?

21 A. I see what you have put on the screen. It is
22 part of an MRI, not a complete MRI.

23 Q. All right. And on the left panel, the slice
24 shows the view level for the axial images that I set
25 next to it. True?

1 A. Or one of them.

2 Q. All right. And these axial images differ
3 because one is at T2 and one is at T1; right?

4 A. Yes.

5 Q. And the T2 shows water or fluid as white;
6 right?

7 A. I can't see what you're pointing to on that
8 screen.

9 Q. Same thing you're looking at.

10 A. I can't see what you're pointing to on the
11 screen.

12 Q. Okay. So look at the T2 image. You know
13 which one that is?

14 A. I do.

15 Q. And you see any white on it?

16 A. I do.

17 Q. That's what I'm pointing to.

18 A. Thank you.

19 Q. And that's spinal fluid; right?

20 A. Yes.

21 Q. And the little dots in there, that's the
22 spinal canal and those are the nerve rootlets; right?

23 A. Yes.

24 Q. Okay. And above, up above here, that is the
25 disk; right? And -- at L5?

1 A. There's no disk in that middle panel or the
2 right panel shown.

3 Q. So you don't see a disk?

4 A. On the left panel, I do. The cross sections
5 displayed in the middle and right panels are through
6 bone, not disk.

7 Q. I see. All right. Thank you.

8 MR. ROBERTS: And, Your Honor, for the
9 record, the three different slides on the screen are
10 from Exhibit 40.

11 THE COURT: Thank you.

12 BY MR. STRASSBURG:

13 Q. All right. And you will agree that in your
14 observations of her spine you observed that she had
15 preexisting disk disease?

16 A. She had no prior disease whatsoever.

17 Q. In her spine?

18 A. Correct. She had --

19 Q. Pristine spine?

20 A. She had no prior disease. I have previously
21 testified and will attempt to reiterate accurately
22 here, she had a -- an anomaly called a spondylolysis
23 which rendered her more susceptible. She may possibly
24 have had some spondylolisthesis. We don't know that,
25 and we'll never know that because there was no reason

1 to know until the present injury.

2 Q. Do you see any deterioration of the disks in
3 her spine?

4 A. At what time?

5 Q. Any of the MRIs that you reviewed?

6 A. The MRIs after the injury do show some
7 deterioration.

8 Q. Is it normal aging or is it the product of
9 disease?

10 A. There's no evidence of any disease process
11 here unless one considers trauma a disease.

12 Q. Do you?

13 A. Well, it is something epidemiologists study
14 and it is a leading cause in young and middle ages of
15 problems of the spine, so I suppose it can be in
16 relation to trauma. It is certainly something we try
17 to prevent by designing seat belts and what have you.

18 Q. Did you hear my question?

19 A. Yes, and I think it's answered.

20 Q. Do you consider it a disease?

21 A. "It" being what?

22 Q. Spondylolisthesis.

23 A. Spondylolisthesis is not a disease.

24 Q. Okay. And you met with Attorney Roberts
25 before you came to court?

1 A. A couple of weeks ago, yes.

2 Q. How long?

3 A. A few hours.

4 Q. Can you be more specific or can't you

5 remember?

6 A. It was two to three hours, perhaps.

7 Q. Anyone else or was it just the two of you?

8 A. Counsel at the table, Mr. Smith, was present;

9 and a colleague of Mr. Roberts, Mr. Mott, was present.

10 It was just the four of us.

11 Q. Okay. And you had your file?

12 A. I did.

13 Q. You went through the file with them?

14 A. Correct.

15 Q. And you went through MRIs with them?

16 A. I did.

17 Q. And did you discuss with them the nature and

18 character of the surgery you performed?

19 A. I did.

20 Q. Okay. Because you wanted them to understand

21 exactly what happened during your surgery; right?

22 A. No, not of my desire. They wanted to meet me

23 and understand the medicine and the case clearly and

24 get an idea of the type of opinions I would be

25 providing for the jury.

1 Q. Okay. And you did your level best to explain
2 to those lawyers the medicine in the case; right?

3 A. I did.

4 Q. All of it; right? You didn't hold back?

5 A. I did not.

6 Q. Did they show you a picture of the vehicles
7 involved?

8 A. I don't know if they did, but I believe I
9 have seen them.

10 Q. Before you decided to do surgery, did you
11 order flexion-extension X rays?

12 A. May I check?

13 Q. You can't remember?

14 A. I can't remember this very moment. Would you
15 like me to check?

16 Q. No. I want to find out what's in your
17 cranium.

18 Did you have occasion to read -- read
19 Dr. Cash's papers?

20 A. Yes.

21 Q. And do you recollect whether Dr. Cash did a
22 flexion-extension X ray?

23 A. I don't recall off the top of my head --

24 Q. Okay.

25 A. -- but I could check quickly, with your

1 permission.

2 Q. No, I have some other stuff to ask you.

3 Now, the purpose of your surgery was
4 decompression; correct?

5 A. In part.

6 Q. And you wanted to decompress a nerve that you
7 believe was being compressed; right?

8 A. Nerves, plural, but yes.

9 Q. Now, which nerves did you think needed
10 decompression?

11 A. Mainly the L5 nerves.

12 Q. And less than mainly, which nerves?

13 A. Well, I was also dealing with the L4-5 level.
14 And while there, I decompressed the L4 nerves as well.
15 And below the L5, I decompressed the S1 nerves.

16 Q. And the technique you utilized to do this
17 decompression was the removal of bone; right?

18 A. In part.

19 Q. And cartilage?

20 A. In part.

21 Q. Okay. Fair enough.

22 Now, in doing your surgery, what precautions
23 did you take to prevent the formation of scar tissue
24 that would affect the nerves?

25 A. The usual precautions.

1 Q. We may not know what's usual in your line of
2 work. Do you think you could enlighten us?

3 A. Sure. Scar tissue prevention includes
4 washing away any blood products that may occur and
5 putting small pieces of a dissolvable foam called
6 Gelfoam around the nerves, structures, and membranes.

7 So as part of my typical process, that was
8 done.

9 Q. And what Gelfoam did you use?

10 A. I don't know the brand but that it's Gelfoam.
11 It's probably Johnson & Johnson.

12 Q. Where did you get it? CVS?

13 A. I'm not sure if you mean to be funny or
14 facetious, but, I mean, it's a hospital supply. It's
15 given to the surgeons in the hospital when we ask for
16 it just like we ask for a suture or a gauze.

17 Q. And do you see the bottle before you put it
18 in?

19 A. It comes in a wrapper, like a gauze.

20 Q. Does it got a name on it?

21 A. Probably.

22 Q. Do you remember it?

23 A. Gelfoam.

24 Q. Manufactured by who?

25 A. I -- I don't know the manufacturer. I'm

1 sorry. Probably Johnson & Johnson or one of their
2 subsidiaries. They make most of the products we use in
3 the operating room that are consumables like that.

4 Q. All right. So other than wash away the blood
5 and the foam, you didn't do anything else to prevent
6 scar tissue forming around the nerves; right?

7 A. I didn't understand your question. It
8 implies that there would be something else I would do.

9 Q. That's the point. There isn't anything else
10 you can do; right?

11 A. Well, then why the trick question? Of course
12 not.

13 Q. Just trying to get to the truth because I
14 don't trust you.

15 A. Then just ask the question, I'll give you the
16 truthful answer. And I don't know why you don't trust
17 me.

18 MR. ROBERTS: Objection to form, Your Honor.

19 THE COURT: Sustained.

20 MR. ROBERTS: Strike that from the record.

21 THE COURT: It will be stricken. You don't
22 get to say whether you trust a witness. Ask a
23 question, please.

24 BY MR. STRASSBURG:

25 Q. Now, when you performed your surgery, you

1 removed more bone on one side than the other; correct?

2 A. Indeed, I did.

3 Q. You removed more bone on the right side;

4 right?

5 A. I believe that was the correct side.

6 Q. Uh-huh. And you removed less bone on the

7 left side; right?

8 A. It wasn't less; it was the normal amount.

9 But, yes, less than the side where I removed more bone.

10 Q. So you removed more than the normal amount of

11 bone on the right side; true?

12 A. Well, I can see how you just cornered me into

13 that, but I removed the proper amount of bone on both

14 sides and a little bit more on the side where I put the

15 implants for a safer approach to protect the nerves.

16 Q. You put more metal on the left side than the

17 right side?

18 A. No. The acrylic plastic innerbody cages.

19 They're not metal. They need more of a running room on

20 the side where we put them in, so I make more space by

21 removing more of the bone structure.

22 Q. All right. By "metal" I meant the screws and

23 the rods.

24 A. There's -- there's -- there's supposed to be

25 an equal amount of screws and rods on both sides, but

1 as you might recall -- and I remember this part -- I
2 had trouble with the right L4 screw, so that screw is
3 not there. There's three screws on the left and two
4 screws on the right, I believe.

5 Q. And what was the trouble you had with that
6 top right L4 pedicle screw?

7 A. It -- it wasn't seated well, and it -- it
8 fell out of the facet joint, or pedicle, on that side,
9 so it wasn't in a good position. I didn't feel
10 comfortable leaving it

11 Q. Did you break it?

12 A. I did not break it.

13 Q. Did you overtorque it?

14 A. I don't think so.

15 Q. It just sort of got loose?

16 A. It didn't just get loose, it just didn't have
17 a good seating and wasn't tight enough and I didn't
18 feel comfortable with it, so I used my best judgment to
19 take it out.

20 Q. Did you have complete control over
21 determining where and how to seat that screw?

22 A. Yes.

23 Q. And your objective was to seat that screw
24 firmly in the bone; right?

25 A. Yes.

1 Q. And you failed at that. True?

2 A. Essentially, yes.

3 Q. So what we're talking about is -- and this

4 is -- this one I can cite you to because it's the

5 Plaintiff's own demonstrative picture.

6 Do you have that in front of you?

7 A. Yes, I see it.

8 Q. Okay. So what we're talking about here is

9 these are the rods and screws that you installed in the

10 spine; right?

11 A. Yes.

12 Q. All right. And -- and you can kind of see

13 some of the facet joint on the left side; right?

14 Right here. Right here. Do you see it

15 peeking out there?

16 A. Yes.

17 Q. And the -- and on the right side, it's all

18 cut out; right?

19 A. Yes.

20 Q. Okay. And so that's part of the normal

21 amount of bone on the left side and more than normal

22 removal of bone on the right side; true?

23 A. More than normal is kind of silly. It's --

24 it's --

25 Q. I thought you said that.

1 A. And I -- and I -- and I did. And I said you
2 backed me into it, but what I meant was the normal
3 amount on the left was normal for the side we don't put
4 the spacer, and taking more on the side where we do put
5 the spacer is normal for that side. But it's more than
6 the other side. Both are normal.

7 Q. Okay. Now, on the right side -- and I
8 just -- MRIs are mirror images; right? So they're
9 flipped, right's left and left is right.

10 But this diagram is just like you're, you
11 know, standing there looking down at her back. Okay.

12 A. It is.

13 Q. All right. So the plan when you started your
14 surgery was, you were going to put two rods in that
15 were like the one on the left; right?

16 A. Yes. I mean true. Okay. It's -- that's
17 true. Okay. Yes.

18 Q. And then, because the top screw at L4
19 wouldn't seat and you had to take it out, you couldn't
20 put a full-length rod there; right?

21 Right?

22 A. Correct.

23 Q. And so you had to put a short rod at this
24 location; right?

25 A. Right.

1 Q. And right above the short rod on the right is
2 the area where you carved out more bone than you did on
3 the left side; true?

4 A. I did.

5 Q. And you also removed stabilizing ligaments?

6 A. Yes, that's part of the surgery.

7 Q. Uh-huh. And the stabilizing ligament that
8 you removed is called the ligamentum flavum; right?

9 A. Ligamentum flavum is not a stabilizing
10 ligament. The ligament that's stabilizing that was
11 removed is called the interspinous ligament.

12 Q. Did you remove any of that?

13 A. Yes.

14 Q. So it's fair to say that the -- that the
15 spine derives stability from ligamental tissues that
16 you remove as part of your surgery; right?

17 A. A healthy spine does.

18 Q. Uh-huh. And to restore stability to the
19 spine, you were relying upon two strategies; right?
20 Bone and rods. True?

21 A. And the innerbody cages. Perhaps three would
22 be a more accurate answer.

23 Q. Okay. So what -- the way this works is, you
24 put the -- the -- you have to put the rods and the
25 screws in there to -- to keep the spine strong until

1 the bone grafts you pack in there have a chance to
2 fuse; right?

3 A. Correct.

4 Q. Okay. And when the bone grafts don't fuse --

5 THE COURT: Mr. Strassburg, let me interrupt
6 you for a second. Come on up here for a minute, guys.

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

9 THE COURT: All right. I'm sorry,
10 Mr. Strassburg, go ahead.

11 MR. STRASSBURG: Thank you, Judge.

12 BY MR. STRASSBURG:

13 Q. All right. So we were talking ligaments.
14 Oh, thank you so much. Bear with me a sec.

15 A. Sure.

16 Q. So what -- what happens as part of your
17 surgery is you remove the spinal processes at L4-L5 and
18 S1; right?

19 A. Yes.

20 Q. And we can see them in the picture, they're
21 gone. And then you remove these facet joints here to
22 here. You remove one here; right?

23 A. Yes.

24 Q. And --

25 A. Mostly, I should say.

1 Q. All right. And so what we have left, if --
2 if -- if you start with a picture of the back of the
3 spine, you can see on the screen what we have been
4 talking about here, and this is, you know, L5 here and
5 then S1 and L4 on this spine, which I will put here.

6 And then when you're done removing bone,
7 those features are no longer there, and that's what we
8 have been seeing in, you know, for example, the
9 plaintiff's demonstrative evidence here that shows the
10 operative site without the rods in place. True?

11 A. Generally depicted, yes.

12 Q. Thank you, sir. So basically it's fair to
13 say that the surgery did not go according to plan;
14 right? Right?

15 A. You mean because of the screw? The one
16 screw? That part didn't. Everything else did, of
17 course.

18 Q. All right. You were planning a six -- a
19 construct of rods that would be stabilized at six
20 locations on the spine. True?

21 A. Right.

22 Q. And that was pretty important because the
23 strength of the -- of the construct, at least until the
24 bone graphs could fuse, that depended upon the rods
25 stabilizing the spine because you had cut away so much

1 to decompress the nerves. Fair?

2 A. In part, it is.

3 Q. All right. And the -- one of the -- one of
4 the complications -- well, let me ask you this: You
5 attempted to leave a longer rod on the right side
6 because you wanted to put a cross-link in; right?

7 A. I did.

8 Q. And what -- what you were thinking is you --
9 you'd put a longer rod here and then you'd put a
10 cross-link from side to side that would add additional
11 strength to the scaffolding; right?

12 A. That's an idea, yes.

13 Q. That was your idea; right?

14 A. Yes.

15 Q. All right. And the reason that you went to
16 all that effort to -- to try to put that cross-link in
17 there was because you wanted to make the whole finished
18 product stronger -- as strong and stable as you could;
19 right?

20 A. Yes.

21 Q. And you had doubts that without that
22 cross-link it was going to be stable enough. True?

23 A. Yes. I knew it would be stable enough
24 without the cross-link, but I like to go as stable as I
25 can.

1 Q. So what you are saying, then, is that it's
2 not that you had any doubts that the -- the long -- the
3 long rod on the left and the short rod on the right
4 wouldn't be adequate, you wanted to go that extra mile
5 and make it extra strong; right?

6 A. If I could, yes.

7 Q. But you couldn't; right?

8 A. I could not do those things.

9 Q. You couldn't get that cross-link to fit;
10 right?

11 A. Correct.

12 Q. Now, you also had a problem with the angle of
13 the -- the rod; correct?

14 A. I don't recall that.

15 Q. Let me see if -- if I can refresh your
16 recollection.

17 A. Thank you.

18 MR. ROBERTS: As a demonstrative, no
19 objection.

20 MR. STRASSBURG: Just checking.

21 BY MR. STRASSBURG:

22 Q. Let me show you the post-op X ray. Doctor,
23 do you have that? It's on your screen. Could you take
24 a look.

25 A. I see it.

1 Q. Okay. And you recognize that this is the
2 X ray that you have -- you ordered to be taken at the
3 hospital after the surgery in the -- in recovery;
4 right?

5 A. I think in the operating room. This is a
6 fluoroscopic image. It was taken actually in the
7 operating room, either toward the end of or at the end
8 of the surgery.

9 Q. Okay. That's very important, because this
10 X ray was taken at a time in the OR when you could go
11 back in and fix it; right?

12 A. Fix what?

13 Q. Fix -- if you didn't see something -- if you
14 saw something that wasn't quite right, you had the
15 opportunity to go back in and fix it; right?

16 A. If there was something that required fixing,
17 I could have, sure.

18 Q. And you saw nothing in this post-op X ray
19 from December 26th, 2012, taken at the hospital, that
20 warranted going back in and making adjustments. True?

21 A. Correct.

22 Q. Okay. Now, you did mention in your operative
23 notes that the angle of the rod on the right side was
24 somewhat steep and partially embedded into the location
25 where the prior right L4 screw was placed and then

1 removed. Do you remember making that comment?

2 A. I see it here on my op report; so, yes, I do,
3 now that I have refreshed. Thank you.

4 Q. Now, why would having a steep rod in the
5 location shown on the X ray, why would that be worth a
6 mention in your op report?

7 A. Because I knew it would look like this on an
8 X ray afterwards and someone might ask me, "Hey, why
9 does your X ray look like that?" And I would have to
10 say, "Because I put it that way."

11 Q. So you foresaw that I might be asking you or
12 somebody like me --

13 A. Oh, no.

14 Q. -- somebody worse than me --

15 A. I don't have nightmares. It had -- it had to
16 do with any radiologist in the hospital who would read
17 the X ray and give me a call and say, "Hey, you know,
18 those two rods don't line up exactly perfectly." And I
19 would say, "I know."

20 Q. I meant it that way; right?

21 A. Correct.

22 Q. Now, do you remember that -- do you remember
23 charting that you saw the pars -- you saw the
24 spondylolisthesis; right?

25 A. Yes.

1 Q. All right. And you also observed the pars
2 defects; right?

3 A. Yes.

4 Q. And you could see that it wasn't a fracture.
5 True?

6 A. Correct.

7 Q. Now, when the pain that Ms. Garcia was
8 experiencing and reported to you, when that wouldn't go
9 away, you worked with Dr. Kidwell to devise a treatment
10 plan that would give her some relief. True?

11 A. Can you be specific to time?

12 Q. After your surgery.

13 A. At some point after the surgery, that became
14 true.

15 Q. You mean you didn't work continuously after
16 the surgery with Dr. Kidwell?

17 A. Well, in that case, your prior question was
18 clearly compound. I did work with Dr. Kidwell as to
19 all times after the surgery. But as to coordinating a
20 plan to deal with pain after the surgery, that was
21 later months, if not over a year, after the surgery
22 where we reendeavored to do that.

23 Q. Now -- and whose idea was it to inject
24 anesthesia into the location of the hard points -- the
25 five hard points that are shown on this X ray? Was

1 that Dr. Kidwell's idea? Or was that yours?

2 A. It was my idea in part of the treatment plan.

3 Q. All right. And the -- and the purpose of
4 injecting anesthesia is to try to relieve a condition
5 that's causing pain; right?

6 A. Yes.

7 Q. And so by instructing Kidwell -- Dr. Kidwell
8 that you wanted to inject -- you wanted him to inject
9 anesthesia into the screw points from your surgery,
10 that reflected your concern that her pain was being
11 produced by those screws; true?

12 A. At some point, yes.

13 Q. Now, did you ever -- in trying to understand
14 what was causing her pain, post surgery, did you ever
15 consider having a CT scan done of this area of her
16 spine?

17 A. Yeah, may I have a moment to answer?

18 Q. Take whatever time you need, Doctor.

19 A. (Witness reviewing document.)

20 I don't know if I considered a CT scan. I
21 did order other tests, but I don't know if I can say I
22 considered a CT scan.

23 Q. Is a CT scan the accepted appropriate
24 diagnostic treatment -- or procedure to determine
25 whether a fusion has successfully fused?

1 A. It is one of them.

2 Q. And, in fact, it's the best one; right?

3 A. It depends on what you're looking for. It is
4 the best one to look at the innerbody bone growth, but
5 flexion-extension X rays are usually used for the best
6 determination of stability of a fused segment.

7 Q. So that's why you gave her those; right?

8 A. We did order flexion-extension X rays, yes.
9 Or I did.

10 Q. And the result?

11 A. No apparent hardware loosening.

12 Q. So your concern that -- that prompted you to
13 order flexion-extension X rays was that there might be
14 loosening of the hardware and that that loosening would
15 lead to micromotion in this area of her spine. True?

16 A. No. And I may have led you down the wrong
17 path here. It was actually Dr. Oliveri who ordered
18 those X rays. I didn't have any such concerns. The
19 static X rays, meaning the ones where she's just
20 standing there, didn't show any loosening. And she was
21 still 70 percent improved from the surgery, so I felt
22 it was a success to that degree.

23 Q. Now, we've heard testimony from Dr. Cash. Do
24 you guys know each other?

25 A. Sure, we do.

1 Q. Socially or just professionally?

2 A. Well, I have had dinner with him, but it was
3 to talk about business. I don't know that we're
4 friends who hang out or anything like that.

5 Q. And you -- you and Dr. Cash are rivals in a
6 sense in the competitive Las Vegas medical community?

7 A. I don't really feel that doctors really
8 compete, but I suppose that we do the same thing in the
9 same community.

10 Q. Now, we've heard testimony from Dr. Cash.
11 I'll show it to you, again, to be fair to you. And in
12 his testimony, Dr. Cash said, if there's any extra
13 micromotion in the front, the bone doesn't grow back
14 together, it's like a bone that doesn't mend. Do you
15 agree with that?

16 A. Well, if there is micromotion and pain
17 related to it, then the bone usually is not healed. I
18 can agree with those components. But I don't see the
19 rest of the testimony as to what was being discussed,
20 so I don't want to get pinned down in a vague sense
21 here.

22 Q. That's -- that's fine. Be on your guard.
23 I'm fine with it.

24 Now, do you understand and agree that one of
25 the recognized causes of this pseudoarthrosis, this