

No. 71348

IN THE SUPREME COURT OF THE STATE OF NEVADA

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Elizabeth A. Brown
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EMILIA GARCIA,
Appellant,

v.

ANDREA AWERBACH,
Respondent.

**APPELLANT'S APPENDIX
VOLUME XXVI, BATES NUMBERS 6251 TO 6700**

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1 image and find some real estate over here. So that's
2 what we're going to compare, and I'd like to make some
3 observations for whatever purpose it seems best to you
4 to make them.

5 Let's look again at the vertebral bodies.
6 Okay. Same outlines. And I'm just going to skip to the
7 one that matters. Let's go to -- on this slide of
8 January 21st and here. You see it's the same alignment.
9 Same view, sagittal viewing from the left. We're
10 looking through to the two-screw rod on the right side
11 shown with the yellow lines.

12 All right. And here it comes. And let me
13 show you the two. I'll show them side by side. Hold
14 on. That takes a little finagling here. That's one and
15 then here's the other one. Okay. They're there side by
16 side.

17 One, two, three. Three threats exposed
18 compare the blue line, January 2013. Compare that to
19 the blue line of June 27, 2014. Ask yourself which one
20 is longer. Is it really so that the blue line marking
21 the distance between the back of the vertebral body at
22 L5 and the bottom of this securing rod on January 21st
23 of 2013 is shorter than the same location on June 27,
24 2014. Ask yourself, am I seeing five threads in 2014
25 and am I seeing three threads in 2013?

1 MR. ROBERTS: Objection. Improper evidence.
2 The medical evidence, the two MRIs are comparable.

3 THE COURT: Sustained.

4 MR. STRASSBURG: My man, Tindall, again, a big
5 help. Another way to look at them, and one that, you
6 know, it didn't occur to me, but it's just as true.
7 Compare the distance between the bottom of the screw on
8 June 27th of 2014 and the front of the vertebral body at
9 L5 and compare --

10 MR. ROBERTS: Objection. Same objection.

11 THE COURT: I'm going to sustain it again.
12 Get on with the evidence.

13 MR. STRASSBURG: Well, observe this distance
14 with that distance, ask yourself, do these images show
15 the screw is backing itself up and pulling it? That
16 screw is just as loose as Dr. Klein told you.

17 MR. ROBERTS: Same objection.

18 THE COURT: Sustained again.

19 MR. STRASSBURG: Well, Dr. Klein told you the
20 screw is loose. Now, let me draw your attention to the
21 colloquy that we had, you know, back in -- during the
22 trial in which I showed Dr. Klein the other view of this
23 June 2014. All right? And remember we drew the red
24 lines, and I asked Dr. Klein when we had this
25 communication this was March 2, 2016, Page 194.

1 Again, I'm asking Dr. Klein. The testimony
2 is:

3 "Q You have in front of you what
4 we -- a slide of post-operative
5 surgical construct, this rhomboid, do
6 you see that?

7 "A Yeah, let me blow up this part.

8 "Q This is a front view. We're
9 looking at the spine like this; is
10 that right?

11 "A Yes.

12 And Ms. Garcia the screws on the right. This
13 is the right side. This is the left side and it says
14 the word left. Do you see in little words it says left?

15 All right. And you can see right here --
16 again, this is the slide you may recall we showed you
17 and I've circled the part that says left. So you can
18 see that this is the part that the testimony is relating
19 to.

20 Now, and then Mr. Roberts in a later
21 examination, he showed the slide and he marked that
22 slide as -- well, let me finish what we did with Klein.
23 Remember we then showed you the diagram that Dr. Gross
24 helped the plaintiff's do. And there was a rhomboid in
25 red that we traced out on the diagram there, and we

1 compared it to the rhomboid on the actual image, and you
2 can see it. Bigger at the front, bigger at the top on
3 the actual image, bigger at the bottom on the diagram
4 that Gross helped the plaintiff's lawyers create to show
5 his surgery.

6 Now, on redirect, Mr. Roberts talked to Gross
7 before. I'm sorry, Dr. Gross. And Roberts asked him
8 about his experience reading MRIs and then Mr. Roberts
9 showed Dr. Gross and he said March 4, Page 137:

10 "Audra, can you display Exhibit
11 40, Page 20130121, et cetera. And,
12 Your Honor, sorry, the witness didn't
13 have to remember that. I would ask
14 to mark a copy of this page as
15 Exhibit 40C."

16 All right. And what he's shown as 40C is this
17 image here. And Exhibit 40C that was admitted. I'm
18 sorry. Excuse me. And that was admitted into evidence.
19 As you can see here, March 4, Page 138. And now
20 Mr. Roberts said to the witness, Dr. Klein, he said.

21 "Q Now, the jury saw Dr. Klein
22 review this, by this we mean C40, on
23 a slide during his testimony and I'd
24 like to ask you some questions about
25 it."

1 All right. And then talking about Exhibit
2 40C. They got to the money quote from Gross. Robert
3 said on Page 140 of March 4.

4 "Q "And even though the head of the
5 pedicle screw is offset to the left,
6 is the screw actually coming down at
7 an angle into the bone as shown in
8 the X-ray?

9 "A Yes, it is."

10 And then here is the quotation from Page 140,
11 March 4. He says:

12 "I know it's there because I put
13 it in the bone and I felt in the bone
14 when I put it there."

15 All right. So there you have the initial --
16 the testimony by Dr. Gross that as initially placed the
17 screw was in the bone.

18 Now, Dr. Klein, as I showed you previously, is
19 saying that the screw loosened and moved after initial
20 placement. And Dr. Gross never rebutted it.

21 So if I show you 40C. This is the image that
22 Mr. Roberts indicated that Dr. Klein was looking at.
23 But here's the actual image Dr. Klein was looking at.
24 Dr. Klein was looking at the image from June 27 of 2014.
25 And you know that because it says left. Remember the --

1 that's what Dr. Klein was talking about.

2 Roberts was showing Gross the image from 2013.
3 Not 2014. So when Roberts put Gross on for rebuttal, he
4 showed him the slide from January 21, 2013. He told you
5 it was the same slide that Klein was talking about, but
6 that was false. The slide that Klein was talking about
7 was from a year and a half later. Roberts didn't tell
8 you the truth. That representation is false. All
9 right.

10 MR. ROBERTS: Your Honor, can I have a page
11 for the film that's displayed to the right? I can't
12 verify that's in evidence.

13 MR. STRASSBURG: Judge, I'd be happy to meet
14 with Mr. Roberts on the break and dial him in. I would
15 like to go on to the next assumption and try to get this
16 done.

17 MR. ROBERTS: That's fine, Your Honor. As
18 long as before I get back up I can have the page number,
19 exhibit number.

20 THE COURT: That's fine.

21 MR. STRASSBURG: Now, here's the fifth
22 assumption they want you to make without having to prove
23 it to you. Right? They want you to assume that this
24 one year post surgery of relief she got was caused by
25 the surgery correcting the misalignment of the spine

1 that was impinging upon a nerve. That's what they want
2 you to believe. But, Dr. Kidwell, he gave this
3 testimony. February 24th, Page 95. And he said, he's
4 describing to you his conversation with Dr. Gross, and
5 Kidwell says:

6 Like I said, I've never seen a
7 fusion except during anesthesia for
8 him, and I've never operated during a
9 fusion, so I did not know that he" --
10 meaning Gross -- "would cauterize the
11 nerves that go to the facet joints at
12 the time of fusion.

13 And then here's what I want you to
14 particularly notice.

15 "It's just like me doing a
16 rhizotomy, even better. Because he's
17 got the perfect exposure and he can
18 cauterize the heck out of those
19 things so that was news -- that was
20 new to me."

21 So, the first rhizotomy she had, it wasn't in
22 September of 2015. It was on December 26th of 2012
23 during the surgery, because that's when Gross cauterized
24 the nerves. He tried to take credit for it with all
25 that fancy surgery realigning the spine but he burned

1 all the nerves up that could have told the patient what
2 was really going on and then tried to take credit for it
3 with the surgery.

4 And, lo and behold, the effects that
5 cauterization during surgery, they go away in a year
6 pretty much like they do with a rhizotomy.

7 They want you to assume it was the surgery,
8 but it wasn't. It was the cauterization of the nerves.
9 It's yet another assumption they want you to make
10 without having to prove it, without having to rule out
11 the cauterization during surgery as the real reason. So
12 look at that scale of justice and take that assumption
13 off because it doesn't belong on their side.

14 MR. ROBERTS: Objection. Move to strike. No
15 medical evidence.

16 THE COURT: Overruled. I'll allow it.

17 MR. STRASSBURG: Okay. My sixth -- my sixth
18 assumption that I don't think you should be making.
19 They want you to make it, but it's not evidence. And
20 that is that the conservative treatment failed. Now,
21 Dr. Oliveri, he said on February 22, 2016, Page 45,
22 Oliveri.

23 "Q Prior to surgery, should the
24 patient try to exhaust conservative
25 treatment?

1 "A Depends on diagnosis. There are
2 some problems that emergent surgery
3 is necessary, but if it is not
4 emergent, then most people should
5 exhaust conservative treatment
6 measures."

7 So even their own hired gun, Dr. Oliveri, the
8 medical expert, the guy from Stamford that they hired to
9 look at the whole case, he says conservative therapy
10 should be tried in most cases. And he said also this.
11 The closer -- again, Page 46, February 22.

12 "The closer you get to doing an
13 elective surgery on a patient" --

14 MR. ROBERTS: Objection to Mr. Strassburg
15 being in the jury box.

16 THE COURT: He's not in the box. Overruled.
17 Go ahead.

18 MR. STRASSBURG: Where was I? Okay.

19 "And the closer you get to doing
20 an elective surgery on a patient
21 that's significant, you want to try
22 to explore all of those conservative
23 options that are even" -- I'm sorry
24 -- "that are even more
25 interventional."

1 Okay. So, again, conservative before we start
2 moving spinal vertebra around and conservative treatment
3 was reasonable here on Ms. Garcia February 22, Page 46.
4 Now, what are we talking about here? Conservative
5 therapy post surgery is chiro therapy. And that's this.
6 Here the chiro with Gulitz. Here's the physical therapy
7 with Select for a month, and you can see there's nothing
8 else between here and the surgery.

9 Now, why was that? Let me direct your
10 attention to testimony March 4, 2016, Page 76.

11 "Q And were you always 100 percent
12 compliant with the orders your
13 physicians gave to the physical
14 therapist to provide you that"
15 theory -- I'm sorry, "therapy?"
16 Ms. Garcia said: "No."
17 Let's look at testimony March 4, Page 77 and
18 78.

19 Ms. Garcia was asked:

20 "Q Your last visit with Dr. Gulitz
21 he charted that he was going to
22 continue it once a week, true?

23 "A I'm sorry?

24 "Q Well, the last time you actually
25 went to Dr. Gulitz office --

1 "A Uh-huh.

2 "Q -- did he tell you he was going
3 to continue seeing you once a week?"

4 She said: "I can't remember."

5 You take a look at Gulitz's chart, and he did,
6 and that is the May 20th of 2011. That chart. He was
7 going to see her once a week thereafter, but she never
8 went.

9 And this was the treatment that was working.
10 February 18, Page 251.

11 "Q With respect to the back,
12 February 16, 2011, she indicated that
13 the physical therapy had given her
14 40 percent improvement, right?

15 "A Correct.

16 "Q And she indicated that the
17 chiropractic had given her 40 percent
18 improvement?

19 "A Yeah.

20 And that's by May 20th of 2011. 40 percent
21 improvement, 40 percent.

22 They want you to assume that the conservative
23 treatment wasn't working, but the actual fact was it
24 wasn't being tried.

25 Here's my seventh assumption that they want

1 you to make that you should not make. Now, they want
2 you to believe that she had this pain and the pain was
3 caused by this offset of the vertebra in the back.
4 Well, so if the collision really did cause this offset
5 the way they say it did, then that offset would have
6 been present in the ER because the offset would have
7 been caused by the physical forces of the collision.
8 And so when she went to the ER it had been -- it would
9 be there.

10 And so, when Dr. Sandra, who you met, in the
11 ER, when he palpitated her, he was palpating her spine.
12 And, remember, this is -- and that's what he said. He
13 said -- let me show you it was March 7th, Page 21 to 22.
14 It's this Tindall guy again.

15 "Q Could you please walk us through
16 the exam you did on her?"

17 To the doctor, Dr. Sandra.

18 "A Sure. First part of my exam
19 begins with visually assessing" --

20 Yada, yada. I want to direct your attention
21 down here to the part where it says:

22 "If it's somebody that has got a
23 neck or back injury, then I palpate
24 the spine from the skull all the way
25 down to the buttocks region."

1 And he was asked March 7, Page 23.

2 "Q So you pressed on her, she didn't
3 say ow.

4 "A Correct."

5 So picture the scene. Here's Sandra in the
6 ER. He's looking for an injury to the spine. He's got
7 her on the table. He's pushing on her spine. He starts
8 at the neck, push; mid back, he pushes; low back, he
9 pushes; buttocks, he pushes. She doesn't say ow. That
10 proves to you that her back was stable. That
11 spondylolisthesis wasn't moving.

12 MR. ROBERTS: Objection. No medical evidence.

13 THE COURT: Overruled.

14 MR. STRASSBURG: I'm glad he mentioned that.
15 Let's look at the medical evidence. Again, Dr. Sandra's
16 testimony, March 7, Page 23. Going through the chart.
17 Now, here's the question. Now, on GJL -- Glen J.
18 Lerner. On GJL 77, there's a heading called "Clinical
19 Impression," and what's written there low back strength,
20 and then on the next line, motor vehicle accident.

21 "Q What's a clinical impression?

22 "A It's a diagnosis. It's my best
23 impression of what's going on based
24 on my medical judgment.

25 "Q What's the low back strength?

1 "A It's usually a muscle strain, but
2 it's a very vague term that means
3 back pain. Most commonly comes from
4 muscle strains but could also come
5 from other problems, you know, like
6 spondylolisthesis.

7 "Q So you pressed on her, she didn't
8 say ow?

9 "A Correct.

10 Page 24, March 7. Again, Dr. Sandra, if it is
11 a muscle problem usually the patient's pain will develop
12 over a period of hours or days to the point where they
13 come in because they are too uncomfortable at home. Her
14 presentation was very consistent with a muscle strain.
15 How does it happen? Because he pushed on her spine, he
16 pushed on the neck, he pushed on the mid back, he pushed
17 on the low back, and he pushed on the buttocks and she
18 didn't even say ow.

19 But in the shower, on February -- on
20 September 13, 2011, 9 months later she's screaming in
21 pain. Dr. Sandra was asked, "Did you take any x-rays?"
22 He said he didn't.

23 Directing your attention to March 7, Page 24,
24 25.

25 "Q How come?

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

12 All right.

13 THE COURT: Are you at a good breaking point?

14 MR. STRASSBURG: Yes, sir.

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

1 Take until 1:15. Have a good lunch.

2 (Jury exited.)

3 THE COURT: All right. Outside the presence.

4 I know you guys want to make a record for a couple of
5 things. Can we do it when we come back at five after
6 1:00?

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

8 THE COURT: All right. We'll see you when we
9 get back.

10 (Recess taken from 11:58 a.m. to
11 1:07 p.m.)

12 (The following proceedings were held
13 outside the presence of the jury.)

14 MR. ROBERTS: The first matter, Your Honor,
15 are objections to the slides and associated argument
16 with regard to the forces of daily living, and the
17 forces of the collision put on the screen, a slide that
18 had been used with his expert, Dr. Scher. It was the
19 same slide he used with Dr. Scher. He had taken off
20 some words that had been excluded. Obviously the
21 evidence and the slides had all been struck. The jury
22 was told to disregard it, and now they're looking at the
23 same slides without the words and making the same
24 arguments, but now it's just common sense instead of
25 from a doctor.

1 And that's improper, and I would like for the
2 proposed slides that were to be used with Dr. Scher to
3 be marked as a court's exhibit, and I'd like the
4 exhibits he showed the jury today that I objected to as
5 a court's exhibit, and when the court looks, you'll see
6 at one point when I objected again, he actually put up
7 an exhibit that the Court had excluded when Dr. Scher
8 was even on the stand for no foundation, and that was
9 the spine. Arrows from each side and then he's got a
10 big arrow and little arrow inside it.

11 Now, when he wanted to show it during
12 Dr. Scher's testimony, the big arrow was the forces of
13 daily life and the little arrow were the forces of the
14 collision, and so he's trying -- he's already told the
15 jury what Dr. Scher was going to say. He already got
16 Dr. Scher to say some stuff. Those opinions were
17 excluded. The jury is not supposed to even think about
18 them, and now he's allowed to go bang and try to bring
19 back all of these things in their mind and to get them
20 to find that the forces of the collision were not enough
21 to cause the injuries to the spine when there's no
22 medical evidence of that. And that's why I objected to
23 the slide and why I think that argument was improper
24 with no medical evidence -- excuse me, no scientific
25 evidence to support it in the record.

1 THE COURT: He never made the statement that
2 you just made, your last statement.

3 MR. ROBERTS: I understand. He wants the jury
4 to reach that conclusion, and if not for wanting the
5 jury to make -- to speculate that that's true, all of
6 the things he talked about would have no relevance, and
7 therefore, their prejudice would outweigh any probative
8 value. It's only for that conclusion. He never got to
9 that. He's talking about those things. Otherwise, it's
10 just prejudicial, and he said the forces were less than
11 a roller coaster.

12 THE COURT: I don't remember an objection to
13 that though.

14 MR. ROBERTS: I did, I think. I meant to -- I
15 meant to object.

16 THE COURT: I don't know how the question was
17 asked.

18 MR. ROBERTS: The record will reflect whether
19 I did or not, but --

20 THE COURT: Again, I think if the statement
21 was made that the forces of this impact were less than
22 forces of a roller coaster, I would have sustained that
23 objection because that's a conclusion that doesn't have
24 a basis in evidence, I agree, but I think the way --

25 MR. ROBERTS: And he may not have said it that

1 way. He may have said it in a way to infer that or get
2 the jury to assume that. That's what he's saying.

3 THE COURT: Well, and that's part of the
4 closing argument is what can you infer from the evidence
5 that has come in. I've got to try to let him make those
6 inferences. Even if Dr. Scher was stricken and I told
7 the jury Dr. Scher is stricken, and these opinions are
8 not Dr. Scher's opinions.

9 MR. ROBERTS: But you can only ask the jury to
10 infer things that don't require an expert.

11 THE COURT: Agreed.

12 MR. ROBERTS: And this is something that
13 requires an expert and you can't ask them to infer
14 something that a doctor or biomechanic or physicist is
15 to know. Otherwise, you're asking them to speculate.

16 THE COURT: I understand your argument. What
17 else?

18 MR. ROBERTS: The others were the objections I
19 made to other arguments for which there's no medical
20 evidence and for which medical evidence would be
21 required to reach those conclusions. One is the roller
22 coasters. I've talked about that.

23 The other is this inference that he wants the
24 jury to make that she was hurt in the shower. Not a
25 single doctor testified that she was hurt in the shower.

1 She was hurt before the shower and he's made these
2 arguments asking the jury to find that she was hurt in
3 the shower, that the surgery was due to the shower, not
4 that she was hurt, not that the pain was exacerbated,
5 but he said that -- he asked the jury to find that the
6 shower incident caused the need for the surgery. That's
7 what he wants them to speculate about. Not one of their
8 defense doctors said that. Not one of the treating
9 doctors acknowledged that. No one but Mr Strassburg
10 ever claimed that washing your legs or feet in the
11 shower caused her need for surgery.

12 THE COURT: That's true. Was there a specific
13 objection to a question that dealt with that?

14 MR. ROBERTS: I thought there was, Your Honor.
15 I can check.

16 THE COURT: Because the way I remember him
17 arguing that was that she made inconsistent statements.
18 One of the inconsistent statements inquired washing her
19 feet and crawling out of the trial, and I think he was
20 trying to infer that crawling out of the trial meant she
21 slipped and if she slipped and fell, she could have hurt
22 her back in the fall. That's how I understood the
23 argument. If that's not how he argued.

24 Do you want to say anything?

25 MR. STRASSBURG: Thank you, sir. The argument

1 was the rooster. Dr. Kindle -- Kidwell, just shoot me.
2 Dr. Kidwell had a theory of the causation and it had a
3 basis. And his theory was, as he put it, temporal
4 sequence of events and he said -- and we talked about
5 it, that she wasn't in pain before, then there was the
6 accident, and then she has pain. So, you know, post
7 hoc, propter hoc; before, because of. That's
8 fallacious, and I was simply pointing out that it's like
9 the rooster crowing before Sunset.

10 And the point of it is is they are asking for
11 an assumption that nothing else could have occurred
12 between the time of the accident and the time of the
13 treatment because Dr. Kidwell's logic requires that
14 there be nothing else that could have intervened to have
15 created a condition that required the treatment that he
16 gave, and I was simply pointing out that that was an
17 assumption without truth that the plaintiff wants the
18 jury to make.

19 And there is evidence of the shower incident.
20 She gave testimony that she reached down to wash her
21 feet, or was it her legs, that she crawled out of the
22 shower or maybe she crawled into bed, and that
23 testimony, to the extent that you could infer activities
24 involving bending over, was, I argued, inconsistent
25 medical evidence from the flexion/extension x-rays that

1 showed that to the doctors. She couldn't bend over that
2 far, and so I was impeaching her credibility.

3 I was also impeaching the credibility of
4 Dr. Kidwell, and his so-called logic, and all of that is
5 appropriate. It's appropriate argument, and I think
6 your rulings were correct.

7 THE COURT: Anything else, Mr. Roberts?

8 MR. ROBERTS: Yes, just that he's now
9 misconstruing the medical testimony from our side. They
10 said that there was nothing intervening between the
11 crash of January 2nd and the onset of pain of
12 January 5th. That's the relevant time frame according
13 to our doctors. A shower incident that happened nine
14 months after the crash is not an event that intervened
15 before she had pain, so...

16 THE COURT: No, but I think he was clear when
17 he said that to the jury that it was between the
18 accident and the surgery.

19 MR. ROBERTS: Right. So now we're getting to
20 them saying the surgery was caused by the shower when
21 there's no medical evidence of that. Asking the jury to
22 speculate about something that has to be medical
23 evidence on.

24 And then the final thing, Your Honor. And I
25 waited hoping Mr. Strassburg was going to move. He got

1 right up against the rail and I even got up and made
2 sure I was seeing things correctly, and I stood at the
3 rail. His upper body is leaning into the jury box. His
4 arm all the way into the jury box talking to the jury.
5 There may not be a rule on it, but I was taught in
6 ethics class that you don't lean into the jury box, you
7 give the jury their space. That's for the jury's
8 protection and comfort. It's not my objection, so if
9 the Court doesn't mind lawyers leaning in and waiving
10 their arms against the jury box, I guess that's not a
11 valid objection.

12 THE COURT: I guess I didn't see that happen
13 that he was into the jury box as much. I know you're
14 trying to see the screen as you're talking to them --

15 MR. STRASSBURG: Judge, I --

16 MR. ROBERTS: It's because he moved the screen
17 there intentionally.

18 THE COURT: Please stop. If you need to move
19 the screen so you don't have to lean into the jury box,
20 move the screen.

21 MR. STRASSBURG: Yes, sir.

22 THE COURT: Easy enough. Anything else?

23 MR. ROBERTS: Yes, I apologize for
24 interrupting.

25 THE COURT: It's okay. You made one statement

1 that was not objected to. I was going to say, don't say
2 it again.

3 MR. STRASSBURG: Hired gun.

4 THE COURT: You can't call a doctor a hired
5 gun. It's very clear.

6 MR. STRASSBURG: Yes, Judge. Mr. Tindall told
7 me about that.

8 THE COURT: Anything else on the record?

9 MR. ROBERTS: Yes, Judge. Does that mean I
10 can't turn it around and say Dr. Klein is the only hired
11 gun in the case?

12 THE COURT: You can't call anybody a hired
13 gun.

14 MR. ROBERTS: That's why I didn't object.

15 (Jury entered.)

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

19 MR. ROBERTS: Yes, Your Honor.

20 MR. MAZZEO: Yes, Your Honor.

21 THE COURT: Go ahead, Mr. Strassburg.

22 MR. STRASSBURG: Thank you.

23 To pick something back up about the palpation
24 by the ER doctor, Dr. Sandra. He also testified that
25 palpation, the way he does it, it does mean to push

1 hard. And right here, March 7, Page 22.

2 "Q What does palpate mean?

3 "A It means push hard.

4 "Q You pushed on her to see if she
5 would say ow or not, correct?

6 "Q When you pushed on her, did she
7 say ow?

8 "A No, she did not.

9 So this isn't just a back rub. This is an ER
10 doctor pushing hard on the structures of the back to try
11 to elicit pain and she did not say ow in the ER.

12 Okay. I'm going to skip one just to move this
13 along and make sure that we don't -- now, another one of
14 the issues that you may want to discuss because you're
15 being asked by the plaintiff to make an inference that
16 the spondylolisthesis was to some degree caused by the
17 forces of the collision on January 2, 2011.

18 That means that at the time that this image,
19 this MRI from the study of January 26, 2011, Series 3,
20 Photo 10, it's also in evidence. At the time this was
21 taken, the plaintiff wants you to assume that that
22 structure was 24 days old, a little over three weeks.
23 That, however, is not so.

24 Now we had testimony from Dr. Oliveri for the
25 plaintiff, February 22, Page 146.

1 "Q The MRI report showing the
2 condition of the spondylitic
3 spondylolisthesis, your assessment
4 was that it had predated the subject
5 motor vehicle accident?

6 "A The offset at L5-S1 I thought
7 probably did predate, at least to
8 some degree.

9 But of course he couldn't say how much. And
10 by that we are talking about he said, "Not just any
11 offset but the relevant offset."

12 Again, page 212, February 22nd.

13 "Q Where is the offset?"

14 He says between L5 and S1. So the offset
15 L5-S1 is to Oliveri himself preexisting.

16 And it's interesting his use of the words.
17 You see Oliveri is precise. He called the condition at
18 L5-S1, he called it an offset. Not a slip. Gross is
19 the guy calling it a slip and Oliveri had a reason for
20 that. And, again, Oliveri, plaintiff's hired
21 consultant. February 22nd, Page 56.

22 "Q So -- and by the way, when I
23 reference the term "subluxation" that
24 also refers to spondylo, it's a
25 slipped vertebra, right?

1 "A You could use the word "slip." I
2 guess I -- I used the word "offset"
3 earlier. The word "slip" implies
4 you've got something that is sort of
5 actively moving, but then I don't
6 like to think that that's what was
7 happening. It wasn't like it was up
8 unstable, about ready to slip off the
9 edge. That's why I usually didn't --
10 I refrained from using the word
11 "slipped." I usually used the word
12 "offset."

13 Because Oliveri doesn't believe that her
14 spondylolisthesis was caused by the forces of the
15 collision on January 2, 2011 because -- which is what
16 the plaintiff wants you to assume, but that's not what
17 happened.

18 Now, he admitted February 2nd --
19 February 22nd, Page 211:

20 "Q You don't know the degree of
21 offset before the accident?

22 "A That's right."

23 So, plaintiff wants you to assume that the
24 amount of the offset after the collision was enough to
25 cause the condition that they're seeking recovery for.

1 But that's an assumption they want you to make that you
2 should not.

3 So here's Dr. Kidwell. February 24, Page 53.

4 "Q So, now the spondylitic
5 spondylolisthesis was a condition
6 that preexisted the motor vehicle
7 accident, yes?

8 "A Most likely. I don't think we
9 have any data to show that it was
10 preexisting, but most of the time you
11 consider that slippage chronic pain."

12 Well, just because Kidwell couldn't think of
13 any doesn't mean there wasn't, and I'll show you what it
14 was.

15 Let me show you Lemper, Dr. Lemper. First
16 pain management before Kidwell. February 18, Page 147.

17 "Q And would you agree that most of
18 the findings that are contained in
19 this report by the radiologist do
20 identify what would be considered
21 pre-accident degenerative conditions
22 or age-related changes?"

23 "A The only pre-accident condition I
24 could hang my hat on would be to say
25 that the spondylolisthesis was

1 present beforehand, before the
2 accident."

3 Here's Dr. Cash, February 18, Page 243.

4 "Q And this entire -- the -- the --
5 which means that this entire
6 condition, the -- the pars defect as
7 well as the spondylolisthesis
8 predated the subject accident?

9 "A The spondylolisthesis and the
10 associated pars defect at L5-S1
11 predate the subject" answer -- I'm
12 sorry, "the subject accident."

13 Dr. Klein, he's the hired consultant for the
14 defense, Dr. Klein. March 1st, Page 90. He goes at
15 this a slightly different way in terms it's not acute.

16 "Q In your opinion, did Ms. Garcia
17 sustain an acute grade two
18 spondylolisthesis at the L5-S1 level
19 of her spine as a result of the
20 accident on 1/2/2011.

21 "A In my opinion, she did not."

22 What did Klein base that on. Here it is,
23 March 1, Page 91 to 92.

24 "Q In your opinion, do the records
25 that you've reviewed in this case of

1 the treatment that's been provided to
2 Ms. Garcia support the constellation
3 of symptoms that go along with an
4 acute grade two spondylolisthesis?

5 "A No. Those symptoms fortunately
6 are not in the records as an acute
7 event."

8 Now, you've heard testimony regarding the
9 progressivity of the spondylolisthesis. I'm going to
10 get to that. That's when -- remember the Hake report,
11 Hake, you heard about that. It's November 21, 2012.
12 Hake says, you know, the prior slide, it was seven and a
13 half and now it's 1.02 centimeters, that's
14 10.02 millimeters, so it's progressively moving, which
15 would indicate that it's unstable, but the proof is Hake
16 is just wrong about that, and I'll show you.

17 See, if Hake is right, it's unstable but he's
18 wrong and it is stable, and here's Dr. Klein on that.
19 March 1, Page 159.

20 "Q What is the significance because
21 you testified to this when you -- you
22 referred that there was -- you didn't
23 observe any progressive changes
24 between January 2011 MRI and the
25 November 2012 MRI. What is the

1 significance of no progressive
2 changes between those two MRIs at the
3 L4-L5 and L5-S1 levels?

4 "A That there is stability. That
5 this is a stable spondylolisthesis in
6 which there is no evidence of an
7 acute change taking place, nor change
8 taking place over a 22-month period.

9 So if it's stable over those 22
10 months, that means that this is a
11 spondylolisthesis that was not caused
12 by the forces of that accident and
13 there's MRI evidence to prove it."

14 First, let's go back and talk about the slide
15 I started with. 2011.01.26, Series 3, Photograph 10.
16 You heard testimony about this and the testimony focused
17 on a number of aspects of this, but you can see there is
18 a structure here that is lighter than the rest of the
19 vertebra, all right? And that's been referred to in the
20 case by a number of different names. Dr. Klein called
21 it bone spur. And other doctors called it a modic -- a
22 modic change, but it's a modic change to the bone.

23 The -- I think you can see it better. There's
24 another slide that has been shown. It's from the
25 January 26, 2011 imaging, and you can see here, again,

1 the arrows that are yellow and they are pointing to
2 these whitened areas here. This is -- this is bone
3 spurring here. Where the bone is thickening. It's
4 strengthening, and you can see that there's a rough
5 symmetry to this structure in that the bone spurring is
6 wider here on L5 posterior and it is wider here,
7 anterior on S1.

8 And why is that? It's because that's the way
9 the forces are distributed through these anatomical
10 structures, and as Dr. Klein told you, that the bone
11 responds to force and pressure by creating more bone to
12 be stronger, and that's what you're seeing happening
13 here. There's pressure here on L5 posterior, the body
14 responds by growing bone. There's pressure here as the
15 forces translate through down her spine. There's more
16 force here, the bone responds by growing more bone.
17 That didn't happen in three weeks. So that's the proof
18 that this is a chronic condition predating the accident.

19 I'm sorry. So here's Lemper. Dr. Lemper,
20 plaintiff's treating pain management. February 18,
21 Page 212 to 213.

22 "Q And that's something that is a
23 chronic condition?

24 "A That's been going on for a while.

25 "Q For years?

1 "A Yeah. At least -- at least six
2 months or longer if not. That's the
3 best I can say right now."

4 So clearly it's predating the accident here.

5 One of the other terms used was remodeling of
6 the bone. Remodeling, as you can see here, February 18,
7 Page 224. The question was about the modic changes, and
8 what the doctor was testifying that modic change,
9 remodeling a bone, it's interchangeable. So the
10 modeling, modic, bone spur, same thing. Same structure.
11 Chronic. Predating the accident. This is Lemper.
12 Lemper was asked about this, February 18, Page 225.

13 "Q Am I correct that none of your
14 treatment records indicate that you
15 discussed or identified a modic
16 change in the end plates of a
17 vertebra as part of your treatment
18 analysis?

19 "A Well, the modic changes" -- and
20 this is the remodeling, the burn spur
21 that we talked about.

22 "Well, the modic changes were
23 there before she was having the pain, and
24 I did not utilize them as the focus of my
25 treatment. That was just something I

1 could tell the age of that level of a
2 problem was longer than the likelihood of
3 it occurring during that accident.

4 Now, there was also testimony -- I want to get
5 the attribution correct here. Bear with me a sec.
6 Okay. Again, Lemper.

7 So Dr. Lemper February 18 again. 227 of 228.

8 "Q Okay. Let's turn back to the
9 remodeling MRI. For the record, it's
10 marked at 2011.01.26, S 3, Photo 10"
11 -- that's the one I just showed you.

12 "Could you come down here and
13 let's just make this clear, are you
14 of the view that the cause of these
15 light spots is the pressure generated
16 in these vicinities by the
17 spondylolisthesis.

18 "A You have a lack of discursioning
19 right here. So just like in the knee
20 and any other joint, you would -- the
21 meniscus wears out. Once that wears
22 out, then you start to have changes
23 in the bone."

24 And he's not done.

25 "So the spondylolisthesis

1 occurred and then these changes got
2 worse, or it's possible that these
3 changes were stressing in the area
4 and ended up having -- it's hard to
5 date which came first, but more
6 likely than not it fractured" -- that
7 means the pars -- "and then had these
8 changes on the bone. That's the
9 natural course, because in order to
10 have the disk slide like that, to
11 have a less of a cushion right there,
12 and you can see these match up in the
13 slipped position so this is --

14 "Q This was before the accident?

15 "A This is something that happened
16 before the spondylolisthesis. I
17 would see a much more even -- even,
18 not thick in the back here and thick
19 in the front here. You see how the
20 two of them match up to the
21 weightbearing.

22 That's what I just showed you. That's the
23 formation of the -- of the structures as Dr. Lemper
24 indicated. Here it is. They match up to the
25 weightbearing. Let me show you the better one. It's a

1 little clearer. Okay. And what he -- what he means by
2 that is that these kind of look like, I don't know,
3 sequins or something -- like Calico dresses, little
4 squiggly things. They're wide. Tadpole. You know, the
5 head of the tadpole on L5 is posterior. The tail of the
6 tadpole is anterior. That's the way the forces go. S1,
7 it's reversed. The head of the tadpole is posterior --
8 is posterior, I'm sorry. The head is anterior. That's
9 the way the forces go. That's why it's chronic. That's
10 why it didn't happen in the accident.

11 It's because the spondylolisthesis created a
12 mismatch in how the forces are transmitted from L5 to
13 S1. The body responded to the transmission of those
14 forces, which were no longer anatomic, the way they
15 should have been, and formed more bone with the shape of
16 the bone spurring corresponding with the increase in the
17 forces. That shows the spondylolisthesis preexisted the
18 accident and was not caused by the accident.

19 Again, here's a snippet of the evidence of
20 Dr. Klein, Page 111, March 1st. Klein is saying:

21 The reason it's wider is, as I
22 testified earlier, bone responds to
23 pressure. The bone cells. We call
24 this buttressing. The body knows
25 that this is slipping and it responds

1 by building up bone and remodeling,
2 and you can see that it's here at S1.
3 I'm telling you this is a longterm
4 chronic problem."

5 So, because of the spondylolisthesis, the body
6 built stronger vertebra. It formed bone spurring that
7 made the vertebra bigger, stronger, tougher, and that's
8 why, even though it was preexisting the accident, she
9 didn't have any pain before the accident even though she
10 had the spondylolisthesis before the accident because
11 she had formed -- her body had formed bigger, tougher,
12 stronger vertebra through the bone spurring, the
13 remodeling, the buttressing, the modic changes. They
14 all mean the same thing. And that's why you know this
15 spondylolisthesis was not caused by the accident but
16 long predated the accident.

17 And Mr. Awerbach cannot be liable for the
18 pain, for the cost of the surgery to realign that spine
19 because he didn't cause that. The collision didn't
20 cause that.

21 Now I'm on 10. I skipped one. I'm on 10 then
22 we'll do the arguments and then I'll shut up and then
23 Mr. Roberts, he's going to stand up and then the case
24 will be yours.

25 So let's talk about the proposed causes of

1 pain. The causes that the plaintiff wants you to
2 assume, without them having to prove it to you, caused
3 her pain. Now, the plaintiff's own physicians admit
4 there's no evidence on the imaging showing acute changes
5 that an accident would have caused.

6 Again, Oliveri, February 22, 169.

7 "Q Would you agree that there are no
8 findings on any diagnostic studies --
9 MRIs, x-rays -- showing any acute
10 changes to the spondylolisthesis or
11 spondylolysis?

12 "A Agreed.

13 Oliveri again. February 22nd, 169.

14 "Q Would you agree that there's no
15 objective medical evidence that the
16 preexisting asymptomatic spondylotic
17 spondylolisthesis ever became
18 symptomatic as a result of the motor
19 vehicle accident?

20 "A I think that the injection
21 results provide some objective
22 information, but I would agree. I
23 think the in tenure question is
24 objective in terms of an imaging
25 study, and I would agree there's not

1 an imaging study that shows that.

2 So, even Oliveri, he'd like to hang his hat on
3 imaging studies -- or the injection but he knows they
4 didn't work. So even he admits that the MRIs didn't
5 show an acute accident-caused condition.

6 Oliveri again, Page 147.

7 "Q Now, would you agree, though,
8 that there was -- none of the reports
9 that you reviewed. The MRI reports
10 that you reviewed at the time of your
11 evaluation on June of 2013 indicated
12 that she sustained an acute injury to
13 this pars defect and
14 spondylolisthesis?

15 "A The terminology of acute injury
16 has to be defined because MRI has
17 limitations in identifying an acute
18 injury. There wasn't any evidence of
19 hemorrhage. There wasn't any
20 evidence of dislocation at that
21 location, and so I did not see any of
22 these find -- those findings of acute
23 injury at that level."

24 Now, let's talk about the proposes --
25 proposals that they want you to assume explain her

1 condition.

2 And, here, let's take a look at the Hake
3 report. It's on the screen in front of you. You've
4 seen this before. Just to remind you. Again, this was
5 the finding from the Radiologist Hake, November 20, 2012
6 of continued slipping.

7 There was, you know, an argument about, well,
8 was he talking about the January 26, 2011 study or was
9 he talking about the October 19, 2011 study or what?
10 But, in any event, there's a finding here of progressive
11 slippage, but that didn't happen. And you can see,
12 remember when we talked about percentages. I mean, what
13 he's telling in his report is that there's a 30 percent
14 increase in slippage. Between whatever he's looking at.
15 It's either from January of 2011 to November of 2012 or
16 it's from August of 2011 to November of 2012. Whatever.
17 30 percent increased narrowing, increasing foraminal
18 narrowing.

19 We took a look at these images -- I'm sorry, I
20 just want to show you these images myself. There we go.
21 And here we compare the image from January 26, 2011. We
22 compare that to the image of November 19, 2012. Klein's
23 Radiology Consultant, Sidemoore gets on his radiologic
24 computer and measures. .96 centimeters here.
25 .95 centimeters here. It didn't move. It was stable.

1 Dr. Hake's report was inaccurate and misleading. For --
2 you have to ask yourself --

3 MR. ROBERTS: Objection and move to strike.

4 THE COURT: Come up.

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

7 THE COURT: Okay. The instruction is
8 sustained. I'm going to instruct you folks to disregard
9 any comments as it results to anything Klein Radiology
10 Consultant Sidemoore, whatever his name is.

11 Go ahead.

12 MR. STRASSBURG: Okay. As you can see, I would
13 observe comparing the November 19, 2012 image to the
14 January 26, 2011 image that the displacement, the offset
15 of Oliveri is unchanged. There's no progressivity.
16 Dr. Hake's report was not accurate. It should not have
17 been the basis for Gross' surgery because it didn't
18 really show what the facts were.

19 Now, let me show you another thing. Okay. So
20 that's talking about the vertebra slipping on the top,
21 okay? It didn't move, so it was stable.

22 Let's talk about nerve roots. You remember
23 the testimony that if the vertebra moves forward too
24 much, it pinches a nerve root here, that can cause pain.
25 Here we have the nerve root at L5-S1. Here's the nerve

1 root, L5-S1. What we're doing here is -- I mean, we're
2 looking right at this hole here and -- and the dark
3 stuff is a slice through the nerve fibers that's coming
4 out at you right here.

5 Now, if Hake is right -- and he's not, but if
6 he was right, then this one would be 30 percent more
7 displaced than this one in 2011, and you can see -- and
8 I observed that the foramen, the hole through which the
9 nerve root comes out, it's coming out from the spinal
10 cord, out through the bone out to go down to the legs.
11 This -- and it's surrounded here in white. This is the
12 protected fat around the nerve root. You can see here
13 there is no 30 percent change between these nerve roots
14 here. That's not so. That nerve root did not cause --
15 it was not impinged upon, and it didn't cause any pain.
16 To attribute pain from this nerve root, it's just
17 fallacious. They want you to make an assumption that's
18 not supported by the evidence, which clearly shows no
19 change in the width of that nerve root.

20 Again, you're shown -- Dr. Klein traced this
21 out for you. Now this is showing both views, and you
22 can see that even the nerve root on top, one on the
23 bottom, there's no impingement. The nerve is right
24 here. It's round. There is no impingement on it. It's
25 got blood vessels on either side. It is not the tort

1 cause of any impingement or pain.

2 You saw also testimony regarding the --
3 looking at it from the front, now what we're doing is
4 we're watching these nerve roots come out here and go
5 down like this on either side. You can see them here.
6 Right here and right here. You can see the nerve roots
7 come out between the bone on either end. There's no
8 impingement.

9 So the objective medical evidence shows it
10 wasn't the nerve roots, and for the witnesses to try to
11 blame the nerve roots to provide some justification for
12 these pain complaints is fallacious. They want you to
13 make an assumption. It's not based on fact.

14 Again, just to make sure we're all on the same
15 page, an illustration, this is just illustrating from --
16 now you see instead of looking at it like this, we're
17 turning it around. We're looking at it from the front.
18 Here's where the nerves come out. That's this stuff
19 here coming out, going down, and you can see here
20 unimpaired, unimpinged.

21 All right. Then we also had the plaintiff's
22 suggested facet joints. Okay. Well, maybe it's the
23 facet joints. The facet joints are -- let's see. Okay.
24 The facet joints are these things back here. I hope you
25 can all see this. These little joints here, okay? On

1 either side, they're facets.

2 And what do they do? They help keep the
3 vertebra from sliding forward. Because, you see,
4 they're slanted, okay? And the slant, when you put
5 them -- it's really brilliant engineering. But when you
6 put them over each other, right, and you pull them
7 forward, you see, they lock. Okay?

8 So, the facets had degenerative changes, not
9 traumatic ones. And that we have testimony here.
10 Again, Dr. Oliveri. February 22nd, Page 158.

11 "Q Going to move on to Plaintiff's
12 196 and this continues at the top and
13 I just want to direct your attention
14 to the L5-S1. It says there are
15 facet joints hypertrophic changes,
16 right?

17 "A Yes, hypertrophic changes. As
18 you remember from the testimony,
19 they're degenerative in nature, over
20 years."

21 Further testimony. Page 158, February 22nd.

22 "Q And would you agree that facet
23 hypertrophic change is a -- facet
24 joint hypertrophic change is an
25 age-related degenerative-type finding

1 to the facet joint?

2 "A Yes.

3 Not traumatic, not acute. And indeed it's
4 just what you would expect with somebody that had an
5 age-relate degenerative spondylolisthesis.

6 Page 158, February 22.

7 "Q And it's something that you would
8 probably expect to find in a person
9 with spondylolisthesis?

10 "A Yes.

11 "Q How does it happen?

12 This is on Page 158, February 22nd. Answer
13 from Oliveri.

14 "A When there's that development
15 change of the small area bone, there
16 is a change to the associated facet
17 joint that's right nearby. So it's
18 not unusual to see a reported finding
19 where they say hypertrophic change.
20 Hypertrophic change means that the
21 joint just looks like it has maybe a
22 little bone spurring in it."

23 Right? And what do we know about bone
24 spurring? We know that it comes from the bone's
25 response to anatomical pressure. And what is that?

1 It's because the chronic spondylolisthesis, as this
2 joint at L5 slipped forward, it put pressure on the
3 facet at L5-S1. That pressure caused the body to react,
4 the body built a better facet, a stronger facet, a facet
5 with bone spurring in it. That's chronic. It didn't
6 happen overnight, and it wasn't caused by the accident.

7 All right. Disk desiccation, remember that?
8 They trotted that one up. The disk goes between -- the
9 disk goes between the vertebra. There were findings
10 that the disks had desiccated. That's a fancy word for
11 drying out. Disks dry out over time. You saw the video
12 in the beginning. As the disks dry out, it gets
13 narrower. It allows the upper vertebra to slip forward,
14 slide forward. Over time. It's a chronic condition.

15 Talking about the January 26, 2011 MRI.
16 Oliveri on February 22nd, Page 157.

17 "Q Also this MRI showed at L5 -- I'm
18 sorry, L5-L4 disk desiccation,
19 correct?"

20 His answer was yes.

21 And that is chronic in nature. Now -- and I'm
22 getting near the end.

23 Another, they tried to route another reason
24 and that was disk bulge. Remember Oliveri with the
25 model. You remember Dr. Oliveri. He was very engaging.

1 Here he is with his model. He's got it right in his
2 hand here, and here's the disk that he brought, okay?
3 And so if I show you, you know, here's the normal
4 version right here.

5 And what Oliveri's model is trying to show is
6 that the center part of the disk is called the -- you
7 know, I forget what it's called, but anyway, sometimes
8 if the outer part of the disk, the annulus ruptures,
9 then the inside of the disk can ooze forward and that's
10 a herniation. You heard about herniation disks. Well,
11 this is what it looks like. It's really bad.

12 This annulus here, that's like the nylon cord
13 in a tire. This is tough and it is meant to keep the
14 center, a more gel-like configuration, contained.

15 And so that's, why when you see these football
16 players slam through the line and a shock on their
17 vertebra. Well, this is the shock absorbing system of
18 the body where when the vertebrae try to slam together,
19 the gel doesn't compress because it's like water, it's
20 noncompressive. And so it tries to escape on either
21 side. The annulus holds it in place, the end plates
22 holds it in place. And that's what absorbs the shock.
23 The whole system kind of bumps, all right? So that's
24 why this works.

25 And as you can see that if -- again, if you're

1 looking down on top, if you're looking down on top, you
2 can see the nerve roots are coming out on either side.
3 And if this disk bulges -- like that, if this disk
4 bulges, it bulges right in to where the nerve roots are
5 going, okay? That's another form of impingement.

6 The only thing is Oliveri's model is totally
7 misleading. None of that happened. This is an
8 assumption they want you to make that that is what was
9 really going on, but it's not so. What is so? Here is
10 Dr. Poindexter, February 26, Page 34, my colleague
11 Mazzeo is here showing him radiologic reports.

12 "Q Based on what the -- based on the
13 radiologist's statements and
14 impressions on this MRI -- I'm going
15 to go to the second page. With
16 respect to the -- did the radiologist
17 note any -- did he indicate that the
18 bulges that appeared at L1-L2, L2-L3,
19 and L3-L4 were traumatically induced?
20 Poindexter reads no.

21 And these images are produced and they're in
22 evidence. And here you can see a comparison of the
23 slicing. Now we're looking down from the top. We're
24 slicing at L5-S1. This is the slice that the MRI
25 machine is making.

1 If you look at the model, we're cutting it
2 this way, and what we're seeing -- you know, the cut
3 goes this way, and what you see is this view from the
4 top. Because that's the best view to check the disk.
5 What do you see?

6 Klein testified these nerve roots here, these
7 nerve roots here, you can see the fat around them. The
8 fat around them as they're -- they're exiting out here.
9 No impingement. And here you can see the spinal canal.
10 Remember we talked about nerve rootlets, the spinal cord
11 ends at about -- you know, where your ribs stop, that's
12 where your spinal cord stops. And after that, it
13 becomes rootlets that go down further, and these
14 rootlets, when you lay on your back, see, like this, the
15 rootlets fall to the bottom, you know, in the spinal
16 fluid. They sink to the bottom.

17 And you can see there's nothing in any
18 position to impinge upon those nerve rootlets, and the
19 nerve root -- oops. The nerve root that was coming out
20 at that level here, no impingement by this disk.

21 Let me try to make it clearer. Here's an
22 illustration of what you're seeing here. This is just a
23 drawing. Disk, spinal cord, nerve roots coming out
24 here. Here's the hole. They call it the foramen in the
25 bone, right?

1 Now, here's where the impingement would be,
2 have to be for the disk to impinge upon the nerve root,
3 and you can see the telltale white area of fat right
4 here, here, here that shows there's fat in there, and
5 the disk is not impinging at L5-S1, and the nerve roots
6 could not be the cause of the pain.

7 We took a look at L4-L5, all right? We --
8 during the testimony that you've been enduring,
9 listening to. Now we're going to go up one level. You
10 know, we're going to move from S1, L5-S1, that's the one
11 we just talked about. Now we're going to talk about the
12 disk from L5 and L4.

13 There it is, January 26, 2011 imaging. A
14 little more than three weeks post collision. Here's the
15 slice, and now we're going to slice right through the
16 disk. So this one is -- this was going right through
17 here, all right? There's the disk, nerve roots here.
18 There's no nerve roots in the way, same here, no nerve
19 roots. There's no impingement of a disk bulge.

20 So that model that Oliveri showed you, again,
21 he wants you to make an assumption that that has
22 anything to do with this case when it really doesn't,
23 and it would be fair -- if you talk about this in the
24 jury room, it would be fair for you to discuss whether
25 Dr. Oliveri tried to fool you into thinking that his

1 model was anywhere close to reality, and that would be a
2 fair thing for you to talk about.

3 Okay. You were also showed -- we kind of, we
4 took a tour on the disks at L1-L2, L2-L3, L3-L4, all
5 from the January 26, 2011 imaging and, again, you can
6 see here at L1-L2 the disk here. You can see the nerve
7 roots gone. You can see the nerve rootlets. No
8 impingement.

9 L2-L3, you can see the disk. You can see the
10 nerve roots coming out. No impingement by the disk.
11 You can see the nerve rootlets sag down. No
12 impingement.

13 L3-L4 here's the disk. You can see the nerve
14 rootlets coming out here. You can see that white fat
15 between the disk and the nerve root. No impingement.

16 Okay. So that's basically all I have about
17 the top 10 assumptions. I don't know if there were 10.
18 I think I left out one. So maybe top nine assumptions.

19 So let me talk about just the 9 or 10
20 arguments that you may want to discuss that people may
21 bring up and you'll have to deal with, and then I'll
22 stop.

23 Let's talk about the first one. One of the
24 arguments people may offer to you is, again, why would
25 anyone go through all that if it wasn't so. You know,

1 people may say that it's just not reasonable for
2 somebody to put themselves through all this treatment
3 from Kidwell, all this treatment from the gross, the
4 rhizotomy, the injections, injections, spinal cord
5 stimulator, injections from Lemper, physical therapy,
6 more physical therapy after surgery, and even more
7 physical therapy. Oh, by the way which she didn't
8 follow through on. Here's some more she didn't follow
9 through on. Who would put themselves thorough all of
10 that if they weren't really in pain? Well, yeah, but
11 that doesn't mean that the pain was caused by the
12 accident or that Mr. Awerbach or his mom are responsible
13 for it.

14 What it means is that the complications from
15 the surgery by Dr. Gross because the screw that moved
16 and caused nonunion. I mean, to all -- it's really
17 tragic. The bone chips, remember the grains of rice he
18 talked about? Well, those things don't fuse. He has
19 cut away all the bones in the spinal processes, the
20 facet joints. Remember I showed you he stopped the --
21 he cut all that out. So if that bone doesn't fuse, all
22 she's got is, you know, three screws on one side and two
23 screws on the other and a couple of rods, and that's it.
24 And those rods and screws were never intended to take
25 the place of the bone that Gross cut out of there. They

1 were only supposed to stabilize this thing until all the
2 bone he packed in there. You know, the grains, the
3 rice, and the puddy, right? Until all of that fused and
4 created one big block.

5 But if that fusion doesn't happen because the
6 screws are moving and the fusion doesn't go, well, then
7 that causes a complication, pseudarthrosis. You heard
8 it's basically nonunion and that causes the pain.

9 And, you know, what's really tragic in a way
10 is that this pain that keeps her coming to these
11 doctors, they caused that, and she doesn't have any
12 choice anymore. She's stuck with it, but it's because
13 of them, not because of Mrs. Awerbach and her son.

14 And, you know, I'd also point out another
15 issue you might want to talk about is what did she
16 really go through, you know? I mean, the hard stuff,
17 the stuff that hurts, the physical therapy, the
18 exercises, right? The sweat, remember Lemper and the
19 Lemper sweats, right? That hurts. That's effort. She
20 didn't do enough of that, and she wasn't compliant with
21 what they assigned her to do.

22 And what they did was the easy stuff. The
23 stuff where they knock you out. Give you anesthesia,
24 stick a needle in you, and send you home. These
25 doctors, you have to ask yourself whether this is

1 cleverer or not. They don't just inject you with a
2 steroid, they also inject you with an anesthesia that
3 takes effect just like that and to get you out of the
4 office, right? So there's another issue that might make
5 sense to talk about.

6 Number two, you know, if you guys don't come
7 back with a big verdict, you know, hasn't this all been
8 a waste of time, right? And if somebody says to you if
9 we can't come to a verdict, they're just going to pick
10 another jury and do this all over again and they'll find
11 like, you know, 10 more suckers like this and sit
12 through this another month. We've got to do something
13 here, right?

14 That might be an argument that comes up, and
15 let me tell you something, doing justice, it's never a
16 waste of time, ever.

17 And, you know, there's a maxim. I told you
18 some things are true even when old guys say it. One
19 thing us old guys, you know, the old prosecutors in
20 England where all this started, they had a saying, and
21 the saying is, it's a good one, the crown never loses
22 when justice is done.

23 Now, we don't have a crown because we the
24 people are sovereign. In this country, we're the crown,
25 you're, and we the people speak through you. The

1 sovereign power of the United States is in front of me
2 right now, and when you do justice, whether the verdict
3 is big or small, really, that's the right thing, right?
4 There's no winners or losers. It's just you make a
5 determination of what's really just.

6 Number four, somebody may say Tuesday in
7 deliberations, Oh, my God, did you see all those lawyers
8 on the plaintiff's side? That Mr. Roberts, he's smart.
9 I mean, they've got all lawyers and on defense -- who
10 would, like, martial all that legal power if there isn't
11 something here? You know, if there's smoke, there's
12 fire. That the argument, right? It's got to be
13 something. It's got to be more than the \$50,000 that
14 Strassburg said we ought to give. That's what I'm
15 telling you. You shouldn't give any more than \$50,000.

16 Well, again, this is -- you know, my dad used
17 to say this, you know, a pile this big has got to have a
18 pony in it some place, right? That's the argument. If
19 there's smoke, there's fire.

20 But that's not so because you've got to ask
21 yourself, what would you do for a chance at 16 million
22 bucks? What would you go through for that? And how
23 much legal help would help you? So just because there's
24 a lot of effort put in this case doesn't mean there's
25 any more to it than what we tell you that it's a soft

1 tissue sprain/strain case and that your verdict should
2 be for \$50,000. Not \$16.2 million. Not the \$300,000
3 that Ms. Garcia told her daughter she thought they'd
4 get. Remember that? When her daughter admitted that
5 Ms. Garcia told her that if -- you know, if she would
6 testify she could have money for college.

7 MR. ROBERTS: Objection. Mischaracterizes the
8 evidence.

9 THE COURT: Overruled.

10 MR. STRASSBURG: I thought he would object.
11 Let me direct your attention to the evidence. March 4,
12 Page 81. All right. Do -- and this is the questioning
13 to Ms. Garcia.

14 "Q And do you recollect when you had
15 an occasion to tell Emily that if you
16 won this case that you would give
17 some of the money to her for her
18 schooling.

19 "A Right around the time I had a
20 meeting with one of my lawyers and he
21 told me that --

22 And then everybody stopped her not to get into
23 the privileged stuff. And remember we had the bench
24 conference and we all sorted it out and we said
25 question. Question, again, March 4, Page 81.

1 "Q Okay. Why don't you complete
2 your answer.

3 Ms. Garcia said: "I thought
4 that we would have like \$300,000
5 maybe and I told Emily out of that I
6 would pay for any schooling that, you
7 know, she would complete by the time
8 or if she needed to continue with her
9 education that I would -- that I
10 would be more than willing to help
11 her."

12 Now, let me talk to you. You've heard some
13 evidence also about how all of these plaintiff's lawyers
14 got here. And let's talk about that because that's also
15 the evidence, and you've heard evidence about how all
16 these doctors got here for treatment. And what you
17 heard was -- here's Ms. Garcia again. March 4, Page 82.

18 "Q You first went to him after you
19 consulted with the lawyers at Glen
20 Lerner?

21 "A True.

22 This is Gulitz, the chiropractor.

23 "They gave me a few numbers and
24 that's how I decided to go with,
25 yes."

1 "Q How many numbers?

2 "A Maybe three or four.

3 Answering further.

4 "Q Of other chiropractors that they
5 recommended?

6 "A Yes, sir.

7 "Q And Gulitz was one of the ones on
8 the list?

9 "A Yes, sir.

10 March 4, Page 82. And Dr. Gulitz referred her
11 to Dr. Cash, so, Gulitz to Cash, and Cash, this is
12 February 16th, right? He's a quick study. You need a
13 surgery right now, and you need a fusion, and you need
14 it at two levels. You also heard testimony Gulitz makes
15 the referral to Lemper.

16 "Q And it was Gulitz that referred
17 you to Dr. Lemper?

18 "A Yes, sir I believe.

19 March 4, Page 83. So -- and remember Lemper.
20 And you remember Lemper? Well, perhaps you can remember
21 Lemper was the one who said I don't think she needs
22 surgery. And what happened was they needed a new pain
23 management guy. And the obliging lawyers, March 4,
24 Page 3.

25 "Q And it was Lerner who referred

1 you to Dr. Kidwell?

2 "A I called them to see if they had
3 any numbers for anybody that would be
4 closer as far as the pain management.
5 Dr. Gross, March 4th, Page 84.

6 "Q And the Lerner firm referred you
7 to Dr. Gross?

8 "A After getting Dr. Cash's, yeah,
9 they gave me their -- his number.

10 So here's what happened. Here's what the
11 evidence shows. The lawyers send her to Gulitz. Gulitz
12 sent her to Cash. Gulitz sent her to Lemper. The
13 lawyers send her to Kidwell. And the lawyers send her
14 to Gross.

15 So this tangled web, the spider in the center
16 is the lawyers.

17 Now I need to talk to you about punitive
18 damages because Ms. Garcia and her lawyers, they don't
19 just want her to be fully compensated, they want
20 punishment. We used to call this smart money because
21 it's to make them smart.

22 Mrs. Awerbach sitting here. Mr. Awerbach
23 working at his first real job. And these are the people
24 they want you to punish.

25 And there's going to be law. Here's

1 Instruction Number 40:

2 "If you find that plaintiff is
3 entitled to compensatory damage for
4 actual harm caused by Defendant Jared
5 Awerbach's breach of an obligation,
6 you may also consider whether you
7 should assess punitive damages
8 against Defendant Jared Awerbach on
9 the basis of his impairment with a
10 controlled substance."

11 But you don't have to. They're not entitled
12 to this. This is for you to decide, and there has to be
13 proof of two things. Number one, that Jared Awerbach
14 willfully consumed or used marijuana knowing that he
15 would thereafter operate a motor vehicle. Willful
16 consumption knowing that he would drive. Number two,
17 Defendant Jared Awerbach thereafter caused actual harm
18 to the plaintiff by operating a motor vehicle.

19 The purpose of punitive damages are to punish
20 a wrongdoer that harms a plaintiff and to deter similar
21 conduct in the future. Not to make the plaintiff whole
22 for her injuries. I mean, Jared Awerbach? What's to
23 deter? He crashed and burned. His life blew up.
24 October 2015, you heard that, his own mother was done
25 with him. What that woman went through. From age 12 to

1 age 19, talk about pain. She went through all that day
2 in, day out. Lying. He manipulated. She stuck with
3 him, and even she, October 24th, was done. Because even
4 a mother's love has limits, and he reached hers.

5 And so when nobody would take him in, he saw,
6 he went to the mission, and for the first time in his
7 life it wasn't somebody making him do it. It wasn't
8 somebody imposing it on him as punishment like they want
9 you to do today. It was because he knew he couldn't do
10 it alone. He knew he was broke, and he had to change
11 and he did the 12-step program. He did all their
12 programs. He hung in there over a year, and you saw
13 when he graduated, they picked three of the most
14 improved, he was one of them. You know, 12-step
15 programs, they don't ever end. You do it your whole
16 life. And he's doing it day by day right now. You
17 heard her talk about it. What it was like and they want
18 you to punish him again. It wasn't enough, the jail,
19 the program --

20 MR. ROBERTS: Objection. Move to strike.

21 THE COURT: Come on up.

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

24 MR. STRASSBURG: Judge, I'll withdraw that
25 question -- or statement.

1 THE COURT: All right. It's stricken.

2 MR. STRASSBURG: Now, what should you
3 consider? And this was in Instruction 41. Let me show
4 you this.

5 "The amount of a punitive
6 damages award is not to compensate
7 the plaintiff for damages suffered,
8 but what is reasonably necessary in
9 light of the defendant's financial
10 condition."

11 You think he's got any money? He's --

12 MR. ROBERTS: Objection.

13 THE COURT: The jury is going to have to make
14 the determination based on what the evidence has been.

15 MR. STRASSBURG: He's got a job at the
16 Mission. March 7, Page 77.

17 "Q The rates they pay at the mission
18 are like minimum wage?"

19 Answer -- and this is mom.

20 "A Ten bucks an hour, I think. I
21 don't know how much they -- I think
22 they get 10 bucks an hour."

23 March 7, Page 77, mom.

24 "Q To your knowledge, he didn't have
25 any income while he was in the

1 program at the mission?

2 "A In the beginning phases, no,
3 they're not allowed to earn money.

4 At Phase 4 they have day jobs. Well, you can
5 earn -- you may go out and move somebody's house there,
6 and then when he was in Phase 4 and eligible he went to
7 work at CaptionCall. He started working while he was in
8 the program."

9 What did he have going in? March 7, Page 78,
10 mom.

11 "Q To your knowledge, when Jared
12 started in the program he was broke?

13 "A Yes."

14 The job he got at CaptionCall. March 7,
15 Page 76, mom.

16 "Q And to your knowledge, do you
17 know what Jared was making at that
18 CaptionCall job?"

19 And I'll skip all the objections.

20 "A I want to say 11 and change.

21 Between \$11 and \$12."

22 That is when he was working at CaptionCall.
23 But he has expenses. March 8, Page 78 -- I'm sorry,
24 March 7, Page 78, mom.

25 "Q You said he helped you with the

1 rent, right?

2 "A Currently?

3 "Q Yeah.

4 "A He -- he puts a portion of his
5 income into the house. He's an adult
6 living in the house."

7 So she treats him like one and he pays rent.

8 "Q Yeah, is it a token?

9 "A No."

10 Again mom, March 7, Page 78.

11 "Q And what's the rent that he's
12 paying?

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

19 Because he's a single parent. He has two kids
20 and he wants them back as a family.

21 Now, you'll see in the instructions that one
22 of the factors you have to take into consideration when
23 determining how much, if at all, to punish Jared,
24 Mr. Awerbach. One of the things you're to consider is
25 the degree of reprehensibility of his actions. Right?

1 And there is an instruction about that. It's
2 Instruction 29. And I'm not going to read you the whole
3 thing. You'll have it with you. But it basically says
4 here, "Defendant Jared Awerbach has been deemed impaired
5 as a matter of law." That's for having marijuana
6 metabolite in excess of legal limits. He's been deemed
7 impaired as a matter of law.

8 And the degree of impairment -- oh, that's not
9 there, is it? So the instruction doesn't tell you the
10 degree of impairment that he's been deemed as a matter
11 of law. And here, so what do you do with that? How do
12 you intelligently consider this factor of degree of
13 reprehensibility if there's no evidence of degree of
14 impairment?

15 Here's how you do it. Remember the burden of
16 proof I talked about in the beginning. The plaintiff
17 has the burden of proof. They've got to prove it with
18 evidence. They've got to prove everything they want,
19 all the elements by evidence, not assumptions, remember
20 that.

21 Remember me also telling you that means the
22 benefit of the doubt is for Mr. Awerbach because the
23 plaintiff has the burden of proof. And here there's no
24 evidence of the degree of impairment, so you should give
25 him the benefit of the doubt and deem him minimally

1 impaired because that's fair. And that's what justice
2 is about in this case, and you should not punish him
3 with this for being a stupid, knuckleheaded teenager.

4 Okay. Now, here's another Instruction 9.
5 Well, this is the same one. I guess I just highlighted
6 a different part.

7 "At the time of the subject
8 collision, Defendant Jared Awerbach
9 had 47 milligrams of marijuana
10 metabolite per milliliter of blood.
11 This exceeds the legal level of
12 5 nanograms of marijuana metabolite
13 per milliliter."

14 Oh, my God. Nine times the legal limit of
15 marijuana metabolite, right? Somebody may confront you
16 with that argument.

17 Well, what's marijuana metabolite? Huh?
18 What's metabolite? What's a metabolism, right? I mean,
19 you're supposed to understand these jury instructions as
20 you would understand any normal English terminology. So
21 marijuana metabolite obviously is what is left over when
22 the body is done metabolizing marijuana, right?

23 And, you know, alcohol, it's kind of like the
24 same thing. What's left over when the body is done
25 metabolizing alcohol? Well, in my case, if it's beer

1 it's urine. So there's no proof. There's no evidence
2 what does marijuana metabolite do to you.

3 MR. ROBERTS: Objection. Move to strike.

4 THE COURT: Sustained. There's no evidence of
5 that. It will be stricken.

6 MR. STRASSBURG: So there's no evidence from
7 which you can base a decision that Mr. Awerbach
8 shouldn't have the benefit of the doubt because the
9 plaintiff has the burden of proof.

10 MR. ROBERTS: Objection. Move to strike.

11 THE COURT: Come on up.

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

14 THE COURT: Objection sustained. The
15 statement will be stricken.

16 MR. STRASSBURG: Now, you heard evidence from
17 a witness about marijuana smoking prior to the accident.
18 Remember her? It was a while ago. Cheche Killian. And
19 did Cheche Killian ever say anything that you can rely
20 on? Or doesn't the plaintiff want you to assume that he
21 was smoking marijuana just before the accident? Well,
22 let's look at what Cheche said. February 16, Page 140.

23 "Q Ma'am, I totally get it and I
24 appreciate you doing the best you
25 can. Isn't it so that back in

1 December of 2014 you said they were
2 smoking outside your apartment?

3 "A I don't understand."

4 February 16 Page 141 to 142.

5 "Q And you were also asked, quote,
6 and how many people were at your
7 house when Jared got there, unquote?
8 And your answer was. They all was
9 outside. It was just everybody was
10 outside."

11 "A I don't remember.

12 "Q Do you remember saying that?

13 "A No, I don't remember saying
14 that."

15 Further testimony in the case February 16,
16 165.

17 "Q Let me direct your attention to
18 Page 32. It will come up on the
19 screen. You were asked: 'Okay, and
20 you just told Ms. Compton that you
21 didn't see him smoking it, so what's
22 the difference now?'.
23

24 "And your answer was, quote,
25 well, I'm sorry, yes, I did see him
smoking. He was outside. When I

1 went out, he did have the joint in
2 his hand. Like I said, in out and I
3 went about my business.

4 "And then you were asked, And
5 did you see him smoking the joint,
6 right? And you said, Yes, I'm sorry,
7 yes."

8 Okay. So back then it was outside and a
9 joint, which that's a marijuana cigarette, but in front
10 of you here it was inside and a blunt. That's when they
11 take a cigar and they stuff it with marijuana.

12 What she told you was this. February 16,
13 Page 141.

14 "Q Can you read that, what's on the
15 screen?

16 "A Yes, I remember saying he was
17 smoking outside, but I don't remember
18 me saying that. I know they were
19 smoking in the house in the living
20 room."

21 So when she's swearing on a deposition
22 statement it's outside and a joint. When she's swearing
23 to you it's inside.

24 So what opportunities did she have to observe
25 this inside? February 16, Page 168.

1 "Q And how long do you recollect you
2 observed him in this activity?

3 "A I don't know. I went back in the
4 room.

5 "Q So was it a brief glance before
6 you returned to the kitchen?

7 "A Yeah. I just went in and went
8 back in the room."

9 Now, one of the things you're also going to
10 see in this case is this jury instruction. Instruction
11 Number 26:

12 "The court has taken judicial
13 notice that sunset on January 2,
14 2011, the date of the accident that's
15 the subject of this lawsuit occurred
16 at 4:46 p.m. Pacific Standard Time.
17 You are to accept this fact as true
18 and give it the weight you deem it
19 deserves."

20 When you heard that, you probably like what is
21 this all about? Let me tell you. You heard testimony
22 from the officer, Officer Figueroa, February 16,
23 Page 50.

24 "Q So go ahead, take a look at it,
25 and I guess my question was the

1 approximate time of the accident?

2 "A The time of the accident report

3 reflects 5:57 p.m., military time

4 17:57."

5 That's about 6:00 p.m. Sunset was at like

6 4:46. So here's where we are. Going in. Deposition of

7 Killian. It's outside with a joint. We ask for

8 judicial notice time of sunset and it shows that the

9 time of the accident is like over an hour after sunset.

10 It's dark.

11 So, you might want to talk about it, that

12 Ms. Killian redoes her story, and now she recites to you

13 a version of an incident. It takes place in a well-lit

14 room.

15 Now, it's up to you. Remember I showed you

16 when we were talking about the credibility of

17 Ms. Garcia. It's up to you what kind of credibility she

18 has left after talking out of both sides of her mouth.

19 What can you rely on there? The plaintiff here, they

20 want you to assume that there's some degree to

21 impairment. This testimony by Cheche --

22 MR. ROBERTS: Objection. Move to strike.

23 THE COURT: Sustained. There's an instruction

24 there. It's been determined as a matter of law.

25 MR. STRASSBURG: You are to consider -- there

1 is also an instruction. You are to consider the degree
2 of reprehensibility of his conduct. What is the degree
3 of reprehensibility? Now, I submit to you that in
4 considering degree of reprehensibility, one of the
5 factors that distinguishes bad acts from minimally
6 reprehensible acts is whether the person doing it knew
7 what they knew.

8 And so the issue is, did, in considering
9 whether to what extent there was -- to what degree there
10 was reprehensibility in Mr. Awerbach's actions, did he
11 know he was impaired? What was his state of mind? What
12 was his knowledge? Because deliberate intentional acts
13 are more reprehensible than ones that aren't.

14 Just to -- may I approach?

15 THE COURT: Come on up.

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

18 MR. STRASSBURG: Sorry, let me just give this
19 TV a chance to wake itself back up. I would elicit the
20 help of my partner to help me with this technical
21 problem while I go on. He's very useful.

22 Here's another, number six. I'm getting it.
23 Number six. Here's another argument that you may
24 confront and have to deal with. People may say, whoa,
25 what should be do. Should we start at 16.2 million and

1 start subtracting stuff to get to our verdict or should
2 we start at \$50,000 and start adding stuff to get to our
3 verdict, right?

4 Well, I have some thoughts on that, and here
5 you should start with the amount that there is no
6 dispute about your verdict should be. Now, it's not
7 \$50,000 because Mr. Mazzeo has some different ideas
8 about that, but it's below \$50,000, and I submit to you
9 that the right thing to do is to start at the part that
10 both sides agree upon and then make whatever adjustments
11 make sense then. Don't start at what the plaintiff
12 wants because that's contention on their part.

13 You know, what we're talking about here.
14 Here's the last argument is, well, what are we really
15 doing here? And here, make no mistake about it, that
16 what we're talking about here is a lifetime supply of
17 justice for both -- for all of these people. A lifetime
18 supply of justice for the plaintiff and a lifetime
19 supply of justice for Mr. Awerbach and his mother.

20 You are entitled to consider that your
21 punitive damages award cannot financially destroy them,
22 and you can consider what that would do. We're not
23 talking Donald Trump here. We're talking two people
24 that don't have very much and are trying to get back on
25 their feet after a grueling seven years of hell. And I

1 plead with you your verdict should take that into
2 account.

3 MR. ROBERTS: Same objection, Your Honor.

4 THE COURT: Overruled.

5 MR. STRASSBURG: I plead with you your verdict
6 should take that into account. You should not
7 financially destroy these people. Your verdict should
8 not be a penny over \$50,000.

9 You will be getting a verdict form. It looks
10 like this. Mr. Mazzeo yesterday showed you how to fill
11 it out. We're fine with that. On the first page, past
12 medical expenses, 20,018.52.

13 Future medical expenses caused by the
14 collision, zero.

15 Past loss of household services caused by the
16 collision, zero.

17 Future loss of household services caused by
18 the accident, zero.

19 Past pain and suffering and loss of enjoyment
20 of life -- well, let me go to future pain and suffering
21 and loss of enjoyment of life. Zero.

22 His total was 30,018.52. He advocated past
23 pain suffering, loss of enjoyment of life \$10,000.

24 Well, you know I'm advocating for more of
25 that, but total verdict, no more than \$50,000, and

1 remember, Ms. Garcia doesn't get to recover twice. She
2 only gets one recovery.

3 Question 2: "Do you find that
4 plaintiff proved by clear and
5 convincing evidence that Jared
6 Awerbach willfully consumed marijuana
7 knowing he would thereafter operate a
8 motor vehicle?"

9 Yes or no. You should answer that question
10 no.

11 Number 3: "Should punitive
12 damages be assessed against Defendant
13 Jared Awerbach for the sake of
14 example and by way of punishing the
15 defendant?"

16 No, no they should not.

17 Number 4: Will you assess
18 punitive damages against Jared
19 Awerbach in the amount of."

20 It's blank. And it's a big, long blank. Not
21 applicable. No punitive damages.

22 The other ones relate to the mom, and I won't
23 address them. So that's the verdict form and that's how
24 I submit to you justice requires it be filled out.

25 Again, I want to thank you for sitting here so

1 attentively for so long. I want to thank you for
2 showing up on time every day. I want to thank you for
3 being patient, being attentive. My thanks.

4 I also extend my thanks to the court and I
5 thank you for your time. Thank you very much.

6 Like we said this is a service you do for you
7 country. Thank you very much.

8 THE COURT: Let's go ahead and take another
9 quick break, folks.

10 During the break, you're admonished not to
11 converse amongst yourselves or with anyone else on any
12 subject connected with this trial or to read, watch, or
13 listen to any report of or commentary on the trial by
14 any persons connected with this case or by any medium of
15 information including without limitations newspapers,
16 television, radio, social media, Facebook or Twitter, or
17 to form or express any opinions on any subject connected
18 with this trial until the cause is finally submitted to
19 you.

20 (Jury exited.)

21 (The following proceedings were held
22 outside the presence of the jury.)

23 THE COURT: We're outside the presence. I
24 know Mr. Strassburg wanted to make a record on -- you
25 wanted to show the jury something that was said by

1 Perspective Juror Number 10 during voir dire. I didn't
2 allow that. You want to make a record on that?

3 MR. STRASSBURG: Having consulted with my
4 partner, I'm going to withdraw that request.

5 THE COURT: Okay. Anybody else need to make a
6 record on anything?

7 MR. TINDALL: Yes, Your Honor, on the issue
8 the last time we approached, Mr. Roberts had objected
9 to -- what was it? What was the last thing you said?

10 MR. ROBERTS: Me?

11 MR. TINDALL: Where me and you kind of walked
12 up there together and I said are you all right, and
13 Judge Wiese said -- kind of gave you that admonition
14 that you better watch it. What was that about?

15 MR. STRASSBURG: Well, it's sort of hard to
16 keep them all straight.

17 MR. ROBERTS: I can refresh your recollection.

18 MR. TINDALL: Thank you.

19 MR. ROBERTS: That was when, for the second
20 time, Mr. Strassburg made statements that asked the jury
21 to nullify Nevada law that you were impaired when you
22 had over 5 nanograms of marijuana metabolite in his
23 blood.

24 MR. TINDALL: Yes, I did not believe that that
25 was any misstatement of law or asking for nullification.

1 He was simply pointing out there had been no evidence
2 about anything to do with what metabolite was, which is
3 a true statement, and that shouldn't have been stricken.

4 MR. ROBERTS: It implies that they need
5 evidence and we don't need evidence because the court
6 has ruled as a matter of law and the jury's been
7 instructed on it. So they don't need to know what a
8 metabolite is because the court has told them that he
9 had over that legal limit, and then over that legal
10 limit you're legally impaired. So there's no further
11 evidence that's needed. And you can't ask the jury to
12 disregard the instructions of the court or to second
13 guess whether it's true.

14 MR. STRASSBURG: Judge, if I could just --
15 since I'm the defendant here. Look, the law is that the
16 jury must consider degree of reprehensibility and why is
17 that? Because the legislature says so? Huh-uh. It's
18 because the Constitution says so.

19 Degree of reprehensibility is a guide post.
20 It must be considered. How are they going to do that?
21 Because it's a question of degree and the instruction
22 says he's -- it simply says he's deemed impaired. It
23 doesn't say anything about to what degree.

24 Is he impaired to the maximum possible degree?
25 Is he impaired to a lesser degree or a minimal degree?

1 There's no evidence. And, you know, I made this
2 argument before. I lost before. I get that. But I'm
3 just trying to try to get through the predicament this
4 places the defense in because we're entitled to argue
5 degree of reprehensibility. But then we are deprived of
6 all possibility -- of all evidence to do that with.

7 We can -- you know, every time we mention
8 impairment, there's an objection, and we're not trying
9 to nullify Nevada law. We're not trying to say that
10 he's not impaired. We're saying that the Constitution
11 requires a consideration of the degree of
12 reprehensibility, and there's just no evidence from
13 which they can discharge that constitutionally and post
14 obligation.

15 So, okay, I get it. I lost. There's no
16 evidence. But I can certainly, it's proper argument to
17 say that you don't make assumptions in a court of law.
18 You make a decision based on evidence and there's no
19 evidence as to the amount of degree of impairment. That
20 is a factually true statement. And because there's no
21 evidence on that point that because the plaintiff has
22 the burden of proof, the defendant has the benefit of
23 the doubt.

24 And what that means is where there's two
25 options, right? Maximally impaired, minimally impaired.

1 The party with the benefit of the doubt should be able
2 to claim the minimum. That's just the law. That's just
3 logic, Judge.

4 I mean, I get it. It's not a perfect fit in
5 all cases, but this is a unique case. It's been made
6 by -- you've been handed a bunch of rulings that you
7 didn't make. We get that. But there is nothing
8 improper going on here however much Mr. Roberts thinks
9 it hurts his case. We are simply trying to discharge
10 our constitutional right to argue a degree of
11 reprehensibility by pointing out an absence of evidence
12 of that.

13 That's -- that's within the bounds, Judge, and
14 it's fair. I'm not saying he's not impaired at all.
15 I'm saying there's no evidence from which you can make a
16 determination as to what degree he's impaired. And
17 because of that, you have to fall back on the burden of
18 proof. Whose got the burden of proof? Yeah, they can
19 show he's impaired but as to the degree of
20 reprehensibility, the party with the benefit of doubt.

21 Because there's either maximally impaired,
22 minimally, party with the benefit of the doubt should be
23 entitled to argue for a minimal degree of
24 reprehensibility even though we're not contesting the
25 legal determination that he's impaired. There's a

1 difference between reprehensibility and impairment.

2 That's what we're trying to argue.

3 THE COURT: I understand what you're trying to
4 argue. The problem I have is I don't think -- there's
5 an instruction that talks about the level of marijuana
6 metabolite that was stipulated by all the parties.
7 That's the only evidence that I'm aware of that is
8 before the jury about the amount of marijuana or
9 marijuana metabolite.

10 So for either side to argue different than
11 those numbers without any evidence, I'm not going to
12 allow it. Because the plaintiff can't argue that the
13 degree of reprehensibility is very high because of, you
14 know, something that's not in evidence. You can't argue
15 that it's the minimum degree of reprehensibility because
16 of something that is not in evidence, and that's what I
17 thought you were doing.

18 I still think that's what your argument is
19 that you should be able to argue the minimum degree of
20 reprehensibility based upon the minimum degree of
21 impairment but there's no evidence of that. Neither
22 side put an expert on to say if somebody -- if
23 Mr. Awerbach was significantly impaired or minimally
24 impaired, so neither side can argue that.

25 MR. STRASSBURG: We're not arguing about

1 degrees of impairment. We're arguing about degrees of
2 reprehensibility.

3 THE COURT: But your argument about degree of
4 reprehensibility was based on the degree of impairment.

5 MR. STRASSBURG: It was based upon pointing
6 out that there's no evidence as to degree of impairment.
7 And in the absence --

8 THE COURT: Other than what's in the
9 instruction.

10 MR. STRASSBURG: Well, that's law, right?

11 THE COURT: Exactly.

12 MR. STRASSBURG: It's not evidence.

13 THE COURT: That's what the jury has to depend
14 on at this point.

15 MR. STRASSBURG: Yeah, they have to follow the
16 law. But they still have to follow the other law that
17 they must consider degree of reprehensibility.

18 THE COURT: I understand your argument.

19 MR. STRASSBURG: Okay.

20 MR. ROBERTS: And I'd just like to state for
21 the record that that is a false portrayal of the state
22 of the evidence. We put on Officer Figueroa through
23 deposition who testified as to all of the impairment
24 tests that he put Mr. Awerbach through, and testified
25 that he flunked 16 out of 17 of the tests for

1 impairment. So we do have evidence of the degree of
2 impairment.

3 THE COURT: You have evidence in about the
4 degree to which he was able to comply with the field
5 sobriety test.

6 MR. ROBERTS: Correct. The degree that he was
7 affected physically by the fact that he had consumed
8 marijuana. And you know what the motion in limine said,
9 it said that they cannot argue he was not impaired, but
10 they can put on evidence as to the level of impairment.

11 That's what the order said and he had an
12 expert and he closed his case, and he never tried to put
13 on evidence of the level of impairment. He just wants
14 to argue to the jury and ask them to speculate contrary
15 to the court's instructions.

16 MR. STRASSBURG: No. Judge, you know -- you
17 know that field sobriety tests don't determine
18 impairment.

19 THE COURT: I agree.

20 MR. STRASSBURG: They determine probable cause
21 to arrest.

22 THE COURT: That's why I just said, the field
23 sobriety test show the degree to which he was able to
24 comply with the field sobriety test.

25 MR. STRASSBURG: Right.

1 THE COURT: So he can't get up and say he was
2 so impaired because he failed 16 out of 17 of the field
3 sobriety test.

4 MR. STRASSBURG: That's kind of what I thought
5 I heard he was going to do.

6 THE COURT: He can say he failed 16 out of 17.

7 MR. STRASSBURG: Right.

8 THE COURT: Yeah. Yeah.

9 MR. STRASSBURG: And I hope when I object
10 you're going to tell him that a field sobriety test
11 doesn't determine impairment. It determines probable
12 cause to arrest.

13 THE COURT: But it depends what he argues it
14 for.

15 MR. STRASSBURG: Okay. But he can't mislead
16 the jury.

17 THE COURT: I agree.

18 MR. ROBERTS: Let's reserve for
19 Mr. Strassburg.

20 MR. STRASSBURG: If I didn't have a thick
21 skin, I would remonstrate. But since I do -- and I know
22 that Lee doesn't really mean it.

23 THE COURT: Are we done?

24 MR. STRASSBURG: Sir, yes.

25 THE COURT: Everybody? Did you have anything

1 else?

2 MR. ROBERTS: No, I just actually need a
3 break.

4 THE COURT: Me too. Off the record.

5 (Recess taken from 3:25 p.m. to
6 3:34 p.m.)

7 THE COURT: Welcome back folks. We're back on
8 the record, case number A637772.

9 Parties stipulate to the presence of the jury?

10 MR. ROBERTS: Yes, Your Honor.

11 MR. MAZZEO: Yes, Your Honor.

12 THE COURT: Mr. Roberts, your rebuttal
13 argument.

14 MR. ROBERTS: Thank you.

15 Okay this is it. After I'm done, you get to
16 go deliberate. We've had about seven hours of closing
17 argument after I rested my closing. I've got about
18 seven hours worth of things I'd like to show you from
19 the record, but the good news for you is I've to be in
20 another court at 9:00 a.m. tomorrow, so I've got to
21 finish today. You're going to finish today.

22 Before I get into the evidence I'd like to
23 review with you, I do want to thank my great team here
24 for all their hard work during trial, and thank you for
25 your time and patience with all of us.

1 This is -- Marissa and Tim both went to UNLV.
2 This is her first trial, Tim's second. If you remember,
3 Adam's from Mr. Lerner's office, and Audra is the one
4 that makes sure that I get all my exhibit numbers and
5 page numbers. Lots of books as Mr. Strassburg pointed
6 out.

7 Going back to yesterday afternoon, you may
8 have remembered that [banging] from Mr. Mazzeo, and it
9 reminded me of an old saying that he taught me in law
10 school. When you don't have the law, you pound on the
11 facts. When you don't have the facts, you pound on the
12 law. And when you don't have either, you pound on the
13 table.

14 And seriously, seriously folks you've been
15 asked to disregard the facts and the evidence. You've
16 now been asked to disregard the law, the orders of the
17 court and to disregard at least one promise that you
18 made to this court and the parties, and I'll --
19 hopefully the first few things will become obvious to
20 you as I talk through some of the rebuttal evidence I'd
21 like to show you.

22 But what about the promise you make in court
23 to the parties? If you remember back in voir dire, the
24 judge asked everyone here, if the parties aren't here,
25 is anybody going to hold it against them? And nobody in

1 this box said yes. No one. And yet, how many times did
2 we hear that you should take into account that
3 Ms. Garcia was not in court every day, that you should
4 hold that against her. That's what they've asked you to
5 do even though you said you wouldn't.

6 And after they made a point of it and I put
7 her on the stand and I asked her why, and you know why,
8 they're criticizing her for not being here when she's
9 been attending to her dying mother. And she also said
10 she knew all the bad things that they were going to say
11 about her, and she didn't want to hear that but she
12 would've been here if the judge told her.

13 So you should disregard all this nonsense
14 about how she wasn't here in court because it has no
15 relevance to any decision you have to make when you go
16 into the back room. Nothing. And I think it's apparent
17 now that we've heard the closing arguments that her
18 fears were justified.

19 The gloves are off. The pretext in the lawyer
20 code has officially been abandoned. You heard
21 Mr. Mazzeo say she feigned her discomfort on the stand.
22 She exaggerated her symptoms. I haven't counted today
23 yet because I don't have the transcript, but over a
24 dozen times yesterday it was said outright or implied
25 that Emilia has lied to you.

1 He said or implied her doctors are
2 incompetent. He implied they were in conspiracy to
3 involve unnecessary treatment due to some relationship
4 with the Glen Lerner firm, which most of the doctors
5 didn't agree with. Those were words out of their mouth.

6 And today you heard that I have not been
7 honest with you. Everybody's being dishonest on my side
8 of the table from Emilia, to me, to the doctors. And
9 I'd suggest that it's unprofessional and improper to
10 accuse all these people of being dishonest when there's
11 no evidence to base it on.

12 They just want you to speculate. They want to
13 plant these seeds in your mind. They're calling doctors
14 hired guns. That's not appropriate. What does that
15 mean? They said that Dr. Oliveri was trying to fool you
16 after misrepresenting his testimony to you.

17 They have no competent medical evidence that
18 these injuries and damages that we put forward were not
19 caused by the collision. We put on our evidence.
20 You've heard our doctors testify. And they've got no
21 competent doctors to say otherwise, so they're resorting
22 to these tactics. They can't put on competent evidence.
23 The doctors that they did put on were not qualified, and
24 so they're resorting to desperate tactics. Yesterday I
25 said that she's the victim and they have put her on

1 trial. That's all the more support with what you've
2 heard after I sat down.

3 Let me ask you to recall something which you
4 didn't hear about. They put on evidence that she got
5 fired from Sam's Town before the crash. They brought in
6 her supervisor and went through her performance reviews
7 where she needed improvement in various areas. Why did
8 they bring that up? Did they even mention it during
9 closing? Did they tie it together for some relevance in
10 the case? Of course not.

11 She's not claiming a wage-loss because every
12 morning that she could she got up and went to work
13 despite her pain. So if we don't have a wage claim and
14 we're not claiming things into the future, why would
15 they bring up the fact that she transposed a couple
16 numbers and got fired? Why would they bring up the fact
17 that she had bad performance reviews? They just want to
18 embarrass her. They just want to penalize her for
19 having the nerve to carry this through to trial.

20 Let's talk about the Facebook photos.
21 Mr. Strassburg's right. If Ms. Garcia had something to
22 hide, she could have made her pictures private or not
23 have posted at all, but she wasn't hiding anything. But
24 he told you that they weren't sneaky. They didn't sneak
25 because they didn't have to hack into her account or

1 steal a password.

2 But I don't think Mr. Strassburg understands
3 what sneak means. It means to move quietly and secretly
4 in order to avoid being noticed, to take something
5 secretly. And that's exactly what they did with
6 Facebook and that's not where they stopped. As you know
7 from Ms. Garcia, they showed her surveillance films that
8 they had taken of her and her kids in her deposition.
9 And certainly they had to sneak around to get those.

10 They had to creep around her house and follow
11 her and her kids around, and you never saw any of those
12 tapes in evidence. So I would ask you to infer one of
13 two things. You can infer that they followed her around
14 and they filmed her and they never saw anything that
15 helped them with her case, which is why --

16 MR. MAZZEO: Objection, Your Honor. Improper
17 foundation and improper argument.

18 THE COURT: Overruled.

19 MR. ROBERTS: I'm not going to say the second
20 inference because that might not be proper. It comes
21 down to this and it is pretty simple as Mr. Strassburg
22 explained, the main argument that I've made and the main
23 rationale for the doctors as far as that the injuries
24 and the treatment were caused by the collision.

25 No pain before the collision. Pain comes on

1 three days after the collision, no other intervening
2 incident. The collision becomes the most likely source
3 of the pain. No treatment before the collision. Within
4 three days after the collision, we've got treatment that
5 hasn't ended and will not end for the rest of her life.
6 Neither Mr. Mazzeo or Mr. Strassburg or any of the
7 doctors have offered any explanation other than the
8 collision for why her pain started three days after and
9 never stopped.

10 They say it was just a sprain/strain but
11 Poindexter acknowledged that sprain/strains heal on
12 their own within three months even without treatment.
13 Klein said sprain/strains will heal on their own within
14 six months even without treatment. So if it was just a
15 sprain/strain and they caused no other type of more
16 permanent damage, why didn't the pain not go away?

17 Mr. Strassburg now wants you to believe that
18 it's because she actually hurt it in the shower, and the
19 shower incident caused the need for the surgery. Well,
20 the shower incident was in September of 2011 over nine
21 months after her pain started.

22 So according to their own experts, if this had
23 just been a sprain/strain and the shower incident had
24 caused the need for the surgery, the pain would've gone
25 away at least three months and maybe six months before

1 the shower incident and it hadn't. At the time of the
2 shower incident she had already been told she needed the
3 surgery.

4 The shower incident -- there's simply no
5 evidence that the shower incident -- no medical
6 evidence. You can't speculate that's true when not a
7 single doctor said that that was likely to a reasonable
8 degree of medical probability. And as far as the
9 demonstration you got this morning, I don't know anyone
10 who washes their feet without bending their knees. And
11 there's simply no evidence to support that type
12 argument.

13 But what about some of the other arguments
14 that he spent a long time refuting. So in philosophy
15 there are forms of arguments that have been recognized
16 and studied, and one of those types of arguments is
17 called a "strawman argument." A strawman is what's
18 classified as an informal fallacy. And what you do is
19 you give the impression that you're rebutting and
20 refuting your opponent's argument, but actually your
21 refuting an argument that was never advanced by your
22 opponent.

23 So you set up the strawman, which is the false
24 argument that has not been made, and then you knock down
25 the strawman and say, see, I told you, none of it's

1 true. Mr. Strassburg and Mr. Mazzeo both made strawman
2 arguments with regard to issues that simply were never
3 relied upon by the plaintiff lawyers or Ms. Garcia's
4 doctors.

5 The first one that you've heard a lot about is
6 edema. Remember the changes that you can see, L5-S1 on
7 the end caps of the vertebra. Mr. Strassburg talked to
8 you about it for quite a while.

9 When I reviewed the evidence with you that we
10 were going to put forward and prove our case -- one of
11 the reasons we can find things so quick is when we get
12 the official transcript, there's a word index in the
13 back.

14 And so if you look at the word index for
15 opening statements, you can find edema and it was
16 mentioned once for Mr. Mazzeo. And the word edema never
17 came out of my mouth once during opening statements, and
18 not single one of the doctors who testified to you that
19 the injuries and the medical procedures were
20 necessitated by the automobile crash relied upon edema
21 for their conclusions. Not a one of them. So whether
22 edema's there or not, it doesn't matter to our case.

23 Dr. Lemper did talk about the fact that he
24 didn't see any edema. He thought there were bone
25 changes in the end caps. And when I got back up and I

1 talked to him, I asked him to clarify whether there were
2 different types of modic changes, and he acknowledged,
3 yes, that a modic change can either be edema or it can
4 be marrow, it can be fatty or it could be bone
5 remodeling.

6 And he told you to really tell the difference
7 between the different types of modic changes you have to
8 look at the T1 versus the T2 because the different modic
9 changes look different. And guess what, not a single
10 doctor did that. Nobody did it. Not one of our
11 doctors, not one of their doctors.

12 No one looked at the T1 versus T2 to see what
13 kind of modic change it was, and that's because no one
14 thought it was important. None of the doctors were
15 relying on it. No one thought it was important. The
16 only people who think it's important are now the defense
17 lawyers. Their doctors don't say anything about edema
18 or modic changes in their reports or the testimony they
19 gave about their reports, rather, in the court. No one
20 was relying on it because it didn't matter.

21 Oliveri said that he thought that the offset
22 was preexisting. Lemper believed that there was no
23 edema and he believed there was no slip caused by the
24 accident. Guess what? Oliveri and Lemper both still
25 thought all of the procedures and the surgery were

1 causally related to the accident because they weren't
2 relying on the fact of was edema.

3 Gross said there was edema and he believed
4 there was slippage after the crash, but everyone agrees.
5 Regardless of whether there's edema or no edema,
6 everyone agrees, the treating doctors all still agree
7 about the conclusion. So that's the first strawman.

8 The second is related to it, and that's
9 whether there was an acute traumatic slippage caused by
10 the crash. And, you know, Oliveri said I think that
11 there was an offset before the crash. There's no way to
12 tell for certain. No one can tell for certain because
13 there are no films from before the crash. But I think
14 there was some offset and I really don't know. But I
15 still think even if there's no change in the offset,
16 that the crash caused the spondylolisthesis to become a
17 pain generator because it doesn't have to move. And, in
18 fact, if it had moved 4 to 7 centimeters, there probably
19 would have been immediate onset of pain so it probably
20 didn't move.

21 And Gross didn't tell you that he thought
22 there was a traumatic slippage and it moved 4 to
23 7 centimeters. That's not what he said. Excuse me, 4
24 to 7 millimeters. I just did my own misconversion.

25 What Gross talked about is the fact that the

1 radiologist report and Dr. Hake said that they're
2 comparing the January of 2011 -- and there's no
3 disagreement about what comparison was made. It's right
4 there in the report. Their doctor just didn't know it.

5 So January of '11 to November of '12, and he
6 says, gee, it's gone from 7.5 to 10.2. And Gross said,
7 look, I relied on that. They've got sophisticated
8 equipment and he was alarmed by the progression and he
9 thought that was one of the reasons why he needed to go
10 forward with the surgery.

11 But he had recommended the surgery before he
12 ever saw the slippage progress. He doesn't rely on the
13 slippage for his opinion that there's a causal
14 relationship. So if they have proved to you that there
15 was no slippage, then it doesn't matter. It's a
16 strawman.

17 None of our experts relied upon that fact
18 because you can cause age-related changes to become
19 symptomatic through trauma. You can cause a
20 preexisting, asymptomatic, non-pain-generating
21 spondylolisthesis to become painful due to trauma, even
22 if there's no change on a film.

23 So we don't have to prove that there was a
24 traumatic acute slippage. That's not what our burden
25 is. Our burden is to just show you more likely than not

1 she has pain, she has medical procedures and that the
2 pain was caused more likely than not by the crash, and
3 the medical procedures were more likely than not due to
4 the crash. And we've met that burden.

5 And once we put that evidence on the scale and
6 all our doctors testify, they've got to put something on
7 the other side of the scale and they haven't done that.
8 and just so you're not confused about something and the
9 judge sustained my objection, just so you know what
10 they're objecting to.

11 During Dr. Klein's testimony, and if you
12 remember Dr. Klein, they hadn't invented MRIs when he
13 went to medical school so he didn't get schooling on how
14 to read them. And so he says that he conferred with
15 Dr. Cidinworm, a neuroradiologist, and our objection was
16 sustained. And then after the objection was sustained,
17 he was asked:

18 "So Dr. Klein, after speaking
19 with Dr. David Cidinworm, did your
20 discussion with him change any
21 opinions you arrived at independently
22 with regard to there being no change
23 between the three studies that were
24 performed?"

25 And not to be denied by the court, Dr. Klein

1 says, "He concurred with my assessment."

2 "Objection. Move to strike.

3 It'll be stricken."

4 That means you're not supposed to think about
5 it again. You're not supposed to mention it again.

6 It's not supposed to be referred to by counsel again.

7 It's stricken.

8 And it makes sense because he didn't take the
9 stand, his friend. I can't cross-examine his friend.
10 His friend hasn't shown me the films that he looked at
11 to compare. Remember when Dr. Gross got up here and put
12 the disk in the computer, and he was the only one that
13 did that, and the MRI has all those different slices and
14 all the different angles. And he scanned through and
15 showed you how he found certain films.

16 Well, you've got to compare comparable films
17 for your measurements. They've got to be slices in the
18 right place from the right angle to have a valid
19 measurement. I can't cross-examine the doctor's friend
20 on what film he used and how he made his measurements.
21 And I'm going to demonstrate to you a little bit the
22 dangers that come from lawyers trying to make
23 measurements on films when they're not competent to do
24 so.

25 Strawman, slippage doesn't matter. It's an

1 interesting fact.

2 Your Honor, could I have the ELmo?

3 THE COURT: Yep.

4 MR. ROBERTS: And I talked about this slippage
5 in my opening, and I was never dishonest with you about
6 what the evidence would be. If you look down here
7 starting at line 16, and this is something you're going
8 to hear some disagreement on even among our doctors.
9 There's lots of slices to an MRI and you do the
10 measurements and you have to measure the same place in
11 both films and there's some disagreement.

12 But according to the radiologist this is what
13 he found. I never relied upon the fact of slippage as
14 the proof of our causation. Certainly it's a concern
15 and Dr. Gross thought that she was showing some
16 instability that couldn't have been there to that degree
17 before that crash, but it didn't add to any of the
18 damages. The same surgery had been recommended before
19 any slippage was seen by the radiologist. It doesn't --
20 if there's no slippage, not a single dollar comes off
21 the damages that I've put forward to you.

22 So what about Dr. Oliveri? Mr. Strassburg
23 told you that you could go back in the back room and you
24 could discuss whether Dr. Oliveri had tried to fool you
25 when he showed you a disk with a rupture. Let's take a

1 look at what Dr. Oliveri actually said about that disk
2 with the rupture.

3 This is February 22nd, a couple weeks ago,
4 Page 33, starting at Line 8.

5 "A person has a disk injury to
6 their lower back where the disk
7 actually ruptures and herniates and
8 there's compression on a nerve root,
9 that person's probably going to have
10 immediate onset of symptoms.

11 However, Ms. Garcia did not have one
12 of those types of problems."

13 So he showed you the rupture and he says this
14 isn't what happened to Ms. Garcia. This would've caused
15 an immediate onset of symptoms, which she didn't have.
16 He never claimed that her disk ruptured like that as a
17 result of trauma.

18 Page 35, and he's talking more about the
19 rupture and the immediate onset of pain and the
20 immediate symptoms. And that's going to be an example
21 of someone, not Ms. Garcia, after a motor vehicle
22 accident is going to have an onset of symptoms, terrible
23 pain down their leg.

24 But what did he say about Ms. Garcia, his
25 medical opinion regarding her injury?

1 "Ms. Garcia's injury was an
2 injury in part to those fibers, but
3 it didn't tear all the way through."

4 In fact, we know from medical research, it's
5 just the outer third of those fibers that receive nerve
6 supply and it's the outer third of those fibers that
7 allow us to sense pain.

8 So we knew -- we know from the eventual
9 studies that were done on Ms. Garcia that she eventually
10 had tears that reached almost to the edge of the disk
11 but not through. You see? He's saying that she didn't
12 have one of those ruptures that looked like the one that
13 Mr. Strassburg showed you.

14 So it made sense to me that she was in this
15 accident, she began to develop tears in the disks. The
16 tears have to start somewhere, and they worked their way
17 out to the edge. And the working out to the edge
18 process can take hours, it could take a day, it could
19 take a couple of days. And so the gradual onset of
20 developing symptoms and then going to the emergency room
21 at three days, is consistent with the type of injury she
22 had to the disk.

23 So you see, Dr. Oliveri wasn't trying to fool
24 you into thinking she had one of those ruptures that
25 Mr. Strassburg showed you. He said that's not what

1 happened to her. If she had something that looked like
2 this, she would've had immediate onset of pain just like
3 the defense doctors told you.

4 Instead, he knows that she had injuries which
5 slowly worked their way and eventually made it to the
6 outer edge of the disk, and that's what he told you he
7 believed happened. So once again, it's another strawman
8 argument where he disproves something that Dr. Oliveri
9 never told you.

10 Disk desiccation, another strawman argument.
11 Age-related changes. There's been no testimony that
12 Ms. Garcia's medical procedures and expenses and pain
13 would've happened as a result of her disk desiccation
14 and age-related changes in the absence of the collision.
15 No evidence of that from any doctor. We're not claiming
16 it, so it's not something that refutes any argument that
17 we're making.

18 Dr. Scher. You saw some slides from
19 Mr. Strassburg. And the slides looked like the ones
20 that Dr. Scher showed you except he took off the words
21 because Dr. Scher's evidence has been stricken. The
22 Court found he didn't have an adequate scientific
23 foundation for his testimony, and the Court struck it
24 and told you to disregard it.

25 So Dr. Scher's testimony isn't in evidence but

1 now Mr. Strassburg wants to testify that the forces of
2 the accident weren't enough to cause the injuries.
3 Think about the evidence that's in the case. There is
4 no evidence from Dr. Scher in the case. There is no
5 expert testimony from somebody else that the forces of
6 the collision were greater than or less than the forces
7 of daily living. No one's done that calculation. You
8 don't know. You can't speculate about that.

9 And if -- and if you want to make a reasonable
10 inference based on the evidence, if she rode a roller
11 coaster and she mopped the floor and she scrubbed her
12 feet for 32 years or for 25 years. It's like that
13 27-year smoking record. I don't think she'd been
14 smoking since she was four years old. Sometimes there
15 are mistakes.

16 But you know that the forces of daily living
17 never caused the onset of pain or the need for treatment
18 until this crash. So something happened in the crash
19 different that caused the pain to come. And the exhibit
20 that Mr. Strassburg showed you had an arrow pointing
21 here and another arrow pointing here, and that was part
22 of the problem about the forces. That the strength of
23 the spine balances out the activities of daily living
24 and the crash, and everything balances and nothing gets
25 hurt. But when you get hit from the side and then you

1 spin around, that doesn't -- there aren't activities of
2 daily living that can recreate that type of event.

3 So I'd ask you to disregard any part of the
4 arguments that Mr. Strassburg made about the forces of
5 daily living and the implication that the accident could
6 not have caused the injuries if there's no evidence to
7 support it. And if you look in your notes, you'll see
8 there's absolutely no evidence to support it.

9 And it's also contrary to common sense. And
10 it's a fundamental flaw in their logic when they try to
11 infer and have you believe that the forces of the
12 accident were not enough to injure Ms. Garcia and cause
13 the need for treatment.

14 And this is the inconsistency. Two doctors
15 testified for them, Klein and Poindexter. Poindexter
16 said myofascial sprain/strain, damage to muscles,
17 tendons, ligaments, right? And certain treatment up
18 through some injections were reasonable and causally
19 related. Klein says myofascial sprain/strain is caused
20 by the collision and conservative treatment was
21 justified and causally related.

22 Some of the treating doctors explained to you
23 about Ms. Garcia's pars defect, a developmental issue
24 where the pars interarticularis that keeps the bones
25 from sliding down, never fully developed in Ms. Garcia.

1 And you heard evidence that 80 percent of people with a
2 spondylolisthesis never have pain, never require
3 surgery, go to their -- go to their death with never
4 needing medical treatment. Lots of them don't even know
5 they have it.

6 But what they told you is that there's gristle
7 and tendon and stuff that's holding it in place and
8 stabilizing it, and that's what keeps it from slipping
9 more. You remember how tough -- Dr. Gross said, I know,
10 I've been in there. It's kind of tough and you've got
11 to -- when you try to cut through it.

12 So what you've got that's stabilizing
13 Ms. Garcia instead of bone is her muscles and the
14 ligament and tendon stuff. Well, if all of their
15 doctors have acknowledged that the collision was enough
16 to damage tendon, muscle and ligament, then it was
17 enough to damage the muscle, tendon and ligament that
18 was stabilizing her spondylolisthesis.

19 It's logical. It's common sense. The
20 collision didn't have to be enough to break a bone
21 because she didn't have the bone there, and it became a
22 pain generator after the crash and that's enough.

23 Pete -- excuse me, Mr. Mazzeo said something
24 yesterday afternoon that Ms. Garcia and the doctors want
25 Jared and Andrea to pay for a condition that was not

1 made, that did not sustain an acute or traumatic injury
2 and that's not justified, and he called it a preexisting
3 condition.

4 And there's a jury instruction that talks
5 about preexisting conditions. And I want to make sure
6 that this is something that you focus on and understand
7 when you go back into the back room. Because a
8 preexisting condition, you can't compensate us for. So
9 you've got the -- I'm going to get some help here so I
10 can keep talking.

11 So the doctors all agree that some degree of
12 spondylolisthesis was probable before the crash. So we
13 cannot ask them to pay for any medical treatment or pain
14 and suffering that would've been generated by that
15 spondylolisthesis in the absence of the crash, okay?

16 But I'll say it again, the testimony is that
17 80 percent of people never become symptomatic. Meaning,
18 they never need treatment and they never have pain. So
19 more likely than not, the legal standard you're required
20 to apply, you have to find that 100 percent of the pain
21 and the treatment necessary to the spondylolisthesis was
22 caused by the crash because it would not have been
23 incurred in the absence of the crash.

24 So it's Instruction Number 35:

25 "A person who has a condition or

1 disability is not entitled to recover
2 damages."

3 So we're not seeking any damages due to the
4 preexisting condition of spondylolisthesis or
5 age-related changes, because the evidence in the court
6 is that they would not require treatment and would've
7 been asymptomatic -- asymptomatic in the absence of the
8 crash.

9 But the plaintiff is entitled to recover for
10 any aggravation of the preexisting condition or
11 disability caused by the injury. And, in this case,
12 what the evidence is, is that 100 percent of the pain,
13 100 percent of the disability was caused by the
14 aggravation of the injury that occurred in the crash.

15 This is a well-known legal doctrine. It's
16 called the "eggshell case," the eggshell doctrine. The
17 original case I think was back in England where someone
18 got a knock in the head, and it would not have damaged a
19 normal person but this person had a thin skull, and so
20 it caused a lot of damage. And they said look, you're
21 still liable for it. You're not off the hook because
22 this person had a condition that made them susceptible
23 to injury.

24 Think about maybe an older gentleman with some
25 bone loss and he's got really brittle bones and he's 96

1 years old walking across the street, and a car runs into
2 him. Taps him, something that wouldn't have injured a
3 normal person, but it breaks his bone. They're
4 responsible for that. They're not off the hook just
5 because she was susceptible to injury. She would've
6 been fine if Mr. Awerbach had not chosen to become
7 impaired and drive a car.

8 I'm not going to pull up the picture of the
9 door, but I did want to briefly talk about that so
10 you're not mislead about what Ms. Garcia said.
11 Ms. Garcia wasn't saying or contending that the door got
12 knocked open in the crash. The point was -- Page 111,
13 March 4th. So the point was in the whole quote here:

14 "Q And you were successfully able to
15 open it?

16 "A No, it wouldn't open. It was
17 stuck."

18 So she told you that it was stuck. And the
19 whole point of that wasn't that the collision was so
20 strong it knocked the door open, but the collision was
21 strong enough to make the door stick so it wouldn't
22 open. And it isn't just the little bit of damage they
23 show you by the wheel, but there's a whole line of
24 damage that runs all the way up the door. And that, in
25 fact, made the door stick.

1 And you've seen Mr. Awerbach's car and the
2 damage that's done to the front of it. And you also
3 know both cars were totaled. And you also know that
4 Mr. Awerbach's car was so totaled that when he stepped
5 on the gas to try to leave the scene before he checked
6 on anyone, his car was so disabled that it wouldn't go.

7 So Mr. Strassburg told you that I wasn't being
8 honest with you because Dr. Klein had reviewed a 2014
9 film, and I had showed Dr. Gross a 2013 film, and they
10 both looked pretty similar. You saw him put both of
11 them up in on the screen here during closing. They were
12 both the same view. On the left side it showed a little
13 offset there that Dr. Klein had pointed out when he was
14 on the stand.

15 And if you remember, I asked him, I said,
16 Roger, for this 2014 film that you're showing me, can I
17 have an exhibit number and page number, and he didn't
18 have it and I still don't have it. And I don't even
19 know if it's in the record. I don't even know if it's
20 an exhibit that he just showed you. And I still don't
21 know if I compared the right ones. I've gone back to
22 look.

23 Let's look at when Dr. Klein was on the stand.

24 "Dr. Klein, take a look at this
25 post-op X-ray that has two films,

1 right, side by side, an AP and a
2 lateral."

3 Not identified by exhibit number. Not
4 identified by date, and it had two films side by side,
5 remember? Two films side by side with words up at the
6 top put there by the lawyers. So what they showed
7 Dr. Klein was not an exhibit, but it was a slide that
8 the lawyers had put together with two films side by side
9 and writing. That's what they showed Dr. Klein. They
10 made a second reference that day when Mr. Strassburg
11 asked him about the same exhibit. What did
12 Mr. Strassburg say?

13 "Q Now, you have in front of you a
14 slide of the post-operative, the
15 surgical construct, this rhomboid.
16 Do you see that?

17 "A Yes."

18 And let me blow up this part. So he goes on
19 to talk about it. Never identifies a date. Never
20 identifies an exhibit number. It's a slide.

21 And then on March 2, 2016, Mr. Smith asked the
22 doctor if he reviewed the actual set of films or just
23 the demonstrative exhibit, and he said the demonstrative
24 exhibit. So this is the doctor they supposedly hired to
25 figure out the case and whether or not surgery was

1 reasonable and necessary, whether or not it was caused
2 by the accident.

3 The doctor didn't come up with this. The
4 doctor was shown a demonstrative exhibit prepared by
5 counsel and he agreed on the stand. And Mr. Strassburg
6 showed you a film again, and he showed -- and it looked
7 pretty close to the same to me, but he never blew it up
8 and showed you if that film showed anything different
9 than Exhibit 40C.

10 Can you put 40C up? Because it's not
11 identified, I can't show it. I looked at it. I
12 couldn't see any difference from back here. But 40C --
13 and just blow up the hardware really big. This is
14 what -- remember, Klein said, oh, look. Look at this
15 low quality slide put together by the lawyers, and you
16 can see the screw is offset and it's outside the bone.

17 But if you blow it up -- and he never did
18 this. He never looked at the film. If you blow it up
19 and you look at where the screw goes, and here's the
20 head right here. Here's the bone. The head's down into
21 the bone and it's parallel to the other one.

22 There's no evidence the screw wasn't into the
23 bone. Dr. Gross told you the precautions he makes to
24 make sure it's seated. He told you he doesn't leave it
25 in if it's not in the bone, and there's proof of that.

1 Because the third screw up here, he couldn't get it
2 firmly set into the bone so he took it out. That's what
3 he tells you. If I can't get it firmly into the bone, I
4 take it out, and you've got proof he takes it out if he
5 can't get it into the bone. That screw was in the bone
6 and there's no evidence that it ever loosened.

7 So because there's no competent evidence from
8 his doctors, Mr. Strassburg tried to come up with a
9 brand-new theory for you here in closing. He tried to
10 interpret the MRI films and prove to you that the screw
11 had loosened from 2013 to 2014 with all these outlines
12 and all these measurements that none of his doctors had
13 done. But Mr. Strassburg's going to read the films and
14 he's going to prove to you that the screws had loosened.

15 Audra, do you -- you have -- you took a
16 picture of that. Can you put up the slide of the two
17 screws?

18 I took a picture of this on my TV monitor.
19 All right. So he asked you to count the threads, a very
20 scientific exercise to prove that. Here's the 2013,
21 count the threads. 2014, count the threads. Aha, the
22 screw has loosened.

23 Well, it's kind of hard to see on this, but
24 look at the angle that this MRI was taken and how these
25 two screws from the right and left side overlap and come

1 together. Do you see that? And he's drawn a yellow
2 line so he can tell you what he's talking about. But
3 now look at the angle from 2013. It's taken from a
4 different angle. The two screws are both fully visible
5 with space in between them.

6 These two MRIs are not taken from the same
7 angle. And just in case you need any further proof that
8 they're from the wrong angle and that was a completely
9 invalid exercise and a waste of 15 minutes of your life,
10 let's look at the S1 screw, which he didn't talk about.

11 2013. So let's go here. We'll be just as
12 scientific at Mr. Strassburg. So here's the 2013
13 measurement of the amount of space between what he says
14 the top of the vertebral body is and the head of the
15 screw. And now we're going to go over here to 2014 and
16 it's further in.

17 Now, either these are different angles and
18 this is the danger of lawyers reading MRIs or what
19 happened is between 2013 and 2014, the S1 screw screwed
20 itself further into the bone by two threads.
21 Mr. Strassburg is not qualified to read an MRI and his
22 doctors --

23 MR. MAZZEO: Objection, Your Honor. They're
24 X-rays, not MRIs.

25 THE COURT: Okay.

1 MR. MAZZEO: He's not reading MRIs.

2 MR. ROBERTS: Mr. Strassburg is not qualified
3 to read an X-ray or an MRI. This is an X-ray
4 apparently, which is proof I'm not qualified either,
5 which is why I rely on my doctors. And this also
6 demonstrates why you can't count on somebody coming in
7 here and telling you, I don't think there was any
8 slippage.

9 Because guess what? To competently determine
10 if there's slippage you've got to be competent to read
11 an X-ray or MRI, and you've got to compare the right
12 film to the right film. And they didn't put anybody up
13 who showed you how they got there and how they
14 determined they were comparing the right films.

15 You heard a doctor say that he looked on an --
16 looked at an exhibit and he used his school ruler to
17 make a measurement. It's not scientific, it's not
18 reliable, and it doesn't refute the evidence from
19 Dr. Hake, a competent radiologist, who determined that
20 there was a slippage.

21 Nerve root. You heard them talk about the
22 fact that their doctors showed you some slices, some
23 axial slices looking down from the top that proved that
24 there was no impingement of the nerve root, no narrowing
25 of the foramen which impinged on the nerve root.

1 And if I could go back to our gentleman who
2 broke his leg. So a car runs into him. He has a
3 fracture, broken clean through right here. Has an MRI.
4 You've got axial slices. Well, if you look at the axial
5 slice right here you'd say, look at that. His bone's
6 not broken. It's all a lie. Look at these axial slices
7 and there's no broken bone, therefore, I've proved that
8 there's no broken bone.

9 You can't prove a broken bone on an axial view
10 and you can't prove an impingement on an axial view by
11 showing one, two or even three slices of no impingement
12 or no break. The doctors have to look at all of the
13 slices to verify that there are no impingements, or in
14 my example, breaks. And once you find an impingement on
15 one of the slices, that's what matters, not the absence
16 of an impingement on a different slice.

17 So what did Dr. Gross do? He's actually the
18 only one who put a full disk of an MRI into the computer
19 and flipped through it with you to move down through the
20 slices until he found the impingement that he had seen
21 when he treated Ms. Garcia. And I can't do that again
22 for you.

23 One, I'm not sure I could do it. But second,
24 the computer's already been given to you for your use
25 back in the deliberation room. And you've got the disk

1 and you can try to do this yourself when you go back
2 there. I'll give you the information on how you need to
3 do it. So, Dr. Gross was kind enough to identify --

4 Could I have the ELmo back, Your Honor?

5 THE COURT: Yep.

6 MR. ROBERTS: Thank you, sir.

7 He was kind enough to actually identify the
8 disk and the slices. These were from January 26, 2011
9 within a month of the crash. And then he walked through
10 that disk of slides with you. And -- okay, Key 122.
11 And his answer right here by my Post-It.

12 Now, I was showing you the nerves coming out
13 as happily. But the very last nerve of the lumbar spine
14 is this gray circle, which is clearly being flattened or
15 bothered or pressed on by the disk herniation -- whoops,
16 sorry -- also in Image 12 from L5-S1. So it's part
17 being caught up in that foramen or window where it comes
18 out.

19 So if you find Image 12 from January of 2011,
20 you can go look for that yourself, but I'm sure you'll
21 remember him putting this up on the screen and showing
22 you what the normal ones look like, and then showing
23 this one that was flattened. You saw it with your own
24 eyes that it was flattened. And then Page 41, beginning
25 Line 2.

1 And on the other side of the
2 spine, the right side, you could see
3 the same thing on Image 3 where the
4 nerve is almost oval and flattened
5 out, and the one above it at L4-5 has
6 got plenty of room."

7 So contrary to what they told you, there was
8 medical evidence of an impingement, encroachment by the
9 foramen on the nerve root. And Dr. Gross showed it to
10 you and you've got the disk in the notebooks, and if the
11 computer's working, you can figure it out. You can go
12 look at Image 12 and Image 3 and see that for yourself.
13 The fact they showed you a couple slices with no
14 impingement proves nothing.

15 Mr. Strassburg's closing was all about
16 assumptions, and that it is improper for you to make
17 assumptions. I would generally agree with that
18 statement, and I'm not going to ask you to make any
19 assumptions. But the things that Mr. Strassburg talked
20 about are not assumptions.

21 An assumption is -- being asked to make an
22 assumption is being asked to assume something is true in
23 total absence of evidence. Just assume it. There's no
24 evidence but assume it. On the other hand, an inference
25 is a conclusion or opinion that is formed on the basis

1 of known facts and known evidence.

2 The things that I've asked you to do in my
3 closing where there's no direct evidence are inferences
4 and not assumptions. And they're inferences based on
5 the evidence and your common sense.

6 So what did the Court tell you about this?

7 "You cannot consider
8 assumptions, but what you can do is
9 you can bring to the consideration of
10 the evidence your everything day
11 common sense of judgment as
12 reasonable men and women."

13 Skip a sentence.

14 "You may draw reasonable
15 inferences from the evidence which
16 you feel are justified in light of
17 the common experience, keeping in
18 mind such inferences should not be
19 based on speculation or guess."

20 So assumptions no; inferences, yes. The Court
21 has told you so. The Court has also told you in
22 Instruction 10 that there's two types of evidence,
23 direct and circumstantial.

24 "Direct evidence is direct proof
25 of a fact. Circumstantial evidence

1 is indirect evidence that is proof
2 from a chain of facts from which you
3 can find that another fact exists
4 even though it has not been proved
5 directly."

6 And I talked to you about this with the
7 example of the person who comes in. They're wet; you
8 can infer that it's raining outside. She had no pain
9 before the crash; the pain develops after the crash.
10 You've heard the medical testimony that even from their
11 doctors that a crash can cause this pain; it can cause
12 trauma to a spondylolisthesis; it can cause damage to
13 the vertebra, so you know it's possible. So crash, no
14 pain; crash, pain. You can reasonably infer that the
15 crash caused the pain, that the crash did, in fact,
16 cause the damages.

17 And the rooster and the sun is a good example.
18 So a rooster crows, the sun came up; therefore the sun
19 came up because the rooster crowed. Okay. Let's bring
20 common sense to it. Let's look at how you would apply
21 that in court. Is there any evidence in court that a
22 rooster crowing can make the sun come up? No. That's
23 not a reasonable inference. We reject it based on our
24 common sense and the evidence in this case.

25 There's a crash. Three days later she has

1 pain and the pain never go away. Is that a reasonable
2 inference? The doctors all agree, including the defense
3 doctors, that the crash can cause the pain and the
4 injury. There's no other explanation for it; therefore,
5 that's a reasonable inference.

6 And the medical doctors who looked at the
7 medical records and who know about these things, all
8 said that is the most likely cause. Even the defense
9 doctors said that is the most likely cause of her pain,
10 they just disagree about whether it was sprain/strain or
11 damage to the vertebra. Using common sense, it didn't
12 go away; therefore, it wasn't just a sprain/strain.

13 So they talked a lot about Glen Lerner,
14 especially Mr. Mazzeo.

15 "Didn't Mr. Lerner's office send
16 you to all of these doctors?"

17 Oh, you didn't tell -- she didn't tell the
18 whole story to the jury when she was talking about
19 asking for treatment. Remember this when she was on the
20 stand? Crash. Hospital. First call.

21 What they didn't remind you of about that
22 first call was she said, you know, I'm hoping this all
23 goes away. I'm hoping I get better. That's still what
24 she thought and hoped the day after the hospital. The
25 doctor had said it's a sprain/strain and given her a

1 prescription, and she's hoping the pain just resolves
2 and goes away the way sprain/strains do.

3 The call she was talking about was the 11th,
4 her next day off, where it's not getting better and she
5 decides that she needs to see a doctor. And she doesn't
6 want to go back to the hospital because she felt that
7 they had treated her differently because of her ability
8 to pay.

9 And it's this conversation on the 11th that
10 there's no dispute about, and it's right there in the
11 notes of the representative, where she said, can you
12 help me get treatment from a doctor? And they said,
13 well, we can pay for some prescriptions. But, no, we
14 don't pay for treatment from a doctor.

15 And if you look through the binders -- you see
16 all the binders of evidence and look through our summary
17 of exhibits. We're not asking for any medications they
18 offered to pay for. It's not part of our damages.

19 So they brought in here at the end the
20 MountainView physician, one of their last witnesses.
21 And they argued that his testimony impeaches
22 Ms. Garcia's claims, and it doesn't impeach anything she
23 said. What the MountainView physician said was that he
24 did not treat Ms. Garcia any differently because of her
25 ability to pay, and Ms. Garcia isn't claiming that. She

1 doesn't have a claim against MountainView. She's not
2 trying to prove that.

3 Ms. Garcia has testified to how she felt from
4 what they said to her, and the MountainView physician
5 can't impeach how Ms. Garcia felt and that she felt she
6 was being treated differently once they found out that
7 she didn't have a means to pay. And this is not
8 something that we brought up. It's not something that
9 we need to prove as part of our case.

10 In the opening statement, one of the defense
11 lawyers, he said, quote:

12 "We'll prove to you that before
13 Ms. Garcia sought treatment after the
14 ER, she sought treatment first with a
15 lawyer, the Lerner firm."

16 So this is what they said they were going to
17 prove, which is the only reason we're bringing this up.
18 That they're trying to portray her as a money hungry
19 person who went to the Lerner firm first. Before she
20 even sought treatment from a doctor, she sought
21 treatment with a lawyer because she wanted to file a big
22 claim, and that's what we're refuting.

23 We're refuting that by showing that before she
24 ever called Glen Lerner's office to inquire about making
25 a claim, she first asked the defendant's

1 representatives, can you help me with some treatment?
2 That's all she wanted. Can you send me to a doctor? We
3 don't do that, ma'am. And that's why she called Glen
4 Lerner.

5 And they can criticize Glen Lerner's office
6 all they want to. I suppose that because he advertises,
7 maybe they think they can make hay with that by tying
8 this to Glen Lerner -- and I'm not with that firm if you
9 remember, so I can say this.

10 Glen Lerner's office -- the evidence is that
11 Glen Lerner's office helped Ms. Garcia when no one else
12 would help her. That she asked the defendant's
13 representative for help with a doctor, and it was denied
14 and she went to Glen Lerner and he gave her options and
15 a list of doctors who he knew would be willing to help
16 her without a guarantee of immediate payment.

17 There's nothing shady or wrong with what
18 happened, and there's no improper motive here due to the
19 fact that the Lerner firm helped her find doctors
20 willing to treat her. There's no evidence of that.
21 They just want you to speculate. They want you to
22 assume. They want you to think there's some big
23 conspiracy. There isn't. There's a conspiracy to help
24 people who need help and can get it no other way.

25 And I have to point out one thing, which I

1 thought about when this good doctor was on the stand
2 from MountainView. He testified to you that he didn't
3 treat Ms. Garcia any differently because of her
4 financial condition. But he also told you that he had
5 no independent recollection of who Ms. Garcia was or
6 anything about the treatment, that he was relying
7 totally on the chart.

8 That's not really consistent. When a hospital
9 doesn't treat someone because of their money, it's not
10 the sort of thing that they put in the chart. That
11 doesn't happen. But he told you that he wouldn't treat
12 anyone differently because they didn't have money. He
13 wants you to believe he's not motivated by money, but if
14 you remember, he got served with a subpoena. He's not a
15 paid consultant, you know, an expert that got hired and
16 is under a contract.

17 He got served with a subpoena on Friday night
18 by the defense lawyers compelling him to be in court.
19 And when you get served with a subpoena compelling you
20 to be in court, citizens of the United States have to go
21 to court. And guess what he said? Well, I'll go to
22 court. I'll comply with the law if you pay me
23 \$2,250 for 15 minutes of testimony. 10,000 an hour, the
24 highest rate anyone's been paid in this case, and his
25 main testimony was I'm not motivated by money.

1 MR. TINDALL: Objection. Improper argument.
2 His testimony was at a three-hour minimum.

3 THE COURT: I don't specifically recall what
4 he said. Hopefully the jury will remember what he said.

5 MR. TINDALL: Well, maybe if we show you, will
6 you sustain the objection? Just let me approach and
7 show you.

8 THE COURT: Come on up.

9 MR. ROBERTS: The doctor said \$750 an hour for
10 a three-hour minimum.

11 THE COURT: Come on up.

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

14 THE COURT: Objection is overruled.

15 MR. ROBERTS: Audra, can you put up the Mazzeo
16 slide of treating doctors?

17 So this is something Mr. Mazzeo said and it's
18 contrary to the evidence that you've heard. Treating
19 doctors all have a financial interest. Obviously, they
20 wanted that to be true and they tried to prove it.

21 But if you recall, Dr. Lemper testified under
22 oath that he had no interest, no financial interest in
23 his claim, and Dr. Kidwell said he had no financial
24 interest in this claim. So all of the doctors did not
25 have current liens and a financial interest, and

1 Mr. Mazzeo just --

2 MR. MAZZEO: Objection, Your Honor. Counsel's
3 misstating what I said to the jury during closing.

4 THE COURT: Well, we can all see it.

5 MR. MAZZEO: Then what I said in reference to
6 this. I said at the time they provided service they all
7 had an interest because they all had medical-legal --
8 medical liens on this case. That's what I said.

9 THE COURT: Okay.

10 MR. MAZZEO: Thank you.

11 MR. ROBERTS: And actually, Dr. Kidwell said
12 at the time he provided a service he had no interest in
13 the claim. So that was false, too.

14 MR. MAZZEO: That's false. He saw the lien
15 after --

16 MR. ROBERTS: Objection, Your Honor. Move to
17 strike.

18 THE COURT: The objection's overruled.

19 MR. ROBERTS: So what are you left with here?
20 They have a budget apparently of over \$100,000 for
21 experts, and they failed to put up a spine surgeon to
22 testify under oath that the spine surgery was
23 unnecessary or incorrectly done or not caused by the
24 accident.

25 They couldn't find a board certified pain

1 management doctor to testify that either Dr. Lemper or
2 Dr. Kidwell did anything wrong or unnecessary. You're
3 left with arguments of counsel trying to convince you
4 that MRI films and X-rays show you things that no
5 medical expert has told you that they show.

6 And then after hours and hours, Mr. Strassburg
7 gave you his grand conclusion a few minutes before I
8 started that her pain was caused by the doctors and the
9 botched surgery, and now she's stuck and has to keep
10 going and she's going to need even more surgery, but
11 it's all caused by the doctors.

12 The court has instructed you, and I went over
13 it in my opening, that if Ms. Garcia goes to see a
14 doctor as a result of a crash, as a result of the
15 negligence of Mr. Awerbach, which has already been found
16 by the court, then if the doctors screw up, it doesn't
17 break the chain of causation. They're liable for that,
18 too. He's just proved to you that we're entitled to the
19 money in a different way for a different reason, but
20 which either way you go, we're still entitled to the
21 money.

22 Because the only reason she went to the
23 doctors is because of the crash. Their doctors
24 acknowledge the crash caused an injury, and if the
25 course of treatment from the injury they acknowledge she

1 received treatment that was wrong or unnecessary or
2 misguided, it's still their fault because they sent her
3 to the doctor.

4 She would not have gone to the doctor on
5 January 5th and had this long, continuous chain of
6 treatment that is going to continue her entire life if
7 Mr. Awerbach had not ran into her. And that's why it's
8 a recoverable damage whichever way it is. Whichever way
9 it is, they've got to pay because they sent her to the
10 doctor.

11 And Mr. Strassburg suggested that when you go
12 back into the jury room and you start deliberations and
13 you start negotiating on damages, that you start at
14 their number of 30 or \$50,000 and work your way up.
15 Don't start at the plaintiff's proof and work your way
16 down.

17 Well, in a case like this, why are they
18 arguing for only 30 to \$50,000? Well, they've got a box
19 that they're in. Their doctors agree it's a
20 sprain/strain, and that should've resolved but it
21 didn't. But the sprain/strain, 20 to \$50,000, fine, if
22 that's what it was.

23 However, if it wasn't just a sprain/strain,
24 then this is the damage. That's why they're not
25 suggesting a compromise because it's sort of -- it's an

1 injury which has required spine surgery and rhizotomies
2 and nerve root blocks, and it's not just a sprain/strain
3 or it's a sprain/strain and it's 30 to 50.

4 So I would suggest that you've got a choice.
5 You've got a choice of 2.7 million, more or less, or 30
6 to 50,000. Those are your choices. Either it was a
7 sprain/strain or it wasn't. So there's no starting at
8 the top or starting at the bottom. It's not a
9 negotiation. It's not a compromise. It's a finding of
10 the truth and the facts. And if you find it wasn't just
11 a sprain/strain, then the treatment was reasonable and
12 necessary caused by the accident.

13 And they've thrown around the 13 and
14 \$16,000 numbers, and that's fair enough, but don't let
15 them mischaracterize what that is. This is for
16 Ms. Garcia. This is for her medical treatment which she
17 would not have incurred in the absence of their
18 negligence. And the 3 million that I asked for for
19 punitive damages, is not intended to compensate her.
20 It's for a different purpose.

21 The court has instructed you on the things you
22 can consider in determining the amount of punitive
23 damages that are appropriate, and that's Instruction 41.
24 And Mr. Strassburg --

25 I seemed to have lost the ELmo, Your Honor.

1 THE COURT: I'll get it back to you.

2 MR. ROBERTS: Thank you. So Mr. Strassburg
3 focused a lot on the financially annihilate or destroy
4 the defendant in light of the defendant's financial
5 condition.

6 You should give very little weight to
7 Mr. Strassburg's representations about what will
8 financially destroy Jared, and how that compares to the
9 other factors which you are required to consider by the
10 court of law.

11 Why should you give very little weight to that
12 representation? Well, it's because -- remember, I
13 called Jared and put him on the stand and just briefly
14 talked to him about a few things. But Jared never took
15 the stand in his case. He never came back and testified
16 in his part of the case. Jared never testified to his
17 assets.

18 They put mom on the stand to testify what her
19 understanding was of how much he made and what her
20 understanding was of his savings, but he never testified
21 at all in this case, and he certainly didn't put on
22 testimony of all of the assets he has available to him.
23 But what evidence is in the record and what you can
24 reasonably infer, is that Mr. Strassburg's
25 representations are not accurate.

1 The defendants paid \$126,000 for expert
2 witnesses. They've had two -- four lawyers sitting here
3 for five weeks. They hired the creeps to do the
4 surveillance. You've seen depositions. Lawyers were in
5 all these depositions.

6 MR. STRASSBURG: Objection, Judge. Objection,
7 Judge.

8 MR. ROBERTS: I've got to finish. I'll
9 withdraw it. I know what it is, Your Honor. They hired
10 people to do surveillance.

11 MR. STRASSBURG: Objection, Judge.

12 THE COURT: He's withdraw it. Come on up.

13 MR. ROBERTS: Look, I'll withdraw the
14 objection. That's been gone over. Let's get this thing
15 done.

16 So they've got all of the depositions that
17 have been published. They've got lawyers defending all
18 of these depositions, over five years litigating the
19 case. Obviously, they have not been forthcoming about
20 all of Jared's assets and what would financially --

21 MR. MAZZEO: Objection, Your Honor.

22 MR. STRASSBURG: Objection, Judge.

23 MR. MAZZEO: It's baseless.

24 THE COURT: Sustained. You can talk about
25 what you've talked about so far, but you can't go there.

1 MR. ROBERTS: I didn't go there, Your Honor.

2 MR. STRASSBURG: Permission to approach,
3 Judge.

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

6 THE COURT: Objection sustained. The last
7 comment is stricken.

8 MR. ROBERTS: I talked to you about the other
9 factors you can consider. You can consider the amount
10 necessary to punish him, and you also have to consider
11 the amount to make sure that this doesn't happen again
12 to deter others similarly situated.

13 The jury foreman's going to ask you if you
14 find that punitive damages should be assessed against
15 Andrea Awerbach, and I would submit to you that there is
16 proof of despicable conduct, conduct that would be
17 looked down upon and despised by ordinary, decent
18 people.

19 Ordinary, decent people don't let unlicensed
20 drug addicts who are getting high every day drive their
21 car. That's not something that ordinary, decent people
22 think is okay. And she did consciously disregard the
23 safety of society when she did that.

24 And you've heard lots of different stories.
25 She put her keys in his hand that morning, didn't know

1 if she got them back. Jared testified one of the
2 different times that he testified that his mom had said,
3 no, you can't use the car today. But you didn't hear
4 Ms. Awerbach saying that she remembered saying that.
5 Different stories on different dates. I don't have time
6 to go through all the inconsistencies. But this is what
7 I'd like you to think about.

8 If you know someone doesn't have a license and
9 they've been driving your car for three years, sometimes
10 with permission, sometimes not, getting stuff for you
11 from the store, that there's a difference between
12 leaving your keys on the counter where you know the guy
13 that used your car many, many times before can pick them
14 up and use them again.

15 There's a difference between saying, no, you
16 can't use my car today, I need it, versus, hey, you
17 can't use my car until you get a license and get
18 yourself clean. I'm not going to have my car being
19 driven by an unlicensed drug addict impaired on the
20 road. Don't you ever do that again. That's what should
21 have happened.

22 I told him I needed the car today doesn't mean
23 she didn't consciously disregard the safety of society,
24 because she had a pattern in the past where he used her
25 car over and over again. And she knew about that

1 pattern and she took no measures to prevent him from
2 doing that that day.

3 No keys available to Mr. Awerbach; no damage
4 to Ms. Garcia. Car locked in the garage; no damage to
5 Ms. Garcia. So if it's a million dollars, I bet she
6 would've found a way to put a lock on the garage. She
7 left the loaded gun that she knew had been used before
8 out and available for Mr. Awerbach's use.

9 And you want to talk about conscious
10 disregard? She said in the deposition after the lawsuit
11 was filed, she never thought about whether it was
12 unsafe. Never even thought about it.

13 A car in the hands of an impaired and
14 unlicensed driver is just as dangerous as a gun and can
15 cause just as much harm. And if I could take the last
16 two minutes to close.

17 Your Honor, may I borrow your statue of
18 justice?

19 THE COURT: Sure.

20 MR. ROBERTS: Thank you, Your Honor. I know
21 it's hard to see all the way up there.

22 But both Mr. Mazzeo and Mr. Strassburg told
23 you what they thought justice required. And this is
24 justice right here. This is the Greek goddess,
25 Justitia, the symbol of justice.

1 So we've got to weigh the evidence, and if you
2 look she's wearing a blindfold. Now, the original
3 Justitia was a Greek goddess, she didn't have the
4 blindfold on. But this is the United States of America
5 and she's weighing the evidence without regard to who
6 the plaintiff is and who the defendant is.

7 And full and fair compensation for Ms. Garcia
8 doesn't matter whether it's a FedEx truck driver who
9 injured her or Mr. Awerbach. The identity doesn't
10 matter. The evidence is what it is; full and fair
11 compensation is what it is.

12 And in her hand she's got a sword, and the
13 sword represents punishment, which is what the punitive
14 damage phase is about. After weighing the evidence,
15 justice requires the punishment of the wrongdoer when
16 justified, and that's up to you.

17 And down here we've got the serpent. And this
18 is what justice does, and the serpent is sort of
19 symbolic. It goes back to like the Biblical serpent,
20 but it's symbolic of evil and immorality. And justice
21 weighing the evidence and wielding the sword of
22 punishment keeps society safe and squashes out the bad
23 conduct.

24 That's your job. That's what justice requires
25 and that's what I'd ask you to do.

1 Thank you, Your Honor.

2 THE COURT: Thank you, Mr. Roberts. All
3 right, folks. We are to the point now where ordinarily
4 I would send you to deliberate, but it's 5:00 p.m. I'm
5 not going to do that to you. But I am going to make you
6 come back tomorrow, which is -- I don't know if that's
7 any better.

8 I'm going to tell you -- this is the point
9 where I have to tell you who the alternates are. After
10 sitting here for five weeks of trial, nobody wants to be
11 the alternate in a case. Now, you've listened to
12 everything and most people would prefer to deliberate.
13 Unfortunately, I can't do that. I have to tell you who
14 the alternates are. In this trial, it is our last two
15 people. So it's Austin Corum and Shanel Sako.

16 She is excited.

17 A JUROR: Oh, my God. I'm going to cry.

18 THE COURT: So here's what I'm going to do.
19 I'm going to have the alternates -- we're going to send
20 you with Tatiana in a minute so she can get your
21 information from you. You're not excused as jurors
22 until we actually have a verdict because there may be
23 circumstances that we need to call you back in. So you
24 still can't talk to anybody about the case.

25 But she's going to get your information. You

1 don't necessarily have to come back in tomorrow.

2 Everybody else is going to have to come back in
3 tomorrow.

4 Now, I'm going to give you a little bit of
5 leeway here. I've got a calendar at 9:00, but you're
6 going to start deliberating as soon as you come in.
7 We'll have the evidence and everything back in the
8 deliberation room for you. You can come in whenever you
9 want. Do you want to come in at 9:00? Do you want come
10 in at 9:30? Do you want to come in at 10:00? Does
11 anybody have a preference?

12 A JUROR: 9:00.

13 THE COURT: 9:00.

14 A JUROR: I'll be here at 8:30.

15 THE COURT: Let's have everybody come back at
16 9:00 tomorrow. So before we do that, before I can let
17 you go, I'm going to remind you that until the eight of
18 you are in the deliberation room together tomorrow, you
19 still can't talk about the case, okay? Let's swear in
20 -- I'm going to swear in Tatiana and Curt to take charge
21 of the jurors.

22 (Whereupon, the officers of the court
23 were sworn to take care the jury for
24 deliberations.)

25 THE COURT: That's a cool accent, isn't it?

1 All right. So if I can have the two of you that are
2 alternates, if you would follow Tatiana. Make sure that
3 you give her real good contact information for you. And
4 we will contact you as soon as we have a verdict or if
5 we need you before then, okay, so you won't have to
6 wonder. We'll let you know.

7 The rest of you, I'm going to have go with
8 Curt. Like I said, tomorrow morning I'm going to have
9 you come in and start deliberating. But don't start
10 deliberating until you're altogether in the deliberation
11 room.

12 You'll have the evidence that been admitted.
13 You'll have the jury instructions that I read from.
14 You'll also have a verdict form. I believe there's a
15 clean computer that will go back there because some of
16 the evidence is on disk, so that will all be available
17 for you, and we'll see you when you're done. All right.

18 So I'm going to let you follow-up with Curt
19 right now. I'm not -- you know what? I am going to
20 admonish you because I'm going to send you home without
21 having you deliberate.

22 So you're admonished not to converse amongst
23 yourselves or with anyone else on any subject connected
24 with this trial or to read, watch, or listen to any
25 report of or commentary on the trial by any persons

1 connected with this case or by any medium of information
2 including without limitations newspapers, television,
3 radio, social media, Facebook or Twitter, or to form or
4 express any opinions on any subject connected with this
5 trial until the cause is finally submitted to you.

6 Once you're back in the deliberation room,
7 that will no longer apply. You can go ahead and start
8 talking tomorrow morning. Yes, question?

9 Curt's going to probably have you take those
10 and I don't know if he can have you put them back there
11 or leave them on your chair for now.

12 THE MARSHAL: Just on the chairs for now.

13 THE COURT: Leave them on the chair for now.
14 Thanks, folks. Have a good night.

15 (Jury exited.)

16 THE COURT: We're outside the presence. Do
17 you guys need to make a record of anything?

18 MR. MAZZEO: No, Your Honor.

19 MR. STRASSBURG: No, Your Honor.

20 MR. ROBERTS: No, Your Honor.

21 THE COURT: Okay.

22 MR. STRASSBURG: We would make a record to
23 thank you, Judge, for all the work you've done here.

24 THE COURT: It's my job.

25 MR. STRASSBURG: We know it's been hotly

1 contested.

2 THE COURT: You know what? Hotly contested
3 cases are not bad as long as the attorneys are
4 professional, and you guys did a good job. Thank you.
5 Off the record.

6 (The proceedings were concluded at
7 5:07 p.m.)

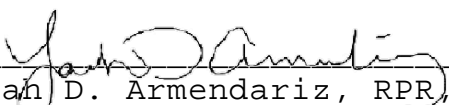
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REPORTER'S CERTIFICATE

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 10th day of March, 2016.


Leah D. Armendariz, RPR, CCR 921

<p>A JUROR: [3] 183/16 184/11 184/13 MR. MAZZEO: [15] 3/10 44/7 44/9 71/19 132/10 137/15 160/22 160/25 173/1 173/4 173/9 173/13 178/20 178/22 186/17 MR. ROBERTS: [69] 3/9 7/21 11/1 19/9 43/16 43/19 43/22 44/6 47/5 47/19 48/25 49/9 49/16 53/9 53/16 55/13 56/13 60/11 63/6 63/13 65/2 65/13 65/17 65/24 66/8 66/11 66/17 67/13 69/7 69/18 70/15 70/22 71/8 71/13 71/18 88/2 103/6 108/19 109/11 114/2 114/9 118/21 121/2 124/9 124/16 124/18 125/3 129/19 130/5 131/17 132/1 132/9 132/13 137/18 146/3 161/1 163/5 172/8 172/14 173/10 173/15 173/18 177/1 178/7 178/12 178/25 179/7 181/19 186/19 MR. STRASSBURG: [61] 3/12 7/23 8/12 11/4 11/9 19/14 43/13 44/5 47/11 47/14 47/24 49/3 49/12 49/18 53/12 53/20 55/16 56/17 60/13 62/13 67/24 70/14 70/20 71/2 71/5 71/21 88/11 103/9 108/23 109/1 109/14 114/5 114/15 118/24 119/17 121/4 124/2 124/14 125/13 128/24 129/4 129/9 129/11 129/14 129/18 130/15 130/19 130/24 131/3 131/6 131/8 131/14 131/19 131/23 178/5 178/10 178/21 179/1 186/18 186/21 186/24 MR. TINDALL: [6] 124/6 124/10 124/17 124/23 171/25 172/4 THE COURT: [110] 3/4 3/11 7/25 8/3 11/5 11/8 19/12 42/24 43/3 43/8 43/18 43/21 43/23 44/2 44/8 47/7 47/10 47/13 47/22 49/2 49/10 49/17 53/19 55/15 56/15 60/12 62/12 62/14 63/2 63/7 64/25 65/11 65/15 65/19 66/2 66/10 66/15 67/11 67/15 69/6 69/15 70/11 70/17 70/21 70/24 71/3 71/7 71/11 71/15 71/20 88/3 88/6 103/8 108/20 108/25 109/12 114/3 114/10 114/13 118/22 119/14 121/3 123/7 123/22 124/4 128/2 129/2 129/7 129/10 129/12 129/17 130/2 130/18 130/21 130/25 131/5 131/7 131/12 131/16 131/22 131/24 132/3 132/6 132/11 137/17 146/2 160/24 163/4 172/2 172/7 172/10 172/13 173/3 173/8 173/17 176/25 178/11 178/23 179/5 181/18 183/1 183/17 184/12 184/14 184/24 186/12 186/15 186/20 186/23 187/1 THE MARSHAL: [1] 186/11</p>	<p>\$50,000 [11] 102/13 102/15 103/2 120/2 120/7 120/8 121/8 121/25 175/14 175/18 175/21 \$750 [1] 172/9 \$750 an [1] 172/9 ' '11 [1] 143/5 '11 to [1] 143/5 '12 [1] 143/5 'I [1] 26/16 'Okay [1] 115/19 ' .95 [1] 87/25 .95 centimeters [1] 87/25 .96 [1] 87/24 .96 centimeters [1] 87/24 0 07 [1] 14/21 1 1.02 [1] 77/13 1/2/2011 [1] 76/20 10 [14] 7/4 7/6 72/20 78/15 81/10 84/21 84/21 98/17 98/17 98/19 101/11 109/22 124/1 165/22 10 degrees [1] 29/12 10,000 [1] 171/23 10.02 millimeters [1] 77/14 10.2 [1] 143/6 100 [4] 57/11 153/20 154/12 154/13 103,000 [1] 12/12 106 [1] 13/5 108 [1] 17/4 10:00 [1] 184/10 10th [2] 2/16 188/14 11 [1] 110/20 110 [1] 16/14 111 [5] 12/17 16/8 21/13 83/20 155/12 11:03 [1] 43/25 11:15 a.m [1] 44/1 11:58 [1] 63/10 11th [2] 168/3 168/9 12 [4] 107/25 163/16 163/19 164/12 12-step [2] 108/11 108/14 122 [1] 163/10 13 [3] 27/18 61/20 176/13 130 [2] 30/6 30/14 131 [2] 30/20 31/9 132 [1] 33/1 133 [1] 33/16 137 [1] 51/9 138 [1] 51/19 140 [3] 52/3 52/10 114/22 141 [2] 115/4 116/13 142 [1] 115/4 146 [1] 72/25 147 [2] 75/16 86/6 15 [6] 30/7 30/10 33/10 36/10 160/9 171/23 1500 [1] 2/5 157 [1] 93/16 158 [4] 91/10 91/21 92/6 92/12 159 [1] 77/19 16 [11] 58/12 114/22 115/4 115/15 116/12 116/25 117/22 129/25 131/2 131/6 146/7</p>	<p>16 million [1] 102/21 16.2 [1] 119/25 160 [1] 19/1 164 [1] 39/25 165 [1] 115/16 168 [1] 116/25 169 [2] 85/6 85/13 16th [1] 105/12 17 [3] 129/25 131/2 131/6 17:57 [1] 118/4 18 [7] 58/10 75/16 76/3 79/20 80/6 80/12 81/7 18 degrees [1] 28/16 180 [1] 15/8 180 degrees [4] 13/25 14/2 14/3 15/2 187 [1] 38/4 19 [4] 87/9 87/22 88/13 108/1 194 [3] 37/22 39/4 49/25 196 [1] 91/12 1:00 [1] 63/6 1:07 p.m [1] 63/11 1:15 [1] 63/1 1st [2] 76/14 83/20 2 2.7 million [1] 176/5 20 [4] 5/5 6/15 87/5 175/21 20 degrees [2] 29/11 29/18 20,018.52 [1] 121/12 2011 [29] 26/8 27/19 29/15 29/16 58/6 58/12 58/20 61/20 72/17 72/19 74/15 76/20 77/24 78/25 87/8 87/9 87/15 87/16 87/21 88/14 89/7 93/15 97/13 98/5 117/14 138/20 143/2 163/8 163/19 2011.01.26 [2] 78/15 81/10 2012 [11] 30/7 30/11 33/10 54/22 77/11 77/25 87/5 87/15 87/16 87/22 88/13 2013 [15] 28/9 47/16 48/18 48/23 48/25 53/2 53/4 86/11 156/9 159/11 159/20 160/3 160/11 160/12 160/19 20130121 [1] 51/11 2014 [18] 34/15 41/20 44/23 47/5 48/19 48/24 48/24 49/8 49/23 52/24 53/3 115/1 156/8 156/16 159/11 159/21 160/15 160/19 2015 [2] 54/22 107/24 2016 [11] 1/22 3/1 8/21 13/5 19/1 29/4 49/25 55/21 57/10 157/21 188/14 20th [2] 58/6 58/20 21 [4] 47/16 53/4 59/13 77/11 211 [1] 74/19 212 [4] 8/22 39/9 73/12 79/21 213 [1] 79/21 21st [2] 48/8 48/22 22 [11] 8/21 19/1 55/21 56/11 57/3 59/13 72/1 72/25 78/9 85/6 92/6 22-month [1] 78/8 222 [1] 40/13 224 [1] 80/7 225 [1] 80/12 227 [1] 81/7 228 [1] 81/7 22nd [9] 73/12 73/21 74/19 85/13 91/10 91/21 92/12 93/16 147/3 23 [2] 60/1 60/16 24 [8] 13/5 14/21 18/16 40/13 61/10 61/23 72/22 75/3</p>
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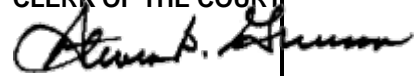
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Steven D. Grierson
CLERK OF THE COURT



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 THURSDAY, MARCH 10, 2016

REPORTED BY: LEAH ARMENDARIZ, RPR, CRR, CCR 921

AA_006423

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8 GUNN & DIAL,
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BY: TIMOTHY MOTT, ESQ.
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23 * * * * *

1 LAS VEGAS, NEVADA, THURSDAY, MARCH 10, 2016;
2 4:26 P.M.

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

4 * * * * *

5 THE COURT: We're back on the record. We're
6 outside the presence of the jury. Just for the record,
7 I got several questions. We talked about them on the
8 phone.

9 First one was:

10 "We would like to see the poster
11 exhibits and see the courtroom to see
12 the stairs in the witness area and
13 the attorney area."

14 I sent Kirk back and told them that they
15 couldn't see the posters that they only got the exhibits
16 that had been admitted into the evidence. So they
17 crossed that part off.

18 I did allow them to come back into the
19 courtroom. I told Kirk that there were posters in here,
20 that they were not to look at those posters. I wasn't
21 here. I don't know what they looked at and what they
22 did. But that's first question.

23 Second one was the MRI disk does not appear to
24 be included in the evidence provided. I asked Tatiana
25 to get ahold of the attorneys to figure out what exhibit

1 number it was to refer them to. Before she did that,
2 they apparently said that they had located the evidence
3 that they were looking for, so that became moot.

4 Next question was:

5 "Based on Instruction 25, would
6 it possible to award the plaintiff
7 entire amount of past medical
8 expenses without awarding anything
9 for future medical expenses?"

10 I responded with a "yes."

11 The next question:

12 "We would like some
13 clarification on Instruction
14 Number 25 as it pertains to the
15 original injury influencing continued
16 past medical treatment."

17 The response after talking to you guys on the
18 phone was:

19 "We don't have enough
20 information to answer the question as
21 posed. Please be more specific as
22 far as what you need."

23 I never received another question. So
24 apparently the question that I answered with a yes
25 answered this question as well somehow. So those are

1 the questions.

2 Anybody want to make a record on any of those?

3 MR. SMITH: We do on the third question about
4 whether the jury could award only past medical expenses
5 and not future medical expenses. Under Jury Instruction
6 Number 25, and when we had a discussion we asked the
7 Court either not to answer that question or to answer
8 that question no.

9 As we explained, there is no evidence put on
10 by the defense that the future damages are unnecessary.
11 That wasn't their argument. The defense's argument was
12 that the injury and the treatment past a muscle sprain
13 or ligament strain is not related to the crash.

14 So if the jury determines that any treatment
15 beyond that is related to the crash, then the undisputed
16 future medical treatment is also related to the crash,
17 and the jury has to order future damages in addition to
18 the past medical specials that lead up to that.

19 If the Court had disagreed with that, then the
20 Court's other option would have been to not answer the
21 question because answering the question -- if the Court
22 can answer -- cannot answer the question no, then the
23 Court also should not have answered the question yes and
24 explained it further to the jury in a way that it is
25 contrary to the evidence that was put on in the case.

1 THE COURT: Do you guys want to say anything?

2 MR. TINDALL: The Court's decision was
3 completely appropriate because the jury is free to
4 disregard any evidence, any testimony, any document that
5 they do not believe is truthful. You have a jury
6 instruction on that and they very easily could have
7 believed that any future treatment was not reasonable
8 regardless of whether the defense had an expert saying
9 whatever Mr. Smith would like it to say. So that was a
10 sound decision.

11 MS. ESTANISLAO: And I just want to add to
12 what Mr. Tindal said that they also mentioned about a
13 preexisting condition. If they believe the preexisting
14 condition was aggravated by something else unrelated to
15 the accident, they can also choose not to award future
16 medical specialties on that and that's my understanding
17 of what their question was based on.

18 THE COURT: I thought that there was --
19 there's always a choice and I didn't want to take that
20 choice away. So whether it was based on a doctor's
21 testimony or a party's testimony or whatever it was, I
22 think they still have the choice. I told them they have
23 a choice.

24 MR. MAZZEO: Judge, can you read the fourth
25 note regarding the clarification of Jury Instruction

1 Number 25?

2 THE COURT: "We would like some clarification
3 on Instruction Number 25 as it pertains to the original
4 injury influencing continued past medical treatment."

5 MR. MAZZEO: Thank you.

6 THE COURT: Okay. I'm going to mark these as
7 court exhibits, and since Mr. Strassburg said to go
8 ahead without him, I guess as soon as Kirk comes back
9 we'll get the jury and see what they say. Off the
10 record.

11 (Discussion off the record.)

12 THE COURT: Welcome back, folks. We're back
13 on the record. Case Number A637772. Do the parties
14 stipulate to the presence of the jury?

15 MR. SMITH: Yes, Your Honor.

16 MR. MAZZEO: Yes, Your Honor.

17 MR. TINDALL: Yes, Your Honor.

18 THE COURT: Ladies and gentlemen, has the jury
19 selected a foreperson?

20 MS. FOREWOMAN: Yes, Your Honor.

21 THE COURT: Ms. Klein?

22 MS. FOREWOMAN: Yes.

23 THE COURT: Ms. Klein, have at least six of
24 the jurors agreed on each question on the verdict form?

25 MS. FOREWOMAN: Yes, Your Honor.

1 THE COURT: Can you please hand the verdict
2 form to the marshal?

3 All right. I'll have Alice read the verdict
4 into the minutes of the court.

5 THE CLERK: District Court, Clark County,
6 Nevada. Case Number A63772, Department 30.

7 Emily Garcia, plaintiff, versus Jared Awerbach
8 and Andrea Awerbach. On the questions submitted, the
9 jury finds as follows:

10 Number 1, what amount of damages do you find
11 were sustained by Emily Garcia excluding any punitive
12 damages as a proximate result of the auto collision of
13 January 2, 2001.

14 Past medical expenses, \$574,846.01.

15 Future medical expenses, \$0.

16 Past loss of household services, \$0.

17 Future loss of household services, \$0.

18 Past pain, suffering, and loss of enjoyment of
19 life, \$250,000.

20 Future pain, suffering, and loss of enjoyment
21 of life, \$0.

22 Totaling the amount of 824 -- I'm sorry
23 \$824,846.01.

24 Question 2: Do you find that plaintiff proved
25 by clear and convincing evidence that Jared Awerbach

1 willfully consumed marijuana knowing that he would
2 thereafter operate a motor vehicle?

3 Yes.

4 If you answered yes, answer Question 3.

5 Question 3: Should punitive damages be
6 assessed against Defendant Jared Awerbach for the sake
7 of the example and by way of punishing the defendant?

8 Yes.

9 If you answered yes, answer Question 4.

10 We assess punitive damages against Jared
11 Awerbach in the amount of \$2 million.

12 Number 5: Did Defendant Andrea Awerbach give
13 express or implied permission to Defendant Jared
14 Awerbach to use her vehicle on January 2, 2011?

15 No.

16 If you answered no, please skip to the end of
17 the form and have the jury foreperson sign where
18 indicated.

19 Question 6: Did Defendant Andrea Awerbach
20 negligently entrust her vehicle to an inexperienced or
21 incompetent person on January 2, 2011?

22 No.

23 If you answered no, please skip to the end of
24 the form and have the jury foreperson sign where
25 indicated.

1 Dated March 10, 2016 by foreperson Janelle
2 Klein.

3 THE COURT: Thank you. Either parties wish to
4 have the jury polled?

5 MR. SMITH: Yes, Your Honor.

6 THE COURT: Okay. What's going to happen now
7 is Alice is going to ask you each if this is your
8 verdict as read, so if you disagree with the verdict --
9 the reason that that may happen is because in Nevada in
10 a civil case six out of eight can reach a verdict. If
11 six of you agree to the verdict and you are one of two
12 people that didn't you would say no. If you agreed with
13 the verdict you would say yes.

14 THE CLERK: Dean Blurton, is this your verdict
15 as read?

16 JUROR BURTON: Yes.

17 THE CLERK: Juliana Flores, is this your
18 verdict as read?

19 JUROR FLORES: If it was one question I didn't
20 agree on, would I say no? It was one question.

21 THE COURT: Tell us which one.

22 JUROR FLORES: The punitive damage amount.

23 THE COURT: Okay. Thank you.

24 THE CLERK: Janelle Klein, is this your
25 verdict as read?

1 JUROR KLEIN: Yes.

2 THE CLERK: Jeffery Evans, is this your
3 verdict as read?

4 JUROR EVANS: Yes.

5 THE CLERK: Keith Berkery, is this your
6 verdict as read?

7 JUROR BERKERY: Yes.

8 THE CLERK: Jessica Bias, is this your verdict
9 as read?

10 JUROR BIAS: About punitive damages, no.

11 THE CLERK: Jose Avilaroa, is this your
12 verdict as read?

13 JUROR AVILAROA: Yes.

14 THE CLERK: And, Michael Retzlaff, is this
15 your verdict as read?

16 JUROR RETZLAFF: Yes.

17 THE COURT: Okay. Thank you, folks. The
18 clerk will now record the verdict in the minutes of the
19 court.

20 Now you're going to have the question at this
21 point of whether or not you can talk to anybody about
22 the case. You're going to be excused in a minute.
23 What's going to happen is I'm going to excuse you and
24 send you back to the deliberation room. I may come back
25 there and talk to you for just a couple minutes.

1 One of the things I'm going to do is I'm going
2 to try to convince you to come back out here and talk to
3 the lawyers. Because the lawyers, one of the most
4 helpful ways to know what they did right or wrong in a
5 trial is to be able to talk to the jurors and find out
6 which witnesses you like, which witnesses you didn't
7 like. If there was something in their style of
8 presentation that you liked or didn't like. Those are
9 things that would be helpful to them for the next case.
10 So I always try to convince as many of you as possible
11 to stick around for a few minutes. You don't have to.

12 You are -- once you're excused, you are able
13 to talk to anyone you want about the case, about what
14 you talked about back there, what you heard, what you
15 saw. Anything you want to talk about you can talk about
16 once you are excused as jurors.

17 You don't have to talk to anybody. If anybody
18 persists in talking to you against your wishes, let me
19 know and I'll take care of that. But once you're
20 excused, you are free to talk to anybody you want.

21 We do appreciate the time that you spent here.
22 I know that this was supposed to last three to four
23 weeks and it lasted five weeks, and I apologize for that
24 on behalf of myself and the attorneys and the parties.
25 We try to gauge how long trials are going to last.

1 Sometimes -- sometimes they're wrong but we do our best.

2 But thank you folks for being here. You have
3 all been good citizens. You did your civic duty and we
4 appreciate your time. You are now excused as jurors.

5 (Jury exited.)

6 THE COURT: Okay. We're outside the presence
7 of the jury. Anybody have anything that we need to put
8 on the record before we're done?

9 MR. SMITH: No, Your Honor.

10 MR. MAZZEO: No, Your Honor.

11 THE COURT: Anything for the record?

12 MR. TINDALL: No, Your Honor.

13 (The proceedings were concluded at
14 4:44 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 14th day of April, 2016.

Leah D. Armendariz
Leah D. Armendariz, RPR, CRR, CCR 921

JUROR AVILAROA: [1] 11/12 JUROR BERKERY: [1] 11/6 JUROR BIAS: [1] 11/9 JUROR BURTON: [1] 10/15 JUROR EVANS: [1] 11/3 JUROR FLORES: [2] 10/18 10/21 JUROR KLEIN: [1] 10/25 JUROR RETZLAFF: [1] 11/15 MR. MAZZEO: [4] 6/23 7/4 7/15 13/9 MR. SMITH: [4] 5/2 7/14 10/4 13/8 MR. TINDALL: [3] 6/1 7/16 13/11 MS. ESTANISLAO: [1] 6/10 MS. FOREWOMAN: [3] 7/19 7/21 7/24 THE CLERK: [9] 8/4 10/13 10/16 10/23 11/1 11/4 11/7 11/10 11/13 THE COURT: [17]	938-3838 [1] 2/11 977-1500 [1] 2/5 997-3800 [1] 2/22	awarding [1] 4/8 away [1] 6/20 AWERBACH [12] 1/12 1/12 2/13 2/18 8/7 8/8 8/25 9/6 9/11 9/12 9/14 9/19
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DISTRICT COURT
CLARK COUNTY, NEVADA

EMILIA GARCIA, individually,)	
)	
Plaintiff,)	
)	
vs.)	CASE NO. A637772
)	DEPT. NO.: XXVII
JARED AWERBACH, individually;)	
ANDREA AWERBACH, individually;)	
DOES I - X, and ROE)	
CORPORATIONS I - X, inclusive,)	
)	
Defendants.)	
_____)	

VIDEOTAPED DEPOSITION OF JARED EMMANUEL AWERBACH
Las Vegas, Nevada
Thursday, March 27, 2014

REPORTED BY: PEGGY S. ELIAS, RPR
Nevada CCR No. 274 - California CSR No. 8671
JOB NO.: 206073

AA_006641

1 Videotaped deposition of JARED EMMANUEL AWERBACH
2 taken at Glen Lerner Injury Attorneys, 4795 South
3 Durango Drive, Las Vegas, Nevada, on Thursday,
4 March 27, 2014, at 10:08 a.m., before Peggy S. Elias,
5 Certified Court Reporter in and for the State of
6 Nevada.

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23 Also Present:

24
25 TERRELL HOLLOWAY, VIDEOGRAPHER

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1 VIDEOTAPED DEPOSITION OF JARED EMMANUEL AWERBACH

2 Thursday, March 27, 2014, 10:08 a.m.

3 -oOo-

4 THE VIDEOGRAPHER: This is the beginning of
5 Videotape No. 1 in the deposition of Jared Awerbach in
6 the matter of Garcia versus Awerbach held at Glen
7 Lerner at 4795 South Durango Drive, Las Vegas, Nevada
8 89147, on March 27th, 2014, at 10:08 a.m.

9 The court reporter is Peggy S. Elias. I am
10 Terrell Holloway, the videographer, an employee of
11 Litigation Services, located at 3770 Howard Hughes
12 Parkway, Suite 300, Las Vegas, Nevada 89169. This
13 deposition is being videotaped at all times unless
14 specified to go off the video record.

15 Would all present please identify themselves,
16 beginning with the witness.

17 THE WITNESS: I'm Jared Awerbach.

18 MR. STRASSBURG: Roger Strassburg. I'll be
19 speaking for Mr. Awerbach as his lawyer.

20 MS. COMPTON: Lilly Compton. I'm
21 Mr. Strassburg's paralegal.

22 MR. MAZZEO: Peter Mazzeo for Andrea
23 Awerbach.

24 MR. ESCHWEILER: Corey Eschweiler on behalf
25 of the plaintiff.

1 THE VIDEOGRAPHER: Will the court reporter
2 please swear in the witness.

3 Whereupon,

4 JARED EMMANUEL AWERBACH,
5 having been first duly sworn to testify to the truth,
6 the whole truth, and nothing but the truth, was
7 examined and testified as follows:

8 EXAMINATION

9 BY MR. ESCHWEILER:

10 Q. Can you state your name, and spell it for the
11 record, please.

12 A. My name is Jared Awerbach, J-a-r-e-d,
13 A-w-e-r-b-a-c-h.

14 Q. Do you have a middle name?

15 A. Yeah. My name is Jared Emmanuel Awerbach.

16 Q. How do you spell the middle name?

17 A. E-m-m-a-n-u-e-l.

18 Q. Have you ever had your deposition taken
19 before?

20 A. No, sir.

21 Q. Have you ever been a party to a lawsuit other
22 than this one?

23 A. No, sir.

24 Q. Have you ever been a witness in a lawsuit?

25 A. No, sir.

1 Q. Have you ever been placed under oath and
2 required to testify before?

3 A. No, sir.

4 Q. Let's go through some of the ground rules,
5 then, so we can all be on the same page moving forward
6 today. The oath that you just took is the same oath
7 that would be given in a court of law. Obviously,
8 we're not in a court of law, but we're in the informal
9 setting in my office. The oath, however, still carries
10 with it the penalty of perjury.

11 Do you understand that?

12 A. Yes, sir.

13 Q. The court reporter is -- is taking down my
14 questions. She's also going to be taking down your
15 answers. At the end of the deposition, she's going to
16 transcribe those into a booklet, and you'll be allowed
17 to review the booklet prior to trial.

18 I want to caution you, however, if you make
19 any changes to your responses in that booklet, I will
20 be able to comment on those changes at the time of
21 trial, and it may impact your credibility.

22 Do you understand that?

23 A. Yes, sir.

24 Q. Also, in normal conversation we may use
25 nonverbal signals or nods of the heads or uh-huhs. The

1 court reporter can't really take those down; so I'm
2 going to ask you to verbally respond to each of my
3 questions.

4 Is that fair?

5 A. Understood.

6 Q. Also, in order to make sure the record is
7 clear, I'm going to ask that you allow me to finish my
8 question before you begin your answer, and I'll allow
9 you the same courtesy to finish your answer before I
10 start by saying -- start my next question so that we're
11 not talking over each other to maintain the consistency
12 of the record.

13 A. Sounds good.

14 Q. Today is not an endurance contest. I don't
15 imagine that this will take more than two or three
16 hours, but if you need to take a break for any reason,
17 please let me know, and we can take a five- or
18 ten-minute break; bathroom, drink, whatever you need.
19 I would ask, though, that if there's a question
20 pending, you respond to the question before we break.

21 Is that fair?

22 A. Yes, sir.

23 Q. Last, if you don't understand any of my
24 questions, I'm going to ask that you tell me what you
25 don't understand. Otherwise I'm going to assume that

1 you understood all of the questions that I'm asking you
2 today if you respond.

3 Is that fair?

4 A. Yes, sir. Thank you.

5 Q. Do you have any questions about the process?

6 A. Not at this moment.

7 Q. Do you understand the ground rules?

8 A. Yes, sir.

9 Q. Is there any reason why we can't go forward
10 today?

11 A. No, sir.

12 Q. Is there any reason that you cannot provide
13 true and honest answers today?

14 A. No, sir.

15 Q. Are you on any medication that would prevent
16 you from responding truthfully to any questions?

17 A. Not -- no, sir. I'm on two medications but
18 not any medications that would alter my conscious.

19 Q. And not your ability to tell the truth?

20 A. No, sir.

21 Q. Does it -- does the medication you're on
22 affect your memory or your recall?

23 A. No, sir.

24 Q. Okay. Have you consumed any alcohol in the
25 last 24 hours that would impede your ability to tell

1 the truth?

2 A. No, sir.

3 Q. Any illicit drugs that would impede your
4 ability to tell the truth?

5 A. No, sir.

6 Q. Thank you.

7 What did you do to prepare for the deposition
8 today?

9 A. Reviewed the interrogatories. Reviewed the
10 paperwork that my attorney sent to me.

11 Q. Well, besides the interrogatories do you have
12 a specific recollection of any -- reviewing any other
13 documents?

14 A. No, sir.

15 Q. Did you speak with anybody about the
16 deposition today?

17 A. Just my attorneys.

18 Q. And when did you meet with them?

19 A. Yesterday.

20 Q. How long was the meeting?

21 A. An hour and a half.

22 Q. Where did you meet at?

23 A. My house.

24 Q. They came to your house?

25 A. Yes, sir.

1 **Q. Was anybody else present besides your**
2 **attorneys?**

3 A. My mother was.

4 **Q. Your mother was present?**

5 A. She was in the home.

6 **Q. Well, was she participating in the meeting?**

7 A. No, sir.

8 **Q. Well, where was she?**

9 A. In her room.

10 **Q. Was the door closed?**

11 A. No, sir.

12 **Q. Could she hear what you guys were talking**
13 **about?**

14 A. No, sir.

15 **Q. How do you know?**

16 A. She was occupied.

17 MR. MAZZEO: Speculation.

18 THE WITNESS: Huh?

19 BY MR. ESCHWEILER:

20 **Q. You can answer.**

21 A. She was occupied.

22 **Q. Well, do you know what she was doing?**

23 A. Playing with her tablet.

24 **Q. Okay. Well, one other thing I didn't**
25 **mention, there may be objections interposed by your**

1 attorney or your mother's attorney throughout the
2 process. Unless they instruct you not to answer, you
3 will be required to answer the question.

4 A. Understood.

5 Q. Okay. Thank you.

6 Did you review any of your mom's responses to
7 any documents that she's filed in this case?

8 A. No, sir.

9 Q. So the interrogatory responses that you
10 completed and signed were the only thing that you
11 reviewed in preparation for the deposition?

12 A. Yes, sir.

13 MR. STRASSBURG: He reviewed his statement.

14 MR. ESCHWEILER: His recorded statement?

15 MR. STRASSBURG: The transcript.

16 MR. ESCHWEILER: Of the recorded statement?

17 MR. STRASSBURG: Yes, sir.

18 THE VIDEOGRAPHER: His mic is...

19 MR. ESCHWEILER: Can we stop it? We'll go
20 off for a second.

21 THE VIDEOGRAPHER: Off the record at 10:15.

22 (Discussion off the record.)

23 THE VIDEOGRAPHER: Back on the video record
24 at 10:18.

25 ///

1 BY MR. ESCHWEILER:

2 Q. Prior to the break, you were talking about
3 documents that you had reviewed in preparation for the
4 deposition, one of which was your interrogatory
5 responses, and your attorney indicated that you had
6 also reviewed the transcript of your recorded
7 statement.

8 A. Yes, sir.

9 Q. Did that refresh your recollection about the
10 events that transpired on January 2, 2011?

11 A. Yes, sir.

12 Q. Any other documents that you recall?

13 A. Should I tell him about going back to the
14 scene or...

15 Q. I'm just asking about documents right now.

16 A. We -- no. No, sir.

17 Q. Did you do anything else to prepare for the
18 deposition?

19 A. Well, what my attorney did was take me back
20 to the scene and kind of played out for him step by
21 step.

22 Q. How long were you at the scene of the
23 accident?

24 A. 30 minutes.

25 Q. Okay. And what exactly did you do to play it

1 out step by step?

2 A. We took --

3 MR. MAZZEO: Objection, attorney/client
4 privilege.

5 MR. STRASSBURG: You can answer.

6 BY MR. ESCHWEILER:

7 Q. Go ahead.

8 A. We took pictures of -- reviewing the traffic
9 in the area and reviewing the -- where the plaintiff
10 was and where I was, the distance, and the -- pretty
11 much how the accident happened.

12 Q. Based upon your review of the recorded
13 statement or your visit to the site within the last
14 week, did it change your recollection of the events
15 that transpired on January 2nd, 2011?

16 A. No, sir.

17 Q. Did you talk to your mom about the deposition
18 today?

19 A. Just the fact that we had a deposition.

20 Q. You didn't talk to her about the deposition
21 that she gave in this matter?

22 A. No, sir.

23 Q. Did you review the transcript of the
24 deposition she gave in this matter?

25 A. No, sir.

1 Q. You had no discussion with her about the
2 substance of your testimony today?

3 A. No, sir.

4 Q. When was the last time you talked to your
5 mom?

6 MR. STRASSBURG: Objection. About the case?

7 MR. ESCHWEILER: No, at any time.

8 THE WITNESS: Upon being dropped off at this
9 location.

10 BY MR. ESCHWEILER:

11 Q. She drove you here today?

12 A. Yes, sir.

13 Q. Did your mom tell you anything about the
14 questions that she was asked?

15 A. No, sir.

16 Q. I want to talk a little bit about your
17 background --

18 A. Yes, sir.

19 Q. -- before we get into the substance of the
20 questions.

21 Did you graduate from high school?

22 A. Yes, sir.

23 Q. What school?

24 A. Desert Rose Adult High School.

25 Q. Where's that located?

1 A. On Brooks Street.

2 Q. What's the cross street?

3 A. Brooks and Revere.

4 Q. And you said it's an adult high school?

5 A. Yes, sir.

6 Q. Well, what's that mean?

7 A. Adult education, like credit retrieval.

8 Q. Well, why did you go to that specific high
9 school?

10 A. I had had problems at other schools as a
11 juvenile, and I didn't want to return to a normal
12 school, in a normal school environment, meaning peer
13 pressure, being influenced by my peers and negative
14 behavior. I kind of wanted to be serious about school.

15 Q. Well, what problems?

16 A. Just delinquent behavior.

17 Q. Well, what do you mean by "delinquent
18 behavior"?

19 A. Like -- say like running around and smoking
20 weed, ditching class, not taking school serious.

21 Q. Was that a problem for you when you were a
22 juvenile?

23 A. Yes, sir.

24 Q. What age did you start smoking weed?

25 A. Like twelve.

1 Q. Twelve?

2 A. Yes, sir.

3 Q. Would you smoke weed at the house where you
4 lived with your mom?

5 A. No, sir.

6 Q. Where would you smoke weed?

7 A. Outside.

8 Q. Outside the house where you lived?

9 A. Outside the house or at -- when I was
10 supposed to be at school.

11 Q. Did you do any other drugs besides weed?

12 A. At that time, no.

13 Q. And you said you had a problem with missing
14 school, as well?

15 A. Yes, sir.

16 Q. Were you ever suspended or expelled from --
17 from any school for missing class?

18 A. Not for missing class, no.

19 Q. Were you ever suspended or expelled from
20 school for any reason?

21 A. Yes, sir.

22 Q. What school?

23 A. Green Valley High School.

24 Q. What was the reason for the expulsion?

25 A. Possession of marijuana.

1 Q. What year was that?

2 A. I don't remember.

3 Q. Do you know what year of school you were?

4 A. Ninth grade.

5 Q. Ninth grade.

6 When you were expelled for possession of
7 marijuana, did they hold a hearing or any type of
8 proceeding before they expelled you?

9 A. No, sir.

10 Q. Did they tell your mom?

11 A. Yes, sir.

12 Q. So your mom knew that you had possession of
13 marijuana at Green Valley High School?

14 A. Yes, sir.

15 Q. Did your mom know that you were smoking weed
16 since you were twelve?

17 A. Yes, sir.

18 Q. How did she know that?

19 A. From the multiple times that she caught me.

20 Q. How would she catch you?

21 A. She searched my room, drug tests.

22 Q. Where would you hide your weed?

23 A. Different places in the house.

24 Q. And your mom drug tested you or a drug test
25 at school or what?

1 A. My mother drug tested me.

2 Q. How often did your mom drug test you in the
3 ninth grade?

4 A. Pretty often.

5 Q. Well, once a week, once a month?

6 A. Yeah, it was like a once-a-week thing.

7 Q. How often did you fail those tests?

8 A. I don't know. A lot.

9 Q. A lot?

10 A. Yes, sir.

11 Q. More than 50 percent of the time?

12 MR. MAZZEO: I'm going to object to this
13 whole line of questioning. It's not -- will not
14 reasonably lead to the admissibility of evidence.

15 BY MR. ESCHWEILER:

16 Q. You can answer.

17 A. (No audible response.)

18 MR. STRASSBURG: You can go ahead.

19 BY MR. ESCHWEILER:

20 Q. You can answer.

21 A. Yes, sir.

22 Q. More than 50 percent of the time you failed?

23 A. Yes, sir.

24 Q. More than 75 percent of the time?

25 A. Yes, sir.

1 Q. Was it after that expulsion that you ended up
2 going to Desert Rose Adult High School?

3 A. No, sir.

4 Q. Well, where did you go after -- after you
5 were expelled from Green Valley?

6 A. I was in the juvenile drug court program, and
7 I relapsed and I failed, and I was sent to Salt Lake
8 City, Utah, and to a therapy group home called Odyssey
9 House, and I was able to get myself together there.

10 And it was upon return to Las Vegas that I
11 decided I did not want to go back to the normal school
12 environment. So I waited until I was seventeen and
13 enrolled myself in Desert Rose.

14 Q. Well, let's back up.

15 When were you placed in the juvenile drug
16 court system?

17 A. In January.

18 Q. Do you know of what year?

19 A. No, sir, I don't. I don't remember what
20 year. Maybe it was --

21 Q. Was it --

22 A. -- in 2008 or 2009.

23 Q. I apologize for interrupting you.

24 A. 2007 maybe. That's all right.

25 Q. Well, was your placement in the juvenile drug

1 court system as a result of your expulsion from Green
2 Valley High School?

3 A. No, sir.

4 Q. Okay. What was the reason for the placement
5 in the juvenile drug court system?

6 A. Auto theft and possession of marijuana
7 repeatedly.

8 Q. What do you mean, "repeatedly"? You were
9 busted more than once for auto theft?

10 A. Yes, sir.

11 Q. How many times?

12 A. Three or four.

13 Q. In Las Vegas?

14 A. Yes, sir.

15 MR. STRASSBURG: As a juvenile?

16 THE WITNESS: As a juvenile, yes, sir.

17 BY MR. ESCHWEILER:

18 Q. Were you convicted of those offenses?

19 A. Yes, sir.

20 Q. No, sir; is that what you said?

21 A. Yes, sir.

22 Q. Yes, okay.

23 Yes, you were convicted?

24 A. Yes, sir.

25 And part of the reason they placed me in the

1 juvenile drug court program was because Judge Roy asked
2 me -- because I had marijuana on my person every time I
3 was arrested for auto theft, and Judge Roy asked me if
4 I was stealing any cars or just breaking into cars and
5 getting what I could to scavage to supply my habit, and
6 I told him it was to supply my habit, and he was kind
7 enough to place me in the drug court program.

8 **Q. And when you say supply your habit, your**
9 **habit at that time was marijuana?**

10 A. Yes, sir.

11 **Q. Is it fair to say you've been addicted to**
12 **marijuana since you were twelve years old?**

13 A. No, sir.

14 MR. STRASSBURG: Object to the form.

15 BY MR. ESCHWEILER:

16 **Q. Well, what age would you say that you became**
17 **addicted to marijuana?**

18 MR. STRASSBURG: Object to the form,
19 misconstrues his testimony.

20 Go ahead. Put it in your own words.

21 THE WITNESS: I'm not addicted to marijuana,
22 sir.

23 BY MR. ESCHWEILER:

24 **Q. You're not?**

25 A. No, sir.

1 Q. You just had an admitted problem with
2 marijuana?

3 A. Yes, sir.

4 Q. And what was your problem with marijuana if
5 you weren't addicted?

6 A. I was attracted to the lifestyle that it
7 brought.

8 Q. Well, what do you mean, "the lifestyle"?

9 A. Girls like you, everybody wants to be your
10 friend, a little bit of extra cash circulates through
11 your hands.

12 Q. Well, were you also selling weed back then?

13 A. Yes, sir.

14 Q. Is that what you mean by the extra cash?

15 A. Yes, sir.

16 Q. At what age did you start selling marijuana?

17 A. Thirteen.

18 Q. Thirteen?

19 A. Yes, sir.

20 Q. Were you selling marijuana at school?

21 A. No, sir.

22 Q. Where were you selling it?

23 A. Outside of school.

24 Q. Were you selling it at the house where you
25 lived with your mom?

1 A. No, sir.

2 Q. When you say "outside of school," what do you
3 mean?

4 A. Before school and after school.

5 Q. So on the school premises, just not in
6 school?

7 A. No, sir.

8 Q. Well, where?

9 A. Maybe across the street from the school.

10 Q. Okay. Did you ever have friends over to the
11 house where you sold them weed?

12 A. I had friends at the house, but I never sold
13 weed from my house at that time.

14 Q. Does your mom know that you've been dealing
15 weed since you were thirteen?

16 MR. MAZZEO: Objection, speculation, as to
17 what the mom -- what he knows the mom knows.

18 BY MR. ESCHWEILER:

19 Q. You can answer.

20 MR. STRASSBURG: If you know what's in her
21 mind.

22 THE WITNESS: Yes, sir.

23 BY MR. ESCHWEILER:

24 Q. What's that?

25 A. Yes, sir.

1 Q. And how do you know your mom knows that
2 you've been selling weed since you were thirteen?

3 A. My juvenile record.

4 Q. Did your mom ever attend any of the court
5 proceedings with you?

6 A. Yes, sir.

7 Q. So she understood the charges that were
8 against you --

9 MR. MAZZEO: Objection -- sorry.

10 BY MR. ESCHWEILER:

11 Q. -- back when you were thirteen?

12 MR. MAZZEO: Objection, speculation.

13 BY MR. ESCHWEILER:

14 Q. You can answer.

15 MR. STRASSBURG: If you understand and know
16 what's in her mind.

17 BY MR. ESCHWEILER:

18 Q. That's not what I asked. I asked you if she
19 attended with you.

20 A. Yes, sir.

21 Q. And were the charges against you discussed at
22 those proceedings?

23 A. Yes, sir.

24 And on November 10th, 2005, I was struck with
25 brass knuckles at my middle school, and since then it

1 was kind of a wild ride; so my mother was very involved
2 with my life and what was going on.

3 Q. Well, let's talk about the November 10th,
4 2005, event. Tell me what happened.

5 A. It happened after school. There was a gang
6 riot, and some Reptables assaulted me.

7 Q. Some what?

8 A. Reptables.

9 Q. Well, what's that?

10 A. Opposite gang members.

11 Q. Did you have any involvement with these
12 individuals prior to the disturbance?

13 A. No, sir.

14 Q. And where did -- where did the fight take
15 place?

16 A. Sahara and Maryland in the A-Mall.

17 Q. Villa Pizza?

18 A. Yes, sir.

19 Q. Well, what led to the fight in the parking
20 lot? Was it in the parking lot? I'm sorry.

21 A. Yeah. Yes, sir. The day before I was at
22 orchestra practice, and my friends had got into an
23 altercation with these boys, and school police stopped
24 it, and the school police found weapons on the -- on
25 the guys, and so they all faced expulsion, they all

1 faced charges, and they weren't so happy about that; so
2 they were waiting for us after school the next day.

3 **Q. And how many of them were there?**

4 A. Nine.

5 **Q. How many of you and your friends were there?**

6 A. I was -- I was alone at the time of the
7 assault.

8 **Q. You were by yourself?**

9 A. Yes, sir.

10 **Q. And all -- all nine of them participated**
11 **in --**

12 A. Yes, sir.

13 **Q. -- the assault?**

14 A. Yes, sir.

15 **Q. Did the police come?**

16 A. Yes, sir.

17 I was taken in an ambulance to the hospital.

18 **Q. Well, what injuries did you suffer as a**
19 **result of the assault?**

20 A. Traumatic macular hole in my retina.

21 **Q. So you had a bad eye injury?**

22 A. Yes, sir.

23 **Q. What did they do or what did they diagnose at**
24 **the emergency room?**

25 A. Traumatic macular hole in my retina.

1 **Q. And what was the course of treatment for that**
2 **injury?**

3 A. I saw Dr. Yepremyan, and we did a sutureless
4 procedure, placing a gas bubble in my eye, and I had to
5 sit at a 90-degree angle for 23 and a half hours that
6 day so that gas bubble could put the pressure on the
7 wound and close the wound. We weren't able to save my
8 sight; so I lost sight in my right eye.

9 **Q. So you had a permanent injury from --**

10 A. Yes.

11 **Q. -- from the assault?**

12 A. Yes, sir.

13 I'm diagnosed post-traumatic stress syndrome,
14 in remission, since then.

15 **Q. That's the emotional injury that you've been**
16 **diagnosed with from that incident?**

17 A. Yes, sir.

18 **Q. Do you -- did you -- well, strike that.**
19 **When did you see the eye specialist after the**
20 **assault?**

21 A. Immediately.

22 MR. STRASSBURG: You mean Yepremyan?

23 MR. ESCHWEILER: Yes. I couldn't pronounce
24 his name; so...

25 MR. STRASSBURG: Okay. That was the eye

1 specialist?

2 THE WITNESS: Yes, sir.

3 MR. STRASSBURG: Thank you.

4 BY MR. ESCHWEILER:

5 Q. Yepremyan?

6 A. Yes, sir.

7 Q. Where is he located?

8 A. I don't -- I don't know. I don't remember.

9 Q. You don't remember where his office is?

10 A. No, sir.

11 Q. And was the surgery that he performed
12 immediate?

13 A. I would say yes. We had time to contemplate
14 the surgery and see if it was what we wanted to do and
15 get my eyes checked out to figure out, you know, what
16 the damage was done because we pressed charges on the
17 boy who assaulted me; so it was needed in the case.

18 Q. What were the options if you didn't have
19 surgery?

20 A. Either close the hole or don't close the
21 hole.

22 Q. And what were the possible consequences of
23 that?

24 A. If I didn't close the hole, retina
25 detachment. If I closed the hole, I got to keep my

1 retina.

2 Q. And if the retina detached, possible
3 blindness in that eye?

4 A. Complete blindness.

5 Q. And is it your left or right eye?

6 A. My right eye, sir.

7 Q. Was the procedure by Yepremyan successful?

8 A. Very.

9 Q. And did it -- did it allow -- did it restore
10 your vision?

11 A. Partially. I'm still -- I still have
12 distorted vision in my eye.

13 Q. Is it just distorted vision in the right eye?

14 A. Yes, sir.

15 Q. Are you still treating for that -- for that
16 injury?

17 A. Constantly.

18 Q. And what's the course of treatment since the
19 time of the first surgery with Yepremyan?

20 A. I go to an optometrist, and I go through a
21 procedure where they look at my retina, and they assess
22 my eyes in an eye exam, and I wear glasses.

23 Q. When you say your vision is impaired or you
24 have a permanent injury, what exactly is the injury?

25 A. A scar on my retina.

1 **Q. And how does that affect your vision?**

2 A. No peripheral vision in my right eye,
3 complete peripheral vision, and my left eye has to
4 compensate for what my right eye lacks.

5 **Q. Any other effects physically of the permanent**
6 **right eye injury?**

7 A. No, sir.

8 **Q. Do you have -- I know you've talked about the**
9 **peripheral vision.**

10 Do you have problems seeing near -- near or
11 far --

12 A. Not at all.

13 **Q. -- in that eye?**

14 A. Not at all.

15 **Q. So it's just the peripheral vision that's**
16 **affected?**

17 A. Yeah, partial peripheral vision. It makes
18 your eyes work together; so, as a team, you're --
19 they're actually a unit. So what my right eye lacks,
20 my left eye compensates. They balance each other out.

21 **Q. And does the -- the corrective eyewear that**
22 **you wear, does that help with the peripheral vision, or**
23 **is that intended to help with just your normal vision?**

24 A. It's intended to help with all my vision, and
25 it also protects my eyes.

1 Q. Do you have a deficiency rating in your right
2 eye as far as sight?

3 A. No, sir.

4 Q. So you're at 20/20 in your right eye?

5 A. I think it's -- I don't know my last eye
6 score, but with the glasses I'm able to see. Without
7 them it's blurry.

8 Q. In both eyes or just your right eye?

9 A. Both.

10 Q. Both eyes.

11 So your lenses are protective, but they also
12 are corrective, as well?

13 A. Yes, sir.

14 Q. Did you wear corrective glasses before the
15 injury?

16 A. No, sir.

17 Q. And when was the last time you saw the
18 optometrist?

19 A. Two or three years ago.

20 Q. What did he do for you at that visit?

21 A. Provided a new prescription.

22 Q. Do you recall what the prescription was?

23 A. No, sir.

24 Q. Was your mom aware of the permanent injury to
25 your right eye?

1 A. Yes, sir.

2 Q. And how do you know that?

3 A. It was a family event.

4 Q. But did she go with you to, let's say, the
5 emergency room the day that --

6 A. Yes, sir.

7 Q. -- you were injured?

8 A. Yes, sir.

9 Q. So she heard the diagnosis from the -- from
10 the doctor at the emergency room?

11 A. She made sure to get the diagnosis.

12 Q. And --

13 (Reporter interrupted.)

14 THE WITNESS: Yes, sir.

15 BY MR. ESCHWEILER:

16 Q. She made sure to get the diagnosis, is that
17 what you said?

18 A. Yes, sir.

19 Q. And did she also go with you with your -- on
20 your visits to Yepremyan?

21 A. Yes, sir.

22 Q. So she knew about the significance of the eye
23 injury?

24 A. Yes, sir.

25 MR. MAZZEO: Objection, speculation.

1 BY MR. ESCHWEILER:

2 Q. Did she participate with you in the decision
3 on whether or not to get that surgery?

4 A. Yes, sir.

5 Q. Did she also go with you to follow-ups after
6 the surgery?

7 A. Yes, sir.

8 Q. Do you -- do you wear your glasses around the
9 house? Do you need them to, say, watch TV?

10 A. Yes, sir.

11 Q. And if you weren't wearing your glasses, how
12 far -- what would be the range of your sight?

13 A. Pretty much the same.

14 Q. What do you mean, "the same"?

15 A. I'd still be able to see everything that I
16 see with my glasses on. It just would be blurry.

17 Q. It would be blurry?

18 A. Yes, sir.

19 Q. Okay. So, in other words, if -- let's say
20 we're sitting on the couch watching a game. The --
21 maybe the ticker on the bottom would be blurry that you
22 wouldn't be able to see, but you'd be able to see the
23 guys playing basketball or something like that?

24 A. Yes, sir. I'd have to squint.

25 Q. Okay. Have you ever been told that you're

1 **nearsighted?**

2 A. No, sir.

3 **Q. Farsighted?**

4 A. No, sir.

5 **Q. What happened at school as a result of this**
6 **incident?**

7 A. A police investigation and was -- faced
8 expulsion for gang enhancement.

9 **Q. The individuals who assaulted you were**
10 **expelled?**

11 A. We all were.

12 **Q. You were -- you were expelled, as well?**

13 A. Yes, sir.

14 **Q. And the reason for expulsion was gang**
15 **involvement?**

16 A. Gang -- gang enhancement.

17 **Q. And what does that mean?**

18 A. It's a -- it's a charge.

19 **Q. Were you charged criminally with the police**
20 **as a result of this accident?**

21 A. No, sir. They just found me guilty of gang
22 enhancement and faced expulsion.

23 **Q. And what was the basis for you being charged**
24 **in -- of gang enhancement?**

25 A. The conclusion to the investigation.

1 Q. Did you participate in the investigation?

2 A. No, sir.

3 Q. Were you allowed to give a statement about
4 what happened to your school?

5 A. No, sir.

6 Q. So this was just the school investigated and
7 came to the conclusion that you were involved with
8 the --

9 A. Based on the statements given by my peers at
10 the scene.

11 Q. Okay. What school were you at at the time?

12 A. John C. Fremont Middle School.

13 Q. What grade was that?

14 A. Eighth.

15 Q. Other than the eye injury, did you suffer any
16 other physical injuries?

17 A. No. No, sir.

18 Q. And I believe you said that you suffered
19 emotional injury in the form of PTSD?

20 A. Yes, sir.

21 Q. That's now resolved?

22 A. It's in remission.

23 Q. In remission?

24 A. Yes, sir.

25 Q. Did you treat for PTSD after the incident?

1 A. Constantly.

2 Q. Who did you treat with?

3 A. Pam Goldberg, Bridge Counseling, different
4 counselors, different therapists, different
5 psychiatrists.

6 Q. How long did you treat for the PTSD?

7 A. For years.

8 Q. Years?

9 A. Yes, sir.

10 Q. Are you still treating?

11 A. Yes, sir.

12 Q. When was the last time you saw anybody
13 regarding the PTSD?

14 A. March 18th.

15 Q. So two weeks, ten days ago.

16 A. Yes, sir.

17 Q. Who did you see?

18 A. Dr. Bhushan.

19 Q. Bhushan?

20 A. Yes, sir.

21 Q. How do you spell that?

22 A. I don't know. Sorry.

23 Q. Well, do you know where he's located?

24 A. At Rawson-Neal Psychiatric Hospital.

25 Q. When you were expelled from John Fremont

1 **Middle School, what happened next? Where did you go to**
2 **school?**

3 A. Jerome D. Mack.

4 MR. STRASSBURG: I'm sorry. I couldn't
5 hear -- say again.

6 THE WITNESS: Jerome D. Mack.

7 MR. STRASSBURG: Thank you.

8 BY MR. ESCHWEILER:

9 Q. Well, were you out of school for a period of
10 time because of the expulsion, or how -- how did that
11 work?

12 A. Upon the healing of the surgery and the
13 healing of my eye, the doctor said that he didn't want
14 me in school if there was retaliation because my eye
15 was fragile. If there was retaliation, the surgery
16 would have been ineffective. I was out of school for
17 the conclusion of the investigation, as well.

18 Q. How long was the surgery and the recuperation
19 period after the surgery?

20 A. Two, three months.

21 Q. And this happened in November?

22 A. November 10th, 2005.

23 Q. So you were basically out of school until
24 after the Christmas break?

25 A. Yes, sir.

1 Q. And then was the investigation by the school
2 completed by the time that you had recuperated from
3 your surgery?

4 A. No, sir.

5 Q. When was the investigation completed?

6 A. A few weeks after.

7 Q. And at that point you were expelled?

8 A. Yes, sir.

9 Q. Well, was there any gap in time before you
10 enrolled at Jerome D. Mack?

11 A. No, sir.

12 Q. Did Jerome D. Mack have to make any special
13 accommodations for you because of your eye injury?

14 A. I received an IEP.

15 Q. What's that?

16 A. It's for special education, for children with
17 needs. I'm not sure what IEP stands for, but it's an
18 education plan and accommodations like Jared needs to
19 sit in the front of the room, I can use magnifying
20 glasses to read, and just my teachers were aware of my
21 condition. Like schoolwork, homework I would get
22 longer days and stuff to complete. It's an education
23 program.

24 Q. And does this -- was this based on like a
25 meeting you had with the school prior to enrollment?

1 A. My mother is an autism teacher.

2 Q. Okay.

3 A. So she knew I needed it.

4 Q. But is the accommodation and the plan for
5 your accommodation completed with a meeting with the
6 school so that --

7 A. Oh, yes. Yes, sir.

8 Q. And did you participate in that meeting?

9 A. I was there, yeah.

10 Q. Well, was your mom there, too?

11 A. Yes, sir.

12 Q. So you -- you had accommodations for
13 basically your vision. You needed to sit at the front
14 of the class. You needed a magnifying glass to do work
15 that was at your desk.

16 A. Yeah.

17 Q. Any other accommodations?

18 A. I can -- I can take a couple extra days on my
19 homework. I would get extra work if I missed school.
20 It's an education -- it's an educational program.

21 Q. Was it -- was it helpful in completing your
22 schoolwork?

23 A. Yes, sir.

24 Q. When you went to Desert Rose Adult High
25 School, did they make similar accommodations for you?

1 A. No, sir.

2 Q. Well, why not?

3 A. That was years after the assault. I had
4 already trained myself academically and had already
5 become accustomed to the damage that was done.

6 Q. Well, what do you mean by the phrase trained
7 yourself academically?

8 A. Like I got used to my eye being messed up and
9 being serious about school at that time, and so things
10 that were in the IEP were no longer needed, such as a
11 magnifying glass, sitting at the front of the room,
12 extra time on my homework, things like that.

13 Q. And you said this -- when you got to Desert
14 Rose Adult High School, you were serious about school?

15 A. Yes, sir.

16 Q. Does that mean that you were no longer
17 smoking weed?

18 A. Yes, sir.

19 Q. Not dealing weed anymore?

20 A. Yes, sir.

21 Q. And what year did you graduate?

22 A. 2010.

23 Q. What was your GPA when you graduated?

24 A. I think it was a 3.4.

25 Q. Did you take the SIT or the SAT?

1 A. I took the proficiencies twice. I passed
2 them on my first time both times. I took them once in
3 Utah, passed them, and I took them once when I returned
4 here and passed them.

5 **Q. And what's the proficiency exam?**

6 A. The -- like the SATs for high schoolers.
7 The -- basically, where every student, in order to
8 graduate, needs to pass their proficiencies to receive
9 a diploma.

10 **Q. Did you want to go to college?**

11 A. Yes, sir.

12 **Q. Okay. And did you actually go to college?**

13 A. No, sir.

14 **Q. Why not?**

15 A. I had a baby.

16 **Q. What year did you have your baby?**

17 A. 2010.

18 **Q. What's your baby's name?**

19 A. Khaliyah Maii.

20 **Q. How do you spell "Khaliyah"?**

21 A. K-h-a-l-i-y-a-h, M-a-i-i. I have two
22 children.

23 **Q. What's your other child's name?**

24 A. Mecca.

25 **Q. How do you spell that?**

1 A. M-e-c-c-a.

2 Q. Last name Awerbach?

3 A. Howard-Reed.

4 Q. Howard-Reed?

5 A. Yes, sir.

6 Khaliyah has my last name.

7 Q. How do you spell "Howard-Reed"?

8 A. H-o-w-a-r-d hyphen R-e-e-d.

9 Q. Same moms?

10 A. Yes, sir.

11 Q. And what's the mother's name?

12 A. Tikiera Howard.

13 Q. How do you spell "Tikiera"?

14 A. Tikiera Howard-Reed or -- she's married
15 now -- Tikiera White. T-i-k-i-e-r-a Howard-Reed.

16 Q. Do you have contact information for her?

17 A. No, sir.

18 Q. You don't have her phone number?

19 A. I don't. It's not in my mind.

20 Q. Do you have it in a phone?

21 A. Yes, sir, in my mother's phone.

22 I try to limit my contact with her.

23 Q. Well, why is that?

24 A. Given our history.

25 Q. What do you mean, your history?

1 A. We have two children together, and we're not
2 always good for each other, and she's married now.

3 Q. When you say "we're not always good for each
4 other," what do you mean?

5 A. We get consumed with each other.

6 Q. You -- pardon?

7 A. We get consumed with each other. She's
8 married and has a life; so sexual involvement is
9 infidelity, and it hinders her, it hinders me, hinders
10 both of us.

11 Q. Was Tikiera someone that you consumed
12 marijuana with?

13 A. No.

14 Q. You never smoked weed with her?

15 A. No. She doesn't smoke.

16 Q. How do you communicate with regard to your
17 children?

18 A. Through my mom's phone. My mom is the third
19 party.

20 Q. So your mom texts to her?

21 A. No, I text her.

22 Q. Just from her phone?

23 A. Yeah.

24 We're very cautious of our conversation
25 because her husband has caught us together before, and

1 my mom's not always happy with her indulging in me
2 while she's married. I've known her since I was
3 fourteen.

4 Q. Well, what do you mean the husband's caught
5 you guys together before? So you -- she's had an
6 affair, while married, with you?

7 A. With him.

8 Q. Right, but the affair was with you?

9 A. Yes. I mean, engaged in sexual activity.

10 MR. MAZZEO: Objection to this whole line of
11 questioning. It won't reasonably lead to the discovery
12 of admissible evidence.

13 MR. ESCHWEILER: Objection noted.

14 BY MR. ESCHWEILER:

15 Q. When you were at Desert Rose Adult School,
16 did they have outside activities that you could
17 participate in?

18 A. No, sir.

19 Q. And you said the birth of the child was the
20 reason while -- why you couldn't go to college?

21 A. Yes, sir.

22 Q. And why did that prevent you from going to
23 college?

24 A. I decided to begin a career as an ABA tutor,
25 applied behavior analysis. I decided to get a job

1 instead of going to college and provide for my family.

2 Q. Were you and Tikiera together at the time?

3 A. Yes, sir.

4 Q. How long were you together?

5 A. Two years.

6 Q. So from 2010 to, say, 2012?

7 A. Say 2010 to, yeah, 2012.

8 Q. I apologize if I asked.

9 When was Mecca born?

10 A. February 21st, 2012.

11 Q. So that was at kind of the tail end of the
12 relationship?

13 A. We had already separated before she was born.

14 Q. And you talked about getting a job as an ABA
15 tutor?

16 A. Yes, sir.

17 Q. Where was the job at?

18 A. In-home tutoring, different locations,
19 applied behavior analysis for autistic children,
20 one-on-one trials, and I also worked at -- for a
21 company called Bartech.

22 Q. How do you spell that?

23 A. B-a-r-t-e-c-h.

24 Q. And what did they do?

25 A. Installation and modification of the mini

1 bars in the Cosmopolitan Casino.

2 Q. So construction?

3 A. Yes, sir.

4 Q. Let's start with the in-home tutoring for
5 autistic children.

6 Did you have to have any specialized training
7 to do that?

8 A. The companies that provide the funding for
9 the children hire tutors, and they train you, but
10 because my mother was an autism teacher for so long, I
11 kind of grew up with the training.

12 Q. Did you have to pass a test or get certified
13 or anything to be -- before --

14 A. No, sir.

15 Q. -- you started?

16 A. No, sir.

17 What happens is you come in the home, receive
18 an interview, and then they give you different tasks to
19 perform with the child, and if they like the technique,
20 if they like your communication with the child, they
21 hire you. I also had a little cousin who was autistic.

22 Q. How many -- how many children would you see
23 in any given week during the time period that you
24 worked here?

25 A. Say four.

1 Q. Four kids?

2 A. Yes, sir.

3 Q. Would that be one kid on separate days of
4 four different days or...

5 A. Depending on the schedule that the parent is
6 comfortable with.

7 Q. How many kids total would you be seeing like
8 in any given week?

9 A. Four.

10 Q. Okay. And was it the same four kids every
11 week that you would see, or did they place you with
12 different kids?

13 A. They placed me with different kids, but it --
14 it would be the same four kids.

15 Q. Do you recall what days you were working?

16 A. No, sir.

17 Q. Do you recall the hours? Like how long were
18 you in the house?

19 A. Three-hour sessions.

20 Q. Did you have to do a report or anything after
21 each of the sessions?

22 A. Yes, sir.

23 Q. And where would you do the report at?

24 A. In the report book that is provided by the
25 company.

1 Q. Well, was there a -- was there like a
2 headquarters, though, that you would go back to or
3 check in at?

4 A. No, sir.

5 What it is is the family receives funding for
6 the autistic child and refers them to different
7 companies that provide this service, and the companies
8 provide a liaison or a director, something like that,
9 and educational directors.

10 So the educational director would come to the
11 family's house, and we'd have a team meeting and go
12 over the score that the child would get, the scores,
13 the academic scores that the child was getting, and
14 discuss what was appropriate for the child, what the
15 child needed to be working on, and that would happen
16 once a month.

17 Q. And that would be based upon the reports that
18 you submitted after each three-hour session?

19 A. Yes, sir.

20 Q. So you -- you would basically work out of
21 your own home and then travel to the house, wherever
22 the autistic child was?

23 A. I would work in their home.

24 Q. Right. But you would travel from your home
25 to their home?

1 A. Yeah.

2 Q. And I apologize. Did you say that it was
3 four days a week or four kids a week on separate days?

4 A. Yes, sir.

5 Q. What were your dates of employment with ABA?

6 A. I don't remember.

7 Q. Did it start in 2010?

8 Let me ask it to you this way. I apologize.
9 Was it before the accident that we're here to talk
10 about today?

11 A. Oh, yes, sir.

12 Q. And the accident happened on January 2nd,
13 2011.

14 A. Yes, sir.

15 Q. So were you still working with ABA at the
16 time of the accident?

17 A. No, sir.

18 Q. When did you complete your work with ABA?

19 A. September 2010. Maybe August.

20 Q. And do you recall when you began work there?
21 Sometime in 2010?

22 A. I think early 2009.

23 Q. So you worked there for approximately a year
24 and a half?

25 A. Yes, sir.

1 Q. What was the reason for your termination?

2 A. I received a job at Bartech.

3 Q. Okay. So you stopped working to work at the
4 Cosmo?

5 A. Yes, sir.

6 Q. Was it more money? What was the reason --

7 A. Yes, sir.

8 Q. -- why you left?

9 A. More money, more hours.

10 Q. So when did you start with the Cosmo?

11 A. September.

12 Q. 2010?

13 A. Yes, sir.

14 Q. When you said "more hours," were you working
15 full-time?

16 A. Yes, sir.

17 Q. Pardon?

18 A. Yes, sir.

19 Q. So 40 hours a week?

20 A. Sometimes more.

21 Q. Sometimes overtime?

22 A. Yes, sir.

23 Q. What was your rate of pay?

24 A. \$15 an hour.

25 Q. Was it Monday through Friday, or what were

1 **the days that you were working?**

2 A. It was Monday through Friday.

3 **Q. 9:00 to 5:00 or 7:00 to 3:00?**

4 A. 6:00 to 5:00, I think.

5 **Q. Going back to ABA for a second, did you ever**
6 **get any performance evaluations?**

7 A. I got statements from the parents, letters
8 and stuff like that, given to the company that was
9 hired to perform the ABA tutoring.

10 **Q. Who was your supervisor at ABA?**

11 A. Whoever the lead ABA tutor was.

12 You work for different companies with that
13 kind of work. You work for Autism Partnership, Lovaas,
14 Autism Care West, different companies that are provided
15 through the funding that the child receives.

16 **Q. So you didn't have a direct report as far as**
17 **a supervisor?**

18 A. Whoever -- like I said previously, whoever
19 the lead teacher was, the lead tutor was, is where my
20 reports would go and would document everything in --

21 **Q. How would you figure out what the schedule**
22 **was or how -- where you were supposed to go?**

23 A. You received the schedule from the parents.

24 **Q. At Bartech did you have a supervisor?**

25 A. Yes, sir.

1 Q. And what was his -- his or her name?

2 A. Terry.

3 Q. Do you know what his last name is?

4 A. No, sir, I don't remember.

5 Terry Campbell.

6 Q. Campbell?

7 A. Yes, sir.

8 Q. How'd you get the job at Bartech?

9 A. A friend.

10 Q. Somebody that was already working with the
11 firm?

12 A. No, sir.

13 Q. How long did you work at Bartech?

14 A. Two months.

15 Q. Two months?

16 A. Yeah. It was only a three-month gig.

17 Q. What happened after the two months?

18 A. My water broke.

19 Q. What do you mean?

20 A. I had a baby.

21 Q. Oh. So November of 2010 you had Khaliyah?

22 A. I had Khaliyah December 6th, 2010.

23 Q. And then you stopped work?

24 A. Yes, sir.

25 Q. Well, what were you doing to support Khaliyah

1 if you didn't have a job after December 6th, 2010?

2 A. Began selling drugs.

3 Q. December 6th, 2010, were you living at the
4 Gowan Street apartment --

5 A. Yes, sir.

6 Q. -- with your mom?

7 A. Yes, sir.

8 Q. How long did you live at the Gowan Street
9 apartment?

10 A. Four years.

11 Q. Now, that was a bad question. Let's start
12 when you left the Gowan Street apartment.

13 A. March 10th, 2011.

14 Q. It seems like you have a pretty good recall
15 of the exact date.

16 A. Yes, sir.

17 Q. Did something happen on that date that caused
18 you to leave the house with your mom?

19 A. I was raided.

20 Q. You were what?

21 A. Raided.

22 Q. Raided?

23 A. Yes, sir.

24 Q. What does that mean?

25 A. A SWAT team came into the house.

1 **Q. The Gowan Street address?**

2 A. Yes, sir.

3 They came twice. They came the day before
4 Thanksgiving in 2010 and renewed the search warrant in
5 March and came again.

6 **Q. So in November of 2010, you were living at**
7 **the Gowan Street apartment, and you were raided by**
8 **SWAT?**

9 A. Yes, sir.

10 **Q. Metro?**

11 A. North Las Vegas.

12 **Q. Did they find anything in November of 2010?**

13 A. No.

14 **Q. You weren't arrested or anything based upon**
15 **that raid?**

16 A. No, sir.

17 **Q. Were you dealing drugs at that point in time?**

18 A. Yes, sir.

19 **Q. What drugs were you dealing?**

20 A. Marijuana, cocaine, and xstacy.

21 **Q. Was your hiding spot somewhere else other**
22 **than the apartment?**

23 A. In November we knew they were coming; so we
24 moved everything and kept very little at the house. So
25 when they came they didn't find enough to arrest me, or

1 they would lose their investigation.

2 Q. When you say "we," who are you talking about?

3 A. Me and my baby's momma. Me and the children
4 of my mother [sic].

5 Q. You and Tikiera?

6 A. Yes, sir.

7 Q. Did Tikiera live at the Gowan Street
8 apartment with you --

9 A. Yes, sir.

10 Q. -- and your mom?

11 A. Yes, sir.

12 Q. So Tikiera was also involved in your drug
13 dealing?

14 A. Yes, sir.

15 Q. And when you say they wouldn't have found
16 enough to continue the investigation, what do you mean?

17 A. Meaning if I was booked on the marijuana that
18 they found at the time, the officer was going to -- it
19 didn't -- what they found in the house did not warrant
20 a warrant.

21 Q. So in the November 2010 raid, they did find
22 marijuana?

23 A. Yes, sir.

24 Q. Did they find anything -- any other drugs?

25 A. No, sir.

1 Q. How much marijuana did they find?

2 A. Just less than an eighth.

3 Q. Less than an eighth of an ounce?

4 A. Yes, sir.

5 Q. Did they confiscate that?

6 A. Yes, sir.

7 Q. Was your mom home at the time?

8 A. Yes, sir.

9 Q. Was your mom aware that you were dealing
10 drugs out of the Gowan Street apartment?

11 A. No, sir.

12 Q. Was she aware of it after the raid?

13 A. Yes, sir.

14 But the police were very careful not to tell
15 her what was happening.

16 Q. Did you have a conversation with your mom
17 about what was happening?

18 A. A brief conversation.

19 Q. Well, what was the substance of the
20 conversation?

21 A. My mom asked the police officer what was
22 going on and what they were doing there, and the police
23 officer said ask Jared what we're doing here, and I
24 said I've been selling weed. That's pretty much it.

25 Q. And then you said the second raid was

1 **March 10th, 2011?**

2 A. Yes, sir.

3 **Q. North Las Vegas SWAT?**

4 A. Yes, sir.

5 **Q. And what did they find on that raid?**

6 A. They found a gun, cocaine, marijuana, a
7 scale.

8 **Q. What kind of gun did they find?**

9 A. 357 magnum Ruger GP100.

10 **Q. How long have you -- did you -- had you had**
11 **the gun at the Gowan Street apartment?**

12 A. A week.

13 **Q. Did your mom know the gun was there?**

14 A. No, sir.

15 **Q. How much cocaine did they find?**

16 A. .8.

17 **Q. .8 ounces?**

18 A. No, .8, .8, less than a gram.

19 **Q. How much marijuana?**

20 A. 32 grams.

21 **Q. My math is terrible.**

22 **Is that less than an ounce?**

23 A. It's over an ounce. It's 4 grams over an
24 ounce.

25 **Q. Were you arrested?**

1 A. Yes, sir.

2 Q. Well, what were -- what were the charges?

3 A. Possession of a controlled substance;
4 possession of marijuana, intent to sell; possession of
5 an unregistered firearm. I had four felony charges and
6 a bunch of misdemeanors.

7 And they gave me a wobbler, and I didn't
8 receive any cases between the raid and the court date;
9 so I was able to take a plea for a gross misdemeanor,
10 which is possession of drugs not to be introduced into
11 interstate commerce, and I had to forfeit the weapon.

12 Q. So you went from intent to sell to a,
13 basically, possession charge?

14 A. Yes, sir.

15 Q. And then -- and that was on the marijuana?

16 A. The marijuana and the cocaine, the gun, the
17 scale, the extent of their investigation.

18 Q. Okay. But did they -- they dropped the
19 cocaine possession charges?

20 A. Yes, sir.

21 Q. And then you forfeited the gun, and they
22 dropped the gun charge?

23 A. Yes, sir.

24 Well, they dropped the felony gun charge, and
25 they gave me possession of an unregistered firearm,

1 which is a misdemeanor because in North Las Vegas it's
2 not illegal to own a gun in your household. It has to
3 be registered, and they retrieved the gun from the
4 household, from inside the home.

5 Q. So your gun -- the gun was unregistered?

6 A. Yes, sir.

7 It was a clean gun.

8 Q. Did you buy it?

9 A. Yes, sir.

10 Q. From a store?

11 A. No, sir.

12 MR. ESCHWEILER: Do you guys need to take a
13 break?

14 MR. MAZZEO: No, we're good.

15 BY MR. ESCHWEILER:

16 Q. And you mentioned a word that I'm not
17 familiar with.

18 What's a wobbler?

19 A. It's a -- it's a -- like a court date, a
20 court thing. It's a court term, and it's like when
21 you're facing that many charges, a wobbler is, you
22 know, if you do good, you get this deal, or if you
23 plead probation [sic] or something like that, you get
24 this deal, and if you screw up, you get another deal.
25 It's a wobbler.