

No. 71348

IN THE SUPREME COURT OF THE STATE OF NEVADA

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Elizabeth A. Brown  
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EMILIA GARCIA,  
Appellant,

v.

ANDREA AWERBACH,  
Respondent.

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**APPELLANT'S APPENDIX  
VOLUME XXV, BATES NUMBERS 6001 TO 6250**

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1           So for that basis, we believe the word  
2 "controlled" has to come out of this first paragraph.

3           THE COURT: I think that you're trying to make  
4 a distinction that I don't think exists. I understand  
5 the argument.

6           What else? What other instructions do you  
7 object to?

8           MR. TINDALL: Court's indulgence, please.  
9 We have no others to which we object.

10          THE COURT: Does Jared Awerbach have any other  
11 instructions that we propose that are not being given?

12          MR. TINDALL: Yes. We submit -- purge with.  
13 This one reads, "For the purpose of applying  
14 NRS 484.110(3)(g), I instruct you that the term  
15 'marijuana' in the statute refers only to the substance  
16 delta-9-tetrahydrocannabinols, also referred to as THC.

17          THE COURT: Okay. Give it to Alice.

18          And for the same reasons, I'm not comfortable  
19 giving that one because you're trying to draw a  
20 distinction between the metabolite and marijuana that I  
21 don't think exists.

22          What else?

23          MR. TINDALL: Your Honor, that is all.

24          MS. ESTANISLAO: Your Honor, may I add to our  
25 objections?

1 THE COURT: Sure.

2 MS. ESTANISLAO: Okay.

3 THE COURT: You be another one you want to  
4 object to now?

5 MS. ESTANISLAO: Yes.

6 THE COURT: Okay.

7 MS. ESTANISLAO: That Instruction Number 25  
8 regarding the medical negligence, one, that this -- this  
9 instruction is not supported by the evidence. There is  
10 no evidence of medical negligence. The evidence that  
11 has been presented goes to plaintiff's burden regarding  
12 them having to prove reasonable and necessary treatment.

13 And I think it's misleading to the jury to  
14 throw out the word "medical negligence," particularly  
15 when it's not defined for them; and, in light of the  
16 testimony regarding reasonable and necessary, they can  
17 misperceive that testimony as medical negligence. And,  
18 again, particularly because they have no definition of  
19 what constitutes medical negligence.

20 THE COURT: I think that you're correct, that  
21 the plaintiff has the burden of proving reasonable and  
22 necessary.

23 The way the testimony came in through one of  
24 the defense experts -- I'm thinking specifically of the  
25 X-ray that was on this -- on the screen in front of the

1 jury with the hardware and the -- the contention by the  
2 doctor that there was something wrong with the hardware  
3 being off to the left and not parallel with the one on  
4 the other side.

5 I think that there's at least an argument that  
6 could -- not an argument. I think that there's at least  
7 a possible misunderstanding in the minds of the jurors  
8 that a doctor did something wrong. And that's why --  
9 the supreme court has indicated that, with regard to  
10 jury instructions, if there's any basis or a valid  
11 reasonable legal basis for a party to -- to instruct the  
12 jury on an issue of law, that the Court should, you  
13 know, favor allowing those things.

14 MS. ESTANISLAO: But my understanding is the  
15 doctor testified that it wasn't negligence.

16 THE COURT: He did.

17 MS. ESTANISLAO: And that is a concern  
18 because, like I said, it's been testimony for a while,  
19 but, you know, that's a part that they may forget  
20 regardless of how many times we might remind it to them.  
21 But they may forget and see this instruction and  
22 believe, "Oh, well that's negligence."

23 But clearly there's no evidence of negligence.  
24 Nobody has testified that the doctor fell below the  
25 standard of care. And we know that, even if you have

1 surgery, bad results can happen -- even A screw can be  
2 put in loose -- without there being negligence, meaning  
3 there was no breach of the standard of care. And  
4 there's no testimony of that.

5 But, again, it can be misleading to the jury.  
6 They think, oh, well, they're saying you shouldn't --  
7 this surgery shouldn't have been done. That's  
8 negligence. Well, they caused it."

9 You know, but that's not the testimony. Like  
10 I said, misleading to the jury particularly when it's  
11 never been identified to them what is medical  
12 negligence. There's no instruction defining medical  
13 negligence, making a distinction between medical  
14 negligence and plaintiff's burden of proof to show that  
15 all the treatment, all the surgeries are reasonable and  
16 medically necessary.

17 THE COURT: I understand the problem you have  
18 with it, but I think that, if the jury thinks that  
19 Dr. Gross was negligent in his performance of the  
20 surgery, then this instruction takes care of that.

21 If the jury doesn't believe Dr. Gross was  
22 negligent in his performance of the surgery, then this  
23 instruction doesn't apply.

24 I don't know that it's confusing. It's  
25 just -- it's going to help them make that decision if

1 that's their thought.

2 MS. ESTANISLAO: And I apologize. This just  
3 came into my head. But may I suggest adding an  
4 instruction defining what medical negligence is and  
5 that -- and telling the jury that there's no testimony  
6 regarding medical negligence.

7 I mean, there is no testimony regarding  
8 medical negligence. There's no doctor that stood up,  
9 there's no expert that stood up that said any doctor  
10 fell below the standard of care.

11 THE COURT: I agree. You guys are welcome to  
12 say that in closing arguments. I don't know we need  
13 a -- I think if we define "medical negligence" in the  
14 instructions, then we're confusing the jury. Now we're  
15 telling them, let's think about what this means and if  
16 somebody did that.

17 MS. ESTANISLAO: Well, I think if we  
18 distinguish it between plaintiff's burden of proof and  
19 what medical negligence is and say, "Hey, there's no  
20 testimony satisfying what medical negligence is."

21 THE COURT: I understand your request. I'm  
22 not going to give it.

23 Let's talk about verdict forms.

24 The one that I'm leaning towards is I guess  
25 the one that was submitted by the plaintiff. I don't

1 know like the way the first paragraph is worded. I  
2 think it's confusing. This is how I would propose to  
3 change it. You guys see what you think. Because you  
4 put the two Emilia Garcia at the end of the sentence, I  
5 kind of would -- it seems like, "What amount of damages  
6 do you find were sustained by Emilia Garcia (excluding  
7 punitive damages) as a proximate result of the auto  
8 collision of January 2, 2011?"

9 MR. ROBERTS: That's fine with us, Your Honor.  
10 It is clearer than the way we had it worded.

11 THE COURT: Audra, can you make that change?  
12 Do you have that up?

13 MS. RODRIGUEZ-SHAPOVAL: I do. I just one  
14 second.

15 MS. ESTANISLAO: Your Honor, may I address  
16 this --

17 THE COURT: I know you guys are going to argue  
18 about it. Give me a second.

19 MS. ESTANISLAO: Okay.

20 THE COURT: Since you guys can't agree on  
21 something, I had to come up with something. So I --

22 MS. ESTANISLAO: Well, I generally --

23 THE COURT: So we're going to put in what I  
24 came up with, and then you can make a record on --

25 MS. ESTANISLAO: Well, plaintiff's and ours is



1 not vastly different. It's just certain wording that we  
2 wanted to add in there, specifically the preponderance  
3 of the evidence, of course taking out the negligence  
4 instruction.

5 MR. ROBERTS: No negligence is in there.

6 THE COURT: I don't even know which one is  
7 yours.

8 MS. ESTANISLAO: It says, "Defendant Andrea  
9 Awerbach's Proposed Special Verdict."

10 THE COURT: I've got it.

11 MS. ESTANISLAO: Like I said, I just like  
12 having the preponderance of the evidence.

13 THE COURT: Hold on one second.

14 Do you want me to read it again, Audra?

15 MS. RODRIGUEZ-SHAPOVAL: Yes, I would  
16 appreciate that.

17 THE COURT: "What amount of damages do you  
18 find were sustained by Emilia Garcia," and then in  
19 parenthesis "excluding any punitive damages" close  
20 paren, as a proximate result of the automobile collision  
21 of January 2, 2011?"

22 MS. RODRIGUEZ-SHAPOVAL: Okay.

23 THE COURT: Your Paragraph Number 7 is your  
24 general negligence question. So we would eliminate  
25 Question Number 7. So then the follow-up would be, "If

1 you answered 'yes' to Question 6" --

2 MS. RODRIGUEZ-SHAPOVAL: Okay.

3 THE COURT: -- "then answer Question

4 Number 7." So 8 needs to change to 7.

5 MS. RODRIGUEZ-SHAPOVAL: Okay.

6 THE COURT: "If you answered 'no,' skip to the

7 end of the form." Then your next question, instead of

8 being Number 8 would be Number 7.

9 MS. RODRIGUEZ-SHAPOVAL: Okay.

10 THE COURT: Your last question would be 8

11 instead of Number 9.

12 MS. RODRIGUEZ-SHAPOVAL: There's a reference

13 in 7, "If you answer Question 9," so that should be 8.

14 THE COURT: Yep. Well, that should -- yeah.

15 "If you answered 'yes,' answer Question Number 8."

16 MS. RODRIGUEZ-SHAPOVAL: Okay.

17 THE COURT: Correct.

18 MS. RODRIGUEZ-SHAPOVAL: Okay.

19 THE COURT: With those modifications, does the

20 plaintiff object to the verdict form that I'm proposing?

21 MR. ROBERTS: No, Your Honor, no objection.

22 THE COURT: All right. You guys, I know,

23 submitted a different one.

24 MS. ESTANISLAO: Correct.

25 THE COURT: So tell me -- tell me why you

1 object to the one that I proposed.

2 MS. ESTANISLAO: Well, generally we are fine  
3 with plaintiff Emilia Garcia's proposed jury verdict but  
4 would like to add, for example, with Number 1, "What  
5 amount of damages, not including any punitive damages,  
6 did you find that plaintiff proved by a preponderance of  
7 the evidence that she -- that was proximately caused by  
8 the automobile collision?"

9 We just like having the burden, make sure that  
10 the jury is finding, in fact, that it was by a  
11 preponderance of the evidence. And that goes to 5 and 6  
12 as well.

13 Agree with deleting Number 7.

14 With the new paragraph that's 7, "Did  
15 plaintiff prove by clear and convincing evidence that  
16 Andrea Awerbach acted with compression or malice  
17 express, implied," I would suggest taking out the word  
18 "negligently" and inserting "in the conduct that caused  
19 the harm to Emilia Garcia."

20 The standard for punitive damages is you need  
21 contact that's willful and deliberate. That's more than  
22 gross negligence. That's more than reckless and  
23 wanting.

24 I believe that could be an issue on appeal.  
25 But, you know, will give plaintiff -- I mean defense an

1 issue on appeal.

2 THE COURT: I'm not necessarily opposed to  
3 that. What do you guys think of that new language in  
4 paragraph 7, which was your paragraph 8?

5 MR. SMITH: Well, the standard of the first  
6 part that we have to prove is that she acted  
7 negligently. And then this Question 7 says, "In the  
8 conduct where you now found she acted negligently, did  
9 she act with oppression or malice, express or implied?"

10 There is no standard of gross negligence.  
11 That's adding a standard that we don't have in this  
12 case. There are two standards: Did she act  
13 negligently? And then once you found she acted  
14 negligently, did she act with oppression or malice,  
15 which is the standard of punitive damages.

16 MR. ROBERTS: Your Honor, that's consistent  
17 with Instruction 38, which says, "If you find that  
18 plaintiff is entitled to compensatory damages for actual  
19 harm caused by defendants' breach of an obligation, then  
20 you may consider whether you may award punitive  
21 damages."

22 So the defendants' breach of an obligation in  
23 this case is negligence.

24 THE COURT: That's true.

25 MS. ESTANISLAO: Like I said, I believe it's

1 going to be confusing to the jury, particularly since  
2 they need to find willful and deliberate. That's pretty  
3 much the standard on the conscious disregard,  
4 oppression, or malice. Both requires willful and  
5 deliberate.

6 MR. SMITH: That's not really the standard,  
7 and the standard has been laid out for the jury in the  
8 jury instructions. It's more than that -- or it's  
9 different than that. I wouldn't say more; it's  
10 different from that.

11 THE COURT: We're not going to incorporate all  
12 the jury instructions into the verdict form. I'm okay  
13 it as it is.

14 What other objections do you have?

15 MS. ESTANISLAO: Like I as suggested, using  
16 the word "preponderance of the evidence" in paragraph 1,  
17 paragraph 5 and 6. "Did plaintiff prove by a  
18 preponderance of the evidence that" --

19 THE COURT: I think preponderance of the  
20 evidence applies to everything other than where we put  
21 the clear and convincing evidence, right?

22 MS. ESTANISLAO: Correct. And they had it in  
23 paragraph 2.

24 MR. MAZZEO: Judge, we're much more familiar  
25 with the standard that the plaintiff has to meet in the

1 case, but the jurors aren't. And it's easy to get lost  
2 when they're looking at this verdict form if that  
3 standard not in front of them.

4           Of course, they're getting an instruction, but  
5 they're not all getting the booklet. They're going to  
6 hear it once. They're getting one booklet in the back  
7 room, in the deliberation room. So I think -- I think  
8 it's germane and imperative to put the standard that  
9 they have to satisfy, that has to be met by the  
10 plaintiff in order to find damages. And that's  
11 preponderance of the evidence.

12           If they have any question about that, they can  
13 always go to the book, but if it's not in there, then  
14 that may be a fact that's lost on the jury when you're  
15 looking at the verdict form.

16           And they're allowed to award anything unless  
17 the plaintiff satisfies that burden, which is  
18 preponderance of the evidence. So I don't see where the  
19 harm is in putting it in there, but there is harm by not  
20 putting it in there. The omission of that could lead  
21 the jurors to not consider that burden of proof,  
22 preponderance of the evidence.

23           So even though it's -- even though you have  
24 clear and convincing standard for the punitive damages,  
25 we should have that standard in every --

1           THE COURT: I get it. You keep saying the  
2 same thing over and over.

3           You guys object to it?

4           MR. ROBERTS: I object to it because we've got  
5 instructions and we're ready to go, and the jury already  
6 knows that it's preponderance except it's clear and  
7 convincing. I don't think it would be erroneous to add  
8 it if the Court wanted to take 20 minutes to do so, but  
9 I certainly don't think it's necessary to add in a  
10 preponderance standard every single place that it's  
11 required.

12           It would be unusual to do so. The pattern  
13 instructions certainly don't do that. But it is a  
14 correct statement of law.

15           Audra says it will take more than 20 minutes.

16           MS. ESTANISLAO: Three lines?

17           THE COURT: We're just modifying the verdict  
18 form.

19           MR. ROBERTS: She misunderstood. She thought  
20 it was the jury instructions, and that was my fault,  
21 Your Honor. I misunderstood.

22           THE COURT: We're not changing any  
23 instructions; we're just incorporating --

24           MR. MAZZEO: Paste that phrase three times,  
25 and it's done.

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

2 THE COURT: Where do you want it? Which  
3 questions?

4 MS. ESTANISLAO: Item 1, 5, and 6. And it's a  
5 lot easier in 5 and 6.

6 "Did you find that plaintiff proved by a  
7 preponderance of the evidence that..."

8 And in line -- line 1, "What amount of damages  
9 did you find that plaintiff proved by a preponderance of  
10 the evidence was proximately caused by an automobile  
11 collision of January 2, 2011?"

12 So in the middle right, after -- wanted to  
13 change -- okay.

14 MR. ROBERTS: Your Honor, that gets too  
15 cumbersome. I object to doing that in every place. And  
16 then we have to change "theirs," "Did Andrea Awerbach  
17 prove by a preponderance of the evidence that she did  
18 not give Jared permission to drive her car?"

19 THE COURT: Let's leave it out.

20 What else?

21 MS. ESTANISLAO: That's it.

22 MR. TINDALL: Your Honor, does 6 still read  
23 the same way as it is on the paper? Did we change that  
24 at all?

25 THE COURT: 6, I didn't change.



1           MR. TINDALL: Okay. 6 is actually two  
2 questions. I think that needs to be broken out, because  
3 they can find one but not the other.

4           MR. ROBERTS: And if they do that, then they  
5 check "no." We can explain that to them.

6           MR. TINDALL: They can find that she  
7 negligently entrusted the vehicle, but that was not a  
8 proximate cause.

9           MR. ROBERTS: And then they check "no." We  
10 can explain that to them.

11          MR. TINDALL: No, they need to be two separate  
12 questions.

13          THE COURT: I'm okay with that being two  
14 separate questions.

15          MR. ROBERTS: That's fine, Your Honor, go  
16 ahead.

17          THE COURT: Makes sense. "Did defendant  
18 Andrea Awerbach negligently entrust her vehicle to an  
19 inexperienced or incompetent person on January 2nd?"  
20 question mark.

21                 And then we do another question: "Was that  
22 negligence a proximate cause of harm to Emilia Garcia?"

23                 So this would be two different questions with  
24 two sets of answers there. So that rennumbers everything  
25 back to the way it was before.

1           MR. TINDALL: And then regarding Question 2, I  
2 make the same objection that I made to the jury  
3 instructions. He didn't -- this needs to read either  
4 "marijuana metabolite" or something other. I'll submit  
5 it.

6           THE COURT: Okay. And I'm not going to modify  
7 that for the same reasons.

8           Anything else we need to put on the record as  
9 far as jury instructions or verdict forms, folks?

10          MR. MAZZEO: No, Your Honor.

11          MR. ROBERTS: No, Your Honor.

12          THE COURT: Let's go off the record.

13          (Jury entered.)

14          THE COURT: Welcome back, folks. Back on the  
15 record. Case Number A637772. Do the parties stipulate  
16 to the presence of the jury?

17          MR. ROBERTS: Yes, Your Honor.

18          MR. MAZZEO: Yes, Your Honor.

19          THE COURT: Ladies and gentlemen, you heard  
20 all the evidence. That's been concluded. Now is the  
21 time I'm going to instruct you on the law that applies  
22 to the case. It used to be we would give every juror  
23 their own set of jury instructions and you'd flip  
24 through them as I was reading them, and we found that  
25 the jurors once they go back to the deliberation room

1 everybody throws them in the garbage can and it was just  
2 a waste of paper.

3           So what we're going to do and what we've done  
4 for the last probably year is my JEA, Tatiana, is going  
5 to flip through the instructions on the ELmo so you can  
6 read them as I'm reading them. You will have the  
7 original set of instructions that I'm reading that will  
8 go back with you to the jury room. You're welcome to  
9 look back at any or every jury instruction when you're  
10 back there in the deliberation room. If you have any  
11 questions, you can refer to them then. All right?

12           Instruction Number 1: Ladies and gentlemen of  
13 the jury, it is my duty as judge to instruct you in the  
14 law that applies to this case. It is your duty as  
15 jurors to follow these instructions and to apply the  
16 rules of law to the facts as you find them from the  
17 evidence.

18           You must not be concerned with the wisdom of  
19 any rule of law stated in these instructions.  
20 Regardless of any opinion you may have as to what the  
21 law ought to be, it would be a violation of your oath to  
22 base a verdict upon any other view of the law than that  
23 given in the instructions of the Court.

24           Instruction Number 2: The purpose of the  
25 trial is to ascertain the truth.

1           Instruction Number 3: If in these  
2 instructions any rule, direction, or idea is repeated or  
3 stated in different ways, no emphasis thereon is  
4 intended by me or none may be inferred by you. For that  
5 reason, you are not to single out any certain sentence  
6 or any individual point or instruction and ignore the  
7 others, but you are to consider all the instructions as  
8 a whole and regard each in the light of all the others.  
9 The order in which the instructions are given has no  
10 significance as to their relative importance.

11           Instruction Number 4: The masculine form as  
12 used in these instructions, if applicable, as shown by  
13 the context of the instruction and the evidence applies  
14 to a male person or female person.

15           Instruction Number 5: The evidence which you  
16 are to consider in this case consists of the testimony  
17 of the witnesses, the exhibits, and any facts admitted  
18 or agreed to by counsel. Statements, arguments, and  
19 opinions of counsel are not evidence in this case.  
20 However, if the attorneys stipulate as to the existence  
21 of a fact, you must accept the stipulation as evidence  
22 and regard that fact as proved.

23           You must not speculate to be true any  
24 insinuation suggested by a question asked of a witness.  
25 A question is not evidence and may be considered only as

1 it supplies meaning to the answer. You must disregard  
2 any evidence to which an objection was sustained by the  
3 Court and any evidence ordered stricken by the Court.  
4 Anything you may have seen or heard outside the  
5 courtroom is not evidence and must also be disregarded.

6           Instruction Number 6: You must decide all  
7 questions of fact in this case from the evidence  
8 received in this trial and not from any other source.  
9 You must not make any independent investigation of the  
10 facts or the law or consider or discuss facts as to  
11 which there is no evidence. This means, for example,  
12 that you must not on your own visit the scene, conduct  
13 experiments or consult reference works for additional  
14 information.

15           Instruction Number 7: Although you are to  
16 consider only the evidence in the case in reaching a  
17 verdict, you must bring to the consideration of the  
18 evidence your everyday common sense and judgment as  
19 reasonable men and women, thus you are not limited  
20 solely to what you see and hear as the witnesses  
21 testify. You may draw reasonable inferences from the  
22 evidence which you feel are justified in the light of  
23 common experience. Keeping in mind that such inferences  
24 should not be based on speculation or guess.

25           A verdict may never be influenced by sympathy,

1 prejudice, or public opinion. Your decision should be  
2 the product of sincere judgment and sound discretion in  
3 accordance with these rules of law.

4           Instruction Number 8: You are not to discuss  
5 or even consider whether or not the plaintiff was  
6 carrying insurance to cover medical bills, loss of  
7 earnings, or any other damages she claims to have  
8 sustained. You are not to discuss or even consider  
9 whether or not the defendants were carrying insurance  
10 that would reimburse them for whatever sum of money they  
11 may be called upon to pay to the plaintiff. Whether or  
12 not any party was insured is immaterial and should make  
13 no difference in any verdict you may render in this  
14 case.

15           Instruction Number 9: If during this trial I  
16 have said or done anything which has suggested to you  
17 that I am inclined to favor the claims or position of  
18 any party, you will not be influenced by any such  
19 suggestion. I have not expressed nor intended to  
20 express nor have I intended to intimate any opinion as  
21 to which witnesses are or are not worthy of belief, what  
22 facts are or are not established, or what inference  
23 should be drawn from the evidence. If any expression of  
24 mine has seemed to indicate an opinion relating to any  
25 of these matters, I instruct you to disregard it.

1           Instruction Number 10: There are two kinds of  
2 evidence direct and circumstantial. Direct evidence is  
3 direct proof of a fact such as testimony of an eye  
4 witness. Circumstantial evidence is direct -- is  
5 indirect evidence. That is proof of a chain of facts  
6 from which you could find that another fact exists even  
7 though it has not been proved directly. You are  
8 entitled to consider both kinds of evidence. The law  
9 permits you to give equal weight to both, but it is for  
10 you to decide how much weight to give to any evidence.  
11 It is for you to decide whether a fact has been proved  
12 by circumstantial evidence.

13           Instruction Number 11: In determining whether  
14 any proposition has been proved, you should consider all  
15 of the evidence bearing on the question without regard  
16 to which party produced it.

17           Instruction Number 12: Certain testimony has  
18 been read into evidence from a deposition. A deposition  
19 is testimony taken under oath before the trial and  
20 preserved in writing. You are to consider that  
21 testimony as if it had been given in court.

22           Instruction Number 13: During the course of  
23 the trial you have heard reference made to the word  
24 "interrogatory." An interrogatory is a written question  
25 asked by one party of another who must answer it under

1 oath in writing. You are to consider interrogatories  
2 and the answers there to the same as if the questions  
3 had been asked and answered here in court.

4           Instruction Number 14: In this case as  
5 permitted by law, Plaintiff Emilia Garcia served on the  
6 Defendant Andrea Awerbach, a written request for the  
7 admission of the truth of certain matters of fact. You  
8 will regard as being conclusively proved all such  
9 matters of fact which were expressly admitted by the  
10 defendant, Andrea Awerbach, or which Defendant Andrea  
11 Awerbach failed to deny.

12           Instruction Number 15: The credibility or  
13 believability of a witness should be determined by his  
14 or her manner upon the stand; his or her relationship to  
15 the parties; his or her fears, motives, interests or  
16 feelings; his or her opportunity to have observed the  
17 matter to which he or she testified; the reasonableness  
18 of his or her statements; and the strength or weakness  
19 of his or her recollections.

20           If you believe that a witness has lied about  
21 any material fact in the case, you may disregard the  
22 entire testimony of that witness or any portion of this  
23 testimony which is not proved by other evidence.

24           Instruction Number 16: Discrepancies in a  
25 witness' testimony or between his testimony and that of



1 others, if there were any discrepancies, do not  
2 necessarily mean that the witness should be discredited.  
3 Failure of recollection is a common experience and  
4 innocent misrecollection is not uncommon. It is a fact  
5 also that two persons witnessing an incident or  
6 transaction often will see or hear it differently.  
7 Whether a discrepancy pertains to a fact of importance  
8 or only to a trivial detail should be considered in  
9 weighing its significance.

10           Instruction Number 17: An attorney has a  
11 right to interview a witness for purpose of learning  
12 what testimony the witness will give. The fact that the  
13 witness has talked to an attorney and told him what he  
14 would testify to does not by itself reflect adversely on  
15 the truth of the testimony of the witness.

16           Instruction Number 18: A witness who has  
17 special knowledge, skill, experience, training, or  
18 education in a particular science, profession, or  
19 occupation is an expert witness. An expert witness may  
20 give his or her opinion as to any matter in which he or  
21 she is skilled. You should consider such expert opinion  
22 and weigh the reasons, if any, give for it. You are not  
23 bound, however, by such an opinion. Give it the weight  
24 to which you deem it entitled, whether that be great or  
25 slight, and you may reject it if in your judgment the

1 reasons given for it are unsound.

2           Instruction Number 19: A question has been  
3 asked in which an expert witness was told to assume that  
4 certain facts were true and to give an opinion based  
5 upon the assumption. This is called a hypothetical  
6 question. If any fact assumed in the question has not  
7 been established by the evidence you should determine  
8 the effect of that omission upon the value of the  
9 opinion.

10           Instruction Number 20: Whenever in these  
11 instructions I state that the burden or the burden of  
12 proof rests upon a certain party to prove a certain  
13 allegation made by him, the meaning of such an  
14 instruction is this: That unless the truth of the  
15 allegation is proved by a preponderance of the evidence,  
16 you shall find the same to be not true.

17           The term "preponderance of the evidence" means  
18 such evidence as when weighed with that opposed to it  
19 has more convincing force and from which it appears that  
20 the greater probability of truth lies therein.

21           Instruction Number 21: The preponderance or  
22 weight of evidence is not necessarily with the greater  
23 number of witnesses. The testimony of one witness  
24 worthy of belief is sufficient for the proof of any fact  
25 and would justify a verdict in accordance with such

1 testimony even if a number of witnesses have testified  
2 to the contrary.

3           If from the whole case, considering the  
4 credibility of witnesses and after weighing the various  
5 factors of evidence, you believe there is a balance of  
6 probability pointing to the accuracy and honesty of the  
7 one witness, you should accept his testimony.

8           Instruction Number 22: As to defendant Jared  
9 Awerbach, the plaintiff has the burden of proving by a  
10 preponderance of the evidence all of the facts necessary  
11 to establish the following: One, that the plaintiff  
12 sustained damages; and two, that Jared Awerbach's  
13 negligence, which has been established by the Court, was  
14 a proximate cause of the damage sustained by the  
15 plaintiff.

16           Instruction Number 23: When I use the  
17 expression "proximate cause," I mean any cause which in  
18 natural, foreseeable, and continuous sequence, unbroken  
19 by any efficient intervening cause, produces the injury  
20 complained of and without which the result would not  
21 have occurred. It need not be the only cause nor the  
22 last or nearest cause. It is sufficient if it concurs  
23 with some other cause acting at the same time, which in  
24 combination with it causes the injury.

25           Instruction Number 24: There may be more than

1 one proximate cause of an injury. When negligent  
2 conduct of two or more persons contributes concurrently  
3 as proximate causes of an injury the conduct of said  
4 persons is a proximate cause of the injury, regardless  
5 of the extent to which each contributes to the injury.  
6 A cause is concurrent if it was operative at the moment  
7 of injury and acted with another cause to produce the  
8 injury.

9           Instruction Number 25: If you find that a  
10 defendant is liable for the original injury to the  
11 plaintiff, that defendant is also liable for any  
12 aggravation of the original injury caused by negligent  
13 medical or hospital treatment or care of the original  
14 injury or for any additional injury caused by negligent  
15 medical or hospital treatment or care of the original  
16 injury.

17           Instruction Number 26: The Court has taken  
18 judicial notice that Sunset on January 2, 2011, the date  
19 of the accident that is the subject of this lawsuit  
20 occurred at 4:46 p.m. Pacific Standard Time. You are to  
21 accept this fact as true and give it the weight you deem  
22 it deserves.

23           Instruction Number 27: Certain charts and  
24 summaries have been received into evidence to illustrate  
25 facts brought out in the testimony of some witnesses.

1 Charts and summaries are only as good as the underlying  
2 evidence that supports them. You should therefore give  
3 them only such weight as you think the underlying  
4 evidence deserves.

5           Instruction Number 28: There was in force at  
6 the time of the occurrence in question a law,  
7 NRS 484C.110 which read as follows: It is unlawful for  
8 any person who is under the influence of a controlled  
9 substance to drive or be in actual physical control of a  
10 vehicle on a highway or on premises to which the public  
11 has access. It is unlawful for any person to drive or  
12 be in actual physical control of a vehicle on a highway  
13 or on premises to which the public has access with an  
14 amount of a prohibited substance in his or her blood or  
15 urine that is equal to or greater than Prohibited  
16 Substance H, marijuana metabolite, urine nanograms per  
17 milliliter is 15, blood nanograms per milliliter is 5.  
18 A violation of the law just read to you constitutes  
19 negligence as a matter of law.

20           Instruction Number 29: It has been  
21 established as a matter of law that defendant Jared  
22 Awerbach, was impaired at the time of the January 2,  
23 2011 collision. After the subject collision, Defendant  
24 Jared Awerbach consented to having Las Vegas  
25 Metropolitan Police Department take a sample of his

1 blood. The Las Vegas Metropolitan Police Department  
2 toxicology laboratory tested Defendant Jared Awerbach's  
3 blood and determined that at the time of the subject  
4 collision, Defendant Jared Awerbach had 47 nanograms of  
5 marijuana metabolite per milliliter of blood. This  
6 exceeds the legal level of 5 nanograms of marijuana  
7 metabolite per milliliter. Defendant Jared Awerbach has  
8 been deemed impaired as a matter of law.

9           Instruction Number 30: In order to establish  
10 a claim of negligent entrustment against Defendant  
11 Andrea Awerbach, plaintiff has the burden of proving the  
12 following elements by a preponderance of the evidence.  
13 One, that the defendant Andrea Awerbach knowingly  
14 entrusted her vehicle to an inexperienced or incompetent  
15 person; and two, that the defendant Andrea Awerbach  
16 entrustment of her vehicle was a proximate and legal  
17 cause of the damage to plaintiff.

18           Among other factors, you may consider that  
19 fact that Defendant Jared Awerbach was unlicensed as  
20 evidence that he was inexperienced or incompetent to  
21 drive a motor vehicle on the date of the collision.  
22 Entrustment may be established through proof of either  
23 expressed or implied permission.

24           Instruction Number 31: The law provides for a  
25 rebuttable presumption that Defendant Andrea Awerbach

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

9           Instruction Number 32: An owner of a motor  
10 vehicle is liable for any damages approximately  
11 resulting from the negligence of an immediate family  
12 member in driving and operating the vehicle upon a  
13 highway with the owner's express or implied permission.

14           As advised in these instructions, Defendant  
15 Jared Awerbach was negligent and caused the accident  
16 that gives rise to this case. You must then determine  
17 whether or not he was driving with the express or  
18 implied permission of Defendant Andrea Awerbach. If you  
19 find that Defendant Jared Awerbach did not have such  
20 permission, then your verdict must be in favor of  
21 Defendant Andrea Awerbach. But if you find that such  
22 permission, express or implied, had been given, you must  
23 find Defendant Andrea Awerbach also liable.

24           Instruction Number 33: In determining the  
25 amount of loss, if any, suffered by plaintiff as a

1 proximate result of the accident in question, you will  
2 take into consideration the nature, extent, and duration  
3 of the injuries or damages you believe from the evidence  
4 plaintiff has sustained, and you will decide upon a sum  
5 of money sufficient to fairly compensate her for the  
6 following items: One, the reasonable medical expenses  
7 plaintiff has necessarily incurred as a result of the  
8 accident; two, the reasonable medical expenses which you  
9 believe plaintiff probably will incur in the future as a  
10 result of the accident; three, any loss of household  
11 services proximately caused by the accident from the  
12 date of the accident to the present and any loss of  
13 household services you believe plaintiff will probably  
14 experience in the future as a proximate result of the  
15 accident; four, the physical and mental pain, suffering,  
16 anguish, and disability endured by plaintiff from the  
17 date of the accident to the present, including loss  
18 enjoyment of life or the lost ability to participate in  
19 derived pleasure from the normal activities of daily  
20 life, or inability to pursue talent, recreational  
21 interests, hobbies, or avocations; five, the physical  
22 and mental pain, suffering, anguish, and disability  
23 which you believe plaintiff will probably experience in  
24 the future as a proximate result of the accident,  
25 including lost enjoyment of life or the lost ability to



1 participate in derived pleasure from the normal  
2 activities of daily life or from the inability to pursue  
3 talent, recreational interest, hobbies or avocations.

4           Instruction Number 34: Where plaintiff's  
5 injury or disability is clear and readily observable, no  
6 expert testimony is required for an award of future  
7 pain, suffering, anguish, and disability. However,  
8 where an anguish or disability is subjective and not  
9 demonstrable to others, expert testimony is necessary  
10 before a jury may award future damages.

11           Instruction Number 35: A person who has a  
12 condition or disability at the time of an injury is not  
13 entitled to recover damages therefore. However, a  
14 plaintiff is entitled to recover damages for any  
15 aggravation of a preexisting condition or disability  
16 caused by the injury. This is true even if a condition  
17 or disability made plaintiff more susceptible to the  
18 possibility of ill effects than a normally healthy  
19 person would have been, even if a normally healthy  
20 person probably would not have suffered any substantial  
21 injury. Where a preexisting condition or disability is  
22 so aggravated, the damages as to such condition or  
23 disability are limited to the additional injury caused  
24 by the aggravation.

25           Instruction Number 36: No definite standard

1 or method of calculation described by law for which to  
2 fix reasonable compensation for pain and suffering nor  
3 is the opinion of any witness required as to the amount  
4 of reasonable compensation. Furthermore, the argument  
5 of counsel as to the amount of damages is not evidence  
6 of reasonable compensation. In making an award for pain  
7 and suffering, you shall exercise your authority with  
8 calm and reasonable judgment. The damages you affix  
9 shall be just and reasonable in light of the evidence.

10           Instruction Number 37: Whether any of these  
11 elements of damage have been proven by the evidence is  
12 for you to determine. Neither sympathy nor speculation  
13 is a proper basis for determine, however, absolute  
14 certainty as to the damages is not required. It is only  
15 required that plaintiff prove each item of evidence by a  
16 preponderance of the evidence.

17           Instruction Number 38: If you find plaintiff  
18 entitled to compensatory harm of defendant's obligation,  
19 then you may consider whether you should award punitive  
20 damages against Defendant Andrea Awerbach. The question  
21 whether to award punitive damages on a particular  
22 defendant must be considered separately with respect to  
23 each defendant.

24           You may award punitive damages against  
25 Defendant Andrea Awerbach only if plaintiff proves by

1 clear and convincing evidence that the wrongful conduct  
2 upon which you base your finding of liability for  
3 compensatory damages was engaged in with oppression  
4 and/or malice on part of Defendant Andrea Awerbach. You  
5 cannot punish Defendant Andrea Awerbach for conduct that  
6 is lawful or which did not cause harm to the plaintiff.

7           For the purpose of consideration of punitive  
8 damage sonly, oppression means despicable conduct that  
9 subjects to cruel and unjust hardship with a conscious  
10 disregard of the rights of the plaintiff. Malice means  
11 conduct which is intended to injure the plaintiff or  
12 despicably engaged in with conscious disregard of rights  
13 or safety of the plaintiff.

14           Despicable conduct means conduct so vile, base  
15 or contemptible it would be looked down upon and  
16 despised by ordinary, decent people. Conscious  
17 disregard means the knowledge of the probable harmful  
18 consequences of a wrongful act and a willful and  
19 deliberate failure to avoid these consequences.

20           The purposes of punitive damages is deter  
21 similar conduct in the future, not to make plaintiff  
22 whole for her injuries.

23           Consequently, plaintiff is never entitled to  
24 punitive damages as a matter of right and whether to  
25 award punitive damages against the defendant is entirely

1 within your discretion. At this time, you are to decide  
2 only whether Defendant Andrea Awerbach engaged in  
3 wrongful conduct causing actual harm to the plaintiff  
4 with the requisite state of mind to permit an award of  
5 punitive damages against Defendant Andrea Awerbach, and  
6 if so, whether an assessment of punitive damages against  
7 Defendant Andrea Awerbach is justified by the punishment  
8 and for deterrent purposes under the circumstances of  
9 this case.

10           If you decide an award of punitive damages is  
11 justified, you will later decide the amount of punitive  
12 damages to be awarded after you heard additional  
13 evidence and instruction.

14           Instruction Number 39: Clear and convincing  
15 evidence is that measure or degree of proof which will  
16 produce in the mind of the jury a firm belief or  
17 conviction as to the allegation sought to be  
18 established. Intermediate degree of proof being more  
19 than a mere preponderance but not to the extent as such  
20 certainty required to prove an issue beyond a reasonable  
21 doubt. Proof by clear and convincing evidence is proof  
22 that persuades the jury that proof of the contentions is  
23 highly likely.

24           Instruction Number 40: If you find that  
25 plaintiff is entitled to compensatory damages for actual

1 harm caused by Defendant Jared Awerbach, breach of an  
2 obligation, you may also consider whether you should  
3 assess punitive damages against Defendant Jared Awerbach  
4 on the basis of his impairment with a controlled  
5 substance. If plaintiff proves that, one, Defendant  
6 Jared Awerbach willfully consumed or used marijuana  
7 knowing that he would thereafter operate a motor  
8 vehicle, and two, Defendant Jared Awerbach thereafter  
9 caused actual harm to plaintiff by operating the motor  
10 vehicle. The purpose of punitive damages is to punish a  
11 wrongdoer that harms the plaintiff and deter it in the  
12 future. Not to make plaintiff whole for injuries.

13           Consequently, plaintiff is never entitled to  
14 punitive damages as a matter of right and whether to  
15 award punitive damages against the defendant is entirely  
16 within your discretion.

17           Instruction Number 41: There are no fixed  
18 standards to determine the amount of punitive damage to  
19 award. The amount, if any, is left to your sound  
20 discretion to be exercised without passion or prejudice  
21 and in accordance with the following governing  
22 principals. The amount of a punitive damage award is  
23 not to compensate the plaintiff for damages suffered but  
24 what is reasonably necessary in light of the defendant's  
25 financial condition and fairly deserved in light of the

1 blameworthiness and harmfulness inherent in defendant's  
2 conduct to punish and deter the defendant and others for  
3 engaging in conduct such as that warranting punitive  
4 damages in this case. Your award cannot be more than  
5 otherwise warranted by the evidence in this case merely  
6 because of the wealth of the defendant. Your award  
7 cannot punish the defendant for conduct injuring others  
8 not parties to the litigation or financially annihilate  
9 or destroy the defendant in light of the defendant's  
10 financial condition.

11           In determining the amounts of your punitive  
12 damage awards, if any, against Defendant Jared Awerbach,  
13 you should consider the following guide posts: The  
14 degree of reprehensibility of defendant's conduct in  
15 light of, A, the culpability and blameworthiness of  
16 defendant's fraudulent oppressive and/or malicious  
17 conduct under the circumstances of this case; B, whether  
18 the conduct injuring plaintiff that warrants punitive  
19 damages in this case was part of a pattern of similar  
20 conduct by the defendant; and C, any mitigating conduct  
21 by the defendant including any efforts to settle the  
22 dispute.

23           The purpose of a punitive damage award is to  
24 punish the defendant for the actual harm inflicted on  
25 the plaintiff by the conduct warranting punitive

1 damages. In this case, since the measure of punitive --  
2 excuse me, since the measure of punishment must be both  
3 reasonable and proportionate to the amount of harm to  
4 the plaintiff and to the compensatory damages recovered  
5 by the plaintiff in this case how your punitive damage  
6 award compares to other civil or criminal penalties  
7 could be imposed to comparable misconduct since punitive  
8 damages are to provide a means by which the community  
9 can express iteration, outrage, or distaste for the  
10 misconduct of a fraudulent, oppressive, or malicious  
11 defendant and deter and warn others such conduct will  
12 not be tolerated.

13           Evidence has been presented concerning  
14 Defendant Jared Awerbach's 2008 car accident. You  
15 cannot use such evidence to award plaintiff punitive  
16 damage for conduct injuring others not parties to this  
17 litigation or conduct that does not bear reasonable  
18 relationship to the conduct injuring plaintiff that  
19 warrants punitive damages in this case. You may  
20 consider such evidence only with respect to the  
21 reprehensibility of the defendant's conduct and only to  
22 the extent that conduct is similar and bears a  
23 reasonable relationship to the defendant's conduct  
24 injuring plaintiff that warrants punitive damages in  
25 this case.

1           Instruction Number 42: The Court has given  
2 you instructions embodying various rules of law to help  
3 guide you to a just and lawful verdict. Whether some of  
4 these instructions will apply will depend upon what you  
5 find to be the facts. The fact that I have instructed  
6 you on various subjects in this case, including that of  
7 damages, must not be taken as indicating an opinion of  
8 the Court as to what you should find to be the facts or  
9 of as to which party is entitled to your verdict.

10           Instruction Number 43: It is your duty as  
11 jurors to consult with one another and to deliberate  
12 with a view toward reaching an agreement if you can do  
13 so without violation to your individual judgment. Each  
14 of you must decide the case yourself but should do so  
15 only after a consideration of the case with your fellow  
16 jurors and you should not hesitate to change an opinion  
17 when convinced it is erroneous.

18           However, you should not be influenced to vote  
19 in any way on any question submitted to you by the  
20 single fact that a majority of the jurors or any of them  
21 favor such a decision. In other words, you should not  
22 surrender your honest convictions concerning the effect  
23 or weight of evidence for mere purpose of returning a  
24 verdict or solely because of the opinions of other  
25 jurors. Whatever your verdict is, it must be the



1 product of a careful and impartial consideration of all  
2 the evidence in the case under the rules of law as given  
3 by the Court.

4           Instruction Number 44: If during your  
5 deliberation you should desire to be further informed on  
6 any point of law or hear again portions of the  
7 testimony, you must reduce your request to writing  
8 signed by the foreman. The officer will return you to  
9 court where information sought will be given to you in  
10 the presence of the parties and attorneys. Read backs  
11 of testimony are time consuming and not encouraged  
12 unless you deem it a necessity. Should you require a  
13 read back, you must carefully describe the testimony to  
14 be read back so that the court reporter can arrange her  
15 notes. Remember the court is not at liberty to  
16 supplement the evidence.

17           Instruction Number 45: When you retire to  
18 consider your verdict, you must select one of your  
19 number to act as foreperson who will preside over your  
20 deliberations and be your spokesman here in court.  
21 During your deliberation, all the exhibits admitted into  
22 evidence, these written instructions, and forms of  
23 verdict which have been prepared for your convenience.

24           In civil actions three-fourths of the total  
25 number of jurors may find and return a verdict. This is

1 a civil action. If your verdict is in favor of the  
2 plaintiff, you are directed to make special findings of  
3 fact consisting of written answers to the questions on a  
4 form that will be given to you. You shall answer the  
5 questions in accordance to directions in the form and  
6 all the instructions of the Court. As soon as six or  
7 more of you have agreed on a verdict and six or more of  
8 you agreed upon every answer in the special findings,  
9 you must have verdict and special findings signed and  
10 dated by your foreman and then return with them to this  
11 room.

12           Instruction Number 46: During opening  
13 statements, counsel for Defendant Andrea Awerbach stated  
14 that, quote, "Just because there's no evidence of any  
15 preexisting records doesn't mean none exist," end quote.  
16 You should disregard this statement. There is no  
17 evidence that plaintiff Emilia Garcia ever sought  
18 medical treatment related to back pain prior to the  
19 accident. It would be improper for you to speculate  
20 that such medical records exist.

21           Instruction Number 47: Now you will listen to  
22 the arguments of counsel as they endeavor to aid you to  
23 reach a proper verdict refreshing in your mind the  
24 evidence and law. Whatever counsel may say, you will  
25 bear in mind it is your duty to be governed in your

1 deliberations by the evidence as you understand it and  
2 remember it to be and by the law as given you in these  
3 instructions and return a verdict, which according to  
4 your reason and candid judgment, is just and proper.

5 Dated now March 8, 2016. I now sign the  
6 instructions. We are to the point of closing arguments.

7 Mr. Roberts, ready to proceed?

8 MR. ROBERTS: I am, Your Honor.

9 THE COURT: Just a couple minutes. Okay --

10 MR. ROBERTS: I appreciate it.

11 THE COURT: -- and then I'm going to interrupt  
12 you.

13 MR. ROBERTSON: Good morning. Jury in a  
14 little while, hopefully today you will go back into the  
15 deliberation room and you're going to have three jobs.  
16 The first and most obvious job is to answer the  
17 questions that are going to be given to you by the court  
18 and as the court noted in the instructions, the court  
19 has prepared a jury verdict form for your convenience.  
20 It's three pages of questions that you need to answer  
21 for us that's probably something everyone knew.

22 Your other jobs can be found also in the  
23 instructions of the Court. Let me show you again  
24 Instruction Number 1. It is your duty as jurors to  
25 follow the instructions and apply the rules of law. It

1 is a violation of your oath to base a verdict upon any  
2 other view of the law than that given in the  
3 instructions.

4           So your second job when you go back in the  
5 deliberation room is to make sure that everyone in the  
6 jury room follows the law when you answer the questions  
7 and that you answer the questions based on the law the  
8 judge has given you.

9           Your third job can be found in Instruction  
10 Number 43. It is your duty as jurors to consult with  
11 one another and deliberate with the idea of reaching an  
12 agreement if you can do so without violation of your  
13 individual judgment. Each of you must decide the case  
14 for yourself, but should only do so after consideration  
15 of the case with your fellow jurors.

16           So your third job is -- before you answer any  
17 of the questions on the verdict form is to explain to  
18 each other why you feel you should be answering the  
19 questions each way. So you have to look at the law.  
20 You have to make sure everyone follows it, and each of  
21 you has to deliberate and explain to the other jurors  
22 why you feel that way about the questions. This is the  
23 way the process works, and this is the way that justice  
24 is ensured.

25           During the case -- and you've been here for a

1 month, and I'm not going to sit here and go through  
2 every day and every witness and recap what I think they  
3 said. You've been here too. I understand despite my  
4 best efforts you may have questions as evidence comes in  
5 and certainly after these fine defense lawyers come in  
6 giving you their argument today you may have even more  
7 questions. So what I've done is put together some of  
8 the questions I think someone might raise in the back  
9 room and suggest to you what I think the answer to that  
10 question is, and the one I want to start with goes back  
11 to something that you've heard over and over and over  
12 again, and that I addressed in my opening statement.

13           If you recall, I said in opening statement,  
14 You're going to hear evidence, and part of what you're  
15 going to hear is an argument that Emilia is lying about  
16 something and there was an objection. We're not going  
17 to do that.

18           Let me share with you some lawyer code that  
19 you have heard over and over and over again. Subjective  
20 complaints which cannot be verified. That's code for  
21 don't believe her, she's not telling the truth. That's  
22 exactly what that is. And we've heard it over and over  
23 and over again for the last month. So if someone in the  
24 back room suggests to you, well, isn't all of this pain  
25 just a subjective complaint which cannot be verified?

1 What I'd like you to tell them is Emilia not lying. I  
2 don't think anybody believes that after watching that on  
3 the stand --

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

5 THE COURT: Come on up.

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

8 THE COURT: The last comment regarding  
9 Mr. Roberts' personal opinion is stricken from the  
10 record. You are instructed to disregard that. Go  
11 ahead.

12 MR. ROBERTS: With regard to subjective  
13 complaints that cannot be verified, certainly pain is a  
14 subjective complaint and the amount of pain that someone  
15 perceives is totally subjective, but the fact that  
16 Ms. Garcia had an injury is not subjective, and I want  
17 you to remember back to the evidence, remember back to  
18 the evidence of spasms, palpable spasms which was never  
19 explained by any of the defense doctors.

20 Ms. Garcia when she went to the emergency room  
21 three days after when her pain was slowly growing to the  
22 point she had to seek help, still had no palpable spasm  
23 in her lumbar spine, doctors told you palpable spasm  
24 cannot be faked. It's not something reported by the  
25 patient. It's something you press in and you feel the

1 spasm. So three days after the accident, after the  
2 accident, after the rebuttal, wasn't asked about spasm.  
3 In the examination, didn't feel spasm in the lumbar  
4 spine. Now, we go to the 11th, a little more than a  
5 week later and the chiropractor feels palpable spasm.  
6 The primary-care physician, palpable spasm. Then goes  
7 to Dr. Lemper who verified the palpable spasm.  
8 Dr. Cash, Dr. Gross, Dr. Kidwell and all three the crash  
9 occurred, the doctors testified still had palpable spasm  
10 that they can independently verify. This is not  
11 subjective, and we know that the palpable guarding is a  
12 mechanism of the body to protect itself when the body  
13 senses it has been injured. This is not subjective, the  
14 fact of injury.

15           Her pain levels, I agree. That's something  
16 that you have to listen to her complaints, you have to  
17 listen to the doctors and how they felt about how  
18 realistic she was evaluating the pain, but the fact of  
19 injury, that's not something subjective and not  
20 something in dispute. Two doctors for the defense,  
21 Poindexter and Klein. Poindexter and Klein both agreed  
22 and acknowledged that Ms. Garcia was injured in an  
23 automobile crash. They both said sprain/strain and that  
24 was the extent of the injury, so they agreed she was  
25 injured. They agreed she is in pain. Klein went so far

1 to agree that her pain complaints were real throughout  
2 all of this. This is not just suggestive. The doctors  
3 looked at the -- I would submit to you that there's real  
4 evidence of an injury and real evidence that the injury  
5 occurred in the automobile crash.

6           Sprain/strain is what the two doctors said,  
7 Poindexter and Klein, and that's it. Muscle damage,  
8 tendon damage, everybody agreed. Every single doctor  
9 who took the stand agreed that sprain/strain will  
10 resolve over time with or without treatment. You heard  
11 8 to 12 weeks from some doctors. Some doctors a little  
12 longer, but we know that all of the doctors agreed that  
13 it was just sprain/strain it would have resolved no  
14 matter what she did. It did not resolve. It got worse,  
15 and it ultimately required treatment that was  
16 recommended by her physicians.

17           If someone says Emilia might have had back  
18 pain before the crash, remind them that they're not  
19 allowed to speculate. The judge has told you that. He  
20 has issued an instruction. He has even issued a special  
21 instruction to disregard statements that medical records  
22 might have existed before the crash that would indicate  
23 that Ms. Garcia received treatment for lower back pain  
24 because there's simply no evidence of that and you can't  
25 speculate that that exists. There's no evidence of any



1 lower back pain suffered by Ms. Garcia before the crash,  
2 and there's more to it than that.

3           You know, we know about the preexisting  
4 spondylolisthesis. And we also know that the evidence  
5 is undisputed. It was causing her no pain before the  
6 crash, but it predisposed her, it made her more easily  
7 injured. The doctors all agree that most people with a  
8 spondylolisthesis are asymptomatic for the course of  
9 their life.

10           So if you look at treatment necessary to  
11 correct the spondylolisthesis because the  
12 spondylolisthesis had become painful after the accident  
13 then more likely than not, that treatment would have  
14 never been required. You heard testimony 80 percent of  
15 people with spondylolisthesis never need surgery, never  
16 experience pain, stays asymptomatic. And more likely  
17 than not, Ms. Garcia, who had lived her life for  
18 32 years without pain from her spondylolisthesis, would  
19 have continued to live her life without pain if  
20 Mr. Awerbach had not chosen to consume marijuana, get in  
21 the car, and crash into her on January 2, 2011.

22           If someone said that Emilia was inconsistent  
23 in statements, remember, Dr. Klein agreed that her pain  
24 complaints were real, and he even agreed that they were  
25 consistent based on his review of the records. Her pain

1 comes and goes. She's testified to that. She's agreed  
2 to that. The charts that are prepared by defense  
3 counsel show pain came and went, but it never went away  
4 and her doctors have told you it will never go away, her  
5 entire lifetime.

6           If someone says, Look at these photographs  
7 they've showed you of Emilia, she doesn't look injured.  
8 She's having fun. Look at that. She's drinking with  
9 her friends, she must be exaggerating. Her subjective  
10 reports of her pain must be exaggerated. And if this  
11 comes up -- and I'm sure you're going to see a lot of  
12 these pictures again. We spent hours going over these  
13 pictures with Ms. Garcia that they downloaded from her  
14 Facebook account, and you'll see them again, I'm sure.

15           But there's one I want you to think about and  
16 go back to and look at and it's Exhibit AAK2, and you'll  
17 probably remember seeing that. And that's her cousin  
18 Dolche, and she was helping her with an errand. Do you  
19 remember that testimony? And this was in January of  
20 2013. She had surgery on December 26th of 2012. So  
21 this is about more or less three weeks after her spine  
22 got opened up.

23           I'm sure you remember what happened.  
24 Dr. Gross told you about the procedure. Where they went  
25 in and removed the disk and put in the cages and put

1 these screws into her vertebrae. This had happened  
2 three weeks before this picture. The doctors had  
3 excused her from work for four months. She didn't have  
4 to go to work for four months while she recuperated.  
5 She was only using the walker for about two weeks and  
6 this is three weeks.

7           And this tells you what you can take from  
8 these pictures and whether or not you can believe the  
9 arguments about what these pictures showed. Nobody  
10 could contend that three weeks away from this Ms. Garcia  
11 was not in pain and her mobility was not limited, but  
12 here she is helping her cousin out, a smile on her face,  
13 putting on the construction worker jackets for a fun  
14 photo, doing her best to live her life and help her  
15 family. You can't see pain in a picture. You can't see  
16 what she's going through in this picture, and you can't  
17 see it in any of the other 17 pictures they want to show  
18 you in order to contend that she's living a normal life  
19 and she's not in pain.

20           And they'll show you 17 photographs. 17  
21 photographs over five years, that's over 1,800 days,  
22 1,891 days from the crash until today. And they're  
23 going to show you 17 photographs and ask you to  
24 disbelieve her testimony of her pain and her limited  
25 mobility and her limited ability to do the things that

1 she needs to do. Seventeen pictures over 1,800 days.

2           They didn't show you pictures of her using her  
3 walker. They didn't show you pictures that they didn't  
4 think supported their case. It's all smiles and, you  
5 know --

6           MR. MAZZEO: Objection, Your Honor, assumes  
7 facts not in evidence. Referring to the pictures that  
8 don't exist.

9           THE COURT: Sustained. I don't know if  
10 there's pictures of her in a walker.

11           MR. MAZZEO: Thank you.

12           MR. ROBERTS: So when you look at the  
13 pictures, remember that this is the face Emilia Garcia  
14 puts on even when she's in pain, and that she helps her  
15 family even if that means the pain is worse the next  
16 day.

17           MR. MAZZEO: Objection, Your Honor. That's  
18 speculation. That's not in evidence either.

19           THE COURT: Overruled.

20           MR. MOTT: And she told you. She said that  
21 when she gets up and she does things and she's more  
22 active she pays the price the next day, her pain  
23 increases. And she also said that she gets up and does  
24 it again.

25           Now, you've heard from Dr. Poindexter, you've

1 heard from Dr. Klein, and if someone says that you  
2 should listen to them when they tell you that her  
3 treatment is not reasonably caused by the crash, I want  
4 you to say, no, remember their qualifications compared  
5 to the qualifications of the doctors that treated  
6 Ms. Garcia and testified.

7           Dr. Klein, nice old guy, hadn't done spine  
8 surgery for 30 years, told you that there are people  
9 still doing spine surgery who testify as experts who are  
10 available who are even here in Nevada and they go all  
11 the way to California and find someone who hadn't done  
12 surgery for 30 years to tell you the surgery was not  
13 reasonably related to the accident.

14           And, guess what, they paid him \$93,000.  
15 \$93,000 they paid to someone who wasn't even qualified  
16 to do a spine surgery anymore to come and tell you that  
17 the surgery done by a qualified spine surgeon, a board  
18 certified spine surgeon, confirmed by Dr. Cash, another  
19 board certified orthopedic surgeon, was unnecessary and  
20 ill advised.

21           What about the qualifications of  
22 Dr. Poindexter? I don't need to go into this to a great  
23 degree. I don't need to go into this anymore than the  
24 first five minutes of my cross-examination. When you  
25 found out that Dr. Poindexter had failed his boards two

1 times in the specialty that he primarily practices in,  
2 in the specialty he wants to talk to you about, he  
3 failed his boards twice.

4           Now, you don't have to be a board certified  
5 doctor in order to practice medicine. It's not  
6 required. But you heard some of the other doctors talk  
7 about the process where you have to take a test and then  
8 you have to appear before a panel of qualified  
9 physicians in your specialty and convince them that  
10 you're knowledgeable and should be board certified, and  
11 he failed that twice. And that's the best they can do  
12 to find someone that disagrees with all of our board  
13 certified treating physicians.

14           Then there -- the next thing is very telling,  
15 the next question. I asked Dr. Poindexter, did you take  
16 the boards a third time and fail them again? He told  
17 you he did not remember. He told you that I don't  
18 remember if I failed the boards a third time in my  
19 specialty. That's not credible. Simply not credible.  
20 He doesn't know if he took his boards and failed them a  
21 third time.

22           So he's not qualified, he doesn't have the  
23 expertise to criticize Ms. Garcia's doctors, and he's  
24 not going to be honest with you on the stand. That's  
25 what you know about Dr. Poindexter.

1 MR. TINDALL: Objection. Move to strike the  
2 last comment about not going to be honest on the stand.  
3 It's a Crusteen [phonetic] violation.

4 THE COURT: Based on his prior statements I  
5 think it's okay. I'll overrule it.

6 MR. ROBERTS: Okay. I'll talk to you about  
7 some of the causation arguments that you've heard. So  
8 if someone says that the crash could not have caused her  
9 need for treatment because she didn't feel pain  
10 immediately at the scene, remind them that the doctors,  
11 the board certified doctors were asked about this and  
12 they all agreed that it was not uncommon in a case of a  
13 spine injury.

14 The defense doctors, Poindexter and Klein also  
15 agreed that it wasn't uncommon to feel pain immediately,  
16 but they had different opinions. I think Dr. Poindexter  
17 said 24 hours in his experience. He couldn't point to  
18 any studies. And then we heard from Dr. Klein who  
19 originally said a few hours and then he said up to 12,  
20 and he said, But I can't show you a study. This is just  
21 based on my experience. And for Dr. Klein, that's  
22 telling because Dr. Klein claims to be a specialist in  
23 evidence-based medicine. And evidence-based medicine  
24 is -- the theory is doctors shouldn't just rely on their  
25 own personal clinical experience, because it's not broad

1 enough, and they should be familiar with the literature  
2 and they should rely upon studies which show what all  
3 the other peer-reviewed literature has established.

4           And he said, I can't cite you to any study  
5 that's peer reviewed that says that you will feel pain  
6 immediately or within 24 hours or within 36 or 48 hours  
7 of the type of injury that Ms. Garcia. He couldn't  
8 point to anything other than his personal, anecdotal  
9 experience, and remember his experience, he hasn't been  
10 a spine surgeon for 30 years.

11           And the spine surgeons who deal with this  
12 every day, whose practice is dealing with spine  
13 treatment 90 percent of the time told you in their  
14 experience it is not unusual.

15           And Dr. Oliveri told you one of the reasons  
16 that this type of pain can come on slowly and not felt  
17 immediately and he showed you that little disk, and he  
18 showed you where the pain sensors were around the  
19 outside edge. It's called the annulus. And there  
20 aren't any pain receptors in the middle. So if you've  
21 got some damage in the middle of the disk, you're not  
22 going to feel it right away. But as it migrates towards  
23 the edge, it comes on slow. There are medical  
24 explanations for this, but ultimately, it comes down to  
25 common sense.



1           One of the jury instructions talks about  
2 direct evidence versus indirect evidence, probably a  
3 different word, but that's what it basically means, and  
4 if someone comes in and they're soaked wet, you can have  
5 direct evidence I saw them outside, I saw the rain  
6 coming down on them, I saw them get wet. That's direct  
7 evidence that the rain made them wet.

8           You can infer that the rain made them wet if  
9 there's evidence that it's raining outside, they were  
10 outside. They weren't wet before they went out in the  
11 rain and they came back in and now they're wet, you can  
12 infer that the rain made them wet. Now, maybe the  
13 security guard hit them with the hose as they came in  
14 the door, but that's not likely, and in this case, the  
15 doctors, all of the doctors, relied extensively on the  
16 time element as why they inferred that the injuries and  
17 the pain were caused by the automobile crash. She's  
18 asymptomatic before the accident. She has no pain.  
19 Within three days after the incident her pain is coming  
20 on and it never goes away. And the doctors could find  
21 no other explanation other than the crash.

22           So you could infer that the crash caused her  
23 pain because she had no pain before the crash, it comes  
24 on after the crash, and the doctors tell you she would  
25 not necessarily have felt pain at the scene of the

1 accident or even within a day.

2           And the burden of proof which the court put in  
3 the instructions and just read to you, the preponderance  
4 of the evidence, is nothing more than more likely than  
5 not. What we've been talking about the whole trial, and  
6 when I asked the doctors, the treating physicians, more  
7 likely than not, did the crash cause the pain, did the  
8 crash cause the need for the medical treatment we've  
9 discussed in the trial? Every doctor not only agreed  
10 but said it wasn't even close. That's what the evidence  
11 is. And I see it's noon, so this might be a good break,  
12 Your Honor.

13           THE COURT: Thank you. Let's go ahead and  
14 take our lunch break. During the break, you're  
15 instructed not to talk with each other or with anyone  
16 else about any subject or issue connected with the  
17 trial. You're not to read, watch, or listen to any  
18 report or commentary on the trial by any person  
19 connected with the case or by any median of information,  
20 including without limitation, newspaper, television, the  
21 Internet, or radio.

22           You're not to conduct any research on your  
23 own, which means you do not talk to others, text others,  
24 tweet others, Google, or perform any other kind of book  
25 or computer research with regard to any issue, party,

1 witness, or attorney involved in a case.

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

5           See you back at 1:15.

6           (Recess taken from 12:04 p.m. to  
7 1:11 p.m.)

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

10          THE COURT: Let's go back on the record.  
11 We're outside the presence of the jury.

12          Go ahead, Mr. Mazzeo.

13          MR. MAZZEO: Thank you, Judge.

14          Judge, I'm going to move for a directed  
15 verdict with regard to the claim for punitive damages  
16 against Andrea Awerbach, and the reasons why is because  
17 you've heard the evidence presented by the plaintiffs so  
18 far. They have not proved and provided any facts to  
19 support a claim to satisfy the elements for punitive  
20 damages. Pursuant to 42.005, they have not proven  
21 oppression or malice.

22          Both oppression and malice require a finding  
23 of despicable conduct with a conscious disregard.  
24 Malice as, you know, is either intentional, with intent  
25 to injure, or despicable conduct which is engaged in

1 with a conscious disregard of the rights or safety of  
2 plaintiffs.

3           So they have to prove both of those for  
4 conscious disregard, and -- they have to prove both  
5 conscious disregard and despicable conduct if they're  
6 seeking to prove either malice or oppression against  
7 Andrea.

8           Now, despicable conduct is conduct so vile and  
9 base or contemptible that it would be looked down upon  
10 and despised by ordinary, decent people. They didn't  
11 prove that.

12           Conscious disregard requires knowledge of a  
13 probable, harmful consequences of a wrongful act and,  
14 and a willful and deliberate failure to avoid these  
15 consequences.

16           So we're talking about conduct that is just  
17 underneath intentional but more than reckless:  
18 willful and deliberate failure. And we don't have  
19 that. The facts in this case don't support that --

20           The plaintiff has rested. They did not  
21 establish these facts. And it's a matter of law for the  
22 judge to dismiss this claim for punitive damages against  
23 Andrea.

24           Nevada case law requires, with regard to  
25 finding conscious disregard, it's conduct that has to

1 exceed negligence --

2 MS. ESTANISLAO: Gross negligence.

3 MR. MAZZEO: I'm sorry -- gross negligence or  
4 reckless disregard. They have not established that in  
5 this case.

6 Based on that, Your Honor, I request that the  
7 Court dismiss plaintiff's claim for punitive damages.

8 MS. SCHELL: Your Honor, we would object to a  
9 motion being made at this time as untimely. Under  
10 Rule 50(a)(2), motions for judgment as a matter of law  
11 may be made at the close of the evidence offered by the  
12 nonmoving party or at the close of the case.

13 We're not at either one of those points right  
14 now. You can renew a motion after the trial. We're not  
15 at that point.

16 I'll address it on this on the merits if you  
17 want me to, but I believe this is untimely. I've never  
18 had someone make a motion for directed verdict in the  
19 middle of my closing.

20 MR. STRASSBURG: Well, I could have waited  
21 until after his closing, but we are at the close of the  
22 case. And it's before the case is being submitted to  
23 the jury, so it is a proper time. So we can hear it now  
24 or we can hear it after Mr. Roberts finishes his closing  
25 argument, but...

1           THE COURT: I think it's still an issue of  
2 fact for the jury. I think there's at least  
3 circumstantial evidence that the key was either given or  
4 the key was left out with knowledge that Jared had a  
5 drug problem, had taken the car before, had been in an  
6 accident before. I think it's up to them. It's going  
7 to be up to the jury to decide whether or not it meets  
8 the burden.

9           MR. MAZZEO: That's it, Your Honor.

10          MR. MOTT: Just one housekeeping matter. The  
11 deposition testimony for Jared Awerbach and Andrea  
12 Awerbach that was played in the record during our case,  
13 this is just a transcript of it. We would like to mark  
14 it as a court exhibit if we can.

15          THE COURT: Okay. A court exhibit.

16          MR. MOTT: Thanks, Your Honor.

17          THE COURT: Otherwise, we're ready to get  
18 going?

19          MR. TINDALL: By court exhibit, they mean  
20 that's just for court, right?

21          THE COURT: Yep. It doesn't go back to the  
22 jury.

23          While I'm thinking about it, I just want  
24 everybody to look at the verdict form before it goes  
25 back to make sure it's the right one, because I had lots

1 of different versions of verdict forms on my desk. You  
2 can check now or you can check later. I mean, not going  
3 to go back until after closings are all done. I just  
4 may forget to remind you again later.

5 MR. MOTT: I'll remember.

6 MS. RODRIGUEZ-SHAPOVAL: I'll remember for  
7 you.

8 MR. MOTT: That's what it really is. Audra  
9 will make sure we don't forget.

10 (Jury entered.)

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

13 THE COURT: Go ahead and be seated.

14 Welcome back, folks. Back on the record, Case  
15 Number A637772.

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

18 MR. ROBERTS: Yes, Your Honor.

19 MR. MAZZEO: Yes, Your Honor.

20 THE COURT: All right. Mr. Roberts, you may  
21 proceed.

22 MR. ROBERTS: Thank you, Your Honor.

23 I'm going to do everyone a favor. I've got  
24 some more lists of those points that I was going to go  
25 through. I think I'm going to save the rest for my

1 rebuttal case if they get mentioned again and try to  
2 move through this a little bit more quickly -- not quick  
3 but a little bit more quickly.

4           The photographs -- I do want to address one  
5 point that I left out when I was talking about the  
6 photographs before. And, as you recall, when Ms. Garcia  
7 was being questioned about these photographs, this board  
8 was taken up to her time and time again, and she was  
9 asked about the report of pain levels somewhere in the  
10 area of the time in which the photographs were taken.  
11 But one of the things that I'm not sure we've focused on  
12 is what those numbers mean.

13           It is subjective. It's subjective reporting.  
14 But when Ms. Garcia was reporting her pain and writing  
15 the numbers, there was an explanation for what those  
16 numbers meant. And I'd like to go through that with you  
17 so that, as you hear the argument made by the  
18 defendants, you can judge for yourself whether or not  
19 the photographs are inconsistent with the reporting by  
20 Ms. Garcia.

21           So you've seen the pain diagrams, and we've  
22 talked about those. And here's the scale. Zero is no  
23 pain, 1 to 10 is minimal pain. During a period of time  
24 in which they showed Ms. Garcia out and active, the pain  
25 was a 3. That's a minimal impact on daily activities.



1 A 4 out of 10, minimal limitation in daily activities.

2 5 out of 10 is some limitation.

3           And you go all the way up to 8 out of 10,  
4 daily activities are difficult. Not that she can't do  
5 them; it hurts and it's hard to do them. So all the way  
6 up to 8 out of 10, Ms. Garcia is not saying she can't do  
7 activities; she's saying that activities are made very  
8 difficult by her pain.

9           You go all the way up to 9 out of 10 before  
10 you have a limited ability to do daily activities  
11 because of the pain. And 10 out of 10 says essentially  
12 unable to do any activity.

13           Now, if you keep this pain scale in mind and  
14 the definitions in mind, you'll see that all the  
15 pictures they want to show you, which is 17 pictures out  
16 of 1,981 days, there's nothing inconsistent in her  
17 reporting versus the pictures they're going to show you.  
18 Her reporting is not inconsistent with what she  
19 testified to.

20           And, remember, even during the worst period of  
21 time, she said 70 percent of limitation. Now, after the  
22 rhizotomy, she says 30 percent limitation, which means  
23 shed acknowledged she can still do 70 percent of what  
24 she used to do. There's absolutely nothing inconsistent  
25 or disingenuous about what Ms. Garcia testified to

1 during this trial.

2           So I told you your second job was going to be  
3 to follow the law. And if all we had was law, we  
4 wouldn't need you; we'd just have a judge. But your job  
5 is to take the law and apply it to the facts, because  
6 you are the judge of the facts. And I'd like to review  
7 with you some of the most important instructions that  
8 you're going to have to deal with in order to answer the  
9 questions that the judge has given you.

10           I'd like to draw your attention first to  
11 Instruction Number 33.

12           So, in determining the amount of losses  
13 suffered by Ms. Garcia as a result of the accident,  
14 here's some of the things that you take into account.  
15 And although this instruction says "if any," keep in  
16 mind what you've heard what the testimony is so far.  
17 There hasn't been now at this point any evidence that  
18 there was no injury and no damage. That evidence has  
19 not come in.

20           Because the evidence that you can consider is  
21 the -- is what happened after the lawyers gave opening  
22 statements. And remember the judge said opening  
23 statements are not evidence, and what lawyers told you  
24 they thought the evidence would be is not evidence.

25           So going back to the opening statements,

1 Andrea Awerbach's attorney told you you would hear from  
2 a Dr. Odell. You never heard from Dr. Odell.

3 Andrea Awerbach's attorney said you would hear  
4 from Dr. Scher. You did hear from him a little bit. He  
5 was the biomechanic who flew in from Seattle.

6 And go back to opening statements. They told  
7 you that Dr. Scher was going to testify that it was not  
8 scientifically probable that the motor vehicle accident  
9 caused damage to the lumbar spine or exacerbated any  
10 preexisting condition of the lumbar spine. That's what  
11 they told you they were going to do.

12 Dr. Scher came in. He started to give his  
13 opinions. The Court struck all his opinions because  
14 they were without scientific foundation. So you can't  
15 consider what they told you in opening as evidence that  
16 there were no injuries.

17 Similarly, Jared Awerbach's counsel, about  
18 Dr. Scher, told you that he's going to do it the way  
19 engineers do it. He's got computers. He's got science,  
20 science the you-know-what out of it. And he promised  
21 you that you were going to hear from Dr. Scher, but you  
22 didn't. So there's no evidence that the collision did  
23 not cause the injuries.

24 So the only question for you to consider at  
25 this point is how much of the injuries and the treatment

1 that you've heard about was proximately caused by the  
2 collision.

3           And we've got the burden of proving that. We  
4 have to prove that the things beyond what they've  
5 acknowledged -- the strain/sprain -- we have to prove  
6 that it was reasonably related to the collision and that  
7 the treatment was reasonable and necessary. And I think  
8 if you -- strike that.

9           If you think back to the testimony of all of  
10 the treating physicians, you'll remember that every  
11 single one of them told you that, in their opinion to a  
12 reasonable degree of medical probability or higher, that  
13 the treatment that you heard about was caused by the  
14 collision and that none of the treatment would have been  
15 incurred in the absence of the collision.

16           So these are the items of damage that you'll  
17 need to consider. The reasonable medical expense the  
18 plaintiff has necessarily incurred as a result of the  
19 accident. The reasonable medical expenses that you  
20 believe the plaintiff will probably incur in the future,  
21 loss of household services in the past, any loss in the  
22 future that you may find.

23           And the Court has also instructed you that  
24 full and fair compensation includes physical and mental  
25 pain, suffering, anguish, and disability, including the

1 loss of enjoyment of life or the lost ability to  
2 participate and derive pleasure from the normal  
3 activities of daily life.

4           And that's what we're going to ask you to do  
5 as part of full and fair compensation. This is what the  
6 law requires as part of your oath. If you find that  
7 Ms. Garcia has suffered this type of damage, the law  
8 requires you to try to award the amount of money  
9 necessary to compensate for that.

10           And one way to look at this and look at the  
11 types of damage that the Court has instructed you on is  
12 you've got harms and losses that we've shown were the  
13 result of the accident. And so when you look at the  
14 medical expenses, when you look at household services,  
15 it's money to fix what can be fixed.

16           If a surgery or a rhizotomy doesn't fix it and  
17 doesn't take away the pain but helps, that's still part  
18 of damage, to fix what can be fixed and help what can be  
19 helped.

20           And then what's left are the things that can't  
21 be fixed or helped. And that's where physical and  
22 mental pain, suffering, anguish, and disability come in.

23           And if someone says, "Well, the money won't  
24 make the pain go away, the money won't give her back the  
25 activities," well, if it could, then that would be

1 special damage. That would be money to fix what can be  
2 fixed.

3           So, by definition, this is money that you need  
4 to weigh and balance the harms versus the amount of  
5 money to reasonably compensate for that. And I'll talk  
6 about some ways that you can do that when we get to our  
7 discussion of damages.

8           And when you consider damages and you consider  
9 the harms that were proximately caused by the accident,  
10 this is a very important instruction, Number 35.

11           "A person who has a condition or disability at  
12 the time of an injury is not entitled to recover damages  
13 for that."

14           This is where the spondylolisthesis comes in.  
15 This is where the claims of age-related changes in the  
16 spine that were not causing pain.

17           So you can't award money due to the fact that  
18 she had an asymptomatic spondylolisthesis, but there  
19 were no damages that were going to flow from that.  
20 There were no costs that she was going to incur, because  
21 the scientific evidence is more likely than not it never  
22 would have become painful, it never would have been  
23 treated.

24           But the fact that she had this, she is still  
25 entitled to recover for an aggravation caused by the

1 injury. So if it's asymptomatic and now it requires  
2 treatment, under the law she gets all of the treatment  
3 unless you find that some of the treatment would have  
4 been necessary anyway, simply due to the preexisting  
5 spondylolisthesis. And there's no scientific evidence  
6 of that. Even the defense doctors agreed.

7           And the fact that her condition might have  
8 made her more susceptible to being hurt in this  
9 collision is not a defense. They still have to pay if  
10 you find that the spondylolisthesis was asymptomatic  
11 before the accident and became symptomatic during the  
12 accident.

13           And I'd submit to you that you have to find  
14 that it was asymptomatic before the accident because  
15 there's no evidence otherwise. And the Court has  
16 instructed you that there is no evidence that Emilia  
17 Garcia ever sought medical treatment related to back  
18 pain, and it would be improper for you to speculate that  
19 such medical records exist.

20           So the evidence shows that there's no medical  
21 treatment before the collision; there's medical  
22 treatment after the collision. The defense doctors  
23 agree that some of the treatment related to  
24 sprain/strain is reasonable, but at some point the  
25 causal connection stopped. But they've offered you no

1 explanation for why, to a reasonable degree of medical  
2 probability.

3           So what have they done instead? They've  
4 criticized the treatment. They've criticized the fact  
5 that the doctors can't find the pain generators.  
6 They've criticized Dr. Gross and Dr. Cash for  
7 recommending surgery.

8           They've talked about failed back surgery  
9 syndrome and claimed that the back surgery made things  
10 worse instead of better and that part of the current  
11 pain is caused by the surgery and not the accident.

12           This is where Instruction Number 25 comes in.  
13 If you find that a defendant is liable for the original  
14 injury, the sprain/strain, the original need to go to  
15 the doctor, then that defendant is also liable for any  
16 aggravation of the original injury caused by negligent  
17 medical or hospital treatment or care or for any  
18 additional injury caused by medical injury or care.

19           MR. MAZZEO: Objection, Your Honor. There's  
20 no evidence of negligent medical treatment in this case.

21           THE COURT: Overruled.

22           MR. ROBERTS: Thank you, Your Honor.

23           And I agree with Mr. Mazzeo. There is no  
24 evidence of negligent medical treatment. Dr. Klein,  
25 although he disagreed with the decision, said it wasn't



1 negligence, it wasn't malpractice.

2 But even though the defendants aren't saying  
3 it and aren't saying it's negligence, they want to imply  
4 it by their doctors saying, shouldn't have done the  
5 surgery; now the pain is caused by the surgery.

6 MR. MAZZEO: Objection, Your Honor.  
7 Misstatement. Mischaracterization.

8 THE COURT: Overruled.

9 MR. ROBERTS: So keep this in mind. The  
10 evidence that we've submitted is that her treatment was  
11 continuous from three days after the collision until  
12 today. And all the doctors say that it's causally  
13 related. And when they put on evidence and talk about  
14 doctors doing things which they don't think are  
15 necessary, don't think that, oh, well, this breaks the  
16 chain of causation, because it doesn't. If it is  
17 related to the accident and she would not have been at  
18 the doctor but for the collision, then it's causally  
19 related to the collision even if the treatment is  
20 negligent, even if it caused additional pain.

21 We're not saying it did. We believe that the  
22 evidence shows that all of the treatment has helped,  
23 that the spine surgery immediately resulted in a  
24 70 percent reduction in the symptoms from the spine. It  
25 deteriorated 50 percent, and now the rhizotomies have

1 continued to fix things.

2           So we think that the treatment has been  
3 appropriate. That's what the proof is. There is no  
4 negligence. But don't think that the testimony that  
5 they've put on breaks the legal chain of causation. It  
6 doesn't.

7           Here's Instruction Number 24. And a lot of  
8 legal language in here. There can be more than one  
9 proximate cause of the injury. And this is what I want  
10 you to take away from this. The court has already found  
11 as a matter of law that the collision was Jared's fault.  
12 The question is how much injury and damage was caused by  
13 that? We're also going to be arguing that it's Andrea  
14 Awerbach's fault for negligently entrusting her vehicle  
15 to Jared.

16           And what this instruction says is they can  
17 both be at fault. You don't have to choose. If they're  
18 acting together, then you can have more than one  
19 proximate cause of the injury.

20           And when you're determining whether or not  
21 Mr. Awerbach had permissive use of the vehicle, whether  
22 he had permission to drive Andrea Awerbach's car, this  
23 is a very important instruction, because we talked a lot  
24 about the plaintiff having the burden of proof as a  
25 general matter, and we have to prove everything we need

1 to prove by a preponderance of the evidence, more likely  
2 than not.

3 For issues dealing with our demand for  
4 punitive damages, we have to prove by clear and  
5 convincing evidence. That's a standard between more  
6 likely than not and beyond a reasonable doubt.

7 What this says is for this particular issue of  
8 permission, express or implied, the defendant Andrea  
9 Awerbach has the burden of proof. There's a presumption  
10 that he had permission, and they have to prove to you  
11 that he didn't. Very important.

12 And the claim for negligent entrustment  
13 requires us to prove one thing other than permissive  
14 use. Actually, two things. One and two.

15 So it's not negligent to entrust the car, to  
16 give him permissive use, unless Ms. Awerbach knew that  
17 he was an inexperienced or incompetent person.

18 We would submit to you that she knew or should  
19 have known that he did not have a license, which makes  
20 him an incompetent person; that she knew or should have  
21 known that he was smoking marijuana every day for the  
22 four years that he lived at that apartment; and that she  
23 knew that when she drug-tested him for a period of time,  
24 according to Jared Awerbach, he failed over 75 percent  
25 of the tests.

1           So the evidence is going to be that, if she  
2 gave him permissive use, she gave permissive use to an  
3 inexperienced or incompetent person. And the Court has  
4 already found that Jared Awerbach was at fault for the  
5 accident.

6           This instruction goes to our request for  
7 punitive damages. So we know that Jared Awerbach has  
8 already been found at fault for the accident and for any  
9 harms caused by the collision.

10           In order to award punitive damages, we have to  
11 show a couple more things by clear and convincing  
12 evidence. We have to show that Jared Awerbach willfully  
13 consumed or used marijuana, knowing he would thereafter  
14 operate a motor vehicle.

15           What is the evidence of that?

16           The evidence is that he drove his mother's car  
17 to Cherise Killian's apartment, and she told you that he  
18 smoked a big blunt -- which is a cigar wrapper cut open,  
19 filled with marijuana -- and that she saw him do that.

20           MR. MAZZEO: Objection, Your Honor. That is  
21 misstatement of Cherise Killian's testimony.

22           THE COURT: Overruled.

23           MR. ROBERTS: So Cherise Killian has told you  
24 that he willfully consumed or used marijuana. You can  
25 infer that he knew he would thereafter operate a motor

1 vehicle because he drove there and needed to drive back  
2 and, in fact, he was driving back and driving home.

3           Number two has already been found as a matter  
4 of law, that he caused actual harm to the plaintiff by  
5 operating the motor vehicle.

6           In addition to the statements of Cherise  
7 Killian, we've also got in the record Exhibit 1-16, and  
8 this is the impaired driving report from Officer  
9 Figueroa where he states, "Driver admitted to smoking  
10 marijuana prior to driving listed vehicle."

11           So we have an admission by Mr. Awerbach, and  
12 you also heard the deposition of Officer Figueroa where  
13 he stated under oath in his deposition that Mr. Awerbach  
14 admitted to this.

15           So we've got Cherise Killian's testimony. We  
16 have an admission by the driver against his interest.  
17 And Mr. Awerbach has not taken the stand and denied. So  
18 the un rebutted evidence, the clear and convincing  
19 evidence, is that he smoked marijuana knowing that he  
20 was going to drive a motor vehicle.

21           There's also circumstantial evidence from  
22 which you can infer that he had smoked that day, and  
23 that's contained in Exhibit 1, Page 11, the impaired  
24 driving report, where "Driver had a clear plastic bag  
25 with green leafy substance, positive for marijuana,

1 8.8 grams."

2           So seen smoking, 8.8 grams in his possession,  
3 admitted smoking.

4           And, finally, we have his blood work, which  
5 the Court has instructed you on, where marijuana  
6 metabolite, right here on this line, 47 nanograms per  
7 milliliter, the legal standard for impaired, which the  
8 Court instructed you on -- I'm not going to pull it up;  
9 I know you all saw it -- was 5.

10           So Mr. Awerbach smoked, was seen smoking,  
11 admitted to smoking, and had marijuana metabolite in his  
12 blood of almost 10 times the legal limit. Clear and  
13 convincing evidence that he intentionally consumed  
14 marijuana knowing that he was going to drive a vehicle.

15           So let's get to the questions and your job to  
16 fill out the questions from the judge.

17           Your very first question that you need to  
18 determine is what amount of damages were sustained by  
19 Emilia Garcia as a result of the automobile collision on  
20 January 2nd of 2011? And then there are various  
21 categories that you're going to be asked to fill in, and  
22 I'd like to go through those categories with you and  
23 review the evidence in support of what numbers goes in  
24 each of those blanks.

25           The first category is the past medical

1 expense. And if you remember back in opening, I showed  
2 you a chart where we had gone through and totaled up all  
3 of the invoices for medical treatment. And I told you  
4 that you were going to hear some disagreement about the  
5 reasonableness of some of these prices.

6 And, in fact, we put Dr. Oliveri on the stand,  
7 who reviewed all of the invoices for reasonableness.  
8 And he told you that he found some of the charges to be  
9 excessive or unreasonable, and I wrote those down as he  
10 went through it.

11 In addition, Dr. Oliveri explained that, to  
12 get to that number, there were three entries that were  
13 not shown on the original chart. And, if you remember,  
14 I wrote those down as he went through them: Matt Smith,  
15 Surgery Arts, and Valley View. And he found these  
16 amounts to be reasonable.

17 So what I have done for you is I've taken the  
18 flip chart. I've taken these new numbers, and I've put  
19 them together in a new summary of the evidence. And  
20 you'll see that the reasonable medical expense causally  
21 related to the accident, which we're seeking, has been  
22 reduced from 627,920 at the beginning of trial to  
23 \$574,846.01. Now, Mr. Mott found the one cent last  
24 night about midnight as we were going through the  
25 spreadsheet.

1           So this is the number that we would ask you to  
2 place in the line for past medical expense causally  
3 related to the collision.

4           You also heard evidence which will help you  
5 determine the number to put in the next line for future  
6 medical expenses, and this was what Dr. Oliveri called  
7 his life-care plan. After reviewing all of the  
8 treatment, all of the recommendations of her treating  
9 physicians, he came up with a plan that would include  
10 all of the medical expenses he found that would more  
11 likely than not be necessary as a result of the  
12 collision.

13           And when he was on the stand, we reviewed his  
14 summaries. It really wasn't that complicated. He went  
15 through, and he planned physician visits for her  
16 remaining life expectancy -- spine surgeon visits, some  
17 physical therapy, some analgesic medications and  
18 high-spasm medications, some MRI costs -- and he came up  
19 with the current cost of each of those items and the  
20 number of years in which he found that they were needed.

21           He also planned for repeat radiofrequency  
22 ablations. And I actually misspoke during my opening.  
23 I think I told you that was two a year, and that was  
24 because I thought that's what he had done because  
25 Dr. Kidwell and Dr. Gross -- Dr. Gross, rather, had



1 stated that she could need them up to every six months,  
2 based on his experience.

3 Dr. Oliveri said, well, up to every six  
4 months, but sometimes 18 months. So what's the  
5 more-likely-than-not scenario is once every 12 months.  
6 So we used a more conservative number, and this is one  
7 rhizotomy per year for 48 years in the life-care plan  
8 that Dr. Oliveri put together.

9 She's had one. It was back in November. And  
10 when she testified, she told you that the pain was just  
11 starting to come back somewhat. The nerves are growing,  
12 and so the pain is going to continue to get worse until  
13 she needs another rhizotomy. And, according to  
14 Dr. Oliveri, more likely than not that will be in  
15 September.

16 We also have the cost of a lumbar  
17 reconstructive surgery. All of the treating physicians  
18 have said, more likely than not, you have that adjacent  
19 section breakdown, which will eventually, more likely  
20 than not in 22 years, result in the need for one more  
21 surgery like she had already.

22 Another fusion, this one of the level above at  
23 L3-4 because of the additional stress put on this once  
24 4-5 and 5-S1 are fused. And even the defense doctor  
25 agrees that, more likely than not, she's going to need

1 another fusion now that she's had the first.

2 Both of these treatments will help her pain,  
3 but it won't take it away. She's still going to have  
4 pain for the rest of her life. And I'd like you to  
5 think about the way that pain will present itself.

6 Right now she came in and testified -- and  
7 she's less than six months from her last rhizotomy --  
8 she's doing better. She only has a 30 percent loss of  
9 her ability to do activities that she's told you about.  
10 Her pain levels are better, sometimes as low as 2, 4 on  
11 a bad day, which is pretty good. She's off the narcotic  
12 medicine.

13 But now, according to the doctors, to a  
14 reasonable degree of medical probability, her pain is  
15 going to go up from a 4. It's going to continue to go  
16 up. She needs that rhizotomy again in September. It's  
17 going to drop back down, and then it's going to do this.

18 That's going to happen 50 different times over  
19 her life -- 48 times over her life, a continued cycle  
20 with the pain getting better and then knowing it's  
21 coming back and having to deal with that.

22 The lumbar reconstruction surgery. You've  
23 heard the evidence from her doctors. They recommended  
24 this. It took her two years to go through it because  
25 she was terrified of the thought, terrified of the

1 thought of having her back cut open and screws put into  
2 her spine.

3           It took her two years. She's glad she did it.  
4 She told me she would do it again based on the relief  
5 she got.

6           But now she knows in 22 years, she's going to  
7 have to go through that all over again and face all of  
8 those risks again. And Dr. Gross told you it's not just  
9 that it, Oh, whoops, we have another segment that's  
10 unstable now; we've got to do something about it. It's  
11 going to be another, more likely than not, five-year  
12 build-up in pain in that segment until you reach the  
13 point where it's so unbearable, she has to consent to  
14 the surgery again. And she has to look forward to that,  
15 and that hangs over her head for her whole life.

16           The medical treatment in this plan does not  
17 fix everything. It helps, but it does not take away the  
18 pain, the suffering, the anxiety, and the knowledge of  
19 what's coming. It doesn't take away the fact that her  
20 activities and restrictions will increase again, not  
21 just in 22 years, but every year leading up to that  
22 rhizotomy.

23           Dr. Smith came in, and he reviewed the  
24 life-care plan that Dr. Oliveri put together, and he  
25 assigned a present value to that. What amount of money

1 today do you need in order to pay for all the medical  
2 treatment into the future that she's more likely than  
3 not is going to need?

4           And he explained to you how he did that. And,  
5 if you remember, this was cumulative up to her life  
6 expectancy of 84 years.

7           And the 593 is the stimulator option, but  
8 because the stimulator is that permanent implant that  
9 has -- you have to have surgery to change the batteries,  
10 Ms. Garcia opted for the rhizotomy instead. Her  
11 physician said that was a good option.

12           So we're not asking you for the 593. This is  
13 the number without the stimulator. So the number we  
14 would ask for you to put in for future medical care is  
15 2,166,715. We're not asking for the 593.

16           But to the extent that they're arguing or will  
17 argue that she's not really going to need the  
18 rhizotomies. She had some pain come back after the  
19 rhizotomy. If the nerve roots are burned, the pain  
20 can't come back. So if she's got pain, the rhizotomy  
21 must not have been effective and she doesn't need any  
22 more.

23           Well, if you take away any of the rhizotomy,  
24 then we would ask you give the stimulator at \$593,462.  
25 But the medical evidence simply doesn't support it.

1 Because, while they want to isolate one note where she  
2 said she had a recurrence of pain and where the  
3 physician assistant wrote something down about her usual  
4 pain taken out of context, remember we showed you the  
5 previous visit where Dr. Kidwell said the pain was above  
6 and below the rhizotomy site, and she has resumed a lot  
7 more activity.

8           And Dr. Kidwell told you he didn't think her  
9 pain indicated the rhizotomies didn't work because it  
10 was above and below. And then it was the natural result  
11 of her being so limited for so long, that the  
12 rhizotomies were so effective, she started doing more  
13 things and got sore above and below the site.

14           So there is no competent medical evidence that  
15 the rhizotomies didn't work. The unrebutted medical  
16 testimony from her treating physicians is that the  
17 rhizotomies are reasonable, they're necessary, and  
18 they're causally related to the collision.

19           So past loss of household services. You've  
20 heard testimony from Ms. Garcia. You've heard testimony  
21 from Dr. Stan Smith, the economist, which has given you  
22 the tools to calculate a number to put in this blank.

23           Dr. Smith gave you a number of \$19 an hour,  
24 based on his market research, and said that was for  
25 service such as Merry Maids, to have someone come in

1 your house to perform household services.

2           He then said, based upon tables that  
3 economists have studies and created, someone in her  
4 demographic would spend about 24 hours a week doing  
5 household services. So that's 52 weeks a year. That's  
6 1,248 hours a year. So if there was a full 100 percent  
7 loss of household services, that would be a loss of  
8 \$23,712.

9           And he says he interviewed Ms. Garcia and he  
10 asked her about how much time she spent. She said that  
11 24 hours sounded about right. She has told you that  
12 herself on the stand.

13           And then there's some numbers where she told  
14 Dr. Smith that she had lost about 70 percent of her  
15 ability to do those household services before the  
16 fusion. After the fusion, it got better and went up to  
17 50 percent, and that it's currently at only a 30 percent  
18 loss after the rhizotomy.

19           So if you just do the math based on the  
20 numbers Mr. Smith gave you and the testimony of  
21 Ms. Garcia, it's about 16,000 a year before the fusion,  
22 11,000 a year after the fusion before the rhizotomies,  
23 and then just 1,700 for the partial year since then.

24           You add those up, and this is the number we  
25 would ask to put in the blank, \$67,579 for past loss of

1 household services.

2           Mr. Smith also talked to you about future loss  
3 of household services through her life expectancy. And  
4 one of the numbers that he gave you -- and he told you  
5 that he's not telling you what the percentage is; he's  
6 just looking at what she said, he's looking at what  
7 Dr. Mortillaro said, and he's coming up with some  
8 examples to give you based on what you find to be her  
9 probable loss of her ability to do household services  
10 into the future.

11           And, remember, what she can do today and how  
12 she appears today is not going to be consistent. There  
13 are going to be times that she's worse and times that  
14 she's better. She's at one of her best times right now.  
15 And right now she's testified she's at about a  
16 30 percent loss.

17           So if you were to find that that's probably  
18 going to be her condition based on her testimony and the  
19 medical evidence, there would be 263,000 for loss of  
20 household services.

21           If, due to these periods of time when things  
22 were going to be worse, especially that five years  
23 approaching her next fusion, 40 percent would be  
24 439,666. If you think that's a little bit high based on  
25 what you've seen, 20 percent would be 219,833.

1           So these are some numbers that you can use to  
2 decide what to put in that blank. I'm going to ask you  
3 to put 263,000 in. I think that's conservative, and I  
4 think it's fair and justified by the evidence that's  
5 before you.

6           So now we've got pain, suffering, and loss of  
7 enjoyment of life into the past and into the future.

8           This is the hard one. Up until now, the  
9 numbers that I've given you are what the evidence shows  
10 are money reasonable and necessary to pay her past  
11 medical expenses, her future medical expenses, to pay  
12 for help around the house.

13           None of these numbers are intended to  
14 compensate, under the law, Ms. Garcia for the  
15 noneconomic part of the equation, for the things that  
16 can't be fixed or helped.

17           So how do you go about placing a number on  
18 those things? How bad? How much does it hurt? You've  
19 seen evidence of the pain charts, of her subjective  
20 reporting. You've heard her describe the impact on her  
21 life, and you've seen that her pain is 4 to 8. So I  
22 would submit to you, the evidence shows that her pain is  
23 on the bad side.

24           In determining pain and suffering and loss of  
25 enjoyment of life, we also have to look at how long.



1 The evidence is undisputed that how long in this case is  
2 forever. Her pain will not go away until she dies. And  
3 that's on the high side of the scale. Pain that never  
4 goes away.

5           And when pain never goes away when the doctors  
6 have told you it's never going to go away, then hope  
7 goes away, hope that you'll have no pain goes away. And  
8 that's part of the equation. And when you've got  
9 3 million for the expenses, the harm here, the pain is  
10 the worst harm of all. And it's got to be more than  
11 that.

12           When someone gets a call in the middle of the  
13 night and their loved one has been involved in an  
14 automobile crash, your loved one has been taken to the  
15 hospital, they were in an automobile crash, what is the  
16 first thing that a person thinks of? Do they say, "How  
17 much is the ambulance going to cost? How much treatment  
18 is this going to require? What are the hospital bills  
19 going to be?"

20           That is not what a reasonable person thinks  
21 when they are told their loved one has been involved in  
22 a crash and is hurt. It's, "How is she? Is she in  
23 pain? Is she going to be okay? Is she ever going to  
24 get better?"

25           These are the things that a reasonable person

1 thinks of because these are the most important things.  
2 They're more important than the cost of the treatment,  
3 and they have to be valued and compensated in accordance  
4 with how important they really are.

5           So Ms. Garcia's pain will continue for 47  
6 years. 4 out of 10, 8 out of 10, in that range, more  
7 likely than not. It will never go away.

8           And in thinking about the value of that, think  
9 about a reasonable person and they're in a situation  
10 like Ms. Garcia where they have pain that's never going  
11 to go away for the rest of their life and there's a  
12 machine that can take away their pain for a minute.  
13 Like a laundromat: You put it in the slot, you turn the  
14 knob, and your pain goes away for a moment.

15           If you would believe it would be reasonable  
16 for a person to put a quarter in and turn the slot, if  
17 that's a reasonable compensation to make the pain go  
18 away -- and this is just one example -- a quarter a  
19 minute for 47 years is \$87,600 a year for a quarter a  
20 minute for the pain.

21           There is no standard by law. You determine  
22 what is reasonable, in your enlightened conscience what  
23 is reasonable for having to endure life long pain and  
24 suffering.

25           And even though the line on the verdict form

1 just says "pain, suffering, and loss of enjoyment of  
2 life," I want to take you back to the instructions by  
3 the Court, and you'll see "mental pain, physical pain,  
4 anguish, grief."

5           Each one of those elements has a value and are  
6 subtly different. The amount that you put in there is  
7 totally up to you. But it has to be full and fair  
8 compensation. It can't be less just because it's not  
9 going to take the pain away. That's not what the law  
10 demands.

11           Loss of enjoyment of life is one of the things  
12 here that's included in that line item but which we've  
13 put on separate evidence of. And this was Stan Smith,  
14 and you heard him talk about the studies and the  
15 economic way of trying to value enjoyment of life.

16           And this is a tool for you to use. You're not  
17 bound by it. Give it whatever weight you think it  
18 deserves.

19           Dr. Ireland, who criticizes it, has never  
20 calculated loss of enjoyment of life. He's simply not  
21 qualified to criticize someone who does. And this is  
22 his specialty, following Stan Smith around the country,  
23 making extraordinary sums of money criticizing his work  
24 without providing there is any alternative.

25           So Stan Smith said 132,000 a year, more or

1 less. You apply a 30 percent reduction in the enjoyment  
2 of life, and that's 39,600 a year. \$39,000 a year to  
3 have pain every -- every day when you try to do the  
4 activities, to have your activities limited.

5           Even when you're doing the activities and  
6 taking your kids out to the beach, you're not enjoying  
7 them as much because you're limited and you're in pain  
8 and you know the pain is going to be worse the next day  
9 because of what you did. \$39,600 is what you would get  
10 using Stan's calculation. And that's a reasonable  
11 number.

12           And I told you at the beginning that this is  
13 the type of case where I was going to have to ask for a  
14 big award. And this is one calculation of how you could  
15 get to a number for future loss of enjoyment of life.  
16 \$39,600 for loss of enjoyment of life based on a  
17 30 percent reduction and Dr. Smith's calculations,  
18 87,600 based on a quarter of minute. And that's only  
19 for the 16 hours she's awake. I didn't put anything for  
20 when she's sleeping.

21           Then you've got to talk about the mental pain  
22 and suffering that goes along with the physical pain and  
23 suffering. We've talked about her grief, her anguish  
24 during times -- during times that are bad. And the law  
25 requires you to also award for disability, being unable

1 to do things in a normal way.

2           So you add all those up together, and you  
3 can't leave anything out under the law if you find the  
4 evidence supports it, and that's \$177,000 a year times  
5 47 years is \$8,328,400. Again, this is one calculation.  
6 The number that you put there is yours, as long as it's  
7 full and fair compensation.

8           So this recaps the numbers. Things add up.  
9 This is just the numbers that I've gone through with  
10 you, and they add up to \$13,096,540.01. And this does  
11 not yet include any award that you decide to make  
12 against Jared Awerbach for punitive damages.

13           So how do you go about deciding what award of  
14 punitive damages is proper?

15           The degree of reprehensibility of the  
16 defendant's conduct. Almost 10 times the legal limit,  
17 driving without a license, whether or not the conduct  
18 was a pattern of similar conduct by the defendant.

19           We've heard, by his own testimony, he drove  
20 two to three times a week on errands with no license,  
21 and you can infer he drove two or three times a week on  
22 errands high on marijuana, because he testified under  
23 oath that he smoked marijuana every day over the four  
24 years he lived at that apartment. So this is a  
25 continuing pattern from the time he crashed his mom's

1 car in 2008 until he crashed it again in 2011.

2 And then, see, you can determine any  
3 mitigating conduct, including any efforts to settle the  
4 dispute. These are the things the law allows you to  
5 consider, which is why they've been telling you Jared is  
6 sorry. He's sorry this happened. He's a changed man.  
7 He's made efforts to become better. And this is  
8 mitigating conduct which you should consider in deciding  
9 either not to award punitive damages.

10 Because, remember, these numbers here are to  
11 compensate Ms. Garcia for her harm. The punitive  
12 damages aren't to compensate Ms. Garcia. That's not the  
13 purpose under the law. The purpose under the law is to  
14 punish Jared Awerbach for what he did and to deter him  
15 and others from similar conduct in the future.

16 So what does the evidence show? Words. "I'm  
17 sorry." But what do Mr. Awerbach's actions show? They  
18 show that he continues to refuse to accept  
19 responsibility for the damage he did that day; that he  
20 continues to blame others, from Ms. Garcia to her  
21 treating physicians; and that he continues to this day  
22 to avoid responsibility for the damage he caused in the  
23 crash. And that's a factor that you can consider in  
24 deciding to award punitive damages and the amount of  
25 punitive damages.

1           Think about it. Dr. Klein, \$93,000.  
2 Dr. Ireland, 23 to \$25,000. Dr. Poindexter, \$8,000.  
3 Two attorneys for five weeks, attorneys for five years,  
4 all in attempt to avoid responsibility for paying the  
5 damages he caused by the crash.

6           The evidence shows that he's not really sorry.  
7 And he certainly hasn't completed the 12-step program,  
8 which includes admitting responsibility and then making  
9 amends.

10           So the amount has to be sufficient to deter  
11 Mr. Awerbach from doing this again. Maybe the evidence  
12 shows that it wouldn't take that much to deter him, but  
13 it also has to be sufficient to deter others similarly  
14 situated.

15           And we're at a time in Las Vegas, in Nevada,  
16 in our community, where medical marijuana is becoming  
17 available. And you need to consider what amount is  
18 necessary to deter people from smoking marijuana  
19 legally.

20           This isn't about whether marijuana should be  
21 legal or not. It's about whether it's okay to violate  
22 Nevada law and drive when you're legally impaired.

23           What amount is necessary to keep truck drivers  
24 from driving marijuana and hurting people? For  
25 commercial vehicles? For bus drivers? For other people

1 out there? For companies to make sure this doesn't  
2 happen?

3           It has to be a big enough number. And it's a  
4 number that hasn't been out there. You get to decide  
5 how much it should take to deter others from getting  
6 this high and hurting people. The number has to bear a  
7 reasonable relationship to the harms in this case.

8           The quantifiable harms that we can add up,  
9 \$3 million. It's not including the noneconomic damages  
10 that are so hard to value. In order to be proportional,  
11 as the law suggests, the award of punitive damages has  
12 to be at least \$3 million. It has to at least equal the  
13 actual harm.

14           And, if you remember in opening, I told you  
15 this was the kind of case where I was going to have to  
16 ask for \$16 million. I think I said 16.2. Dr. Oliveri  
17 cut some of the expenses a little more than I thought  
18 was going to happen. But this is the numbers that I've  
19 already showed you. \$3 million in punitives. It leaves  
20 a total verdict of 16 million.

21           And 1 times the actual special damages is not  
22 the only proportional that there is. Proportional can  
23 mean 2 times actual damages. It can mean 3 times actual  
24 damages. It could mean 3 times -- it could be 3 times  
25 the 13 million.



1           It would not be unreasonable for you to decide  
2 that people should not choose to smoke, choose to be 10  
3 times over the legal limit, and choose to drive and hurt  
4 someone; that that's not okay; and that there needs to  
5 be a big message sent to the community that this will  
6 not be tolerated and that there will be enough of a  
7 punitive award to deter others from getting hurt, others  
8 that may never suffer damages like Ms. Garcia, other  
9 people that may not die because you tell the community  
10 that this will not be tolerated.

11           The wall downstairs has engravings. I don't  
12 know if you notice that when you go downstairs. This is  
13 from 1924, right downstairs on the wall of the  
14 courthouse. "The moment you have protected an  
15 individual, you have protected society."

16           If you protect Ms. Garcia by awarding fair and  
17 full damages and you award punitive damages sufficient  
18 to deter others from doing this again, you will have not  
19 only protected Ms. Garcia, you will have protected  
20 society.

21           And when you think about punitives, you're  
22 also going to have to think about whether or not you  
23 assess punitive damages against Andrea Awerbach. And  
24 under the way the questions are in the form, you're not  
25 going to put in an amount for Andrea Awerbach, even if

1 you decide that punitive damages should be assessed  
2 against her for her conduct.

3           You first have to make a finding of whether  
4 punitive damages may be awarded under the law. And the  
5 Court has given you instruction on that. It's  
6 Instruction Number 38.

7           So, if you find that plaintiff is entitled to  
8 compensatory damages for actual harm caused by  
9 defendant's breach of an obligation, then you can  
10 consider whether to award punitive damages.

11           So first, before you can get to this point,  
12 you have to find that she breached an obligation.  
13 That's the negligent entrustment. And we've talked  
14 briefly about that, but I want to point out again the  
15 instructions on negligent entrustment which you've seen  
16 from the Court.

17           There's a presumption that she entrusted her  
18 vehicle. And there's also something else. Look at the  
19 instructions carefully, and you'll see that the Court  
20 deals with the request for admissions that I showed you  
21 all, when Andrea Awerbach was on the stand, where:

22           "Did you give him permissive use?

23           "Answer: Admit."

24           And the Court has told you that, as a matter  
25 of law, that admission conclusively establishes

1 permission.

2           But we don't just need that. We don't just  
3 need that admission. Look at the other evidence. You  
4 can have implied permission as well as express  
5 permission.

6           He drove the car twice a week. He ran  
7 errands. Mom called him up and said, "Hey, while you're  
8 out, stop at the grocery store." Mom knew he was  
9 driving the car. Mom gave him the keys that morning.  
10 She had given him the keys in 2008; he went on a joyride  
11 and wrecked another car.

12           She gave him the keys. She couldn't remember  
13 if he gave them back. And he took the car. The story  
14 now is, "I thought I hid them. I don't know how he got  
15 them." She testified that she's left them on the  
16 mantle, which is more of a kitchen counter. She  
17 testified that she's hid them. She's been all over the  
18 place in her stories under oath.

19           And because of the presumption, they have to  
20 prove, Andrea has to prove, that she didn't give him  
21 permission. And the only evidence she didn't give  
22 permission is this conflicting evidence under oath that  
23 goes both ways.

24           So I would suggest to you that, if you  
25 consider her conflicting evidence under oath, you

1 consider the admission she's made, that you will find  
2 that she entrusted her vehicle to someone without a  
3 license, who is a drug addict, who she knew was a drug  
4 addict.

5 But that's not enough to award punitive  
6 damages. You have to find that she acted with  
7 oppression or malice. And "malice" means an intent to  
8 hurt someone. And we're not claiming that she intended  
9 to hurt someone and acted with actual malice.

10 But there's another type of malice, and that's  
11 despicable conduct which is engaged in with conscious  
12 disregard of the rights or safety of the plaintiff. And  
13 there's a definition the Court has given you of  
14 conscious disregard.

15 "Knowledge of the probable harmful  
16 consequences of a wrongful act and a willful and  
17 deliberate failure to avoid these consequences."

18 So the evidence will allow you to find that  
19 she knew Jared was dangerous. She told you, "I knew he  
20 was dangerous. That's why I hid the keys from him. He  
21 crashed my car in the past. I knew he couldn't be  
22 trusted. He's dangerous."

23 She knew that he was dangerous. She knew  
24 that, if he was allowed to drive a car high two to three  
25 times a week, he was probably going to hurt someone.

1           And yet she willfully and deliberately failed  
2 to keep the keys away from him. She willfully and  
3 deliberately allowed for him to continue using her car.

4           And this would allow you to say, "You know, we  
5 don't have to award punitive damages, but we think maybe  
6 this is conduct that needs to be deterred in the future;  
7 that people need to know that, if they entrust their car  
8 to a drug addict who is high and who doesn't have a  
9 license and he goes out on the streets and hurts  
10 someone, they're on the hook too.

11           Not just for the compensatory damages that the  
12 law provides, but also for punishment and deterrence  
13 from a jury of their peers. Not just for Andrea  
14 Awerbach, but for others similarly situated. And we  
15 would ask you to check that block, that punitive damages  
16 are justified.

17           And then there will be a second short phase  
18 where you come back and deliberate again. You don't  
19 have to do that with Jared because he was high -- strike  
20 that -- he was impaired as a matter of law, and so the  
21 Court finds conscious disregard as a matter of law.  
22 That's one way to look at it.

23           But you need to find conscious disregard  
24 before you can determine whether or not you want to  
25 award punitive damages against Andrea Awerbach.

1           Just a second. Make sure I've covered  
2 everything.

3           There's one more thing that I want you to  
4 consider in awarding full and fair compensation for what  
5 happened and in determining whether or not punitive  
6 damages are justified in the amount of those damages,  
7 that Mr. Awerbach, as a matter of law, crashed into  
8 Emilia Garcia. She's living her life. She's not in any  
9 pain. He chooses to do these illegal acts, runs into  
10 her, and now she's in pain the rest of her life.

11           And then they add to that by fighting  
12 responsibility for her injuries. They add to the pain  
13 by --

14           MR. TINDALL: Objection. Improper argument.

15           MR. STRASSBURG: Joined.

16           THE COURT: I'm going to sustain that.

17           MR. ROBERTS: They demonstrate that they're  
18 not sorry for what they did. They demonstrate that they  
19 don't yet -- that they're not yet deterred.

20           Because what did they do? They put  
21 surveillance on Ms. Garcia. They took videos of her and  
22 her kids. They downloaded her Facebook pictures. They  
23 attack her credibility and her character. They called  
24 her fat. They called her lazy. She was driving down  
25 the road innocently and got hurt, and she has been put

1 on trial.

2           They're not sorry. They're still trying to  
3 avoid responsibility. They need to be deterred.

4           And I'm not telling you that you have to award  
5 the numbers that I've suggested to you, but you can't  
6 award a penny, not even a penny, less than full and fair  
7 compensation.

8           Thank you.

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

10          THE COURT: Sure. Come on up.

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

13          THE COURT: Let's go ahead and take another  
14 quick break, folks. You're admonished not to converse  
15 amongst yourselves or with anyone else on any subject  
16 connected with this trial or to read, watch, or listen  
17 to any report of or commentary on the trial by any  
18 persons connected with this case or by any medium of  
19 information including without limitations newspapers,  
20 television, radio, social media, Facebook or Twitter, or  
21 to form or express any opinions on any subject connected  
22 with this trial until the cause is finally submitted to  
23 you.

24          (Whereupon, the jury exited the  
25 courtroom.)

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

3           THE COURT: We're outside the presence. Do  
4 you guys want to make a record?

5           MR. TINDALL: No, Your Honor.

6           MR. MAZZEO: Yes, Your Honor.

7           THE COURT: Go ahead.

8           MR. MAZZEO: During Mr. Roberts' closing  
9 argument, he made a reference, a negative reference, to  
10 the fact that I had said during opening statement that  
11 one of the witnesses I would call would be Dr. Odell and  
12 that they didn't hear from Dr. Odell during the course  
13 of the trial.

14           Plaintiff had brought a motion prior to trial,  
15 Motion in Limine Number 16, including any negative  
16 inferences from failing to call cumulative witnesses.  
17 And they had another motion outstanding that was seeking  
18 to strike cumulative testimony from the likes of both  
19 Dr. Poindexter and Odell, arguing that they were  
20 essentially the same specialty, one being physiatrist,  
21 physical medicine and rehab doctor, the other one being  
22 a pain management and anesthesiologist.

23           So in light of that ruling, Mr. Roberts should  
24 not have made any negative inferences for failure to  
25 call cumulative, a motion brought by plaintiffs, it was



1 granted, but then he made a negative reference during  
2 his closing argument which was inappropriate and  
3 prejudicial.

4 THE COURT: The problem is I don't know why  
5 you didn't call Dr. Odell. I don't think the negative  
6 comment was as much that you didn't call another witness  
7 as you said you were going to call somebody that you  
8 didn't call.

9 Now, if it was cumulative, he probably  
10 shouldn't have been identified or designated to begin  
11 with. But I don't -- I don't find that was violative of  
12 a pretrial order. I mean, I guess it would have been  
13 violative of a pretrial order if we knew that he was a  
14 cumulative doctor and then he said that. But if we knew  
15 that it was cumulative testimony, he would have been  
16 stricken before trial anyway.

17 MR. MAZZEO: And he wasn't, and that's why he  
18 wasn't stricken. But there was an overlap between the  
19 testimonies from Drs. Odell and Poindexter. So -- and  
20 then Dr. Odell had other testimony that he was going to  
21 offer. Then we elected not to call him due to the  
22 length of the trial and due to the testimony received  
23 from Dr. Poindexter and Dr. Klein.

24 THE COURT: And that's fine. But I just don't  
25 think that warrants some kind of admonition or

1 instruction to the jury about it.

2 MR. MAZZEO: Okay. I just want to go on the  
3 record that they violated an order of the Court that was  
4 granted on a motion that they brought, so...

5 MR. SMITH: In addition to your comments, Your  
6 Honor, they knew ahead of time, before trial, what each  
7 of their witnesses would say. So if they believed that  
8 Dr. Odell would be cumulative of Dr. Poindexter or they  
9 had some other reason why they wouldn't call him, they  
10 should not have addressed him in opening.

11 And the comment that Mr. Roberts made was  
12 simply that they told you that Dr. Odell would be here  
13 at trial and testify and they didn't bring him. It  
14 doesn't have anything to do with him being cumulative.  
15 It has to do with addressing what was said in opening  
16 and whether the defendant actually backed up their  
17 assertions in opening.

18 THE COURT: Anything else?

19 MR. MAZZEO: No, Your Honor.

20 THE COURT: All right. Off the record.

21 (Recess taken from 2:39 p.m. to  
22 2:54 p.m.)

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

25 THE COURT: Let's go back on the record.

1 We're outside the presence of the jury.

2 What do we got?

3 MR. MAZZEO: All right, Judge. Instruction  
4 Number 25, with regard to medical malpractice, and  
5 plaintiff's argument improperly tells the jury that they  
6 can infer and find defendants' medical evidence argument  
7 is equivalent to medical malpractice.

8 They can't. The plaintiff did not prove  
9 medical malpractice or the breach of a standard of care  
10 to a reasonable degree of medical certainty. It cannot  
11 be inferred from defendants' arguments, and no one  
12 testified, that plaintiff's doctors breached the  
13 standard of care.

14 If the jury returns a verdict closer to what  
15 plaintiff is seeking, how can they -- how can we tell  
16 the jury if they found the unnecessary surgery as a  
17 resulting pain is from medical malpractice? It can't be  
18 inferred from absent expert -- inferred absent expert  
19 testimony to a reasonable degree of medical malpractice,  
20 which is a breach of the standard of care.

21 So if plaintiff believes it's medical  
22 malpractice, then their obligation is to prove it to a  
23 reasonable degree of medical certainty. Hence the  
24 reason why you included a jury instruction for medical  
25 malpractice.

1           If the defendant is allowed to tell and  
2 explain to the jury why plaintiff's doctors did not  
3 commit medical malpractice -- but it's difficult when  
4 there's no jury instruction as to what medical  
5 malpractice is. So -- and this is --

6           THE COURT: Haven't we argued this a few times  
7 already?

8           MR. MAZZEO: Yeah, we did. And this is just  
9 making for the record with regard to this medical  
10 malpractice jury instruction.

11           MS. ESTANISLAO: And his opening statement  
12 where he said --

13           MR. MAZZEO: So we can't explain to the jury  
14 the difference between medical malpractice and what the  
15 defendants' experts are saying that plaintiff's surgery  
16 is unrelated and unnecessary. So...

17           THE COURT: That's exactly what you can tell  
18 them.

19           MR. MAZZEO: They're two separate things,  
20 though.

21           MS. ESTANISLAO: Well, and plaintiff also  
22 stated in his opening statement, told the jury, that  
23 they can infer medical malpractice. That was --

24           THE COURT: The plaintiffs aren't trying to  
25 prove there's malpractice.

1 MS. ESTANISLAO: He said that -- he said, If,  
2 from defendants' evidence, you believe that there's --  
3 you can infer medical malpractice, then we're still  
4 liable." That's what he said.

5 THE COURT: That's why I allowed the  
6 instruction, because you had a doctor that got up there,  
7 and while he said that it was still within the standard  
8 of care, he implied that Dr. Gross had done something  
9 wrong. That's why I allowed the instruction.

10 MR. ROBERTS: And, Your Honor, just for the  
11 record, even if it wasn't negligence, even if it wasn't  
12 malpractice, the instructions in my arguments are still  
13 correct as a matter of law under the Restatement Second  
14 of Torts, Section 457, "Additional harm resulting from  
15 efforts to mitigate harm. If the negligent actor is  
16 liable for another's bodily injury, he is also  
17 liable" -- excuse me -- "he is also subject to liability  
18 for any additional bodily harm resulting from normal  
19 efforts of third persons in rendering aid, which the  
20 other's injury reasonably requires, irrespective of  
21 whether such acts are done proper or in a negligent  
22 matter."

23 So even if there's no negligence, even if  
24 there's not malpractice, it's still a proper argument  
25 that the chain of causation is not broken if increased

1 harm was caused by her efforts to mitigate for seeking  
2 medical care.

3 MR. MAZZEO: We've made the record, Judge.  
4 We're fine.

5 THE COURT: You're good to move on?

6 MR. MAZZEO: Yes, Judge.

7 THE COURT: All right. Let's bring them back.  
8 (Jury entered.)

9 THE COURT: Go ahead and be seated. Welcome  
10 back, folks. We're back on the record. Case Number  
11 A637772.

12 Do the parties stipulate to the presence of  
13 the jury?

14 MR. ROBERTS: Yes, Your Honor.

15 MR. MAZZEO: Yes, Your Honor.

16 THE COURT: All right. Mr. Mazzeo, you may  
17 proceed with your closing.

18 MR. MAZZEO: Thank you, Judge. Good  
19 afternoon, ladies and gentlemen.

20 THE JURY: Good afternoon.

21 MR. MAZZEO: Now, I want to thank you again  
22 and apologize for how long this trial has taken. We  
23 told you three to four weeks -- three to four weeks and,  
24 as you know, we're now into the fifth week. And no  
25 doubt, ladies and gentlemen, you've had a difficult job.

1 You sat here, listened to witnesses, looked at  
2 documents. Part of your job is to evaluate the  
3 witnesses and the documents, but you also have another  
4 job and that's to deliberate on the evidence.

5           Not only in looking at the evidence, but  
6 you've had -- we've had breaks, we've had interruptions  
7 we've had side bar conferences with the Court, and no  
8 doubt, sitting there I can imagine how frustrating it  
9 might be at times when you're told it's only going to go  
10 three to four weeks. Well that was -- as you know, that  
11 was under estimated, and both Andrea Awerbach and myself  
12 want to thank you for the service you're providing. We  
13 know that you're undercompensated for your role when  
14 serving your civic duty as jurors. So, again, we want  
15 to thank you for the time you've spent in this trial and  
16 the additional time you're going to spend deliberating  
17 in this case.

18           Now, in the deliberation room you're going to  
19 have two tasks. You'll have more, but two tasks  
20 immediately come to mind. One, you're going to decide  
21 the case. That's what you're going to do. That's  
22 number one. You're going to decide the case.

23           Number two, you're going to explain to each  
24 other why you feel they way you do about the case. So  
25 this is not a one-person deliberation, two-person,

1 three-person. It's an eight-person deliberation. All  
2 of you get to deliberate in there. All of you get to  
3 express your feelings and your thoughts about the  
4 evidence in this case, and part of the reason for the  
5 closing argument is to give you some ideas as to how to  
6 go about doing that.

7           There's no doubt when you go in to deliberate  
8 you're going to have questions in your minds about --  
9 you're going to go into the back and you're going to  
10 say, Well, you know, what about this issue, what about  
11 that issue? And part of the reason for the closing  
12 argument, as you saw from Mr. Roberts' closing argument,  
13 is to give you some ideas as to how is best to go about  
14 doing it. It's to give you some ideas about ways to  
15 look at the evidence that's been presented in this case.

16           So far you've got one viewpoint from  
17 Mr. Roberts. Well, now you're going to get two more  
18 viewpoints. One from myself and another from  
19 Mr. Strassburg. So, during the deliberation, there's  
20 two questions that you're going to ask undoubtedly, and  
21 I'm going to come up with more questions as I go through  
22 my closing argument with you.

23           First question is: What injuries did  
24 Ms. Garcia prove by a preponderance of the evidence  
25 related to the motor vehicle accident case? This is in



1 three parts. What injuries, number one. She has to  
2 prove those by a preponderance of the evidence, two.  
3 And they have to be related to the motor vehicle  
4 accident case. And then another question you might ask  
5 yourselves is what is the reasonable value of the  
6 damages based on credible and reliable evidence? Not  
7 based on all the evidence, based on the reliable and  
8 credible evidence. Those are two questions.

9           Preponderance of the evidence. A jury  
10 instruction that was read to you earlier. It means such  
11 evidence as when weighed with that opposed to it has  
12 more convincing force, and from which it appears that  
13 the greater probability of truth lies therein. This is  
14 the standard by which you will apply your application of  
15 the law to the facts. This is the burden that the  
16 plaintiff has to prove that he -- the damages and the  
17 injuries that were sustained by Ms. Garcia.

18           Now, the first thing that comes to mind, what  
19 was the -- what was the biggest focus in plaintiff's  
20 case? And it was this spondylo -- no,  
21 spondylolisthesis, the slipped vertebrae from the very  
22 get-go. That was the main contention in this case.

23           So the question is: Did Ms. Garcia sustain an  
24 injury to the spondylolisthesis? I'm abbreviating as  
25 spondylo just for simplicity sake. I don't want to say

1 that word over and over again today.

2           So did she sustain an injury to the slipped  
3 vertebrae? The spondylolisthesis, the L4-5 or the  
4 L5-S1, and the answer, ladies and gentlemen, is no. How  
5 do we know that? Because an acute injury -- and let me  
6 reference something that Mr. Roberts said during his  
7 closing argument.

8           He said that the doctors looked at the MRI  
9 films and verified the injuries. He didn't show you any  
10 films. He just said the doctors looked at the MRI films  
11 and verified the injuries. I'm going to prove to you  
12 and the evidence is going to prove to you that that's  
13 not what happened in this case. Because the injuries,  
14 the spondylolisthesis, did not sustain an acute injury.  
15 How do we know that? Because an acute injury to a  
16 preexisting spondylolisthesis results in an immediate  
17 onset of pain. We know that. It results in a decreased  
18 functionality and it results in an instability of part  
19 of the construct of the L5 on top of the S1 by its very  
20 nature.

21           In this case, there was no immediate onset of  
22 pain. There was no decrease in functionality for  
23 Ms. Garcia, and there was no instability of the  
24 spondylolisthesis.

25           The nerve root, Dr. Klein told you, is the

1 most susceptible structure, most susceptible to injury  
2 in the lumbar spine and he showed you -- he actually  
3 showed you films of the spine. Dr. Gross didn't,  
4 Dr. Lemper didn't, Dr. Kidwell didn't, and Dr. Cash  
5 didn't. It took Dr. Klein to come in here and show you  
6 the nerve roots. And what Dr. Klein showed you was that  
7 these nerve roots are pristine. They're in great shape  
8 at the L4-5 and the L5-S1. There is nothing wrong with  
9 the nerve root. There is no compression, there is no  
10 radiculopathy, there is no edema, and there is no  
11 swelling.

12           Mr. Roberts in his closing argument just a few  
13 minutes ago, he said all -- referring to my client,  
14 Andrea Awerbach and Jared Awerbach -- attempt to avoid  
15 paying the damages caused by the crash. That's false  
16 and I'll say that again. That is false. That's a false  
17 statement. The defendants are very willing and  
18 responsible for paying for the injuries caused by the  
19 crash. Not for the injuries, all the other injuries  
20 that they're alleging or conditions or treatment that  
21 they're alleging is related to the motor vehicle  
22 accident because the evidence proves that it is not. So  
23 that was a false statement by Mr. Roberts.

24           He said you should find full and fair  
25 compensation. That's true. I agree with him. Full and

1 fair compensation is not \$13 million. It's not  
2 \$8 million. It's not \$3 million. Full and fair  
3 compensation for the injuries sustained from this  
4 accident.

5           Dr. Klein and Dr. Poindexter, he criticized  
6 them for their credentials. You heard them on the  
7 stand. They came in here. They took an oath to tell  
8 the truth, and you heard their ability to articulate and  
9 talk about the spine and the diagnosing and treatment of  
10 spinal injuries and conditions. They weren't lacking in  
11 their ability to articulate with their knowledge of the  
12 spine and their experience in dealing with spinal  
13 injuries and conditions.

14           And both of them said, You can't have a  
15 progressive worsening where you have an acute injury to  
16 an unstable spondylolisthesis. Because the injury to  
17 this interarticular joint causes a shifting which  
18 results in pressure, compression, impingement of the  
19 nerve root. If you have, that's the most susceptible  
20 structure, the nerve root. So if you have any pressure  
21 impingement on this nerve root, that's what will cause  
22 pain. A symptom will arise automatically.

23           Mr. Roberts, in his closing arguments, said  
24 that the defendants are going to suggest that the  
25 plaintiff is lying about something. Lawyer code is that

1 the subject of complaints can't be verified. Well,  
2 that's his argument. That's not my argument. That's  
3 what he assumed we were going to say.

4 But if he was following the evidence in this  
5 case and following the cross-examination of his doctors  
6 and experts, he would that know what we're saying is  
7 that Ms. Garcia's subjective complaints of pain are not  
8 supported by objective medical evidence. That's what  
9 I'm going to go over with you. That's what I'm saying.  
10 I'm not saying it can't be verified. I'm saying it  
11 can't be supported by objective medical evidence.

12 And he said -- oh, he also said that all the  
13 doctors said that Ms. Garcia did not feel pain  
14 immediately at the scene, and that it's not uncommon.  
15 Well, that's true. It's not uncommon to not feel pain  
16 immediately at the scene except -- except -- he didn't  
17 say this. Except with an acute injury to an unstable  
18 spondylolisthesis. That's an immediate onset of pain.  
19 That's immediate right then and there. There's no delay  
20 in symptoms.

21 The MRI showed no instability to the  
22 spondylolisthesis. We know that. And not just the  
23 defense doctors, but the plaintiff's doctors admitted  
24 that the MRI did not show any -- and we're going to go  
25 through those MRIs in the minute. But it did not show

1 any acute or traumatic injury to any structure of the  
2 lumbar spine.

3           Now, we know Dr. Cash took the stand, saw the  
4 plaintiff once, Ms. Garcia. He did a flexion and  
5 extension X-ray of the lumbar spine. Why would he do  
6 that? Well, we know from the evidence you do a  
7 flexion/extension X-ray of the lumbar spine to determine  
8 whether the spondylolisthesis is unstable. What did he  
9 say -- and he did it both of the neck and the lumbar  
10 spine. He said it was not unstable. That's from their  
11 own expert who on the same day said -- met her once. On  
12 the same day said, Let's do surgery. To a condition  
13 that was not unstable. That's their expert or their  
14 treating doctor I should say.

15           Now, and here's the -- as you saw this picture  
16 on the right you have the spondylolisthesis, the slipped  
17 vertebrae and it is pars interarticularious defect.  
18 There it says fracture. Here you have the slippage.

19           We're going to look at the films in this case.  
20 Mr. Roberts didn't show you any films in his closing  
21 argument. He talked about money a lot, but he didn't  
22 show you medical evidence in this case.

23           Now, in looking at this, ladies and gentlemen,  
24 we see that -- and this was something that it was  
25 Dr. Klein that showed you. None of the plaintiff's

1 treating doctors. Dr. Klein, who is an expert in  
2 diagnosing and treating these injuries, and also in  
3 reading 200 MRI films a year. So he showed you L4-L5  
4 disk bulge and fissure without root compression. He  
5 showed you how they're in pristine condition. This is a  
6 January 26, 2011 film. There's nothing wrong with any  
7 of the nerves at this juncture in this location.

8           So why -- why then -- and we're going to get  
9 to it in a little while as to why would the doctors  
10 treat a perfectly fine nerve where there's no  
11 compression, no impingement? Where there's no  
12 radiculopathy. No pain stemming from this area, and  
13 that's the L4-L5. That's fine but Dr. Gross fused it  
14 anyway. No need to.

15           And then we look at the L5-S1. This is the  
16 next level. Disk level without root compression.  
17 They're perfectly normal. Mr. Roberts brought Dr. Gross  
18 back in after Dr. Klein testified. He could have showed  
19 him these films. He didn't talk about these films  
20 because he couldn't say anything bad about the nerve  
21 root in these. He operated on a perfectly good  
22 location. The L4-L5 and L5-S1. It was not indicated  
23 for this motor vehicle accident. Preexisting condition,  
24 okay. Preexisting condition is not a result of this  
25 accident. That's preexisting.

1           So, let's move on. Another question you might  
2 ask when you're deliberating amongst yourselves. What  
3 were Ms. Garcia's injuries? Well, we know what they  
4 were. We know because we had the doctor, the emergency  
5 room doctor testify yesterday. Plaintiff wanted to  
6 intimate and suggest it to you during opening statement  
7 and then when she was on the stand that, Oh, they  
8 wouldn't take any diagnostic imaging studies of her  
9 because she didn't have the money to pay.

10           The doctor contradicted plaintiff's testimony.  
11 The doctor doesn't have an interest in this case.  
12 Plaintiff does. She does. Doctor does not. He said,  
13 Of course we would have examined her if I felt based on  
14 my physical examination that there was a need to do an  
15 X-ray, if there was a fracture. Okay. Or if there was  
16 a need to do an MRI or any imaging study they would have  
17 done it regardless of the ability to pay.

18           So that was not -- and this is Mr. Roberts  
19 that brought it up about his own client. So his client  
20 is not being truthful about this particular situation  
21 about, oh, they wouldn't take films of me at the  
22 hospital so I had to go out and I had to hire  
23 Glen Lerner because the representative for Jared  
24 Awerbach wouldn't refer a medical doctor to me. We know  
25 that's false too because she spoke to that



1 representative for Jared Awerbach the day after she left  
2 the hospital, and it was the representative, we know --  
3 this is Ms. Garcia being deceptive, deceptive because  
4 she spoke to the representative twice. We know that the  
5 representative -- representative had asked Ms. Garcia,  
6 How are you feeling? She didn't tell you that, did she?  
7 I had to ask her on cross-examination. She didn't even  
8 remember the so-called conversation even though it was  
9 recorded.

10           And then are you going to follow-up with  
11 medical doctors? I don't remember that and then she  
12 read it. And that's what was in the transcript. That  
13 was the conversation that took place the day after she  
14 left the ER. And what did she say? Well, I don't  
15 really know. If I do, you know, I'll let you know or  
16 whatever. But she was -- she did not inquire. She did  
17 not ask on January 6th the day after MountainView  
18 Hospital, she did not ask the representative to get her  
19 treatment. She wasn't looking for treatment. It was  
20 only on January 11th, and that's when the representative  
21 offered to give her, for pain medications if that's --  
22 when she left MountainView she was prescribed  
23 medication -- that's it.

24           So, yes, I submit that Ms. Garcia has an  
25 interest in this litigation, and I'll be open about it.

1 She has a financial interest. She has a  
2 \$13 million financial -- \$16 million financial interest  
3 in this litigation. She has a huge interest in this  
4 litigation. Does that affect her credibility? You  
5 determine for yourselves because that's just one  
6 inconsistency from Ms. Garcia, but there's a number of  
7 them.

8 We do question --

9 MR. ROBERTS: Your Honor, I object to the  
10 argument. Mischaracterizes the law. Seeks jury  
11 nullification. The Oregon case I cited earlier.

12 THE COURT: Come on up for a minute.

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

15 MR. MAZZEO: Thank you, Your Honor. So let me  
16 restate that ladies and gentlemen. So, plaintiff,  
17 Ms. Garcia has a \$13 million interest in the  
18 compensatory state of this trial, and then she's also  
19 asking, as you know, for another \$3 million for punitive  
20 damages. So what were her injuries, sprain and strain.  
21 She was diagnosed by the doctor at MountainView.

22 He didn't have to do films. Contrary to what  
23 Ms. Garcia said, they wouldn't do films of her because  
24 she didn't have the money. She had -- she was diagnosed  
25 with sprain/strain. The extremities were atraumatic.

1 No lower extremity edema. No motory sensory deficit.  
2 Well, this is key. I mean, if she had an injury -- an  
3 acute injury to the spondylolisthesis, then as the  
4 doctor said, as Dr. Poindexter and Dr. Klein told you,  
5 there would be motor and sensory deficit. There was  
6 none three days after the accident.

7 Dr. Gulitz then on January 12th did a physical  
8 examination. Also diagnosed her with a sprain/strain of  
9 the cervical, lumbar, and thoracic -- cervical,  
10 thoracic, and lumbosacral spine.

11 Ladies and gentlemen, this is the accident, as  
12 you know, that Ms. Garcia sustained sprains and strains  
13 from. That's her car, and that's the vehicle where the  
14 impact occurred to the side.

15 And what I want to go over with you -- and I  
16 did this in my opening statement. But I'm going to  
17 focus on just two of these boxes in this medical  
18 intervention flowchart. So we have this flowchart and  
19 we have the two boxes I want to point to primarily. The  
20 first box over on the left. The complaints and history,  
21 which is subjective, and then radiographic or  
22 radio-diagnostic tests which is diagnostic. So the  
23 subjective is what is reported by Ms. Garcia. We know  
24 that. And so she reported. She felt fine. Pain free  
25 after the accident. No head injury. No loss of

1 consciousness. Symptoms started on 1/5 of 2011. Neck  
2 pain, sacrale low back pain, headache. History of  
3 depression, anxiety, antidepressants.

4           And then the objective. So that's all  
5 subjective. Then we go to the objective. This is  
6 what's key because, you know, the whole issue in  
7 contention in this case is whether the subjective  
8 complaints of pain are supported by objective medical  
9 evidence. We didn't hear a lot about that in  
10 Mr. Roberts' closing. He spent about an hour and a  
11 half, almost two hours with you in closing argument and  
12 very little was spent on the doctors, on the medical  
13 evidence in this case.

14           So if we look at the lumbar spine. And this  
15 is in agreement with all the doctors and radiologists.  
16 We have disk desiccation, bulges, Grade 2  
17 spondylolisthesis. No evidence of nerve root  
18 impingement. No evidence of pressure on any exiting  
19 nerve. No acute trauma or trauma -- no evidence of  
20 acute trauma -- acute injury or trauma to the lumbar  
21 spine.

22           Now, who's in agreement with this? We know  
23 Dr. Cash, Dr. Gross, Dr. Kidwell, Dr. Lemper, Dr. Klein,  
24 Dr. Poindexter, all the doctors are in agreement that  
25 there's no evidence of any acute injury to this lumbar

1 spine which involves the spondylolisthesis. It's a  
2 fact.

3           And then the MRI of the lumbar spine on 11/19.  
4 Now this is interesting because the very first finding  
5 finds new posterior bulges at three levels for the first  
6 time. Age-related changes. L1-2, L2-3, and L3-4.  
7 These are all new findings. Not from an acute trauma.  
8 Not from the subject accident. They're age-related  
9 changes.

10           Then we also have the preexisting.  
11 Preexisting degenerative age-related changes that are  
12 showed on the film as well. No evidence of nerve root  
13 impingement. No evidence of pressure on exiting nerve.  
14 No acute injury or trauma to the lumbar spine.

15           Now what's the significance of these MRIs?  
16 Well, this is objective evidence, ladies and gentlemen.  
17 And -- and what's interesting between the two, there was  
18 some -- there was some discussion of -- and dispute with  
19 regard to whether there is a progressive change of the  
20 slippage of the spondylolisthesis, and, again, it wasn't  
21 not -- it wasn't Dr. Lemper, Dr. Kidwell, Dr. Gross, or  
22 Dr. Cash that showed you these films. They're proving  
23 that she has an injury, and they're not showing you the  
24 actual structure. It was Dr. Klein, the defense expert.

25           And what it shows, the film on the left is

1 January 26th of 2011. Film on the right is  
2 November 19th of 2012. So you have the January 2011,  
3 November 2012. And if you look at these structures,  
4 Dr. Klein went through all of these. He came down here  
5 and he discussed each one. And if you look, these are  
6 the exact same condition. There's no 30 percent  
7 slippage or change in appearance or progression. If you  
8 look at the reference points on the film on the left for  
9 the -- this is the L5. Here's the S1. This is the  
10 bottom end plate of L5, and it shows the bone spurs,  
11 condition of them. Reference points. The end of the  
12 edges anteriorly of L5 and S1. Identical with L5 and S1  
13 20 months later. The disk has not changed. The nerve  
14 root is still in great condition. These are identical  
15 in appearance from one to another.

16           Yet none -- none of plaintiff's doctors or  
17 experts -- and they had five doctors in here, including  
18 Dr. Oliveri who was their expert, four treating doctors.  
19 None of them showed you any of the films to show you  
20 that the structure had changed. That there was a  
21 progression. That there was a need for any surgery to  
22 this level or that it was a pain generator.

23           Okay. Then Dr. Klein showed you this as well.  
24 Three films. January 2011, August 2011, and November of  
25 2012. And he showed you -- he pointed out the nerve

1 roots on each one. He showed you the -- again, the end  
2 plates, the bone spurs. He showed you the disks. It's  
3 exact same appearance from one to the next. There's no  
4 30 percent change as suggested by Dr. Hachy who actually  
5 got his numbers wrong as Mr. Strassburg pointed out on  
6 examination.

7           That the -- these are identical and there's no  
8 further slippage from one to the other. And if you look  
9 at the reference points, the front and the back of each  
10 one, none of them -- you can see that there's no change,  
11 and there's three different films taken at three  
12 different times.

13           So objective evidence, yes, we're saying that  
14 the subjective complaints do not support the objective  
15 evidence for an acute trauma to a preexisting  
16 spondylolisthesis. That's exactly -- exactly what we  
17 are saying. That's true. We are saying that. That  
18 the -- that the objective medical evidence does not  
19 support her complaints.

20           But remember what her complaints are. Her  
21 complaints are not specific. She's not saying,  
22 Doctor -- Dr. Cash, Dr. Gross, Dr. Kidwell -- I  
23 sustained an injury to my L5-S1. She's saying -- it's a  
24 nonspecific complaint. I have pain in my lower back.  
25 That's what she's saying. That's number one,

1 subjective, and it's nonspecific.

2           We'll get to what the treatment  
3 protocol was -- actually, we're going to that in a  
4 minute. Why the treatment protocol and what the  
5 treatment protocol of these doctors was based on. So  
6 here you have pictures that are worth thousands of words  
7 right here. This is the evidence.

8           As you're sitting back there and you're  
9 listening to Mr. Roberts put up all these numbers and  
10 the pain and suffering she's gone through, Ms. Garcia  
11 who would have no reason, no medical condition that  
12 would prevent her from coming to court. But she's here  
13 for money day, she's sitting there. But for the first  
14 three and a half weeks she was here for three half days,  
15 that's what she said. Three half days as of last  
16 Wednesday. And then she was here Thursday and Friday  
17 for cross-examination. So for a total of three and a  
18 half days up until today. Three and a half days out of  
19 the more than four weeks that you all have been here  
20 every single day, and that's her interest in this  
21 litigation.

22           So there's no objective evidence that the  
23 spondylolisthesis ever became unstable from the motor  
24 vehicle accident. They simply did not prove it.  
25 Dr. Klein proved that it did not become unstable and



1 that it wasn't the pain generator. They never proved  
2 that it was. And so you're wondering, Well, why would  
3 they keep giving her this treatment? Why didn't the  
4 doctors then make this determination that they were  
5 treating this condition that was symptomatic?

6           Let's finish with this. So the diagnosis,  
7 based on this medical model of care, there's no nerve  
8 root impingement. There's no medical necessity or  
9 treatment for any facet joints or nerve roots in the  
10 spine because they're fine. They never identify those  
11 as a pain generator.

12           So what was Ms. Garcia's treatment based on?  
13 It's based on three things. Her subjective complaints,  
14 nonspecific. Then an MRI showing a preexisting  
15 condition. So, Ms. Garcia goes to Dr. Cash and then  
16 goes to Dr. Gross.

17           By the way, plaintiff's counsel made a big  
18 deal that, Dr. Klein, you only saw the plaintiff once  
19 and you're rendering a decision, an opinion with regard  
20 to treatment and injuries and diagnosis.

21           What's interesting is that all of his doctors  
22 did the same thing. Dr. Cash, one time. January 16th  
23 of 2011. Saw her one time and made an opinion that, oh,  
24 previously asymptomatic spondylolisthesis became  
25 symptomatic as a result of the accident, notwithstanding

1 his flexion and extension x-rays that said, no, it did  
2 not.

3           Notwithstanding the MRIs that said there's  
4 nothing wrong with nerve roots. No impingement, no  
5 compression of any nerve root. They didn't prove their  
6 case. It's as simple as that. I don't have to stand up  
7 here for three hours and convince you. They didn't  
8 prove their case. The evidence is right here.

9           No doctor -- no doctor ever confirmed -- her  
10 treating doctor -- Lemper, Kidwell, Cash, and Gross --  
11 ever confirmed that the spondylolisthesis, L4-L5 or  
12 L5-S1, was the source of pain.

13           We'll get to the injections in a little bit.  
14 They were not confirmatory. They were not diagnostic.

15           They all admitted that the spondylolisthesis  
16 preexisted the motor vehicle accident. They agreed that  
17 the MRI findings showed only preexisting -- this is all  
18 of the plaintiff's doctors. That it showed preexisting  
19 and degenerative conditions. And that there's no  
20 objective evidence of an unstable, pars defect,  
21 spondylolisthesis, or a never root impingement.

22           The problem is that these doctors --  
23 Dr. Lemper, Kidwell, Cash, and Gross -- all made a false  
24 assumption this pain was coming from this L5-S1, the  
25 slipped vertebrae.

1           Now, it's interesting -- what Kidwell told us  
2 was very interesting, very enlightening. I mean, I  
3 wasn't surprised. I think it would be enlightening for  
4 you jurors because what he said was whenever he gets a  
5 medical-legal claim, a patient with a medical-legal  
6 claim. He said he always -- what did he say from the  
7 stand? He always makes a causation determination.  
8 Based on what? Based on the patient telling me,  
9 subjective self-report, telling me she was in an  
10 accident. He or she, whoever it is. The plaintiff said  
11 he was in an accident. He puts that finding in each and  
12 every report that he drafts. He doesn't make an  
13 independent causation determination. He just got a  
14 subjective self-report from the patient and, oh, it's a  
15 third party that you're alleging the claim against.  
16 Okay. It stems from that. All the treatment I render  
17 stems from that. That's not scientific.

18           And the other doctors I submit to you did the  
19 same thing.

20           So, ladies and gentlemen, her excessive  
21 treatment. Another area we have to touch upon and you  
22 should discuss in deliberation. Ms. Garcia's excessive  
23 treatment is not proof of the source of pain or a  
24 necessity, and so I'm sitting back there. I'm listening  
25 to the evidence as it comes in. And they parade these

1 doctors that come in here that all treated her, and --  
2 and I'm wondering, Well, wow, based on the -- based on  
3 the numbers, it must sound pretty impressive. They have  
4 these doctors that are on the stand. They have these  
5 credentials.

6           They've treated her. They've treated her on a  
7 medical lien. And once they treat her on a medical  
8 lien, they have an instant interest in the outcome of  
9 the litigation. Notwithstanding the fact that  
10 Dr. Kidwell had a lien and then sold it immediately  
11 after his treatment, but once he treated her, once he  
12 gave that treatment, he had an interest in the outcome.  
13 Notwithstanding that.

14           So it must be pretty impressive for these  
15 doctors to come in here, testify, are they all wrong?  
16 They all treated her the same way but none of them have  
17 identified the pain generator and they've been flipping  
18 back and forth with these injections, with the fusion,  
19 with the trial spinal cord stimulator, and we'll go  
20 through that in a few minutes.

21           Dr. Cash. Dr. Cash, okay, first doctor, what  
22 did he do? He did a physical examination, flexion and  
23 extension, and he said something that was interesting  
24 that was preposterous at the same time. He said that  
25 Ms. Garcia's flexion was 20 percent. Basically upright

1 position from the waist doing the lumbar, 20 percent, 20  
2 degrees, I think, and then backwards, 10 degrees. If  
3 that was her limitation, her range of motion for the  
4 lumbar spine, she would not be able to engage in all  
5 these activities of daily living including work.

6 I know on the stand she said she had a  
7 difficult time. But the fact of the matter is she was  
8 working full time for three years and three months after  
9 the accident. She didn't even miss the day after the  
10 accident. She didn't miss the day after she left the  
11 hospital on January 5th. She went to work the next day.  
12 Tuesday, Wednesday. So she went Thursday, Friday,  
13 Saturday, Sunday, Monday. She kept going for  
14 three-and-a-half years.

15 So if what Dr. Cash says -- he said he  
16 eyeballed it. He didn't use -- he didn't use a  
17 measurement device. But the fact of the matter is  
18 that's not very believable because she wouldn't be able  
19 to do anything basically. She wouldn't be able to tie  
20 her shoes, get dressed, shower, do her hair, cook,  
21 clean, anything. But the fact of the matter is she was  
22 working at full-duty capacity after this accident and at  
23 the time she was seeing Dr. Cash.

24 Now, Dr. Lemper in all his treatment notes,  
25 you may remember on the ELmo, I put up his records and

1 all the records, one after another, showed radiating  
2 pain. Radiating pain. Radiating pain. He didn't refer  
3 to it as radicular pain. We know from the testimony  
4 that radicular pain and radiating pain are two different  
5 things. Radiculopathy is pressure, compression on the  
6 nerve root resulting in symptoms of pain as a result.  
7 Radiating pain spreads out from a central area.

8           Well, he doesn't refer to it as radicular  
9 pain. He keeps referring to it as radiating pain.  
10 There's a distinction. Dr. Lemper and Kidwell gave  
11 multiple diagnostic injections to the plaintiff. But  
12 not one of them -- and I asked them: Did you identify  
13 the pain generator from this injection? Dr. Lemper  
14 8/30 of 2011, nope, didn't identify. He did multiple  
15 levels. He's not saying that she got some relief.

16           But he admitted -- he admitted -- Dr. Oliveri  
17 admitted as well -- that from these diagnostic  
18 procedures with a local anesthetic that you're going to  
19 get some relief immediately after the procedure. You're  
20 going to get anesthetic. It's going to numb nerves.  
21 It's automatic you're going to get relief whether or not  
22 that's a pain generator. But for none of them, none of  
23 these diagnostic procedures, and you can recall back you  
24 can ask for, you know, the record, ask yourselves, but  
25 none of these diagnostic procedures gave her the

1 anticipated or expected relief that these doctors  
2 thought she should have gotten because you're injecting  
3 a steroid that's going to be in there for several weeks.  
4 Never got the relief from that. She got temporary one  
5 to two day's relief. Immediate relief right after the  
6 procedure, but not the anticipated extent of relief.

7           So, Dr. Lemper, selected nerve root block on  
8 8/30 of 2011. He said, Well, it didn't give the  
9 anticipated relief, but it was still diagnostic. You  
10 know, she told me after -- right after the procedure she  
11 got relief.

12           Well, if it was diagnostic, then why two weeks  
13 later on 9/14/2011 is he doing the facet block  
14 injection? According to him he already identified the  
15 pain generator. But we know that's not true because he  
16 didn't.

17           Now he's doing something different. Now he's  
18 injecting the facet blocks on 9/14 of 2011. And that's  
19 not diagnostic either. And then Kidwell a year later,  
20 9/27/2012, did a selective nerve root block. One to two  
21 days of relief. If it was a true pain generator, number  
22 one, should have relief for three to four weeks. So  
23 that's not a true pain generator, and the relief can be  
24 associated with a local anesthetic that could be  
25 relieved based on placebo effect.

1           When a patient is seeking out this much  
2 treatment and is pursuing this much treatment, there's a  
3 certain anticipation that there's going to be relief  
4 automatically from any procedure that they do. So  
5 there's a certain degree of placebo effect that she  
6 gets. Again, he still hasn't identified the pain  
7 generator.

8           And then Dr. Gross, after the surgery, says to  
9 Dr. Kidwell, Well, why don't you inject -- this is  
10 12/1/2014 -- the sacroiliac joint and the facet joint at  
11 L3-4, and while you're with it, do the hardware blocks.  
12 This is after the surgery. Well, he's doing these  
13 hardware blocks. Why? Because he suspects a pain  
14 generator. It's still not identified, ladies and  
15 gentlemen.

16           Why would Dr. Kidwell continue to give  
17 diagnostic injections if Lemper already diagnosed the  
18 pain generator on 8/30 or 9/14 of 2011. None of them  
19 have given her long-lasting relief. And that's because  
20 they don't know the source of her continuing pain  
21 complaints.

22           Now, Dr. Gross testified he expects a  
23 successful fusion surgery to yield 70 to 80 percent  
24 decrease in pain symptoms. Well, we know that didn't  
25 happen. So she's getting these procedures, she's not



1 getting the relief because they're not identifying the  
2 pain generator.

3           Gross' surgery was not indicated, and it was  
4 not beneficial. We know it wasn't indicated from the  
5 start because they're treating her subjective complaints  
6 and an MRI that shows no problem with the nerve roots.  
7 That's the problem. This treatment is not related to  
8 the accident in question. Dr. Gross admitted that  
9 smoking, poor conditioning can all contribute to a  
10 person's low back pain.

11           Now, Dr. Kidwell, after he does the  
12 radiofrequency ablation on 9/24/15, remember, he did  
13 that at two levels -- actually, three. The L3-4, L4-5,  
14 and the sacroiliac joint. And then on 11/1, Mr. Roberts  
15 says, Well, his PA wrote down flare. You know, it's the  
16 usual pain. So it wasn't Dr. Kidwell that did that. It  
17 was that was his PA, Jenanwin [phonetic]. So, you know,  
18 what she wrote. You know what, we can explain that  
19 away. No, we can't explain that away because the  
20 specific statement says, Flare-up in usual pain at last  
21 office visit. It doesn't say, I had the same pain as  
22 I've had for the first time at the last office visit.  
23 It says, Flare-up in usual pain at last office visit.  
24 That can only refer to usual and regular pain that she's  
25 having predating this radiofrequency ablation.

1           You can't have pain stemming from a  
2 radiofrequency ablation if you actually burned the nerve  
3 roots at the source of the pain. If the telephone cord  
4 is cut, it's not going to send a signal. So there's  
5 something wrong with this, and to explain this and the  
6 other inconsistencies in his testimony, he sits down  
7 with plaintiff's counsel for 3 hours and 40 minutes.  
8 He's a treating physician, what's there to explain? He  
9 has to explain these inconsistencies.

10           Then what does Dr. Kidwell tell us, Well --  
11 regarding the inconsistencies of Ms. Garcia's reporting  
12 of the onset of pain. Well, you know, that's not really  
13 inconsistent. I wouldn't call that inconsistent.  
14 That's just -- he wanted to explain it. Well, it is  
15 inconsistent. When on the one hand she says -- and the  
16 self-reporting of a patient close to the time of the  
17 event is much more accurate than later on after they've  
18 filed a lawsuit and it's in contemplation of litigation  
19 where they have a reason exaggerate and embellish. She  
20 tells MountainView pain started three days afterwards,  
21 no question about it.

22           And then what does she tell -- what does he  
23 tell Dr. Gross on May 25th? She was dizzy, dazed,  
24 confused, nauseated, and in shock. Really? Dr. Kidwell  
25 is going to still be credible and say that that's not

1 inconsistent. There's no -- there's no consistency in  
2 it. That's a totally different report of the onset of  
3 pain and her constellation of symptoms.

4           So, why does Ms. Garcia continue to treat for  
5 five years, ladies and gentlemen? Well, all statements  
6 regarding her injuries and the pain -- and we're not  
7 saying -- Mr. Roberts is correct. She was -- she did  
8 sustain an injury in this case. That's not in dispute.  
9 The nature and extent of the injury, the location of the  
10 injury is in dispute. Because we're saying consistent  
11 with MountainView, Dr. Gulitz. Primary Care  
12 Consultants. We're saying, Yes, sprain and strain,  
13 muscular ligamentous tissues that she did injure.

14           Her routine visits to Dr. Lemper and Kidwell.  
15 What were they for? Do you remember? I mean, I'll go  
16 over that with you. I'm going to show you. Her routine  
17 visits. All these visits to Dr. Lemper and Kidwell.  
18 These pain medicine doctors. Pain medicine is to  
19 relieve pain and to give pain meds. And it's to give  
20 pain meds notwithstanding the fact that the diagnostic  
21 procedures do not treat the pain. They're not  
22 therapeutic for her. Their injections are not  
23 therapeutic because they keep on giving these  
24 injections.

25           And then after the surgery -- I apologize it's

1 kind of shifted off the screen there. But after the  
2 surgery at the end of 2012 on top. She's still getting  
3 all these pain meds, ladies and gentlemen. Then in 2014  
4 and in 2015, she's still on these pain meds for five  
5 years.

6           If these procedures really worked, if they  
7 were really appropriate for her to reduce her pain, why  
8 does she need -- and Dr. Gross testified the reason for  
9 the surgery was to give her enough relief from her pain  
10 symptoms so that she could get off the pain medicine, so  
11 she wouldn't have to use alternative type of treatment.  
12 Well, we know that didn't happen. Because she's still  
13 on these pain meds as we sit here today.

14           None of the interventional treatments resolved  
15 her symptoms, and she continues to treat with these  
16 injections, the trial spinal cord stimulator. The RFAs.  
17 The life -- now a life care plan that needs treatment  
18 for the rest of her life.

19           So why? Dr. Klein put it simply to you and so  
20 did Dr. Poindexter. As a result of poor conditioning.  
21 As a result of her continued activities of daily living,  
22 age-related changes as we saw in the November 2012 MRI.  
23 She does have an interest, and that's a fact in this  
24 case. She has an interest in this litigation.

25           However, there's no objective medical evidence

1 that she injured her lumbar spine. The objective  
2 medical evidence proves that she did not injure her  
3 lumbar spine. But yet they're giving her treatment and  
4 saying it's related when in fact it's not related to the  
5 accident.

6           Why is she having post-surgical pain? Well, a  
7 surgery, as you've heard from Dr. Klein, was only  
8 indicated for an unstable spondylolisthesis, and she did  
9 not obtain the anticipated benefit of 80 percent relief  
10 from it. The films suggests that she may have  
11 pseudarthrosis, a nonunion of bone, or an insecure  
12 pedicle screw. That's what is suggested.

13           Dr. Gross' artistic rendition does not match  
14 up to this. This is clearly something that, as  
15 Dr. Klein pointed out, is not a stable construct, and it  
16 was indicated on this film on the right where there's a  
17 halo where there may be some loosening of the screw,  
18 which may be a source of the pain which may be why  
19 Dr. Gross said, Hey, let's inject the hardware to  
20 Dr. Kidwell. That's why he wanted to inject it.

21           All of plaintiff's doctors have a financial  
22 interest in this medical-legal claim. Why is that  
23 important? It's important, ladies and gentlemen,  
24 because if the doctors figured out -- by the way, if the  
25 doctors figured out her pain complaints and identified

1 her pain generators, then why would she need these  
2 continual diagnostic injections to continue to identify  
3 a pain generator because they never did. If the surgery  
4 was successful, why would she need the pain meds, the  
5 injections, and spinal cord stimulator and millions of  
6 dollars in a life care plan.

7 Now, we know that Doctors Cash, Gross, Lemper  
8 and Kidwell all of them have a professional relationship  
9 with plaintiff's attorney in this case, the law firm,  
10 Glen Lerner's office.

11 What's interesting is Dr. Gross was licensed  
12 in March of 2011. He's from California. He used to  
13 work at Pacific Hospital. Licensed here in Nevada in  
14 March of 2011. He was getting this referral in May of  
15 2011, and I asked him about that, about how he marketed  
16 himself to plaintiff's counsel. He said, oh, he didn't.  
17 He just talked -- he kind of evaded and avoided that  
18 topic. He didn't want to talk about it.

19 MR. ROBERTS: Objection. Move to strike.

20 MR. MAZZEO: Based on my recollection of the  
21 evidence.

22 THE COURT: I don't know that you can say he  
23 evaded. I don't know. I'm going to -- I'm going to  
24 grant the objection. Just rephrase it.

25 MR. MAZZEO: Sure.

1 Dr. Gross was not inclined to want to discuss  
2 his -- how he developed that relationship with Glen  
3 Lerner's office in this town.

4 Dr. Lemper. I asked Dr. Lemper about this,  
5 how many clients of Glen Lerner's office do you treat?

6 MR. STRASSBURG: He said, well, they may have  
7 referred one of their employees or a couple of their  
8 employees. I said, I didn't ask you that. How many  
9 clients do you treat from Glen Lerner's office? Have  
10 you treated. What's your pro -- he said, Oh, I don't  
11 have one. He kept denying it and denying it. And then  
12 he finally admitted that he's treated anywhere from 200  
13 to 500 clients from Glen Lerner's office.

14 Now, on direct examination Mr. Silver tongue,  
15 I want to help out everybody. But on cross-examination  
16 he was not honest with you, ladies and gentlemen, and  
17 that's a fact to consider as well.

18 MR. ROBERTS: Objection. Move to strike.

19 THE COURT: Sustain. It will be stricken.

20 MR. MAZZEO: Dr. Lemper was not candid with  
21 you, ladies and gentlemen, and that's what I submit the  
22 testimony shows in this case.

23 Dr. Kidwell testified he has had upwards of  
24 150 clients from Glen Lerner's office. Again, the  
25 medical liens give the doctors an immediate interest in

1 the litigation at the time of the services provided.

2           Dr. Oliveri, he was an expert. He did a life  
3 care plan, and he had a financially profitable  
4 relationship with Glen Lerner's office doing medical  
5 evaluations and life care plans. What's interesting  
6 with Dr. Oliveri is that he said he never did a life  
7 care plan for a private-paid patient. Only on  
8 medical-legal claims. Which is interesting because  
9 patients -- he didn't say patients without medical-legal  
10 claims don't need life care plans. He just doesn't do  
11 it for them. He's not going to get paid for it, ladies  
12 and gentlemen. He does it on a case where he can be an  
13 expert.

14           Dr. Cash and Gross. As I said, they met the  
15 plaintiff one time and claimed that she had an injury to  
16 the spondylolisthesis. Although there was no objective  
17 evidence of it. Just because she got all this treatment  
18 doesn't mean it was necessary or related to this  
19 accident.

20           Ms. Garcia and the doctors want Jared and  
21 Andrea to pay for a preexisting condition that was not  
22 made. That did not sustain an acute or traumatic injury  
23 and that is not -- that's not justified. That's not  
24 part of the full and fair compensation if it's a  
25 preexisting condition. That was not. That did not



1 develop an acute injury or sustain any injury to it.  
2 It's still just a preexisting condition that is stable.

3           Now, also in this case Ms. Garcia did not  
4 prove damages for household services or loss of  
5 enjoyment of life. How do we know that? Well, we had  
6 Dr. Smith testify, ladies and gentlemen, that -- and  
7 basically his entire testimony and his opinion was based  
8 on the self-report as far as Ms. Garcia's diminishment  
9 in the loss of household services as well as the loss of  
10 enjoyment of life.

11           What Dr. Smith admitted on the stand was that  
12 he never used any objective measurement for a baseline  
13 for anything. He never established a baseline for what  
14 her household services were before. Some general  
15 comments from her for what she did. But he never  
16 established the baseline with any objective criteria  
17 before or diminishment afterwards.

18           He never established a baseline for her  
19 enjoyment of life. He just had his assistant basically  
20 ask her, Well, what was your loss of enjoyment of life?  
21 And she just gave him a number, a random arbitrary  
22 number. That's not proof in this case.

23           Ms. Garcia even said on the stand, when I  
24 asked her specific questions about how often she would  
25 do X, Y, and Z before. Well, I wasn't asked that.

1 Well, you weren't because it was your attorney that  
2 asked you that on direct examination, and you're right,  
3 he did not ask you that. He didn't establish that. She  
4 didn't establish that on her direct examination. She  
5 didn't prove it.

6 Her testimony is subjective. Not just  
7 subjective but it's self-serving because of her interest  
8 in this case. She hasn't proven that she's had a loss  
9 of household services. We've had inconsistencies in her  
10 testimony and in Emily's testimony.

11 She wasn't there so much for her kids after  
12 the accident. Well, she wasn't there for her kids  
13 before the accident, I'll submit to you. She was  
14 working Saturday and Sunday and her kids were in school  
15 during the week. So there's a little disconnect there  
16 between what her daughter was saying and what the actual  
17 evidence in this case shows and proves.

18 Now another question during deliberation,  
19 ladies and gentlemen -- and I appreciate your time. I  
20 know it's late in the day. I know it's been an hour.  
21 We're into the fifth week. And I just ask you to stay  
22 with me for a little while longer. I know it can be  
23 distracting. You can lose focus. Because you've heard,  
24 you know, closing argument for two hours earlier.  
25 You've been waiting around. So I just appreciate your

1 time and attention for a little while longer.

2           These are serious claims that Ms. Garcia has  
3 brought against Andrea Awerbach and Jared Awerbach where  
4 she's seeking compensation for -- and she's only  
5 entitled to compensation for the injuries sustained from  
6 this case. Not for unnecessary treatment or symptoms  
7 that were caused from unnecessary treatment. That's  
8 what she is not entitled to.

9           And, yes, we're saying that the fusion surgery  
10 was not necessary. Dr. Klein and Dr. Poindexter said  
11 she's not entitled to that. She's cut off. She's not  
12 entitled to any treatment after that first injection by  
13 Dr. Lemper on August 30th of 2011.

14           She's requesting big money. You saw the  
15 charts that plaintiff's counsel put in front of you.  
16 For her pain, her treatment, her injuries, five years,  
17 future pain and suffering. And yet her interest in this  
18 case -- well, she showed you, as I said a few minutes  
19 ago, for the first three and a half weeks she's here for  
20 three half days and for now a total -- including today  
21 now a total four and a half days.

22           MR. ROBERTS: Objection. Irrelevant.

23           THE COURT: Overruled.

24           MR. MAZZEO: There is no medical reason why  
25 Ms. Garcia couldn't be here. She has a significant

1 interest in this case especially since she brought this  
2 claim against Andrea and Jared Awerbach who made every  
3 effort to be here as much as possible.

4           She has no problem sitting though. We saw her  
5 on the stand quite often, and she got up during the side  
6 bar conferences. Feigning, I submit to you and this is  
7 my argument. That she was feigning this grunting and  
8 groning. That it was not realistic. It was not  
9 genuine. It was all for effect and she was playing up  
10 to you, ladies and gentlemen.

11           Now, she wants basically for you to make her  
12 rich with these numbers that plaintiff's counsel gave to  
13 you, 13-point-something million. 13-something million  
14 in compensatory damages.

15           And then she told you on the stand, you know,  
16 when she was testifying some two years ago when she was  
17 talking about giving some to her daughter Emily. Well,  
18 if she got \$300,000 she was going to share that with her  
19 daughter, Emily.

20           We're here today at trial because the  
21 defendants are contesting the nature and extent of the  
22 injuries she claims she sustained from this accident.  
23 Because we're disputing that she sustained any injuries  
24 to her lumbar spine. Her request for this award, ladies  
25 and gentlemen, for these numbers that Mr. Roberts put up

1 is random, arbitrary, capricious, it's unconscionable,  
2 and it's baseless. There's no basis for the numbers  
3 that they're asking for.

4           You know what's interesting? You know, I  
5 don't know if you all have seen the Wizard of Oz. This  
6 is the wizard, he made all sorts of claims. He was the  
7 powerful and all-mighty wizard. He just didn't want you  
8 to look behind the curtain. Because behind the curtain  
9 is the objective evidence that the plaintiff's counsel  
10 has not shown you, the plaintiff has not shown you and  
11 hasn't shown you in this case. The objective evidence  
12 behind the curtain to show you that her claims are not  
13 supported by objective evidence in this case, and that's  
14 what the evidence will show in this case, ladies and  
15 gentlemen.

16           There are inconsistencies in her reporting,  
17 and you have to -- we have to consider that. Not ignore  
18 it. She has -- she's making these claims, and yet her  
19 claims and her subjective self-statements are not  
20 consistent, as we know, with the statement she made  
21 after the accident as to when the pain started and the  
22 nature and extent of the symptoms, and they just  
23 developed and -- and increased and were -- increased in  
24 size that were not consistent with her initial  
25 complaints.

1           Ladies and gentlemen, she continued with her  
2 functionality after this accident, her work, and by the  
3 way, you heard about her separating from Aliante, her  
4 separating from Fiesta Rancho. It had nothing to do --  
5 and this is in evidence. You know this. Nothing to do  
6 with her physical condition. Nothing whatsoever.

7           We even had Jonathan Davis testify from Fiesta  
8 Rancho testify last week who admitted that. It had  
9 nothing to do with her physical condition. Travel. She  
10 talks about travel. Shopping, Circus. Well, she was  
11 able to do these things beforehand, and guess what, she  
12 was able to do these things after the accident.

13           Working Saturdays and Sundays before. By the  
14 way, three days -- three months, within three months  
15 after the accident, she drove to Texas post-fusion.

16           She moved to a bigger home. If she had a  
17 decrease in functionality, well, moving to a bigger home  
18 would mean she had more tasks and more responsibility.  
19 It would be more time consuming. She didn't talk about  
20 that. I did on cross, but she didn't talk about -- she  
21 stayed away from that topic on direct examination.

22           The Facebook photos very, very telling of her  
23 post-accident functionality and quality of life. You  
24 saw these photos. They were put into evidence last  
25 week. So, ladies and gentlemen, you saw these photos

1 and they're very telling, very representative.

2           Plaintiff's counsel wants you to believe that  
3 these photos, they just depict 17 days. That's it.  
4 Seventeen days out of -- out of 1,800 days in the  
5 last -- and it's actually four years. It's not in 2015.  
6 So it's over the last scope of four years. Nothing  
7 inappropriate. This is a public Facebook account.  
8 Nothing inappropriate in looking at the photos.

9           In light of the claim that Ms. Garcia is  
10 making, the defense has the right to contest the nature  
11 and scope of her injuries, but her counsel is implying  
12 that there's something wrong with that. There's nothing  
13 wrong with that. It's totally appropriate.

14           And so here you see her in various positions  
15 that -- when she posted these. She identified when they  
16 were taken in relation to when they were posted,  
17 relatively, and so you have all of these that are  
18 showing. She is out at the racetrack after the  
19 accident. She's with her kids. So she's doing these  
20 things with her family, with her kids, and she's still  
21 enjoying life.

22           If you look at this one from six months after  
23 the surgery, and that's where she's at -- that's where  
24 she's at the ETA Lounge at Aliante Casino, and what's  
25 significant about that for someone who is saying that

1 she has, you know, very little flexibility in the lumbar  
2 spine and she can't do her -- you know, decreased  
3 functionality, and notwithstanding that she has pain in  
4 performing her duties at work.

5           Her hands are behind her back. She testified  
6 to that. The objective is to bend over. This requires  
7 some agility. To bend over, grab the shot glass in her  
8 mouth, kick the head back. So she's doing -- in a  
9 whipping-type motion. It didn't work for her, but that  
10 was the idea. That's what that shows. And we have  
11 action pictures of several of these.

12           Well, she's having this fun behind the scenes,  
13 and we're wrong for showing this picture where she tells  
14 you, I'm having all this pain and I have all these  
15 limitations I'm going to have for the rest of my life  
16 and in 20 years I'm going to have to have another  
17 surgery. That's speculation. It's also not related to  
18 this accident. She's at the beach. She's outside the  
19 water. She's engaging -- she's engaged in these  
20 activities.

21           And if you think that Mr. Roberts is  
22 suggesting, Well, she's in pain in all of these. Oh,  
23 she's smiling but she's in pain. There's no evidence  
24 she's in pain. She's not wincing. She's not crying in  
25 any of these. You can see from your --



1 MR. ROBERTS: Objection.

2 THE COURT: Sustained. We already talked  
3 about this.

4 MR. MAZZEO: Ladies and gentlemen, you can see  
5 for yourselves that -- how she appeared after the  
6 accident in 2011, 2012, 2013 after the surgery.

7 Ladies and gentlemen, I submit that she did  
8 exaggerate because the evidence is there in the record,  
9 the onset of symptoms, the nature of her activities of  
10 daily living before and after the accident. Her work  
11 limitations. That is not credible and you're allowed to  
12 consider that. There's a jury instruction that allows  
13 you to consider that, ladies and gentlemen.

14 You're allowed to consider the credibility of  
15 any witness. Ladies and gentlemen, that's in one of the  
16 instructions that's given to you, which is relevant in  
17 the case. And it's not just of Ms. Garcia. It's of any  
18 witness in the case. You're allowed to consider that.

19 Now, let's -- let's continue. Let's talk  
20 about Andrea Awerbach for a few minutes. We know that  
21 she did not give Jared Awerbach permission to use the  
22 car on the day of the accident. How do we know that?  
23 Well, she testified to that. She testified as to when  
24 she found out. When she learned about the accident.  
25 She learned when she got the call from the police

1 officer.

2           They're required to prove permissive, implied  
3 or express permissive use on the day of the accident.  
4 Permissive use to use the car on the day of the  
5 accident, and --

6           MR. ROBERTS: Objection. Misstates law.

7           THE COURT: Sustained.

8           MR. MAZZEO: Withdrawn.

9           There's a presumption. That's correct.  
10 Mr. Roberts was correct. There's a presumption of  
11 permissive against Andrea Awerbach. There's a  
12 presumption. And to rebut that presumption. We had  
13 Andrea Awerbach testify, and including Jared Awerbach,  
14 you heard testimony from him in way of a transcript.  
15 And we rebutted that presumption when Andrea Awerbach  
16 told you the circumstances of where she was on the day  
17 of the incident. She gave him keys earlier to get  
18 something out of the car. Not to drive it.

19           As a matter of fact, Jared Awerbach asked to  
20 drive it, and she said no. And then she went away. She  
21 went to shower or something, in her restroom or bedroom.

22           MR. ROBERTS: Objection. Mischaracterizes the  
23 evidence. Never came out.

24           THE COURT: I don't recall what she said she  
25 did so I can't. Sustained. Jury will have to remember

1 what she said.

2 MR. MAZZEO: So is that overruled for now?

3 THE COURT: Yeah, it's overruled for now.

4 MR. MAZZEO: Thank you. May I have the ELmo?

5 So this is testimony that you've heard. It's  
6 been entered into the record, and this is testimony from  
7 Jared. So it says -- and let me increase that size,  
8 ladies and gentlemen. Mr. Roberts gave you his take on  
9 the evidence a few minutes ago.

10 So, question to Jared during trial:

11 "Q And on the day of the  
12 accident your mom didn't actually  
13 tell you, no, you couldn't take the  
14 car; isn't that correct?

15 "A She did.

16 "Q She did?

17 "A Yes, sir.

18 "Q I thought you said she was  
19 in the shower?

20 "A She was.

21 "Q Did you ask her?

22 "A We asked. We had. I had asked  
23 her to take us to the location. She  
24 said no. I said, Can I take myself.  
25 She said no.

1 "Q Okay.

2 "A Can I take -- the mother of my  
3 children take me and she said no.

4 She said no. There was no implied permission.  
5 There's no express permission. The only thing that was  
6 expressed was that she said no. She didn't say he could  
7 take the car. So rebutting the presumption of  
8 permissive use, it's rebutted.

9 MR. ROBERTS: Objection. Hearsay to the  
10 extent he's offering to the truth.

11 THE COURT: Overruled.

12 MR. MAZZEO: Ladies and gentlemen, one of the  
13 jury instructions -- one of the jury instructions that  
14 you will see is -- and the question -- it's Jury  
15 Instruction Number 30. It's this one. Let me decrease  
16 it. One of the things that you have to find in order to  
17 establish a claim of negligent entrustment is that  
18 Andrea knowingly entrusted her vehicle. Knowingly  
19 entrusted -- that's one of the elements -- to an  
20 inexperienced and incompetent person. But you have to  
21 find knowingly entrusted. She did not knowingly entrust  
22 the vehicle. We proved that she did not do that. So  
23 there was no permissive use. She did not knowingly  
24 entrust the vehicle.

25 Now, the plaintiff's counsel, Mr. Roberts,

1 during his closing argument suggested, well, there's an  
2 instruction that says that with the request for  
3 admission -- you saw that yesterday when Andrea was on  
4 the stand. Request for admission where it's deemed  
5 conclusively proved, the request for omission about  
6 Andrea saying -- that was filed by her attorney then,  
7 her then attorney. Saying that Andrea gave Jared  
8 permission to use the car. So let's look at that  
9 instruction. I don't know if Mr. Roberts showed this to  
10 you but I will.

11           You will regard it as being conclusively  
12 proved -- I'm sorry. In this case, as permitted by law,  
13 plaintiff served on Defendant Andrea Awerbach a written  
14 request for admission of the truth of certain matters of  
15 fact, and that was with regard to use of the vehicle,  
16 the use, permission to use the vehicle. You remember  
17 that from yesterday.

18           And you will regard that as being conclusively  
19 proved, all matters of fact that were expressly admitted  
20 or which Andrea failed to deny. Or which Andrea failed  
21 to deny.

22           So that takes us to Jury Instruction  
23 Number 13, the interrogatory. In the interrogatory --

24           MR. ROBERTS: Objection. Misstates Rule 36.

25           THE COURT: We've discussed this already. I'm

1 going to allow it. Overrule.

2 MR. MAZZEO: Thank you, Judge.

3 So the interrogatory that was filed that  
4 Andrea signed, verification, she signed that. She  
5 specifically -- it was sent -- it was dated two weeks  
6 later. Two weeks after the requests for admissions  
7 signed by her counsel. It was dated two weeks later.  
8 She signed the verification. She told you on the stand  
9 yesterday. She expressly stated that she did not give  
10 Jared permission to use the car. Your request for  
11 admission, she did deny it.

12 Now we move on to oppression. Let's talk  
13 about oppression of malice, ladies and gentlemen. And  
14 you're going to get this instruction. Instruction  
15 Number 38. This instruction 38. Let's look at it.  
16 Let's look at whether the plaintiff proved this  
17 instruction -- and, by the way, at the very top.  
18 Remember what you -- remember the standard here. Clear  
19 and convincing evidence. Not preponderance of the  
20 evidence but clear and convincing evidence. That's what  
21 the plaintiff has to prove in order to succeed and avail  
22 on the punitive damages against Andrea.

23 So what does he have to show? Oppression.  
24 And we're going to define what it means. Despicable  
25 conduct. Subjects plaintiff to cruel and unjust

1 hardship with conscious disregard. So despicable  
2 conduct and conscious disregard. We have two,  
3 oppression or malice. And then they define despicable  
4 conduct with conscious disregard. Conduct that is so  
5 vile, base or contemptible it would be looked down upon  
6 and despised by decent ordinary people. All the  
7 troubles and tribulations she's had with her son in the  
8 past. Hiding keys, hiding her wallet, hiding things  
9 because her son was a bit of a -- you know, he was a  
10 troubled son. They had a troubled relationship. She  
11 had to hide this stuff from him. That's what they're  
12 contending is despicable conduct because he took the  
13 keys to her car the day of the accident when she first  
14 learned about the accident when the police officer  
15 called her and told her that her son is being arrested  
16 and she asked -- for a DUI.

17           She said, What is it? Drugs or -- marijuana  
18 or alcohol. That's oppression. That's despicable  
19 conduct. That's what they're seeking punitive damages  
20 from you all from. That's outrageous. That they're  
21 actually pursuing this. And then that's just one  
22 phrase. They have to prove both conscious disregard and  
23 despicable conduct for both oppression and malice,  
24 either one, but both of these terms aren't both of these  
25 definitions, whether they're seeking it by oppression or

1 malice.

2           Well, malice, it's either intention. Intended  
3 to injure. We know that's not in this case. There's no  
4 intent to injure the plaintiff or despicable conduct  
5 engaged with a conscious disregard. So you have it in  
6 both oppression and malice.

7           So conscious disregard. Knowledge of the  
8 probable harmful consequences of her wrongful act.  
9 She's in the bathroom. She's in the shower. She  
10 doesn't know he took the keys. She gets a call  
11 afterwards from a police officer and they're saying she  
12 had a conscious disregard. That's outrageous that  
13 they're actually insinuating and pursuing this claim  
14 against her.

15           Probable harmful consequences of a wrongful  
16 act, willful and deliberate failure to avoid. Willful  
17 and deliberate. Her willful and deliberate failure.  
18 Right underneath intentional conduct. Willful and  
19 deliberate failure to avoid these consequences. The  
20 consequences of Jared taking the car and getting into an  
21 accident. Willful and deliberate. There's absolutely  
22 no evidence, any evidence in this case of any willful  
23 and deliberate failure to avoid the consequences.

24           And yet Ms. Garcia has the audacity to come to  
25 court and pursue a claim for punitive damages against my



1 client. That's outrageous. They didn't prove it,  
2 ladies and gentlemen. They did not prove punitive  
3 damages against my client. That she engaged in conduct  
4 so vile biased and contemptible that it's despised by  
5 ordinary people. Where's the evidence?

6           They showed you a board with all these numbers  
7 on it. Hey, full and fair compensation. Let's give her  
8 this money, and let's give her this. You can give her  
9 more. You can go up to 10 times. Really? Based on  
10 conscious disregard and willful and deliberate.

11           It's not about -- Judge, may we switch back to  
12 my PowerPoint, please?

13           MR. ROBERTS: I'm going to object. Misstates  
14 my argument. I was not allowed to argue an amount to  
15 Ms. Awerbach.

16           THE COURT: Sustained.

17           MR. MAZZEO: Okay. Ladies and gentlemen, do  
18 not consider punitive damages against her. There is no  
19 oppression or malice. There's no conscious disregard or  
20 despicable conduct that requires willful and deliberate  
21 failure. We don't have that. Conduct that is so vile,  
22 based or contemptible. We don't have that. There's  
23 just no evidence in this case about -- that with regard  
24 to Jared's use of the car, taking it without permission  
25 on the day of the accident when both he and Andrea

1 Awerbach both say that he didn't have permission. She  
2 didn't know about it until after this. The claim is not  
3 about punishing Andrea. She's not entitled to punitive  
4 damages. Period.

5 And then Jared Awerbach. Well, by the way --  
6 and you'll see this. It's clear and convincing  
7 evidence. Judge, if I may I switch back. Thank you,  
8 Judge.

9 So this is Jury Instruction 39, and it just  
10 tells you about clear and convincing evidence, the  
11 standard that you have to meet in order to find it.  
12 It's more than preponderance of the evidence. It's a  
13 firm belief or conviction as to the allegation sought to  
14 be established. More than mere preponderance. Proof  
15 which persuades the jury the truth of the contentions is  
16 highly likely, and they haven't met that burden or any  
17 burden in this case with regard to even finding punitive  
18 damages against Andrea. So on that question on the jury  
19 verdict form, says if you want to consider it, I ask you  
20 to just put no, unless there's actually clear and  
21 convincing evidence that they're entitled to it, of  
22 oppression and malice and conscious disregard, which  
23 there isn't any.

24 Now, with respect to Jared Awerbach. Jared,  
25 as you know, you've heard it, and I'm not going to go

1 over the whole thing with you. You heard Andrea  
2 yesterday. You heard Jared for a little bit on Friday.  
3 She struggled with Jared with her son, she struggled  
4 with him for many years in his formative years as a  
5 teenager. He was addicted to marijuana. He was  
6 manipulative. He lied. He stole. He was a troubled  
7 kid. He certainly was. He just had a bad adolescence  
8 and this addiction was certainly a problem.

9           The reprehensibility of his conduct, though,  
10 with respect to when we look at the reprehensibility of  
11 the conduct, this same motor vehicle accident -- we all  
12 heard about the circumstances surrounding the accident.  
13 The same motor vehicle accident, Ms. Garcia testified  
14 she was coming down southbound on Rainbow, there was a  
15 bus or truck to her right, and after that was the  
16 private drive that Jared pulled out of. It's dark out.  
17 It's night. It's January 2nd. It's dark at that time  
18 of day, that time of year.

19           And so that accident, I submit to you, could  
20 have happened whether a person is impaired and whether a  
21 person is not impaired. So when we look at the  
22 reprehensibility of his conduct, you have to look at the  
23 factors whether this accident could have happened,  
24 regardless whether Jared was found to be impaired.  
25 Because we all know that accidents happen regardless of

1 impairment or not.

2           And we're going to look at the instruction,  
3 notwithstanding Mr. Strassburg, Jared's counsel might go  
4 through this with you anyway. This Instruction  
5 Number 41, and plaintiff's counsel, Mr. Roberts, showed  
6 this to you during his closing argument, so I want to  
7 highlight a few things. Your word --

8           MR. ROBERTS: Your Honor, may we approach?

9           THE COURT: Sure.

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

12           THE COURT: Objection sustained. Let's move  
13 on.

14           MR. MAZZEO: All right, Judge. Judge, could  
15 we switch back to the computer? I like having the  
16 multimedia assistant in the courtroom.

17           THE COURT: Glad I could help.

18           MR. MAZZEO: All right, ladies and gentlemen.  
19 So here we have. Give me a second -- oh, by the way --  
20 well, I'll get back to that jury instruction. So  
21 medical specials comparison, and I showed you this,  
22 ladies and gentlemen, in the opening statement and I'm  
23 showing it to you again because the defendant does have  
24 a difference in contesting the injuries, the damages,  
25 the treatment that plaintiff claims is related to this

1 accident. We're saying, no, most of it is not related  
2 to this accident. And so I showed you their list.

3           Now, their list had changed. Dr. Oliveri had  
4 made some changes to it. If you look at the second  
5 page. Took out the \$627,000 and it's now \$574,000. But  
6 the important number isn't the 627 or 574. The  
7 important number is \$20,018.52. That's the important  
8 number because none of the work -- if you look at  
9 fourteen down. Kidwell and Pacific Hospital, Dr. Gross.  
10 The surgeries that were performed. Dr. Mortillaro. She  
11 doesn't get any of this. I submit to you they did not  
12 prove the case. And it's because the objective medical  
13 evidence does not support that she needed medical  
14 treatment for those injuries.

15           So if we go to the accident-related medical  
16 treatment.

17           Your Honor, I apologize. It's cut off on the  
18 right for some reason. \$20,018.52 is what we contend  
19 are the related medical costs in this case.

20           And then I showed you this in opening.  
21 Haven't changed any -- the evidence actually supports --  
22 now supports this chart that I put up for you.  
23 Plaintiff's damages related to the subject accident for  
24 the past medical costs. We still say. \$20,018.52.  
25 Past pain and suffering. Not future. Past pain and

1 suffering, \$10,000. Alleged future medical costs, zero.  
2 Alleged lost services both past and future, zero. She  
3 should not get any compensation for that.

4           The defense submits that this is full and fair  
5 compensation. Mr. Roberts, in his closing arguments,  
6 said, Well, we're here and they had Dr. Klein -- they  
7 paid him so much and the attorneys are here for so long,  
8 and all we want is full and fair compensation. Well,  
9 guess what, okay, the secret is out. That's what we  
10 want. We want full and fair compensation for the  
11 injuries related to this accident based on objective  
12 medical evidence. Reasonable and reliable evidence,  
13 ladies and gentlemen. That's what we're asking for in  
14 this case.

15           Judge, may I -- can you please transfer?  
16 Thank you. You're on it, Judge. Thank you.

17           THE COURT: I try.

18           MR. MAZZEO: Okay. The instruction I was  
19 referring to before. It is Instruction Number 15 with  
20 regard to the credibility of a witness.

21                   "If you believe that a witness  
22                   has lied about any material fact in  
23                   the case you may disregard the entire  
24                   testimony of that witness or any  
25                   portion of that testimony which is

1 not proved by other evidence."

2 So that's one thing I was referring to. Now I  
3 want to show you the jury verdict form. And I'm going  
4 to give you some suggestions as to how to fill it out.  
5 What's appropriate in this case. And I've already  
6 filled it out. Past medical expenses \$20,018.52.  
7 Future medical expenses, zero. This is based on the  
8 medical evidence in this case. Past loss of household  
9 services, zero. Future loss of household services,  
10 zero. Past pain and suffering, loss of enjoyment of  
11 life, \$10,000 is appropriate for the injuries that are  
12 related to this accident. For a total amount of  
13 \$30,018.52.

14 Number 3 -- we'll move on to Number 5.

15 "Did Defendant Andrea Awerbach  
16 give express or implied permission to  
17 Defendant Jared Awerbach to use her  
18 vehicle?"

19 No.

20 "Did Defendant Andrea Awerbach  
21 negligently entrust her vehicle to an  
22 inexperienced or incompetent person?"

23 She never gave it to him on January 2nd, so  
24 the answer has to be -- it has to be no.

25 "Did plaintiff prove by clear

1           and convincing evidence that Andrea  
2           Awerbach acted with oppression or  
3           malice?"

4           The answer is no. And then:

5                    "Should punitive damages be  
6           assessed against Andrea Awerbach for  
7           sake of punishment?"

8           The answer is no. But if you already answered  
9 no to number eight, you skip to the end and you just  
10 sign it, but the instructions are there. You'll see it,  
11 ladies and gentlemen. You're going to receive this  
12 form.

13                   So, finally, ladies and gentlemen -- Judge,  
14 one more time.

15                   Ladies and gentlemen, as you know, we dispute  
16 the nature and extent of the medical specials, household  
17 services, pain and suffering, loss of enjoyment of life.

18                   Pain and suffering, Mr. Roberts kind of went  
19 over that with you. You'll have an instruction on it.  
20 Physical and mental pain, suffering, anguish, disability  
21 endured by plaintiff from the date of the accident to  
22 the present related to the accident. It's subjective.  
23 There's no definitive standard to affix reasonable  
24 compensation. That's for you all to decide amongst  
25 yourselves. What's reasonable in this case?



1           You can use objective factors. Facebook  
2 photos, activities of daily living, work, her alleged  
3 limitations. You can use her answers on  
4 cross-examination as well to come to a conclusion and a  
5 figure as to pain and suffering. But it's what you feel  
6 is reasonable and just in light of the evidence. It's  
7 not what I say. It's not what Mr. Roberts. It's not  
8 what numbers he posts on a board or numbers I post.  
9 It's what you all come to a conclusion because that's  
10 what -- we have chosen you as jurors in this case to  
11 make that decision, and you're going to make that  
12 decision.

13           Ladies and gentlemen, and I'll leave you with  
14 this.

15                       "Justice requires that if the  
16                       subjective complaints and medical  
17                       treatment is not supported by  
18                       objective medical evidence, then the  
19                       plaintiff has not proven her claim by  
20                       a preponderance of the evidence."

21           And you can't award her. You can only award  
22 her, as Mr. Roberts says, I'm in agreement, full and  
23 fair compensation for the injuries related to the  
24 accident and any treatment that is related to the  
25 accident. If it's not related, she doesn't get paid for

1 it. Thank you.

2 THE COURT: I think we need a break. Take a  
3 quick break.

4 (Jury exited.)

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

7 THE COURT: Outside the presence of the jury.  
8 Anybody need to make a record on anything that happened  
9 during the closings so far?

10 MR. MAZZEO: No, Judge.

11 THE COURT: You've got a half hour. Do you  
12 want to get started?

13 MR. STRASSBURG: No. Would it be okay if we  
14 just start tomorrow morning when everybody is fresh,  
15 including Mr. Roberts who has the last word?

16 MR. MAZZEO: They look like they're dragging,  
17 Judge. They look --

18 THE COURT: I agree.

19 MR. MAZZEO: -- foggy in the eyes.

20 THE COURT: So start at 9:00?

21 MR. STRASSBURG: Yeah, that would be great.

22 THE COURT: You're closing. You finish your  
23 rebuttal and give it to them tomorrow.

24 MR. MOTT: I do have one thing, Your Honor.

25 THE COURT: Okay.

1           MR. MOTT: I would request reconsideration.  
2 You sustained their objection during my opening. When I  
3 said during my opening they were going to call  
4 Ms. Garcia a liar. You sustained the objection and  
5 stated to the jury you don't think anyone was going to  
6 do that. I think that has just happened about a dozen  
7 times.

8           THE COURT: I don't remember sustaining that  
9 and saying that nobody was going to do that.

10          MR. MAZZEO: And I didn't call her a liar. I  
11 said she was not.

12          MR. MOTT: He said she feigned it. She  
13 feigned her pain and exaggerated her symptoms.

14          MR. STRASSBURG: Judge, there's a jury  
15 instruction on credibility.

16          THE COURT: And, Mr. Roberts, I think you may  
17 misremember how that happened because I don't think I  
18 sustained the objection.

19          MR. ROBERTS: I may --

20          THE COURT: I did?

21          MR. ROBERTS: I may misremember it, Your  
22 Honor, but I think you did, and you told the jury you  
23 didn't think that was going to happen.

24          MR. MAZZEO: I don't. I don't think so. Did  
25 he --

1 THE COURT: Well, he didn't -- he didn't use  
2 the word "liar" but he did --

3 MR. MAZZEO: I didn't.

4 THE COURT: -- imply that she was being  
5 dishonest, I agree.

6 MR. MAZZEO: Well, yes, about her antics on  
7 the stand when we had side bars. That's correct. I  
8 definitely did. Absolutely.

9 THE COURT: So you can talk about it in your  
10 rebuttal.

11 MR. ROBERTS: Thank you, Your Honor.

12 THE COURT: Does that fix it? Anything else?  
13 How about I have Kirk send everybody home and we'll just  
14 tell them to come back tomorrow at 9:00, okay?

15 MR. MAZZEO: Okay.

16 THE COURT: All right. Off the record.

17 (The proceedings was concluded at  
18 4:28 p.m.)

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REPORTER'S CERTIFICATE

STATE OF NEVADA )  
 ) ss  
COUNTY OF CLARK )

I, Leah Armendariz, CCR 921, RPR, do  
hereby certify that I took down in Stenotype all of the  
proceedings had in the before-entitled matter at the  
time and place indicated and that thereafter said  
shorthand notes were transcribed into typewriting by me  
and that the foregoing transcript constitutes a full,  
true, and accurate record of the proceedings had.

IN THE WITNESS WHEREOF, I have hereunto  
set my hand and affixed my signature in the County of  
Clark, State of Nevada, this 8th day of March, 2016.

*Leah D. Armendariz*  
Leah D. Armendariz, RPR, CCR 921

MR. MAZZEO: [54] 15/9 16/3 16/7 34/23 36/23 39/9 39/17 73/5 73/10 73/16 80/12 82/2 83/8 84/18 93/18 94/5 97/19 125/5 125/7 126/16 127/1 127/18 128/2 129/7 129/12 129/18 131/2 131/5 131/14 131/17 131/20 143/14 163/19 163/24 164/19 168/23 174/3 175/7 176/1 176/3 177/11 179/1 182/16 185/13 185/17 187/17 191/9 191/15 191/18 192/9 192/23 193/2 193/5 193/14 MR. MOTT: [8] 73/19 83/9 83/15 84/4 84/7 191/23 191/25 192/11 MR. ROBERTS: [66] 3/18 3/20 6/8 7/3 7/23 7/25 8/2 8/9 8/11 8/20 8/23 10/5 10/12 10/16 10/23 11/1 11/5 11/9 11/12 11/16 14/11 14/14 17/23 18/10 18/18 20/15 29/8 30/4 31/20 33/15 36/3 36/18 36/25 37/13 38/3 38/8 38/14 39/10 39/16 64/7 64/9 67/11 73/11 76/5 84/17 84/21 93/21 94/8 97/22 123/16 130/9 131/13 143/8 163/18 164/17 168/21 173/25 175/5 175/21 177/8 178/23 182/12 185/7 192/18 192/20 193/10 MR. ROBERTSON: [1] 64/12 MR. SMITH: [4] 16/17 33/4 34/5 127/4 MR. STRASSBURG: [8] 12/20 12/22 82/19 123/14 164/5 191/12 191/20 192/13 MR. 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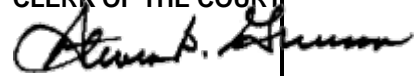
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Steven D. Grierson  
CLERK OF THE COURT



CASE NO. A-11-637772-C

DEPT. NO. 30

DOCKET U

DISTRICT COURT

CLARK COUNTY, NEVADA

\* \* \* \* \*

EMILIA GARCIA, individually,

Plaintiff,

vs.

JARED AWERBACH, individually;

ANDREA AWERBACH, individually; DOES

I-X, and ROE CORPORATIONS I-X,  
inclusive,

Defendants.

REPORTER'S TRANSCRIPT  
OF  
PROCEEDINGS

BEFORE THE HONORABLE JERRY A. WIESE, II

DEPARTMENT XXX

DATED WEDNESDAY, MARCH 9, 2016

REPORTED BY: LEAH ARMENDARIZ, RPR, CCR #921

AA\_006204

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23 \* \* \* \* \*

1           **LAS VEGAS, NEVADA, Wednesday, March 9, 2016;**

2                           **9:33 A.M.**

3  
4                           P R O C E E D I N G S

5                           \* \* \* \* \*

6           THE COURT: Welcome back, ladies and  
7 gentlemen. Sorry for the delay. We're back on the  
8 record, Case Number A637772. Do the parties stipulate  
9 to the presence of the jury?

10           MR. ROBERTS: Yes, Your Honor.

11           MR. MAZZEO: Yes, Your Honor.

12           THE COURT: Mr. Strassburg, your closing.

13           MR. STRASSBURG: Thank you, Judge.

14           I want to thank you for the time that you've  
15 devoted to this case. And as the one who has always  
16 been going last, I'm doubly grateful for you paying  
17 attention and keeping an open mind.

18           This is closing statement, and I wonder if it  
19 would be all right if -- I've moved the table over here  
20 because I just need to see the screen while I'm with you  
21 because I have to make adjustments. I hope I'm not too  
22 close.

23           What we -- I think what -- this really isn't  
24 closing argument in a sense. The arguments happen in  
25 the jury room in deliberations, and I think that



1 probably the best way I can be of assistance to you in  
2 conducting your deliberations is to just identify some  
3 issues that might come up and the kind of evidence that  
4 you may want to point to to reason with anybody that  
5 disagrees with you in the jury room just to help you in  
6 those deliberations.

7           Let's start with the law. You know, one of  
8 the arguments you can make is it keeps coming back to  
9 has the plaintiff met the burden of proof, and they have  
10 not. And, here, the plaintiff has the burden of proof  
11 in this case to prove -- they have to prove  
12 negligence -- I'm sorry. They have to prove causation  
13 and they have to prove what their damages are, and  
14 that's their burden, and one of the things that you may  
15 want to talk about is that they haven't met that burden.

16           Because, you see, when the plaintiffs have the  
17 burden of proof, that means that the defendant has the  
18 benefit of the doubt. Because if there's doubt there's  
19 not proof, and where there's not proof, plaintiff hasn't  
20 met the burden.

21           So, in this case then, you may want to remind  
22 whoever you're talking with that, Hey, look, the  
23 benefit -- I'm sorry, the benefit of the doubt is on the  
24 defendant because here the burden of proof is on the  
25 plaintiff and the burden requires evidence.

1           Now, let's talk about evidence. One of the  
2 things that jurors have told me is helpful is the  
3 difference between evidence and assumptions. Because  
4 assumptions are not evidence. There's a jury  
5 instruction here. It's Instruction Number 20. And it  
6 says, what this concept of preponderance of the evidence  
7 means. Remember all that stuff on opening about the  
8 tipping and all that stuff? I don't see it that way.

9           You have a right to insist that the burden,  
10 the weight does not shift to the plaintiff unless you're  
11 sure that the weight has shifted. And you see the  
12 scales of justice up here that the judge has. That's  
13 kind of an image of this shifting, that the weight of  
14 the evidence on the plaintiff's scale compared to the  
15 weight of the evidence on the defendant's scale. And  
16 the burden is satisfied only if you're sure that the  
17 scale on the plaintiff's side has shifted in their  
18 favor, and here, it has not.

19           Now, if you think of these scales as -- as  
20 piled with evidence, and what I want you to focus on is  
21 on the plaintiff's scale, what they say is evidence,  
22 it's really assumptions they want you to make, and what  
23 I want to show you is don't fall for that. An  
24 assumption is not evidence. That's jumping to  
25 conclusions rather than insisting it be proven. And

1 that's one thing you might want to mention when you  
2 deliberate.

3           Because as you can see what we're talking  
4 about is the greater probability of truth, and that's  
5 how you tell where the probabilities lie, and here, the  
6 probabilities from the evidence, not just the  
7 assumptions they want you to make, the probabilities  
8 point to this accident didn't cause all of the  
9 conditions that the doctors were treating. It just  
10 didn't happen. The accident only caused soft tissue  
11 strain and sprain. It didn't cause any condition that  
12 required a fusion -- bless you -- fusion, injection,  
13 rhizotomy, and the like.

14           The other instruction you might want to point  
15 to is Number 20 -- sorry. Number 35. And this is the  
16 instruction on preexisting conditions, and here the law  
17 says that if a condition is present at the time of the  
18 injury, the plaintiff is not entitled to recover for  
19 that. And here the evidence shows -- not the  
20 assumptions they want you to make, but the evidence  
21 shows that the offset in her spine at L5-S1, the bulges  
22 in the disk, the condition of the facet joints, that was  
23 all present at the time of the accident. It was not  
24 caused. She cannot recover for that. That's just the  
25 law.

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

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

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

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

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

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

1 THE COURT: Come on up.

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

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

12 Go ahead, Mr. Strassburg.

13 MR. STRASSBURG: Thank you, Judge.

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

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

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

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

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

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

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

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

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

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

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

1 also seen count -- bless you.

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

5 MR. STRASSBURG: Permission to approach.

6 THE COURT: Come on up.

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

9 THE COURT: The objection is overruled.

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

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



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

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

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

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

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

20           "A I tried."

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

25           Now, let me show you how they went about

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

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

17           And what was Dr. Kidwell's answer?

18           "A It's my understanding" -- oh,  
19           where did he go? He talked to -- "as  
20           part of the collision she was  
21           traveling approximate 35 miles an  
22           hour" -- from her -- "struck by  
23           another vehicle" -- that's true --  
24           "causing her vehicle to spin at least  
25           180 degrees."

1           That's kind of spin because we know it was  
2 only 180 degrees. It wasn't 360 or any more.  
3 180 degrees.

4           And then Dr. Kidwell says:

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

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

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

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

21           Okay. February 24, Page 07.

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

1 "A I don't know. I mean, she spun  
2 180 degrees. If you ever watched a  
3 video of people of crash-test  
4 dummies, they get flopped all over  
5 the place. I mean, nobody is really  
6 there to videotape it, but I dare say  
7 if you took one of the crash test  
8 dummies and put it at in a 180 spin  
9 while traveling at 35 miles an hour,  
10 it would result in some shaking up,  
11 for lack of a better word.

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

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

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

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

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

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

13 Did it hurt his spine? Of course not.  
14 Page 110:

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

17 "A Played a little havoc with my  
18 neck.

19 "Q But your spine was okay?

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

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

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

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

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

15 "Q Could the injury have exacerbated  
16 that sheering?

17 "A Sure, I would go that far."

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

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

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

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

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

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

19 "A I can say that.

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

22 "A Correct.

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

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

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

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

5 "A Correct.

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

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

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

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

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

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



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

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

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

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

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

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

25 "Q The airbags did not deploy?

1 "A No, sir."

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

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

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

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

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

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

1           The only thing between the two is the  
2 accident, therefore, the rooster must have caused the  
3 sun to come up. That's what's called an assumption.

4           Okay. Here, let me do a Kidwell. See how you  
5 like this, and this you might want to talk about in your  
6 deliberations. At times, Strassburg, he pulled a  
7 rooster. Let me show you how logical this really is and  
8 then ask yourself, is this the kind of thing we ought to  
9 hit somebody for for millions of dollars and his mother?

10           Remember when Ms. Garcia said she called  
11 Jared's representative, and she called after she went to  
12 the ER. And if you don't, March 3, Page 25:

13           "Q On direct examination you told us  
14 the jurors that you had -- I guess  
15 after you went to the emergency room  
16 at MountainView you would call Jared  
17 Awerbach's representative."

18           And she said, "I did."

19           And she said that when she called them she  
20 asked for a referral to a doctor. March 3rd, Page 25,  
21 and when she was doing that, she managed to forget about  
22 any offers of assistance.

23           March 3, Page 39:

24           "Q Did Jared Awerbach's  
25 representatives ever offer to pay for

1           your medication prescription?

2           "A No, not that I can remember."

3           She did admit that the representative asked  
4 her if she was okay. Page 39 on March 3rd.

5           "Q In any event, it's correct that  
6 when you spoke to Jared Awerbach's  
7 representative, based on the  
8 recording statement, the rep did ask  
9 how you were feeling, right?

10          She said "yes."

11          And the part she left out was that the rep  
12 asked her if she was planning on following up with  
13 treatment, and she told them she was just going to go to  
14 the hospital clinic. Directing your attention March 3,  
15 Page 40.

16          "Q When the representative asked you  
17 if you plan on seeking any follow-up  
18 treatment, your response, and your  
19 only response to them was you're  
20 hoping it stops hurting and if  
21 anything I would go back to either  
22 the hospital or the clinic. Isn't  
23 that what you said?

24                 Her answer was: If that's what  
25 it says here -- "If that's what it

1           says on there, yeah."

2           So, how about this for the rooster, Ms. Garcia  
3 gets in a wreck, she calls the representative of Jared.  
4 She doesn't get just exactly what she wants, she gets  
5 pissed off, and she goes to get a check from Mr. Lerner.  
6 That's just about as logical as Dr. Kidwell.

7           Now, Dr. Kidwell's whole logic -- dare I say,  
8 house of cards -- depends upon his assumption that  
9 nothing happened between the accident and the surgery,  
10 and this raises the issue that you may want to remind  
11 anybody who is arguing with you on September 3rd, right  
12 here, and it's the day before she runs to Dr. Lemper and  
13 he gives her the facet injection, remember the emergency  
14 appointment where she said something happened in the  
15 shower. And what happened in the shower?

16           And here there's varying testimony that I just  
17 want to call to your mind and you can decide did it  
18 really happen the way she says or not? March 4,  
19 Page 72:

20           "Q The day before you experienced a  
21 dramatic increase in your pain level,  
22 do you recall?

23           "A Yes, sir."

24           And Page 73:

25           "Q As a result of that experience

1           you went to Lemper and he gave you an  
2           injection, right?

3           "A Yes, sir."

4           Now, she was asked in the courtroom, so what  
5 happened? What did -- March 4, Page 73.

6           "Q Now, what do you recall happened  
7           in the shower the day before?

8           "A I -- I couldn't remember  
9           whether -- you know, I had bent over  
10          to wash my feet" --

11          Think about that. Here's the spine. Bending  
12 over to wash her feet. Give that a try in the jury  
13 room. Stand up, bend over, and try to touch your toes,  
14 and tell whoever is asking you to change your mind how  
15 your back feels about L5-S1 when you try to. But that's  
16 what she said.

17          She said:

18                 "Wash my feet or my leg and just  
19                 the shooting pain stopped me from  
20                 continuing what I was doing, and I  
21                 had to scream for somebody to come  
22                 and help me out of the shower."

23          She had to scream. In the accident, did you  
24 hear her screaming on the 911 call? Any witnesses at  
25 the accident say she screamed? Oh, no. This pain is

1 different because it made her scream while she was  
2 performing an activity that I can't do today. That's  
3 what she says. But that wasn't all she said.

4 She was showed her deposition. March 4,  
5 Page 74. The question was -- I'll skip some of this,  
6 read of the records, yada, yada, yada. It says:

7 There's a note in Dr. Lemper's  
8 records in about September 2011. So  
9 about nine months after the accident  
10 that says she, which is referring to  
11 you in the records, had a sudden  
12 increase of low back pain radiating  
13 to both legs when she bent to wash  
14 her legs in the shower. Do you  
15 recall that?

16 "And you, your answer was: 'I  
17 don't remember bending or I don't  
18 remember if there was anything that  
19 triggered it that I could have done  
20 because I have had problems bending.  
21 I just remember being in the shower  
22 and hurting.'"

23 That's not it. That's not all of it. All  
24 right let me give you the answer in full.

25 She says:

1                   "I just remember being in the  
2                   shower and hurting and pretty much  
3                   crawling, somehow out -- not crawling  
4                   but got out of the shower slowly and  
5                   crawled into bed."

6                   You think about whether that's credible. What  
7 was she really going to say when she tried to walk it  
8 back, and pretty much crawling somewhere out -- not  
9 crawling. Do you think she realized that she had  
10 spilled the beans and went on that she slipped in the  
11 shower, she fell in the shower, and that's how she got  
12 to a position in the shower where she had to crawl out  
13 of the shower? Use your common sense.

14                  Ask yourself, what probably really happened,  
15 because the plaintiff wants you to assume the same  
16 assumption Kidwell did. That assumption that there's  
17 nothing between the accident and the surgery. That  
18 makes any bit of difference, even though September 13,  
19 2011 she's in the shower doing something that makes her  
20 scream with pain where she can't walk, and even she  
21 admits that she had to crawl to bed. And you ask  
22 herself, was she really going to say she had to crawl  
23 out of the shower because she fell.

24                  Now, also you might want to say to whoever --  
25 if there's some -- and I'm not saying you're going to



1 argue. I'm not saying there's anything untort or  
2 unpolite about it, it's just when you're having your  
3 discussions with your fellow jurors, you might ask  
4 yourself how could she bend down and wash her feet or  
5 wash her legs? Because, you know, there was an IME  
6 conducted by Dr. Stamford, Dr. Oliveri, and Oliveri  
7 says.

8 I'll just give you the part -- so Oliveri sees  
9 her in June, June 4 of 2013 and Oliveri testifies that  
10 he measured her lower back range of motion.

11 "I used an electronic device  
12 that gave me specific degrees of  
13 motion. She had some decreased range  
14 of motion in her lower back. Her  
15 lower back extension, bending  
16 backwards, was 18 degrees. Her lower  
17 back flexion, bending forward, was  
18 38 degrees. That's about a  
19 50 percent reduction in her lower  
20 back motion."

21 So, let's see -- bless you. To get to your  
22 feet, you've got to bend 90. To get to your knees, I've  
23 got to bend 90, and she could only bend 38. How could  
24 somebody with a condition that imposed that on her, even  
25 after the surgery. I mean, this was the surgery that

1 Gross did that was wonderful she says. She's still  
2 50 percent reduction.

3 And then Dr. Cash, he had her do the bending  
4 stuff before. March 26, 2016, Page 42. Okay. Now,  
5 just so we're clear. This is Dr. Poindexter. I know  
6 they don't like him, and they say he flunked his boards,  
7 but they never say he couldn't read, and what he's  
8 reading here is Dr. Cash who passed his boards so  
9 Dr. Cash says:

10 "Q And so specifically what Dr. Cash  
11 has on the report is 20 degrees  
12 flexion, 10 degrees extension.  
13 Yeah."

14 Remember Dr. Cash? He saw her back here. Six  
15 weeks after the accident. February 2011. The shower  
16 incident is in September 2011. And according to Cash's  
17 report, assuming Dr. Poindexter can read, I believe he  
18 can -- 20 degrees of flexion. That's even worse than  
19 38, right? But she says she's touching her feet or her  
20 legs in September, seven months later, in the shower.

21 So here's my third assumption that you should  
22 not -- Mr. Roberts wants you to assume that Ms. Garcia  
23 is believable, she's credible, that you can take her  
24 testimony that she swore from that witness stand to the  
25 bank. And one of the questions you might want to have

1 is do you agree with that or is it just another  
2 assumption they want you to make?

3 Let me give you an example. Remember the  
4 testimony about her social life? You don't? How could  
5 you be expected to, so I brought it. Let's start with  
6 the foundational question. March 3, Page 130:

7 "Q So Kidwell, August 15, 2012,  
8 recall?

9 "A Okay.

10 Now, where are we? Right here. August 15,  
11 2012. This is kind of Kidwell's kick off. First visit,  
12 assesses her before he starts all this. So that's where  
13 we are on the chart in the course of treatment. And he  
14 has her fill out a form. Page 130, March 3:

15 "Q And when you went to Kidwell he  
16 had you fill out some documents,  
17 remember that?

18 "A Yes.

19 And one of those questions. One of the  
20 questions was about social life, March 3, Page 131.

21 "Q And one of the questions was  
22 about your social life, remember?

23 "A (Witness nods.)

24 "Q And you answer that you hardly  
25 had any social life because of the

1 pain.

2 And her answer was: Oh, no I had plenty of  
3 social life. I went to the beach. We did this. We did  
4 that with the kids. That's what her answer was, wasn't  
5 it? Well, no. Her answer was:

6 "Correct. I hardly had any  
7 social life."

8 And, remember, just to make sure to be fair to  
9 her, Page 131, March 3:

10 "Q Now, let me direct your attention  
11 to Exhibit 26, Bates number, do you  
12 see that on the screen?

13 "A Yes.

14 "Q Okay. And that's the question  
15 that you answered and you circled it  
16 along with some other ones, right?

17 "A Yeah.

18 And.

19 "Q Okay. And you had five options  
20 to characterize how the pain affected  
21 your social life and you picked the  
22 most severe impact on your social  
23 life, true?

24 "A Correct.

25 And you probably remember this was the

1 document she was shown because I showed it to you from  
2 Kidwell's questionnaire. And this isn't just some  
3 casual conversation here. This is what you fill out to  
4 get medical treatment. You know this history that the  
5 doctors are relying upon that's so important to them.  
6 Well, this is part of it too. And of all the questions,  
7 she said, I have hardly any social life because of the  
8 pain. The most severe one.

9           So, let me direct you, you recall the Facebook  
10 photos and this is -- remember, Mr. Roberts was critical  
11 of us for getting these Facebook photos. Did we stalk  
12 around, hack something, breach a password, sneak into  
13 her site, steal her personal -- is that what we did?

14           No, we went to the public pages of her  
15 Facebook page, and, you know, I should probably take  
16 lessons from you all because you're probably much more  
17 experts at Facebook than I ever will be. So you  
18 probably know just from your own common sense in life.  
19 If you want something to be secret on Facebook there's  
20 ways to do it, and if you want to show the world,  
21 there's ways to do it, and that's what she was doing.

22           So -- and just to be clear. Hold on. I have  
23 to find this one. Let me give you both of them.  
24 Because she wasn't just talking about a point in time  
25 here. Let me direct your attention to this evidence

1 March 3, Page 132.

2           Again I asked her the same stuff we've been  
3 talking about. Second question.

4           "Q And is that an accurate  
5 description, pretty much of the  
6 impact on your social life that the  
7 pain had from the time you started  
8 treating just after the accident  
9 until the time you filled out the  
10 form on August 15, 2012?"

11           And she said: "Yeah."

12           So what she swore to -- to you, right here,  
13 from the time she started treating down here until the  
14 time she shows up in Kidwell, this period of time,  
15 hardly any social life. But, you know, didn't stop  
16 there. March 3, Page 133.

17           "Q And is it an accurate description  
18 of the impact the pain has had on  
19 your social life pretty much ever  
20 since?"

21           And the answer was: "Yes."

22           So -- no, I did it. I've come prepared for  
23 you. So while he looks on his screen, let's look at the  
24 board. So here you have it. And let's review.  
25 Ms. Garcia went up there on that witness stand, swore to

1 tell the truth. And then she swore to you hardly any  
2 social life. And just so we recall, she's also making a  
3 claim for millions of dollars for loss of enjoyment of  
4 life, and the Facebook photos, we talked about them.  
5 You can remember she described the dates they were  
6 taken. These are the Facebook photos shown, hardly any  
7 enjoyment and social life. Hardly any social life.

8           And, for example, remember this one here in  
9 the French Maid outfit where she had a dinner date. She  
10 went over, cooked a guy enchiladas on a date dressed  
11 like that. Do you think she was wearing heels in that  
12 outfit or was it flats? The romance. You know, when  
13 she went into the ER she said she wasn't sexually  
14 involved with anybody.

15           In 2014, we're not just talking about  
16 activities of daily living, could you do the ones after  
17 that you could do before? Well, here's some new ones,  
18 new activities of daily living. She is -- to her  
19 credit, God bless her. She has gone on with her life.  
20 She has found a man that she's serious with. She said  
21 he's serious with her. God love her. But did she tell  
22 you the truth when she said I hardly have any social  
23 life? That's something you've got to talk about. You  
24 ought to ask whoever asks you questions, isn't this just  
25 another one of those assumptions Mr. Roberts wants us to

1 make? Because it is and you should not.

2 Now, was that the only one? Mr. Strassburg,  
3 after all these days you just picked out one and you  
4 jumped on -- is that the only one? Remember the ER  
5 where Ms. Garcia said, what? Let me show you.

6 March 2, Page 245.

7 "Q So after the lady with the cart  
8 left and took your financial  
9 information, did the doctor come back  
10 and see you?

11 "A No. It was the nurse that came  
12 back with prescriptions and no tests  
13 were done. I asked and they brushed  
14 it off and sent me on my way.

15 Well, that heartless ER. My goodness. But  
16 you got to meet the Dr. Sandra, remember him, kind of at  
17 the end. Nice kid. He went and got his schooling in  
18 Utah.

19 And he was asked -- and this is Kindle [sic]  
20 again, my partner. I should have turned the whole case  
21 over to him. March 7, Page 25. To the doctor, he's the  
22 guy turning his back on her, according to her:

23 "Q If somebody were to make an  
24 allegation that MountainView or you  
25 didn't really see her or didn't



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

5           "A No."

6           Was she candid with you? Were her lawyers  
7           candid with you or did they want you to make an  
8           assumption that MountainView spit in her face because  
9           she couldn't pay. That wasn't true.

10           You're going to see an instruction, Number 15.  
11           And this is -- the Judge read it to you to give you some  
12           guidance, to give you the law. What do you do with a  
13           witness like this? Any witness.

14                        "If you believe that a witness  
15                        has lied about any material fact in  
16                        the case, you may disregard the  
17                        entire testimony of that witness or  
18                        any portion of this testimony which  
19                        is not proved by other evidence."

20           That's the law. If she didn't play square  
21           with you, this is the law.

22           Now here's my fourth assumption that they want  
23           you to make that you should not. And, you know, I bet  
24           at least one of you -- because you're smart, at least  
25           one of you is saying, oh, for the love of Pete, who goes

1 through all of that if it's not real, huh? You're all  
2 too polite to respond, but I get it. I can read some of  
3 your minds. Who goes through all of that if it's not  
4 for real? Why would you do that? Why do all this if  
5 it's not for real?

6 Well, it's because she had complications from  
7 that surgery. And all the pain that she's dealing with  
8 now and that she will be dealing with for the rest of  
9 her life is because of that surgery.

10 That guy, Gross, I probably don't have to tell  
11 you what I thought of him. In fact, I can't. That's  
12 not right. But that doesn't stop you from forming your  
13 own opinions of the nattily-attired Dr. Gross.

14 And the defense doctors, they had an opinion  
15 on what he did, what he did to her. Because, you know,  
16 somebody goes through all this post surgery who doesn't  
17 have any choice because that screw moved, that fusion  
18 didn't fuse, and Gross is covering up. And let me show  
19 you.

20 Here's Klein, Dr. Klein. I know they don't  
21 think much of him. He's old. But some things are true,  
22 even when old people say it. March 2, Page 194.

23 "Q In your opinion, Dr. Klein, the  
24 complications from the surgery  
25 probably account for Ms. Garcia's

1 current pain symptoms?

2 "A Yes.

3 The complication he identified March 2nd,

4 Page 187, 6: "That screw is loose."

5 We'll get to it, what he's talking about  
6 because there's two angles to this, two considerations.  
7 Did Gross put the screw in wrong the first time? Well,  
8 remember, Klein criticized that. They brought Gross  
9 back, Gross gave a bunch of testimony. It all added up  
10 to I felt. I put that screw in the bone and I felt.  
11 We're talking L5 right at seven. I'll get to it.  
12 You'll see, but that was Gross.

13 But, you know, what Klein said was the screw  
14 moved after Gross put it in. Klein wasn't being  
15 critical of Gross as malpractice. You know, there's a  
16 jury instruction on this, but that's not the point.  
17 They want you to think it's the point but it's not.  
18 It's not. What we're doing is we're addressing the  
19 reasonable question, who goes through all this who is  
20 faking or not in real pain? It's somebody who doesn't  
21 have any other choice because the surgery resulted in a  
22 loose screw that moved after the doctor put it in and  
23 that's what is causing the pain, and that's what causes  
24 the adjacent segment disorder, 25 years, it's because  
25 Gross misdiagnosed her. He was in too much of a hurry

1 to cut on her and make the big bucks.

2 And Dr. Klein testified at the time he saw her  
3 there was time enough for micromotion to cause some  
4 pain. This is March 2, Page 194: Yes.

5 "Loose screws?"

6 He said "Yes."

7 And here is Attorney Smith, but he went after  
8 Klein on cross, as is his right. It's his right.  
9 March 2, Page 212, Attorney Smith.

10 "Q The screw that you're saying that  
11 Dr. Gross -- well, let me ask you a  
12 different question first.

13 "A Sure.

14 "Q Are you saying he placed it wrong  
15 or it moved after he placed it in  
16 there?

17 "A He placed it wrong. It moved.

18 Dr. Klein said, answer: "It's moved after he  
19 placed it."

20 Did Gross address that when they brought him  
21 back? No. All he talked about because this one, I  
22 placed it right. But they ignore the second issue, the  
23 real issue that it moved. That was Klein's opinion.  
24 Gross left the stand without explaining it. But, you  
25 know, Dr. Gross, he did say February 26th, Page 164:

1 "Q I wanted to ask you a little bit  
2 more about that as to whether you  
3 have any opinions whether nonunion of  
4 bone grafts in a spinal fusion like  
5 she had is a recognized cause of  
6 post-surgical pain?

7 "A It is, yes."

8 So even Dr. Gross, the nattily-attired  
9 Dr. Gross, even he recognizes that nonunion can cause  
10 post-surgical problems. Even when the great Dr. Gross  
11 does the surgery.

12 And even Dr. Gross, March -- I'm sorry,  
13 February 24, Page 222.

14 "Q Would you agree that if the  
15 surgery is to treat a condition that  
16 is not caused by the collision then  
17 complications resulting from that  
18 surgery are also not causally related  
19 to the collision, would you agree?

20 "A In a general sense, yeah.

21 So, that's the logic. And that's the truth.  
22 That if this offset disk or vertebra or whatever --  
23 we'll get to that, but whatever. If this offset, if the  
24 motion that was necessary to cause this  
25 spondylolisthesis in the accident, if that condition is

1 not caused by the collision, you know, the slippage  
2 because it's degenerative or it's preexisting, so if the  
3 offset in the back, if that's not caused by the  
4 collision, then the surgery to realign her spine may be  
5 perfectly fine, right? Her spine was realigned when  
6 Gross was done with her. Okay. But that surgery wasn't  
7 caused by the accident any more than the condition the  
8 surgery corrected was caused by the accident.

9           And not only that, the complications from the  
10 surgery because of what Gross did, they're not caused by  
11 the accident. And if our back didn't cause it, he's not  
12 liable for it.

13           Now, let me show you this. Because you'll  
14 have in Exhibit 40 -- I mean, you'll have medical  
15 imaging. I mean, I don't know if you can see it, all  
16 these volumes here. Those are the documents in the  
17 case. All that. Those are just the plaintiff's. So  
18 that's what's waiting for you and what do they show?

19           Let me show you this slide because this was  
20 talked about, and it's a slide from June 27, 2014.  
21 Here, I'll just show it to you now. Let me show you the  
22 slide. Okay. And you can see sagittal image, just to  
23 orient you. Here's the spine. Let's look at a  
24 vertebra, so you can see, you can kind of see the  
25 landmarks on the film. Here, this part, this part here,

1 that's the vertebral body they call it. So that's like  
2 this, do you see the vertebral body? And then this  
3 stuff, well, that goes out to the facets. You can see  
4 that. I mean, we've been talking about this for a  
5 month, and then the rest of this stuff is the part he  
6 removed in surgery.

7 Remember he talked about he cut off the spinal  
8 process and all that stuff, right? That's this stuff.  
9 Gross cut it all out. So that's kind of what you've got  
10 there. Just so you know the landmarks.

11 So, what do we know about this surgery? The  
12 outcome in the operating room? Well, Dr. Gross did a  
13 report, and in that report -- which you'll also have,  
14 you're going to have this, this is the Op report, and  
15 let me blow it up for you, the part I want to draw your  
16 attention to.

17 And, you see, Gross put it in writing, "I was  
18 able to get a complete reduction." Okay? What is that?  
19 That's doctor talk for -- what's a complete reduction?  
20 Okay. So we start out. You remember the one vertebra  
21 slides forward over the top, right? L5 slides over S1,  
22 okay? Right? And then a complete reduction is Gross  
23 pulls it back into anatomic. That's what's meant by a  
24 reduction.

25 THE COURT: Mr. Strassburg, can I have counsel

1 come up for a second?

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

4 THE COURT: Folks, I'm going to give you a  
5 quick break.

6 (Jury exited.)

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

9 THE COURT: We're outside the record. Just  
10 for the record the primary reason is because Mr. Mazzeo  
11 had to run out. He needed a break. I didn't know it  
12 was that urgent or I would have interrupted you, but I  
13 don't like to go forward without one of the attorneys.

14 MR. STRASSBURG: Totally fine, Judge. No  
15 problem. Do you guys need to put anything on the  
16 record?

17 MR. ROBERTS: Yes. That I was overly  
18 optimistic about finishing by lunch.

19 THE COURT: Me too.

20 MR. ROBERTS: I don't know if I should do it  
21 without Mr. Mazzeo not here.

22 THE COURT: Let's do it when he comes back.

23 MR. ROBERTS: Okay.

24 THE COURT: Off the record.

25 (Recess taken from 11:03 a.m. to



1 11:15 a.m.)

2 (Jury entered.)

3 THE COURT: Welcome back, folks. Back on the  
4 record. Case Number A637772. Do the parties stipulate  
5 to the presence of the jury?

6 MR. STRASSBURG: Yes.

7 MR. ROBERTS: Yes, Your Honor.

8 MR. MAZZEO: Yes, Your Honor.

9 THE COURT: Go ahead, Mr. Strassburg.

10 MR. MAZZEO: Thank you.

11 And I do apologize for how long this is  
12 taking, but I wanted to actually show you the testimony  
13 and the evidence.

14 Also, Dr. Gross -- we'll pick up. What's his  
15 description of the condition of her spine, you know,  
16 when he's done with the surgery? Complete lumbar facial  
17 alignment. Alignment. What he's saying is when he was  
18 done, the spine was in alignment because he pulled back  
19 that L5.

20 Now, let's turn our attention to the MRIs,  
21 which, you know, you probably seen until you're sick to  
22 death of them, but here is the MRI -- real quickly.  
23 Here's the MRI, June 27, 2014, all right? And, you  
24 know, we talked about what do you see? Kind of in this  
25 ghostly outline you see the rectangular vertebral body,

1 right? You see the screws, the rods, and you see just  
2 what Gross was talking about, alignment, alignment. If  
3 you follow down the line of the back, they call it  
4 posterior in the record, but it means back. Anterior  
5 front, posterior back.

6           The back of the vertebral bodies is in  
7 alignment, okay? That's a pictural representation of  
8 what you saw Gross put in the records. So here's an  
9 outline of just the alignment we were talking about,  
10 and, you know, just so you can see this stuff  
11 comparatively.

12           Okay. Here's the same -- you know, it's the  
13 same picture. So you can assure yourself that the red  
14 outlines are appropriately placed by looking at the  
15 alignment that you see of the spine, and the telltale  
16 landmark is this line of the back of the vertebra, the  
17 back of the vertebral bodies, that's like right here,  
18 this line.

19           Now, and we know something else. We know  
20 which vertebral bodies because we know that Gross said,  
21 okay, S1, L5, L4. So we know S1, L5, L4, L3. We also  
22 know that if the rods got three screws in it, it's on  
23 the left, and if the rods got two screws in it, it's on  
24 the right. Because remember he said the screw at L4 on  
25 the right side he couldn't get it to take so he had to

1 take a -- so that tells us that this rod here that's got  
2 three screws in it has to be on the left, and the rod  
3 with two has to be on the right. And right and left --  
4 and, remember, when you see the anatomical drawing that  
5 Gross helped the lawyers do for Ms. Garcia, that's  
6 looking down on it and that is true image. By that I  
7 mean right is right. Right in the image is right in  
8 real life and vice versa, okay? MRIs when you see those  
9 that's a mirror image. Left is right, right is left.

10           Okay. So we're talking about rods down either  
11 side in a mirror, but we're seeing it like this. You  
12 can kind of see through. You can kind of see through  
13 like the rod on the left. Because this is of a -- this  
14 is a sagittal image, right? The rod on the left is in  
15 front. The rod with two on the right is in back. Are  
16 you following?

17           So, we know where we are, and so we know these  
18 are the screws shown in yellow. Screws on the left  
19 side. Here's the rod on the left side. We see that.  
20 Here are the screws on the right side, and here's the  
21 rod on the right side, okay? Now, I want you to -- let  
22 me bring this up just so -- how many threads are above  
23 the landmark? The rear edge of the L5 vertebral body?  
24 How many? One, two, three, four, five. So take a look.  
25 Five screws. Threads are showing and what we might do

1 is mark out a distance in blue. Distance from the  
2 landmark of the vertebral body rear end and the bottom  
3 of the bolt, the screw, the bolt that affixes it to the  
4 rod, okay? Two landmarks. Five threads. June 27,  
5 2014. And so you know -- you know how this works.

6 MR. ROBERTS: Your Honor, may we approach?

7 Thank you.

8 THE COURT: Come on up.

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

11 THE COURT: Go ahead.

12 MR. STRASSBURG: I'm sorry. Was there an  
13 objection?

14 THE COURT: He just asked to approach.

15 MR. STRASSBURG: Okay. So, let's now look at  
16 the MRI from January 21, 2013, a year and a half before,  
17 and how many screw threads do you think we're going to  
18 see between the back of the vertebral body and the  
19 bottom of this securing nut a year and a half before.

20 MR. ROBERTS: Objection, Your Honor. No  
21 medical evidence of that. Mr. Strassburg doesn't have  
22 the medical expertise to read the MRIs.

23 THE COURT: We'll allow him to make the  
24 observations. It's fine.

25 MR. STRASSBURG: Now, let me turn to this