

No. 71348

IN THE SUPREME COURT OF THE STATE OF NEVADA

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Elizabeth A. Brown
Clerk of Supreme Court

EMILIA GARCIA,
Appellant,

v.

ANDREA AWERBACH,
Respondent.

**APPELLANT'S APPENDIX
VOLUME XXIV, BATES NUMBERS 5751 TO 6000**

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1 really sorry for this accident"?

2 A. I didn't know that was legal to do.

3 Q. Are you sorry?

4 A. Extremely. Beyond sorry.

5 Q. Okay. Are you sorry you drove without a
6 license?

7 A. When?

8 Q. The day that you crashed into Ms. Garcia.

9 A. Yes.

10 Q. But yet, five years later, in the middle of
11 the lawsuit about what injuries have been caused to
12 Ms. Garcia, you're still driving without a license,
13 aren't you?

14 A. Circumstances are a little different this
15 year.

16 MR. ROBERTS: No further questions, Your
17 Honor.

18 MR. MAZZEO: Thank you, Judge.

19

20 RE CROSS-EXAMINATION

21 BY MR. MAZZEO:

22 Q. Jared, the accident was on January 2nd of
23 2011. Did you know that Ms. Garcia filed the lawsuit
24 and commenced litigation in this accident by March of
25 2011?

1 A. No.

2 Q. And did you have counsel -- did you have any
3 counsel with respect to this case prior to Ms. Garcia
4 filing this -- filing this lawsuit in March of 2011?

5 A. No.

6 MR. MAZZEO: Nothing further.

7

8 CROSS-EXAMINATION

9 BY MR. STRASSBURG:

10 Q. Why were you driving your mom to court?

11 A. Because I was in the transition of obtaining
12 my license. I had passed the written test and the
13 driver's test. I was waiting on a sponsor at Goodwill
14 to pay for my reinstatement fee.

15 Q. And do you have a license now?

16 A. I do.

17 Q. When did you get it?

18 A. I think -- I don't know the exact date. On a
19 Saturday.

20 Q. During trial?

21 A. Yes, sir.

22

23 FURTHER REDIRECT EXAMINATION

24 BY MR. ROBERTS:

25 Q. Mr. Awerbach, you're not telling the jury you

1 thought it was legal to drive a car without a license
2 because you had started a process, are you?

3 A. From what I understood -- I had papers
4 stamped by the DMV. From what I understood, I could
5 drive with that with a licensed driver. So, no, I'm
6 not telling them I thought it was legal. I am telling
7 them I thought I was okay to drive, from my
8 understanding.

9 Q. A paper stamped from the DMV?

10 A. Yes, sir, with my written results on it.

11 Q. So you're telling the jury that, at the
12 beginning of trial, you had passed a written test?

13 A. And a driver's test, yes, sir.

14 Q. Okay. Any reason that you know of why that
15 wouldn't be on your official record from the DMV?

16 A. Because it didn't come from Carson City; it's
17 still local here.

18 Q. And isn't it a fact --

19 A. Did you ask for it?

20 Q. -- you didn't go down -- yes, we did. We
21 subpoenaed the DMV. And a lady came into court with
22 all of your history from Carson City and told the jury
23 that, as of the day that you drove the car, you hadn't
24 taken a test and you hadn't taken --

25 A. She never said that. I was here for that.

1 She never said that.

2 Q. Sir, isn't it true that you didn't go down
3 and get your license until I called you out on it in
4 front of this jury during opening statements?

5 MR. STRASSBURG: Objection. He's badgering.

6 THE COURT: He was, but this question is
7 fair.

8 MR. STRASSBURG: I wanted them to see how he
9 holds up, Judge.

10 THE COURT: Overruled on this question.

11 THE WITNESS: No.

12 MR. ROBERTS: No further questions, Your
13 Honor.

14 MR. MAZZEO: Judge, may I?

15 THE COURT: Go ahead.

16

17 FURTHER RECROSS-EXAMINATION

18 BY MR. MAZZEO:

19 Q. When -- when you -- did you have to take a
20 driver's test on that -- during the course of trial --

21 A. No.

22 Q. -- to get your drivers's license?

23 A. No.

24 Q. What did you do to obtain your driver's
25 license?

1 A. I went to an insurance broker. I spoke to
2 them about SR-22, because that's the legal requirement
3 for me to begin even having my license. I got an
4 SR-22.

5 I went to take the written test. I failed it
6 the first time. I went back and took it the second
7 time, scheduled the driver's test. I could not get on
8 the schedule until the 1st of February. So I took it
9 the 1st of February at the Henderson location, passed,
10 let them put it in the computer, kept the paperwork
11 that I had. And they told me I had a year to pay the
12 reinstatement fee.

13 And Goodwill, because I'm a participant in
14 their program, offered to cover that expense. So I was
15 waiting for them to cover that expense.

16 Q. So the only thing you had to do to get your
17 driver's license was -- during that first week of trial
18 was to pay a fee; correct?

19 A. Was to go to -- yes.

20 Q. Not to take a driver's test?

21 A. No. Go to the DMV with the results from my
22 test, pay the fee. That was it. I had it.

23 MR. MAZZEO: Okay. Nothing further.

24 /////

25 /////

1 FURTHER REDIRECT EXAMINATION

2 BY MR. ROBERTS:

3 Q. Now I'm really confused, Mr. Awerbach. You
4 just said that you knew it wasn't legal for you to
5 drive until you had your SR-22 and paid the
6 reinstatement fee; right?

7 A. No.

8 Q. So you thought it was legal for you to drive
9 even though you hadn't gotten your SR-22 or paid the
10 reinstatement?

11 A. I had my SR-22. That was the first thing I
12 did.

13 Q. Had you paid the fee?

14 A. Which fee?

15 Q. The reinstatement fee.

16 A. No, sir.

17 Q. Okay. But you thought it was legal for you
18 to drive even though you hadn't paid the fee?

19 A. My understanding, yes, sir.

20 Q. How long could you have driven without paying
21 the fee? A year? Two years? Five years?

22 A. I would assume a year. I have a year to pay
23 the fee.

24 MR. ROBERTS: No further questions.

25 MR. MAZZEO: Nothing.

1 MR. STRASSBURG: No.

2 THE COURT: Any questions, ladies and
3 gentlemen?

4 Not seeing any hands.

5 Thank you, sir.

6 All right. Let's go ahead and take our break
7 for today, folks.

8 Come on up for just a second. Let's talk
9 timing.

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

12 THE COURT: All right, folks. So I got a
13 calendar Monday at 9:00. We're going to have you guys
14 come in Monday at 10:00. It's likely that Monday will
15 be a short day for you. Not that the trial will be
16 over, but we have other things that we have to resolve
17 as far as jury instructions and things like that before
18 we can finish the case up.

19 Our hope is that we can bring you in Tuesday.
20 I'll give you the law -- the instructions on the law,
21 and you can -- you'll hear closing arguments on
22 Tuesday. And that's -- hopefully, you'll get the --
23 the case to deliberate sometime Tuesday.

24 That's our plan. I'm just kind of giving you
25 a plan. As you know, the plan was that the trial was

1 going to last three to four weeks. So I'm just going
2 to -- I'm just kind of giving you a heads-up what we're
3 thinking.

4 So if you have things to do Monday -- the
5 reason I tell you that is because sometimes during
6 these long trials people have things that they are
7 putting off doing because you don't have time, like
8 doctor's appointments and getting an electrician to
9 your house and things like that. It's likely that
10 you're going to be able to be home for a good portion
11 of Monday afternoon. Okay? So I tell that in advance
12 just to give you some heads-up.

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

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

1 this case.

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

5 We'll see you Monday at 10:00. Have a good
6 weekend.

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

9 THE COURT: All right. We're outside the
10 presence of the jury. Do you guys have anything to
11 make a record on today?

12 MR. MAZZEO: I can move for a directed
13 verdict on Monday. I'm going to reserve my right to do
14 that since they have rested. Have they rested?

15 THE COURT: I actually forgot to ask.

16 MR. MAZZEO: Yeah. They didn't rest yet. So
17 I guess I can't move anyway.

18 MR. ROBERTS: Well, we're still on the
19 record. So if you want to work on the motion over the
20 weekend, the plaintiff rests her case. I'll have to
21 say it again in front the jury if you want me to, but
22 that's fine, just so Mr. Mazzeo can know what he's up
23 against.

24 THE COURT: Okay.

25 MR. ROBERTS: Professional courtesy.

1 MR. MAZZEO: Thank you.

2 THE COURT: All right. So plaintiffs rest.

3 We'll come back Monday at 10:00, put your
4 doctor on. You can reserve your right. You can make
5 your motion when there's time.

6 MR. MAZZEO: Okay. That's fine.

7 MR. ROBERTS: We'll have a motion, too, once
8 they rest their case.

9 THE COURT: Okay.

10 MR. ROBERTS: For planning purposes.

11 THE COURT: I know you have to make them. I
12 understand.

13 So was my representation to the jury about
14 our plan, did that sound good to everybody?

15 MR. MAZZEO: Sounded fine.

16 MR. ROBERTS: Sounded good to us, Your Honor.

17 MR. STRASSBURG: It's a good plan, Judge.

18 THE COURT: We'll see if it works; right?

19 MR. STRASSBURG: Yes. So we're about due.

20 THE COURT: Anything else on the record
21 today, guys?

22 MR. MAZZEO: Judge, we just want to give you
23 a set of -- I guess we're ready -- of disputed jury
24 instructions. Plaintiff's -- what? This is -- this is
25 Andrea Awerbach's proposed disputed jury instructions.

1 THE COURT: Okay.

2 MR. MAZZEO: And then how about stipulated?

3 Do we have them?

4 THE COURT: I have a set from the plaintiffs

5 of the plaintiff's proposed.

6 MR. MAZZEO: Do we have copies for everybody?

7 Okay. Plaintiff's -- so you should have a

8 set of stipulated jury instructions; right?

9 MR. ROBERTS: We just submitted our set. And

10 I believe we notated on there if our set was disputed,

11 so ...

12 MR. MAZZEO: Okay.

13 MR. ROBERTS: So I think the ones that are

14 stipulated just don't say "disputed." But -- but we

15 sent them to you. And if we -- if we've dismissed one

16 that you currently dispute, then you can just let us

17 know over the weekend.

18 MR. MAZZEO: Do we have the same set that the

19 judge got?

20 MR. ROBERTS: You do. That was the one that

21 was e-mailed to you this morning, a clean set.

22 MR. MAZZEO: Okay. Fine.

23 All right. And they have a copy and they

24 have a copy?

25 THE COURT: Okay. Anything else, guys, on

1 the record?

2 MR. MAZZEO: No, Judge.

3 THE COURT: All right.

4 MR. ROBERTS: Nothing further.

5 THE COURT: Off the record.

6 (Thereupon, the proceedings
7 concluded at 3:33 p.m.)

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CERTIFICATE OF REPORTER

STATE OF NEVADA)
COUNTY OF CLARK) ss:

I, Kristy L. Clark, a duly commissioned
Notary Public, Clark County, State of Nevada, do hereby
certify: That I reported the proceedings commencing on
Friday, March 4, 2016, at 9:12 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
4th day of March, 2016.



KRISTY L. CLARK, CCR #708

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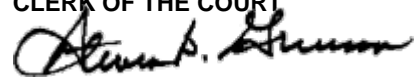
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1 CASE NO. A-11-637772-C
2 DEPT. NO. 30
3 DOCKET U
4

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 MONDAY, MARCH 7, 2016
23
24 REPORTED BY: KRISTY L. CLARK, RPR, NV CCR #708,
25 CA CSR #13529

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LAS VEGAS, NEVADA, MONDAY, MARCH 7, 2016;

10:05 A.M.

P R O C E E D I N G S

* * * * *

THE COURT: Back on the record, Case No.
A637772. We're outside the presence of the jury.
Go ahead.

MR. MAZZEO: Thank you, Judge. Defendant has
a 50(a) motion for judgment as a matter of law with
respect to two matters. Seeking to exclude Dr. Smith's
opinion -- opinions and testimony regarding loss of
household services and hedonic damages.

As you know, NRS 50.275 permits a witness to
testify to matters within the scope of scientific,
technical, or other specialized knowledge which will
assist the trier of fact to understand the evidence and
determine the fact in issue.

Hallmark, of course, requires that the expert
be qualified in an area of scientific, technical, or
other specialized knowledge, that that knowledge must
assist the trier of fact to understand the evidence
and/or determine a fact in issue, and the testimony
must be limited to matters within the scope of the

1 specialized knowledge.

2 Now, Dr. Smith, defendants' -- plaintiff's
3 expert, testified that he did not perform any
4 standardized testing to establish a baseline for
5 Ms. Garcia's household services that she performed
6 prior to the accident. He didn't establish -- use any
7 objective standardized testing to establish a baseline
8 for those -- for the diminishment in household services
9 after the accident.

10 Same thing with enjoyment of life. He didn't
11 establish any baseline for her enjoyment of life prior
12 to the accident versus after the accident using
13 objective criteria; he -- he just merely relied on --
14 on the plaintiff's subjective, self-reporting,
15 self-serving assessment.

16 Now, his figures that he provided for both
17 household losses and enjoyment of life for these
18 statistically -- average statistical person is not
19 recognized in any literature. As Dr. Ireland testified
20 to, it appears to be a creation of his own personal
21 opinion. So based on that, Your Honor, Dr. Smith's
22 opinions and testimony regarding loss of household
23 services, as well as loss of enjoyment of life, must be
24 stricken.

25 And -- and then the second part of that was

1 his -- of the 50(a) motion is to exclude plaintiff's
2 testimony regarding her loss of enjoyment of life. She
3 testified to subjective, self-serving statements
4 regarding the diminishment of the enjoyment of life.
5 She did not provide any facts to support the basis for
6 loss of enjoyment of life; she merely referenced
7 various activities of daily living and -- and household
8 services she did before the accident, which don't
9 really go to the enjoyment of life.

10 She provided an arbitrary number to the
11 percentage that she believed those activities were
12 diminished, but there's -- that's a separate damages.
13 The household services is a separate damages component
14 of her claim. That certainly doesn't support the loss
15 of enjoyment of life. She did not otherwise quantify
16 how her -- how she enjoyed life prior to the accident
17 and how it was diminished in enjoyment after the
18 accident. She can't just refer to an activity to
19 quantify the level of enjoyment of life.

20 For those reasons, Judge, I request that you
21 exclude all of plaintiff's testimony regarding the loss
22 of enjoyment of life claim.

23 MR. TINDALL: And, Your Honor, we join in
24 Andrea Awerbach's motion to this extent: They cannot
25 make a claim for past loss of household services

1 because the testimony from Dr. Smith is, "I don't know
2 if she paid any amount;" and the testimony from
3 plaintiff is she didn't pay any amount for past
4 household services/losses. She didn't hire a maid, she
5 didn't bring anybody in to mow the lawn, anything of
6 that nature.

7 This is no different than a claim for medical
8 damages. A plaintiff doesn't get to come to court and
9 say, "Well, you know what? I was hurt, but I couldn't
10 afford to go to the doctor. So if I would have, I
11 would have had to spend this much money on medical
12 expenses." That's not something a trier of fact
13 or -- or a court can award.

14 So in this case, since she didn't incur any
15 past loss of household services, we respectfully submit
16 the Court would abuse its discretion if it allowed her
17 to make a claim now for past loss of household services
18 submitted.

19 MR. ROBERTS: I will address the last point
20 first.

21 While she said that she did not hire anyone
22 and couldn't afford to hire anyone for past household
23 services, there was testimony from her daughter Emilia
24 that she, in fact, did perform household services for
25 her mother that her mother used to be able to perform

1 and was no longer able to perform. And the fact that
2 Emilia didn't charge for those services and donated
3 them instead is a collateral source. And they can't
4 get summary judgment just because a collateral source
5 came forward and provided services.

6 In addition, a loss of household services is
7 not something you have to incur like a medical expense
8 in order to recover it in the past. It's like damage
9 to a car. The car is in an accident, you have an
10 appraisal saying it's 5,000 to fix the car. The fact
11 that you haven't fixed the car yet, you may never fix
12 the car is not a defense to paying the reasonable value
13 of the damage that you caused.

14 As far as the argument on Dr. Smith, I think
15 we've done that two or three times, and I'm satisfied
16 to rely on the record unless the Court needs to hear
17 more on that motion.

18 THE COURT: All right. Do you want to say
19 anything else?

20 MR. TINDALL: Yes, Your Honor, just this: In
21 regard to his argument about the daughter, that would
22 be the daughter's claim. She would be the one entitled
23 to money because "I provided the service, and I didn't
24 get paid for it." That's not a collateral source.
25 That's the daughter's claim, and she isn't making one.

1 THE COURT: You know, I think it -- it is a
2 collateral source if the -- the mom suffers the damage,
3 the daughter provides the service and doesn't charge
4 for it. I mean, it's like -- it's like having an
5 injury and having a doctor that provided service
6 without billing for it. I mean, it doesn't mean that
7 you weren't hurt, and it doesn't mean you didn't incur
8 the -- the treatment. You just, maybe, didn't have to
9 pay for it because of the collateral source.

10 Now, sorry. Motion is denied. What else?

11 MR. MAZZEO: That's -- well --

12 THE COURT: Is that it for now?

13 MR. MAZZEO: Yeah. Let's do it. Why not?

14 So during Roger Strassburg's
15 cross-examination, he was able to lay foundation and
16 admit a number of Facebook photos, and I have the same
17 Facebook photos in Andrea Awerbach's trial exhibits.
18 They're just enlarged, and they have the date stamp on
19 it.

20 But since Roger Strassburg laid the
21 foundation for the -- the fact that they were posted at
22 around the same time that the date is indicated on
23 those -- on Jared Awerbach's trial exhibits which
24 coincide with those that are on Andrea Awerbach's trial
25 exhibits, I would like the Court to deem Andrea

1 Awerbach's Facebook photo trial exhibits admitted as
2 well to the extent they're the same exact photos that
3 Mr. Strassburg had admitted last week.

4 THE COURT: And the reason that we're going
5 to admit two of the same pictures is what?

6 MR. MAZZEO: Well, just because it's -- it's
7 a larger photograph, it's clearer, it's easier to read,
8 and it has the date so no reference has to be made to a
9 date. And the date was part of the foundation that
10 Mr. Strassburg laid for the admissibility of those
11 records.

12 Now, with your -- the direction from the
13 Court to eliminate the information, that was not --
14 that was adjacent to the photograph, the Court's not --
15 jury's not going to have that reference.

16 So for -- for those photographs that coincide
17 or are identical to Andrea Awerbach's photographs, I
18 want these deemed admitted.

19 THE COURT: I think we already have the
20 pictures in.

21 MR. MAZZEO: Okay. Good.

22 THE COURT: Not -- not yours; I mean theirs.
23 They're the same pictures.

24 MR. MAZZEO: Well, they're -- yes. But --
25 but --

1 THE COURT: They don't have the date that you
2 put on them.

3 MR. MAZZEO: Well, I didn't -- yeah. I
4 didn't put on it, but -- right. It doesn't have the
5 date, which was established, and it gives the jury --
6 the jury some reference point rather than trying to
7 guess, so, you know, what date was that from? Was it
8 from 2011? I can recall the plaintiff to -- to do
9 this, but I don't see the point in doing this.

10 THE COURT: They heard the testimony.

11 MR. MAZZEO: So do I have to call the
12 plaintiff back to the stand to get these in, or
13 should -- can we -- can we have the same ones admitted?
14 We have one. I mean, there was one that was admitted
15 anyway, and -- which was Andrea Awerbach's K13. And
16 then I had the opportunity to have the other ones
17 admitted, but since Mr. Strassburg did it, I mean, it's
18 just cumulative. It's -- it's a waste of time.

19 THE COURT: It's cumulative. That's why I'm
20 not going to allow it.

21 MR. MAZZEO: However, it's very -- Judge,
22 however, it's very important for the jury because it
23 has a reference. The date stamp is what was -- was --
24 was part of the foundation that Mr. Strassburg laid
25 with the plaintiff, and -- and now it's not going to

1 appear on his photographs. So that's going to be --
2 it's not going to assist the jury if -- if they're
3 guessing, "Oh, when was that from? From what year?
4 From what date?" So this will simplify things during
5 closing arguments for the jury with the date on it.

6 MR. ROBERTS: Your Honor --

7 MR. MAZZEO: They're identical photographs.

8 MR. ROBERTS: Your Honor, we established,
9 through Emilia Garcia, that the date was not on the
10 original photograph; therefore, it's -- it's not
11 properly in evidence. And if Mr. Mazzeo's representing
12 to the Court that he didn't put it on there, I would
13 like to know who did because it's not on the original
14 photograph.

15 MR. MAZZEO: They were put on during the
16 course of litigation by one of the parties. So -- but
17 they do correspond to the same dates that -- that -- of
18 the photographs that Mr. Strassburg had -- had
19 admitted.

20 THE COURT: I believe you.

21 MR. MAZZEO: Yeah. So -- so I -- that's why
22 I'm asking the Court do this, so that we can -- it's
23 for the jury's benefit. I mean, it's -- so it's easily
24 referenced and identifiable with -- with when this
25 photograph was posted on Facebook. We know that --

1 THE COURT: You want to stipulate these
2 pictures in?

3 MR. ROBERTS: No -- no, Your Honor. In fact,
4 the witness testified that many of those pictures were
5 taken years before the date that the defense counsel --
6 one of the defense counsel stamped on there. So I
7 think it's misleading to have it in, and it's not
8 proper evidence. It's hearsay placed on there by
9 plaintiff -- by defense counsel.

10 MR. MAZZEO: It's not misleading because we
11 have testimony that's in the record from -- from the
12 plaintiff as to when it was posted and as to when the
13 picture may have been taken. So there's nothing
14 misleading about it.

15 THE COURT: The pictures are already in
16 through -- through theirs. The testimony is already in
17 about the dates. I'm not going to put a second set of
18 same pictures in. Sorry.

19 MR. TINDALL: Is there any objection to us
20 enlarging the ones that were admitted and taking off
21 the Facebook portion? We have to take off the Facebook
22 portion, but can we enlarge -- enlarge the picture for
23 the exhibit?

24 THE COURT: I don't think that's going to be
25 a problem. I don't think anybody is going to oppose

1 that.

2 MR. ROBERTS: No objection.

3 MR. TINDALL: Thank you.

4 MR. MAZZEO: And -- and for purposes of
5 closing argument, there shouldn't be any objection to
6 us writing in the date on the -- in the margin of the
7 photograph to reference when -- to reference
8 plaintiff's testimony as to when the particular
9 photograph was posted.

10 THE COURT: If you want to tell them the date
11 or write it on the picture as you're showing it to them
12 during closing argument, I don't think there's a
13 problem with that.

14 MR. MAZZEO: Of course. Okay.

15 THE COURT: As long as there's support for
16 the date that you're alleging.

17 MR. MAZZEO: Of course. Okay. That's it.

18 THE COURT: Good to go?

19 MR. MAZZEO: Yep.

20 THE COURT: What are we doing this morning?

21 MR. TINDALL: We have the MountainView
22 doctor, Dr. Sondrup here. He should be here in
23 approximately 30 minutes, I would imagine.

24 THE COURT: Okay.

25 (Clarification by the reporter.)

1 MR. TINDALL: S-o-n-d-r-u-p. First name is
2 Logan.

3 THE COURT: Got them ready?

4 THE MARSHAL: One minute.

5 THE COURT: Okay. I think we're ready for
6 them.

7 THE MARSHAL: All rise for the presence the
8 jury.

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

11 THE COURT: Go ahead and be seated. Welcome
12 back, folks. We're back on the record, Case No.
13 A637772.

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

16 MR. ROBERTS: Yes, Your Honor.

17 MR. MAZZEO: Yes, Your Honor.

18 MR. TINDALL: Yes, Your Honor.

19 THE COURT: All right. We did this off the
20 record, without you guys represent, but I'm going to
21 ask it on the record.

22 Do the plaintiffs -- does the plaintiff have
23 any -- have any additional witnesses?

24 MR. ROBERTS: We have no additional
25 witnesses, Your Honor, and the plaintiff rests their

1 case.

2 THE COURT: Okay.

3 Now we're to the defense case. I don't know
4 who's calling doctor.

5 Mr. Tindall?

6 MR. TINDALL: Call Dr. Logan Sondrup.

7 THE COURT: Come on up, Doctor. Once you get
8 up on the stand, if you would please remain standing.
9 Raise your right hand to be sworn.

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

14 THE WITNESS: Yes.

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

17 THE WITNESS: Logan Cole Sondrup. L-o-g-a-n
18 C-o-l-e S-o-n-d-r-u-p.

19 THE COURT: Great. Thank you, sir. Go ahead
20 and be seated. There's a microphone right there in
21 front of you. Try to talk into that.

22 Go ahead, Mr. Tindall.

23 DIRECT EXAMINATION

24 BY MR. TINDALL:

25 Q. Good morning, Doctor.

1 A. Good morning.

2 Q. Could you please start out by telling us what
3 kind of a doctor you are and where you work now.

4 A. I am an emergency physician. Currently, I
5 work for TeamHealth, which is a large national
6 corporation that employs a number of physicians here in
7 town. Most often, I am working within the St. Rose
8 health system but still carry privileges throughout the
9 Sunrise Health System here in town.

10 Q. Where did you go to medical school?

11 A. University of Utah.

12 Q. Okay. You're an MD?

13 A. Yes.

14 Q. What is an MD as opposed to some other type
15 of doctor, like a DO? Can you tell the jury that?

16 A. I can tell you that the difference is very,
17 very vague. The difference is largely in the type of
18 schooling that we go to. Not that the education is
19 different per se, but that MD is a medical doctorate,
20 which is traditionally called an allopathic medical
21 school. It is the type of medical school that our
22 grandparents went to and our great grandparents went
23 to.

24 Osteopathic medical school, which is a DO, is
25 more of a new phenomenon that has come -- I don't even

1 know how long we've had osteopathic medical schools.
2 But, in essence, it is a different pathway to become
3 the same type of physician with the same
4 responsibilities, but you have a slightly different
5 degree. The training in an -- of an osteopathic
6 physician is a little different, but in the end, we're
7 all the exact same, and we do the same job.

8 Q. Now, I notice you brought some documents up
9 there with you. Can I take a peek at those, please?

10 A. Yeah. This is just the same thing that's
11 sitting in front of me in this thing.

12 Q. Okay.

13 A. I just had it e-mailed to me today.

14 Q. All right. Ms. Garcia's chart, in other
15 words?

16 A. Correct.

17 Q. Okay. So, Doctor, how is it you come to be
18 here today?

19 A. I was subpoenaed on Friday night.

20 Q. Who subpoenaed you?

21 A. I don't know. I was asleep at the time. It
22 was delivered to my wife, I believe, by somebody in
23 your office, but I don't know.

24 Q. Yes. We subpoenaed you.

25 A. Uh-huh.

1 Q. So back in January 2011, where were you
2 working?

3 A. I was working within the Sunrise Health
4 System, which meant -- which means that I worked at
5 Sunrise Hospital, MountainView Hospital, and Southern
6 Hills Hospitals in their emergency departments.

7 Q. Okay. So little background about why we're
8 here.

9 Ms. Garcia is the plaintiff in this case.
10 She's filed a lawsuit. And you were -- you'll correct
11 me if I'm wrong here, but you were a doctor who saw her
12 at MountainView emergency room on January 5th, 2011.

13 Am I right about that?

14 A. That is correct.

15 Q. Okay. And do you have any independent
16 recollection of this patient?

17 A. None.

18 Q. Okay. Anything you know about it right now
19 is because of what you reviewed in the -- in the --
20 this little pile of documents you had?

21 A. That is correct.

22 Q. So you have your documents, and then before
23 you is Exhibit 18 from the plaintiff's binder. And
24 feel free to go through that, if you need to, to
25 refresh any of your recollection.

1 Could you please start by telling us why
2 Ms. Garcia presented to the emergency room on
3 January 5th, 2011, at MountainView?

4 MR. ROBERTS: Objection. Foundation.

5 THE COURT: He can say what his understanding
6 is. Overruled.

7 THE WITNESS: Based on what's documented, she
8 presented because of a headache, neck pain, and lower
9 back pain sustained in a car accident two days prior to
10 when she presented to me.

11 BY MR. TINDALL:

12 Q. If you look in the binder, there's a little
13 code down at the bottom right-hand corner, reads GJL76.

14 Do you see that page?

15 A. Yes.

16 Q. What is this physician clinical report?

17 A. This report in front of me is the documented
18 report that I made during and after her encounter in
19 the emergency department.

20 Q. Okay. And if you go to JGL78 [sic], there's
21 a sentence in parentheses, reads, "Electronically
22 signed by Sondrup, Logan."

23 What does "electronically signed" mean?

24 A. That is when I finish the chart, I have an
25 electronic signature that I put in to indicate that

1 this is the -- my chart and reflects what happened in
2 the emergency department.

3 Q. Did you personally see Ms. Garcia?

4 A. Yes.

5 Q. Personally examined her?

6 A. Yes.

7 Q. Personally heard words come out of her mouth
8 telling you what was wrong?

9 A. Yes.

10 Q. Okay. You are sure about that?

11 A. I'm positive about that.

12 Q. So could you please just walk her through
13 what her complaints were and what you did for her.

14 A. So as to the best of my knowledge, she came
15 in because of a headache, neck pain, and lower back
16 pain. The accident, as I mentioned, was two days prior
17 to her presentation. I examined the patient, did a
18 full examination, and found her to have no tenderness
19 in her spine, from her neck all the way down to her
20 back. I found no bony tenderness whatsoever throughout
21 her exam. I determined that she had a likely muscle
22 strain from a motor vehicle accident and discharged her
23 home with pain medication and muscle relaxers.

24 Q. Could you please walk us through the exam you
25 did on her.

1 A. Sure. So the first part of my exam begins
2 with just visually assessing a patient. Are they
3 walking? Are they talking? Do they interact with me
4 appropriately? Beyond that, I examine their heart by
5 listening with a stethoscope. I examine their lungs by
6 the same means. I press on their belly. If it's
7 somebody who's got a neck or back injury, then I
8 palpate the spine from the skull all the way down to
9 the buttocks region.

10 Q. Can I -- can I break in for a second? What
11 does palpate mean?

12 A. It means push hard.

13 Q. You pushed on her to see if she would say
14 "ow" or not?

15 A. Correct.

16 Q. When you pushed on her, did she say, "ow"?

17 A. No, she did not.

18 Q. Please go on with your exam.

19 A. After that, we generally see if the patient
20 can walk. I don't remember seeing -- I didn't see any
21 documentation of whether or not she could walk in here,
22 but that's customary. And that's about it as far as
23 the physical exam goes.

24 If she passes all of those well, in her case,
25 we would diagnose her -- or I would diagnose her with a

1 muscle strain and treat her appropriately with
2 medications.

3 Q. Now, on GJL77, there's a heading called,
4 "Clinical Impression." And what is written there is
5 low back strain. Then the next line, motor vehicle
6 accident.

7 What -- what is a clinical impression?

8 A. It's a diagnosis. It's my best impression of
9 what is going on based on my medical judgment.

10 Q. What is a low back strain?

11 A. It's usually a muscle strain, but it's a very
12 vague term that means back pain. Most commonly comes
13 from muscle strains, but could also come from other
14 problems.

15 Q. So you pressed on her, she didn't say, "ow"?

16 A. Correct.

17 Q. That being the case, how is it you arrived at
18 your impression of low back strain?

19 A. Based on her history.

20 Q. Which was what?

21 A. Well, she had a car accident two days prior.
22 And so somebody has a car accident two days prior and
23 then shows up to see me with pain, more often than not,
24 that indicates a muscle etiology for their pain. If
25 somebody comes in after a car accident and they have

1 broken their spine, they usually come in the same day,
2 immediately from the accident. They're usually not
3 walking. They usually have some tenderness on their
4 exam.

5 If it is a muscle problem, usually the
6 patient's pain will develop over a period of hours or
7 days to the point where they come in because they are
8 too uncomfortable at home. Her presentation was very
9 consistent with a muscle strain.

10 Q. A couple of times now you said the accident
11 happened two days prior.

12 A. Correct.

13 Q. Why is it you think it's two rather than some
14 other date?

15 A. I think I wrote on here two. I wrote on
16 there two -- that the injury occurred two days ago.
17 Right in my history of present illness.

18 Q. Okay. How is it that you came to have that
19 understanding?

20 A. I believe she told me.

21 Q. So you -- you got the impression of low back
22 strain.

23 Did you take any X rays?

24 A. No, I did not.

25 Q. How come?

1 A. She wasn't tender over any of her bones, and
2 the evidence of -- for -- evidence supporting X rays in
3 the emergency department is very weak in somebody who
4 has no tenderness over a bone understanding, of course,
5 that the only thing that an X ray will show me is if a
6 bone is broken. And if she's not tender over a bone,
7 the likelihood of a bone being broken is very, very
8 small.

9 Q. So you got the low back strain.

10 What were your recommendations for her?

11 A. My recommendations -- let me see. My
12 recommendations were, first of all, to use the
13 medication as needed.

14 Q. What medication was that, by the way?

15 A. I gave her Lortab.

16 Q. What does Lortab do for you?

17 A. It's a pain medication. It is a narcotic
18 pain medication. I prescribed for her Naproxen, which
19 is an anti-inflammatory medication. And I prescribed
20 Valium, which is a muscle relaxer.

21 My pattern in patients like this is to
22 recommend they spend about a day resting and then try
23 and move and get back to their normal physical
24 activities as soon as possible after that.

25 Q. Okay. If someone were to make an allegation

1 that MountainView or you didn't really see her or
2 didn't really do much for her because MountainView
3 found out she couldn't pay, would that be an accurate
4 statement?

5 A. No.

6 Q. Does MountainView cut people loose because
7 they can't pay, if they're there, to the ER?

8 A. No.

9 Q. If you go to page GJL78, there's a section
10 called "follow-up."

11 What's that all about? What's that section
12 mean?

13 A. That is a recommendation for the patient to
14 follow up with a primary care physician within two days
15 after they're discharged from the emergency department
16 to be rechecked.

17 Q. And I see on there there's actually -- is
18 that what you'd call a referral to a specific doctor?

19 A. That is a specific doctor referral, yes.

20 Q. For what reason did you pick that specific
21 doctor?

22 A. I don't know in this case for sure, but
23 there -- it -- he came to be the referring -- he came
24 to be the physician by one of two means. Either he was
25 her primary care physician and we referred her back to

1 her primary care; or in the case that she did not have
2 one, we would have referred her to the physician that
3 was on call.

4 Q. Okay. We subpoenaed you. You were required
5 to come to court. But we also paid you.

6 What did you ask to be paid to be here?

7 A. Our fee schedule is \$750 per hour with a
8 three-hour minimum.

9 Q. And what do you mean by "our fee schedule"?

10 A. Our group has a standard fee schedule.

11 Q. So even though we subpoenaed you and even
12 though we're not representing the person you treated,
13 we were required to pay you. Is that fair?

14 A. That's fair.

15 Q. Thank you, Doctor.

16 MR. TINDALL: I'll pass the witness.

17 DIRECT EXAMINATION

18 BY MR. MAZZEO:

19 Q. Dr. Sondrup, good morning.

20 A. Good morning.

21 Q. If you learned today that the motor vehicle
22 accident actually occurred three days prior to
23 Ms. Garcia's visit at MountainView, meaning that the
24 accident occurred on January 2nd of 2011, would that
25 change any opinions that you've rendered with regard to

1 your physical examination --

2 A. No.

3 Q. -- and diagnosis?

4 A. No.

5 MR. MAZZEO: Nothing further.

6 THE COURT: Mr. Roberts?

7 MR. ROBERTS: Thank you, Your Honor.

8 Audra, could I have Exhibit 18, page 5,
9 please -- 18, page 5.

10

11 CROSS-EXAMINATION

12 BY MR. ROBERTS:

13 Q. Doctor, do you see the patients -- just as
14 your custom and standard back at the time at the
15 hospital, 2011, did you see the patients before or
16 after the triage nurse saw them?

17 A. Probably after.

18 Q. And did you know Nurse Mae Taylor, RN?

19 A. Yes.

20 Q. Did you find her to be reliable and
21 competent?

22 A. Yes.

23 MR. ROBERTS: And, actually, Audra, could we
24 have page 4 briefly just to give the doctor some
25 context.

1 BY MR. ROBERTS:

2 Q. Okay. So, for context, are you familiar with
3 this type of triage report?

4 A. Yes.

5 MR. ROBERTS: Okay. And blow up the top
6 third for us, Audra.

7 BY MR. ROBERTS:

8 Q. And this would indicate that the triage was
9 done on Ms. Garcia at 1317 on January 5th; right?

10 A. Yes, that is correct.

11 MR. ROBERTS: Okay. Next page, Audra,
12 page 5.

13 BY MR. ROBERTS:

14 Q. Would the triage nurse take notes that you
15 had access to when you did your exam, assuming the
16 triage was done first?

17 A. Yes.

18 MR. ROBERTS: Okay. And could you blow up
19 "physical assessment," Audra.

20 BY MR. ROBERTS:

21 Q. Okay. So if the triage nurse wrote that
22 "Ms. Garcia appears in pain and anxious," you have no
23 reason to dispute that?

24 A. No.

25 Q. "The patient appears uncomfortable and in

1 pain."

2 You have no reason to dispute that?

3 A. No.

4 Q. "The patient shows apparent trauma."

5 You have no reason to dispute that; right?

6 A. No.

7 MR. ROBERTS: And back to page 4, Audra,
8 under "history."

9 BY MR. ROBERTS:

10 Q. And so when the nurse took the history, the
11 nurse indicates that the automobile collision occurred
12 three days ago; right?

13 A. Yes.

14 Q. So you would have had access to the nurse's
15 notes saying the accident occurred three days ago even
16 if Ms. Garcia had told you two days; right?

17 A. Yes.

18 Q. But, as you said, it would have made no
19 difference in your evaluation or treatment of her;
20 correct?

21 A. That is correct.

22 Q. So as you sit here and -- and looked at the
23 document showed to you by other counsel and you looked
24 at the triage report, did that refresh your
25 recollection of actually treating Ms. Garcia, or are

1 you still relying totally on the records?

2 A. I'm relying totally on the records.

3 Q. Okay. If this was just a muscle problem,

4 would you have expected the pain to go away eventually

5 even if Ms. Garcia got no further treatment?

6 A. A isolated muscle problem, yes.

7 Q. Did Ms. Garcia have a spondylolisthesis in

8 her spine when you examined her?

9 A. I don't know that.

10 Q. Okay. You would have needed a film to know

11 that; right?

12 A. That is correct.

13 Q. Did Ms. Garcia have any disk damage?

14 A. I do not know that.

15 Q. Okay. And you would have needed a film to

16 determine that; right?

17 A. An X ray would not have shown that.

18 Q. Would an MRI have shown disk damage?

19 A. Yes.

20 Q. And you didn't have an MRI; right?

21 A. No, I didn't.

22 Q. Okay. Thank you, Doctor.

23 MR. ROBERTS: No further questions.

24 THE COURT: Mr. Tindall?

25 /////

1 REDIRECT EXAMINATION

2 BY MR. TINDALL:

3 Q. Doctor, what was plaintiff's pain level on
4 discharge?

5 A. I'm not quite sure. I'm sure it's documented
6 in here somewhere, but I can't remember.

7 Q. Well, take your time and flip through there
8 for a minute, see if you can.

9 A. 6 out of 10.

10 Q. Okay. That would have been before any meds
11 got ingested by her; right?

12 A. I don't remember if I administered any
13 medications in the emergency department, but I have not
14 seen any evidence that any was given. So --

15 Q. Could you, please?

16 A. -- yes.

17 Q. I'm sorry. I didn't mean to cut you off.
18 Did you finish your answer?

19 A. Yes.

20 Q. Could you please turn to JGL4546.

21 A. 4546? We're going back a ways; right? I'm
22 still at JGL70s.

23 All right. I have no idea where 4546 is.

24 Q. That's all discombobulated, isn't it?

25 A. 47. Oh, sorry.

1 Q. All right. Well, let me -- let me see if I
2 can speed this up.

3 May I approach with this?

4 MR. ROBERTS: Yeah.

5 BY MR. TINDALL:

6 Q. I got it right here, Doctor.

7 What is this document?

8 A. This is a document that I used to print out
9 before I went to see the patient. This was the
10 documented nursing assessment note, and that is my
11 handwriting on it of what she told me when I was
12 examining her.

13 Q. Okay. Based upon reviewing that, what did
14 the plaintiff tell you when you were examining her?

15 A. That there was a car accident two days ago.
16 She was a restrained driver. There was no head injury,
17 no loss of consciousness. And back pain initiated --
18 began today on the day of -- of service.

19 Q. So regardless of what the triage nurse wrote,
20 you personally spoke with the plaintiff; she personally
21 told you the information you handwrote?

22 A. Correct.

23 Q. All right. Thank you, Doctor.

24 THE COURT: Mr. Mazzeo?

25 MR. MAZZEO: Nothing, Your Honor.

1 THE COURT: Mr. Roberts?

2 MR. ROBERTS: Yes.

3 Audra, Exhibit 18, page 1, the bottom, under
4 "medications."

5

6 RECROSS-EXAMINATION

7 BY MR. ROBERTS:

8 Q. And I'm just following up on the question as
9 to whether or not Ms. Garcia had taken any type of
10 medication when she reported her pain level to you --

11 A. Sure.

12 Q. -- a 6 out of 10.

13 And if you look at the bottom of the page,
14 "Advil 800 milligrams."

15 Is that a normal dose of Advil?

16 A. Yes. Depending on the size of the patient,
17 but yes.

18 Q. Okay. How many pills would that be if you
19 got a --

20 A. If it's the over-the-counter form of Advil,
21 which I guess it is because it's Advil, that would be
22 four.

23 Q. Four Advils.

24 A. Mm-hmm.

25 Q. And then you wrote, "last dose this a.m."

1 And since this is the afternoon, she had
2 already taken four Advils; right?

3 A. It appears that way, yes.

4 Q. Okay. And then just -- and then we see
5 this -- the time you saw her was at 1407.

6 So it was after the triage nurse; right?

7 A. Correct.

8 Q. Thank you, Doctor.

9 MR. ROBERTS: Thank you, Your Honor.

10 MR. TINDALL: Nothing further, Your Honor.

11 MR. MAZZEO: Nothing, Your Honor.

12 THE COURT: Any from our jurors? I'm not
13 seeing any hands.

14 Thank you, Doctor. You're excused.

15 THE WITNESS: Thank you.

16 THE COURT: Defense have additional
17 witnesses?

18 MR. MAZZEO: Yes, Your Honor. May we
19 approach, please.

20 THE COURT: Sure. Come on up.

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

23 THE COURT: Who's the defense next witness?

24 MR. MAZZEO: Your Honor, yes, the defense is
25 going to call Defendant Andrea Awerbach.

1 THE COURT: Good morning again, ma'am. I'm
2 going to have you resworn again because it's been a
3 while since you were here.

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

8 THE WITNESS: I do.

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

11 THE WITNESS: Andrea Awerbach, A-n-d-r-e-a
12 A-w-e-r-b-a-c-h.

13 THE COURT: Thank you, ma'am. Go ahead and
14 be seated.

15 MR. MAZZEO: May I proceed, Judge?

16 THE COURT: Go ahead, Mr. Mazzeo.

17 MR. MAZZEO: Thank you.

18 DIRECT EXAMINATION

19 BY MR. MAZZEO:

20 Q. Good morning, Andrea.

21 A. Good morning.

22 Q. Andrea, would you tell the jurors where you
23 live currently?

24 A. 4217 Orion, O-r-i-o-n, Avenue. That's
25 Las Vegas 89110.

1 Q. Okay. You're fine to proceed? You want to
2 take a moment?

3 A. Just one second. Windy days. I'm good.

4 Q. Okay. Andrea, who do you reside there with?

5 A. My husband, my two granddaughters, and my
6 son.

7 Q. And how long have they been residing with
8 you?

9 A. My son moved in at the end of January, after
10 graduating Las Vegas Rescue Mission earlier in that
11 month. My husband relocated from California,
12 Thanksgiving 2014. He was my boyfriend at the time.
13 And my granddaughters moved in the day before
14 Thanksgiving 2014.

15 Q. And tell us about your educational history
16 since high school.

17 A. Well, actually, I didn't graduate high
18 school. I have a GED. I went on later to get my
19 bachelor's. I have a master's. And then the school
20 district has rankings after your master's. So I have a
21 master's plus 32 credits. I chose not to turn that
22 into a PhD because I went for national board
23 certification, which I held up until my retirement.

24 Q. Okay. And would you tell the jurors what was
25 your employment at the time of this accident?

1 A. I worked for the Clark County School
2 District. My main assignment was as a primary autism
3 teacher at an elementary school, but I worked at what
4 we called extra duty or enhanced compensation. I
5 tutored students with individualized educational plans
6 who maybe had been taken out of school for behavior. I
7 tutored children via the homebound program, kids who
8 had had surgeries or long-term illnesses. I mentored
9 other teachers.

10 And then I don't remember if it was 2011, but
11 during that period I also did tutoring. There was a
12 lot of -- I think it's called SES, supplemental money.
13 I think it was called supplemental -- for failing
14 schools. So I tutored students through those companies
15 as well.

16 Q. And tell us about your work with the
17 special ed kids.

18 A. I've been blessed to do a variety of things.
19 My primary work has been with young children with
20 autism, first through -- mostly first through third,
21 varying from children who were severely disabled in the
22 area of communication.

23 So in third grade they might still be in
24 diapers, nonverbal, violent. And within that same
25 classroom, students who were ready to learn how to

1 read. So every day was an adventure, a lot of
2 planning.

3 I also worked for a charter school, middle
4 school and high school math. And it was a
5 project-based school, so a lot of English and language,
6 reading. Mostly my job as a teacher has been language
7 development and behavior.

8 Q. And why did you go on to teaching?

9 A. Prior to teaching, I worked in the therapy
10 field. It's funny because, for a time, teachers
11 went -- they were teachers and then they became
12 therapists. I went the other way. I was a mental
13 health therapist who became a teacher because almost
14 all of my clients -- at that time I was -- before I
15 left to go to school -- back to school, I was working
16 for children's behavioral services.

17 Almost all of them were failing in school,
18 and I felt like what I knew to help parents when --
19 what I knew to help kids was great, but I really wanted
20 to get in there and teach kids how to read and do
21 academics as well.

22 Q. Why don't you tell the jurors about your
23 family life and your physical abilities at the time of
24 this accident.

25 A. I have always been a large woman. I have

1 always been obese, and I've always been morbidly obese.
2 I'm blessed that I don't have health problems. I have
3 no high blood pressure. I have no diabetes. I have no
4 heart trouble. I have terrible hay fever.

5 So I ran a classroom. I was able to move --
6 you know, they were young kids. When the rest of the
7 district was losing recess, we had to have it to teach
8 social skills. So -- and we did stretching every day
9 on the floor. I was always able to move. I prided
10 myself on that activity level.

11 I ran a house. I went to church. I went to
12 Nar-Anon meetings. I was very active in the teachers
13 union. So I was always moving. In 2011, that was the
14 case.

15 Should I keep going?

16 Q. Oh, keep going. Yeah.

17 A. 2013, I retired from the school district on
18 disability for generalized anxiety and depression.
19 While that was wonderful for my mental state and I was
20 able to rest, I didn't realize how much I was not
21 moving as much. You know, you don't have a classroom
22 to run.

23 For a time, my granddaughters were with us.
24 So I was at the park and things. And then -- as I
25 said, I was not moving as much. I didn't realize I was

1 losing some of my mobility.

2 And then, with the girls moving in, I got
3 stretched a little bit and -- and caught that "Hey, you
4 stopped moving."

5 However, 2015, January, my mom, who had been
6 living on her own -- she was 92. We realized that she
7 was suffering from a variety of illnesses. She had a
8 very, very serious urinary tract infection, which led
9 to some violent dementia. I became her primary
10 caregiver.

11 For four months she was in the hospital, but
12 I was there. I was getting calls at midnight, 10:00 in
13 the morning, 2:00 in the morning because they didn't
14 know what was wrong and she would calm down for me.

15 In April we were able to get her stabilized
16 enough to move home with us, which meant midnight
17 bathroom transfers, moving during the day. So I was
18 active. But, again, I was stuck home. I was a
19 caregiver of two small children and a 93-year-old.

20 I didn't -- like a lot of caregivers, I lost
21 touch what was happening to my body and began to lose
22 my mobility, which is not typical for me.

23 Now, my mother passed in her home
24 December 15th. Now I'm working on -- on my mobility.
25 I'm in physical therapy. I'm pushing to get that back.

1 I'm not -- I'm very -- I'm fiercely independent. It
2 bothers me to be in this place.

3 Q. Okay. And -- and you've used a walker during
4 the course of this trial.

5 When did you start -- first start using a
6 walker?

7 A. I have regrets because my mother begged me.
8 When she saw how -- even through her being home, she
9 begged me to try the walker. And I was stubborn and
10 stoic.

11 I began using it shortly after she passed.
12 And then there was no way -- I just saw how much I
13 wasn't doing. I wasn't doing the food shopping. I
14 wasn't doing anything. So once I started to use the
15 walker, I began to use it more.

16 There's not a way I could make it from --
17 well, if I did it without the walker, it would take
18 probably about three hours and a lot of stops. So I
19 move better with it.

20 Q. Okay. Now, directing your attention to the
21 day of the accident.

22 Last week, on -- when you -- on the
23 plaintiff's case, Mr. Roberts called you to the stand,
24 and you had testified that you received a call from the
25 police officer at some point that day; correct?

1 A. Yes.

2 Q. Okay. And can you now tell us about the
3 conversation you had with the police officer?

4 A. He called, asked to speak with me, said that
5 my car had been in an accident, that my son had been in
6 an accident. I asked him if anyone was hurt. He said
7 not -- not that he knew of.

8 He told me that Jared was going to be
9 arrested for DUI, to which I asked, "Is he drunk or is
10 he high?" Because I didn't necessarily understand DUI
11 versus intoxication.

12 He said, "Ma'am, I'm just calling as a
13 courtesy."

14 And I said, "I'm not trying to argue you out
15 of that. Jared's going to lie to me. He's going to
16 say he was clean. So I need to know from you what
17 happened. I also need you to know he took the car
18 without permission. Can you -- can you arrest him for
19 that?"

20 He said, "I'm not going to pursue that."

21 Q. Okay. And with regard to Jared's use of the
22 car, how many times before the accident were you aware
23 that Jared had used the car?

24 A. I was never aware when he took it. I came to
25 learn after. I don't know exactly. I'm guessing

1 between 5:00 and 10:00.

2 Q. And what was the -- what was the arrangement
3 with your keys? Was that -- or -- withdrawn.

4 What was the arrangement with your vehicle?
5 Was that a family vehicle? Your vehicle?

6 Tell the jury what was the vehicle's purpose
7 and who was -- who was the sole user of that vehicle.

8 A. I used the vehicle. It was a family vehicle
9 in that I did the food shopping, I drove Jared to work,
10 I took Tikeria places.

11 But it wasn't -- I was the only person who
12 could use the car. When Tikeria had her license, she
13 would have to ask me. We had one car. And, as I told
14 you, I worked multiple positions. The car is mine.

15 Q. Were there instances where you had to hide
16 the keys so that they wouldn't be taken by Jared?

17 A. As I testified, I think, on Friday, I was
18 hiding everything. Some of that because Jared was
19 feeling entitled, taking everything. Some of it was --

20 I started to say feeling entitled. I don't
21 think I finished.

22 -- taking everything. Some of it is for that
23 sense of control. I -- I came to learn a lot more than
24 I knew at that time, but when there's chaos around you,
25 knowing where everything was -- I had testified that,

1 you know, I hid school items. I didn't think Jared was
2 necessarily going to steal my grade book, but would
3 they misplace -- would they move it, would they spill
4 something on it?

5 He and Tikeria were fighting all the time.
6 Could it have gotten lost? I knew where -- you know, I
7 had to keep everything near me. I hid the keys because
8 it was the car key, it was -- and I might have things
9 in the car that I needed. I didn't want them to use
10 the car. It was the house key, it was the mailbox key,
11 it was my school keys, my classroom keys. You -- you
12 lose school keys, you're in trouble.

13 Q. Okay. And also, Andrea, did you ever give
14 Jared permission to use the car prior to this accident?

15 A. I had given him permission to use the car
16 when Tikeria had her license. Let's say they had to go
17 to the store or to an appointment, he drove with a
18 select group of licensed drivers, myself included.

19 Q. And when did you first give Jared permission
20 to use a car with a licensed driver? At what age?

21 A. He was over 18.

22 Q. Okay. And was your understanding -- was your
23 understanding that Jared had a permit?

24 A. Yes.

25 Q. Okay. And why was that -- why did you think

1 that?

2 A. Well, I had gone with them to the -- to the
3 DMV. I had paid online for a duplicate. If I may
4 speak, I know there was testimony that you can't. I
5 went online on my phone and looked it up. You can pay
6 for a duplicate license. You can pay for a duplicate
7 permit online. I paid online. There were times his
8 grandmother gave him money. Because the story was
9 always that he lost it.

10 I was -- at the point that I paid online, I
11 was not going to give him the money, so I went online
12 to the DMV and paid with my debit card.

13 Q. And those instances where you gave Jared
14 permission to use the car, was it a blanket permission,
15 or did he have to ask each time?

16 A. No. He had to ask each time. Had the
17 situation been different and Jared were not in trouble
18 and had a license, he still would have had to ask me
19 because it was one car and I worked multiple places. I
20 had food shopping to do. I had meetings to go to.
21 Maybe there wasn't gas to finish out the month.
22 There's not a "just take the car."

23 Q. And what was the first instance where Jared
24 had used the car without your permission?

25 A. It was a different car, 2008. We were in my

1 classroom. I gave him the keys to go out to -- to take
2 things back and forth. I got a call from just up the
3 street from the school that he had hit another car.

4 Q. Okay. And what would you do after you found
5 out that Jared had used your car without permission?

6 A. Well, 2008, he was involved with juvenile
7 court, so I reported that to his probation officer. I
8 reported it to the judge. I began to hide things more
9 vehemently because I thought he was doing better than
10 he was at that time because, like I said, he was
11 involved in juvenile court.

12 For any of his behavior, when he was a
13 teenager, I had more -- more -- you know, I could
14 restrict things. I could say that he couldn't go out
15 to the point that he would listen. I could call him in
16 as a runaway. I could call his probation officer. As
17 an adult, there's only limits. There's not punishment.
18 I'm not going to send an 18-year-old -- he wasn't
19 listening when he was 15.

20 So, again, I would call the car in as stolen.
21 If I found out -- let's say I found out in the morning
22 that he had taken it the night before, I did call that
23 in a few times. They told me there was nothing they
24 could do because the car was back. I called it in a
25 few times, he would get it back before they could --

1 could find it.

2 Again, I was -- I was pulling back more and
3 more. I was detaching more and more. But anything
4 that I was doing -- let's say I was helping them
5 with -- they were renting a TV from Rent-A-Center. I
6 no longer provided those funds.

7 I also began to increase my research on --
8 how was I going to move -- money was very, very tight
9 for us. So I had to find some place I could get
10 into -- get into a loan. I began to look at the
11 eviction process. It's not as easy to do when you live
12 in an apartment. I increased my meetings with Nar-Anon
13 so I could learn -- N-a-r-A-n-o-n.

14 Nar-Anon is the sister program to NA, just
15 like AA has Al-Anon. It's for family members to learn
16 how to cope with that chaos.

17 Maya Angelou has a saying, "You do what you
18 do till you know better. When you know better, you do
19 better." In that time, I was still learning an awful
20 lot.

21 Q. Okay. And at some point, did you come to
22 learn that Jared did not have an actual permit?

23 A. I have never completely understood Jared's
24 status. When he now regained his -- his driving
25 privileges and got the SR22, he showed up in the system

1 as having had something. He showed up in the system as
2 being revoked. It wasn't new. So I -- I have never
3 been clear on whether he had one and didn't comply, if
4 he never had one.

5 Q. Okay. And what was your understanding --
6 why -- why was Jared driving that first week of trial,
7 that Mr. Roberts made a point about?

8 A. If I could say, I -- I don't want to be
9 argumentative, but if I can say, the reason anyone
10 knows Jared was driving is that no one was hiding
11 anything. I parked at the side by the handicap -- by
12 the ramp. Jared let me out. All the attorneys had to
13 do was ask. They didn't have to wait at the corner or
14 take pictures. I would have explained it.

15 At that -- and in January, Jared went to the
16 insurance company -- his own insurance company. Got an
17 SR22. He paid for that. The following week, we went
18 to the DMV. We went together, although it's easier for
19 my husband to do it, because I was transferring the
20 car -- my mother's car to us.

21 Interestingly enough, I brought with me to
22 the DMV the paperwork that Carson City, when I called
23 them, told me to bring. When I got to the DMV,
24 everything they had told me was wrong. So I had that
25 experience with Carson City. They didn't know about

1 the 45-day rule. They had told me the wrong papers.
2 That's a side story.

3 We went to the DMV. Jared turned in his
4 SR22. He paid for the permit. He was not intending to
5 take it that day because he didn't have the book and we
6 had his daughters, but he decided to try it. He didn't
7 pass it that first time. The following week, he was
8 still living at the mission. On his day off from work,
9 he took a bus to the Sahara DMV. Took the permit test.
10 Passed it. Made an appointment for the driver's test
11 on February 1st.

12 On February 1st, he went to the DMV with my
13 husband. Took his road test. Passed that. He was
14 told there was a -- the reinstatement fee was \$162. He
15 chose at that time to wait to pay the reinstatement fee
16 because he was also a client at Goodwill. He's doing
17 very well in their level-up program. His case manager
18 asked for good -- said Goodwill would like to pay that
19 money for you. It's a bureaucracy. It takes a while
20 to get that check. We were waiting. He did not drive
21 alone during that time.

22 We had the paperwork. He had the SR22. He
23 had the paperwork from the DMV. He had both test
24 scores. He continued to drive with a licensed driver.
25 The only driving he did was from the -- the curb to the

1 parking garage. I also want to make it clear, Jared is
2 not driving, because I drive. I drive. It may not be
3 comfortable for me, but I drive. We wanted -- my
4 husband and I wanted to drive with him for as long as
5 possible because just because you have a license
6 doesn't mean you can take on a car. Just because you
7 have a license, even though they're your daughters, I'm
8 their guardian. We wanted to see how he was driving.

9 So we, as a family, decided to wait for
10 Goodwill to pay that 162. We called here from -- from
11 court a few times and said where are we going with that
12 because there seems to be some confusion. She said to
13 Jared, "Please wait. I'm going to get you that check."

14 There was so much confusion, and there was so
15 much tension, and there was confusion more -- you know,
16 I expect certain things from the opposing counsel, but
17 our own counsel was so confused that Jared, on his own,
18 paid the 162 to get the license. The license and the
19 driving privileges are not necessarily the same thing.

20 If I lose my license today in Albertsons, I
21 have to replace that license. But I get to drive till
22 they send me the new license. So that was our
23 understanding. He then got that, and now he has a
24 license and drives on his own.

25 Q. Thank you.

1 MR. ROBERTS: Objection. Hearsay.

2 Foundation. Nonresponsive. Move to strike.

3 THE COURT: I don't think so. Overruled.

4 MR. MAZZEO: Thank you, Judge.

5 BY MR. MAZZEO:

6 Q. All right. Andrea, let's talk about your
7 relationship with Jared between the ages of 14 and 19
8 years old. So I want you to describe, you know, what
9 the -- what the home life was and what your
10 relationship with Jared was like.

11 A. It was up and down because he wasn't using
12 the entire time. He went in -- into treatment a few
13 times. He came home clean. He worked in NA program.
14 There was also the -- the competing factors of the fact
15 that he had been blinded in one eye at the age of 13,
16 and I didn't know how much was acting out. And he also
17 had been diagnosed attention deficit. He had been
18 diagnosed depressed. He had been diagnosed bipolar. I
19 was not always getting the greatest counsel from --
20 from the programs he was involved.

21 So when he was clean, there was a lot of
22 hope. We were the unit that we have always been. He
23 was active in my classroom. He's always been involved
24 in my -- in my teaching. I went to meetings with him.
25 We cooked together. We went to church together. We

1 went to celebrate recovery together.

2 When he was relapsing, it was always
3 confusing. I think a lot -- unlike a lot of people
4 that make the mistake of saying, "You know, I don't use
5 drugs, so maybe I'm wrong," I have since learned to say
6 I don't use drugs, so we're going to go by what I know.

7 He -- when he was active, he was able to hide
8 that very well. He was incredibly manipulative. He
9 was relentless. It's not a comfortable -- it was a
10 time that I was sleeping with my wallet and my keys,
11 and the sponsors for my program said you have to do
12 that for now. I didn't always know how to -- you can't
13 just send someone out of the house. If they don't go,
14 the police don't evict them. There's a process you
15 have to go through.

16 So it was up and down, it was confusing, it
17 was heartbreaking. And then, the end of 2010, my first
18 grandchild was born. The -- it got more confusing.
19 The stakes, in essence, got higher. I didn't know
20 where necessarily to -- to draw that line because I
21 needed to make sure that the baby was safe.

22 So there was a lot of grief, a lot of
23 mourning, a lot of -- I don't know if the appropriate
24 term is post -- a lot of stress, a lot of nightmares.
25 It was years until I slept well. Then you add the

1 stress of a stressful job. I love teaching. I did not
2 love the politics of teaching. I didn't love the
3 ever-changing policies. I didn't love the
4 cookie-cutter, one-size-fit-all for any child. So I
5 was constantly battling. There was the union work,
6 which I thought was important to my job. It was a
7 very, very stressful time.

8 Q. Yeah. Thank you. And -- and you kind of
9 touched upon it, but maybe you can elaborate some.

10 How did Jared's addiction with marijuana
11 affect your social life during that time period?

12 A. My social life consisted of meetings, and I
13 don't know if you call it union work, social life. I
14 didn't go out; I didn't date. I became more isolated.
15 There was a time when was younger -- 14, 15 -- that if
16 I went out, say, with friends to -- to lunch, I was
17 going to get a call. Even if I brought him with me, I
18 was going to get a call that something had happened.
19 So I -- I didn't attempt to go to the movies. I had
20 friends who were supportive. You know, I spent time at
21 school with them, but I didn't -- I didn't go out.

22 Q. When did you first learn that Jared was using
23 marijuana?

24 A. I think he was about 13 when I learned.

25 Q. And what is your own personal insight as to

1 the characteristics of an active addict?

2 A. I liken it to zombies. You know, people are
3 crazy about zombies and zombie movies. I love zombie
4 movies, but not the zombie part. I'm not -- just for
5 the makeup. The killings -- it's just relentless. The
6 way that the addiction takes over, changes character,
7 changes everyday conversation. And the -- the addict's
8 sole job is to get what they want. Your sole job as
9 the nonaddict is to try to preserve peace and go on
10 with life.

11 Always one step ahead of me, maybe four or
12 five, and I'm his mother, so it's not a comfortable
13 feeling to be constantly questioning your son. If your
14 son says to you, "Hey, you look nice today," to be
15 thinking, "Where's my wallet? What does he want?" To
16 be constantly criticized. There's a lot of power play,
17 in my experience, in addiction.

18 So we would have arguments about ridiculous
19 things. Whether I was making chicken or steak for
20 dinner, he would argue one and then not be there for
21 dinner.

22 I think you also -- what I learned is that
23 you have to be very careful of the advice that you get
24 from people because it's not always -- people don't
25 always know, and people are at different levels.

1 That's not the question you asked me. You asked me
2 about an addict.

3 Addicts are relentless. It will change your
4 character even when you see glimmers of hope. I don't
5 think most addicts want to be doing what they're doing.
6 There's a desperation. There's a loneliness. There's
7 tremendous guilt, which they then project onto -- at
8 least Jared did project that onto me.

9 Q. Okay. Thank you. And what were some of the
10 things that you did to help Jared with this -- with his
11 addiction?

12 A. We went through a lot of counseling. Jared
13 went -- I went to my own therapist to learn parenting
14 strategies to -- to get through that stress. Like, as
15 I shared, I went to Nar-Anon. I was very active in the
16 Las Vegas Recovery Center, which has a family renewal
17 program. They have an excellent program for families.
18 I went through their four-day workshop I think four or
19 five times.

20 I worked with his probation officers when he
21 was in the program. Whatever they offered for
22 families, I offered to not come if they thought a break
23 was necessary. They never wanted that.

24 I drove out to Utah when he was in rehab
25 there at least once a month, usually twice because they

1 asked. I reported him. I argued. He had one
2 probation officer in particular who was incredibly
3 enabling. Jared can be very charming. And I argued
4 with that probation officer to send him to Utah. He
5 wanted to recommend Spring Mountain, which is local. I
6 said, "He will be home in three weeks on a pass. He
7 needs to go."

8 I did a lot of begging. I remember Jared
9 asked for help. I took him -- one night he called me.
10 I was at work. He said, "Can you come home? Can you
11 take me?" I took him to Montevista's intake. At that
12 intake, I was pretty sure he was -- he was high. The
13 intake worker said that he didn't rise to the level of
14 in-patient services.

15 Maybe six weeks -- I'm not exactly sure of
16 the time, but a very short time later, Jared was a
17 patient at Montevista, inpatient because the courts put
18 him there. He did rise to the level. I spent a lot of
19 time arguing with cops. I would call them because he
20 would either run away or had stolen something. Police
21 officer would come to the house, say, "I'm not going to
22 take him in; I'm going to give him a good talking to."

23 And -- and -- and I came up against some
24 prejudice being a single mother where our skin colors
25 are not the same. And I think, well-meaningly,

1 officers thought they could talk some sense into him.
2 Doesn't work that way.

3 I remembering being at a meeting with his
4 assistant principal. Jared had been drunk on campus.
5 I asked them to call school police. I said, "I'm not
6 coming. I'm not leaving my job until you call school
7 police."

8 He said, "No, we're not going to do that.
9 We're going to let him stay here. If he wants to
10 leave, we have to let him leave."

11 I said, "Isn't it against the law to be drunk
12 on a high school campus?"

13 "We're not going to call school police."

14 I met with the assistant principal after.
15 She said, "There's so much more you can do as a
16 parent." She stood up over her desk to look at Jared's
17 shoes because she was going to say to me, "You know,
18 don't buy him expensive sneakers." The shoes he had on
19 were from Payless. She said to me, "Take away his
20 electronics." What electronics? He had no cell phone.
21 I had done those things.

22 It's hard for me. I try to be a very
23 positive person. I still carry some resentments about
24 people who didn't do their jobs that I think could have
25 made it easier.

1 Q. Was Jared also involved in Eagle Quest and
2 Bridge Counseling?

3 A. Eagle Quest is a group home. He was
4 privately placed there for three months. And Bridge
5 Counseling was the out patient, and they have a drug
6 and treatment program. I -- I believe it's primarily
7 for adults, but yes, he was involved in both of those.

8 Q. And tell us more about the Nar-Anon and your
9 involvement with Jared in that.

10 A. Nar-Anon is a separate program -- well, it's
11 a sister program. There's NA, which is 12-step
12 program. There's AA, which is 12-step program.
13 There's Gamblers Anonymous. Those are the three basic.
14 There have been other 12-step programs. There's OA.
15 The Anon programs are for family members, spouses,
16 friends, anyone who can be in that codependent
17 relationship.

18 You go to -- to Nar-Anon -- it's a -- you
19 have 12 steps as well where you work a program, get a
20 sponsor. You learn how to set boundaries. You learn
21 how to keep yourself sane, how to detach lovingly.
22 People get from it what they want to get. It's not
23 necessarily a program of here's how to fix your addict,
24 although you come in that way.

25 The very first Al-Anon meeting -- because

1 there were many more Al-Anon than Nar-Anon. The very
2 first Al-Anon meeting I went to, I thought, "Oh, good,
3 I'm going to run into parent -- I'm going to see
4 parents. Maybe they'll have some suggestions." And I
5 was shocked that it was an hour that we didn't talk
6 about Jared. Then I was relieved because I had to get
7 stronger, I had to set those boundaries. We were
8 slowly slipping into Jared's standards, and then not so
9 slowly slipping. I had to elevate us. So I was very
10 active in Nar-Anon. I was a sponsor. I was a speaker.
11 I went to multiple meetings a week. I went to Al-Anon
12 as well. I went to NA.

13 Q. Okay. Thank you.

14 And what obstacles, if any, did you have from
15 family members in getting help for Jared?

16 A. I have a difficult family. I have addicts in
17 my family. My mother was quite a bit older. She was
18 almost 41 when I was born. Different generation.
19 Every limit that I set flew in the face of what she
20 thought was appropriate. It devastated her and did
21 damage to our relationship when Jared went to juvenile
22 hall, when he went to detention. It devastated her
23 when, as an adult, I didn't protect him from his
24 consequences.

25 Jared is the youngest of six grandchildren

1 and was the closest to her. She'd do anything for his
2 attention and affection. Before I realized how sick
3 she was, she was allowing Jared to live in her senior
4 apartment, putting herself at risk. This is later when
5 he was an adult. So she, whether deliberately or not,
6 undermined each thing I did, either by giving him money
7 when I said no money or by telling Jared that I was
8 wrong, by taking sides, by believing any story that
9 Jared told. It fit in her picture that I was
10 controlling and I didn't understand him.

11 My -- I had other family members who used
12 with Jared, who, again, undermine, who taught him --
13 well, not taught him but may have said, see what you
14 can get from your mom when you go home this weekend."
15 I have -- I had family members who kept him when he ran
16 away and fought me when I sent the police and fought me
17 in court although they were not providing -- he wasn't
18 going to school, he wasn't clean when he was with them.

19 So I didn't have that support from -- from my
20 family. I had the opposite. I had to -- to fight them
21 and drag -- and so, thankfully, Jared was in program
22 last year and safe and away from my mom so that I could
23 then step in as her caregiver. And we had that almost
24 year together of us taking care of her and bonding and
25 being there, and that was tremendous healing for me.

1 Q. And you're talking about the Las Vegas Rescue
2 Mission?

3 A. Yes.

4 Q. Okay. Before we get to that, in your
5 experience with Jared and his addiction, what have you
6 learned personally?

7 A. I have learned quite a few things. I have
8 learned not to give up hope. I have learned to
9 surround yourself with people of faith. And it doesn't
10 have to be the same faith as me, but people with faith
11 who will stand with me when I'm getting weak.

12 I think the biggest thing I learned, and one
13 of the biggest mistakes I made -- and I see parents
14 make this a lot -- is when Jared said he wanted --
15 whenever he said, "I want to get clean," I would help
16 him with that. I have since learned -- I can't say for
17 every family -- that it was more important for Jared to
18 work this out on his own. And so when I completely
19 broke contact with him just before he went into the
20 mission, I think that was a better turning point for
21 him. This is his now; he owns this; this is his
22 recovery.

23 It's very hard when anyone you love, but
24 especially your child, says, "Please help me get
25 clean," to not jump in. But for us, that was a

1 mistake. He needed to -- to do that on his own.

2 Q. And how long is this -- was this program for
3 Jared when he went to the Las Vegas rescue mission?

4 A. I believe the program is 13 months. Jared,
5 either today or tomorrow, celebrates 18 months clean.
6 He started out at the Las Vegas Recovery Center. He
7 actually went to the mission as a holding bay before
8 going to the Salvation Army and chose to stay in the
9 mission's program, which is -- I think the program is
10 called Genesis. It's a 13-month program with -- you
11 can stay sometime after that to transition.

12 Jared stayed about two or three weeks after
13 his graduation and then decided he was ready to -- to
14 move home full-time.

15 Q. Now, was his stay there voluntary? Could he
16 come and go as he wanted at the Las Vegas Rescue
17 Mission?

18 A. It's not a lockdown facility, but if you
19 leave when you don't have a pass, you're going to be --
20 be kicked out of the program.

21 Q. Okay. And -- and what was the purpose for
22 Jared going there?

23 A. I -- I can share what he shared with me. I
24 can share what I have seen. The -- why he chose the
25 mission is it is a faith-based program. It's a

1 Christian program --

2 MR. ROBERTS: Objection. Hearsay.

3 THE COURT: Sustained.

4 BY MR. MAZZEO:

5 Q. Okay. How is Jared now?

6 A. This -- I -- I have not known this Jared.
7 I'm getting to meet my adult son for the first time.
8 He's much calmer than he ever was. That anger, that
9 arrogance is gone. He's incredibly stressed. We all
10 are. The stress will drop when -- when the trial's
11 over, but there's a lot -- much more communication.
12 He's moving into that full-time parental roll. When he
13 first would come home on passes, it was daddy fun time.
14 Last couple of months, it's daddy no time. Which is --
15 you know, those of us with young kids know it's not fun
16 to tell a five-year-old no. He steps up; he does it.

17 He was an incredible support with my mom. By
18 the time he could have weekend passes, those weekend
19 passes consisted of his coming home and taking the
20 night shift so his stepfather and I could sleep. That
21 power struggle is gone. I was my mother's primary
22 caregiver. Jared deferred to me and then gave his
23 suggestions on how to transfer her -- I mean, he
24 works -- at the time he was a resident of the mission,
25 he was -- his work therapy was security. Dealt a lot

1 with elderly people, sick people, hospitals. There
2 were things that he knew, but he didn't steamroll or
3 bulldoze as he did in the past.

4 He's pursuing his faith. His faith beliefs
5 are a little different than mine, but he's serious
6 about them. He's fun. Like I said, he is stressed
7 right now. He's -- now he's a member of the staff of
8 Las Vegas Rescue Mission. That's a new position for
9 him. He's also starts school tomorrow in a certificate
10 program for nonprofit management. Then there's trial,
11 then there are his daughters.

12 So he -- we have a running joke because, you
13 know, I'm 53, my husband is 45. And we have a running
14 joke among the three of us of who's the oldest, who's
15 the -- who's the biggest stay home body. I'm very
16 proud of him. It's nice to make that connection, to
17 have family time to do things. He's intense, but not
18 that negative intense. He has a reason to be intense.

19 Q. What's the difference between -- in the
20 relationship you have with Jared now as opposed to five
21 years ago, at the time of this accident?

22 A. I think the biggest difference is that I'm
23 not afraid. Relapse is always a possibility.

24 What's different now is that Jared has a very
25 strong program and plan. He has mentors. It certainly

1 helps that he works at the mission. But even when he
2 was working his part-time job at CaptionCall, he had
3 meetings, he had mentors, he had a faith base.

4 I know so much more. My boundaries are so
5 much stronger. I've gone through being afraid that I
6 was going to lose him and facing that.

7 There's a future planned as -- I'm looking
8 forward to having my own time. I love my
9 granddaughters. I would like to be a grandma and not a
10 full-time parent. I'm looking forward to -- now the
11 focus is on my health. And -- and that's a difference
12 too, that the whole world does not center around Jared.
13 Now it's about getting me to my exercises and moving.

14 His stepfather was just diagnosed with
15 diabetes and high blood pressure. So we're all
16 learning the right recipes and things. Now there's a
17 family commitment.

18 Q. And you touched upon it a few minutes ago.

19 What are Jared's responsibilities in the home
20 at this time?

21 A. Jared's an adult living in the home. You
22 know, I don't check his room to make sure his bed is
23 made, but his room is -- is his room. The house is his
24 house. We take turns with chores.

25 Some physical things fall more to him when

1 I'm not strong enough. I try to do as much as I can.

2 He's responsible for his daughters. I mean,
3 if he's worked a graveyard shift, then I'm on girl duty
4 till he wakes up. He contributes to the house from his
5 paycheck. He gives -- for a while, we did 2/3-1/3. We
6 do 50-50. He's responsible for his own recovery, for
7 maintaining that.

8 Q. Okay. Thank you. And also, Andrea, has
9 Jared expressed to you the importance of taking
10 responsibility for those injuries sustained by the
11 plaintiff and only those injuries that are related to
12 the motor vehicle accident?

13 MR. ROBERTS: Objection. Hearsay.

14 THE COURT: I think it is. Sustained.

15 MR. MAZZEO: Okay. Thank you, Andrea.

16 Nothing further. I'll pass the witness.

17 THE COURT: Mr. Tindall? Mr. Strassburg?

18 MR. STRASSBURG: Thank you, Judge.

19

20 CROSS-EXAMINATION

21 BY MR. STRASSBURG:

22 Q. Good morning.

23 A. Good morning.

24 Q. Jared -- after he entered the Las Vegas

25 Rescue Mission, you indicated that was, what, about --

1 was it 15, 18 months ago? It would have been October
2 of 2014?

3 A. I'm not exactly sure when he entered the
4 mission. He went from the Las Vegas Recovery Center to
5 the mission. He was there under what they call special
6 circumstances and then began the program.

7 So I don't know exactly, but yes. I think
8 that timeline is right.

9 Q. At the time he entered the -- that program,
10 were you done with him? Were you estranged? Had you
11 had enough?

12 A. I wouldn't put it in those terms. I had
13 broken -- I had broken contact completely for my own
14 sanity but also for his. I am -- I never gave up hope
15 on my son.

16 Was I done with being involved with him on a
17 daily basis? Yes. I did not visit him in the
18 hospital. That had as much to do with what I felt was
19 best for him. I mean, I think, as someone who loves an
20 addict, you're always looking for what's going to be
21 their bottom. When are you going to get there? What
22 is my -- what's the message I want to send?

23 So not to be rude, but saying things like
24 "done" and "fed up" are kind of cavalier. It's like
25 when a kid breaks a lamp or, God forbid, your husband

1 cheats on you for the last time. It's more intense
2 than that.

3 Q. I'm sure I'm going to ask stupid things just
4 because I -- I can't imagine what you've had to go
5 through. Just bear with me. I'll -- I'll try to --

6 A. It's not a stupid thing. If you haven't gone
7 through it, then you don't know the right -- exactly
8 the feeling.

9 Q. Yeah. Did you stay in touch with him when he
10 was in the Las Vegas Rescue Mission?

11 A. I first -- Jared reached out to me the day
12 before -- I don't believe in coincidence; I believe in
13 divine intervention -- the day Before Thanksgiving, not
14 knowing that I had the girls, and invited me to -- the
15 mission does a family dinner the day before
16 Thanksgiving -- and invited me to come.

17 He said, "I'll understand if you don't want
18 to go." My then boyfriend, now husband, was packing to
19 leave.

20 I called him and said, "What do you think?"

21 He said, "Let the girls see their dad, see
22 how it is. You'll be in a safe place. If it's not
23 good, you can leave."

24 I went to the -- to the mission for the
25 dinner. Jared was already different, already calmer.

1 Q. How far into the program was he at that
2 point?

3 A. I don't know exactly. But if -- if -- he was
4 either before Phase 1 -- I don't think he was Phase 1
5 yet, but he had been at the mission a considerable
6 amount of time.

7 Q. The blackout period?

8 A. I don't know what you mean by "blackout
9 period."

10 Q. Fair enough. Please continue, ma'am.

11 A. The program runs several programs. There's a
12 program for people who are there overnight. There's a
13 short-term program. There's a program for women. And
14 then there's the long-term genesis project -- program.

15 I believe Jared -- but you get counseling and
16 you get spiritual guidance and you have certain things
17 that you have to do whatever level that you're at.

18 Q. And after the Thanksgiving invitation that
19 you accepted, did you from time to time go back to the
20 mission?

21 A. We brought the girls for visits on either
22 Saturday or Sunday and saw him there once a week, once
23 every other week, especially once my mom became ill.

24 He got one emergency pass in January to see
25 her in the hospital. We went very, very slowly in our

1 visits because, again, I had -- I had made that mistake
2 of being involved too early. We went very slowly.

3 Q. So it sounds like this time was different
4 because he had to do it on his own.

5 A. I think that's one of the reasons. I think
6 he was incredibly tired. I think it was their mother
7 calling me and saying "please take the girls" was a
8 relief for him. When -- when he was using -- when he
9 was active, he still maintained as much contact as he
10 could.

11 He's always been worried about the girls. He
12 was always trying to kind of get to the girls. I think
13 that gave him a certain peace, but it also set
14 different limits because I wasn't babysitting and I was
15 temporary guardian. In June, I became permanent legal
16 guardian.

17 Q. For his two kids?

18 A. Uh-huh. And he wasn't the only one that was
19 different. I was always the strongest. Each -- about
20 each year, I got stronger. This was the strongest I
21 had ever been. I'm stronger now than I was 13 months
22 ago.

23 Q. During the time he was in the program at the
24 mission, with what regularity would you say that you
25 had contact with him there?

1 A. We had phone contact several times a week.
2 We had visits, like I said, every week, every other.
3 With each phase, you increase a little bit more with
4 what privileges you can have and what you can do and
5 what's -- what's beneficial.

6 There were times that we didn't do a pass
7 because Jared had an appointment or something he wanted
8 to pursue for his recovery. And that was okay. There
9 were times that we would see him. Like I said, once he
10 was able to get passes, he came home for a few hours.
11 Then he built up to sleepovers.

12 Q. During the time that he was in the mission
13 program and you had contact with him, what changes in
14 his character did you observe yourself?

15 A. Primary change I saw was how calm he had
16 become. As I mentioned, his work therapy was security.
17 You're working security at the Las Vegas Rescue Mission
18 downtown. You can be very tense, very keyed up. I saw
19 a change in how he handled confrontations. I saw a
20 change in how much of a better listener he was, what an
21 evaluator. I credit that to his then supervisor on
22 that work therapy who was very calm, who was about
23 avoiding.

24 I saw -- much more open to hearing how I felt
25 about things, very open and respectful to my husband.

1 Jared grew up without a father. Now there's this man
2 in the house involved with your children. Very open,
3 shared his thoughts, very respectful. I saw him happy.

4 Q. I realize this may be sensitive, but what was
5 Jared's biological father like?

6 A. Jared's biological father was charming. I
7 mean, he was -- it's not for me to say if someone is an
8 addict, but he used drugs off and on.

9 We had -- I moved to -- to Las Vegas from
10 New Jersey in part to end that relationship. Didn't
11 quite work. He came out here. And then Jared's father
12 was silent. He was -- he did not contribute. I did
13 not pursue that. I wanted better for Jared.

14 We saw him once when Jared was nine. His
15 father came to town for something else, looked us up.
16 We had dinner. He made noises about staying. Didn't
17 stay.

18 And then, when Jared was 18, I found his
19 father via Facebook. We had a conversation -- several
20 conversations. Seemed like he was doing well, that he
21 had -- he said, you know, had he been diagnosed
22 bipolar. He was married. I thought he would be a good
23 contact for Jared.

24 Came to find out not much had changed. So
25 within three months, no one was talking to each other.

1 But yeah.

2 Q. What makes you think that the changes you've
3 observed in Jared are lasting?

4 A. Changes are only lasting if you have a strong
5 program. And a strong program can be 12-step. It can
6 be faith-based. It's what you do on a daily basis.
7 Jared does those things on a daily basis. A strong
8 program can carry you through a lot. I'm a testimony
9 to that. So ...

10 Q. What do you mean he does those things on a
11 daily basis?

12 A. Step 10 of a 12-step program is to reflect on
13 the choices you made during the day and to take
14 accountability for them.

15 I watch him reflect constantly. He -- he
16 will come back to me often and say, "I'm sorry. Was I
17 rude with you? Is it okay if I take a nap now after
18 work?"

19 He's -- he's not assuming anything. He's
20 much more gentle. That arrogance, that entitlement,
21 there's not a sense of entitlement to him.

22 Relapse is always a possibility. If Jared
23 doesn't go to meetings, if Jared doesn't talk to his
24 mentor, if Jared doesn't talk to his sponsor, if he
25 doesn't study his scripture, the -- the changes may not

1 be lasting.

2 But, for now, that's what I see. He's not
3 jumping to do anything. When he graduated from the
4 mission, he didn't come home the next day.

5 Q. When he graduated from the mission, was there
6 a ceremony?

7 A. Yes.

8 Q. Did you go?

9 A. Yes.

10 Q. What was his role in it?

11 A. Jared was one of three speakers at the
12 ceremony.

13 Q. Three -- why were three speakers selected out
14 of the graduating class?

15 A. From what the -- the pastor and the president
16 said at the ceremony, he felt that their testimony
17 would have the most benefit, show the most growth, the
18 most potential for success, I think perhaps the most
19 commitment to the program.

20 But, again, when I say "most," 14 people
21 graduated that day. Fourteen people were committed,
22 had done the work. Fourteen people. So it's not he
23 was better -- that he -- he was -- I think -- this is
24 just my opinion.

25 I think also Jared is an articulate young

1 man, so he was chosen. I think possibly because of our
2 family's involvement with the mission -- I helped
3 facilitate a Thursday night meeting at the mission. We
4 had -- actually, we had our wedding -- my husband and I
5 got married in July. We had our wedding at the
6 mission.

7 Q. Does -- you said Jared has a job?

8 A. Yes.

9 Q. Prior to the time that he got the job --
10 which he got during this trial at the mission?

11 A. Yes.

12 Q. Did he have a prior job?

13 A. Yes, he worked at --

14 Q. What was that?

15 A. I'm sorry. He worked at CaptionCall, which
16 is a relay service. It's for hearing-impaired and deaf
17 people. You get a subscription. And one party calls,
18 and the -- I think they're called communications
19 assistants -- speaks into a program called Dragon
20 Speak. The computer types that. The other person
21 reads it. My husband works there as well.

22 Q. And, to your knowledge, do you know what
23 Jared was making at that CaptionCall job?

24 MR. ROBERTS: Objection. Irrelevant.

25 MR. STRASSBURG: Oh, I'm sorry. I thought

1 there was a punitive damages claim.

2 THE COURT: Come on up.

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

5 THE COURT: Objection is overruled.

6 BY MR. STRASSBURG:

7 Q. Do you know what he was making?

8 A. I want to say 11 and change, between 11 and
9 \$12. That was when he was working for CaptionCall.

10 Q. How long did he work at CaptionCall?

11 A. A few months. He left the position to go to
12 the rescue mission, which was really his dream.

13 Q. To your knowledge, he didn't have any income
14 while he was in the program at the mission?

15 A. In the beginning phases, no. They're not
16 allowed to earn money. At Phase 4, they have day jobs
17 where you can earn -- you -- you may go out and move
18 someone's house there --

19 And then, when he was Phase 4 and eligible,
20 he went to work at CaptionCall. He started working
21 while he was in the program.

22 Q. The rates they pay in the mission are, like,
23 minimum wage?

24 A. \$10 an hour, I think. I don't know how much
25 they -- I think they get \$10 an hour.

1 Q. To your knowledge, when Jared started in the
2 program, he was broke?

3 A. Yes.

4 Q. You said he helped you with the rent; right?

5 A. Currently?

6 Q. Yeah.

7 A. He -- he puts a portion of his income into
8 the house. He's an adult living in the house.

9 Q. Sounds fair. He just moved home the Thursday
10 before the trial started?

11 A. I'm not -- I think so, yes. I think that was
12 it.

13 Q. And what's the rent that he's paying?

14 A. We have a formula based on either half of
15 what he's making -- first we said two-thirds, but he
16 had more things that he wanted to -- to take care of
17 for the children and things like that.

18 So he turns half his check -- when he -- the
19 two weeks that he was in trial, when he got his
20 CaptionCall check, I said, "Go ahead and keep that
21 money."

22 But, again, he's not -- he's not a child. He
23 doesn't keep that money so he can go to the movies. He
24 keeps that money because he has to pay his insurance
25 and he has to buy things for the girls. So he

1 contributes in that way. For a long time, I was
2 carrying everyone.

3 Q. You said that he is pursuing -- he just
4 started pursuing an educational goal?

5 A. Yes. The mission -- not the mission --
6 Goodwill helped him find a program. It's a certificate
7 program through UNLV, not a degree program, nonprofit
8 management. He'll start classes -- I think his first
9 class is tomorrow morning.

10 Q. Okay. And do you know who bought him that
11 suit he wore the first day of trial?

12 A. I believe that Goodwill gave him a voucher
13 for that, and he went to Ross's with it.

14 There -- there is -- I don't think he wore a
15 jacket. There is a suit that my husband and I went and
16 got him for work interviews.

17 It's part of the mission's program that they
18 take you on interviews for Cosmopolitan casino. And he
19 asked for that. And they went to, I think, Burlington
20 and got a suit jacket for \$100.

21 Q. Do you know what he's making at the mission?

22 A. I believe it's minimum wage. It is
23 full-time, but it's minimum. It'll be around what he
24 made at CaptionCall, I would guess, because it's less
25 an hour.

1 Q. Ma'am, I realize this has been difficult to
2 rehash all of these old wounds, and thank you for your
3 time.

4 A. You're welcome.

5 THE COURT: Mr. Roberts?

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

7

8 CROSS-EXAMINATION

9 BY MR. ROBERTS:

10 Q. Ms. Awerbach, you said that -- you told the
11 jury that Jared's anger is gone?

12 A. No. I said he's less angry.

13 Q. Okay. You -- you heard him making noises and
14 storm out when Ms. Garcia was testifying; right?

15 A. I saw him get frustrated and walk out.

16 Q. Did you hear the audible noises he was making
17 while she was testifying?

18 A. I may have, yes.

19 Q. And you've told the jury all the things you
20 think that Jared has done to become a better person.

21 He was not that person on January 2nd, 2011,
22 was he?

23 A. No.

24 Q. Okay. And -- and on the date of the crash,
25 you knew he was a drug addict; right?

1 A. Yes.

2 Q. You knew he was irresponsible?

3 A. Yes.

4 Q. You knew he could not be trusted?

5 A. Yes.

6 Q. And just to talk about a few specifics,

7 ma'am.

8 A. Uh-huh.

9 Q. Prior to January 2nd, 2011, you were aware

10 that Jared was using illegal drugs; right?

11 A. Yes.

12 Q. And you became aware that Jared was using

13 drugs as early as the eighth grade; right?

14 A. Yes.

15 Q. And you acquired that understanding that he

16 used illegal drugs from living with him?

17 A. Yes, and from his telling me.

18 Q. And from his telling you.

19 And from you drug testing him randomly for a

20 time period; right?

21 A. Not in the eighth grade.

22 Q. Okay. When -- when were you doing the drug

23 testing?

24 A. He was older, and it lasted for a short time.

25 Because the therapist I was seeing -- let me backtrack.

1 I came to realize that Jared was rigging the
2 test. I smelled rubbing alcohol. For marijuana, you
3 don't test weekly. So once he tested dirty, I would
4 have to wait 30 days. They were about \$40 a pop at
5 that time for a drug test.

6 My therapist said to me, he -- "I want you to
7 stop drug testing. It's not -- it's not working for
8 you. It's creating kind of a police state in the
9 home." So I stopped drug testing.

10 Q. And prior to you stopping, is it fair to say
11 that Jared had failed over 75 percent of the drug tests
12 that you administered to him?

13 A. I don't know that that's true. I don't
14 remember.

15 Q. Okay. The January 2nd, 2011, accident was
16 not the first wreck that Jared had caused; right?

17 A. No. He had an accident in 2008.

18 Q. Okay. And you knew that because you showed
19 up at the scene; right?

20 A. They called me.

21 Q. Okay.

22 A. Uh-huh.

23 Q. And on that former occasion where Jared had
24 wrecked a car, did it cause property damage to someone
25 else's vehicle?

1 A. Yes.

2 Q. And that day you had given Jared the keys to
3 go get something out of your car or to do something for
4 you; right?

5 A. I had given him the keys because Jared was
6 moving back and forth from my classroom to the
7 Dumpster, from my classroom to the car. I was packing
8 up. I was cleaning up. So he had the keys back and
9 forth.

10 Q. Okay. So prior to January 2nd of 2011, you
11 knew that, when you gave Jared your keys in order to go
12 get something out of your car, on at least one prior
13 occasion, he'd taken the opportunity to use your car
14 and cause property damage?

15 A. Yes. I also knew there were times I gave
16 Jared my keys and I got my keys back and nothing
17 happened. There were times between 2008 and 2011 that
18 Jared was doing well and clean.

19 Q. And Jared did not have a driver's license in
20 2008; right?

21 A. No. He was underage.

22 Q. And he didn't have a driver's license when
23 this crash occurred in 2011; right?

24 A. No, he did not.

25 Q. And you told the jury that you went online

1 and that you thought he had a learner's permit or --
2 because you had paid for it online; right?

3 A. Because I paid \$40 with my debit card. The
4 charged went through.

5 Q. And you told the jury this morning that you
6 went and checked on the website and confirmed that you
7 can pay for a duplicate online; right?

8 A. From my phone when I heard that the -- that
9 the witness from the DMV said that you can't pay for a
10 permit online.

11 Q. Can you get a duplicate license if you don't
12 already have a license?

13 A. No. That's why I said I never understood the
14 status. Because why would the DMV take my \$40 for a
15 duplicate permit if he didn't have one?

16 Q. Let's talk about Jared's permission to use
17 your car on January 2nd of 2011.

18 A. Yes, sir.

19 Q. When a lawsuit was filed against you, did you
20 know that your attorneys had filed an answer to the
21 lawsuit?

22 A. I -- I didn't know the process.

23 Q. Okay. Were you aware that the complaint
24 alleges that Defendant Andrea Awerbach did entrust the
25 vehicle to the control of Defendant Jared Awerbach?

1 Were you aware it had that allegation?

2 A. I'm aware -- I'm aware now. I can't tell you
3 when I became aware of that.

4 Q. Were you aware that your attorneys admitted
5 that allegation in your answer on January 23rd of 2012?

6 A. They used the word "stipulated." Again, I
7 don't know the difference in legal terms.

8 Q. Okay. Are you aware that, as part of
9 pretrial litigation procedures and lawsuits, the
10 parties are able to ask questions to each other in
11 writing?

12 A. Yes, sir.

13 Q. And ask parties to admit things in writing so
14 they don't have to prove them at trial?

15 A. Yes, sir.

16 MR. MAZZEO: Your Honor, may we have a
17 sidebar, please?

18 THE COURT: Sure.

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

21 THE COURT: All right. Folks, we're going to
22 go ahead and take a break and let you guys have lunch,
23 and we'll come back and finish this after lunch.

24 During our break, you're instructed not to
25 talk with each other or with anyone else about any

1 subject or issue connected with this trial. You are
2 not to read, watch, or listen to any report of or
3 commentary on the trial by any person connected with
4 this case or by any medium of information, including,
5 without limitation, newspapers, television, the
6 Internet, or radio.

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

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

16 See you back at 1:15.

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

19 THE COURT: All right. We're outside the
20 presence of the jury. I understand there's an issue
21 with regard to the amended complaint and the amended
22 answers to admissions.

23 I've got a lunch appointment in five minutes.
24 Can we come back at 1:00 o'clock and take care of it?

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

1 MR. MAZZEO: Yes, Judge. That's fine.

2 THE COURT: All right. Thanks, guys. Off
3 the record.

4 (Whereupon a short recess was taken.)

5 THE COURT: Back on the record. We're
6 outside the presence of the jury. You guys wanted to
7 go ahead and make your record on this issue.

8 MR. MAZZEO: Yes, Judge.

9 I had -- during Mr. Roberts's re--- or
10 cross-examination of Andrea Awerbach, I had requested a
11 sidebar because he was asking her questions about
12 responses to RFAs that were -- that were drafted and
13 filed by her counsel on June 5th of 2012. And I'll
14 start with that document because there's a sequence of
15 documents here that will help the Court understand what
16 went on with this.

17 So in that request for admission that was
18 served by the plaintiff, Ms. Awerbach's counsel at the
19 time had responded to Request No. 2. Request No. 2 is,
20 "Admit Jared Awerbach was operating your vehicle on
21 January 2nd, 2011, with your permission." Response to
22 Request No. 2 admitted. And that was filed, as I said
23 before, by prior counsel, Alex McLeod, on May -- sorry.
24 June 5th of 2012.

25 And then -- and then, we have also, in that

1 same month -- about ten days later, actually -- filed
2 on June 22nd -- or 21st, we have Ms. Awerbach's answers
3 to interrogatory questions. And -- and -- and, in
4 particular, Interrogatory No. 1 states, "Do you dispute
5 that the driver, Jared Awerbach, was a permissible
6 driver of your vehicle on January 2, 2011? If so,
7 state all facts upon which you base your answer that
8 the driver was not a permissible driver." Response to
9 Interrogatory No. 1. After the objection, the answer
10 is, "Jared did not have my permission to drive the
11 vehicle." That verification was signed by Andrea
12 Awerbach on June 15, 2015, ten days after the -- ten
13 days after the request. The response to the RFAs were
14 signed by defense counsel. So here we have a
15 contradiction here.

16 Then we move on to the -- to the plaintiff's
17 amended complaint filed on January 14th of 2013.
18 Directing the Court's attention to the third cause of
19 action, specifically paragraph 23, which states "that
20 Defendant Andrea Awerbach didn't trust the vehicle to
21 the control of Defendant Jared Awerbach."

22 Looking at the defendant's answers filed on
23 February 7th of 2013, paragraph 17, "In answering
24 paragraphs 23 through 26 of plaintiff's amended
25 complaint, defendants denied -- denied each and every

1 allegation contained therein, including paragraph 23,
2 referencing entrusting the vehicle."

3 And then we have Defendant Andrea Awerbach's
4 correction to her response to plaintiff's first set of
5 requests for admission dated October 20th, 2014. And
6 it's referencing that request for Admission No. 2.
7 "Admit Jared Awerbach was operating your vehicle on
8 January 2, 2011, with your permission." Response to
9 request, "Andrea admits she learned, after the
10 accident, that Jared Awerbach had operated her vehicle
11 on January 2, 2011, but Andrea denies she gave him
12 permission."

13 So I would ask the Court to preclude
14 plaintiff's inquiry into this. I'm asking the Court to
15 strike any response -- question and response concerning
16 this. Clearly, what we have is a contradiction by --
17 in what Andrea's prior counsel had filed and the
18 response to request for admission. And in the same
19 month, two weeks -- two weeks later, Andrea files a --
20 her answers to interrogatories with a verification
21 where she denies giving him permission.

22 So with regard to that prior response to
23 request for admission, we filed a correction to it and
24 we're doing -- we -- we -- want to orally move this
25 Court to strike that answer and accept the corrected

1 response to the request for admission that was
2 identified subsequent.

3 THE COURT: Was there ever a motion before
4 the Court allowing you to file an amended answer to the
5 admissions?

6 MR. MAZZEO: Nothing before the oral motion
7 right now.

8 THE COURT: Okay.

9 MR. ROBERTS: I was looked for a case cite.
10 I can't put my hands on it right now. I will continue
11 to try to look, but with regard to, first, the response
12 to requests for admission, just before we broke, I was
13 attempting to get into Defendant Andrea Awerbach's
14 responses to request for admissions, which were served
15 on June 5th of 2012 and signed by Alexandra B. McLeod,
16 representing that she was the attorney for Jared
17 Awerbach and Andrea Awerbach.

18 Request No. 2 is, "Admit Jared Awerbach was
19 operating your vehicle on January 2nd, 2011, with your
20 permission." Response to Request No. 2, "Admit."

21 As I pointed out at the bench, there was an
22 amended response that was later filed by counsel which
23 denied this request, but there was never a motion filed
24 for relief from the first admission, and the rules are
25 very specific. Under Rule 36, requests for admissions

1 subsection (b), "Effective admission. Any matter
2 admitted under this rule is conclusively established
3 unless the Court, on motion, permits withdrawal or
4 amendment of the admission."

5 So we've got three and a half years from
6 admitting that Jared Awerbach had permission until
7 today. Three and a half years they could have filed a
8 proper motion for relief from that admission, and they
9 didn't. Before this -- the first witness was sworn in
10 this case and when the judge -- the Court was
11 reconsidering its sanction finding permissive use as a
12 matter of law, I raised the fact that they had this
13 admission out there and that it should be conclusively
14 established, due to this admission, that Mr. Awerbach
15 had permissive use.

16 They argued the amended response. I am on
17 the record saying, "You can't amend a response. You
18 have to file a motion and seek relief." And yet here
19 we are, almost a month later, and they still hadn't
20 filed a motion knowing I was going to make this
21 argument. It's too late to do so now. We have already
22 rested our case in chief. After we rest our case in
23 chief, it's too late to seek relief from an admission
24 that's binding and conclusive as a matter of law.

25 With regard to the complaint, even if the

1 complaint is amended, under Rule 51.035,
2 subsection (2)(a), "If a declarant is testifying at a
3 trial or hearing in the subject of cross-examination,
4 statement is not hearsay if it's inconsistent with the
5 declarant's testimony."

6 So she said, "I didn't give him permission."
7 She's filed an answer to the complaint agreeing that he
8 had permission. That's a prior inconsistent statement,
9 and there is a case out there -- and I'm trying to put
10 my hands on it -- which says that an answer filed by an
11 attorney in a pleading is a prior inconsistent
12 statement which can be used to impeach a witness at
13 trial.

14 THE COURT: Okay.

15 MR. MAZZEO: That's it.

16 MR. TINDALL: Our position on this, Your
17 Honor, would be that NRCP 36(b) allows the Court, even
18 up to this point, to permit withdrawal or amendment of
19 the admission. The plaintiffs did not rely on this
20 request for admission. They're -- this is a
21 last-minute find by them that helps their case. If
22 they had in any way believed that this was going to be
23 something that controlled in this matter, that would
24 have been briefed long ago. As soon as Your Honor made
25 the ruling early on in this trial that, you know, what,

1 I -- I -- I need to modify what I said. There's
2 actually going to be a rebuttable presumption about
3 permission. That's when they would have stood up, had
4 they been relying on this, and told the Court, hey, he
5 can't do that. It's already established.

6 So there's no prejudice, is what I'm saying,
7 to allow the amendment pursuant to NRCP 36 that
8 Mr. Mazzeo has now made an oral motion on. Prejudice
9 pursuant to 36(b) is a -- is a factor that -- an
10 element that they have to show. Submitted.

11 THE COURT: I think Mr. Roberts did bring it
12 up at the time I modified the sanction.

13 MR. MAZZEO: Judge --

14 THE COURT: Go ahead.

15 MR. MAZZEO: Okay. So Mr. Roberts did not
16 address the fact that there was a -- verified answers
17 to interrogatories, which I brought up when I initially
18 addressed the Court -- he didn't even mention it --
19 which shows that Andrea -- a document that she actually
20 signed and verified by herself, not through counsel,
21 but herself personally, two weeks after Ms. McLeod had
22 signed the responses to requests for admission.
23 Ms. Awerbach said specifically, "I did not give him
24 permission to drive the vehicle."

25 With respect to complaints and answers,

1 pleadings can be amended to conform to the facts of the
2 case, and that's what was done in this case. So it's
3 improper for him to look at a prior pleading when he
4 knows very well that, in a subsequent answer to the
5 amended complaint, Ms. Awerbach specifically states and
6 denies the averment that she did entrust the vehicle to
7 the control of Jared Awerbach.

8 So I mean, I think it's improper, and I -- I
9 can certainly -- even if you deny this request, I can
10 certainly explore all this with Andrea Awerbach in
11 front of the jury to show that plaintiff -- oh -- oh.
12 One other thing, Judge.

13 Plaintiff had -- had rested. They had their
14 case in chief. They called Andrea to the stand. They
15 didn't address this with her. So if this was a germane
16 issue to their -- to their proving this permissive use,
17 well, they didn't bring it up. And now they bring it
18 up today on the defendant's -- defendant's case in
19 chief.

20 So I think it's disingenuous for Mr. Roberts
21 to stand up here and say it was an important piece of
22 evidence in contention when, in fact, it isn't. It's
23 denied. It's contradicted in other pleadings in this
24 case. So, again, I would request the Court to preclude
25 it, strike the question and answer regarding this

1 topic.

2 THE COURT: All right. I'm not going to
3 strike the question and answer. I think under Rule
4 36(b) it says, "Any matter admitted under this rule is
5 conclusively established unless the Court, on motion,
6 allows oral amendment of the admission."

7 I think that's probably something that had to
8 have been done before plaintiffs rested their case. It
9 wasn't, so I'm not going to permit the withdrawal or
10 amendment. You can't bring up the amendment to the
11 admission. Doesn't mean that you can't bring up the
12 answer to the interrogatory, which is contradictory. I
13 mean, if -- if I read this literally, I think it would
14 preclude you from bringing any evidence that
15 contradicts this, but I don't think that's really the
16 intention of the rule. I think the intention of the
17 rule is to prevent you from coming back and saying, oh,
18 well, we changed our mind at the last second on the
19 request for admission. So I'm not going to let you do
20 that.

21 But I do think it's fair game that you have
22 interrogatory answers. You have an answer to an
23 amended complaint. I think those are -- those things
24 are fair game. You're just going to end up with a
25 bunch of contradictory responses to the same issue.

1 And the jury's going to have to sort that out.

2 MR. MAZZEO: Sure. Okay.

3 MR. TINDALL: So I think -- for clarification
4 for the record, Your Honor, I think the Court's ruling
5 should be that you are permitting amendment to the
6 extent that the interrogatories can be used because we
7 have this conclusively established language. And what
8 we don't want is a record that the Court can get
9 overturned on because it didn't now rule that that is
10 conclusively established. So we'd like the ruling to
11 be you are allowing the amendment, and the amendment is
12 the interrogatories get to come in as well.

13 THE COURT: No. I'm -- I'm allowing the
14 interrogatory responses because it's -- it's a response
15 under a different rule. Under Rule 36, I think the
16 matter is deemed conclusively established as it relates
17 to the request for admission. That's why I'm not going
18 to allow the amended admission response.

19 MR. TINDALL: I understand. Thank you.

20 THE COURT: I may be wrong, but it makes
21 sense to me. May not make sense to the supreme court.
22 We'll see.

23 Anything else?

24 MR. ROBERTS: Yes, Your Honor. I wanted to
25 make a record on the bench conference where we objected

1 to evidence coming in as -- as to what Mr. Awerbach's
2 hourly wage was. I objected on the grounds of
3 relevance. There had been a prior motion in limine
4 where all this was argued before the -- the Court and
5 argued twice, the Court -- oh, March -- November 22.
6 Got my code wrong -- where the Court precluded the
7 defendants from making any argument that the verdict
8 would have to be paid out of their own pocket.

9 And at the time of argument, I'm told by
10 Mr. Smith it was specifically discussed as to punitive
11 damages. But in Nevada, punitive damages are insurable
12 unless there is intent to harm. There's been no
13 allegation that Mr. Awerbach intentionally harmed
14 Ms. Garcia, so punitive damages are insurable. So if
15 we're going to get into assets and ability to pay, his
16 asset is not just the money that he makes from his
17 employment.

18 An insurance policy is an asset. And so if
19 we are going to get into ability to pay, then we get to
20 put on evidence of the insurance policy and that we
21 made a policy limit demand and now we believe that it's
22 a limitless policy. But in order to prevent us doing
23 that, the order says, no, we're just going to preclude
24 any reference to willingness to pay. So either we're
25 going to have this wide open or we're going to request

1 to put in evidence of the insurance policy as an asset
2 available to the defendants to pay any judgment.

3 And certainly the Court has allowed that
4 evidence in. I don't think it's too late to preclude
5 them from making improper arguments that have already
6 been excluded just because the evidence came in. So I
7 would urge the Court to do that at the appropriate
8 time, but that is the basis of our objection. I want
9 to get that on the record.

10 THE COURT: Okay.

11 MR. MAZZEO: Your Honor, just quickly.
12 Seeing as though Mr. Roberts was going from discussing
13 punitive damages to a bad-faith claim, they made a
14 policy limits demand, not for punitive damages but for
15 compensatory damages, and now the policy's full-blown
16 open, and there's no limit to it.

17 I thought he was talking about punitive
18 damages, but then he went to talking about a potential
19 bad-faith claim. They're not one and the same, and
20 Mr. Roberts knows that. So I didn't follow his
21 argument. I don't think it makes sense, and it's not
22 blown wide open for a bad-faith claim since we're not
23 discussing that. That's not an issue in this
24 litigation.

25 So also, the -- with regard to Punitive

1 Damage Instruction 12 PD 22, the instruction states,
2 "With regard to the amount of punitive damages the jury
3 can award, your award cannot either punish the
4 defendant for conduct injuring others who are not
5 parties to this litigation or financially annihilate or
6 destroy the defendant in light of the defendant's
7 financial condition."

8 So -- so the defense -- financial condition
9 is very much an issue in this case, and I don't think
10 the plaintiff has any -- has any independent
11 understanding as to whether they said that punitive
12 damages can be insured -- or are insurable, but they
13 don't have any independent basis to say that the
14 punitive damages in this case are insurable and have
15 been insurable or will be if the jury finds punitive
16 damages against Jared Awerbach.

17 So I don't think they have a good-faith basis
18 for arguing now, oh, now let's talk about insurance.

19 MR. ROBERTS: They've got a policy. The
20 policy doesn't exclude punitives. I would like counsel
21 to make a representation, on the record, as to whether
22 they're saying Liberty is going to refuse to pay any
23 punitive damage award against either defendant. I
24 would like them to make that representation, because I
25 don't think they will, and they're trying to mislead

1 the Court.

2 MR. STRASSBURG: Judge, I wonder if I might
3 talk?

4 THE COURT: Go ahead.

5 MR. STRASSBURG: The questions were entirely
6 appropriate because they went to the net worth of the
7 defendant or lack thereof. That is a long-standing
8 feature of -- of the law, that punitive damages places
9 into issue the net worth of the defendant. And those
10 questions were entirely appropriate to establish the
11 degree of a punitive damages award that would be
12 necessary to achieve the -- the purposes of punitive
13 damages. And so they were proper.

14 Regarding the statements as to the -- the --
15 the bad-faith claim, opening up the policy, I think we
16 should have one trial at a time, and I adopt the
17 comments Mr. Mazzeo had as well.

18 THE COURT: All right, guys. I don't -- I
19 don't think I'm going to allow questions into whether
20 or not there's insurance to pay it. I think the rules
21 and the jury instructions are pretty clear that the
22 financial position of a defendant who is subject to
23 punitive damages is relevant, but I don't know that
24 that changes the jury instruction that says that they
25 are not to consider whether or not somebody has

1 insurance or not.

2 Because whether or not a punitive damage
3 award is paid by insurance or paid by the defendant, I
4 don't think is a relevant issue. I know that you
5 disagree with me, but I don't think that's the issue
6 that the jury looks at in determining whether or not to
7 award punitive damages or the amount of punitive
8 damages is whether or not it's insurable or not. So
9 they may -- I don't know if their insurance company is
10 going to cover it or not, and I don't know that it
11 matters.

12 MR. ROBERTS: If there were stocks, if there
13 were bonds, if there was a car that could be sold, that
14 would come into evidence. An insurance policy that
15 they paid premiums to obtain is an asset that they can
16 use to pay a judgment just like selling stocks or bonds
17 or a house or a car.

18 So if they want to get into this and claim
19 that they don't have assets when, in the real world,
20 they do have assets, they either shouldn't be able to
21 claim they're -- they're going to have to pay it and it
22 will annihilate them because that's a falsehood.
23 That's eliciting false testimony. If counsel knows it
24 won't financially annihilate Mr. and Ms. Awerbach --
25 the -- Ms. Awerbach and Jared Awerbach and they argue

1 that it will with the knowledge they have insurance
2 that will pay, that is misrepresenting the facts to the
3 jury. It's making an argument that ought to be
4 precluded by the rules of professional conduct.

5 THE COURT: Sounds like --

6 MR. ROBERTS: Insurance doesn't come in, but
7 they shouldn't make -- they shouldn't be allowed to
8 make an argument that -- that isn't true.

9 THE COURT: Sounds like an issue for the
10 state bar. If they make that statement, that's
11 misrepresentation. I'm not going to deal with it here.

12 MR. ROBERTS: Thank you, Your Honor.

13 Two questions I wanted to raise with regard
14 to scope of cross outside the presence.

15 One is the related issue -- well, first of
16 all, is the related issue to the testimony on Nar-Anon.

17 So counsel elicited -- elicited testimony that
18 Ms. Awerbach attended Nar-Anon, and she talked about
19 extensive rehab that Mr. Awerbach has been through.
20 And as the Court may recall, Nar-Anon was due to meth,
21 spice, and possibly coke. That's -- that's testimony
22 in Ms. Awerbach's deposition where she said meth,
23 spice, and possibly coke.

24 And I should be able to get into that now
25 because they've opened the door to this, to why he was

1 there. He's done all of this just for marijuana use
2 and an accident? That's what they want the jury to
3 believe, that he's been to all this effort to make
4 himself better for marijuana use, and that's not why he
5 did it. And so I should be able to get into all of the
6 other drugs that he was doing which caused him to go
7 into rehab and his mother to go to Nar-Anon to deal
8 with it.

9 Another issue is, in talking about the money,
10 they've said he doesn't have any savings. He didn't
11 have any savings when he went into rehab. Well, one,
12 that's hearsay. I don't know how his mom would know if
13 he had savings. And two, we all know that when he went
14 into rehab, he was an entrepreneur with a cash
15 business, drug dealing and selling drugs, in order to
16 make cash money. And there's no way mom could know how
17 much cash he has stuck in a shoe box somewhere. And I
18 should be able to get into the fact that she has no
19 knowledge of how much cash he squirreled away when he
20 was selling drugs.

21 MR. MAZZEO: Judge, I don't know if
22 Mr. Roberts is serious or not, but this related issue
23 of Nar-Anon, she testified today on direct examination
24 that -- that he has a long history. She described the
25 relationship of -- of -- with him starting with

1 marijuana at the age of 13 and then described the
2 relationship with him with his use of marijuana for
3 five years from 13 or 14 to the age of 19. So five or
4 six years.

5 So he didn't go into rehab or Nar-Anon as a
6 result of this one accident. It was a result of years
7 and years of marijuana use and -- and -- and also, she
8 didn't -- she didn't say he -- she didn't describe all
9 the drugs that he was using as to why he went on, but
10 one of them was marijuana.

11 So that's one of the -- and I was asking her
12 about the programs that he had participated in during
13 this time period. This certainly doesn't open the
14 door. The -- what I was -- what we're referring to is
15 the relationship, the struggles that -- that
16 Ms. Awerbach had with her son during this time period.

17 And she was very clear that it was -- the
18 gist was marijuana, but both Ms. Awerbach and
19 Mr. Roberts, in his questioning, used the words
20 "drugs." Ms. Awerbach was -- corrected it and referred
21 to it as marijuana use. So we have a ruling that drugs
22 don't come in. Notwithstanding that, Mr. Roberts used
23 that in his questioning of -- of Ms. Awerbach. So his
24 treatment at Nar-Anon, yes. Did it include marijuana?
25 Yes. Exclusive to that, no.

1 Was his treatment at Las Vegas Rescue Center
2 exclusively related to marijuana? No. But we didn't
3 go into those factors as to what it -- what it
4 included. So -- but that was -- it was certainly
5 related to marijuana and -- and -- and -- and related
6 to -- to some extent, to this car accident. So that
7 doesn't open up the door for Mr. Roberts then to go
8 into meth, spice, and coke and these other drugs in
9 light of the outstanding order. The door was not
10 opened to -- to permit that.

11 Secondly, the money. The issue of money, no
12 savings, he didn't have any savings in rehab. Well,
13 she would be -- that's her son; she lives with him. So
14 we can ask Ms. Awerbach outside the presence of the
15 jury what her -- what her basis is for saying that he
16 has no savings. But I don't think, unless plaintiff
17 has a good-faith basis to say that he squirreled away
18 so much money from selling drugs and that he made so
19 much money per week, if they have some sort of matrix
20 that they can show to us with an offer of proof not
21 just to -- to impugn the integrity of Jared and Andrea
22 on the stand in front of the jury without a sufficient
23 basis, well, then, let's see it. Let's see it now
24 before the jury comes in.

25 If not, then that's -- that's totally --

1 that's unfairly prejudicial, and there's no grounds for
2 them to -- to bring up the suspicion that he has money
3 squirreled away from selling drugs previously.

4 THE COURT: Do you want to talk on this one
5 too?

6 MR. STRASSBURG: Thank you, Judge.

7 The argued relevance is for punitive damages.
8 The claim against Jared for punitive damages is based
9 on 42.010 for unlawful driving that's unlawful for
10 exceeding the legal limit for marijuana metabolite in
11 his system. His -- it's not predicated upon exceeding
12 the allowable limit for any other drug or illicit
13 substance.

14 The conduct that the plaintiffs seek to have
15 you allow the jury to punish is this kind of unlawful
16 driving. It's -- it's not being an addict. It's not
17 being irresponsible. It's not for using other kind of
18 drugs. The prejudicial value of this evidence
19 dramatically outweighs any probative impact on to what
20 extent should he be punished for exceeding the legal
21 limit for marijuana metabolite while he was driving.

22 The punitive damages punish conduct; they
23 don't punish status or an individual. And so it's
24 unfair to the plaintiffs to claim that this door is
25 opened because the only door there is leads to

1 marijuana metabolite, and all of this is just
2 irrelevant to that and prejudicial.

3 MR. ROBERTS: Let me start with the money
4 from drug sales. This is now, "We don't have any
5 evidence he's still selling drugs." I was looking at
6 the police report. I saw he had 8.8 grams, which I've
7 been informed by people who probably don't know, is
8 \$100 a gram. That's \$880 worth of marijuana plus a --
9 cash. And that's just on one day.

10 But they're right. I don't have any evidence
11 he's still dealing. So I'll withdraw my request to go
12 into drug use for current assets -- drug dealing. I'm
13 sorry. Drug dealing.

14 With regard to the -- the punitive conduct, I
15 would agree, as far as Mr. Awerbach, it's marijuana
16 use.

17 But now let's go over to our claims against
18 Defendant Andrea Awerbach and our negligent entrustment
19 claim that she negligently entrusted her vehicle to an
20 incompetent user. Part of the proof that we're relying
21 on is, of course, that he was an incompetent user and
22 she should not have entrusted her car to him because he
23 was a marijuana addict who smoked marijuana every day
24 and had no business driving a car.

25 But let's look at the other things that

1 Ms. Awerbach knew when she either gave him permission
2 to use the car or when she left her keys out or gave
3 her key -- him the car keys to go get something out of
4 her car.

5 In her deposition, she stated that:

6 "QUESTION: Prior to the accident, you
7 knew Jared was using meth and weed, and you
8 even suspected cocaine.

9 "ANSWER: Meth, weed. I suspected
10 cocaine, but I didn't know for sure.

11 "QUESTION: And prior to 1/2/11, Jared
12 tested positive for both meth and marijuana;
13 true?"

14 And that was acknowledged as true.

15 So even -- even if this wasn't relevant to
16 the things that they've opened the door on with rehab,
17 her knowledge that he was not only a marijuana addict
18 but he also used meth and maybe coke go to her
19 reasonableness in allowing him to use the car and
20 whether she entrusted the car to an incompetent driver.

21 And if the jury finds that she did
22 negligently entrust the car to Jared, it goes further
23 to the amount of punitives. Because it is more
24 reprehensible to give your car to someone doing meth
25 and you know is doing meth in addition to marijuana.

1 So we still believe that it ought to come in
2 and it's fair game, Your Honor, and certainly now that
3 they've opened the door through this line of
4 questioning.

5 THE COURT: I think there was a -- it came up
6 before, I think, with regard to a statement that was
7 made during opening statements by one of the defense
8 attorneys that this was -- his time at the rescue
9 mission was sufficient to punish him.

10 And I think, when Jared was on the stand, I
11 allowed the question, basically, "This wasn't all you
12 were at the rescue mission for is for marijuana?" And
13 he said, "Correct." And we -- we moved on.

14 I think a similar question is probably
15 appropriate here. She's talking about all this rehab
16 and -- and treatment at the rescue mission. I think
17 there's -- it's probably a fair question if you ask
18 "All this rehab and treatment wasn't just for marijuana
19 addiction or usage; it was for other drugs as well?"
20 She'll say yes, and we can move on without having to
21 discuss it any further.

22 I think that -- I think that is -- it fixes
23 any, I think, misunderstanding that the jury may have
24 based on the testimony, which has seemed to indicate
25 that all this treatment and rehab and everything was

1 just for marijuana use. And I think that everyone
2 would agree that wasn't the case. So it fixes that
3 misunderstanding.

4 But I think it also preserves -- you know, I
5 think if we get into the names of a whole bunch of
6 other drugs, I think that there's more prejudice than
7 probative value. So ...

8 MR. MAZZEO: And also, Judge, I mean, I would
9 just ask the Court to limit it -- to limit that
10 question to "He wasn't only going to rehab for
11 marijuana use; right? It was -- there were other
12 reasons why he went there?" to leave it more generic.

13 There's no reason to put in drugs. I know
14 that -- I know that, in Andrea's answers on the stand
15 on direct and cross and in Mr. Roberts' questions, that
16 the word "drugs" was used repeatedly. So that's -- I
17 think that's -- that's already been put into the record
18 without identifying it.

19 So I don't know if we even have to explore
20 this area any further. But, if we are, I would just
21 ask the Court to limit it to whether her understanding
22 is that he -- "he didn't just go into rehab programs
23 for marijuana use; is that correct?" And leave it at
24 that.

25 MR. STRASSBURG: And, Judge, I would

1 appreciate the opportunity to speak as well. I would
2 join with Mr. Mazzeo in requesting that. Because I
3 think that if -- if you do what Mr. Roberts is
4 requesting, then it seems to me that should open the
5 door to the brain injury that he sustained. Because
6 one of the reasons that drove him to the point in his
7 life where he went to the rescue mission of his own
8 volition and made his own personal commitment was his
9 self-perception that he was not right. And the brain
10 injury that -- that he sustained in the fight that
11 fractured his skull and left him blind in one eye was a
12 factor in that as well.

13 THE COURT: You guys want to reargue every
14 motion in limine? No.

15 MR. MAZZEO: Oh, but -- Judge, I'm sorry. I
16 do -- there was one other thing I wanted to add.

17 Mr. Roberts was intimating that, because she
18 knew that he had used meth and cocaine prior to the
19 accident, that she somehow entrusted him with a vehicle
20 knowing that he would be using meth and cocaine and
21 other drugs when, in fact, there is no evidence in this
22 record and any deposition transcript that she knew
23 that -- that Jared had ever previously used the car
24 with or without permission after consuming any sort
25 of -- of drugs or while he was under the influence or

1 impaired from any substance whatsoever.

2 So I think that suggestion by Mr. Roberts is
3 inappropriate unless he has a good-faith basis and he
4 can give an offer of proof that she knew that he had --
5 Jared had previously driven this vehicle with or
6 without permission while impaired or after consuming --

7 THE COURT: I didn't say I was going to allow
8 that.

9 MR. MAZZEO: Okay. No, I know. I just
10 wanted the record to --

11 THE COURT: He gets to ask if -- if Jared was
12 in the rehab for things -- for drugs other than
13 marijuana.

14 MR. MAZZEO: Fine.

15 THE COURT: I'm going to allow that.

16 MR. MAZZEO: Okay.

17 THE COURT: Because you guys are the ones
18 that brought up the whole rehab and the -- you can't
19 make it seem like he was just there for marijuana when
20 he wasn't. So ...

21 MR. MAZZEO: Fair enough.

22 THE COURT: What else?

23 MR. TINDALL: I'd just like to ask permission
24 to go to the restroom one last time before we start.

25 THE COURT: All right. Let's take a quick

1 break. Off the record.

2 (Whereupon a short recess was taken.)

3 THE COURT: Let's bring them back.

4 THE MARSHAL: All rise for the presence of
5 the jury.

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

8 THE COURT: Go ahead and be seated. Welcome
9 back, folks. We're back on the record, Case
10 No. A637772.

11 Do the parties stipulate to the presence the
12 jury?

13 MR. ROBERTS: Yes, Your Honor.

14 MR. MAZZEO: Yes, Your Honor.

15 THE COURT: Sorry for the delay, folks. I
16 guess I should have given you a long lunch. It wasn't
17 our intention.

18 Ma'am, just be reminded you're still under
19 oath.

20 Mr. Roberts, go ahead.

21 MR. ROBERTS: Thank you.

22 BY MR. ROBERTS:

23 Q. Ms. Awerbach, to bring you back, right before
24 the lunch break, I was just getting ready to ask you
25 about responses that you served to requests for

1 admissions filed by Emilia Garcia.

2 MR. ROBERTS: And, Audra, could you put up
3 page 1 of Defendant Andrea Awerbach's responses to
4 request for admissions, signed on June 5th, 2012.

5 There we go. Thank you, Your Honor.

6 BY MR. ROBERTS:

7 Q. Okay. And so I'm going to show you right now
8 a response from Andrea Awerbach's responses to requests
9 for admissions. Okay, ma'am?

10 A. Yes.

11 MR. ROBERTS: Audra, could we go to the next
12 page. See Request No. 1 and Request No. 2. Okay.

13 BY MR. ROBERTS:

14 Q. Request No. 1, "Admit that, on January 2nd,
15 2011, a traffic accident occurred between an automobile
16 owned by you and an automobile driven by Plaintiff
17 Emilia Garcia in Clark County, Nevada." And your
18 response was, "Admit."

19 And you did admit that in -- statement in
20 this document; correct?

21 A. I'm confused as to how to answer because they
22 are legal -- legal things that have happened and things
23 that I've said. This form was not signed by me.

24 Q. Okay. Have you seen this form before today?

25 A. Yes.

1 Q. Okay. And you know that your attorney
2 admitted this statement on your behalf; right?

3 A. Yes.

4 Q. Okay. Request No. 2 --

5 MR. MAZZEO: Objection. Your Honor, can we
6 specify which attorney? I did not admit that on her
7 behalf.

8 THE COURT: Say it was a different attorney.
9 That's fine.

10 MR. ROBERTS: We'll agree it was a different
11 attorney who signed the document, Your Honor.

12 BY MR. ROBERTS:

13 Q. And Request No. 2, "Admit Jared Awerbach was
14 operating your vehicle on January 2nd, 2011, with your
15 permission."

16 And, again, your attorney admitted this on
17 your behalf; correct?

18 A. Yes.

19 Q. You -- you told the jury about rehab --

20 A. Yes, sir.

21 Q. -- that Jared Awerbach has been through since
22 this collision occurred.

23 A. Yes.

24 Q. And I just wanted to clarify for the jury.

25 That rehab was not just for marijuana use;

1 correct?

2 A. No.

3 Q. It was for other drugs as well?

4 A. Yes.

5 Q. And you testified about your involvement in
6 Nar-Anon as the family member of an addict; right?

7 A. Yes.

8 Q. And your involvement in Nar-Anon was not just
9 about marijuana use, was it?

10 A. No.

11 Q. You testified on direct examination that,
12 when the police officer called you from the scene of
13 the crash, you talked to him on the phone, you told the
14 jury that you told the police officer that Jared did
15 not have permission; right?

16 A. Yes.

17 Q. Okay. You've seen the police report, haven't
18 you, ma'am?

19 A. Not in a long time.

20 Q. Okay. You know that the police officer
21 didn't write that down anywhere on his police report;
22 right?

23 A. Yes.

24 Q. And you also testified in the past that you
25 told the police officer to arrest Jared when you were

1 on the phone with him -- to arrest him for stealing
2 your car.

3 Do you remember that?

4 A. I didn't -- you can't tell a police officer
5 anything. I asked him, could we do anything about
6 that? Can you arrest him for that?

7 Q. Okay. And are you aware that the police
8 officer did not put that in his report?

9 A. I am aware.

10 Q. Are you aware that the police officer, in his
11 deposition, stated that he would have put those things
12 in his report if you had told him those things?

13 A. I was not aware of that.

14 Q. Now, the first time you had your deposition
15 taken in this case was September 12th of 2013.

16 Do you recall that?

17 A. I don't recall exactly the day. I remember a
18 deposition.

19 Q. But you remember that you -- you had your
20 deposition taken several times and that there was a
21 first time?

22 A. Yes. Yes, sir.

23 Q. And you were asked in that first deposition
24 if you had ever let Jared drive your car before
25 January 2nd of 2011, and you answered --

1 MR. MAZZEO: Objection, Your Honor. Improper
2 impeachment for a prior inconsistent statement. No
3 foundation.

4 MR. ROBERTS: She's a party.

5 THE COURT: Come up for a minute.

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

8 THE COURT: Objection's overruled.

9 Go ahead, Mr. Roberts.

10 MR. ROBERTS: Thank you, Your Honor.

11 BY MR. ROBERTS:

12 Q. So I'm going back to your first deposition on
13 September 12th of 2013.

14 Do you recall being asked, "Before
15 January 2nd, 2011, had you ever let Jared drive your
16 car?" Do you remember what your answer was the first
17 time?

18 A. I do not.

19 MR. ROBERTS: Permission to publish the
20 deposition of Andrea Awerbach taken on Tuesday,
21 September 12th, 2013.

22 THE COURT: They're not published yet?

23 MR. ROBERTS: I don't --

24 THE COURT: That's fine. Let's publish it.

25 MR. ROBERTS: Maybe they should have been if

1 that's the Court's point.

2 Permission to approach, Your Honor.

3 THE COURT: That's fine.

4 MR. ROBERTS: Thank you.

5 BY MR. ROBERTS:

6 Q. Here you are, ma'am. If I could ask you to
7 turn to page 17 and look at line 18.

8 A. (Witness complies.) Yes, sir.

9 Q. Okay. So when you were asked on
10 September 12th, 2013, under oath, had you ever let
11 Jared drive your car, your answer was no; right?

12 A. Yes.

13 Q. Okay. And then your deposition was continued
14 and taken again on October 24th of 2014, a year later.

15 Do you remember that?

16 A. Yes.

17 Q. Now, that time you admitted that you had
18 taken Jared to drive because you believed he had a
19 permit; right?

20 A. Yes.

21 Q. And you admitted that Jared had driven your
22 car prior to January 2nd, 2011; right?

23 A. Yes.

24 Q. And you had admitted that you were in the
25 vehicle on one or more occasions when Jared drove your

1 car prior to January 2nd, 2011; right?

2 A. Yes.

3 Q. And, at another time, you testified under
4 oath that Jared had never asked your permission to use
5 the car.

6 Do you remember saying that?

7 A. I don't remember saying that.

8 Q. Okay. Could I have you turn to page 18 of
9 the deposition in front of you?

10 A. Yes.

11 Q. Okay.

12 "QUESTION: Prior to January 2nd, 2011,
13 had he ever asked for permission to use your
14 car?

15 "ANSWER: No, I don't think so."

16 So, under oath, you said that "No, I don't
17 think he ever asked my permission to use the car."

18 A. Right. I said, "No, I don't think so."

19 Q. Okay. But we've already talked about the
20 conversation you had with the representative about a
21 week after the accident.

22 And you admitted that he'd asked to use your
23 car in the past; right?

24 A. I'm trying to think back to the -- to the
25 statement.

1 Q. Well, let me save you the trouble of trying
2 to think back to the statement.

3 In fact, that answer was not correct and --
4 and Jared had asked permission to use your car before
5 January 2nd --

6 A. Yes.

7 Q. -- 2011; right?

8 A. Yes.

9 MR. ROBERTS: Court's indulgence. Just
10 skipping a few here.

11 BY MR. ROBERTS:

12 Q. One of the things that you just said on
13 direct this morning was that your -- one of your
14 concerns was to make your -- your grandchild safe.

15 A. Yes.

16 Q. There was a car seat in your car; right?

17 A. Yes.

18 Q. And there was a car seat in your car before
19 January 2nd, 2011, when you gave Jared permission to
20 drive it; right?

21 I'm just talking about on the day of the
22 accident. You -- you've denied that, but you've
23 admitted that you let him use your car before
24 January 2nd, 2011; right? You'd let him drive your car
25 before January 2nd --

1 A. With a licensed driver, yes.

2 Q. Okay. And it had a car seat in it; right?

3 A. Yes.

4 Q. And you knew that your grandchild was going
5 to be in that car seat; right?

6 A. Yes, I also drove my grandchild.

7 Q. And Jared also drove your grandchild?

8 A. I came to find out later, yes.

9 Q. And you've admitted in the past that, prior
10 to January 2nd, 2011, you had seen Jared impaired or
11 impacted while he was around his children; right?

12 A. Well, he only had one child, and so I'm
13 not -- I don't recall when I said that, but I would
14 agree to that.

15 Q. Okay. So you had seen that; that was
16 something you were aware of as of January 2nd, 2011?

17 A. I -- I need to clarify something.

18 What I was aware of in the moment and signs
19 and symptoms of use that I learned later. So I may not
20 have known it in that second and thought "Oh" going
21 back.

22 Q. So it's only looking back on it that you
23 recall now that you saw signs and symptoms of him being
24 impaired or impacted?

25 A. No. I'm saying there's both. There were

1 times that he was clearly, to me, impaired; and there
2 are times that I misread it and realized, "Okay.
3 That's a sign of use."

4 Q. At the time when you didn't have this full
5 understanding, that was after you were aware he had
6 been doing drugs since the eighth grade and had failed
7 all of his drug tests or most of his drug tests; right?

8 A. I'm not sure what you're asking me.

9 Q. I'm saying that, when you saw him around his
10 kids and he was impaired and impacted, you knew he was
11 a drug addict then; right? It wasn't something you've
12 realized later with time?

13 A. No. Knowing someone is a drug addict and
14 knowing whether -- there are times that Jared was
15 working and in school. And I made the mistake of
16 thinking, if you're working or in school, you're clean.
17 I came to learn later, as a lot of parents do, they're
18 not the same thing.

19 You get -- you learn better symptoms.
20 They're -- you're not high in every moment. And,
21 again, at that time, Jared had one child, who was --
22 had only been born a little over a month before.

23 Q. You testified when I called you a few days
24 ago -- I'm getting my dates --

25 A. Friday? Friday?

1 Q. -- mixed up at this point -- that you had
2 given Jared the keys to your car on January 2nd, 2011,
3 to get something out of it; right?

4 A. Yes.

5 Q. Okay. What -- what was he getting out of the
6 car?

7 A. I don't remember --

8 Q. Was --

9 A. -- whether he was asking for a jacket or
10 something for the baby or a CD. I don't remember the
11 specifics.

12 Q. Okay. Did he keep his stuff in your car?

13 A. Some things, sure.

14 Q. Yeah.

15 A. It was a family car.

16 Q. And where was your car parked when you gave
17 him the keys and said, "Okay. You can go get something
18 out of the car"?

19 A. In the parking lot right by the apartment.

20 Q. Okay. And that's where you usually parked
21 it?

22 A. Yes.

23 Q. Did you have a garage?

24 A. Yes. I didn't always use the garage.

25 Q. Okay. But you could have put the car in the

1 garage and locked the garage; right?

2 A. The garage door didn't -- you could open the
3 garage without an opener. Garage door didn't lock.

4 Q. Could you have fixed the lock on the garage?
5 How much do you think that would have cost?

6 A. I lived in an apartment. You don't fix
7 anything unless maintenance fixes it.

8 Q. Did you ever ask maintenance to fix the lock
9 to the garage?

10 A. Multiple times.

11 Q. Why did you park up front?

12 A. The --

13 Q. Why did you park your car up front?

14 You previously said that was more convenient
15 for you; right?

16 A. Easier access, more convenient. I could see
17 it. I could walk out the door and see it. I can't see
18 it if it's in the garage. And if I -- I don't know if
19 I ever testified to this. I'm more comfortable parking
20 in a parking lot than in a garage.

21 Q. Do you think that driving without a driver's
22 license needlessly dangers the community?

23 MR. MAZZEO: Judge, calls for a legal
24 conclusion. Personal opinion. Irrelevant.
25 Foundation.

1 THE COURT: I don't know if it calls for a
2 legal conclusion. It does call for a personal opinion
3 that -- I don't know that she's identified as that kind
4 of a witness. So let's -- I'll sustain it for now.

5 MR. ROBERTS: It goes to punitives, Your
6 Honor.

7 BY MR. ROBERTS:

8 Q. Ms. Awerbach, do you remember testifying that
9 you had never thought prior to your deposition about
10 whether a driver's license endangered the community or
11 caused safety problems in the community?

12 A. I don't remember.

13 MR. MAZZEO: Same objection, Judge. Move to
14 strike.

15 THE COURT: Overruled.

16 BY MR. ROBERTS:

17 Q. Do you recall saying that you thought Jared
18 driving showed bad judgment but you didn't know whether
19 it was a safety problem?

20 A. I don't recall being asked that in that way.

21 MR. MAZZEO: Judge, can we approach, please?

22 THE COURT: Sure.

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

25 THE COURT: Objection's overruled.

1 BY MR. ROBERTS:

2 Q. Ms. Awerbach, as you sit here today, do you
3 take any responsibility for Emilia's injuries?

4 A. Yes.

5 Q. Explain.

6 A. I take responsibility for -- for the
7 environment that -- that created those choices. I take
8 responsibility --

9 I also work a 12-step program. It's all
10 about accountability and responsibility. There are
11 things that I wish I had known then. There are things
12 I wish I were stronger about. There are things over
13 which I have no control that I wish I'd had control.
14 There are things I would suggest and say to Ms. Garcia
15 now that I'm not able to do.

16 But because I can't do it doesn't mean I
17 don't feel responsible for it.

18 Q. So the only thing you feel responsible for is
19 the environment in which Jared was raised?

20 A. That's not what I just said. There's a lot
21 that I -- that's not the only thing I feel responsible
22 for.

23 Emilia Garcia and I are -- are very similar
24 in many ways. She's facing a loss of her mother. I
25 just went through that. She has children in a

1 difficult situation. She doesn't have a level of
2 confidence about her body. She's in pain. There are a
3 thousand things that I would love to be able to tell
4 her. I'm a person with a lot of information. I'm not
5 able to share that with her. Do I feel responsible?
6 Do I wish I could find a way to do that? Yes. Do I
7 wish that I had made stronger decisions, that I had
8 moved out from living with Jared sooner? Yes. But at
9 the time, those things didn't seem possible.

10 Q. Well, let's talk about the day of the
11 collision.

12 A. Okay.

13 Q. Okay? As you sit here today, you really
14 don't know whether Jared ever gave you your keys back
15 or not, right, of your own personal knowledge? You
16 gave him the keys to go get something out of your car.
17 Of your own personal knowledge, without relying on
18 reading depositions or something Jared may have told
19 you, do you know, of your own personal knowledge,
20 whether he ever gave them back?

21 A. I don't know how to answer that because I do
22 know those things. I mean, if I have that information,
23 how do I unknow it? So based on everything that I
24 know, I know he gave me the keys. Do I remember the
25 exact second when he gave them to me five years ago?

1 No.

2 Q. And that same week you didn't remember. You
3 thought -- you didn't know whether he had given them
4 back to you; right? The very same week, when it was
5 fresh in your mind.

6 A. I don't know that -- again, that you could
7 say it was fresh in my mind. I was piecing it
8 together. I was trying to figure out what to do. I
9 was under incredible stress. And I'm not going to say,
10 yes, at 7:00 o'clock, he handed me the keys and I hid
11 them. I can't promise you that I remember that.

12 If he didn't hand me the keys back and I
13 didn't take them in my hand, I would be responsible for
14 that. Again, it doesn't mean that I deliberately
15 didn't do it, it doesn't mean, again, there were a
16 thousand pressures. I was going back to school after a
17 vacation; I had work to do. So being aware of
18 something, wishing you could do it differently, yeah, I
19 have a lot of incidents like that. I think all parents
20 do.

21 Q. So it's fair to say that you -- that Jared
22 didn't steal the keys off the lanyard while it was
23 around your neck; right?

24 A. I didn't wear a lanyard. Right.

25 Q. Okay. So there were only two ways that Jared

1 could have gotten the keys to go get in the car and
2 crash into Emilia Garcia. One way is, he kept the keys
3 after you gave them to him after you put them in his
4 hand; right?

5 A. Yes.

6 Q. Or two, you left the keys out somewhere where
7 he could pick them up himself and take your car; right?

8 A. No. That's not the only two ways he could
9 have gotten the keys. He could have found where I hid
10 them. He could have gotten Tikeria to distract me. He
11 could have done any number of things. He's better at
12 that than I am. I could have dropped them. I could
13 have thought I hid them and I didn't. I could have
14 thought they were in a bag and that they weren't. So
15 there's more than two ways.

16 And -- and Mr. Roberts, if I may, if I drop
17 my keys or I put my keys down for a moment, okay --
18 when I -- other times when I've moved, I've left my
19 purse over there. That doesn't mean everybody's
20 entitled to it. If you leave your phone, it doesn't
21 mean I'm entitled to go and use it. And -- and an
22 18-year-old with entitlement issues is going to think
23 that. He doesn't have access to the car now without
24 asking.

25 Q. Let's assume, for a minute, that the car keys

1 are a gun, and Jared had used a gun before to shoot
2 people. Would you have left the gun laying on the
3 mantel?

4 MR. MAZZEO: Objection, Your Honor. The
5 analogy is inappropriate. Incomplete hypothetical.

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

8 THE WITNESS: I don't know how to make that
9 comparison. I would not -- a gun is nowhere near a
10 ring of keys that has a key to an apartment, a key to
11 school, a key to a mailbox. And at that time I was
12 thinking that I was keeping the keys safe.

13 BY MR. ROBERTS:

14 Q. Ma'am, I'm not asking you whether keys are
15 the same as a gun. I'm asking you if you would have
16 left the gun out on the counter.

17 A. I don't -- I don't -- I can't engage in a
18 hypothetical, but no, I would not have left a gun out
19 on a counter.

20 Q. Thank you, ma'am.

21 MR. ROBERTS: That's all I have, Your Honor.

22 THE COURT: Mr. Mazzeo.

23 MR. MAZZEO: Yes, Judge.

24 /////

25 /////

1 REDIRECT EXAMINATION

2 BY MR. MAZZEO:

3 Q. Andrea, hi. Let's -- well, let's start with
4 the request for admissions. All right?

5 A. Yes.

6 Q. You remember Mr. Roberts asked you about
7 that?

8 A. Yes.

9 Q. Okay. We're going to put these on the
10 overhead.

11 MR. MAZZEO: Judge, if we can transfer this
12 to the ELMO, please. Okay.

13 BY MR. MAZZEO:

14 Q. So let's start with this request for
15 admission. This is the document that Mr. Roberts
16 showed you a few minutes ago?

17 A. Yes.

18 Q. Okay. And we'll turn to the request on
19 page 2. "Admit Jared was operating your vehicle on
20 January 2, 2011, with your permission."

21 Do you see that?

22 A. Yes.

23 Q. You see the response to Request No. 2,
24 "Admit"?

25 A. Yes.

1 Q. Did you draft this document?
2 A. No.
3 Q. Did you review this document before it was
4 served?
5 A. No.
6 Q. How do you know that?
7 A. Because there's a future document. There's
8 a -- an additional document with changes.
9 Q. Okay. Well, let me direct your attention to
10 the third page. And this is the -- the last page.
11 This -- you see the signature on the line on this page?
12 A. Yes.
13 Q. Is your name underneath the signature line?
14 A. No.
15 Q. Is that your signature?
16 A. No.
17 Q. And this is dated when?
18 A. June 5th, 2012.
19 Q. Okay. So do you recall sitting down with
20 your counsel -- not myself but other counsel -- to go
21 over what was called interrogatories?
22 A. Yes.
23 Q. Okay. And -- and so let's look at that. Do
24 you recognize this document?
25 A. Yes.

1 Q. And it's Defendant Andrea Awerbach's
2 responses to interrogatories.

3 Do you see that?

4 A. Yes.

5 Q. So let's go to the -- let's look at the date
6 on this document. So the request for admission is
7 January 5th, 2012; right?

8 A. June 5.

9 Q. I'm sorry. June 5th, 2012; correct?

10 A. Yes.

11 Q. And this document, page 7, is June 21st,
12 2012?

13 A. Yes.

14 Q. And your signature is not on that line, is
15 there -- is it?

16 A. No.

17 Q. However, if we turn to the next page, we --
18 we have a verification. And do you recognize this
19 verification?

20 A. Yes.

21 Q. Have you seen this before?

22 A. Yes.

23 Q. Is this your signature?

24 A. Yes.

25 Q. Okay. And that's dated when?

1 A. June 15, 2012.

2 Q. All right. So let's turn back to -- so this
3 was two weeks -- this is -- this document is dated
4 about two weeks after -- ten days after the request for
5 admission was signed by your counsel; right?

6 A. Right.

7 Q. Okay. So let's go to Interrogatory No. 1.
8 Let's read it. And do you recall going over this? And
9 I'm not going to go through all the interrogatories,
10 just this one interrogatory. And it's identified as
11 No. 1.

12 You see it?

13 A. Yes.

14 Q. And the question is, "Do you dispute that the
15 driver, Jared Awerbach, was a permissible driver of
16 your vehicle on January 2, 2011? If so, state all
17 facts upon which you base your answer that the driver
18 was not a permissible driver."

19 Do you see that?

20 A. Yes.

21 Q. And then over -- after an objection, the
22 answer is, "Jared did not have my permission to drive
23 the vehicle."

24 A. Correct.

25 Q. Right? Okay.

1 And do you agree that this -- is this answer
2 the same or different from the answer provided by your
3 counsel in the request for admission?

4 A. It's different.

5 Q. Okay. Do you know why?

6 A. Well, she wrote "admit," and I answered that
7 I did not give him permission.

8 Q. Okay. Which one is correct, the document
9 provided by your counsel or this document?

10 A. The document that I signed.

11 Q. Okay.

12 MR. ROBERTS: Objection, Your Honor.

13 THE COURT: What's the objection?

14 MR. ROBERTS: Inconsistent with the legal
15 effect of the first document. She's just disclaimed.
16 The first document.

17 THE COURT: Yeah. I have to allow her to do
18 that. Overruled.

19 BY MR. MAZZEO:

20 Q. Okay. Andrea, I'm showing you what is an
21 amended complaint filed. Do you see in the upper
22 right-hand corner January 14th of 2013?

23 A. Yes.

24 Q. Do you see that? Okay.

25 A. Yes.

1 Q. Okay. And this is filed by Emilia Garcia?

2 A. Yes.

3 Q. Okay. We're going to turn specifically to
4 paragraph 23 under the negligent entrustment claim.

5 And do you see that averment?

6 A. Yes.

7 Q. That Defendant Andrea Awerbach did entrust
8 the vehicle to the control of Defendant Jared Awerbach.

9 Do you see that?

10 A. Yes.

11 Q. Now, you're familiar with that answers -- an
12 answer to this amended complaint was filed on your
13 behalf?

14 A. Yes.

15 Q. And that would be this document, defendant's
16 answer to amended complaint; correct?

17 A. Yes.

18 Q. And as -- the date that it was filed
19 indicates 2/7/2013. Any reason to dispute that?

20 A. No.

21 Q. And if we go to paragraph 17, which refers to
22 the paragraph 23 from the complaint, what does it
23 state?

24 A. You want me to read it?

25 Q. Yes.

1 A. "In answering paragraphs 23 through 26 of
2 plaintiff's amended complaint, defendants deny each and
3 every allegation contained therein."

4 Q. Which -- which would include the paragraph 23
5 referring to entrusting the vehicle to control of
6 Defendant Awerbach; is that correct?

7 A. Yes, that's correct.

8 Q. Okay. And have you ever -- were you ever --
9 ever aware of Jared Awerbach, prior to the accident in
10 question, ever using your car with or without
11 permission and being impaired while operating it?

12 A. No.

13 Q. Okay. At the time of the accident in 2008,
14 did you -- was Jared under the influence when he used
15 your vehicle without permission and caused an accident?

16 A. No.

17 MR. ROBERTS: Objection. Foundation.

18 THE COURT: I think I have to sustain that
19 one.

20 BY MR. MAZZEO:

21 Q. Okay. In that -- at the time of that prior
22 accident in 2008, you had testified that you were at
23 your -- at school at the time; correct?

24 A. Yes.

25 Q. And how long were you at the school for prior

1 to Jared taking the vehicle without permission?

2 A. It was a few hours.

3 Q. Okay. And during that time, did you have the
4 ability to observe Jared while you were at the school
5 for a few hours?

6 A. Yes.

7 Q. And -- and while you were at the school for a
8 few hours, did you observe Jared, at any time prior to
9 Jared taking the car without permission, to have been
10 under the influence of intoxicating beverage or
11 marijuana?

12 A. No.

13 Q. Did you understand Mr. Roberts's hypothetical
14 with -- or the analogy between a gun and keys?

15 A. No.

16 Q. Well, does the gun have the same usefulness
17 as -- as keys do to a car?

18 A. No.

19 MR. MAZZEO: Your Honor, one moment, please.
20 No further questions. Thank you.

21 THE COURT: Mr. Tindall, Mr. Strassburg,
22 anything?

23 MR. TINDALL: One moment, Your Honor.

24 MR. STRASSBURG: No.

25 THE COURT: Mr. Roberts?

1 MR. ROBERTS: Thank you, Your Honor. See if
2 I can get this to turn on.

3 RECROSS-EXAMINATION

4 BY MR. ROBERTS:

5 Q. Okay. Your counsel showed you an answer to a
6 complaint where you denied permissive use. I'm going
7 to show you answer -- excuse me. First, the original
8 complaint, just so the jury can put it in context.

9 And you see paragraph 23, "The Defendant
10 Andrea Awerbach did entrust the vehicle to the control
11 of Defendant Jared Awerbach."

12 Do you see that?

13 A. Yes, I do.

14 Q. 23.

15 A. Yes.

16 Q. And this is Alexandra McLeod, same attorney
17 who signed both of those documents your client showed
18 you; right?

19 A. Yes.

20 Q. And this is defendant's answer to complaint.
21 And you see in paragraph 2, "In answering paragraphs 2,
22 3, 7, 8, 22, and 23, defendants admit the allegations
23 contained herein." Right?

24 A. I see that.

25 Q. Okay. So is it fair to say, Ms. Awerbach,

1 that you or your attorneys have been asked many times
2 about whether you gave Jared permission to drive your
3 car both before and after the collision?

4 A. Yes.

5 Q. And is it fair to say that there have been
6 lots of inconsistent answers that have been given to
7 those questions?

8 A. I don't think that's fair to say.

9 MR. ROBERTS: No further questions, Your
10 Honor.

11 THE COURT: Mr. Mazzeo.

12 MR. MAZZEO: Thank you, Judge.

13 FURTHER REDIRECT EXAMINATION

14 BY MR. MAZZEO:

15 Q. The -- that complaint that you saw
16 Mr. Roberts put on the ELMO.

17 A. Yes.

18 Q. It didn't say Defendant Andrea Awerbach's
19 answer to the complaint; it said "defendants," plural;
20 correct?

21 A. Correct.

22 Q. Referring to both yourself and to Jared
23 Awerbach?

24 A. Yes.

25 Q. By the way, prior to the filing of that

1 complaint in 2012, did you confer with your counsel
2 about the averments with regard to permissive use?

3 A. I'm not sure I know what averments are.

4 Q. Oh. Did -- did you speak with your counsel
5 about the -- the issue regarding permissive use prior
6 to your counsel filing that answer to the complaint?

7 A. Yes.

8 Q. And did you say -- tell your counsel that you
9 had given Jared permission?

10 A. No. I have never said that I gave Jared
11 permission.

12 MR. MAZZEO: Nothing further.

13 THE COURT: Any more from defense table? No?
14 Mr. Roberts?

15 FURTHER RECROSS-EXAMINATION

16 BY MR. ROBERTS:

17 Q. So defendants' answer, just to clarify so the
18 Court -- so the jury understands who defendants are,
19 this is the answer: "Comes now defendants Jared
20 Awerbach and Andrea Awerbach." Right?

21 A. Yes.

22 Q. So initially, when you filed an answer, you
23 filed it together; right?

24 A. I believe at that time we had the same
25 counsel.

1 Q. Okay. And at that time you and Jared were
2 both in agreement in this official document that he had
3 permission to drive your car?

4 MR. MAZZEO: Objection, Your Honor. Document
5 speaks for itself. That's not what Ms. Awerbach
6 testified to.

7 THE COURT: She can answer that. Overruled.

8 THE WITNESS: I don't know how to answer that
9 because agreement, legally, from a paper presented by
10 an attorney and what I agreed to and what Jared and I
11 agreed to, you use the word "agree." I'm a layperson.
12 I don't agree that Jared had permission to use the car.
13 BY MR. ROBERTS:

14 Q. And the first time that a denial of
15 permission shows up in any documents that were filed in
16 this lawsuit was over a year later; right?

17 A. I think that -- that -- that's the time frame
18 in documents.

19 MR. MAZZEO: That's a misstatement, Your
20 Honor. That's actually in 2012, several months later.

21 THE COURT: Sounds like a speaking objection.

22 MR. MAZZEO: Sorry, Judge. Can we -- can we
23 approach?

24 MR. ROBERTS: And, Your Honor, I was
25 referring to the amended answer, and I wasn't thinking

1 about the interrogatory. So I withdraw the question.
2 MR. MAZZEO: Okay.
3 MR. ROBERTS: Okay. Thank you.
4 THE COURT: Anything else from anybody?
5 MR. MAZZEO: No, Your Honor.
6 THE COURT: Any questions from the jurors? I
7 don't see any hands.
8 Thank you, ma'am. You may step down.
9 Any more witnesses, Mr. Mazzeo?
10 MR. MAZZEO: One second, Your Honor.
11 Your Honor -- Your Honor, Defendant Andrea
12 Awerbach rests. No further witnesses.
13 THE COURT: Anything from Jared Awerbach?
14 MR. STRASSBURG: Defendant Jared Awerbach
15 rests.
16 THE COURT: Any additional rebuttal witnesses
17 from the plaintiffs?
18 MR. ROBERTS: No further rebuttal witnesses,
19 Your Honor. We rest our rebuttal case.
20 THE COURT: All right. You folks have been
21 looking forward to this day for five weeks.
22 So here's what we are going to do, folks.
23 I'm going to let you go early this afternoon. I'm
24 going to have you come back tomorrow morning, let's say
25 10:00 o'clock again. I anticipate that you will -- I'm

1 going to instruct you on the law first thing and then
2 you'll hear closing arguments from the attorneys. And
3 that will be the end, and then you'll get a chance to
4 deliberate.

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

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

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

22 I'm going to emphasize it this time because a
23 lot of times what jurors think is that, now you've
24 heard all the evidence, you can talk to each other as
25 you're on your way out to your car or while you're

1 sitting here waiting for each other to get back
2 together again. You still can't do that. Okay? You
3 can't talk to each other until everything is done and
4 you are in the deliberation room together. All right?
5 I'm just emphasizing that to you because sometimes
6 people get confused once both sides have rested.
7 Nothing has changed. I will tell you when you can talk
8 about the case. Okay?

9 Thank you, folks. We'll see you tomorrow
10 morning at 10:00 o'clock.

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

13 THE COURT: All right. We're now outside the
14 presence of the jury. Anything we need to put on the
15 record now, Counsel?

16 MR. ROBERTS: I have got a few motions to
17 make. I don't know if -- and then we need to settle
18 jury instructions, but we can ...

19 THE COURT: Go ahead. Make your motions.

20 MR. ROBERTS: Thank you, Your Honor.

21 THE COURT: You have a few?

22 MR. ROBERTS: Well, a few. Sorry, Your
23 Honor. So many I have to get out my notes to remember
24 them all.

25 The first one is, we would request a directed

1 verdict on the issue of permissive use on whether or
2 not Mr. Awerbach had permission, express or implied, to
3 use the vehicle. Under the Court's modified order on
4 the sanctions, there is a presumption of permissive use
5 shifting the burden of proof to the defendants to
6 rebut.

7 I would submit that there was no evidence
8 from which a reasonable juror could find that they,
9 indeed, met their burden of proof. There's been
10 undisputed evidence now that she allowed Mr. Awerbach
11 to drive her car on past occasions. There's been
12 undisputed evidence that she put the keys to the car in
13 his hand on the day of the incident. And while I
14 understand that it's -- it was a close question and
15 might not otherwise have been an appropriate motion, I
16 think what pushes us over the top is the admission.
17 The -- under the rules, the admission conclusively
18 establishes permissive use as a matter of law; and,
19 therefore, we're entitled to directed verdict on that
20 motion.

21 While Counsel stated that they were going to
22 introduce into evidence an amended admission and proof
23 that this was withdrawn and later corrected, I don't
24 recall seeing that come into evidence. If I missed it
25 because I was doing something else, I apologize. I

1 don't think -- I think they rested their case without
2 putting the amended admission into evidence; therefore,
3 the only thing in evidence is an admission that he had
4 permissive use, and that's conclusive.

5 THE COURT: But didn't we just have an
6 argument on that on our last break, and I said I wasn't
7 going to allow the amendment based on the -- based on
8 the rule, but I was going to allow them to use the
9 interrogatory answer?

10 MR. MAZZEO: You did.

11 MR. ROBERTS: I guess I'm confused. Because
12 if it's conclusively established and they're not being
13 allowed to amend, how could there be an issue of fact
14 for the jury?

15 THE COURT: That goes back to Mr. Tindall's
16 argument. And -- and I said -- I read it as being
17 conclusively presumed as it related to Rule 36. That's
18 why I didn't allow the amended admission response, but
19 I was going to allow additional discovery responses
20 because I knew they were inconsistent.

21 MR. ROBERTS: Okay. Well, I still want to
22 make my motion.

23 THE COURT: That's fine.

24 MR. ROBERTS: You can deny it.

25 THE COURT: Okay. Denied.

1 MR. ROBERTS: The other is -- motion is for a
2 directed verdict on causation. The proposed verdict
3 form by the defendants ask whether or not the collision
4 proximately caused Ms. Garcia's injuries and damages.

5 And we understand that it's in dispute how
6 much of Ms. Garcia's damages were caused by the
7 collision; however, going all the way back to opening
8 statements where Mr. Mazzeo chalked up on the board
9 that \$30,000 in injury was caused by the accident --
10 that's right around between 20, 30,000 bucks, maybe as
11 high as 50. But I know he put some numbers up there.
12 So he admitted in opening that some damage was caused
13 by the collision.

14 Then we look at the witnesses that they put
15 up. And both Dr. Poindexter and Dr. Klein admitted
16 that there was strain/sprain caused by the collision.
17 So the undisputed medical evidence is that the
18 collision caused injury to Ms. Garcia. The only
19 question is how much -- the only question is how much
20 damage.

21 And the -- the jury should not be asked
22 whether it caused injury when all the medical experts
23 and evidence have all agreed and admitted it caused
24 injuries, just how much.

25 So the only question for the jury is, what

1 are the damages? Liability of Mr. Awerbach has already
2 been established as a matter of law for the collision.
3 If all the doctors agree the collision caused some
4 injury, then the only question is how much damages.
5 And we agree that's still a question, but causation is
6 no longer in dispute.

7 MR. MAZZEO: That's not true, Judge. And I'm
8 not sure if Mr. Roberts is misunderstanding what's
9 referred to when we refer to causation.

10 Number 1, in their own jury instructions that
11 they propose to use in this case, they -- based on
12 Nevada Jury Instructions 3.06, they state: "The
13 plaintiff has the burden of proof by a preponderance of
14 the evidence all of the facts necessary to prove that
15 she" -- they put "suffered or sustained damages." And
16 that is, in fact, the burden.

17 So, when we talk about causation, we're
18 talking about what injuries were caused by the subject
19 accident.

20 Now, we've heard a lot of evidence from the
21 witnesses in this case, from the plaintiff and on the
22 defense side. And so does -- we know that Ms. Garcia's
23 claiming certain injuries we're claiming that the
24 accident did not cause. So now we're talking about
25 causation, saying the accident did not cause any trauma

1 to a preexisting spondylolytic spondylolisthesis.

2 So this question is -- is still in contention
3 in this case. It hasn't been settled or resolved
4 simply because we are agreeing that Ms. Garcia
5 sustained some injuries. We are disputing causation
6 with respect to plaintiff's contention that she
7 sustained injuries to her disks and to the facet joints
8 and to the preexisting slipped vertebrae. So causation
9 is still something that's in question.

10 I think Mr. Roberts is trying to streamline
11 or he's trying to use this word "causation" in a very
12 general sense but not in an appropriate sense when it
13 comes to the jury instructions in this case and what
14 causation refers to, which is what injuries were caused
15 by this particular accident. And it is very much in
16 dispute.

17 THE COURT: It sounds to me like you guys
18 actually agree; you're just using the term differently.

19 Because I think what Mr. Roberts is looking
20 for is a ruling that everyone agrees there was some
21 injury as a result of the accident. The question is
22 just whether or not it's a sprain/strain or if it's
23 a -- an injury to the -- the preexisting pars defect;
24 right?

25 So, I mean, I don't know if we can deal with

1 that with an instruction.

2 MR. MAZZEO: I don't think -- I don't think
3 so because we're not using the word "cause"; we're
4 using "causation." And causation is something the jury
5 has to find. That has to be something that they
6 consider in terms of are the -- is the sprain/strain a
7 cause of this accident or is a -- the slipped
8 vertebrae -- is that -- did that -- was that caused as
9 a result of this accident?

10 We're not going to stipulate or agree that it
11 just comes down to what injuries they have to find.
12 It's still causation.

13 THE COURT: But did anybody disagree that, at
14 least the sprain/strain, at least that was caused by
15 the accident?

16 MR. MAZZEO: Well, that's still for the jury
17 to -- I mean, the jury still has to make a
18 determination with regard to any and all injuries in
19 this case.

20 THE COURT: I think that's what he's looking
21 for, though, is -- yeah, they have to make a decision
22 as to whether or not the damages that the plaintiffs
23 are claiming were caused by the accident. But I think
24 what he's saying is everybody has agreed, even the
25 defense doctors and experts, that at least some injury

1 was caused by the accident.

2 MR. TINDALL: May I be heard on this?

3 THE COURT: Sure.

4 MR. TINDALL: Here's what I submit. Your
5 Honor cannot grant the motion at all because the
6 standard is, is there any -- in the light most
7 favorable to the nonmoving party, is there any facts
8 that would allow a reasonable juror not to come to the
9 conclusion they're looking for? And there is.

10 The jury is free to disbelieve everything
11 that the plaintiff said. They're free to disbelieve
12 everything that any expert said. Our own experts --
13 well -- and I can't remember. I think it was Klein who
14 agreed that X amount of the chiro -- this isn't exactly
15 what he said. But the chiro and one of Dr. Lemper's
16 injections were reasonable.

17 But that assumes she really was injured.
18 There's no testimony from Klein that says she was
19 injured and this is what's reasonable.

20 So the Court cannot grant the motion. But
21 here's what I would recommend. We can handle this one
22 of two ways, either in an instruction or a verdict
23 form --

24 And I digress a little here. There are three
25 competing verdict forms at this point that have been

1 passed around. Every single one of them, necessarily
2 so, is going to be unwieldy. I would recommend that we
3 put on the verdict form whatever dollar amount the
4 parties agree to that -- that Klein put as the bare
5 minimum, assuming she got injured.

6 For example, if the cost of the chiro is
7 15,000 and then Lemper's injection is whatever, we can
8 stick that on the verdict form. And the Court denies
9 the motion, but they get what they want in the sense
10 that the jury's now being told, "Here's the baseline."
11 But the Court cannot grant the motion because the
12 standard hasn't been met.

13 Do you have any questions of what I've just
14 inarticulately said?

15 MR. ROBERTS: No. I think I understand what
16 you're saying.

17 MR. TINDALL: Okay.

18 MR. ROBERTS: If they have a stipulation -- I
19 think stipulations are put in with the instructions and
20 not on the verdict form.

21 But what we're proposing -- and we may not
22 have a disagreement as a matter of law. In our
23 proposed verdict, we ask the jury to find what amount
24 of damages were caused by the automobile collision of
25 January 2nd, 2011. Because liability is established,

1 one. The causation is established. So when they
2 determine what damages were caused by the collision,
3 then they can still make their arguments. And I'm not
4 asking for a judgment that anything in particular was
5 caused by the collision. I'm simply asking for a
6 determination that she was injured as a result of the
7 collision.

8 And I can read you what the doctors say. And
9 I don't think the jury can stipulate -- can speculate
10 that she wasn't injured when the medical evidence all
11 says that she was.

12 Dr. Klein said on 3/1/16, page 75, "Based
13 upon my evaluation that day, interview looking at these
14 plethora of medical records, and some but not all the
15 diagnostic studies up to that point in time, my opinion
16 was that she had sustained acute cervical, thoracic,
17 and lumbar myofascial sprain/strain soft tissue
18 events."

19 And then later, page 86, he says, "Soft
20 tissue sprain/strains as a result of this accident."

21 Dr. Poindexter on 226, page 131:

22 "QUESTION: "Thank you, Doctor. And you
23 testified that, in your opinion, Ms. Garcia
24 suffered some sort of sprain/strain in this
25 automobile collision; right?

1 "ANSWER: Possibly, yes. Minimal in
2 nature? I said yes.

3 "QUESTION: Yes. But more likely than
4 not, you agree with the other doctors that she
5 was injured; correct?

6 "ANSWER: With soft tissue-type injuries,
7 yes."

8 So where you have an agreement by all of the
9 doctors that she was injured in the collision and where
10 their biomechanical has been excluded, you wanted to
11 argue the forces were not sufficient to injure her, the
12 jury can't be allowed to speculate. And they shouldn't
13 be able to argue she wasn't injured at all.

14 MR. MAZZEO: Your Honor, I think what
15 Mr. Roberts is proposing is to take over the role of
16 the trier of fact. And we're not the triers of fact.

17 And I think it would be inappropriate and
18 improper and an appellate issue for us to kind of join
19 our heads and huddle and come up with an injury that we
20 can all agree upon that she -- is a minimum that she
21 sustained. That's inappropriate. We're not the triers
22 of fact, and that's for the jurors to determine in the
23 deliberation room.

24 I don't know if we should be picking apart
25 evidence and testimony from witnesses. The jurors have

1 to find -- and we have jury instructions for it. They
2 have to make a -- the determination whether she was
3 injured. They heard all the evidence. So it's -- it's
4 for them make that decision.

5 I'm not going to stipulate to anything, and
6 it shouldn't -- we shouldn't identify any identifiable
7 injuries that we're in agreement on. I'm not in
8 agreement on anything. That's for the jury to decide,
9 not for us.

10 THE COURT: Okay. Motion is granted to the
11 extent that I -- I don't think there's any evidence
12 contradicting the fact that the plaintiff was injured
13 as a result of the accident. But that's as far as I'm
14 going to go.

15 MR. ROBERTS: That's all I wanted. That's
16 it. Thank you, Judge.

17 THE COURT: I don't think I'm going to make
18 any specific ruling about any specific injuries that
19 everybody's agreed to or any bills that everybody's --
20 anybody's agreed to. I just don't think that there's
21 any evidence that anybody suggested that the plaintiff
22 wasn't injured as a result of the accident.

23 MR. ROBERTS: My other two motions deal with
24 precluding at this point, based on the evidence, two
25 arguments that -- from -- that I think they might make

1 during closing. We don't have to do that now. We can
2 do it after we settle instructions, or I can go
3 forward.

4 THE COURT: Go for it.

5 MR. ROBERTS: Okay.

6 THE COURT: Can you do them quick?

7 MR. ROBERTS: Yes, Your Honor, very quick.

8 The proposed verdict form from one or more of
9 the defendants -- and I can't recall which one it was
10 now or if it was both.

11 THE COURT: Does it make sense to argue out
12 the instructions and verdict forms before we make this
13 argument or not?

14 MR. ROBERTS: No. Because I think, once
15 we've decided this argument, then the verdict forms may
16 fall into place.

17 THE COURT: Okay.

18 MR. ROBERTS: They ask for how much -- the
19 jury to find how much punitive damages to award against
20 Jared Awerbach and for Emilia Garcia. And the -- the
21 point is is that, under the statutes, punitive damages
22 are assessed against the defendant for, by way of
23 example, punishment. And they are not to compensate
24 the plaintiff.

25 So any argument or statements in the verdict

1 form that the punitive damages are for Emilia Garcia,
2 that that's too much money to give her, would be
3 improper because they would be asking the jury to
4 nullify the whole point of punitive damages under
5 Nevada law. The damages are not for her. They are
6 assessed against the defendant to punish and to deter
7 conduct.

8 THE COURT: And who's going to get the money?

9 MR. ROBERTS: Emilia Garcia. But asking the
10 jury to take that into account, determining the amount,
11 would be improper.

12 Nevada law doesn't say that how much she
13 deserves is a factor to consider in the amount of
14 punitive damages.

15 And -- and there's a -- there was a case back
16 in Virginia. In Virginia, they've changed the punitive
17 statute so the money goes to the state coffers. And in
18 those cases, the defense lawyers came in and
19 successfully precluded any mention that it was going to
20 the State because then that might inflate the award.

21 But it's -- it's the same thing. It's --
22 it's an irrelevant fact, and the only reason they're
23 going to argue it is to try to get the jury to nullify
24 Nevada law and to either reduce or inflate the award
25 for improper purposes.

1 THE COURT: Okay.

2 MR. MAZZEO: Can we -- can we actually look
3 at the proposed verdict -- special verdicts in this
4 case so that -- and then decide and discuss it at that
5 point?

6 MR. ROBERTS: I'd be happy to defer it if you
7 want to, Judge.

8 THE COURT: Let's defer it until we talk
9 about it. That's fine.

10 MR. ROBERTS: The other one is to preclude
11 any argument by counsel that damages should be reduced
12 because the plaintiff's doctors performed inadvisable
13 or unnecessary medical procedures.

14 You've heard them put on lots of evidence
15 that Dr. Gross should not have performed the spine
16 surgery, that some of her pain is because of the spine
17 surgery and not due to the accident. That would be an
18 improper argument under Nevada law.

19 There are specific cases on point saying
20 that, where the actions of the defendant caused the
21 plaintiff to seek medical treatment -- and the Court
22 has now found as a matter of law that they did -- that
23 even malpractice by the physician is attributed to the
24 original act. It does not break the chain of
25 causation.

1 So even if Dr. Gross and Dr. Kidwell and
2 Dr. Lemper had all committed malpractice and performed
3 needless surgeries or -- or surgeries were botched,
4 that would still be within the chain of causation. So
5 they can't make an improper argument that the jury
6 should reduce damages because surgery is unnecessary or
7 unsuccessful.

8 The only exception -- and you look at the
9 restatement on this, and the restatement deals with
10 whether an intervening act breaks the chain of
11 causation. And it has to be something that's
12 unforeseeable and extraordinarily negligent.

13 And we heard Dr. Klein acknowledge that even
14 Dr. Gross, who he criticized significantly -- it wasn't
15 malpractice, and he wasn't -- not only was he not
16 extraordinarily negligent, he wasn't negligent at all.

17 So to the extent that these procedures were
18 ill-advised, to the extent these procedures didn't go
19 well, that was all foreseeable. It was all
20 necessitated from the original visit to the doctor by
21 the injuries that the Court has found, as a matter of
22 law, occurred. And so the chain of causation goes
23 forward unbroken.

24 If there is a remedy, it's for them to sue
25 the doctors for malpractice. But, of course, their

1 experts have all now admitted on the record that no one
2 committed malpractice.

3 So we would ask the Court to preclude them
4 from making arguments contrary to Nevada law and that
5 damages should be reduced because any of the medical
6 treatment which Ms. Garcia's providers advised her to
7 get and which she did get was inadvisable or
8 ineffective.

9 THE COURT: Okay.

10 MR. TINDALL: Counsel confuses the argument.
11 There has been no evidence of malpractice. So when
12 he's talking about the jury instruction that he would
13 like to have, he's not entitled to that jury
14 instruction.

15 They have the burden to prove treatment was
16 reasonable and necessary and causally related. Our
17 experts have not testified that anyone committed
18 malpractice. What they've testified to is these
19 procedures were unnecessary because they weren't
20 causally related to the accident.

21 So this motion has to be denied. We are
22 entitled to break it out however the evidence will
23 allow. We can take Dr. Klein's testimony, and we can
24 blackboard "Here's what Klein said was reasonable.
25 Here's everything by cost, by line item that Klein says

1 was unreasonable and not necessary."

2 I don't know what more I can add to that. I
3 mean, it's submitted.

4 MR. MAZZEO: Yeah, and I -- I'm not sure -- I
5 think I understood Mr. Roberts was talking about
6 medical malpractice. Then he did refer to the --
7 referring to the surgery as being unnecessary. That's
8 a different argument.

9 We can certainly argue -- well, they have the
10 burden, actually, to prove that all the treatment was
11 reasonable and necessary. We can certainly argue,
12 based on the evidence in the case, that she didn't need
13 the surgery, she didn't need the injections, that it
14 was not reasonable, that it was unnecessary.

15 But, yes, I agree with Mr. Roberts; we're not
16 arguing that there's malpractice and that the doctors
17 committed malpractice.

18 Does that make sense?

19 THE COURT: Yep.

20 MR. MAZZEO: Okay.

21 THE COURT: And I think you're all -- I
22 think, again, this is another one of those
23 semantic-type arguments because I think Mr. Roberts
24 would acknowledge that plaintiffs have the burden to
25 prove reasonable and necessary, causally related.

1 If their argument is that the treatment was
2 unreasonable or unnecessary and they rely on their
3 expert's testimony for that, that's fine. That's part
4 of their defense.

5 If you want to -- I don't know if you have a
6 specific jury instruction proposed as it relates to the
7 malpractice or not. If you do, I mean, that's one that
8 we've used in the past.

9 MR. ROBERTS: I don't, but I -- I can -- can
10 get one real quick. I was just moving actually to
11 preclude the argument. But if they're going to be
12 allowed to make the argument, then I think I do need an
13 instruction, and I'll look for --

14 THE COURT: It doesn't sound like they're
15 going to make an argument that somebody committed
16 malpractice. But you may interpret their arguments as
17 far as reasonableness and necessity as being contrary
18 to what you think they should be able to argue as it
19 relates to reasonableness and necessity.

20 So there is a jury instruction, like I said,
21 that we used in the past as it relates to the fact that
22 a tortfeasors's on the hook even for malpractice that
23 occurs and is not foreseeable. So ...

24 MR. ROBERTS: Has --

25 THE COURT: If you want to propose an

1 instruction like that and if you can put something
2 together quickly, I'm happy to look at it.

3 MR. ROBERTS: In the past, I recall there is
4 not a Nevada proposed instruction on this, a pattern.

5 THE COURT: There's not.

6 MR. ROBERTS: I've used BAJI and CACI.

7 Did the Court have a preference, or did the
8 Court have its own instruction?

9 THE COURT: I know I've used one in the past,
10 but I don't know what we've used.

11 MR. ROBERTS: California has one that I'll
12 modify.

13 MS. ESTANISLAO: I believe the applicable one
14 is the one that's on concurring causes.

15 THE COURT: We'll talk about it in a minute.

16 Anything else we need to deal with right now
17 as far as motions?

18 MR. TINDALL: I would like to build the
19 record a little further on our prior directed verdict
20 for the issue of lost past household services.

21 There was no testimony whatsoever about any
22 dollar amount that -- let me back up.

23 In making his ruling, the Court indicated
24 that Emily, the daughter, had testified that she did
25 certain things around the house. But there was no

1 testimony about the value of any of that. She never
2 said that she was supposed to be paid but wasn't. And
3 she never broke out any time period on that in order --
4 an hourly amount of time she spent.

5 And, based on that, they cannot establish
6 that there was any past loss incurred. Submitted.

7 THE COURT: I think that's something that you
8 could argue, but I think it's similar to pain and
9 suffering that -- I don't know that there needs to
10 necessarily be a dollar figure. Now, I may be wrong
11 about that. I don't know what the cases say about
12 what's required for loss of household services, if
13 specific dollar amounts are required to be submitted by
14 an expert. But ...

15 MR. TINDALL: None that I can find. No
16 cases.

17 THE COURT: So I think I'm going to have to
18 leave it the way it is, and it's kind of like pain and
19 suffering. But I think you can obviously argue that
20 there was no dollar figure placed on it.

21 Anything else on the record, guys? Nope.

22 All right, then. Off the record.

23 (Whereupon a recess recess was taken.)

24 THE COURT: We're back on the record, Case
25 No. A637772. We're outside the presence of the jury.

1 We've been discussing jury instructions off
2 the record. I'm going to now go through what I have as
3 the set that the Court's going to give. I will go
4 through them and number them as I go through them to
5 make sure that, Audra, you have the same numbers on
6 them.

7 No. 1 will be "Ladies and gentlemen of the
8 jury."

9 No. 2 will be "The purpose of the trial is to
10 ascertain the truth."

11 No. 3 will be "If in these instructions any
12 rule, direction, or idea."

13 No. 4 will be "The masculine form as used in
14 these instructions."

15 No. 5 will be "The evidence which you are to
16 consider in this case."

17 No. 6 will be "You must decide all questions
18 of fact in the case from the evidence received."

19 No. 7 will be "Although you are to consider
20 only the evidence in the case in reaching a verdict."

21 No. 8 will be "You are not to discuss or even
22 consider insurance."

23 No. 9 will be "If during this trial I have
24 said or done anything."

25 No. 10 will be "There are two kinds of

1 evidence, direct and circumstantial."

2 No. 11 will be "In determining whether any
3 proposition has been proved."

4 No. 12 will be "Certain testimony has been
5 read into evidence from a deposition."

6 No. 13 will be "During the course of the
7 trial, you have heard reference made to the word
8 'interrogatory.'"

9 No. 14 will be "In this case, as permitted by
10 law, Plaintiff Emilia Garcia served on a defendant the
11 requests for admissions."

12 No. 15 will be "The credibility or
13 believability of a witness."

14 No. 16 will be "Discrepancies in a witness's
15 testimony."

16 No. 17 will be "An attorney has a right to
17 interview a witness."

18 No. 18 will be "A witness who has special
19 knowledge, skill, et cetera."

20 No. 19 will be "A question has been asked in
21 which an expert witness was told to assume."

22 No. 20 will be "Whenever in these
23 instructions I state that the burden or the burden of
24 proof."

25 21 will be "The preponderance or weight of

1 evidence."

2 22 will be "As to Defendant Jared Awerbach,
3 the plaintiff has a burden of proving."

4 23 will be "When I use the expression
5 'proximate cause,' I mean any cause."

6 24 will be "There may be more than one
7 proximate cause of an injury."

8 25 will be "If you find that the defendant is
9 liable for the original injury to the plaintiff."

10 26 will be "The Court has taken judicial
11 notice that sunset."

12 27 will be "Certain charts and summaries have
13 been received into evidence."

14 28 will be "There was in force at the time of
15 the occurrence in question a law which read as
16 follows."

17 29 will be "It's been established as a matter
18 of law that Jared Awerbach was impaired."

19 30 will be "In order to establish claim of
20 negligent entrustment."

21 31 will be "The law provides for rebuttable
22 presumption."

23 32 will be "An owner of a motor vehicle is
24 liable for any damage proximately resulting."

25 33 will be "In determining the amount of

1 losses if any suffered by plaintiff."

2 34 will be "Where plaintiff's injury or
3 disability is clear and readily observable."

4 35 will be "A person who has a condition or
5 disability."

6 36 will be "No definite standard or method of
7 calculation."

8 37 will be "Whether any of these elements of
9 damage have been proven by the evidence."

10 38 will be "If you find that plaintiff's
11 entitled to compensatory damages, you may consider
12 punitives."

13 39 will be "Clear and convincing evidence is
14 that measure or degree of proof."

15 40 will be "If you find that plaintiff's
16 entitled to compensatory damages for actual harm."

17 41 will be "There are no fixed standards for
18 determining the amount of punitive damages."

19 42 will be "The Court has given you
20 instructions embodying various rules of law."

21 43 is "Your duty as jurors to consult with
22 one another."

23 MR. TINDALL: I'm sorry, Your Honor. Can you
24 stop for a second? Okay. What was 42 again?

25 THE COURT: 42, "The Court has given you

1 instructions embodying various rules of law."

2 MR. TINDALL: Okay.

3 THE COURT: 43 is "Your duty as jurors to
4 consult with one another.

5 44, "If during your deliberation you should
6 desire to be further informed."

7 45, "When you retire to consider your
8 verdict."

9 46, "During opening statements." This is
10 about the preexisting records.

11 47, "Now you will listen to arguments of
12 counsel."

13 MR. TINDALL: I'm missing one. What was 46?

14 THE COURT: That's the curative instruction
15 based on the --

16 MR. TINDALL: Oh. We don't have a copy of
17 that yet, do we?

18 MS. ESTANISLAO: Yes, we do. No, wait. No,
19 I don't.

20 MR. TINDALL: Yeah. I don't think we got a
21 copy of that one yet.

22 MS. ESTANISLAO: We don't.

23 MR. TINDALL: That was just read out loud.

24 MR. ROBERTS: It was e-mailed to you and you
25 said, "I've got additional instructions." I hit reply

1 all and attached it.

2 MR. TINDALL: Oh. Okay.

3 MR. ROBERTS: And -- but I think the judge
4 did modify it.

5 THE COURT: I did. So it now says, "During
6 opening statements, counsel for Defendant Andrea
7 Awerbach stated that just because there's no evidence
8 of any preexisting records doesn't mean that none
9 exist. You should disregard his statement. There is
10 no evidence that Plaintiff Emilia Garcia ever sought
11 medical treatment related to back pain prior to the
12 accident. It would be improper for you to speculate
13 that such medical records exist."

14 MR. SMITH: Mr. Mott is handing a copy right
15 now. We just printed that out.

16 MR. ROBERTS: This is the as-modified
17 version --

18 THE COURT: So if you would make copies of
19 that and have them ready for us in the morning, then I
20 will let you guys make your record first thing in the
21 morning after my calendar.

22 MR. ROBERTS: And I hate to do this to you,
23 Your Honor, but we also need to settle the verdict
24 form. We have three competing verdict forms, so we'll
25 probably need to do that in the morning also.

1 THE COURT: You guys tried to work something
2 out here?

3 MR. TINDALL: Well, we're very close. I
4 mean, they're all unwieldy, and --

5 MS. ESTANISLAO: Hey, mine is clearer. Of
6 course, I don't have a copy.

7 THE COURT: You guys see if you can agree to
8 something overnight. If not, we'll come in and argue
9 it, and we will get a verdict form the first thing in
10 the morning too.

11 MR. TINDALL: Okay.

12 THE COURT: I don't want to spend much time
13 because the jury is coming in at 10:00, and I would
14 like to get closings done and give them at least some
15 time to deliberate tomorrow.

16 MR. ROBERTS: We're fine having you tell us
17 what you want to use so -- but I will -- I will
18 delegate that --

19 THE COURT: I will look over them tonight.

20 MR. ROBERTS: -- to Mr. Smith.

21 THE COURT: All right. Anything else we need
22 to do tonight, guys?

23 MR. TINDALL: No, Your Honor.

24 MR. ROBERTS: Thank you, Your Honor.

25 THE COURT: All right. Off the record.

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(Thereupon, the proceedings
concluded at 5:38 p.m.)

CERTIFICATE OF REPORTER

STATE OF NEVADA)
)
COUNTY OF CLARK)

ss:

I, Kristy L. Clark, a duly commissioned

Notary Public, Clark County, State of Nevada, do hereby
certify: That I reported the proceedings commencing on
Monday, March 7, 2016, at 10:05 o'clock a.m.

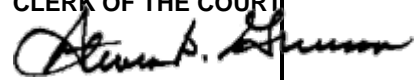
That I thereafter transcribed my said shorthand notes into typewriting and that the typewritten transcript is a complete, true and accurate transcription of my said shorthand notes.

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
7th day of March, 2016.

Krusty Clark

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;)

ANDREA AWERBACH, individually;)

13 DOES I-X, and ROE CORPORATIONS)

I-X, inclusive,)

14 Defendants.)

15
16
17 REPORTER'S TRANSCRIPT

18 OF

19 PROCEEDINGS

20 BEFORE THE HONORABLE JERRY A. WIESE, II

21 DEPARTMENT XXX

22 DATED TUESDAY, MARCH 8, 2016

23
24
25 REPORTED BY: LEAH ARMENDARIZ, RPR, CCR #921

AA_005978

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23
24 * * * * *

1 **LAS VEGAS, NEVADA, Tuesday, March 8, 2016;**

2 **10:05 A.M.**

3
4 P R O C E E D I N G S

5 * * * * *

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

8 THE COURT: We're back on the record, Case
9 Number A637772. We're outside the presence of the jury.

10 We discussed jury instructions last night. I
11 quickly skimmed back over the jury instructions that
12 were prepared for this morning. It looks like they've
13 incorporated all the changes and modifications that we
14 discussed last night. This is your opportunity to make
15 your record on the jury instructions that we discussed.

16 Does the plaintiff object to any of the
17 instructions that the Court has indicated that it's
18 going to give?

19 MR. ROBERTS: Yes, Your Honor.

20 THE COURT: Go ahead.

21 MR. ROBERTS: The plaintiff objects to the
22 form of Instruction Number 41, which is the standard for
23 determining the amount of punitive damage award. In
24 particular, the plaintiff objects to the language in the
25 second paragraph, lines 13 and 14, where the jury is

1 informed that their award cannot financially annihilate
2 or destroy the defendant in light of the defendant's
3 financial condition.

4 We object to that because it's contrary to the
5 prior motions in limine on this case, in particular
6 Motion in Limine Number 22, which precluded defense
7 counsel from suggesting that defendants will be required
8 to pay jury award out of pocket.

9 And that was granted. And, of course, there
10 is no evidence in the record from which the jury could
11 determine that Mr. Awerbach would have to pay the award
12 out of pocket. So the only way they can make that
13 argument is for counsel to make representations to the
14 jury of facts that are not in the record. What is in
15 the record is through Mr. Awerbach's mother the hourly
16 wage he makes and the fact that he has a full-time job.

17 So there is evidence in the record from which
18 they could extrapolate his financial condition. What is
19 not in the record, and that they're going to ask the
20 jury to speculate about, is whether he would have to pay
21 any punitive damage award.

22 And, in particular, we believe that he -- he
23 has two counsel here that are obviously being paid for
24 by somebody. They could not -- Mr. Awerbach could not
25 afford these people at his hourly wage.

1 We have evidence in the record that over
2 \$126,000 in experts was expended in defending this case.
3 Obviously, that couldn't have been paid out in his
4 hourly wage. There is no Nevada policy against coverage
5 for punitive damages.

6 So what they're going to ask the jury to do is
7 to speculate that any award over -- I don't know,
8 what? -- \$10,000 would financially annihilate him
9 because he has no savings. That's absurd in light of
10 the fact that we all know that he's not going to pay the
11 award.

12 And so they're asking the jury to speculate
13 about financial annihilation that is a fiction because
14 he has an insurance policy which is an asset. And
15 because of the Court's rulings, we're being precluded
16 from putting evidence of that asset into the record so
17 that the jury could consider that asset when they
18 determine whether or not he'd be financially annihilated
19 by any punitive damage award they want to make.

20 So if we can't put in the evidence of the
21 asset, they should be precluded from making the argument
22 on financial annihilation. We believe that was the
23 basis of the Judge Allf's ruling.

24 We understand the Court, off the record,
25 indicated that, if that was her intent, you disagreed

1 and would not force it that way. I understand. We're
2 just preserving this issue for the record.

3 Thank you, Your Honor.

4 THE COURT: I think if that was her ruling,
5 it's contrary to Nevada law as it relates to the
6 annihilation. So I've got to enforce the law before I
7 enforce a judge's ruling on a motion in limine that
8 might be contrary to the law.

9 MR. ROBERTS: We agree that's the law. What
10 we disagree with is being precluded from putting in an
11 asset that would prevent financial annihilation while,
12 at the same time, they're allowed to argue financial
13 annihilation.

14 THE COURT: I understand that, but I think
15 that's something that the legislature is going to have
16 to fix or the supreme court because we can't argue
17 collateral source for any reason under Proctor v.
18 Castelletti.

19 If the legislature decides that -- or the
20 supreme court decides that, if the defense gets to argue
21 the annihilation, then plaintiff should be able to put
22 in insurance, that's something they're going to have to
23 decide.

24 At this point the law is that they get to
25 argue the annihilation argument and you don't get to put

1 in evidence about the insurance.

2 So I think that's what the state of law is in
3 Nevada. It may not -- it may not seem fair.

4 MR. ROBERTS: Well, Your Honor, I disagree
5 that's the state of the law. There's not a single
6 supreme court decision on whether or not insurance comes
7 in as an asset in the punitive phase or on whether or
8 not you can argue financial annihilation where an
9 insurance policy exists as an asset.

10 I'm not familiar with that. In fact, the
11 legislative prohibition on the admissibility of
12 insurance only goes to -- to a much narrower issue.
13 This is not one of the reasons why insurance was
14 excluded by the legislature. So I don't believe it's
15 the law.

16 I looked to try to find law in other cases.
17 The only case I could find is from Mr. Strassburg's home
18 state of Arizona. And in that case the Court did not
19 allow the evidence in, but the reason they didn't allow
20 it in was that they didn't know how they could prevent
21 the jury from considering the asset for the purposes of
22 the liability phase --

23 THE COURT: For the compensatory damages.

24 MR. ROBERTS: -- and not the other phase.

25 THE COURT: Right.

1 MR. ROBERTS: Right.

2 THE COURT: And I think --

3 MR. ROBERTS: That's the only case I'm aware
4 of in the country.

5 THE COURT: That's why the supreme court in
6 the Proctor v. Castelletti case in Nevada has said
7 collateral source is not admissible for any reason. I
8 don't know if that was a punitive issue or not. I don't
9 think it did, but --

10 MR. ROBERTS: So --

11 THE COURT: I understand your argument.

12 MR. ROBERTS: I understand your point, Your
13 Honor, and I understand the instruction is what the
14 instruction is. But even if the law is as the Court has
15 held and the instruction is proper, it's still improper
16 for counsel to make an argument that they know is false.
17 And so if they do argue financial annihilation, knowing
18 what counsel knows, I will object.

19 THE COURT: Okay. What other jury
20 instructions do you object to?

21 MR. ROBERTS: That's the only one I object to.

22 THE COURT: Okay. Oh, there's another one.
23 Is there another one?

24 MR. ROBERTS: There is, Your Honor, and it
25 just deals with the optional bracketed language in

1 Instruction Number 34 where the Court has inserted the
2 optional bracketed language to state, "However, where an
3 injury or disability is subjective and not demonstrable
4 to others, expert testimony is necessary before a jury
5 may award damage."

6 We don't believe that's appropriate to the
7 extent that it implies that Emilia Garcia cannot testify
8 about her subjective pain and that the jury could refuse
9 to award damages about that, because you've got to give
10 instructions that apply to the evidence that's come in.

11 And what is the evidence that's come in?
12 Every single doctor, ours and theirs, has agreed that
13 she was injured and agreed that she had pain. In
14 addition, it's not something that's subjective and not
15 demonstrable when the doctors have shown the jury a
16 spondylolisthesis at one point, which is observable and
17 demonstrable, and now she's got a back full of hardware,
18 which is observable and demonstrable.

19 So there is no evidence that would justify
20 giving an instruction which implies only where an injury
21 or disability is subjective and not demonstrable to
22 others.

23 THE COURT: Well, I think Mr. Smith made a
24 point yesterday indicating that even the plaintiff's
25 experts have indicated that the pain and suffering is

1 going to last into the indefinite future. So I think
2 you have evidence that supports that's required.

3 Do you guys want to say anything on this?

4 MS. ESTANISLAO: Other than it's the law.

5 THE COURT: Okay.

6 MR. ROBERTS: The final thing is not an
7 objection to one that's given, and if you'd like me to
8 go forward, we just had one series that was not given,
9 that I wanted to object to the fact it was not given.

10 THE COURT: Okay. That's -- that's the next
11 part. You don't have any others that you're objecting
12 to that are being given?

13 MR. ROBERTS: I do not, Your Honor.

14 THE COURT: Okay. Does the plaintiff have
15 instructions that not being given that you want to
16 offer?

17 MR. ROBERTS: Yes, Your Honor. The plaintiff
18 has proposed exhibits -- I mean, excuse me -- proposed
19 instructions based on the old Nevada pattern
20 instructions on a general negligence cause of action.
21 Basically --

22 THE COURT: You need to give me a copy of the
23 instruction that you're proposing.

24 MR. ROBERTS: Okay.

25 THE COURT: We need to mark that so Alice has

1 that proposed, not given.

2 MR. ROBERTS: Thank you, Your Honor.

3 While my team is digging up that copy for the
4 Court --

5 THE COURT: I have it.

6 MR. ROBERTS: Thank you, Your Honor.

7 THE COURT: It's your 4.03, "Negligence is the
8 failure to exercise that degree of care which an
9 ordinarily careful and prudent person would exercise"?

10 MR. ROBERTS: Yes.

11 THE COURT: All right. I just had it in the
12 set from yesterday still, so...

13 MR. ROBERTS: I appreciate you helping me out
14 with that, Your Honor.

15 THE COURT: We'll mark that as your offered,
16 not given.

17 MR. ROBERTS: And our argument yesterday off
18 the record on this tied into Rule 15, which states that
19 the instructions and the cause of action will conform to
20 the evidence if the facts come in without objection
21 through express or implied consent.

22 As I noted yesterday, we provided general
23 negligence instructions to the plaintiffs at the --
24 excuse me -- to the defendants at the 2.67 conference
25 before trial started.

1 They were aware that we were using general
2 negligence as one of our theories. There was never any
3 objection made on the record to evidence coming in on
4 whether or not, for example, the analogy -- excuse me --
5 whether or not Ms. Awerbach knew that he was a dangerous
6 driver and knew that it was dangerous for him to drive a
7 car and had not taken proper precautions to keep the
8 keys to the car away from him.

9 So we believe that the facts came in which
10 supported a general negligence theory. We believe it's
11 proper to amend to the Court, to the extent the Court
12 believes that a general negligence theory is not within
13 the scope of our amended complaint, that it's not too
14 late for us to amend to conform to the evidence. And we
15 would move to amend the complaint to state a general
16 cause of negligence action so that we can instruct the
17 jury on that cause of action and argue it.

18 THE COURT: And the reason that I --

19 MS. ESTANISLAO: I want to address.

20 THE COURT: You guys want to talk?

21 MR. STRASSBURG: Go ahead, Judge.

22 THE COURT: What's that?

23 MR. STRASSBURG: Go ahead.

24 THE COURT: The reason that I didn't allow
25 that yesterday is because I think it's too late after

1 the plaintiffs rest their case to amend to assert a
2 cause of action that hasn't been a part of the case up
3 to that point.

4 And I think that the evidence that you
5 submitted, while it may be supportive of a general
6 negligence claim, I think it's also supportive of the
7 negligent entrustment claim and the permissive use
8 issue.

9 So I don't know the fact that evidence came in
10 that would otherwise support a general negligence claim
11 puts everybody on notice that you have a new cause of
12 action, because I think the same evidence would have
13 come in as it relates to the negligent entrustment
14 claim.

15 MS. ESTANISLAO: And I just want to add, Your
16 Honor, that at the 2.7 conference, when we saw these
17 proposed instructions, they were not specifically
18 identified as to defendant Andrea Awerbach. So we
19 believed, since they also -- they had the negligence
20 claim against Jared Awerbach, that this referred to
21 Jared Awerbach.

22 Clearly, when we saw the negligent entrustment
23 proposed instruction, we believed that was for defendant
24 Andrea Awerbach, and there was an imputed negligence
25 instruction that was for defendant Andrea Awerbach.

1 Going back to the complaint, those were the
2 two causes of action specifically referencing defendant
3 Andrea Awerbach and not the negligence instruction. So
4 anything that impliedly tried related to the negligence
5 entrustment claim.

6 THE COURT: And if there was still a general
7 negligence claim against Jared Awerbach that hadn't
8 already been determine by the Court, I would have
9 allowed that. But since we have instructions that say
10 that the negligence of Jared has already been
11 determined, I don't think we need it for that purpose.

12 MR. ROBERTS: I would agree, Your Honor.

13 THE COURT: Anything else that the plaintiff
14 proffers that has not being given?

15 MR. ROBERTS: No, Your Honor.

16 THE COURT: Okay. Mr. Mazzeo, let's go with
17 you. Any of the instructions that the Court is giving
18 that Andrea Awerbach is objecting to?

19 MS. ESTANISLAO: Your Honor, of course, we are
20 objecting to the curative instruction regarding -- and
21 that is Number 46 -- regarding the preexisting records.
22 The motion that was -- motion in limine granted filed by
23 plaintiff related to undisclosed medical records, that
24 there were no reference to undisclosed medical records.

25 Mr. Mazzeo, in his stated Instruction 46,

1 didn't insinuate that plaintiff failed to disclose
2 medical records or left -- you know, hid some medical
3 records. What he just said was just because there was
4 no evidence of existing records doesn't mean there
5 wasn't any. It did not violate the Court's motion in
6 limine.

7 THE COURT: I think that's what the
8 implication was, and that's why I'm giving the curative
9 instruction.

10 MR. MAZZEO: Well, the implication was that --
11 and I brought this up in cross-examination with
12 Dr. Oliveri -- is that patients can have longstanding
13 chronic conditions, they can have symptoms, they can
14 have pain and not seek treatment.

15 So just because she didn't have medical
16 records doesn't mean that she wasn't symptomatic. I was
17 not implying anything that was contradictory to the
18 ruling from the Court, which is plaintiff's Motion in
19 Limine Number 3, which states, "Suggesting to the jury
20 that there might be related medical records prior to the
21 crash that had not been disclosed to defendant is
22 granted."

23 So they were seeking to exclude that. That's
24 fine. And I didn't suggest that there were any
25 preexisting or preaccident medical records prior to the

1 crash hadn't been disclosed. I was merely talking about
2 a condition, and I addressed that.

3 THE COURT: With Dr. Oliveri. I agree.

4 MR. MAZZEO: Yes.

5 THE COURT: And I think it was a statement in
6 opening that implied that there were records not
7 disclosed.

8 MR. MAZZEO: And if we look -- then we look at
9 the record, because that's what we have to look at. And
10 if we look that record, I never made any inference or
11 suggestion that there were undisclosed medical records
12 that existed prior to the accident specifically talking
13 about a condition. She had a preexisting condition.
14 And it doesn't preclude the possibility of her having
15 been symptomatic prior to the accident.

16 That's all. So that -- this instruction
17 should not come in.

18 MR. SMITH: For the record, the curative
19 instruction quotes his statement in opening where he
20 says, "Just because there is no evidence of any
21 preexisting records doesn't mean that none exist."

22 That is specifically suggesting that records
23 might exist from prior to the crash, and that's
24 specifically what was excluded by plaintiff's Motion in
25 Limine 3. That's not a discussion of pain. It's

1 expressly a discussion of records, which is why we made
2 the objection at the time, why the Court said it would
3 consider a curative instruction, why it entered a
4 curative instruction.

5 THE COURT: Okay. Any others that you're
6 objecting to?

7 MS. ESTANISLAO: Yes. We object to the
8 word -- the taking out of the word "reasonably certain"
9 in Instruction Number 33. It was in paragraph -- the
10 Items Number 2 and Number 5. Nevada pattern jury
11 instruction upon which this was based, 10.02, has been
12 used for over two decades in Nevada and hasn't been
13 changed by this Court. And I believe the citation
14 plaintiff discussed yesterday came from outside of this
15 state.

16 So, like I said, I agreed to use the word
17 "publicly" only in lieu of the word "likely" that
18 plaintiff had proposed, but we wanted to keep the
19 original word that was in the model instruction, which
20 is "reasonably certain."

21 THE COURT: I thought it was a Nevada Supreme
22 Court case that you guys cited yesterday that said that
23 "reasonably certain" is inappropriate language.

24 MR. ROBERTS: That is correct, Your Honor, and
25 I'll get the citation for the record in just a second.

1 I'm pulling it up. But the allegation was that a judge
2 who committed judicial misconduct by giving a
3 "reasonable certainty" instruction, and the supreme
4 court found that it was not misconduct, but they did
5 find that it was an incorrect statement of the law and
6 pointed out in Footnote Number 2 that, although Pattern
7 Instruction 10.02 states a reasonable certainty
8 standard, that standard had never been adopted by the
9 Nevada -- or approved by the Nevada Supreme Court.

10 THE COURT: Just make sure --

11 MR. ROBERTS: And it's a 2009 case.

12 THE COURT: Just make sure that the cite is
13 part of the record so we can --

14 MS. ESTANISLAO: The only other objection we
15 have is --

16 THE COURT: Hold on. Hold on.

17 MS. ESTANISLAO: Oh, sorry.

18 THE COURT: Let's get the cite first.

19 MR. ROBERTS: Marrone v. Kaczmarek, 125 Nevada
20 1059, and that's a 2009 decision. And I should point
21 out for the record that that decision is unpublished,
22 but there's no contrary law.

23 I think that, with the amendment of the rule,
24 we can cite the unpublished decisions, but we still
25 can't do so unless they were issued after the -- in

1 2016.

2 So it may not be binding authority, but I
3 think it's a good indication of what the court would do
4 and is highly persuasive in the absence of any Nevada
5 Supreme Court decision specifically approving pattern
6 that you can point that to.

7 Thank you, Your Honor.

8 THE COURT: Okay. What other one did you
9 object to?

10 MS. ESTANISLAO: Well, the not giving of 1.

11 THE COURT: We're not to that there yet.

12 MS. ESTANISLAO: Okay. Then that would be it.

13 THE COURT: That's all that you're objecting
14 to that the Court is giving?

15 MS. ESTANISLAO: Yes.

16 THE COURT: Okay. Now, what instructions does
17 Andrea Awerbach propose that the Court is not giving?

18 MS. ESTANISLAO: Both defendants have
19 requested the inversion of Nevada -- Model Instruction
20 Nevada 4NG.1, which discusses the rights of the
21 defendants being separate and distinct. We do believe
22 that applies. There are separate claims. These are not
23 completely, automatically vicarious liability. They
24 still have to find separate findings for defendant
25 Andrea Awerbach to be vicariously or imputatively liable

1 for the damages caused by Jared.

2 THE COURT: Do you have a copy of that?

3 MS. ESTANISLAO: Yes.

4 THE COURT: I don't have that in my file for
5 some reason.

6 MS. ESTANISLAO: It was originally my -- it
7 was page 2 of my proposal instructions, my copy.

8 THE COURT: Rights of the defendants. I got
9 it. We'll mark that as your proposed, not given.

10 Any others?

11 MS. ESTANISLAO: That is it, Your Honor.

12 THE COURT: Okay. Mr. Tindall,
13 Mr. Strassburg, any objections to the instructions that
14 the Court is giving?

15 MR. TINDALL: Yes, Your Honor.

16 MR. ROBERTS: On the separate and distinct, I
17 just wanted to put on the record that we objected
18 because the pattern referred to plaintiffs having
19 separate and distinct right. It doesn't mention
20 defendant. So it's taken out of context, and the fact
21 that we have potential joint liability arising out of
22 permissive use makes the instruction confusing in this
23 case.

24 THE COURT: I agree.

25 MR. TINDALL: All right, Your Honor.

1 Regarding Instruction 29 -- it begins, "It has been
2 established as a matter of law" -- the last sentence we
3 believe should read, "Defendant Jared Awerbach has been
4 deemed impaired with marijuana metabolite as a matter of
5 law," because that's the only impairment. Marijuana was
6 not an impairment. When the Court interchangeably
7 allows getting rid of -- see, in the next instruction,
8 the word "marijuana"? That's a falsehood being told to
9 the jury. It's not in evidence. It never has been.
10 It's specifically been banned as a basis for impairment.

11 So this instruction should be specific.

12 THE COURT: Okay. And I think that -- as we
13 discussed yesterday, I think that the only way you get
14 marijuana metabolite in your blood, that's the
15 by-product of the marijuana. And I understand that you
16 want to make a distinction, but I don't know that
17 there's evidence in the record that supports a
18 distinction.

19 MR. TINDALL: So the related instruction,
20 Number 40, which begins, "If you find the plaintiff is
21 entitled to compensatory damages," Subsection 1.

22 Oh, let's back up to the first paragraph. If
23 we can look at line 4 and 5, beginning, "Defendant Jared
24 Awerbach, on the basis of his impairment with a
25 controlled substance."

1 All right. So if we look at NRS 453.510
2 which -- and this is in Subsection 4. This is what
3 defines controlled substances as it pertains -- I mean,
4 there's hundreds of them. This is the subsection
5 specific to marijuana. "Marijuana metabolite not a
6 controlled substance. The State of Nevada does not
7 recognize it as a controlled substance."

8 So with this jury instructions, with the word
9 "controlled substance," we either need to put in
10 "marijuana metabolite" or take out the word "controlled"
11 because it's not a controlled substance. This misleads
12 the jury.

13 THE COURT: But marijuana is a controlled
14 substance.

15 MR. TINDALL: It is, but he's not -- this
16 first paragraph talks about impairment, "on the basis of
17 his impairment with a controlled substance," and it's
18 not a controlled substance and he wasn't impaired on
19 marijuana.

20 This is a falsehood. It misleads the jury
21 into believing he consumed a controlled substance and he
22 was impaired by that controlled substance, and that's
23 just not the case.

24 THE COURT: Well, I think there's evidence
25 that he had consumed a controlled substance, marijuana,

1 and there's a -- there's a ruling by the court that he
2 was impaired as a matter of law, as evidenced by the
3 marijuana metabolite.

4 MR. TINDALL: So as the Court can see, then --
5 accepting everything the Court just said as completely
6 accurate, we can't have it read "impairment with a
7 controlled substance" because he wasn't impaired with a
8 controlled substance.

9 The court, Judge Alf, has ruled he was
10 impaired by marijuana metabolite, which is not a
11 controlled substance.

12 I'm saying this language has to -- just take
13 out the word "controlled," and then I guess we don't
14 have an objection anymore.

15 THE COURT: I understand the objection. I
16 think you're making a distinction between the marijuana
17 and the marijuana metabolite that I'm not prepared to
18 make.

19 MR. TINDALL: Okay. One moment, please.

20 All right. So if the Court is not going to
21 take out the word "controlled" based on what I've just
22 argued, but if we look at 42.010, the statute doesn't
23 read "controlled substance." We have the word
24 "controlled" in the title, but statute, Subsection 1,
25 reads, "using alcohol or another substance."