

No. 71348

IN THE SUPREME COURT OF THE STATE OF NEVADA

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Elizabeth A. Brown
Clerk of Supreme Court

EMILIA GARCIA,
Appellant,

v.

ANDREA AWERBACH,
Respondent.

**APPELLANT'S APPENDIX
VOLUME XXIII, BATES NUMBERS 5551 TO 5750**

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1 recollection that this picture was taken on or about
2 December 2, 2011?

3 MR. ROBERTS: Objection to form. It couldn't
4 have.

5 MR. MAZZEO: Speaking objection, Judge.

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

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

9 THE COURT: All right. Objection's overruled
10 for now. Let's see where it goes.

11 I'm just trying to maintain what I'm showing
12 the jury here.

13 So far, you're not showing them anything
14 because I shut the TV off. You have something under
15 the document cam that I was showing them for a second.

16 MR. STRASSBURG: This?

17 THE COURT: It's okay. I moved it.

18 MR. STRASSBURG: Okay. I didn't know this
19 was on. All right.

20 BY MR. STRASSBURG:

21 Q. Let's see if we're on the same page. Okay.
22 And this is 33. All right.

23 Has our discussion refreshed your
24 recollection that the image on page 33 was taken on or
25 about December 2nd, 2011?

1 A. I'm not sure.

2 Q. All right. Let me direct your attention to
3 page 30.

4 Do you have it?

5 A. Yes.

6 Q. And is page 30 of Exhibit C a true and
7 correct copy of your Facebook page?

8 A. Yes.

9 Q. And do you recognize either of the
10 individuals shown in the picture?

11 A. Yes.

12 Q. And can you tell us who they are?

13 A. She's one of the bartenders at Aliante.

14 Q. Okay. And are you the other one?

15 A. Yes.

16 Q. All right. And do you recollect the occasion
17 depicted in this picture?

18 A. It was Halloween party.

19 Q. And was this picture taken on or about
20 October 30th, 2012?

21 A. Yeah.

22 Q. And was this picture a -- a social event for
23 you?

24 A. It was the company giving us a Halloween
25 party, yes.

1 Q. And is -- this young woman with you, is she a
2 friend, a social acquaintance?

3 A. She's a friend.

4 Q. Do you guys work together?

5 A. We worked together, yes.

6 Q. And how did you get to this party?

7 A. I drove there.

8 Q. Okay. And did you drive alone, or did you
9 take somebody with you? Or how did that work?

10 A. Alone.

11 Q. And so was the -- the party at your place of
12 employment, or -- or was it, like, a -- an office party
13 that was held at a different location?

14 A. At a different location.

15 Q. Do you recollect where?

16 A. The Santa Fe.

17 Q. And how far a drive is that from your work?

18 A. Maybe 15 minutes.

19 Q. Do you remember when the party started?

20 A. I know it was in the evening. I can't
21 remember exactly what time.

22 Q. And do you remember when the party broke up?

23 A. No. Because I -- I didn't wait till
24 everybody -- to leave for -- for myself to leave. So I
25 don't know what time it ended.

1 Q. But it was an evening affair?

2 A. Yes.

3 Q. And who was watching the kids when you were

4 at this the party?

5 A. My friend Sam -- I'm sorry -- Max was staying

6 with us. So she was with my girls.

7 Q. Oh, Sam's a female?

8 A. I'm sorry. Max.

9 Q. Oh.

10 A. She's a female.

11 Q. Max is female?

12 A. Yeah. Maxine.

13 Q. Okay. Got it. Thank you.

14 And did you have to pay Max for that service?

15 A. No. She -- she stayed with us. She would

16 just -- she had to work in the morning, so she didn't

17 come.

18 Q. All right. Now, was this a -- a costume

19 affair, or were you wearing your work clothes?

20 A. This was a Halloween costume party, so I was

21 wearing a costume.

22 Q. And what was your costume?

23 A. French maid.

24 Q. All right. And did you dress in your costume

25 at work, or did you go home first and then dress and

1 then go to the party?

2 A. I went home, dressed, and then went to the
3 party. Costumes were not allowed at work.

4 Q. Uh-huh. And where did you get your costume?

5 A. At a costume store.

6 Q. Okay. So you didn't make it; you rented it?

7 A. I didn't rent it. I bought it.

8 Q. Oh, okay. And were you able to dress
9 yourself in your costume without assistance?

10 A. Yes. I always have been able to dress
11 myself.

12 Q. So nothing about the pain you experienced in
13 this accident has interfered with your ability to
14 clothe yourself; true?

15 A. Other than after surgery, no.

16 Q. Fair enough. Now, at the party, was there
17 alcohol served?

18 A. Yeah.

19 Q. And did you take some -- have some?

20 A. I had some as soon as I got there, yeah.

21 Q. And do you recollect how much?

22 A. One -- one beer.

23 Q. All right. And so you had no problem driving
24 home?

25 A. No. I stayed there a couple of hours. So I

1 was fine driving.

2 Q. Now, at the party, was there dancing?

3 A. Yeah.

4 Q. And did you engage in dancing at the party?

5 A. No.

6 Q. All right. Now, in the -- in the picture,

7 you -- you appear to be leaning over.

8 Do you see that? You're leaning towards the
9 camera?

10 A. No. I'm leaning towards her like this.

11 Q. Oh, I see. Okay. So you're leaning to your
12 left?

13 A. To my right. Well, to me --

14 Q. To your right?

15 A. Yeah. Sorry. To my left. To my left.

16 Q. Okay. You're leaning to your left.

17 And do you have your arm around her, or are
18 your arms at your side?

19 A. I -- I don't know where my arms are actually.
20 I'm sorry.

21 Q. All right. But you were able to engage in
22 this activity without pain in your back?

23 A. You mean to take a picture?

24 Q. No. You're in the picture.

25 A. Right.

1 Q. Somebody else is taking it; right?

2 A. Right.

3 Q. Unless you've got really long arms.

4 A. Right. To stand there and have somebody take
5 a picture of me, yes.

6 Q. Okay. And you appear to be laughing.

7 Do you recollect the social interaction that
8 produced the mirth? Or -- was it a joke? Or did you
9 get some news? Or what was that about?

10 A. We were at a --

11 Q. Just a party face?

12 A. It's a party face, yes.

13 MR. STRASSBURG: Permission to show 30.

14 THE COURT: No.

15 MR. TINDALL: What did you say, Your Honor?

16 THE COURT: I said no.

17 Now, you're showing the jury the
18 interrogatory answers; right?

19 MR. STRASSBURG: Here, I'll go back to the --
20 let me go back to the --

21 THE COURT: That's why I switched it to the
22 document cam, which also shows pictures.

23 MR. ROBERTS: He just showed what you told
24 him not to, Judge.

25 MR. MAZZEO: Well, he doesn't know. He

1 doesn't know that it's on.

2 THE COURT: I'm trying to -- I'm trying to
3 keep the jury from seeing something.

4 MR. STRASSBURG: This thing --

5 Sorry. I didn't -- I mean, this is -- I'm on
6 my computer.

7 THE COURT: Uh-huh. Come up for a minute.

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

10 MR. STRASSBURG: Okay. I'm ready. Picture
11 only. So I would move the admission into evidence of
12 page 30, as redacted, Jared Exhibit C.

13 MR. ROBERTS: No objection, Your Honor.

14 THE COURT: It will be admitted without all
15 the stuff on the right. That's fine.

16 (Whereupon, Defendant's Exhibit C30 was
17 admitted into evidence.)

18 THE CLERK: C30?

19 THE COURT: C30, correct.

20 MR. STRASSBURG: Judge, I need you to switch
21 over.

22 BY MR. STRASSBURG:

23 Q. Now, on or about October 30th of 2012, that
24 would have been after you had begun seeing Dr. Kidwell;
25 true?

1 A. Yeah.

2 Q. Okay. So, on October 30th, that would have
3 been after you saw Dr. Kidwell on October 10th, and
4 then it would have been before you saw him on
5 November 7th; true?

6 A. Correct.

7 Q. And October 10th you told him your pain level
8 was 7 out of 10?

9 A. Yes.

10 Q. And then on November 7th you told him your
11 pain level was 6 out of 10; true?

12 A. True.

13 MR. ROBERTS: Objection, Your Honor. Is
14 there a question about the picture, or did he just want
15 to show them the French maid costume?

16 MR. STRASSBURG: Permission to complain,
17 Judge.

18 THE COURT: Why doesn't everybody come up.
19 Come on up.

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

22 THE COURT: Permission to complain was
23 granted.

24 MR. STRASSBURG: We're not due for a break by
25 any chance, are we?

1 BY MR. STRASSBURG:

2 Q. Okay. So this picture, taken on or about
3 October 30th of 2012, it depicts activity that you'll
4 agree was -- took place between October 10th of 2012,
5 when you saw Kidwell, and November 7, 2012, when you
6 saw Kidwell; right?

7 A. Right.

8 Q. And so this picture took place between the
9 time when you indicated to Dr. Kidwell that your pain
10 level was 7 out of 10; right? Yes?

11 A. Yes.

12 Q. And the time in November 7th when you
13 indicated your pain level was 6 out of 10; true?

14 A. True.

15 Q. And do you remember, when you'd go to
16 Kidwell's -- Dr. Kidwell's office, from time to time
17 he'd have you fill out a pain diagram?

18 A. Yes.

19 Q. And do you remember filling out a pain
20 diagram on November 7th, 2012?

21 A. Yeah. I would fill one out every time I see
22 him.

23 Q. Let me direct your attention to Exhibit 26,
24 which has been Bates-numbered JGL727, if there's no
25 objection.

1 THE COURT: Is it already in?

2 MR. STRASSBURG: Yeah. This is -- it's
3 already been admitted. But, I mean, there are other
4 objections that could be made, and I was just trying to
5 be --

6 THE COURT: That's fine. It's admitted.

7 MR. STRASSBURG: Not pushing my luck.

8 MR. ROBERTS: It's admitted. But, for the
9 record, we have no idea where it's been admitted
10 because it's not the official exhibit he's displaying.
11 So I can't verify its authenticity.

12 THE COURT: You said it's in Exhibit 26;
13 right?

14 MR. STRASSBURG: Well, let's see.

15 MR. ROBERTS: Which has about 600 pages.

16 MR. STRASSBURG: But, I mean, it's -- it's
17 Bates-numbered 737, JGL7 -- I mean, these are your
18 numbers.

19 MR. ROBERTS: That's not an exhibit number.

20 MR. STRASSBURG: Huh?

21 MR. ROBERTS: I might be able to find the
22 exhibit number, Your Honor.

23 MR. STRASSBURG: I don't mind waiting.

24 MR. ROBERTS: What did you say the Bates
25 number was?

1 MR. MAZZEO: It's GJL, like Glen J. Lerner,
2 737, November 7, 2012.

3 MR. ROBERTS: No objection, Your Honor. It's
4 Exhibit 26, page 130.

5 THE COURT: Okay.

6 BY MR. STRASSBURG:

7 Q. All right. And can you identify this as the
8 pain diagram you filled out on November 7th, 2012?

9 A. The numbers for the date are my handwriting.
10 And where it says my name, that's not my handwriting.
11 So I don't know.

12 I don't know why somebody else would write my
13 name on it other than myself.

14 Q. Maybe somebody in the office?

15 A. They could have.

16 Q. Yeah. Can we agree, though, that this is the
17 pain diagram that you filled out on November 7th, 2012?

18 A. Yeah.

19 Q. Okay. I mean, can you recognize, like, those
20 are your 6s and -- right?

21 A. Yeah.

22 Q. Okay. And you have indicated on this pain
23 diagram, taken a week after the party picture, your --
24 your pain levels as 6 out of 10, which is moderate
25 pain, moderate limitation in daily activities; true?

1 A. Yes.

2 Q. All right. Let me direct your attention to
3 29 in Exhibit C. Do you have that one? I think
4 it's -- do you mind?

5 MR. ROBERTS: I think Your Honor has already
6 ruled on this one.

7 THE COURT: Which one? Yeah. I don't think
8 so.

9 MR. STRASSBURG: I'd like to submit a
10 foundation, and you -- you can tell me if I have
11 succeeded.

12 THE COURT: I will let you make a record
13 outside the presence.

14 MR. STRASSBURG: If it's time, sure.

15 THE COURT: Under 40 -- under 48.035, I don't
16 think it's admissible.

17 MR. STRASSBURG: I'm sorry. I didn't hear.
18 What?

19 THE COURT: Under 48.035, this one is not
20 admissible.

21 MR. STRASSBURG: Okay.

22 THE COURT: Move on to the next one.

23 MR. STRASSBURG: All right.

24 BY MR. STRASSBURG:

25 Q. Ma'am, can I direct your attention to

1 Exhibit C, page 59? Do you have that? Got it? Okay.
2 Good.

3 Can you identify 50 -- I'm sorry -- 59 as a
4 true and correct copy of a page from your Facebook?

5 A. Yes.

6 Q. And do you recollect the people depicted in
7 this photograph?

8 A. Yes.

9 Q. Do you recollect the occasion?

10 A. This was a New Year's party in 2010.

11 Q. So this would have been a party before the
12 accident?

13 A. Yes, sir.

14 Q. Okay. All right. Directing your attention
15 to 58. Go back a page. Is -- let me make sure we're
16 on the same page. Is page 58, Exhibit C, is that a --
17 a true and correct copy of a page from your Facebook?

18 A. Yes.

19 Q. And do you recognize the individuals in --
20 depicted in that picture?

21 A. Yes.

22 Q. And do you recollect the occasion that
23 prompted the taking of this picture?

24 A. Yes.

25 Q. Do you recollect who took it?

1 A. My Emily.

2 Q. And do you recollect where it was taken?

3 A. At Dallas or at Amarillo's airport.

4 Q. I thought so. Okay. I thought it was an

5 airport. And do you recollect what prompted you and

6 your kids to be in Texas?

7 A. We went to see my brother.

8 Q. And what's his name?

9 A. Rogelio.

10 Q. Sorry?

11 A. Rogelio.

12 Q. And how old is he?

13 A. 34.

14 Q. And was the picture shown on page 58 of

15 Exhibit C taken on or about November 15th, 2012?

16 A. No.

17 Q. Do you recollect approximately when it was

18 taken?

19 A. It was -- it was hot in Vegas, but it was a

20 little cold there, so it could -- it was in -- it was

21 in -- it was -- the month was April, because we were

22 able to celebrate Sophia's birthday. So we went to

23 Texas around March, and it was -- spring break.

24 Q. Of 2012? 2013?

25 A. See, Lennay hadn't lost her teeth, so -- oh,

1 I can't -- I can't -- I can't tell you if it was '11 or
2 '12. I'm sorry.

3 Q. But, in any event, it was after the accident?

4 A. Yeah. It -- it must have been after the
5 accident.

6 Q. Okay. And can you tell us who the gentleman
7 is?

8 A. My brother.

9 Q. And how long did you stay in Texas visiting
10 your brother?

11 A. About a week.

12 Q. And so you -- you left from the Las Vegas
13 airport?

14 A. Yes.

15 Q. And how did you get to the airport? Did you
16 drive or take an Uber or take a -- I guess there wasn't
17 Uber back then. Forget that. Cab? What?

18 A. My friend Max drove us to the airport.

19 Q. All right. And how did you get from -- where
20 did he drop you off?

21 A. By the door.

22 Q. Okay.

23 A. By the door.

24 Q. Sorry. No, I thought you were done, and I
25 guess you weren't.

1 A. Sorry.

2 Q. And did you have luggage?

3 A. Yes.

4 Q. Did you recollect how -- how many? I mean,
5 do you travel light? Do you travel heavy? Would it
6 have been two bags? One bag? What?

7 A. We all had, you know, small rolling bags. So
8 it wasn't -- I think they had -- we had one for both
9 the little ones, one for myself, and one for Emily. I
10 would say fairly small bags.

11 Q. Did you manage your own bag, or did one of
12 the kids have to handle yours for you?

13 A. We were dropped off at the curb, and we
14 checked them as soon as we got there, so there was a
15 gentleman that helped us put them on the -- there's
16 this kind of like a -- a scale-type thing right by the
17 curb. So we didn't have to handle the luggage. He
18 carried it onto the scale and took them to the plane or
19 wherever the -- the luggage goes.

20 Q. So it was checked baggage?

21 A. Yes.

22 Q. Okay. And when you got to your destination,
23 were you able to recover your own bag yourself, or did
24 you need help to do that?

25 A. My brother picked them up for us.

1 Q. All right. On the airplane, were you able to
2 sit without having to get up regularly?

3 A. I got up a couple of times. Yes.

4 Q. How long was the flight?

5 A. I want to say two hours.

6 Q. Yeah. That's what I would say.

7 A. Yeah.

8 Q. Okay. So you got up a couple times?

9 A. Yeah.

10 Q. Go to the bathroom?

11 A. Yes.

12 Q. When you got to see your brother, how did you
13 spend that week?

14 A. Well, he lives in a really small, little town
15 in -- by Amarillo, Texas. And he runs a jiu-jitsu
16 school there, so my kids would take classes with him.
17 His fiance has a thrift store, you know, where I would
18 hang out with her and just sit around because there
19 isn't anything to do out there.

20 Q. And your brother's an instructor in this
21 jiu-jitsu school?

22 A. Yeah.

23 Q. Hey, I'm just doing my job now. Okay? All
24 right.

25 And when the kids were doing the classes at

1 the school, what were you doing?

2 A. I was hanging out with my brother's fiance at
3 the shop, because it's the shop and -- it's weird the
4 way that it's set up to where the garage is on the back
5 of it. So he had his classes in the back, and the shop
6 is in the front. So it's all one area.

7 Q. All right. And when you were hanging out
8 with his fiance, was she working in her shop?

9 A. Yeah. Behind the register.

10 Q. And were you helping around the shop?

11 A. No.

12 Q. What were you doing?

13 A. I was on vacation.

14 Q. All right. Good for you. So you were
15 sitting there, talking -- what? -- girl talk with your
16 brother's fiance?

17 A. Checking out the merchandise. I love thrift
18 stores.

19 Q. Really.

20 A. Yes.

21 Q. Any particular kind of thrift store that ...

22 A. Just like the non -- what's the word? The --
23 the ones that are -- you know, you donate your stuff to
24 them and it's -- it's not -- they don't benefit from
25 it. It's an association, so like Goodwill. And that's

1 the same thing that she does is she has people donate
2 to the store, and she donates it to people that are in
3 need. So I can't think of the word. I'm sorry.

4 Q. I'm trying to get clear here. So what do you
5 love about thrift stores? Is it the bargains, or is it
6 doing good -- good in the community, or is it something
7 else?

8 A. Both things. Because I -- I donate myself,
9 so it's, you know, you get -- when you're on budgets,
10 you try to find the best that you can, and you look for
11 them there. And I also, you know, like to give and to
12 know that it's going to, you know, like places where --
13 shelters for women and children and stuff like that.

14 Q. And do you frequent thrift shops in Clark
15 County?

16 A. Sometimes. Deseret Industries is one my
17 favorites.

18 Q. Really. And what do you buy there?

19 A. My -- my -- well, now she's 19. She loves
20 the stuff there. You know, she thinks she's hip and
21 cool, so I like to take Emily to shop around. And I do
22 myself buy shoes or whatever good stuff that I can't
23 afford that I can find there, so ...

24 Q. And how long have you been buying shoes at
25 that Deseret?

1 A. Whenever I get a chance to go and check it
2 out and if there's something good, so you got to get
3 lucky.

4 Q. So you got to go regular; right?

5 A. Not necessarily.

6 Q. So you -- you go -- you've been there since
7 the accident; right?

8 A. Yeah. A couple of times.

9 Q. Now, when you buy shoes at Deseret, do you
10 try them on first or you just pull them off and take
11 your chances?

12 A. I try them on.

13 Q. And do you usually have to just try on one
14 pair, or do you try on a number of them?

15 A. One or two, if I'm lucky.

16 Q. And when you put them on, do you sit down to
17 do that?

18 A. Oh, of course.

19 Q. And does the thrift shop have somebody to put
20 them on your feet, or do you have to do that yourself?

21 A. If it's a slip-on shoe like I'm wearing
22 today, it's very easy. If it's something that I have
23 to tie -- tie myself or whatever, then, if my kids are
24 with me, they will help me. If they're not with me,
25 half the time I won't -- I won't touch them.

1 Q. Okay. But that half of the time that you do
2 touch the tie-ons, you tie them on yourself?

3 A. Not all the time, no.

4 Q. So the times that you do tie them on
5 yourself, you then -- after you cinch up the laces,
6 then you can take the laces off and put them in the bag
7 or however so you can purchase them if you want them?

8 A. Most of the time it's my -- if my girls are
9 with me and if I'm trying something -- which is very
10 rare that I would try something on with laces -- then
11 the girls would help me. And you don't have to take
12 them -- take the laces off to pay for them.

13 Q. Let me move on to the next picture. I'll
14 just keep going if there -- nobody needs a break.

15 THE COURT: Everybody okay?

16 Not seeing any break signs.

17 MR. STRASSBURG: They look okay. All right.

18 BY MR. STRASSBURG:

19 Q. Let me direct your attention to page 28.

20 Can you identify page 28 of Exhibit C as a
21 true and correct copy of a page from your Facebook?

22 A. Yes.

23 Q. And do you recognize the individuals seated
24 on the -- on the floor there?

25 A. Yeah.

1 Q. And was this picture taken on or about the
2 time it was posted on November 20th, 2012?

3 A. No.

4 Q. When was it taken?

5 A. Oh, my God.

6 Q. Well, here. Before or after the accident?

7 A. Oh. Before the accident.

8 Q. Okay. Fair enough.

9 Let me direct your attention to page 56. Got
10 it? I know, they're kind of hard to see.

11 A. Yes.

12 Q. Yeah. That's it.

13 Can you identify page 56 of Exhibit C as a
14 true and correct copy from your Facebook?

15 A. Yes.

16 Q. And do you recognize the individuals depicted
17 in the picture?

18 A. Yes.

19 Q. Do you recognize where the picture was taken?

20 A. Yes.

21 Q. Do you recollect the occasion that prompted
22 the picture?

23 A. Lennay's birthday.

24 Q. Remember who took it?

25 A. Could have been my -- my cousin.

1 Q. All right. And it would have been Lennay's
2 birthday in 2012?

3 A. Yes.

4 Q. Okay. And was this picture taken on or about
5 December 13th, 2012, when it was posted?

6 A. Yes.

7 Q. Where was this picture taken?

8 A. At my apartment.

9 Q. I see. All right. And what -- were you
10 having a party for her?

11 A. No. We had a dinner. It was just the
12 family.

13 Q. And what members of the family showed up
14 other than the ones shown in the picture?

15 A. My cousin. That was it.

16 Q. So there was five of you?

17 A. Yeah.

18 Q. And who did the cooking?

19 A. We bought her pizza, I believe, that day.

20 Q. And who went and got the pizza, or did you
21 have it come in?

22 A. My cousin and Emily drove to -- to go pick up
23 pizza for us.

24 Q. All right. And -- and what activities did
25 you engage in as part of this party for your daughter?

1 A. We ate, we cut the cake, and she opened a
2 couple of presents.

3 Q. And who made the cake?

4 A. My cousin, Dulce.

5 Q. Uh-huh. And who wrapped the presents?

6 A. My Emily.

7 Q. And what did you do as part of the party?

8 A. I gave birth to her.

9 Q. Well, I -- I understand that's what gained
10 you admission to the party. What I'm trying to find
11 out is, what activities did you engage in during the
12 party that might give us a window into seeing your
13 level of physical functioning at this time?

14 A. I sang happy birthday.

15 Q. Seated or standing?

16 A. Seated.

17 Q. And how long were you able to sit at that
18 time?

19 A. However long "happy birthday to you" lasts.

20 Q. And then you had to stand up and relieve
21 your --

22 A. And help her cut the cake and all of those
23 things. Take the candles out of her mouth after she
24 tried to shove them in there, so ...

25 Q. Good for you. And cleanup, who did that?

1 A. Emily.

2 Q. All right. Let me direct your attention to
3 27. Yeah. You're on it.

4 Can you identify page 27 of Exhibit C as a
5 true and correct copy of your Facebook page?

6 A. Yes.

7 Q. Do you recognize the individuals depicted in
8 the picture?

9 A. Yes.

10 Q. Do you remember the occasion that prompted it
11 being taken?

12 A. We had to go pick up Dulce's car from a
13 junkyard.

14 Q. Okay. And can you identify the place the
15 picture was taken?

16 A. The junk -- the junkyard's office.

17 Q. Okay. And was this picture taken on or about
18 January 19, 2013, when it was posted?

19 A. I don't remember. I don't remember exactly.

20 Q. Well, I'll -- I'm sorry. Go on.

21 A. I'm sorry. Go ahead.

22 Q. I'll represent to you that your surgery was
23 on December 26th of 2012 in California.

24 A. Yes.

25 Q. And you were in the hospital for about five

1 days?

2 A. Correct.

3 Q. And then you came home?

4 A. Yeah.

5 Q. All right. And the posting on this picture
6 appears to be about three weeks after you would have
7 got home from your surgery.

8 Does that ring a bell with you as to
9 approximately when this photo was taken?

10 A. Yeah. About that time.

11 Q. So this photo would have been taken sometime
12 in January of 2013?

13 A. It may have been taken around that time.
14 Yeah.

15 Q. As best you can recall; right?

16 A. Yeah.

17 Q. So it would have been taken, is it fair to
18 say, shortly after your spinal fusion surgery?

19 A. Yes.

20 Q. Okay. Now, you -- you -- you appear to be
21 wearing a safety vest.

22 A. Yeah.

23 Q. And how is it that you came to be wearing
24 that?

25 A. We asked one of the workers to let us borrow.

1 Q. And why did you want to borrow one?

2 A. Just to look like construction workers. We

3 thought it was --

4 Q. Cool.

5 A. Cute.

6 Q. Were you able to put the vest on yourself, or

7 did you need help?

8 A. No. Dulce helped me put it on.

9 Q. And -- okay. And did you ask for a hat too?

10 A. We did.

11 Q. And --

12 A. None available.

13 Q. What's that?

14 A. It wasn't -- there wasn't any available.

15 Q. Okay. Boots?

16 A. No.

17 Q. No. Okay.

18 A. No, we were okay with that.

19 Q. All right. And who drove to the junkyard,

20 you or Dulce?

21 A. Dulce drove that time.

22 Q. And you rode with her?

23 A. Yeah.

24 Q. Front or back?

25 A. In the front.

1 Q. Belted in?

2 A. Yes.

3 Q. And how long was the trip over?

4 A. We lived -- we lived very close to the -- to

5 the junkyard, so maybe ten minutes.

6 Q. And what kind of car?

7 A. My TrailBlazer.

8 Q. Okay. And you were able to get in and out of

9 the TrailBlazer with no problem?

10 A. No. She helped me. She helped me up on

11 the -- you know, to be able to get up on the step and

12 then to get into the passenger side.

13 Q. And did you have to use crutches? A cane? A

14 walker?

15 A. No. She held my hand. I was okay.

16 Q. So you were able to walk from the TrailBlazer

17 to the office of the junkyard?

18 A. We parked right in front. Yes.

19 Q. And how long were you at the junkyard?

20 A. Not long. She needed stuff out of the car.

21 I had -- she had asked me to register this vehicle in

22 my name, so she needed me to come with her to be able

23 to get her stuff out of the vehicle. She had her work

24 stuff in it. And so I -- I went and I -- we waited for

25 somebody to get her stuff, and we left. So it wasn't

1 that very -- it wasn't very long.

2 Q. And did you help her get her stuff?

3 A. No.

4 Q. What stuff?

5 A. Uniforms, her makeup bag, or stuff she would
6 keep in the car that she needed, you know, on a daily
7 basis.

8 Q. Who drove home, you or her?

9 A. She did.

10 Q. And why was she driving your car?

11 A. Because I was uncomfortable driving.

12 Q. And why were you uncomfortable driving?

13 A. Because I had surgery.

14 Q. Yeah. But were you uncomfortable driving
15 because -- I mean, there could be a number of reasons.
16 You know, like, you were on pain meds and you didn't
17 trust yourself behind the wheel, or it was
18 uncomfortable for you to sit in the driver's seat
19 because of the seat mechanics.

20 In your case, which was it?

21 A. All of the above.

22 Q. So at this time, when this picture was taken,
23 you were still on pain medications from your surgery;
24 right?

25 A. Oh, yes.

1 Q. And the incision hadn't healed yet; true?

2 A. The incision closed fairly quickly.

3 Q. How quickly?

4 A. I mean, I was able to get, like, to wash
5 myself from, you know, my back and could tell that it
6 was -- it had sealed like two weeks after surgery. It
7 was pretty fast.

8 Q. Were you able to take a shower or bath?

9 A. A shower.

10 Q. Okay. And so is it fair to say that two
11 weeks after the surgery you were able to negotiate a
12 shower stall and take a shower to --

13 A. Get in --

14 Q. -- cleanse yourself?

15 A. Get in with Emily's help, get out with her
16 help, and just, you know, just careful.

17 Q. And you were able to wash yourself?

18 A. Not, you know, to the movement or to try to
19 get down to get -- to get my legs or whatever was
20 fairly difficult, but I started trying to do it after,
21 like, the second week.

22 Q. And your frame of mind was good in
23 January 2013; true?

24 A. I was very hopeful, yes.

25 MR. STRASSBURG: Permission to show 27. I

1 guess I'm saying I move the admission of 27.

2 MR. ROBERTS: No objection.

3 THE COURT: 27 will be admitted. You can
4 show it.

5 (Whereupon, Defendant's Exhibit C27 was
6 admitted into evidence.)

7 MR. STRASSBURG: Now, I take it -- I take it
8 you want it redacted to leave out the other statements;
9 right?

10 THE COURT: Probably a good idea.

11 MR. STRASSBURG: Okay. No problem.

12 BY MR. STRASSBURG:

13 Q. All right. So in January of 2013, you went
14 to see Dr. Kidwell -- remember that? -- at the end of
15 the month?

16 Oh, I'm sorry. Can --

17 A. I'm getting old.

18 Q. Huh?

19 A. I said I'm getting old.

20 Q. Hey, welcome to my world.

21 January 30, you went to see Kidwell --

22 A. Okay.

23 Q. -- and you indicated your pain level was a 7
24 out of 10. Remember that?

25 A. Okay.

1 Q. You know, I wanted to ask you, could you go
2 to page -- you all right?

3 A. Yeah.

4 Q. Do you need a break?

5 A. No. I'm fine.

6 Q. Page 78. Yeah, that's it.

7 Bring back memories? I see you're smiling.

8 A. Yeah.

9 Q. All right. Page 78, is that a true and
10 correct copy, Exhibit C, of a page of your Facebook
11 posted June 1st, 2011?

12 A. Yes, it is.

13 Q. Okay. You recollect -- of course, these are
14 your children; right?

15 A. Yeah.

16 Q. And do you recollect the location the picture
17 was taken?

18 A. Circus Circus.

19 Q. All right. And do you know who took the
20 picture?

21 A. The ride has a camera that takes the picture,
22 and then you get it, like, in a -- like, in a
23 folder-type thing.

24 Q. Oh, I see. And where were you when this
25 picture was taken?

1 A. Standing, watching them ride the ride, on the
2 outside.

3 Q. And were they riding the ride on or about
4 June 1st, 2011?

5 A. No.

6 Q. Was it before or after the incident?

7 A. This is, like, four years before the
8 accident.

9 Q. Before?

10 A. Yeah.

11 Q. Okay.

12 A. Lennay was about three.

13 Q. Three?

14 A. Three or two.

15 Q. Is she the brave one?

16 A. Yes, she is.

17 Q. Okay. Let me show you page 82. Yeah, that's
18 it.

19 All right. Directing your attention to
20 Exhibit C, page 82, can you identify this as a true and
21 correct copy of a page from your Facebook?

22 A. Yeah.

23 Q. And do you recollect the occasion that
24 prompted this photograph to be taken?

25 A. We were out at a fast-food restaurant.

1 Q. Do you remember which one?

2 A. Whataburger.

3 Q. Okay. Whataburger?

4 A. Yeah.

5 Q. Okay. And was this the first time you'd been

6 to this restaurant, or is this a regular?

7 A. The first time.

8 Q. What prompted you to go to this restaurant

9 for the first time?

10 A. Just to try it out.

11 Q. How is it?

12 A. The burgers are pretty good. The meat in

13 Texas is amazing.

14 Q. And where was this picture taken?

15 A. I believe it's Amarillo.

16 Q. In Texas?

17 A. Yeah.

18 Q. And was this picture taken on or about

19 March 30th, 2013, the day it was posted?

20 A. It could have. I'm not -- I'm not sure.

21 Q. All right. Fair enough. Do you recollect a

22 trip to Texas in March of 2013, about 2 1/2 months

23 after surgery?

24 A. We went to Texas, like, three months after

25 surgery.

1 Q. All right.

2 A. So yeah.

3 Q. And was that to visit your brother?

4 A. No. That was to see my mom.

5 Q. Okay. And can you identify the people in the

6 photo for us?

7 A. My mother, my three girls, and my cousin

8 Dulce.

9 Q. Okay. And when -- on this trip to Texas, did

10 you stay with your mom or with someone else?

11 A. With my brother. With Roger, with Rogelio.

12 Q. And how old was your mom back then?

13 Oh, never mind. It's none of my business.

14 A. Sorry.

15 Q. Forget it.

16 Was your mom living independently, or was she

17 in assisted living or some other place?

18 A. They had -- she had gotten out of the

19 hospital, like, a week prior to the picture. And she

20 was living in a nursing home.

21 Q. And were you there to visit her in the

22 nursing home?

23 A. No. I was there because she was in intensive

24 care in the hospital.

25 Q. So did you come visit her when she was in

1 intensive care, and by the time you arrived she had
2 been moved to secondary treatment? Or did you
3 accompany the -- were you there for that transition?

4 A. They had -- they had given my brother a
5 misdiagnosis, and so she was in the hospital. And we
6 were told that she was -- that she had days to live.
7 And when they found out that the results of the tests
8 that they did were wrong, they just waited for her to
9 get back to her normal mental state, released her to
10 the nursing home, who then allowed us to take her out.

11 Q. And did you help with her care in the home?

12 A. No.

13 Q. Did you go visit her?

14 A. Of course.

15 Q. Did you stay with her?

16 A. I mean, as much as they allowed us to be
17 around, you know, after hours, we would -- we would be
18 there.

19 Q. Did you take her food or clothes or stuff to
20 read?

21 A. Anything she wanted.

22 Q. And how did you get to Texas? Flight or
23 drive?

24 A. We had to drive.

25 Q. And who did the driving?

1 A. I did most of it. Dulce was able to help on
2 and off.

3 Q. And how far is it to Texas?

4 A. Thirteen hours.

5 Q. Ooh. And did you drive it all in one shot,
6 or did you stay overnight someplace?

7 A. No. We -- I was told that she was going to
8 go.

9 Q. So you powered through it?

10 A. I sure did.

11 Q. So how long could you drive at one time
12 before you had to stop?

13 A. You know, I took, like, half my dosage of
14 medication to try to be able to stay focused and be
15 okay driving. So every hour, every two hours maybe, I
16 would stop and just stretch my legs and -- you know, to
17 change positions and then get right back in the car.
18 Because we drove overnight.

19 Q. So you'd stop every hour or two and get out,
20 walk around the car?

21 A. Yeah.

22 Q. And then get back in?

23 A. Yes.

24 Q. And what med were you taking at that time?

25 A. I couldn't tell you exactly what it was at

1 the time. I'm not sure if I had transitioned to
2 tramadol or not.

3 Q. Here's the part I don't get.

4 Dulce knows you just -- you had back surgery,
5 like, 2 1/2 months earlier; right?

6 MR. ROBERTS: Objection to form.

7 BY MR. STRASSBURG:

8 Q. But you did all the -- you did nearly all the
9 driving.

10 Why was that?

11 THE COURT: Overruled.

12 THE WITNESS: This was, like, three months --
13 a little over three months after surgery. And I was
14 scared for somebody else to be driving. And it was the
15 worst feeling ever not to have control after what I had
16 been through. I couldn't see myself letting a teenager
17 be in charge of a car where I had my children in it.
18 So it was just a matter of being comfortable enough
19 mentally to -- to let her drive. And that was very
20 difficult.

21 BY MR. STRASSBURG:

22 Q. Okay. Now, the picture we're looking at has
23 your -- has your mom in it; right?

24 A. Yes.

25 Q. So I'm just wondering, is this the occasion

1 where you took her home from the nursing home?

2 A. No.

3 Q. Okay. But it was after you took her home;
4 right? Or was she furloughed?

5 A. I'm sorry?

6 Q. I'm sorry. Was she furloughed from the
7 nursing home for a family outing, or had she already
8 been released from the home and you guys just decided
9 to take her out?

10 A. The nursing home gave her permission to leave
11 for a few hours.

12 Q. Okay. And who paid for the meal?

13 A. I did.

14 MR. STRASSBURG: Permission to show -- I'm
15 sorry. I move the admission into evidence of
16 Exhibit C, page 82.

17 MR. ROBERTS: No objection, Your Honor.

18 THE COURT: 82 will be admitted.

19 (Whereupon, Defendant's Exhibit C82 WAS
20 admitted into evidence.)

21 MR. STRASSBURG: As redacted; correct?

22 THE COURT: Yeah, just the picture.

23 MR. STRASSBURG: Yes, sir. I can do that.

24 MR. MAZZEO: Judge, can we approach for a
25 moment?

1 THE COURT: Sure.

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

4 THE COURT: Let's give you a break for a few
5 minutes, folks. During our break, you're instructed
6 not to talk with each other or with anyone else about
7 any subject or issue connected with this trial. You
8 are not to read, watch, or listen to any report of or
9 commentary on the trial by any person connected with
10 this case or by any medium of information, including,
11 without limitation, newspapers, television, the
12 Internet, or radio.

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

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

22 Let's say 12 minutes.

23 JUROR: Nice arbitrary number.

24 THE COURT: I don't know where Curt is, if
25 he's taking you to the back or the front side. You're

1 going to probably have to go out to the front this
2 time.

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

5 THE COURT: All right. Do we need to do
6 anything outside the presence on the record, Counsel?

7 MR. MAZZEO: No, Judge.

8 MR. TINDALL: Yes, Your Honor. The record I
9 would like to make, Your Honor, is Mr. Strassburg
10 offered into evidence the photograph of --

11 THE COURT: This is our next witness?

12 MR. SEMENZA: No. I'm counsel for the next
13 witness.

14 THE COURT: Okay.

15 MR. TINDALL: -- the photograph of Ms. Garcia
16 and her friend -- I guess her friend -- getting some
17 pretty close contact. And the Court ruled that that
18 was more -- well, the Court ruled NRS 48.035.

19 But what -- what part of that is the Court
20 saying is the part it's ruling on? Prejudicial and
21 probative? Confusing? Misleading? Which?

22 THE COURT: I don't know that there's any
23 relevance. Any relevance, I think, is outweighed by
24 the confusion that the jury might get with two ladies
25 playing tongues with each other. I don't think --

1 yeah, it's just -- it's confusing. It's prejudicial.
2 It's -- and there's no relevance.

3 MR. TINDALL: So it's not only 48.035 but
4 48.015 as well; fair?

5 THE COURT: Yeah.

6 MR. TINDALL: Okay. Thank you.

7 THE COURT: I don't see the relevance under
8 15. But even if it was relevant for some other reason,
9 I think it's over -- overly prejudicial.

10 MR. TINDALL: So to just further that portion
11 of the record a little bit, respectfully --

12 THE COURT: We're talking about the picture
13 with the two ladies with the tongues; right?

14 MR. TINDALL: I am.

15 Respectfully, isn't the Court putting its own
16 values onto the jury? Because, number one, this is the
17 United States of America; and last time I checked,
18 there was nothing illegal about two women sticking
19 their tongues in each other's mouths. And that's -- I
20 think it's a morality judgment. There's nothing per se
21 prejudicial about that.

22 If somehow that was illegal, that would be
23 prejudicial than probative. But since it isn't,
24 that -- I submit that's a function for the jury to
25 determine.

1 MR. MAZZEO: They're just touching tongues,
2 Your Honor. She's not sticking it down her throat.

3 THE COURT: There's no relevance to it.

4 MR. SMITH: For the record, Mr. Mazzeo said
5 that without sarcasm.

6 THE COURT: What else? Anything else on the
7 record, guys? No?

8 All right. Off the record.

9 (Whereupon a short recess was taken.)

10 THE MARSHAL: All rise for the presence of
11 the jury.

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

14 THE COURT: Go ahead and be seated. Welcome
15 back, folks. We're back on the record, Case
16 No. A637772.

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

19 MR. MAZZEO: Yes, Your Honor.

20 MR. SMITH: Yes, Your Honor.

21 THE COURT: So because we want to keep you
22 guys on your toes and because this has happened with
23 just about every witness, we're going to call a
24 different witness in the middle of this witness's
25 testimony.

1 So Ms. Garcia's not finished yet, but we have
2 another witness that the defense is going to call out
3 of order. So the plaintiff is still not done with
4 their case, but this is a witness being called in the
5 defendant's case again. So there you go.

6 Who do you got, Mr. Mazzeo?

7 MR. MAZZEO: Yes, I have Jonathan Davis,
8 Judge.

9 THE COURT: Come on up, sir.

10 MR. SEMENZA: Your Honor, may I just note my
11 appearance for the record?

12 THE COURT: Go ahead.

13 MR. SEMENZA: I'm L.J. Semenza on behalf of
14 the witness Jonathan Davis.

15 THE COURT: Thank you.

16 Come all the way up on the witness stand, if
17 you would. Once you get there, remain standing and
18 raise your right hand to be sworn.

19 THE CLERK: You do solemnly swear the
20 testimony you're about to give in this action shall be
21 the truth, the whole truth, and nothing but the truth,
22 so help you God.

23 THE WITNESS: Yes.

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

1 THE WITNESS: Jonathan Davis, J-o-n-a-t-h-a-n
2 D-a-v-i-s.

3 THE COURT: Go ahead and be seated. There's
4 a microphone there in front of you. Try to talk into
5 that as much as possible.

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

7 THE COURT: Go ahead.

8 DIRECT EXAMINATION

9 BY MR. MAZZEO:

10 Q. Mr. Davis, you are here pursuant to a
11 subpoena; is that correct?

12 A. Correct.

13 Q. And I know you were subpoenaed to come to
14 court today at 3:00 o'clock. I apologize to you for
15 the wait.

16 Would you tell us who your employer is.

17 A. Station Casinos.

18 Q. And which Station casino are you currently
19 working at?

20 A. Fiesta Henderson.

21 Q. And where were you working in the fall of
22 2014?

23 A. Fiesta Rancho.

24 Q. Okay. And what was your position at Fiesta
25 Rancho in the fall of 2014?

1 A. Cage credit and collection manager.
2 Q. Okay. And which department is that in?
3 A. Cage department.
4 Q. Okay. How many employees were you in charge
5 of at that time?
6 A. Roughly 20.
7 Q. And -- and what were the names of the
8 positions for the employees in your department -- the
9 different positions that employees had in your
10 department?
11 A. Cashiers, main bankers, supervisors, shift
12 managers.
13 Q. Okay. And did you know -- or was one of your
14 employees at the time Emilia Garcia?
15 A. Yes.
16 Q. And was she employed at Fiesta Rancho in
17 2014?
18 A. I'm not sure of the date, but, yes, she was
19 employed at Fiesta Rancho.
20 Q. Okay. In what department?
21 A. The cage.
22 Q. And what was her position?
23 A. She was hired as an assistant shift
24 supervisor.
25 Q. And if I was to tell you that she was hired

1 somewhere around September of 2014, would you have any
2 reason to dispute that?

3 A. I don't recall the date.

4 Q. Okay. Fair enough. And was she hired
5 full-time or part-time?

6 A. Full-time.

7 Q. And do you recall what her schedule was in
8 terms of workdays and hours?

9 A. I know we hired her for the swing shift,
10 which is between 2:00 and 4:00 p.m. up to 10:00 to
11 12:00 a.m.

12 Q. Okay. And did the duties for the position
13 at -- for which she was hired include the ability to
14 lift, bend, kneel, reach, lift bags of coins weighing
15 up to 25 pounds when weighing and placing in the
16 storage area?

17 A. Yes.

18 Q. And would these functions be repetitive and
19 repeated throughout the day?

20 A. Yes.

21 Q. Okay. Now, did you interview Ms. Garcia for
22 this position?

23 A. Yes.

24 Q. And at the time of the interview for this
25 position, did Ms. Garcia express to you any limitations

1 that she anticipated having in being able to perform
2 any of the job requirements?

3 A. No.

4 Q. At the time of the interview, did Ms. Garcia
5 disclose to you any physical disabilities of any
6 nature?

7 A. I don't recall.

8 Q. Okay. Okay. And, Mr. Davis, I know that --
9 and I thank you for coming today to testify.

10 And you also recall testifying at a
11 deposition with regard to this case?

12 A. Yes.

13 Q. Okay. And I'm just going to direct your
14 attention --

15 MR. MAZZEO: And can I have -- can I have a
16 copy for the witness that I'm going to ask that it be
17 published?

18 THE COURT: Do you have a copy for us?

19 MR. MAZZEO: This is actually -- I'm going to
20 provide a copy to the Court. I don't have the original
21 right now, but I'm going to provide a copy to the court
22 clerk.

23 THE COURT: Okay.

24 MR. MAZZEO: If I can present this to the
25 witness, Judge?

1 THE COURT: You guys have any problem with
2 this?

3 MR. SMITH: The one that's highlighted with
4 his notes on it?

5 MR. MAZZEO: Well, there's no notes on it,
6 Judge, but it is highlighted. And that's why I'm going
7 to provide a clean copy to the Court.

8 THE COURT: Okay. He doesn't have a copy --
9 a clean copy to show to the witness.

10 MR. SMITH: That's fine.

11 THE COURT: Go ahead.

12 MR. MAZZEO: Thank you.

13 BY MR. MAZZEO:

14 Q. And just to refresh your recollection,
15 Mr. Davis -- and I know that -- you haven't reviewed a
16 copy of your deposition transcript prior to testifying
17 today; right?

18 A. No.

19 Q. Okay. And so, in order to be fair, I just
20 want to direct your attention, then, to page 36,
21 line 1. If you could just turn to that and take a
22 moment to read it. And it's -- it's actually starting
23 at line 1, and there's a question and then an answer
24 that follows.

25 A. Okay.

1 Q. And does that refresh your recollection as to
2 whether Ms. Garcia disclosed to you any physical
3 disabilities of any nature at the time of the
4 interview?

5 A. I stated no.

6 Q. Okay. And did Ms. Garcia disclose to you
7 that she would not be able to do any aspects of the job
8 at the time of the interview?

9 A. No.

10 Q. Did Ms. Garcia disclose to you that she would
11 not be able to perform any -- any of the physical
12 requirements expected of her for her position?

13 A. No.

14 Q. During her employment, did Ms. Garcia ever --
15 ever express any concerns in being able to complete any
16 of the job tasks?

17 A. No.

18 Q. Okay. And during her employment, did
19 Ms. Garcia express any physical disabilities to you?

20 A. No.

21 Q. Did -- at any time during Ms. Garcia's
22 employment, did she ever request that any physical
23 accommodations be made for her?

24 A. No.

25 Q. And do you recall how long Ms. Garcia worked

1 at Fiesta Rancho from the start of her employment?

2 A. I don't know the exact time length. I would
3 guess approximately eight to ten weeks.

4 Q. Okay. And when she was hired, she was placed
5 on a -- in a probationary period?

6 A. Correct.

7 Q. Okay. And how long was that probationary
8 period?

9 A. Ninety days.

10 Q. And was Ms. Garcia able to complete the
11 probationary period?

12 MR. SMITH: Objection. Relevance.

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

14 THE WITNESS: No.

15 BY MR. MAZZEO:

16 Q. And -- and what -- if you recall, Mr. Davis,
17 what, if any, concerns or issues did Ms. Garcia have in
18 being able to complete her probationary period?

19 MR. SMITH: Objection. Relevance.

20 THE COURT: Come on up.

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

23 MR. MAZZEO: Judge, I will withdraw the
24 question.

25 THE COURT: Thank you.

1 BY MR. MAZZEO:

2 Q. Mr. Davis, did there come a time when
3 Ms. Garcia was terminated from employment at Fiesta
4 Rancho?

5 MR. SMITH: Objection. Relevance. And what
6 we just discussed at the bench.

7 MR. MAZZEO: Your Honor -- approach? Okay.

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

10 THE COURT: Objection sustained.

11 MR. MAZZEO: May I proceed, Your Honor?

12 THE COURT: Yep.

13 BY MR. MAZZEO:

14 Q. Mr. Davis, you had indicated that Ms. Garcia
15 was not able to complete the probationary period; is
16 that correct?

17 A. Correct.

18 Q. And there -- did there come a time where
19 Ms. Garcia was separated from working at Fiesta Rancho?

20 A. Yes.

21 Q. And Ms. Garcia's separation from working at
22 Fiesta Rancho, did it have anything to do with any
23 physical limitations or condition or disabilities?

24 A. No.

25 Q. Okay. I'll pass the witness.

1 THE COURT: Mr. Strassburg, Mr. Tindall,
2 anything?

3 MR. TINDALL: Nothing, Your Honor.

4 THE COURT: Plaintiffs?

5

6 CROSS-EXAMINATION

7 BY MR. SMITH:

8 Q. Mr. Davis, you only knew Ms. Garcia for the
9 short eight to ten weeks she worked at Fiesta Rancho;
10 right?

11 A. Yes, sir.

12 Q. You don't know her outside of that?

13 A. No, sir.

14 Q. During the time that she worked there, you
15 worked on the day shift; correct?

16 A. Correct.

17 Q. Your hours were 8:00 to 4:00?

18 A. Around there.

19 Q. She worked swing shift; right?

20 A. Yes.

21 Q. So she worked 4:00 -- 4:00 to midnight?

22 A. Yes.

23 Q. You know what? Let me ask you this: You
24 testified with -- with Counsel that Ms. Garcia didn't
25 tell you at the interview she was physically unable to

1 do the job; right?

2 A. Correct.

3 Q. If she had told you that she was physically
4 unable to meet the requirements of the job, would you
5 have hired her?

6 A. If someone told me they would not be able to
7 do the job that I was hiring for, I probably would not
8 be able to hire them.

9 Q. That's all the questions I have.

10

11 DIRECT EXAMINATION

12 THE COURT: Mr. Mazzeo?

13 MR. MAZZEO: Yes, Your Honor.

14 BY MR. MAZZEO:

15 Q. Mr. Davis, at any time during Ms. Garcia's
16 employment at Fiesta Rancho, within that probationary
17 period, was -- was there -- did there ever come a time
18 where Ms. Garcia was unable to perform her job duties
19 insofar as the physical aspects of her job?

20 MR. SMITH: Outside the scope of cross.

21 THE COURT: I think it's still valid.

22 Overruled.

23 THE WITNESS: Not that I'm aware of.

24 MR. MAZZEO: Thank you. Nothing further.

25 THE COURT: Any more?

1 MR. TINDALL: Nothing, Your Honor.

2 RECROSS EXAMINATION

3 BY MR. SMITH:

4 Q. Since you and Ms. Garcia worked on different
5 shifts, you never saw her lift anything at work; right?

6 A. I don't recall seeing her lift anything.

7 Q. And you never saw her bend over at work;
8 right?

9 A. I don't recall seeing her bend over at work.

10 MR. SMITH: That's all I have, Your Honor.

11 MR. MAZZEO: Nothing further.

12 THE COURT: Anything from our jurors? Not
13 seeing any hands.

14 Thank you, sir.

15 THE WITNESS: Thank you.

16 THE COURT: Come on up, Counsel.

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

19 THE COURT: All right, folks, we're going to
20 give you an early out today. We're going to start
21 tomorrow morning at 9:00 o'clock. I know that there
22 was one juror that had something going on tomorrow
23 afternoon, so we're going to plan on breaking early
24 tomorrow, about 3:30. That gives you a little bit of
25 heads-up. We will be back, I'm sure, on Monday.

1 During our break this evening, you're
2 instructed not to talk with each other or with anyone
3 else about any subject or issue connected with this
4 trial. You are not to read, watch, or listen to any
5 report of or commentary on the trial by any person
6 connected with this case or by any medium of
7 information, including, without limitation, newspapers,
8 television, the Internet, or radio.

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

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

18 See you tomorrow at 9:00.

19 (The following proceedings were held
20 outside the presence of the jury.)

21 THE COURT: We're outside the presence of the
22 jury. Anything we need to put on the record, guys?

23 MR. TINDALL: Not from us, Your Honor.

24 MR. MAZZEO: Not on the record but just
25 logistics for tomorrow.

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THE COURT: Okay. Let's go off the record.
(Thereupon, the proceedings
concluded at 4:29 p.m.)

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CERTIFICATE OF REPORTER

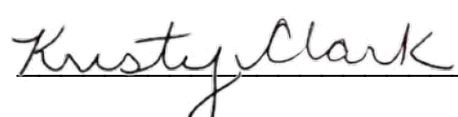
STATE OF NEVADA)
COUNTY OF CLARK) ss:

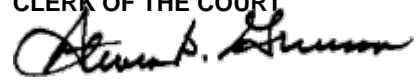
I, Kristy L. Clark, a duly commissioned
Notary Public, Clark County, State of Nevada, do hereby
certify: That I reported the proceedings commencing on
Thursday, March 3, 2016, at 10:10 o'clock a.m.

That I thereafter transcribed my said
shorthand notes into typewriting and that the
typewritten transcript is a complete, true and accurate
transcription of my said shorthand notes.

I further certify that I am not a relative or
employee of counsel of any of the parties, nor a
relative or employee of the parties involved in said
action, nor a person financially interested in the
action.

IN WITNESS WHEREOF, I have set my hand in my
office in the County of Clark, State of Nevada, this
3rd day of March, 2016.


KRISTY L. CLARK, CCR #708



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

5 DISTRICT COURT
6 CLARK COUNTY, NEVADA

7 * * * * *

8
9 EMILIA GARCIA, individually,)
10 Plaintiff,)
11 vs.)
12 JARED AWERBACH, individually;)
13 ANDREA AWERBACH, individually;)
14 DOES I-X, and ROE CORPORATIONS)
15 I-X, inclusive,)
Defendants.)
16

17 REPORTER'S TRANSCRIPT
18 OF
19 JURY TRIAL
20 BEFORE THE HONORABLE JERRY A. WIESE, II
21 DEPARTMENT XXX
22 DATED FRIDAY, MARCH 4, 2016
23
24 REPORTED BY: KRISTY L. CLARK, RPR, NV CCR #708,
25 CA CSR #13529

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1 LAS VEGAS, NEVADA, FRIDAY, MARCH 4, 2016;
2 9:12 A.M.

3
4 P R O C E E D I N G S
5 * * * * *
6

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

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

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

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

16 MR. ROBERTS: Yes, Your Honor.

17 MR. MAZZEO: Yes, Your Honor.

18 THE COURT: All right. Yesterday, we put
19 Mr. Davis on in the middle of Ms. Garcia's testimony.
20 My understanding is we're going to have Ms. Garcia come
21 take the stand again this morning, and we are in
22 Mr. Strassburg's cross-examination still.

23 Ms. Garcia, if you want to come back up. I'm
24 going to have you sworn again because we had another
25 witness in between.

1 THE WITNESS: No problem.

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

6 THE WITNESS: I do.

7 THE CLERK: State your name and spell it for
8 the record, please.

9 THE WITNESS: Emilia Garcia. E-m-i-l-i-a
10 G-a-r-c-i-a.

11 THE COURT: Thank you, ma'am.

12

13 CROSS-EXAMINATION

14 BY MR. STRASSBURG:

15 Q. Good morning.

16 A. Good morning.

17 Q. Showing you what's been marked and admitted
18 as Exhibit C72 -- should be on your screen there --
19 which we've established was taken on or about
20 July 22nd, 2011.

21 Do you recollect going to your chiropractor,
22 Dr. Gulitz, on January 12th, 2011?

23 A. No, sir. I'm sorry.

24 Q. Okay. Let me see if I can refresh your
25 recollection.

1 A. Okay.

2 Q. Exhibit 15, which is from his file, do you
3 recollect filling out this activity discomfort
4 difficulty checklist in 2012?

5 A. Yeah. That's what the sheet says.

6 Q. Okay. And is that your handwriting?

7 A. Yeah.

8 Q. Okay. And is -- what -- what is the date of
9 this document?

10 A. It's either a 7 or a 2. 1/12.

11 Q. In 2012?

12 A. Yes, sir.

13 Q. All right. And you're asked about driving,
14 and you indicated at that time that that was major
15 discomfort or difficulty; true?

16 A. With long trips, yes.

17 Q. Say again?

18 A. Yes.

19 Q. Long trips?

20 A. Yes, sir.

21 Q. And then, when you went to see Dr. Kidwell --
22 first time, August 15, 2012, Plaintiff's Exhibit 26,
23 GJL709. And at that time you were asked about
24 traveling. And you indicated that pain restricted all
25 forms of travel; right? Do you see that?

1 A. And what date was that? I'm sorry.

2 Q. August 15, 2012.

3 A. Okay.

4 Q. So you indicated at that time that the pain
5 was restricting all forms of travel?

6 A. That that's how I felt in long trips, and
7 that's how it's been since the accident. So yes, sir.

8 Q. Okay. And did all forms of travel include
9 airplanes, vehicles, all that?

10 A. Yes, sir.

11 Q. Thank you.

12 And at that time, on August 15, 2012, showing
13 you page GJL708, your pain diagram, you're indicating
14 that you're 8 out of 10 right leg, 7 out of 10 left
15 leg; right?

16 A. Yeah.

17 MR. ROBERTS: Mr. Strassburg, could we have
18 an exhibit number? This is undated.

19 MR. STRASSBURG: Yeah. This is Kidwell
20 Exhibit 26.

21 MR. ROBERTS: Page number?

22 MR. STRASSBURG: GJL708. Pain Institute of
23 Nevada.

24 MR. ROBERTS: Pages 1 to 733.

25 MR. STRASSBURG: Can we find that for you?

1 MR. ROBERTS: Okay. Thank you. Page 101.

2 BY MR. STRASSBURG:

3 Q. Thank you. All right.

4 And you got better from that; right?

5 A. Yeah.

6 Q. In fact, when I took your deposition on
7 April 16th, 2014, you could pretty much drive wherever,
8 whenever you wanted to; true?

9 A. It was still discomfort, but -- there was
10 discomfort there, but, you know, it's a form of daily
11 living, and I have gotten used to it.

12 Q. All right. Do you remember in your
13 deposition I asked you, "And, in fact, you can pretty
14 much drive wherever you want to go, right?" And you
15 said, "Yes." True?

16 A. Sure. Yeah.

17 Q. And we did that on April 16, 2014; true?

18 A. Yes.

19 Q. Now, also, when you went to see Kidwell, he
20 took a history from you. Do you remember that?

21 A. He took what? I'm sorry.

22 Q. A history. He asked you questions about how
23 you were doing?

24 A. Yeah.

25 Q. And let me direct your attention to a consult

1 dated August 15, 2012.

2 Isn't it true that you told Kidwell that you
3 were unable to sit at that time?

4 MR. ROBERTS: Objection. Mischaracterizes
5 the record.

6 THE COURT: Overruled. She can answer.

7 THE WITNESS: Yeah. I -- I'm unable to sit
8 for long periods of time.

9 BY MR. STRASSBURG:

10 Q. And your pain at that time, you related to
11 Kidwell, was 8 out of 10?

12 A. Yes, sir.

13 Q. And you were experiencing trigger points, is
14 that true, in your neck area?

15 A. Yeah.

16 Q. Okay. All right. Let me direct your
17 attention to page 33 in the book.

18 And you -- can you identify this as a true
19 and correct copy of your Facebook page --

20 A. Yes, sir.

21 Q. -- with the date of December 2, 2011?

22 A. The date is what?

23 Q. December 2nd, 2011.

24 A. I don't remember that. I don't know if that
25 was the day that the picture was taken.

1 Q. Okay. Let's take it a step at a time.

2 You're way ahead of me.

3 What I'm asking you is: Could you identify
4 this as a true and correct copy of your Facebook page
5 with the date of December 2, 2011, on the Facebook
6 page?

7 A. Yes.

8 Q. And can you recollect whether the -- the
9 picture of yourself is -- was taken about that period
10 of time?

11 A. I couldn't tell you that. I'm sorry.

12 Q. Can you recollect whether you were able to be
13 photographed sitting in a chair in December 2011?

14 A. I could have, yes.

15 Q. And does the photo on this page, Exhibit C33,
16 does that depict how you would have seated yourself at
17 that time in a chair of this type?

18 A. Yes.

19 Q. All right. And this kind of chair is -- it's
20 not a -- a rigid chair with, you know, a stiff back and
21 lots of cushions. It's -- it's like a -- how would you
22 describe it, kind of a lawn chair?

23 A. I don't know if that's what that is.

24 Q. All right. But the back of the chair are
25 plastic straps and -- do you see that?

1 A. Yes.

2 Q. Was the bottom of the chair the plastic
3 straps as well?

4 A. I don't remember.

5 Q. Do you recollect where this picture was
6 taken?

7 A. I believe it was at a friend's house.

8 Q. Which friend?

9 A. Somebody from work at Sam's Town.

10 MR. ROBERTS: I've got no objection to
11 admissibility if he wants to display it to the jury.

12 MR. STRASSBURG: Thank you, sir.

13 So Judge, I move admission of Exhibit C33 --
14 page 33.

15 THE COURT: No objection?

16 MR. ROBERTS: No objection, Your Honor.

17 THE COURT: It will be admitted.

18 (Whereupon, Defendant's Exhibit C33 was
19 admitted into evidence.)

20 MR. STRASSBURG: And I will cut out the
21 Facebook page --

22 THE COURT: Thank you.

23 MR. STRASSBURG: -- stuff, yes, sir?

24 BY MR. STRASSBURG:

25 Q. All right. So Exhibit 33 shows you seated in

1 this type of chair. And at the -- by the end of 2011,
2 how long would you have been able to sit in this
3 position on this type of -- of chair?

4 A. Depending on what type of day I was having,
5 like my pain goes up and down. So could be 20 minutes,
6 could be 10 minutes.

7 Q. So you -- you would agree, then, that your --
8 your pain is highly variable from day to day?

9 A. Yes, it is.

10 Q. Comes and goes?

11 A. Yes, sir.

12 Q. Sometimes it's nothing; right?

13 A. No. It's never nothing.

14 Q. Never nothing. Okay.

15 A. No, sir.

16 Q. What's the lowest it ever gets?

17 A. At this point, on a good day it's a 2.

18 Q. How about before your surgery?

19 A. On a good day?

20 Q. Any day. Well, look, I mean, if -- if -- I'm
21 asking you the lowest it gets, so that would be a good
22 day; right?

23 A. Okay. A 4.

24 Q. A 4. Okay. So if I show you the chart that
25 we're using, 4 would be about here; right? True?

1 A. I guess. Yeah. That's what the number says.

2 Q. See, there's 4. Okay.

3 So after surgery, you had a lot of days where
4 the pain was in excess of 4, right?

5 A. Yes. I'm sorry. What do you mean by
6 "excess"?

7 Q. In excess?

8 A. What does that mean?

9 Q. Greater than.

10 A. Okay.

11 Q. Sorry. Now, on December 21st, 2011, you paid
12 a visit to the office of Dr. Lemper; right?

13 A. I don't recall.

14 Q. Okay. That's fair. Let me show you, from
15 Exhibit 21, a document that's been Bates-numbered as --

16 MR. STRASSBURG: It's the office visit for
17 December 21, 2011, for Lemper.

18 MR. ROBERTS: Are you in Exhibit 21?

19 MR. STRASSBURG: Yeah. The Lemper exhibits,
20 Exhibit 21.

21 MR. ROBERTS: Could you give me a Bates
22 number?

23 MR. STRASSBURG: You know, I just have our
24 number, which is JALM00027. It's from December 2 --
25 21, 2011.

1 MR. ROBERTS: I don't have your numbers coded
2 into my book.

3 MR. STRASSBURG: Okay. Well, do you mind if
4 I try to refresh her recollection with it?

5 MR. ROBERTS: No. And you can look for it if
6 you want.

7 MR. STRASSBURG: Okay. I got a guy. Do you
8 mind?

9 MR. MAZZEO: December 2nd?

10 MR. STRASSBURG: December 21st, 2011.

11 MR. MAZZEO: 21st?

12 MR. STRASSBURG: Yes.

13 BY MR. STRASSBURG:

14 Q. All right. So let's take a step at a time.

15 Do you see the document in front of you from
16 Exhibit 26? It's date of service, December 21, 2011?

17 A. Okay.

18 Q. Where you went to see Lemper?

19 MR. ROBERTS: Objection to form.

20 Did you mean Exhibit 21?

21 MR. STRASSBURG: Yes, I do.

22 BY MR. STRASSBURG:

23 Q. Does that refresh your recollection that you
24 saw Lemper on December 21st, 2011?

25 A. Yes.

1 Q. And at that time you were indicating that you
2 had severe pain in your pelvis area; true?

3 A. Yes.

4 Q. In fact, you indicated that your worst pain
5 was in your pelvic area and groin; true?

6 A. Is that from the same date?

7 Q. Yeah.

8 A. Okay.

9 Q. Okay. I wanted to ask you, do you mind if I
10 inquire about your pregnancies?

11 A. Go ahead.

12 Q. Did you have -- go through natural
13 childbirth, or was it cesarean or some other way?

14 A. Natural childbirth.

15 Q. Okay. And were you sedated for it, or did
16 you experience the full pains of -- of childbirth?

17 A. With two of them, I was -- I had the
18 epidural. And with my Lennay, it was -- it was too
19 late when I got to the hospital.

20 Q. All right. So you had Lennay without
21 experiencing any sedation or analgesic?

22 A. Correct.

23 Q. Now, compared to -- was that painful, I
24 assume?

25 A. Yes.

1 Q. All right. Compared to that experience, how
2 would you characterize -- for example, when -- you've
3 indicated on August 15th that your pain was an 8 out of
4 10?

5 A. Okay.

6 Q. How would you compare that to the pain you
7 experienced in the birth of Lennay?

8 A. Unless you have -- I -- I'm sorry. But --
9 you don't even think about that when you're giving
10 birth. You just -- you're anticipating seeing that
11 little face. And as much as it's -- it's excruciating,
12 you don't think about it. It's not -- and had I have
13 known that I was going to be asked about it ten years
14 later, I may have, you know, written it down or tried
15 to picture in my mind how much pain that is, but these
16 numbers that you see on these charts do not explain
17 how -- how bad the pain could be.

18 Q. Do you remember the pain you experienced
19 during Lennay's birth?

20 A. No.

21 Q. All right. Now, on December 21st, 2011, you
22 also indicated to Dr. Lemper that -- well, you weren't
23 going to physical therapy yet, but you had been walking
24 the steps at work five days a week.

25 Do you remember telling him that?

1 A. I used to walk the steps before the accident.
2 So I don't know if that meant at the time or if I had
3 told him that it was something that I would do
4 normally.

5 Q. I see. So you don't remember whether you
6 were walking the steps at work after the accident or
7 not?

8 A. No. I don't think I ever did that.

9 Q. Okay.

10 MR. MAZZEO: For the record, that's
11 Exhibit 21, page 93.

12 THE COURT: Thank you.

13 MR. STRASSBURG: Thank you.

14 MR. MAZZEO: Welcome.

15 BY MR. STRASSBURG:

16 Q. Let me direct your attention to page 58 of
17 Exhibit C. And that, we'll have to look at the book.

18 Hmm. Excuse me. Sorry. 78.

19 A. 78?

20 Q. 7-8. Yeah. My fault.

21 Okay. Remember yesterday we talked about the
22 roller coaster at Circus Circus?

23 A. Yes, sir.

24 MR. ROBERTS: No objection.

25 MR. STRASSBURG: So no objection to showing

1 it?

2 MR. ROBERTS: No objection.

3 MR. STRASSBURG: Thank you.

4 THE COURT: You want to admit this one too?

5 MR. STRASSBURG: Move to admit redacted

6 Exhibit C, page 78.

7 THE COURT: No objection. It will be
8 admitted.

9 (Whereupon, Defendant's Exhibit C78 was
10 admitted into evidence.)

11 BY MR. STRASSBURG:

12 Q. Okay. Now, you testified that this picture
13 was taken before the motor vehicle accident; right?

14 A. Yes, sir.

15 Q. And it was taken at the coaster at Circus
16 Circus?

17 A. Yes, sir.

18 Q. But it wasn't taken by you or somebody in the
19 car in front of them; right?

20 A. I don't -- I don't believe so, no.

21 Q. It was taken, you said, by a camera that's,
22 like, on remote or something at the coaster?

23 A. Right.

24 Q. And you were on the ground; right?

25 A. Yes.

1 Q. You weren't riding with them; right?

2 A. No, sir.

3 Q. All right. So there were occasions before
4 the accident when you didn't ride on the roller coaster
5 with your children either; right?

6 A. Yeah. Of course. There's some that --

7 Q. You sent them up there alone, and you stayed
8 on the ground; right?

9 A. Correct.

10 Q. Just like after the accident; true?

11 A. For the most part. It -- it changed, of
12 course, because I would -- I wasn't able to ride on any
13 of them on any occasion after the accident.

14 Q. Okay. So that was -- okay. All right.
15 Could you turn to page 26 of Exhibit C? That's it.

16 Can you identify page 26 as a true and
17 correct copy of your Facebook page for the posting of
18 April 5, 2013?

19 A. Yeah.

20 Q. And can you identify the persons in the
21 photograph as you and your family?

22 A. Yes.

23 Q. And is this -- is that your grandma or mom?

24 A. My grandma.

25 Q. Your grandma. All right. And where was this

1 picture taken?

2 A. At my aunt's house.

3 Q. And where is your aunt's house?

4 A. She's moved so many times, I couldn't tell

5 you.

6 Q. Can you give me a State?

7 A. Nevada.

8 Q. How did you get there?

9 A. We drove.

10 Q. Who -- who drove?

11 A. I -- I -- I may have -- I may have driven

12 them. I drove there.

13 Q. All right. And in the photograph, do you

14 recollect who took it?

15 A. My cousin may have taken it.

16 Q. Now, it appears from the photograph -- and

17 you correct me if -- if I'm wrong -- but it's as though

18 there's a -- a chair that she's sitting on. And -- and

19 you're down like this with your arm around her

20 shoulder; right?

21 A. Uh-huh.

22 Q. Now, are you -- how are you seated? Do you

23 recollect? Are you kneeling on the floor like I am?

24 Are you cross-legged on the floor? How are you -- how

25 is your body oriented so you can put your arm around

1 her?

2 A. I -- I could have been on one knee.

3 Q. And is she resting any weight on you other
4 than her arm?

5 A. No.

6 Q. And were you able to achieve the position
7 that you're in in this photograph without the
8 assistance of anyone else?

9 A. Emily, who's right behind me, held my hand
10 while I got down there to get close to my grandma in
11 her wheelchair.

12 Q. All right. So your grandma's seated. Emily
13 holds one hand --

14 A. Uh-huh.

15 Q. -- to steady you?

16 A. Yeah. As I'm going down.

17 Q. And then you sink to one knee --

18 A. Correct.

19 Q. -- right?

20 A. Yeah.

21 Q. And then you arch your back to stay in
22 balance; true?

23 A. Correct.

24 Q. And you do that without pain; true?

25 A. No.

1 Q. But you're able to do it; true?

2 A. Like I have everything else, yes.

3 MR. STRASSBURG: Permission to admit page 26
4 of Exhibit C.

5 MR. ROBERTS: No objection.

6 THE COURT: It will be admitted.

7 (Whereupon, Defendant's Exhibit C26 was
8 admitted into evidence.)

9 THE COURT: You going to redact it?

10 MR. STRASSBURG: Redacting as you requested,
11 Judge.

12 THE COURT: Thank you.

13 BY MR. STRASSBURG:

14 Q. All right. And so here, your -- your
15 grandmother, you said she's seated in a wheelchair?

16 A. Yes.

17 Q. And that's what -- is it a blanket on the
18 back here?

19 A. Yeah.

20 Q. Okay. So she -- she's seated, and she's --
21 she's sort of turned so she can rest her left arm -- or
22 her right arm across your shoulders; right?

23 A. Yeah.

24 Q. And then you're down on one knee, and you
25 have your arm around her back; true?

1 A. Yes.

2 Q. Thank you.

3 And this photograph -- this -- this scene
4 occurred on or about April 2013; right?

5 A. I have no idea.

6 Q. Okay. Well, in any event, it occurred after
7 the accident; right?

8 A. I couldn't tell you that.

9 Q. And do you recollect how old your girls are?

10 A. In this picture? I don't know. Lennay could
11 have been 5, 6. Sophia could be, I don't know, 8 or 9,
12 maybe. And Emily, I can't tell you.

13 Q. So using the ages of the children --

14 A. Uh-huh.

15 Q. -- does that enable you to estimate when the
16 photo was taken?

17 A. Yeah.

18 Q. 2013?

19 A. It could have been. Yeah.

20 Q. Now, in April of 2013, that would have been
21 four months after your surgery; right?

22 A. April of --

23 Q. 2013.

24 A. Yeah.

25 Q. That would have been four months after your

1 surgery?

2 A. Okay.

3 Q. And you saw Dr. Kidwell on April 10th, 2013,
4 and you told him your pain level was 5 out of 10 true?

5 A. Yeah.

6 Q. Let me direct your attention to Exhibit C.

7 Wait a minute.

8 Now, what's your grandma's name?

9 A. Ramona Zuvia.

10 Q. All right. And -- and is she -- does she
11 live in Mexico?

12 A. She's been back and forth.

13 Q. Okay. So in April of 2013, how did she get
14 to the States?

15 A. I have no idea.

16 Q. Did you go get her?

17 A. No, sir.

18 Q. Let me direct your attention to page 47 of
19 Exhibit C. Right.

20 Can you identify this as a true and correct
21 copy of your Facebook page for posting dated May 8th,
22 2013?

23 A. Yes.

24 Q. And do you -- you recognize, of course, you
25 and your kids in the picture?

1 A. Yes.

2 Q. Okay. And you are carrying something in your
3 right hand with something slung over your right elbow?

4 A. Yeah.

5 Q. And can you identify for us what you're
6 carrying in your right hand.

7 A. That's my -- my purse. And it looks like
8 a -- like a pina colada or something like that.

9 Q. And do you -- can you identify where this
10 picture was taken?

11 A. I think it was Circus Circus.

12 Q. Now, was it taken on or about May 8th, 2013?

13 A. Yeah.

14 Q. Okay. And how did you get to Circus Circus
15 that day?

16 A. I could have driven or Emily could have
17 driven, either/or.

18 Q. And who's taking the picture?

19 A. My Emily's boyfriend at the time.

20 Q. And what's his name?

21 I know. I know. Never mind.

22 The item that's slung over your purse -- I'm
23 sorry -- slung over your right elbow, you said that's
24 your purse?

25 A. Yeah.

1 Q. What's in it?
2 A. My wallet.
3 Q. And everything else?
4 A. A tampon maybe.
5 Q. A phone?
6 A. Yeah.
7 Q. Credit cards?
8 A. Those are in the wallet, yes.
9 Q. A comb?
10 A. No. No, I brushed my hair before I left the
11 house.
12 Q. Take a brush with you?
13 A. No, sir.
14 Q. And about how much would you estimate the bag
15 you have slung over your right elbow weighs?
16 A. 5, 6 pounds.
17 Q. You were able to carry it with the pina
18 colada without a restriction from pain?
19 A. No. No pain.
20 Q. And judging from the expressions on your
21 children's face, this was a good day?
22 A. It was. It was Emily's birthday outing.
23 Q. Good for you.
24 MR. STRASSBURG: Permission to show the jury,
25 Judge, page 47, Exhibit C.

1 MR. ROBERTS: No objection.

2 THE COURT: You want to admit it first?

3 MR. STRASSBURG: Yeah. I'm sorry. Admit --
4 permission to --

5 THE COURT: I'm assuming there's no objection
6 to admitting it, Mr. Roberts?

7 MR. ROBERTS: No objection to admitting it
8 either, Your Honor.

9 THE COURT: Okay. It will be admitted.

10 (Whereupon, Defendant's Exhibit C47 was
11 admitted into evidence.)

12 THE COURT: Exhibit C, page 47.

13 BY MR. STRASSBURG:

14 Q. And -- so on May 8th, 2013, you went to
15 Kidwell and you indicated to him your pain was a 4 out
16 of 10; true?

17 A. I don't -- I don't recall that.

18 Q. No reason to dispute it?

19 A. No.

20 Q. Let me direct your attention to page 25,
21 Exhibit C, please.

22 Yeah. That's it. Thank you.

23 Can you identify page 25, Exhibit C, as a
24 true and correct copy of your Facebook page for posting
25 date June 5, 2013?

1 A. Yes.

2 Q. And this photograph of you and your daughter
3 was taken outside her school?

4 A. Yes, sir.

5 Q. And who took it?

6 A. Emily probably.

7 Q. And who gave you the flowers?

8 A. I bought them for my daughter who had just
9 graduated fifth grade.

10 Q. And was there a ceremony?

11 A. Yes.

12 Q. And when did the ceremony start?

13 A. Early in the morning. Could have been 9:00,
14 10:00 o'clock, maybe.

15 Q. Did she have a big graduating class?

16 A. Yeah.

17 Q. How long did the ceremony last?

18 A. Maybe 30 minutes. I don't remember exactly.

19 Q. You were able to sit through the ceremony?

20 A. No. We had to stand. There was no room for
21 sitting.

22 Q. So you stood for the whole ceremony?

23 A. Yes, sir.

24 Q. That was a good day?

25 A. Yes, sir.

1 Q. And how were her marks at school?

2 A. She's a perfect honor roll student.

3 MR. STRASSBURG: Permission to show --

4 permission to admit page 25, Exhibit C?

5 MR. ROBERTS: No objection.

6 THE COURT: It will be admitted.

7 (Whereupon, Defendant's Exhibit C25 was
8 admitted into evidence.)

9 BY MR. STRASSBURG:

10 Q. And this would have been in June of 2013;
11 right?

12 A. Yes.

13 Q. Early June.

14 A. Yes, sir.

15 Q. And in June 11th, 2013, you went to Kidwell.

16 And you were indicating at that time that your pain was
17 a 3 out of 10; true?

18 A. Yeah.

19 Q. Would you turn to page 44 of Exhibit C,
20 please.

21 Yeah. That's it.

22 Can you identify page 44 of Exhibit C as a
23 true and correct copy of your Facebook posting for
24 posting date June 14th, 2013?

25 A. Yeah.

1 Q. And do you -- can you identify the location
2 of the scene that's depicted in this photograph?
3 A. Aliante Casino.
4 Q. So that's your place of employment?
5 A. Yeah.
6 Q. And can you identify where in the -- at
7 Aliante this picture would have been taken?
8 A. Sorry. It's called ETA. It's a lounge.
9 Q. Okay. And can you identify about what time
10 of day the picture was taken?
11 A. Could have been after work. Yeah.
12 Q. Do you recollect the occasion that prompted
13 the memorializing of this scene in a photograph that
14 you posted?
15 A. One my friends' birthdays.
16 Q. Do you recollect who?
17 A. I'm sorry?
18 Q. Do you recollect which friend?
19 A. Security guard at Aliante. I couldn't tell
20 you exactly. David, I believe.
21 Q. Okay. And were you and David involved?
22 A. No, sir.
23 MR. ROBERTS: Objection, Your Honor.
24 THE COURT: Sustained.
25 MR. ROBERTS: And objection to the

1 photograph. It's not probative and irrelevant.

2 MR. STRASSBURG: I'm sorry. There was an
3 objection. You sustained and he kept talking.

4 THE COURT: Come on up.

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

7 THE COURT: Okay. So the objection as it
8 related to the question was sustained. The further
9 objection as it related to the picture, I think is
10 premature.

11 BY MR. STRASSBURG:

12 Q. All right. Does this picture accurately
13 depict an activity that you were able to physically
14 engage in at the time the picture was taken?

15 A. Yes.

16 Q. And does that activity involve bending
17 forward with your hands behind your back?

18 A. Yeah.

19 Q. And you were able to engage in this activity
20 without a restriction from pain; true?

21 A. I don't remember if I was -- if I hurt or not
22 at that moment.

23 Q. All right. The activity shown in the
24 picture, was this the first time you had done that?

25 A. Yes.

1 Q. And were you able to successfully complete
2 the activity intended?

3 A. No. Unfortunately. I wish we had -- we
4 would have recorded what happened afterwards, but there
5 wasn't a picture.

6 Q. All right.

7 MR. STRASSBURG: Judge, permission to admit
8 page 44, Exhibit C.

9 MR. ROBERTS: No objection.

10 THE COURT: 44 will be admitted.

11 (Whereupon, Defendant's Exhibit C44 was
12 admitted into evidence.)

13 BY MR. STRASSBURG:

14 Q. All right. So this is on or about June 14th,
15 2013. You're at the lounge at work. And this was
16 after hours; right? You clocked out?

17 A. Correct.

18 Q. Okay. And you were in the company of
19 other --

20 A. Coworkers.

21 Q. -- compadres at --

22 A. Coworkers.

23 Q. Coworkers. Okay.

24 And was this, like, just the cashier cage
25 folk, or was it broader than that?

1 A. I knew everybody in that Casino. I still do.
2 Q. And they came to this shindig?
3 A. Yeah.
4 Q. All right. And, in this picture, you're
5 at -- what? -- the bar?
6 A. Yeah.
7 Q. Okay. And you have your hands behind your
8 back?
9 A. As much as I could hold them there, yeah.
10 Q. Okay. And you're in your uniform from work?
11 A. Yes.
12 Q. Okay. So you -- you didn't go home after you
13 clocked out; you went to the lounge --
14 A. Yes, sir.
15 Q. -- right? And you guys were celebrating?
16 A. Yeah.
17 Q. All right. And you were leaning forward like
18 this to get your mouth down to the level of the --
19 that's a glass; right?
20 A. Yeah.
21 Q. All right. And I have it on good authority,
22 because I did some research on this, that the intended
23 activity is to consume this -- the stuff in the shot
24 glass without the use of your hands; right?
25 A. Yes.

1 Q. And how were you intending -- yeah. Right.

2 How were you intending to do that?

3 A. I was hoping that my mouth was big enough to
4 hold it and then be able to swallow it while it was up
5 there, and -- let's just say I couldn't wear that shirt
6 the next day. I failed at it miserably.

7 Q. And this is the one you posted; right?

8 A. Of course. Of course.

9 Q. You know, just for my -- you know, as a
10 student of the human condition, did anybody do that
11 right?

12 A. Well, there was a few girls that -- that
13 offered themselves to do it. But I was the only one
14 that failed.

15 Q. And what's in the glass?

16 A. I have no idea. And I just remember getting
17 some whipped cream afterwards, because I couldn't --
18 I -- like I said, I failed at swallowing whatever was
19 in it.

20 Q. So you were doing this without knowing what
21 was in the glass?

22 A. Yes.

23 Q. So you are a risk-taker?

24 A. I'm sorry?

25 Yes, I am.

1 Q. And bending over -- when you went to see the
2 chiropractor in January 2011, bending over was -- that
3 was one of the activities that caused you major
4 discomfort; right?

5 A. Yeah.

6 Q. Can I direct your attention to page 42.

7 Yeah. That's it. Can you identify page 42
8 of Exhibit C as a true and correct copy of your
9 Facebook page for posting date June 30, 2013?

10 A. Yes, sir.

11 Q. All right. And you're able to identify the
12 individual shown in the picture?

13 A. Yeah.

14 Q. And are you able to remember whether the
15 picture was taken on or about the end of June 2013?

16 A. It may have.

17 Q. And are you able to identify the location
18 where -- that you were in when the picture was taken?

19 A. It could have been a friend's house. Yeah, a
20 friend's house.

21 Q. And you appear to be sitting on a bed.

22 A. Yeah.

23 Q. And are your feet on the floor?

24 A. Yeah.

25 Q. All right. And who's taking the picture?

1 A. One of my girlfriends.

2 Q. All right. Now, you're wearing a hat?

3 A. Yes, sir.

4 Q. And the hat appears to say it's from the

5 Houston Livestock Show and Rodeo?

6 A. Yes.

7 Q. Did you get that hat in Houston?

8 A. No.

9 Q. How did you come by that hat?

10 A. She had gone to visit family there and

11 brought me back a hat.

12 Q. Oh, so you didn't go to Houston?

13 A. No, sir.

14 Q. Okay. Let me direct your attention to

15 page 41, Exhibit C, please.

16 Yeah. Can you identify that as a -- I'm

17 sorry. Can you identify page 41 of Exhibit C as a true

18 and correct copy of your Facebook page posting date

19 July 7, 2013?

20 A. Yes.

21 Q. All right. And does this photograph

22 accurately depict your activity that's shown in the

23 photograph?

24 A. Yeah.

25 Q. And the photograph was taken on or about

1 early July 2013?

2 A. No.

3 Q. Do you recollect when it was taken?

4 A. It was -- it was a long time before. I want
5 to say 2011. That's -- that picture was taken in
6 Lennay's father's apartment.

7 Q. Before or after the accident?

8 A. It's before.

9 Q. So -- I'm sorry. The accident was
10 January 2nd, 2011?

11 A. Yeah.

12 Q. So this would have been taken January 1st of
13 2011 if it was taken in 2011.

14 A. I don't know if it was 2011 -- it could have
15 been -- I mean, 2010, 2011.

16 Q. Just judging from your facial expressions, it
17 looks to me you're not really sure.

18 A. I'm not really sure.

19 Q. Fair enough.

20 Now, on July 10, 2013, do you recollect going
21 to see Dr. Kidwell?

22 A. Okay.

23 Q. And at that time, you were indicating your
24 pain level was a 5 out of 10?

25 A. If that's what it says, yeah.

1 Q. July 10? 5 out of 10; right?

2 A. Okay.

3 Q. And the picture that we were able -- that you
4 were able to recollect on the previous page, page 42,
5 Exhibit C, if you'd turn back to that.

6 A. Okay.

7 Q. And here you are -- are seated on a -- on a
8 bed?

9 A. Yes, sir.

10 Q. And this was about June 30, 2013, when this
11 was taken?

12 A. Yes, sir.

13 MR. STRASSBURG: Permission to admit page 42,
14 Exhibit C.

15 MR. ROBERTS: You're going back to the
16 Houston Rodeo picture?

17 MR. STRASSBURG: Yes, sir.

18 MR. ROBERTS: No objection.

19 THE COURT: 42 will be admitted.

20 (Whereupon, Defendant's Exhibit C42 was
21 admitted into evidence.)

22 BY MR. STRASSBURG:

23 Q. Okay. So this is a picture, June 30, 2013.

24 And as we've indicated, ten days later, you were

25 speaking with Dr. Kidwell, and your self-assessment was

1 pain at 5 out of 10. True?

2 A. Yes, sir.

3 Q. And also on July 10, 2013, you were
4 indicating to Kidwell that you were still experiencing
5 constant pain in the low back radiating down the right
6 lower extremity to the knee?

7 A. Yes.

8 Q. And you indicated to him that, after two
9 weeks of physical therapy, you discontinued the therapy
10 due to schedules?

11 A. Yes.

12 Q. Let me direct your attention to page 24 of
13 Exhibit C.

14 MR. STRASSBURG: And request a bench
15 conference. And this is per the order on the motions
16 in limine.

17 THE COURT: Come on up.

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

20 MR. STRASSBURG: Okay. Hearing no objection
21 intended, I move to admit page 24, Exhibit C.

22 MR. ROBERTS: No objection, Your Honor.

23 THE COURT: 24 will be admitted.

24 MR. MAZZEO: No objection, Judge.

25 /////

1 (Whereupon, Defendant's Exhibit C24 was
2 admitted into evidence.)

3 BY MR. STRASSBURG:

4 Q. All right. This picture was posted on
5 July 12, 2013. Is that about the time it was taken?

6 A. Yes, sir.

7 Q. And who took it?

8 A. Probably my Emily.

9 Q. I'm sorry?

10 A. My Emily.

11 Q. Emily took it.

12 And is that Lennay?

13 A. That's my -- my girls' stepsister.

14 Q. What's her name?

15 A. Daisy.

16 Q. Okay. And where is it taken?

17 A. In California.

18 Q. Where in California?

19 A. By the beach.

20 Q. I meant which beach?

21 A. Santa Monica, I think.

22 Q. All right.

23 A. Probably. Yeah.

24 Q. All right. How did you get there?

25 A. We drove there.

1 Q. Who drove?
2 A. Chris.
3 Q. Did you do any of the driving?
4 A. No, sir.
5 Q. And did you -- you rode along in the front
6 seat?
7 A. Yes, sir. Well, off and on. If I needed --
8 if my right leg was bothering me, then I'd get on the
9 backseat and just stretch myself while he drove.
10 Q. Just your right leg?
11 A. Yeah.
12 Q. Left leg fine?
13 A. Pretty much. It's been okay since the
14 surgery.
15 Q. Back okay?
16 A. I'm sorry?
17 Q. Back okay?
18 A. Well, it bothered me, but we still did it.
19 Q. How often did you have to stop?
20 A. About every 30 minutes, just to stretch.
21 Q. Okay. Now -- all right. So you parked the
22 car. You walk to the beach; right?
23 A. Yes, sir.
24 Q. Walk across the sand; right?
25 A. Yeah.

1 Q. It's a wide beach in Santa Monica; right?

2 A. Yeah.

3 Q. And you -- you were -- what was the activity

4 that y'all were doing there? Were you playing in the

5 sand? Were you walking on the beach? Were you -- what

6 was it?

7 A. Watching the kids get in the water. Walking,

8 you know, down the beach. That was it.

9 Q. Okay. And -- and I apologize. I mean, my --

10 my grandkids just graduated from high school, so I'm

11 not up on -- what's this?

12 A. Daisy did it. And she's like, well, it's

13 their peace signs. So that's what she did.

14 Q. Okay. And you appear to be down on -- are

15 you on one knee or both knees?

16 A. Neither one.

17 Q. How -- how are you -- I mean, how have you

18 oriented your body?

19 A. We're standing.

20 Q. Okay. And you -- how tall is Daisy?

21 A. 4 feet.

22 Q. All right. And you're able to drape your arm

23 on her shoulder like this?

24 A. That's what the picture shows, yes.

25 Q. Right?

1 And you're able to bend --

2 A. Yes.

3 Q. -- to get your face level with hers --

4 A. Yes.

5 Q. -- at 4 feet?

6 A. Uh-huh.

7 Q. How long did you stay in California?

8 A. The weekend. Like, two or three days maybe.

9 Q. And who drove home?

10 A. Chris.

11 Q. And on July 10, 2013, as I believe we've

12 indicated, you were with Dr. Kidwell and you indicated

13 to him that your pain was 5 out of 10?

14 A. Okay.

15 Q. And then, two days later, you were on the

16 beach in Santa Monica; true?

17 A. Yes, sir.

18 Q. Would you turn your attention to page 81 of

19 Exhibit C, please.

20 A. (Witness complies.)

21 Q. Yeah. That's it.

22 Can you identify page 81 of Exhibit C as a

23 true and correct copy of your Facebook page posted

24 August 22nd -- hold on a minute. Okay. Posted

25 August 22nd, 2013?

1 A. Yeah. That's when it was posted.
2 Q. When was it taken?
3 A. I don't remember.
4 Q. Where?
5 A. Where was it taken? Lake Mead.
6 Q. Okay. Was it taken sometime in the summer of
7 2013?
8 A. I don't know if it was -- if it was a year.
9 I know it was in the summer, but I don't remember -- I
10 don't remember the year.
11 Q. Do you recollect the occasion that took you
12 to Lake Mead?
13 A. Take my kids out.
14 Q. And how did you get there?
15 A. Maxine drove.
16 Q. And how long did you spend at Lake Mead?
17 A. A few hours.
18 Q. What was the temperature?
19 A. It was summer, so it was hot.
20 Q. And do you recollect whether you went to Lake
21 Mead with your kids before or after the trip to
22 California, to Santa Monica?
23 A. This had to have been before.
24 Q. Was it after your surgery or before the
25 surgery?

1 A. I want to say before the surgery.

2 Q. Was it after the accident but before the
3 surgery?

4 A. Yeah. After the accident.

5 Q. And does the picture accurately depict the
6 scene that's shown in it?

7 A. Yes.

8 Q. And I move to admit page 81 of Exhibit C.

9 MR. ROBERTS: No objection.

10 THE COURT: 81 will be admitted.

11 (Whereupon, Defendant's Exhibit C81 was
12 admitted into evidence.)

13 MR. STRASSBURG: Judge, I see it's 10:30. If
14 I could just ask a couple more -- are you going to take
15 a break, or do you want to just soldier on?

16 THE COURT: Probably need to take a quick
17 break.

18 MR. STRASSBURG: Okay.

19 THE COURT: That's fine. Tell me when it's a
20 good time.

21 MR. STRASSBURG: Okay. Yes, sir.

22 BY MR. STRASSBURG:

23 Q. Now, in 2013 -- on August 7th of 2013, you
24 were with Kidwell again, and you indicated that your
25 pain was 5 out of 10.

1 Do you see that?

2 A. I see that.

3 Q. And on September 10th of 2013, you went to
4 Dr. Kidwell, and your pain was a 7 out of 10.

5 A. Yes, sir.

6 Q. All right.

7 MR. STRASSBURG: Judge, if you want to take
8 that break?

9 THE COURT: All right. Go ahead and take a
10 quick break, folks.

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

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

25 You're not to form or express any opinion on

1 any subject connected with this trial until the case is
2 finally submitted to you.

3 Plan on ten.

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

6 THE COURT: We're outside the presence the
7 jury. Anything on the record?

8 MR. MAZZEO: Yes, Your Honor, just briefly.

9 We've had this discussion several times at
10 the bench with regard to not discussing the trip to
11 California. And -- and I just want to go on the record
12 and -- and -- and refer to the actual holding or ruling
13 in this case -- in this -- in regard to this motion.
14 It's Plaintiff's Motion In Limine No. 40, and it
15 included, among other things, excluding questioning
16 regarding the trip to California.

17 And that motion was denied regarding evidence
18 of the trip to California following her surgery, but
19 prior to any questions regarding the trip to
20 California, request a sidebar regarding scope of
21 inquiry.

22 So it hasn't -- the -- there's no ruling
23 precluding us from inquiring about that, but of course
24 we needed to seek a sidebar to -- for the permissible
25 inquiry. And -- and -- and -- and so I think it --

1 the -- the whole idea or the reason for that motion in
2 limine was to preclude questioning about an incident
3 that occurred in a hotel room.

4 This photograph, obviously, doesn't discuss
5 that, but her trip to California is very relevant,
6 obviously. She testified to the -- to the scene in
7 the -- in the photograph, but it's relevant because it
8 goes to her ability to ambulate and move and to take
9 trips. She said on the stand that she has difficulty
10 traveling, driving for long periods. So the trip
11 itself is not -- I just want to be clear --

12 THE COURT: That's why it's come in.

13 MR. MAZZEO: Fair. Okay. And -- and also
14 her statements about the -- where she was and the fact
15 that she had traveled there and traveled back. That's
16 certainly -- that's not objectionable. That --
17 that's --

18 THE COURT: That all came in. That was --

19 MR. MAZZEO: Yeah.

20 THE COURT: -- I think that came in without
21 objection.

22 MR. ROBERTS: Without objection.

23 MR. MAZZEO: Yeah. Okay. Just wanted to be
24 clear on that. Okay.

25 THE COURT: I think everybody's just

1 concerned with keeping out what happened -- the
2 incident that happened while they were there. Yeah.

3 MR. MAZZEO: Sure.

4 MR. ROBERTS: And my -- my point was that he
5 violated the motion in limine, not that it was
6 objectionable.

7 MR. MAZZEO: Okay.

8 THE COURT: Anything else?

9 MR. MAZZEO: No.

10 THE COURT: All right. Off the record.

11 (Whereupon a short recess was taken.)

12 THE MARSHAL: All rise for the presence of
13 the jury.

14 (The following proceedings were held in
15 the presence of the jury.)

16 THE COURT: Go ahead and be seated. Welcome
17 back, folks. We're back on the record, Case No.
18 A637772.

19 Do the parties stipulate to the presence the
20 jury?

21 MR. ROBERTS: Yes, Your Honor.

22 MR. MAZZEO: Yes, Your Honor.

23 MR. STRASSBURG: Yes.

24 THE COURT: Ms. Garcia, just be reminded,
25 you're still under oath.

1 THE WITNESS: Yes, sir.

2 THE COURT: Go ahead, Mr. Strassburg.

3 BY MR. STRASSBURG:

4 Q. Directing your attention to page 23 of
5 Exhibit C. Can you turn to that, please?

6 A. (Witness complies.)

7 Q. Yeah. That's it.

8 Can you identify page 23 of Exhibit C as a
9 true and correct copy of your Facebook page for the
10 posting date of September 2, 2013?

11 A. Yes.

12 Q. And does that picture accurately depict the
13 scene shown in it?

14 A. Yes.

15 Q. And can you recall the occasion of the
16 picture?

17 A. I went on a -- on a date.

18 Q. And who took the picture?

19 A. The gentleman that I went out with.

20 Q. And the activity that you're conducting in
21 the picture, were you doing that all yourself, or were
22 you being assisted?

23 A. No. I did that by myself.

24 Q. And what were you doing that is shown in the
25 picture?

1 A. I was cutting up vegetables.
2 Q. Okay. What were you making?
3 A. Green -- green enchiladas. The Spanish came
4 out.
5 Q. Uh-huh. And were you cooking for just the
6 two of you, or were there others attending?
7 A. Just the two of us.
8 Q. And who took the picture? Was it him?
9 A. Yes.
10 Q. Okay. But posted it; right?
11 A. Yes, sir.
12 Q. And did you ever see him again?
13 MR. ROBERTS: Objection. Irrelevant.
14 MR. MAZZEO: Goes to activity, Judge.
15 THE COURT: I don't know that it does. I
16 think I'm going to sustain that.
17 BY MR. STRASSBURG:
18 Q. Well, was this like your first date?
19 A. No.
20 Q. And did you have a relationship with this
21 fellow?
22 A. No, sir.
23 Q. And the -- the clothing that you're wearing,
24 it kind of looks familiar, but I wanted to check with
25 you. Could you identify it, please?

1 A. It's the French maid outfit.

2 MR. STRASSBURG: And permission to admit
3 page 23 of Exhibit C.

4 MR. ROBERTS: No objection.

5 THE COURT: It will be admitted.

6 (Whereupon, Defendant's Exhibit C23 was
7 admitted into evidence.)

8 MR. ROBERTS: Objection. Is there a question
9 with regard to the picture?

10 MR. STRASSBURG: Would you like one?

11 MR. ROBERTS: If you want to show it, you
12 have to ask a question.

13 BY MR. STRASSBURG:

14 Q. The picture that's on the screen -- page 23
15 of Exhibit C -- how long did you conduct the activity
16 that is shown in that picture? I guess what I'm asking
17 is, how long did it take to complete the project of
18 cooking the enchiladas?

19 A. 20 minutes, tops.

20 Q. Okay. And who cleaned up?

21 A. He did.

22 Q. Good for you.

23 A. Thank you. I may have looked the part, but I
24 did not participate in any kind of cleaning.

25 Q. Hey, I'm a married guy. I get this.

1 MR. ROBERTS: Objection, Your Honor. If he's
2 moving on, could we take down the photo?

3 MR. MAZZEO: It's in evidence.

4 THE COURT: It's all right. I think he's --
5 he's trying to tie it in with this. I understand what
6 he's doing.

7 BY MR. STRASSBURG:

8 Q. Directing your attention to September 10th,
9 2013, that would have been five days later, after the
10 dinner date?

11 A. Okay.

12 Q. And you were in front of Dr. Kidwell, and you
13 were indicating to him that your pain was at a 7 out of
14 10; true?

15 A. I don't remember.

16 Q. All right. Let me direct your attention to
17 this document.

18 MR. ROBERTS: Objection until it's identified
19 as an admitted exhibit.

20 THE COURT: What is it, Mr. Strassburg?

21 MR. STRASSBURG: I'll represent that it's --
22 it is such an exhibit.

23 MR. ROBERTS: Objection till it's identified
24 as an exhibit.

25 MR. STRASSBURG: Can I finish? This is

1 the --

2 THE COURT: Well, I'm going to grant the
3 objection. Until it's identified, you can't put it in
4 front of the jury.

5 MR. STRASSBURG: Okay. All right. This is
6 Kidwell office visit, dated September 10, 2013, from
7 Plaintiff's Exhibit 26. And it's Bates-numbered
8 GJL1051.

9 MR. ROBERTS: Objection until it's identified
10 as an exhibit.

11 THE COURT: Come on up, guys.

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

14 THE COURT: So you find the exhibit number,
15 and then I'll let you put it up.

16 BY MR. STRASSBURG:

17 Q. Let me direct your attention to Exhibit 22 --
18 I'm sorry. Exhibit C, page 22.

19 Page 22, ma'am.

20 A. I'm sorry.

21 Q. That's all right. That's it.

22 A. Thank you.

23 Q. Thank you. All right. Can you identify --
24 this one may have already been admitted.

25 MR. STRASSBURG: Was this admitted?

1 MR. MAZZEO: No --

2 MR. ROBERTS: We --

3 MR. MAZZEO: -- that was --

4 MR. ROBERTS: We've agreed, Your Honor, but
5 it hasn't been admitted.

6 MR. MAZZEO: No. Not yet.

7 THE COURT: Okay. So this is Exhibit C,
8 page 22. There's no objection, so it will be admitted.

9 (Whereupon, Defendant's Exhibit C22 was
10 admitted into evidence.)

11 MR. STRASSBURG: Thank you, Judge.

12 BY MR. STRASSBURG:

13 Q. And you can identify page 22 as a true and
14 correct copy of your Facebook posting for posting date
15 December 21st, 2013; true?

16 A. Yeah. I posted it days later, but, yeah.

17 Q. And about when was it taken?

18 A. December 13th. Lennay's birthday.

19 Q. Oh, great. All right. Showing the jury.
20 Now, who's taking the picture?

21 A. It's a machine that they have.

22 Q. Oh, really?

23 A. Yeah.

24 Q. And that's your mom?

25 A. Yes, sir.

1 Q. Okay. And how did you get to the -- the Mini
2 Gran Prix?

3 A. We drove there.

4 Q. And who was behind the wheel?

5 A. I was.

6 Q. Did you drive the whole way over?

7 A. Yes, sir.

8 Q. Whole way back?

9 A. Yes, sir.

10 Q. And what is the activity -- I'm sorry. How
11 long were you there at the Mini Gran Prix?

12 A. You schedule parties for, like, two hours, so
13 about that time.

14 Q. And was there, like, a cake and stuff to eat?

15 A. Of course. Yes.

16 Q. And how long did you spend in a seated
17 position, eating?

18 A. About 30 minutes. And then, you know, get up
19 and have them play. And before we left, we cut the
20 cake. We sat down again and, you know, that's how we
21 did it.

22 Q. Did you take presents for her?

23 A. No. Not -- not the -- not to the place.

24 Q. Who drove the car?

25 A. I did.

1 Q. And what kind of car did you drive?
2 A. My TrailBlazer.
3 Q. Oh, I'm sorry. I meant the cars at the Mini
4 Gran Prix. Who drove those?
5 A. Oh, the kids.
6 Q. And you and your mom watched?
7 A. No. It's -- it was too cold outside.
8 Q. Oh, okay.
9 A. It's really cold.
10 Q. And how long did the kids drive?
11 A. Unfortunately, for what I paid, only like
12 twice.
13 Q. Because it was cold?
14 A. It was really cold.
15 Q. And so this was December 13?
16 A. Yeah.
17 Q. And then you were in front of Kidwell on
18 December 11th of 2013, and you indicated your pain
19 level was a 3 out of 10; right?
20 A. You know, I'm -- forgive me, but I'm -- I'm
21 confused because my mother came into town before my
22 surgery. So this picture had to have been taken the
23 year prior to this posting.
24 Q. So you think it was December of 2012?
25 A. Yes. Because my mom only came into town for

1 that short period of time in December, and it was
2 December of 2012 because my surgery was 2012; correct?

3 I'm --

4 Q. Yes.

5 A. -- sorry. I'm asking you instead of me
6 remembering.

7 Q. No. I -- you're right.

8 A. But I posted this picture the following year
9 around her birthday so that we could remember what we
10 did the year before.

11 Q. Oh, great.

12 A. Because Mom at this time was not living with
13 us. She was in New Mexico for a short period of time.
14 So she came back to be with the girls as I went for
15 surgery. So this is -- this is a year before it was
16 posted.

17 Q. So it would have been taken on December 13th,
18 2012?

19 A. Yes, sir.

20 Q. And it would have been about two weeks before
21 your surgery in California?

22 A. Yes, sir.

23 Q. All right. And on December 5th of 2012, you
24 were in front of Kidwell, and you indicated that your
25 pain level was 8 out of 10; true?

1 A. Yes, sir. Yes.

2 MR. MAZZEO: Roger.

3 BY MR. STRASSBURG:

4 Q. Okay. All right. Let's just go back -- and
5 I appreciate Mr. Mazzeo's help.

6 Let's go back to page 23 of Exhibit C, the
7 dinner date that we just talked about.

8 A. Okay.

9 Q. And this would have been on or about
10 September 2nd, 2013, as you discussed. And I want to
11 show you Exhibit 26, page 583, which is already in
12 evidence.

13 And you can identify this as a -- does this
14 refresh your recollection that you would have been
15 seeing Kidwell on September 10, 2013?

16 A. Yeah. Yes.

17 Q. And so that would have been eight days after
18 the dinner party. And do you see where it says what
19 your complaints were?

20 A. Yes.

21 Q. And does that refresh your recollection what
22 complaints you were bringing to Kidwell on
23 September 10, 2013?

24 A. Yes.

25 Q. And you were saying to him that -- and he

1 recorded, that you were continuing to have low back
2 pain with left lower extremity radicular symptoms;
3 true?

4 A. Yes.

5 Q. So you experienced pain after the surgery on
6 both the right lower extremity and the left lower
7 extremity; true?

8 A. Yes. Off and on. Yes.

9 Q. Just like before the surgery; true?

10 A. Yes, sir.

11 Q. And you indicated to Dr. Kidwell at that
12 time, do you recollect, that your pain level was a 7
13 out of 10; true?

14 A. I don't remember, but, you know, my -- my
15 pain levels were up and down, so that -- that could be
16 right.

17 Q. Let me direct your attention to what's been
18 marked as page 21 on Exhibit C. Yeah. That's right.

19 Can you identify page 21 on Exhibit C as a
20 true and correct copy of your Facebook page for posting
21 date of January 16th, 2014?

22 MR. ROBERTS: Objection, Your Honor. You
23 ruled on this one yesterday.

24 THE COURT: Come on up for a second.

25 /////

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

3 THE COURT: So at this point the objection is
4 overruled. You can lay the foundation.

5 MR. STRASSBURG: Can I see the last one? Can
6 I have the question just read back?

7 (Record read by the reporter.)

8 THE WITNESS: Yes.

9 BY MR. STRASSBURG:

10 Q. And are you familiar with the -- the
11 individuals who are shown in the photograph?

12 A. Yes, sir.

13 Q. And if asked, could you identify by name the
14 individuals?

15 A. Cristobal. C-r-i-s-t-b -- s-t-o-b-a-l. I'm
16 so sorry. And myself.

17 Q. Okay. And can you recollect the occasion
18 that prompted the taking of the photo?

19 A. We walked to -- we walked into Caesars. I
20 think it's -- I think it's Caesars Palace.

21 Q. And was it -- do you recollect the -- I mean,
22 what you were doing? Were you just, like, walking
23 around on an afternoon? Or was it a date? Or were you
24 going to see a show or going to try the tables or what?

25 A. No. We just -- it was on a date. We just

1 wanted to go in and look around.

2 Q. Uh-huh. And did -- was it a -- a dinner date
3 or a show date or a -- just a walking-around date?

4 A. We had coffee, and we went in there to look
5 around and take pictures.

6 Q. And how long did you spend in Caesars?

7 A. About an hour.

8 Q. And where did you park?

9 A. In the garage.

10 Q. And I assume -- well, did -- did you -- he
11 drive you there or did you meet him there?

12 A. He drove me there.

13 Q. And you were able to walk from the car park,
14 or did you -- did he valet it?

15 A. He normally would valet the car.

16 Q. Okay. So you were able to walk through
17 Caesars?

18 A. Yes, sir.

19 Q. And then you could walk to the coffee shop;
20 right?

21 A. We bought Starbucks on the way there. So we
22 had coffee on the way there and walked around and then
23 left.

24 Q. And how long did you spend walking around
25 Caesars?

1 A. About an hour.

2 Q. Okay. And how often did you have to sit down
3 and rest?

4 A. I -- we only sat down once, and -- and then
5 we left.

6 Q. When you sat down, do you recollect where you
7 sat?

8 A. One of the -- the slot machines. One of the
9 chairs on the -- by the slot machines.

10 Q. Okay. And can I call him Ernesto?

11 A. Yes.

12 Q. And were you -- at the time of this photo --
13 and was this photo taken on or about January -- excuse
14 me -- 16, 2014?

15 A. Yeah.

16 Q. And at that time, were you in a
17 relationship -- a romantic relationship with Ernesto?

18 MR. ROBERTS: Same objection, Your Honor.
19 Irrelevant.

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

21 THE WITNESS: We were dating. Yeah.

22 BY MR. STRASSBURG:

23 Q. And can you tell us how long you -- well, let
24 me ask it this way.

25 Do you recollect when you and Ernesto started

1 dating?

2 A. The beginning of -- of January of that year.

3 Q. Of 2014?

4 A. Yes, sir.

5 Q. And when did you meet Ernesto? Was he
6 somebody that you had known before the accident, or did
7 you meet him after the -- afterwards?

8 A. Afterwards.

9 Q. And would it be too terribly personal to ask
10 the circumstances of how you met or --

11 A. An online dating site.

12 Q. And how did you have occasion to be at an
13 online dating -- I guess I'm a little -- I'm a little
14 old -- out of my depth here.

15 MR. ROBERTS: Objection, Your Honor.

16 I didn't mean to interrupt. I thought you
17 were done.

18 MR. STRASSBURG: And I -- and I didn't mean
19 to take a running start, Judge. So I will just
20 withdraw that and try again.

21 THE COURT: Okay.

22 BY MR. STRASSBURG:

23 Q. Did you initiate the contact on the dating
24 site or did he?

25 MR. ROBERTS: Objection. Irrelevant.

1 MR. STRASSBURG: You know, Judge, he's right.
2 I'll just -- let me try again.

3 THE COURT: Okay.

4 BY MR. STRASSBURG:

5 Q. So would it be fair to say that the
6 initiation of this relationship with Ernesto, it began
7 and carried on at least through the time of this
8 picture, January 16th of 2014? And it was all -- all
9 after the motor vehicle accident in 2011; true?

10 A. Yes, sir.

11 Q. Okay. And what did you and Ernesto like to
12 do together? What activities?

13 A. Once in a while, like I said, we would go to
14 the -- the Strip just to look around, you know,
15 drive -- drive there and look at the lights or
16 whatever. Go out for coffee or dinner sometimes.

17 Q. And remember that picture of the -- the
18 cooking picture, the dinner date --

19 A. Yeah.

20 Q. -- that we talked about?

21 A. Yes, sir.

22 Q. Was that for Ernesto or someone else?

23 A. That was someone else.

24 Q. Okay. And Ernesto, is that relationship
25 still current?

1 A. Yes, sir.

2 Q. And have you been romantically involved with
3 Ernesto ever since early January 2014?

4 A. Yes, sir.

5 Q. Is it serious?

6 A. Yes, sir.

7 Q. Has he proposed?

8 A. Not really.

9 Q. Okay. When you go to the Strip with your
10 boyfriend, do you walk around other places other than
11 Caesars? I mean, do you walk up and down the Strip, or
12 do you, like, go to Venetian and walk around there, or
13 which?

14 A. We did this maybe twice --

15 Q. Uh-huh.

16 A. -- to drive up, valet the car, get out, and
17 just, you know, look around in the casino and then go
18 back home.

19 Q. Uh-huh. And how would you characterize the
20 nature of your relationship with Ernesto? Is it -- is
21 it a good one that's satisfying, or do you guys just
22 fight all the time?

23 A. It's good.

24 Q. Okay.

25 MR. STRASSBURG: Permission to admit page 21,

1 Exhibit C.

2 THE COURT: Mr. Roberts?

3 MR. ROBERTS: Objection. Irrelevant.

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

5 Overruled. It will be admitted.

6 (Whereupon, Defendant's Exhibit C21 was
7 admitted into evidence.)

8 BY MR. STRASSBURG:

9 Q. Now, can you identify for us in this picture
10 where in Caesars it's taken.

11 A. By the lobby.

12 Q. All right. And who's taking it?

13 A. One of the workers there.

14 Q. And who asked the worker to take a picture of
15 you? Was it Ernesto or you?

16 A. Ernesto.

17 Q. All right. And why did Ernesto want the
18 worker in the lobby to take the picture of the two of
19 you?

20 MR. ROBERTS: Objection. Calls for
21 speculation. No foundation.

22 THE COURT: Sustained.

23 MR. STRASSBURG: That's right, Judge. And
24 I'll withdraw it.

25 BY MR. STRASSBURG:

1 Q. Why -- did Ernesto say to you why he wanted
2 the worker to take the picture of the two of you?

3 A. This was -- we went out because of my
4 birthday. I believe it was my birthday that day. And
5 he wanted to remember the occasion and wanted me to
6 have, you know, a memory of that.

7 Q. Okay. And this picture, you made this your
8 profile picture on your Facebook page?

9 A. Yes, sir.

10 Q. And did you spell Ernesto's last name? Is it
11 Sosa?

12 A. Yeah. It's his mother's last name.

13 Q. S-o-s-a?

14 A. Yes.

15 Q. And where is he from?

16 A. Cuba.

17 Q. And how long has he been here?

18 MR. ROBERTS: Objection. Irrelevant.

19 THE COURT: Sustained.

20 BY MR. STRASSBURG:

21 Q. At the time of the accident, you were not
22 romantically involved with any guy; true?

23 A. True.

24 Q. Now, is one of the effects that you testified
25 to that the accident has had on you, that you and the

1 kids don't give each other kisses anymore?

2 A. No.

3 Q. Do you remember in your deposition on
4 July 10th of 2013 that you were asked about your
5 hobbies, activities, and family time?

6 A. Okay.

7 Q. And one of your -- I just want to draw your
8 attention to this part of your answer. It's on page
9 98, so your lawyers can follow along.

10 MR. ROBERTS: Volume I, II, or III?

11 MR. STRASSBURG: July 10, 2013, page 98,
12 lines 4 and 5. And it is -- let's see. I don't think
13 there's a volume on this.

14 MR. MAZZEO: Volume I. It's the first one.

15 MR. STRASSBURG: Volume I. Thank you.

16 BY MR. STRASSBURG:

17 Q. And do you remember that in your deposition
18 you testified, "We love swimming, Marco Polo, and
19 swimming underwater"?

20 MR. ROBERTS: Objection, Your Honor. Could
21 we see the question and the whole answer for context?
22 Rule of completeness.

23 THE COURT: That's fair.

24 MR. STRASSBURG: Judge, fine. Sure.

25 Actually, permission to approach?

1 THE COURT: Come on up.

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

4 MR. STRASSBURG: I'll withdraw that.

5 THE COURT: All right.

6 You want to take it off the screen since you
7 are withdrawing the question?

8 MR. STRASSBURG: Certainly.

9 BY MR. STRASSBURG:

10 Q. All right. Let's -- it's April 2nd, 2014.

11 Now, let me ask you a couple of questions
12 about your treatment with Dr. Lemper.

13 Do you recall him?

14 A. Yes.

15 Q. Pain management guy?

16 A. Yes, sir.

17 Q. And do you remember that in mid-September of
18 2011, you went to see him on an emergent appointment,
19 an emergency?

20 A. Yes, sir.

21 Q. And that was because the day before you
22 experienced a dramatic increase in your pain level. Do
23 you recall?

24 A. Yes, sir.

25 Q. And that happened in the shower; true?

1 A. Yes, sir.

2 Q. Okay. And as a result of that experience,
3 you went to Lemper and he gave you an injection; right?

4 A. Yes, sir.

5 Q. And when Dr. Lemper or Dr. Kidwell would give
6 you an injection, would they give you an anesthesia
7 first or not?

8 A. I think Dr. Lemper, for this one, gave me
9 anesthesia before he gave me a shot. I'm not -- I
10 can't remember exactly how -- how that one worked,
11 because it was an emergency. So I don't know -- I
12 couldn't tell you how he did it.

13 Q. Do you think he would have knocked you out?

14 A. Depending on what he -- I mean, he could have
15 given me a shot for pain, or was it an epidural that
16 he -- I -- and I can't remember. I apologize. I can't
17 remember exactly how he treated my pain at that time.

18 Q. All right. Now, what do you recall happened
19 in the shower the day before?

20 A. I -- I couldn't remember whether -- you know,
21 I had bent over to wash my feet or my leg, and just
22 this shooting pain stopped me from continuing what I
23 was doing. And I had to scream for somebody to come
24 and help me out of the shower.

25 Q. Now, that's not what you testified to in your

1 deposition; true?

2 A. I'm sorry?

3 Q. That's not what you testified to in your
4 deposition; true?

5 A. I don't know.

6 Q. Let me direct your attention to page 66.

7 All right. And you were asked -- the
8 question was:

9 "QUESTION: I've had the opportunity to
10 review most of the medical records that have
11 been produced by your attorneys in the case.
12 And there's a note in Dr. Lemper's records in
13 about September 2011, so about nine months
14 after the accident, that says that 'she' --
15 which is referring to you in the records --
16 'had a sudden increase of low back pain
17 radiating into both legs when she bent to wash
18 her legs in the shower.'

19 "Do you recall that?"

20 And you -- your answer was:

21 "ANSWER: I don't remember bending, or I
22 don't remember if there was anything that
23 triggered it that I could have done because I
24 have had problems bending, as you put it. I
25 just remember being in the shower and hurting

1 and pretty much crawling somehow out -- not
2 crawling, but got out of the shower slowly and
3 crawled into bed."

4 Do you remember giving that testimony?

5 A. Yeah.

6 Q. Now, when you think back, do you now remember
7 that you crawled out of the shower?

8 A. No. I mean, I can't tell you how I -- how I
9 got out of there. I'm thinking -- I'm picturing Emily
10 helping me out. But it could have been a different
11 date. I -- I can't remember.

12 Q. So what you do remember is bending over in
13 the shower --

14 A. Uh-huh.

15 Q. -- to wash a body part; true?

16 A. True.

17 Q. And can you -- you can't account for how you
18 got from bent over to crawling out of the shower with
19 Emily's help; true?

20 MR. ROBERTS: Objection. Mischaracterizes
21 her testimony.

22 BY MR. STRASSBURG:

23 Q. Well, what do you recall?

24 A. I -- I'm --

25 THE COURT: I'll sustain the objection. He

1 rephrased it, so that's fine.

2 THE WITNESS: Go ahead. I'm sorry.

3 BY MR. STRASSBURG:

4 Q. What do you recall?

5 A. I have different pictures in my head. And I
6 can't -- I can't recall exactly what happened. I'm
7 thinking of after surgery. I'm thinking the day that
8 it happened. You know, I -- I -- it's not too clear in
9 my head when -- what happened.

10 Q. Do you remember if you slipped and fell in
11 the shower?

12 A. No. That's not -- that's not accurate.

13 Q. You're sure?

14 A. I mean, I would remember, you know, if I had
15 ever slipped in the shower.

16 Q. Now, from time to time, your physicians
17 prescribed physical therapy for your condition; true?

18 A. Yes, sir.

19 Q. And those prescriptions took the form of
20 orders to the physical therapist to provide you for a
21 course of physical therapy a certain number of times a
22 week for a certain length of weeks; true?

23 A. True.

24 Q. And were you always 100 percent compliant
25 with the orders your physicians gave to the physical

1 therapists to provide you that therapy?

2 A. No, sir.

3 Q. And, for example, the last time you saw
4 Dr. Gulitz was May 20th, 2011. Do you recall that?

5 A. No, sir.

6 Q. All right. Well, it would have been about
7 three months after you saw Dr. Cash in mid-February of
8 2011.

9 Do you remember that?

10 A. No.

11 Q. You're shaking your head "no."

12 A. No.

13 Q. And do you recall when you first saw
14 Dr. Gross on May 25th, 2011?

15 A. Yes.

16 Q. So you stopped seeing Gulitz about five days
17 before you first went to Dr. Gross; true?

18 A. I couldn't tell you when one stopped and the
19 other began. I'm sorry.

20 Q. Okay. And your last visit with Dr. Gulitz,
21 he charted that he was going to continue you at once a
22 week; true?

23 A. I'm sorry?

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

1 A. Uh-huh.

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

4 A. I can't -- I cannot remember.

5 Q. Okay. And do you remember when you went to
6 see the physical therapist Matt Smith on March 25,
7 2014?

8 A. I know I went to Matt Smith's. I don't
9 remember the date exactly.

10 Q. All right. And the first time you saw Smith
11 was -- you saw him on April 10th through May 17th of
12 2013; true? Right after the surgery?

13 A. Uh-huh. Okay.

14 Q. And then again you went to see him for one
15 visit on March 25th of 2014.

16 A. Yes, sir.

17 Q. Remember that?

18 And the intention of that visit in March of
19 2014 was to begin another course of physical therapy;
20 true?

21 A. Okay. Yeah.

22 Q. And you never began that additional physical
23 therapy; true?

24 A. I don't remember if it did or not begin. I'm
25 sorry.

1 Q. And do you remember that you were unable to
2 complete the physical therapy at that time due to your
3 work schedule?

4 A. Yeah. I remember that my -- my work schedule
5 was strenuous on me. And I -- I stopped going to
6 therapy. I believe so.

7 Q. Since the accident, have you ever had to hire
8 a maid?

9 A. If I had the money, I would.

10 Q. But you haven't; right?

11 A. No, sir.

12 Q. In the accident, you were wearing your seat
13 belt and shoulder belt?

14 A. Yeah. The seat belt covers your shoulder,
15 and your -- your chest, yes.

16 Q. The airbags did not deploy?

17 A. No, sir.

18 Q. So to get out of the vehicle at the scene of
19 the accident, the first thing you had to do was unhook
20 the shoulder-lap restraint; true?

21 A. Yes, sir.

22 Q. Now, do you recollect your lawyer asking you
23 if, prior to the trial, whether Mr. Awerbach had ever
24 told you he was sorry?

25 A. Yes, sir.

1 Q. Remember that?

2 A. Yes.

3 Q. And do you remember that at the scene of the
4 accident, Awerbach went over to you -- he got out of
5 his vehicle, he went over to you and asked you if you
6 were okay? Do you remember that?

7 A. No, sir.

8 Q. Okay. And do you recollect when your lawyers
9 first sued Mr. Awerbach?

10 A. I have no idea.

11 Q. Well, it was about three months after the
12 collision; true?

13 A. I -- I couldn't tell you. I'm sorry.

14 Q. Now, we've had some -- we've heard some
15 testimony here that -- from your daughter Emily. You
16 were here for that?

17 A. For Emily's testimony here in court?

18 Q. Yeah.

19 A. Yes, sir.

20 Q. Yeah, yeah. And you listened to her, didn't
21 you?

22 A. Yes, sir.

23 Q. All right. And you heard that Emily was
24 asked whether you told her that you'd give her any
25 money after testifying. And Emily said that you told

1 her that you would help her with her schooling.

2 A. Correct.

3 Q. And was that true testimony from Emily?

4 A. Yes, sir.

5 Q. All right. And do you recollect when you had
6 occasion to tell Emily that, if you won this case, that
7 you would give some of the money to her for her
8 schooling?

9 A. Right around the time when I had a meeting
10 with one of my lawyers and he told me that --

11 MR. ROBERTS: Objection. I don't think it
12 called for attorney-client privilege --

13 THE COURT: Yeah. Anything that was said by
14 your attorneys and you is privileged, so you don't have
15 to talk about that.

16 THE WITNESS: I'm sorry.

17 MR. MAZZEO: Unless she waives it, Your
18 Honor.

19 THE COURT: She can only waive it after
20 consultation with counsel.

21 BY MR. STRASSBURG:

22 Q. Okay. Why don't you complete your answer.

23 A. I thought that we would have, like, 300,000
24 maybe. And I told Emily that, out of that, I would pay
25 for any schooling that, you know, she would complete by

1 the time; or if she needed to continue with her
2 education, that I would -- that I would be more than
3 willing to help her with that.

4 Q. And approximately when did you have this
5 conversation with Emily?

6 A. I could not tell you. I'm sorry.

7 Q. Well, was it this year? Last year? When?

8 A. Maybe two years ago, three years ago. I
9 don't know exactly when.

10 Q. And where is Emily planning to go to school?

11 A. She wants to go to dental school.

12 Do you mind if I stand?

13 Q. Not a bit. No, not a bit. Do you want to
14 take a break?

15 A. No, no, no, no. We need to get this done.

16 THE COURT: You can stand anytime you want
17 to.

18 THE WITNESS: Thank you. Is this okay?

19 BY MR. STRASSBURG:

20 Q. All right. So you first went to the
21 chiropractor, Dr. Gulitz. Remember?

22 A. Yes, sir.

23 Q. You first went to him after you consulted
24 with the lawyers at Glen Lerner; true?

25 A. They -- they gave me a few numbers. And

1 that's -- that's who I decided to go with, yes.

2 Q. How many numbers?

3 A. Maybe three or four.

4 Q. Of other chiropractors that they recommended?

5 A. Yes, sir.

6 Q. And Gulitz was one of the ones on the list?

7 A. Yes, sir.

8 Q. And it was Dr. Gulitz who referred you to
9 Dr. Cash?

10 A. Yes, sir.

11 Q. And it was Gulitz who referred you to
12 Dr. Lemper?

13 A. Yes, sir. I -- I believe.

14 Q. And it was Lerner who referred you to
15 Dr. Kidwell?

16 A. I called him to see if they had any numbers
17 for anybody that would be closer to me as far as the
18 pain management.

19 Q. And did they give you a list, or did they
20 just give you Kidwell?

21 A. No, they gave me a list of -- of numbers to
22 call in that area.

23 Q. How many?

24 A. Again, maybe three or four.

25 Q. And Kidwell was on the list the lawyers gave

1 you?

2 A. Yes.

3 Q. And the Lerner firm referred you to
4 Dr. Gross?

5 A. After getting Dr. Cash's -- yeah, they --
6 they gave me their -- his number.

7 Q. And the lawyers referred you to Dr. Oliveri?

8 MR. ROBERTS: Objection, Your Honor.

9 Mischaracterizes Dr. Oliveri's role.

10 THE COURT: She can answer. Overruled.

11 THE WITNESS: I don't remember.

12 BY MR. STRASSBURG:

13 Q. Fair enough.

14 All right. Let me direct you to Exhibit 5.

15 Let me show you this photograph from the --
16 and can you identify this photograph, Exhibit 6, as an
17 accurate depiction of what your vehicle looked like
18 after the accident?

19 A. No, not really.

20 MR. ROBERTS: What page number are we on?

21 MR. MAZZEO: Andrea Awerbach's Exhibit 3, E3.

22 MR. ROBERTS: I thought Mr. Strassburg had
23 just identified it as 5.

24 MR. STRASSBURG: I changed my mind. It's
25 Andrea Awerbach Exhibit E3.

1 THE COURT: That's admitted already?

2 MR. STRASSBURG: Yeah.

3 THE COURT: Okay.

4 BY MR. STRASSBURG:

5 Q. All right. Does the image shown in the
6 exhibit, does that look like your vehicle?

7 A. Yes.

8 Q. Your vehicle was a white Hyundai?

9 A. Yes, sir.

10 Q. And after --

11 THE COURT: Hold on, Mr. Strassburg. Come on
12 up for a minute.

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

15 THE COURT: All right. So pursuant to
16 stipulation of counsel, Exhibit E of Andrea Awerbach's
17 exhibits will be admitted.

18 (Whereupon, Defendant's Exhibit E was
19 admitted into evidence.)

20 MR. STRASSBURG: Thank you, sir.

21 BY MR. STRASSBURG:

22 Q. Now, did you -- the testimony's been that you
23 rode home with the tow truck guy?

24 A. Yes, sir.

25 Q. And did you have occasion to see him put your

1 vehicle on the truck?

2 A. Yeah.

3 Q. And did you have occasion to observe the
4 passenger side of the car?

5 A. Fairly quickly that I -- that I remember
6 seeing it.

7 Q. And do you recollect seeing any damage?

8 A. Yes.

9 Q. And does this photograph accurately depict
10 the damage that you saw?

11 A. No.

12 Q. Let's try this one. Let me direct your
13 attention to E4. Previously -- it's been admitted.

14 Does this accurately reflect the damage to
15 your vehicle in front of the rear tire on the passenger
16 side?

17 A. Yeah.

18 Q. And that's where he hit you?

19 A. No. It was -- I mean, it was higher also to
20 where you couldn't open that -- that -- that door.

21 Q. And do you recollect the mileage of your
22 vehicle?

23 A. No.

24 Q. Do you recollect -- does this photograph
25 refresh you that the mileage was 103,290 miles?

1 A. No. I'm sorry.

2 Q. Bear with me just a sec. I appreciate your
3 time. I'm sorry it took -- it took a while, but thank
4 you for answering my questions, ma'am.

5 A. No problem.

6 THE COURT: Done, Mr. Strassburg? You
7 finished?

8 MR. STRASSBURG: Yes.

9 THE COURT: I think it's a good time for
10 lunch, then. Go ahead and take our lunch break.

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

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

25 You're not to form or express any opinion on

1 any subject connected with this trial until the case is
2 finally submitted to you.

3 We'll just go till 1:00? Let's just go till
4 1:00 today. See you back then.

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

7 THE COURT: We're outside the presence of the
8 jury. Anything on the record, guys?

9 MR. TINDALL: No, Judge.

10 MR. SMITH: Your Honor, I would like to just
11 make a record of the pictures that have been shown over
12 the course of about four hours the last couple days.
13 We have made objections and had a number of different
14 bench conferences about the photographs.

15 First off, the entire line of questioning is
16 irrelevant. It's prejudicial, and it's been very
17 harassing on Ms. Garcia. I think everyone in the
18 courtroom can look at how uncomfortable she's been
19 sitting on the stand for what's now been three days.

20 Your Honor yesterday made a ruling that none
21 of the relationship questions would come in. That has
22 obviously been allowed today, and I want to go through
23 what the objections have been and what the responses
24 have been from the defense so we can put it on the
25 record as to what they said they were going to do and

1 then what they actually did.

2 So the first -- the first response to the
3 objections from the defense was that these pictures
4 show Ms. Garcia's functionality. As we discussed
5 yesterday -- and I think some of this is on the
6 record -- the pictures don't show pain. They're not
7 videos. They don't show her actually doing anything.
8 And many of them are at rather irrelevant times to what
9 they're talking about.

10 So, for example, Counsel will ask about a
11 picture, and then he'll talk about a medical record
12 that was two years before, before she had surgery,
13 attempting to apparently tie them together.

14 Another one of the discussions that we had
15 was that they -- when they don't show pain, then
16 Counsel's coming up here and asking her about her pain
17 scores consecutive or a couple of weeks later to the
18 pictures, which, of course, the pictures don't show how
19 she's feeling, and most of these pain scores don't show
20 that she couldn't do these things. In other words,
21 she's sitting somewhere with her kids and -- at a time
22 where, two weeks later, she had a pain score that was 3
23 or 4.

24 What they have done is they have just paraded
25 her life in front of the jury for two days now, and

1 it's -- it's completely inappropriate and irrelevant.
2 When we have pointed that out, then the next argument
3 today, and the argument that Your Honor said allowed
4 the relationship status, is that we have made a loss of
5 enjoyment of life claim.

6 Well, they're not really saying we made a
7 loss of enjoyment of life claim because every personal
8 injury case in Nevada has a loss of enjoyment of life
9 claim. The only thing that we did differently in this
10 case is we asked an economist to calculate the number.
11 In any case, we're entitled to seek damages for loss of
12 enjoyment of life. And the fact that we make claim
13 doesn't allow them to search her entire Facebook and
14 parade it in front of the jury.

15 In fact, one of the points we've made is that
16 she's not claiming 100 percent loss of enjoyment of
17 life. She's not claiming 100 percent disability. And
18 to say that, because of the claims she's made, she
19 can't go for her kid's birthday and sit and watch her
20 kid drive around in a Mini Gran Prix car -- car is
21 absurd.

22 What they have done, in addition to just
23 parading her in front of the jury, is get into a lot of
24 character evidence, character evidence that is
25 inappropriate in this case.

1 You know, as I sit here, I think about, if
2 this was a sex assault case, they wouldn't be allowed
3 to talk about her relationships. The standard should
4 be even more stringent in this case when it has
5 absolutely nothing to do with her accident and her
6 injuries. She was in a car crash that they caused.
7 That -- that is a finding of the Court. She is
8 injured. Their experts admit she was injured.

9 To -- to parade her like this and parade all
10 of these pictures over many, many hours is totally
11 inappropriate. They have not proven one single thing,
12 and they also have not impeached one single comment
13 that she made in direct through any of these pictures.
14 This is just a complete sideshow that -- that is -- is
15 just harassing to the witness and completely
16 inappropriate and irrelevant to the trial.

17 And they're going to do it again after lunch
18 because Mr. Mazzeo asked for more time. And Your Honor
19 shouldn't allow them more time to ask about more photos
20 over another hour or however long he wants to go. And,
21 in fact, they even overlapped some of the photos they
22 asked about.

23 It's just -- it's totally out of bounds for
24 what this case should be about. It should be about her
25 damages, not about what she's done in her life and

1 things that she admitted on direct she could do.

2 THE COURT: Well, hedonic damages are a part
3 of pain and suffering and general damages in the State
4 of Nevada; but because Dr. Smith testified specifically
5 about hedonic damages and because he specifically
6 allowed the jury to calculate the percentage of loss
7 that Ms. Garcia has experienced, I felt like they were
8 entitled to establish what they think the pictures show
9 that loss of enjoyment of life supports.

10 You may disagree. I understand that. But I
11 think it's -- it's fair evidence. Now, I agree with
12 you, I said at the stand -- at the bench that a picture
13 doesn't show a lack of pain. Nobody has argued that to
14 this point. I understand that you're seeing a picture
15 with Ms. Garcia on the stand, and then they --
16 Mr. Strassburg goes to his chart and talks about what
17 the pain scores were at or about the same time period
18 with some doctor.

19 That -- he's not saying -- he hasn't asked
20 her -- so is this inconsistent? Okay. While he may be
21 asking one question about a picture and then another
22 question about a pain scale close in time, he's not
23 relating them like I think you are relating them and
24 like the jury may be relating them. But he's not. So
25 the questions aren't out of bounds.

1 If he argues that in closing argument, I have
2 already told you, that may be objectionable. We're not
3 to that point.

4 MR. SMITH: And I understand what Your Honor
5 is saying. And I think the one other point that we
6 have made is that she's -- she had already testified to
7 all these things, so it's about parading the pictures
8 of her family, her mom, her grandma, her boyfriend in
9 front of the jury when she had already testified to all
10 of these things.

11 It's not like she sat on direct and said, I'm
12 bedridden. She said, I still go out with my friends
13 and have a beer a couple months -- or a couple of times
14 a month. You know, the -- the way that it has been
15 presented is -- is prejudicial and inappropriate.

16 THE COURT: I don't think so. You guys want
17 to make any more record?

18 MR. MAZZEO: Yes, Judge.

19 Okay. Judge, so Mr. Smith, as we're used to
20 during this trial, he makes statements that are
21 unsupported. He says -- he refers to a sex assault
22 case. Criminal case, really? Where -- where -- a case
23 where you're punishing a defendant, not awarding a
24 plaintiff -- a complainant money? I mean, you can't --
25 you can't compare both an assault case and -- and a

1 civil case where the plaintiff is seeking monetary
2 damages.

3 Harassing a witness? She didn't look
4 harassed up there. Mr. Strassburg was very respectful
5 of her. He just -- they didn't like the questions,
6 they didn't like these photos, they didn't want them
7 coming in, they don't want the jury to see that
8 these -- that these photos represent activities that
9 she engages in after the accident -- after the
10 accident, before the surgery, after the surgery.

11 So it -- these are situations where she's
12 enjoying life. She's clear -- she testified on direct
13 examination she had a diminishment of self-report,
14 diminishment in 70 percent of her enjoyment of life,
15 and these pictures are reflective of activities she
16 engaged in at that point when she's -- she spoke with
17 Dr. Smith in 2013. At the point when she spoke --
18 spoke with Dr. Smith and told -- or spoke with his
19 assistant and said, my -- I've -- my enjoyment of life
20 has diminished 70 percent.

21 So, I mean, these are relevant, and Mr. Smith
22 is certainly -- and I understand, you know, from their
23 perspective and -- and I -- I can understand him making
24 this argument because he doesn't like the -- what these
25 photos reflect of his client and that it might

1 contradict some of the -- some of the claims that
2 they're making and that they have made throughout the
3 history of this litigation. But it's baseless to say
4 they aren't relevant. They're very relevant.

5 That's it.

6 MR. SMITH: I -- I -- I want to address a
7 couple of things he said.

8 First off, I'm not claiming this is a sex
9 assault case, but the sex assault --

10 THE COURT: Let's let Mr. Tindall argue.

11 MR. SMITH: Go ahead.

12 MR. TINDALL: I --

13 THE COURT: I already ruled in you guys'
14 favor. I don't know why you're talking.

15 MR. TINDALL: You did. And I want to say
16 only one thing, and that is, we have to keep in mind
17 what we're dealing with here are pictures that the
18 plaintiff herself decided to post on a website where
19 everybody in the world can see them. So any arguments
20 about this is somehow being character assassination
21 through four hours of presentation, she posted these
22 for all the world to see. These don't hurt her any.
23 In her own mind, there's no character issues going on.

24 That's all I want to say.

25 THE COURT: Okay.

1 MR. SMITH: The defense has objected to the
2 pictures of their clients on Facebook, too, that they
3 posted for the whole world to see as well. And just
4 because somebody puts something on Facebook and just
5 because somebody got hit by another person who was high
6 at the time doesn't mean their entire life is an open
7 book and everything they have ever done get paraded in
8 front of the jury.

9 MR. STRASSBURG: Objection, Judge. That
10 mischaracterizes the record. To call Jared "high" is
11 not true. He is deemed impaired as a matter of law.
12 That's the law in this case. To call him high is
13 slander.

14 MR. SMITH: I'll refer the Court to whatever
15 the summary judgment order says. Mr. -- Mr. Strassburg
16 interrupted my train of thought.

17 THE COURT: "Doesn't mean that their entire
18 life is an open book and everything that they have ever
19 done gets paraded in front of the jury."

20 MR. SMITH: And, you know, what they're doing
21 is they're just -- they're victimizing someone who's
22 already a victim. And -- and I think that's the point
23 that we're making. And they're not impeaching
24 anything -- and now I remember my thought.

25 I want the record to be clear. We're not

1 unhappy with her testimony or her pictures. We are
2 unhappy with what has been allowed to happen to a
3 person who is clearly injured. And regardless of what
4 Mr. Mazzeo says, everyone in the courtroom can see
5 she's clearly uncomfortable sitting on the stand for
6 almost two days now. She's had to stand up, she
7 welcomed every time we come to the bench so that she
8 can stand up and get a break from sitting in the chair.
9 And that's what the issue is.

10 It's not like -- it's not like we think she
11 testified to anything differently than she did on
12 direct because there were pictures there. It's what
13 has been done to her before we got here today and then
14 what's -- what's been done to her over the last couple
15 of days.

16 MR. MAZZEO: Your Honor, nothing's been done
17 to her. Actually, quite often with Mr. Strassburg's
18 questioning of her, she smiled, she laughed at certain
19 things, she smiled at -- looking at some of the
20 pictures, reminiscing, I guess, of situations that she
21 was involved with with her family members.

22 So she didn't look uncomfortable because of
23 that. So that's -- that's -- there's no support for
24 that, Judge. I think --

25 THE COURT: Anything else?

1 MR. MAZZEO: Yeah -- go ahead. No. No. I
2 think that's it.

3 THE COURT: All right. I have already ruled.
4 So, Ms. Garcia, if you are ever uncomfortable
5 up there, feel free to stand whenever you need to.

6 THE WITNESS: Thank you. I appreciate that,
7 Your Honor.

8 MR. MAZZEO: Oh, yeah. There was one other
9 thing. Since we're on -- since Mr. Smith wanted to go
10 on the record, and he claims that we're victimizing
11 her, she's being victimized by this questioning, if
12 anything, we're showing that she's not as much a victim
13 as they're -- as her counsel are portraying her to be.
14 So she's not being victimized in that way. We're
15 actually supporting her and supporting the fact that
16 she's recovered to the extent she has in this case.

17 That's it.

18 THE COURT: Off the record.

19 (Whereupon a short recess was taken.)

20 THE MARSHAL: All rise for the presence of
21 the jury.

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

24 THE COURT: Welcome back, folks. We're back
25 on the record, Case No. A637772.

1 Do the parties stipulate to the presence of
2 the jury?

3 MR. ROBERTS: Yes, Your Honor.

4 MR. MAZZEO: Yes, Your Honor.

5 MR. STRASSBURG: Yes.

6 THE COURT: All right. Ms. Garcia, just be
7 reminded you're still under oath.

8 THE WITNESS: Yes, Your Honor.

9 THE COURT: Mr. Mazzeo, you going to go next?

10 MR. MAZZEO: Yes, Your Honor.

11 Your Honor, if I may, may I have access to
12 the ELMO?

13 THE COURT: Yep.

14

15 CROSS-EXAMINATION

16 BY MR. MAZZEO:

17 Q. Ms. Garcia, this -- you recognize -- oh,
18 that's -- that's not very good, is it?

19 Well, this is -- you recognize this photo,
20 Ms. Garcia?

21 A. Yes, sir.

22 Q. This is the one that Roger Strassburg was
23 asking you about, and it's admitted into evidence as
24 Jared Awerbach's C34. And I just wanted to ask you a
25 couple of questions about this.

1 On cross-examination by Mr. Strassburg, he
2 had asked you about the activity with regard to what's
3 depicted in this photo. Do you recall?

4 A. Yes, sir.

5 Q. And you had mentioned that the intent was to
6 be able to drink from the shot glass without using your
7 hands; correct?

8 A. Yes, sir.

9 Q. And you had mentioned that you couldn't
10 complete the task because it had spilled all over the
11 front of the blouse -- your work blouse that you were
12 wearing?

13 A. Yes, sir.

14 Q. And so I just wanted to ask you, so to -- in
15 order to complete the task, the idea was to take the
16 shot glass in your mouth and then put your head back;
17 correct?

18 A. Yes, sir.

19 Q. Like kick your head back and then drink it
20 and then put it back down; right?

21 A. Yeah.

22 Q. Okay. Thank you.

23 MR. MAZZEO: Nothing further, Judge.

24 THE COURT: Mr. Roberts, redirect?

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

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REDIRECT EXAMINATION

BY MR. ROBERTS:

Q. I'm up quicker than I thought. Let me get my notes.

All right. Emilia, I -- I'm not going to go through this in any logical order, so pay attention to what I'm saying. I'm going to hopscotch around a little bit just to get this done. Okay?

A. Okay.

Q. All right. We've been talking about your depositions and Volumes I, II, and III. Was that one long deposition on one long day?

A. Yes, sir.

Q. Okay. Did you go back again after that deposition?

A. Which one are we talking about? I'm sorry.

Q. How many depositions did they take?

A. Three.

Q. On how many different days?

A. Three different days.

Q. And did they come to you for those depositions?

A. No, sir.

Q. Where did you go?

A. I had to go to different places for them.

1 Q. Let's go through a timeline.

2 MR. ROBERTS: And, Audra, can I have a Magic
3 Marker? Thank you.

4 BY MR. ROBERTS:

5 Q. And, right now, I'm going to talk just to put
6 in context the conversation that you had with the
7 representative about not having the money for a doctor
8 after you went to the emergency room.

9 A. Yes, sir.

10 Q. Okay. So the -- the accident happened on
11 what day?

12 A. January 2nd of 2011.

13 Q. Okay. And this is not working for us.

14 A. There's one right here.

15 Q. This one will work. That one just has a
16 coating on it.

17 Okay. January 2nd. And that's a Sunday?

18 A. Yes, sir.

19 Q. Okay. And the next day, the 3rd, is a
20 Monday. Did you go back to work?

21 A. Yes, sir.

22 Q. Okay. And then the next day is the 4th.
23 That's Tuesday?

24 A. Correct.

25 Q. What did you do on Tuesday?

1 A. I was -- I was home and stayed in bed on
2 Tuesday.

3 Q. Okay. And the 5th, you went to the --

4 A. To the hospital. Correct.

5 Q. Okay. Okay. And the transcript that
6 Mr. Mazzeo showed you yesterday on cross-examination,
7 that was on the 6th. Is that the day that you had told
8 the jury you called and told them you couldn't afford a
9 doctor?

10 A. No.

11 Q. Okay. When was that? Do you recall?

12 A. That would have been on the 12th. My next
13 day off.

14 Q. So you're off on the 4th; right?

15 A. Correct.

16 Q. So it would have been the following --

17 A. The following Tuesday.

18 Q. Four plus seven is?

19 A. Eleven.

20 Q. Okay. The 11th. All right.

21 So it was on the 11th that you had the second
22 call where you told them you couldn't afford a doctor.

23 A. Correct.

24 Q. Okay. And Mr. Mazzeo showed you a transcript
25 from the 6th. I'm going to show you a proposed

1 Exhibit 57, page 10 -- just to you --

2 A. Okay.

3 Q. -- and ask you to look at the highlighted
4 portion.

5 A. Okay.

6 Q. Okay. And is that consistent with what you
7 told the jury happened on the 11th?

8 A. Yes.

9 MR. MAZZEO: Your Honor, can I see that? I
10 only have nine pages for it.

11 MR. ROBERTS: It's -- he's got it. It's a
12 proposed exhibit. It's in the binders we provided to
13 him and the Court.

14 MR. MAZZEO: I just don't know --

15 MR. ROBERTS: I'm happy to show you.

16 MR. MAZZEO: Yeah. I just don't know what
17 you're referring to.

18 THE COURT: Go ahead and show him.

19 MR. ROBERTS: You can even keep that one. I
20 got a second one.

21 MR. MAZZEO: Oh, okay. Thank you.

22 BY MR. ROBERTS:

23 Q. Mr. Mazzeo asked you about losing your job at
24 Sam's Town after almost ten years there.

25 A. Yes.

1 Q. And you told Mr. Mazzeo it was a mistake.
2 Could you tell the jury what your mistake was?

3 A. I transposed the numbers of the lady's
4 paycheck. Her check was for 1460 and some change, and
5 I paid her 1640 and some change. And Sam's Town, I
6 guess, called her and got her to come back.

7 Q. And that's your understanding of why you lost
8 your job at Sam's Town?

9 A. Yeah. That was the -- the last thing that I
10 did wrong.

11 Q. One thing about -- another thing about work I
12 wanted to clarify with you. You had told the jury on
13 direct examination that during this period of time,
14 when you went to the emergency room on the 5th, you
15 were in your 90-day probationary period?

16 A. Correct.

17 Q. And what employer was that?

18 A. Aliante.

19 Q. Right. But Mr. Mazzeo showed the jury some
20 job evaluations from Aliante that were older than that.

21 A. He did.

22 Q. Okay. How could you have been on your 90-day
23 probationary period in January of 2011 when you had
24 been there for months?

25 A. Because I was on call for a while before I

1 got the -- the -- a permanent position or full-time.

2 Q. So you weren't full-time during the period of
3 some of those evaluations Mr. Mazzeo was showing?

4 A. No, sir.

5 Q. Mr. Strassburg showed a trip to California
6 that you took --

7 A. Yes.

8 Q. -- with you on the beach?

9 A. Yes, sir.

10 Q. Why -- why did you decide to go on that trip
11 to California?

12 A. You know, I had put the girls through a lot
13 in the months prior to that. They had seen me in a lot
14 of pain; and, to me, it was a way to reward them for
15 the things that they had seen. And I wanted them in
16 some way to have a joyous occasion. And so I figured
17 before I had to go back to work and things got rough
18 again, I wanted them to have a good memory. So I --
19 you know, I went ahead and made the plans to take them
20 out there.

21 Q. Were you in pain during that trip?

22 A. Yes, sir, I was.

23 Q. Did the trip make your pain better or worse
24 in the following days?

25 A. Worse, of course.

1 Q. And the same thing with regard to household
2 services. You were asked about if you were trying to
3 do the same thing, but it was taking you longer?

4 A. Correct.

5 Q. Was that the only difference between before
6 and after the crash, that it took you longer to do
7 things?

8 A. No.

9 Q. Okay. What other differences were there?

10 A. You know, the pain and being more tired or
11 asking for help. It was completely different.

12 Q. Was it just pain while you were doing the
13 activities?

14 A. It was pain while and after and -- yeah.

15 Q. You were shown a -- a pain -- or a
16 questionnaire from the doctor from August 2012. Just
17 to remind the jury, was that before or after the fusion
18 surgery?

19 A. Could you tell me the date again. I'm so
20 sorry.

21 Q. It was August of 2012.

22 A. Was it after the surgery? No.

23 Q. So before the surgery?

24 A. No, it was before the surgery. Correct.

25 Q. Okay. And do you recall him showing you a

1 sheet which said that your pain restricted your travel?

2 A. Yes, sir.

3 Q. Could you explain to the jury what you
4 thought restricted means -- meant when you -- when you
5 checked that it restricted your travel?

6 A. That I would hurt and I would have to stop
7 and I would have to get out, you know, that -- that it
8 was painful for me. And I -- I would have not thought
9 to take a long trip at that time.

10 Q. Were you trying to answer that question
11 honestly as you understood the question?

12 A. Oh, yes.

13 MR. ROBERTS: Audra, Exhibit 26, page 510,
14 which was shown during Ms. Garcia's cross-examination.
15 BY MR. ROBERTS:

16 Q. Go down to the low back pain in the middle of
17 the page. Do you remember Mr. Strassburg asked you if
18 you told Dr. Kidwell that you were unable to sit?

19 A. Yeah.

20 Q. Do you have a recollection of that visit as
21 you sit here today?

22 A. No.

23 Q. Did you tell Dr. Kidwell that you were pacing
24 the room?

25 A. I don't remember.

1 Q. Did you tell him that you always paced the
2 room? Was that a problem that you had?

3 A. I always --

4 Q. You just don't remember, do you?

5 A. But I don't remember.

6 Q. Okay. Do you remember Mr. Strassburg
7 displaying something on the screen for you and the jury
8 that said, "We love swimming, Marco Polo, and swimming
9 underwater and giving each other kisses. Hasn't
10 happened for two years now"?

11 A. Yeah.

12 Q. Did you stop kissing your children for two
13 years, ma'am?

14 A. No. No, sir.

15 Q. What did you mean when you said that?

16 A. I meant kisses underwater, you know, playing
17 Marco Polo and kissing each other underwater and
18 holding each other down, you know, together and
19 reaching to each other and kissing each other
20 underwater.

21 So, no, I would never stop kissing and
22 hugging my kids.

23 Q. Thank you, ma'am.

24 How long have you been not actively going to
25 work?

1 A. As of today?

2 Q. Yeah, about how long? Months?

3 A. Close to a year.

4 Q. Okay. And does that have anything to do with
5 the accident? Are you claiming you can't work because
6 of the crash?

7 A. No.

8 Q. Why haven't you been working?

9 A. Ernesto was able to allow me to stay home.
10 And I wanted to bring my mom out here from Texas
11 because she was in a nursing home out there. And just,
12 you know, she was gradually getting worse. And I
13 wanted her to be around family. And it was a lot
14 easier for her to be with us. And so she's been --
15 well, she was living with us for about six months.

16 MR. ROBERTS: Audra, do you have this
17 picture?

18 BY MR. ROBERTS:

19 Q. So Mr. Strassburg showed you a couple of
20 pictures from Andrea Awerbach Exhibit E. Do you
21 remember seeing those and he asked you if those
22 accurately depicted the damage that you saw to your
23 car?

24 A. Yes.

25 Q. I'm going to show you one of those,

1 hopefully, No. 2, which I don't think you saw -- that
2 he showed you, rather.

3 And is this your car?

4 A. Yes.

5 Q. And the tire -- it's hard to see, but is the
6 tire flat?

7 A. Yes, sir.

8 Q. And if you look at the damage along the
9 passenger side, does that accurately reflect the damage
10 to your vehicle?

11 A. Yes, sir.

12 Q. And I see the -- the back door is sticking
13 out. Had you opened it?

14 A. I tried.

15 Q. And were you successfully able to open it?

16 A. No. It wouldn't open.

17 Q. Stuck?

18 A. Yeah.

19 MR. ROBERTS: And, Audra, could I have Andrea
20 Awerbach Exhibit K13.

21 BY MR. ROBERTS:

22 Q. And I'm going to show you now one of the
23 pictures that Mr. Mazzeo showed you during his
24 cross-examination yesterday.

25 A. Okay.

1 Q. All right. And this is you and your Lennay;
2 right?

3 A. Yes.

4 Q. Now, do you know if the date stamped in red
5 on this photo was on the original photo?

6 A. No.

7 Q. Was it on the original way you posted it to
8 your Facebook account?

9 A. Was it what? I'm sorry.

10 Q. Was this the way you posted it to your
11 Facebook account, or was this date added by the defense
12 lawyers after they stalked your Facebook page?

13 MR. MAZZEO: Objection, Your Honor. Improper
14 statement by counsel.

15 MR. ROBERTS: It's an accurate depiction of
16 what they did, Your Honor.

17 MR. MAZZEO: Judge.

18 THE COURT: Let's use a different word.

19 BY MR. ROBERTS:

20 Q. After they accessed your Facebook page
21 without your knowledge --

22 MR. MAZZEO: Could we get a ruling on the
23 record, Counsel?

24 THE COURT: I already ruled.

25 MR. MAZZEO: I didn't hear it, Judge. I

1 don't know if the --

2 THE COURT: I sustained the objection.

3 MR. MAZZEO: Thank you.

4 BY MR. ROBERTS:

5 Q. Was this date placed on the photo after the
6 defense lawyers went on your Facebook page without your
7 knowledge and downloaded your personal photographs?

8 A. Yes.

9 Q. Mr. Mazzeo asked you why you weren't here.
10 Are you claiming that you couldn't be here due to your
11 physical condition?

12 A. No.

13 Q. Would you have been here if the judge had
14 told you you had to be here every day?

15 A. Oh, yes.

16 Q. Why -- why did you decide not to come?

17 MR. MAZZEO: Objection, Your Honor. Can we
18 approach?

19 THE COURT: Sure.

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

22 THE COURT: Objection's overruled.

23 BY MR. ROBERTS:

24 Q. Thank you, Emilia. You can answer.

25 A. Okay.

1 Q. Tell the jury why you weren't here.

2 A. My mother has been getting worse within the
3 last month and a half or so. She's been in and out of
4 the hospital and medical facilities. And so I -- and
5 I'm her power of attorney medically. So I have to be
6 available to her at all times. And I have been
7 waiting, you know, prior to that. And I'm sorry if
8 I'm -- if I'm being wrong for telling you this, but for
9 the past five months I have been expecting her to come
10 home. And she hasn't been able to.

11 And the other reason has been, you know, in
12 opening statements there was a lot of bad stuff said
13 about me. You know, I'm -- my weight, me as a person.
14 And going through everything that I'm going through at
15 home has been impossible to bear the things that are
16 happening here. So I -- I decided not to come back
17 until I was -- you know, I had to.

18 Q. Thank you, Emilia.

19 MR. ROBERTS: No further questions, Your
20 Honor.

21 THE COURT: Mr. Mazzeo? No?

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

23

24 /////

25 /////

RECROSS-EXAMINATION

BY MR. MAZZEO:

Q. So, Ms. Garcia, you were here when you did -- the first time you came for trial was the morning of jury selection on February 8th; right?

A. Correct.

Q. And then you weren't here for opening statements, were you?

A. What are -- I'm sorry. What are opening statements?

Q. Oh, well, you just mentioned a minute ago on redirect by your counsel that you heard a lot of bad things during the opening statement about yourself.

A. Right.

Q. But you weren't here to hear them yourself; right?

A. I was here.

Q. For opening statement?

A. For what you said about me. I don't know if that was -- if I'm wording it wrong. But I heard what you said about me to the jury.

Q. Oh, you heard -- now, you heard that based on what someone told you or you were here in the courtroom?

A. I'm sorry. I was present.

1 Q. Because yesterday you had told us that you
2 were here for three half days up until yesterday;
3 right?

4 A. I haven't been able to count all the days
5 that I'm here. I'm sorry.

6 Q. Okay. So it's your -- it's your testimony
7 that you were here during opening statements?

8 A. I don't know if that's the wrong way of
9 saying what it was; I'm just repeating words that I've
10 been hearing here.

11 Q. Okay. Now, your attorney showed you an
12 exhibit, Exhibit 57, page 10, and -- at the beginning
13 of his redirect of you. Do you recall that?

14 A. Is it a picture or --

15 Q. No. I'm going to show it to you.

16 MR. MAZZEO: Judge, may I approach?

17 THE WITNESS: Thank you.

18 BY MR. MAZZEO:

19 Q. I'm going to ask you to look at that same
20 paragraph. And -- and I just want to be clear. This
21 was a statement that you -- you had a conversation with
22 representative on the 11th of January?

23 A. Yes, sir.

24 Q. And is it also correct that on the 11th that
25 the representative asked -- offered to advance you the

1 cost for medical prescriptions?

2 A. For medicine.

3 Q. Medicine --

4 A. Yeah.

5 Q. -- right? And not only that but actually
6 asked you to contact her if you decided to move forward
7 with it; right? If you needed anything.

8 A. I don't remember her saying that exactly.

9 Q. Okay. Well -- well, read -- read
10 underneath -- there's some highlighted writing on that
11 page. And if you can take a moment to read that. And
12 then when you're done, let me know.

13 A. (Witness reviewing document.)

14 Q. There's just two lines that are highlighted
15 in yellow, Ms. Garcia.

16 A. I'm sorry.

17 Q. No. That's fine.

18 A. It says, "I offered to advance the cost of
19 prescriptions if needed." Okay.

20 Q. And the next sentence --

21 A. "I asked her to contact me about this if
22 needed."

23 Q. If needed; right?

24 A. That's -- yeah, for medication.

25 Q. Do you recall that?

1 A. For medication; correct.

2 Q. Right. For medication; right?

3 A. Yes, sir.

4 Q. Okay. And -- but -- but yesterday, when I

5 was questioning you, I was asking you questions about

6 the conversation you had with the representative on the

7 6th, which was the day after you went to the ER at

8 MountainView; correct?

9 A. Okay.

10 Q. No. Correct? Yes or no.

11 A. Yes.

12 Q. Do you recall that?

13 A. Uh-huh.

14 Q. Okay. And you recall that I showed you a

15 recorded statement of the conversation you had with the

16 representative from January 6th?

17 A. Yes.

18 Q. And you recall reading the dialogue that took

19 place, where the representative actually asked you if

20 you were going to seek any follow-up treatment. Yes?

21 A. Yes.

22 Q. Okay. You do recall that; right?

23 A. Yes.

24 Q. And are you disputing that that conversation

25 took place, or you just don't recall it?

1 A. No. I don't recall it. I thought that was
2 the -- the actual conversation I had with her on the
3 11th.

4 Q. Okay. Now, with regard to -- Mr. Roberts
5 asked you about a mistake you made at Sam's Town. And
6 you said -- well, that was -- you referred to a -- I
7 guess, a miscalculation?

8 A. Transposing of numbers.

9 Q. Transposing of numbers. That's what you
10 said. And you said that's the last thing you did wrong
11 prior to being terminated from Sam's Town; right?

12 A. Yes, sir.

13 Q. And you agree that you were -- you weren't
14 terminated as a result of one mistake, but it was as
15 of -- as a result of multiple infractions; right?

16 A. Correct.

17 Q. Okay. Now, when you worked at Aliante,
18 and -- thank you for clarifying today that you were --
19 you weren't in a full-time capacity initially when you
20 started in February of 2010; correct?

21 A. Yes, sir.

22 Q. And, however, at the time -- you remember
23 yesterday I showed you team member appraisals that were
24 done?

25 A. Yes.

1 Q. And the three that I showed you were -- one
2 was from November of 2010?

3 A. Okay.

4 Q. Do you remember that?

5 A. Not exactly.

6 Q. No? Okay. Well, in any event, I showed you
7 three team member appraisals. One was from November of
8 2010, one was from May of 2011, and the third was from
9 November of 2011 as well.

10 A. Okay.

11 Q. Okay?

12 And would you agree, though, that as of
13 November of 2010, you were a full-time employee?

14 A. No.

15 Q. Oh, you weren't?

16 A. No, sir.

17 Q. When did you become a full-time employee at
18 Aliante, then, prior -- strike that.

19 Did you become a full-time employee at
20 Aliante prior to the accident?

21 A. I'm sorry?

22 Q. Okay. I'll ask it again.

23 We're talking about Aliante.

24 A. Yes.

25 Q. And you were working as a cage cashier?

1 A. Yes, sir.

2 Q. And were you a full-time employee at Aliante
3 at the time of the accident?

4 A. I was, but I was on my 90-day probationary
5 period.

6 Q. Oh, that's fine. So you were still in your
7 probationary period at the time of the accident. But
8 my question was, you were a full-time employee?

9 A. Yes. I'm so sorry.

10 Q. No. It's fine.

11 Now, in November of 2010, were you a
12 full-time employee, which was about a little over a
13 month prior to the accident?

14 A. Yes, sir.

15 Q. Okay. And you were a full-time employee in
16 May of 2011, five months after the accident?

17 A. Yes, sir.

18 Q. And you were a full-time employee in November
19 of 2011?

20 A. Yes, sir.

21 Q. Okay. Now, you also mentioned on redirect
22 examination about the trip to California and you wanted
23 to reward your kids. You wanted them to have good
24 memories, so you made plans to go to California; right?

25 A. Yes, sir.

1 Q. Now, after your cross-examination yesterday,
2 you spoke with your counsel about that -- that
3 examination; correct?

4 A. Yes.

5 Q. Okay. Now, also, you -- you said you
6 weren't -- you have not been actively working for a
7 year up -- I guess as of -- as we stand here today;
8 correct?

9 A. Yes, sir.

10 Q. And -- and that you wanted your mom to come
11 from Texas and -- and she lived with you for a number
12 of months; right?

13 A. Yes.

14 Q. But as of February 8th of -- of this year,
15 first day of trial, your mom wasn't living with you; is
16 that correct?

17 A. No. She's been -- she's been in, like, a
18 half-hospital/half-rehab center.

19 Q. Like a nursing home/rehab center?

20 A. It's not a nursing home, but it's close to a
21 hospital.

22 Q. Fair enough.

23 But, in any event, she hasn't lived with you
24 at any time during this -- the course of this trial,
25 the last four weeks; correct?

1 A. No, I don't -- she -- I haven't had her at
2 home.

3 Q. Okay. And with regard to -- you saw the
4 photographs that Mr. Strassburg showed to you and --
5 and Mr. Roberts showed to you of -- of your car as it
6 looked after the accident; right?

7 A. Correct.

8 Q. Now, after the accident, you had got -- you
9 got out of your vehicle; right?

10 A. Yes, sir.

11 Q. You were at the scene for about two hours;
12 right?

13 A. Yes, sir.

14 Q. And when you were at the scene after the
15 accident, is it correct to say that, within the first
16 three minutes, you had -- you looked at your car? You
17 went around it and looked at the damage to your car?

18 A. No, sir.

19 Q. Well, is it correct to say that while you
20 were at the scene, you looked at the damage to your
21 vehicle?

22 A. I saw it after they had put it up on the tow
23 truck.

24 Q. Okay. And so that was still at the scene;
25 right?

1 A. Yeah.

2 Q. And so when you looked at it, you saw the
3 damage to your car; right?

4 A. Somewhat.

5 Q. Okay.

6 MR. MAZZEO: I'll pass the witness.

7 THE COURT: Mr. Strassburg?

8 MR. STRASSBURG: No questions, Judge.

9 THE COURT: Any more, Mr. Roberts?

10 MR. ROBERTS: Yes, Your Honor.

11

12 FURTHER REDIRECT EXAMINATION

13 BY MR. ROBERTS:

14 Q. Mr. Mazzeo went back to that conversation
15 that you had with a representative on the 6th, one
16 about -- where there's the recorded statement.

17 A. Yeah.

18 Q. Do you remember what you told her about
19 future treatment and what you were hoping?

20 A. I was hoping that I would get better and that
21 I wouldn't have to, you know, keep treating myself.

22 Q. And a week later, on the 11th, when you
23 called her again, had you gotten better?

24 A. No, sir.

25 Q. And Mr. Mazzeo pointed out that she offered

1 to pay for medications?

2 A. Yes.

3 Q. Do you remember that?

4 A. Yes.

5 Q. Did she offer to pay for any treatment?

6 A. No, sir.

7 Q. No doctors?

8 A. No, sir.

9 Q. And was there a place you got your

10 medications consistently?

11 A. Yes.

12 Q. And where that was?

13 A. The CVS pharmacy on Lake Mead and Torrey

14 Pines.

15 Q. Okay. And I was going to ask you another

16 question, but I don't think you would know the answer.

17 MR. ROBERTS: So, Your Honor, that's all I

18 have.

19 THE WITNESS: Okay.

20 THE COURT: Mr. Mazzeo?

21 MR. MAZZEO: Yes, Judge. Just a couple.

22

23 FURTHER RECROSS-EXAMINATION

24 BY MR. MAZZEO:

25 Q. Ms. Garcia, now, just so I'm clear about

1 this, when you testified on direct examination --
2 today's Friday. I believe you testified on direct exam
3 on Wednesday, two days ago; right?

4 A. Okay.

5 Q. Do you recall?

6 A. Yeah.

7 Q. Okay. And do you recall ever mentioning --
8 when Mr. Roberts was asking you about a conversation
9 with Jared Awerbach's rep, did you say anything about
10 the conversation you had with a rep on January 6th of
11 2011?

12 A. I don't remember.

13 Q. Okay. And the record stands for itself.

14 The conversation on direct examination -- the
15 conversation you referred to -- you referred to --
16 strike that.

17 When you were testifying on direct, the
18 conversation that you were referring to that you had
19 with Jared Awerbach's rep was one conversation after
20 the accident, and it was with regard to -- and it was
21 about a week after you went to the emergency room at
22 MountainView.

23 Do you recall that?

24 MR. ROBERTS: Objection to form.

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

1 THE WITNESS: I lost you. I'm so sorry.

2 BY MR. MAZZEO:

3 Q. Okay. Do you recall on direct examination
4 you had mentioned that, when you spoke with Jared
5 Awerbach's rep, that you spoke with a rep about a week,
6 seven days, six days, approximately a week after you
7 went to the emergency room at MountainView?

8 Do you recall that?

9 A. Yes.

10 Q. Okay. And -- and yet on redirect -- redirect
11 by Mr. Roberts, now you're -- you're recalling that you
12 actually had a conversation with a rep on 1/6 of 2011
13 where you said you were hoping -- you told the rep that
14 you were hoping that you would get better; right?

15 MR. ROBERTS: Objection to form.
16 Mischaracterizes the evidence.

17 THE COURT: I don't know that that's exactly
18 what she said. I'm going to sustain it. Rephrase it.

19 BY MR. MAZZEO:

20 Q. Okay. Did you just say on redirect that you
21 were -- you told the rep you were "hoping that I'd get
22 better"?

23 A. Yes.

24 Q. Okay. You did say that. I thought I wrote
25 it down.

1 So -- so and just -- just so I'm clear, you
2 have a recollection with regard to that conversation --
3 having a conversation with a rep both on January 6th
4 and on the 11th?

5 A. I just remember the 11th conversation with
6 him.

7 Q. Okay.

8 MR. MAZZEO: Thank you. Nothing further.

9 THE COURT: Any more? Mr. Roberts?
10

11 FURTHER REDIRECT EXAMINATION

12 BY MR. ROBERTS:

13 Q. Just for completeness, since we keep talking
14 about the 6th, did you say, "I'm still thinking that
15 it's just my -- the shock of your body and just being
16 shaken up that way. And I'm hoping it stops hurting"?

17 MR. MAZZEO: Objection, Your Honor.

18 BY MR. ROBERTS:

19 Q. Does that sound about right?

20 MR. MAZZEO: Beyond the scope. And she
21 doesn't remember the conversation on the 6th.

22 THE COURT: It's not beyond the scope. I
23 think that's why he's asking the questions. Overruled.

24 Did she answer it?

25 MR. ROBERTS: I think she did, Your Honor.

1 MR. TINDALL: Objection. Leading.
2 THE COURT: It is leading.
3 MR. ROBERTS: That's probably fair.
4 THE COURT: Sustained.
5 MR. ROBERTS: I will withdraw the question,
6 Your Honor. No further questions.
7 That's all I have, Emilia.
8 MR. MAZZEO: Nothing further.
9 THE COURT: Any questions from our jurors?
10 No questions? All right. Thank you, ma'am.
11 Appreciate your time.
12 THE WITNESS: Thank you.
13 THE COURT: Don't we have another witness at
14 2:00?
15 MR. ROBERTS: We do, Your Honor. We can
16 break until 2:00 or --
17 THE COURT: Take a quick break? Let's go
18 ahead and take a quick break. We have another witness
19 that's scheduled to be here in 15 minutes. And then,
20 as I told you before, we're going to be done today at
21 3:30, so we don't have much longer this week.
22 During our break. You're instructed not to
23 talk with each other or with anyone else about any
24 subject or issue connected with this trial. You are
25 not to read, watch, or listen to any report of or

1 commentary on the trial by any person connected with
2 this case or by any medium of information, including,
3 without limitation, newspapers, television, the
4 Internet, or radio.

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

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

14 Come back at 2:00 o'clock. You guys are
15 going to know that admonition by heart by the time the
16 trial is over.

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

19 THE COURT: All right. We're outside the
20 presence. Anything we need to put on the record, guys?

21 MR. MAZZEO: Anything for the record? One
22 second, Judge. Nothing on the record.

23 THE COURT: All right. Off the record.

24 MR. ROBERTS: Thank you, Your Honor.

25 (Whereupon a short recess was taken.)

1 THE COURT: Let's go back on the record.
2 We're outside the presence.

3 What's your issue? We'll decide if we can do
4 it quick or not.

5 MR. ROBERTS: It should be quick because we
6 filed a trial brief. And if the Court has read our
7 trial brief, it's about whether or not they opened the
8 door to character evidence and other bad acts that the
9 Court had previously excluded through the opening
10 statement that they made and the argument they made to
11 jury during -- well, it's not really an argument during
12 an opening.

13 But I think it was where what Mr. Strassburg
14 said was that you shouldn't punish Mr. Awerbach because
15 he spent time in jail and he went to the Las Vegas
16 Rescue Mission and he talked about the Las Vegas Rescue
17 Mission and what it was and what Mr. Awerbach went
18 through there. And then he told the jury that, at the
19 end of the trial, he wanted them to find that that was
20 enough punishment for what he did in this case.

21 Well, Mr. Awerbach went to the Las Vegas
22 Rescue Mission for a lot of reasons in addition to
23 being under the influence and running into Ms. Garcia.
24 He went there for a whole lot more reasons that the
25 Court has excluded. But now the issue -- and what the

1 jury's been asked to do, even if he never makes this
2 argument again, they've been asked to weigh the
3 punishment versus the things he did. They can't do
4 that unless they know all the things he did.

5 So I think I should be able to now go into
6 everything that he did that led to him being in the
7 Las Vegas Rescue Mission. His addictions, his drug
8 dealing, all of the things that he did in addition
9 to -- to smoking marijuana. It's now at issue. The
10 jury's been asked to determine if what he's done is
11 enough to pay for his crimes and bad acts.

12 THE COURT: It's a great argument. You
13 really don't expect me to grant it?

14 MR. MAZZEO: No.

15 MR. ROBERTS: I do, Your Honor. And --
16 and -- and --

17 THE COURT: Here's what I'm going to allow.
18 I am going to allow you to ask the question whether or
19 not his time at the Rescue Mission was solely because
20 of this accident. And if he says "yes," then I may let
21 you get into the other stuff.

22 MR. ROBERTS: Okay.

23 THE COURT: But I'm -- I'm guessing that he's
24 going to admit his time at the Rescue Mission involved
25 other problems. And as long as he acknowledges those

1 other problems, I don't think we get into all the
2 character stuff.

3 Fair enough?

4 MR. ROBERTS: That's probably fair enough,
5 Your Honor.

6 THE COURT: You guys want to make a record on
7 that?

8 MR. STRASSBURG: No.

9 THE COURT: I did read the brief the day you
10 gave it to me.

11 MR. ROBERTS: Okay. Thank you, Your Honor.

12 THE COURT: All right. Is Dr. Gross ready?

13 MR. SMITH: Yes, he is.

14 THE COURT: Let's get the doctor in here
15 first, Curt. Is he waiting out there? He's ready?
16 Wait.

17 MR. MOTT: He is.

18 THE COURT: All right. Let's bring him in
19 and then the jury in and we'll get going.

20 Welcome back.

21 THE WITNESS: I missed you.

22 MR. ROBERTS: There he is.

23 (Discussion was held off the record.)

24 THE COURT: All right. Come ahead and step
25 back up here. Once the jury comes in, I'm going to

1 have you resworn again.

2 THE WITNESS: Okay.

3 THE COURT: We're ready.

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

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

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

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

13 MR. ROBERTS: Yes, Your Honor.

14 MR. MAZZEO: Yes, Your Honor.

15 MR. STRASSBURG: Yes.

16 THE COURT: All right, folks. You probably
17 recognize we have Dr. Gross back on the stand.

18 So let me explain to you what's happening.
19 Ordinarily, the plaintiffs would put on their witness
20 and they would rest. The defense would put on their
21 witnesses, and they would rest. And then there would
22 be a chance for the plaintiff to do rebuttal witnesses,
23 if necessary.

24 In this case, because the trial's lasted
25 longer than anybody expected and the defense had

1 experts that were scheduled, we have those experts
2 testify before the plaintiffs finish their case in
3 chief. Plaintiffs have still not finished their case
4 in chief, but this is the time that Dr. Gross could
5 come back for his rebuttal testimony, so this is the
6 plaintiff's rebuttal case to the medical providers
7 presented by the defense. Okay? Kind of confusing.
8 Hopefully you guys all get that and we'll be okay.

9 Doctor, since you have been gone for a little
10 bit, I'm going to have you resworn again if you would
11 raise your hand, please.

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

16 THE WITNESS: I do.

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

19 THE WITNESS: My name is Jeffrey David Gross,
20 M.D. Spelled J-e-f-f-r-e-y D-a-v-i-d G-r-o-s-s.

21 THE COURT: Thank you, Doctor.

22 THE WITNESS: Thank you.

23 MR. ROBERTS: Thank you, Your Honor.

24

25 DIRECT EXAMINATION

1 BY MR. ROBERTS:

2 Q. Good afternoon, Dr. Gross.

3 A. Good afternoon.

4 Q. Good to see you again.

5 A. Thank you.

6 Q. The -- since you were here last time, the
7 jury has heard from Dr. Klein, and I'd like to talk to
8 you about a couple issues that came up during
9 Dr. Klein's testimony. Okay?

10 A. Okay.

11 Q. Before I ask my questions, let me get into a
12 little bit of foundation. And you talked to your -- to
13 the jury about your qualifications when you first came
14 here two weeks ago?

15 A. I lost track.

16 Q. So could you tell the jury about your
17 specific education, training, and experience in reading
18 MRI films?

19 A. Yes. First, part of my residency -- that's
20 seven years of training after medical school before I
21 started practice -- included a three-month rotation
22 through the department of radiology, specifically
23 what's called neuroradiology, where we looked at brain
24 and spine films all day.

25 Second, the other six years and nine months

1 of my residency, we started every morning, sometimes at
2 4:30 in the morning, at the view board to look at all
3 the X rays, MRIs, CAT scans, and things that had come
4 in the night before. And then we'd go see the patients
5 on rounds, and we'd put two and two together through
6 what's called clinical correlation. So every day we
7 were using films to plan treatments and look at people.

8 Third, part of my residency included a
9 fellowship in MRI reading with a well-known radiologist
10 named William Bradley. He is currently the chairman at
11 the radiology department at the University of
12 California San Diego.

13 Lastly, I read MRIs every day, and then I go
14 into the operating room on some of those patients and I
15 look at the real anatomy. So I get to compare what in
16 real life something looks like so that every day I am
17 becoming even better at reading MRIs and X rays and
18 other films because I have a real knowledge of what
19 that tissue feels like and handles and texture and all
20 this.

21 Q. Thank you very much, Doctor.

22 MR. ROBERTS: Audra, can you display
23 Exhibit 40, page 2013.01.21, xraylumspineph1.jpg.

24 And, Your Honor, so everyone doesn't have to
25 remember that, I would ask to mark a copy of this page

1 as Exhibit 40C.

2 THE COURT: Okay.

3 MR. ROBERTS: And --

4 THE COURT: You have a hard copy for us?

5 MR. ROBERTS: I have a hard copy for the
6 Court.

7 THE COURT: Great.

8 THE CLERK: You said 40C?

9 MR. ROBERTS: 40C, yes.

10 THE COURT: Okay. This is already admitted?

11 MR. ROBERTS: It's already admitted as part
12 of Exhibit 40, which is the disc. And there will be a
13 computer in the jury room, I understand, where the jury
14 can look at all the films.

15 THE COURT: Okay. You guys have a problem
16 admitting 40C?

17 MR. STRASSBURG: No.

18 MR. MAZZEO: No, Judge.

19 THE COURT: 40C will be admitted.

20 (Whereupon, Defendant's Exhibit C40 was
21 admitted into evidence.)

22 BY MR. ROBERTS:

23 Q. Now, the jury saw Dr. Klein review this on a
24 slide during his testimony. I'd like to ask you a
25 question.

1 The pedicle screw that's visible on the
2 left-hand side -- and that's right-hand side in real
3 life; right?

4 A. Left side of the picture is the right on
5 Ms. Garcia.

6 Q. Okay. So when I say "left," I'm going to
7 refer to left on the MRI. Okay?

8 A. X ray, if I can correct you.

9 Q. Thank you.

10 A. Sure.

11 Q. You may correct me.

12 So looking at the left side with -- the side
13 with the two pedicle screws rather than the three, can
14 you tell the jury whether or not that pedicle screw is
15 placed into the bone of the lumbar vertebrae --
16 vertebral body?

17 A. Well, there are two pedicle screws, one at L5
18 and one at S1, on the left of the picture or the right
19 of the patient. And both are in the vert -- vertebra
20 L5 and sacral 1, and I know that from looking at that
21 X ray and from others. This is only a single view, and
22 you can't just look at this one front view to make the
23 determination. That would be unfair.

24 Q. Okay.

25 MR. ROBERTS: Well, Audra, let's take a

1 closer look at this. And just -- just the -- the
2 square.

3 BY MR. ROBERTS:

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

7 A. Yes, it is.

8 Q. Is there any other reason that you have for
9 believing the screw is in the bone other than your
10 review of films?

11 A. I have two other reasons.

12 Q. Okay.

13 A. Well, one is review of another film, and two
14 is because I put it in the bone and felt it in the bone
15 when I put it there.

16 Q. Do you -- as part of your ordinary course, do
17 you verify that the screw is solidly placed in the bone
18 during --

19 A. Yes.

20 Q. -- the procedure?

21 A. Yes. Through multiple --

22 MR. MAZZEO: Objection. Leading.

23 THE COURT: Overruled.

24 THE WITNESS: Yes. Through multiple
25 mechanisms.

1 BY MR. ROBERTS:

2 Q. Could you tell the jury about those
3 mechanisms?

4 A. Sure. First, we drill a little pilot hole,
5 and then we use a hand tool to -- to sort of create
6 the -- the hole in the bone where the screw will go.
7 And that tool allows us to feel up, down, right, and
8 left, and you can feel if you're up against something
9 hard or not. And the only thing hard in there is bone.

10

11 Then we take a little tiny probe next with a
12 little ball tip and we feel around the whole hole to
13 make sure it's solid all the way around so we know
14 we're in bone. And then we direct the screw right down
15 that created path. So that's the first mechanism.

16 The second mechanism in surgery is we use the
17 fluoroscopy X ray machine. And we take front view and
18 side view, and we make sure we are in the bone on the
19 X ray and in life -- in real life.

20 Q. Does the screw sometimes not seat properly in
21 the bone?

22 A. Possibly.

23 Q. And in those situations, what is your normal
24 course?

25 A. Well, if the bone doesn't -- sorry. If the

1 screw is way -- not even close, we start over and
2 reposition it. If -- if we can't get it for various
3 reasons, maybe the bone doesn't accommodate it sizewise
4 or what have you, we abort it, like I did at L4 on the
5 right side. These are the different mechanisms.

6 If it's close, we might redirect the angle or
7 something of the screw, and we can back it out and put
8 it back in like you would, you know, assembling some
9 furniture.

10 Q. Did you have any of those problems with the
11 pedicle screws that remained in Ms. Garcia's spine
12 after you were complete with your surgery?

13 A. No. The five screws were all seated
14 perfectly in the bone.

15 Q. And one of them was not. We talked about
16 that. The sixth screw. Other than the hardware the
17 jury sees here with the screws and the rods, did you do
18 anything else to stabilize that joint above L5-S1?

19 A. I kept her in a brace longer than I might
20 have, but the -- the -- on the right of the picture or
21 the left of the patient has a screw and rod in it, and
22 that one side is more than adequate to fuse a segment.
23 We like two sides because it's even better, but in this
24 case we got by well with one side.

25 Q. Have you reviewed extensive films

1 postsurgery?

2 A. Yes.

3 Q. Have you continued to treat Ms. Garcia since
4 the surgery of December 26, 2012, to today's date?

5 A. Yeah. I saw her a couple of weeks ago.

6 Q. Have you seen any evidence of a
7 pseudarthrosis in Ms. Garcia's spine at either level
8 that you fused?

9 A. No.

10 Q. Any evidence of micromotion?

11 A. No.

12 Q. Any evidence that her bone grafts did not
13 fuse properly?

14 A. No. No evidence of that.

15 Q. Well, if you saw no evidence of that, did you
16 suspect it at any time?

17 A. Well, when she first came back after having
18 done well for quite a while and starting to have pain
19 again, one of the things on my mind to evaluate was the
20 idea of this failed fusion or pseudarthrosis.

21 But when I examined her, her pain was more
22 over in the sacroiliac joints to either side. And when
23 those were injected, the pain went away. So, of
24 course, it's not failed fusion. The pain wouldn't go
25 away with sacroiliac joint injections if it were a

1 failed fusion. The same applies to the facet joints
2 and the hardware, which is a separate issue.

3 Q. Well, if you didn't expect a
4 pseudarthrosis -- did I say that right?

5 A. You did.

6 Q. Okay. Why did you ask Dr. Kidwell to inject
7 her hardware?

8 A. Because sometimes the presence of the
9 hardware against the muscles causes some local pain,
10 and in rare cases we do actually go in and take out the
11 hardware for that reason once the fusion has matured.
12 Not commonly, but we do that. And the hardware
13 injection is the test for hardware-causing pain.

14 Had there been a failed fusion, that
15 injection would not have helped because that medicine's
16 not going to make it more stable.

17 Q. Thank you, Doctor.

18 MR. ROBERTS: That's -- that's all I have,
19 Your Honor.

20 THE COURT: Mr. Mazzeo? Mr. Strassburg?

21 MR. MAZZEO: Yes, Judge.

22

23 CROSS-EXAMINATION

24 BY MR. MAZZEO:

25 Q. Dr. Gross, good afternoon.

1 A. Good afternoon.

2 Q. The -- the post-op X ray that we were looking
3 at, what view is that?

4 A. It's a front view. We call it an AP view or
5 PA view.

6 Q. So it's not an oblique angle view; it's a
7 front view. Right?

8 A. Right.

9 Q. Okay. And do you recall the artistic
10 rendition drawing that -- that the plaintiffs had in
11 this case of the surgery that was performed?

12 A. Yes.

13 Q. Let's see. That's not it.

14 Well, in any event, you recall that this
15 artistic rendition had rods and screws placed in it?

16 A. Yes.

17 Q. On it. There were -- I think there were four
18 or five images on this trial board; right?

19 A. Something like that.

20 Q. Or maybe less. Okay.

21 But, in any event -- and you had -- you had
22 assisted the plaintiff's counsel in this rendition?

23 A. Yes.

24 Q. Like, you were consulted and conferred with
25 and -- and -- with regard to the surgery that you

1 performed with the laminectomy and laminotomies that
2 you performed; right?

3 A. Yes.

4 Q. Okay. And do you agree that -- do you recall
5 the rendition shows that the rods on both the right and
6 left side of Ms. Garcia's back are parallel with one
7 another?

8 A. In the cartoons on the board, yes.

9 Q. Okay. Right. But you agree that this
10 post-op X ray, this front view does not show that they
11 are parallel. It shows that the -- the one on the left
12 side of the image, which is the right side of the body,
13 is actually more -- it's going off to an angle?

14 A. Yes. I -- I believe it's best seen on some
15 of the other films, like the side view; but yes, it --
16 it -- there was an offset to the way the rods sat on
17 either side.

18 Q. Right. And, also, I believe that you
19 testified -- and it was also in your operative
20 report -- you had indicated that you did not get good
21 purchase with the screw at the L4-L5 level?

22 A. It was the L4 screw, and that's why I took it
23 out.

24 Q. That's what I meant. The -- the L4 screw.

25 A. Yes. One of them.

1 Q. And so your intent, as you testified to, was
2 to place two rods the same length on the right and left
3 side; right?

4 A. That was my goal.

5 Q. Okay.

6 MR. MAZZEO: Nothing further.

7 THE COURT: Mr. Strassburg?

8

9 CROSS-EXAMINATION

10 BY MR. STRASSBURG:

11 Q. Dr. Gross, have you brought with you a copy
12 of the CT scan that you took of this area of her lumbar
13 spine after she continued to have pain complaints after
14 the surgery?

15 A. I need to check. I don't think a CT scan was
16 obtained, but may I have just one moment to look?

17 Q. Certainly, Doctor.

18 A. The only CT of -- was of the midback, not of
19 the lower back. It -- if that's what you meant.

20 Q. So no CT scan was ever done of the lumbar
21 spine after she brought renewed complaints of pain post
22 surgery; true?

23 A. True.

24 Q. And the -- the way to find out if there's a
25 loose surgical construct, if there's micromotion, the

1 accepted diagnostic test is a CT scan; true?

2 A. That's one of two accepted tests.

3 Q. The other?

4 A. A flexion and extension X ray where the
5 patient moves and we -- we stress the construct.

6 Q. Did you order that either be done after she
7 came back with renewed complaints post surgery?

8 A. Yeah. June 27, 2014, was the date of the
9 study.

10 Q. And that was CT scan or flexion-extension?

11 A. Flexion-extension X rays.

12 Q. And that was done by Dr. Oliveri?

13 A. Right.

14 Q. Okay. And did you read that
15 flexion-extension film?

16 A. Yes.

17 Q. So your statement that there's no evidence of
18 micromotion, pseudarthrosis, lack of fusion, what you
19 mean by that is all the evidence you've reviewed other
20 than a CT scan shows you there's no -- nothing you
21 could point to that would suggest that there's
22 pseudarthrosis, micromotion, loose screw, any of that?

23 A. That's partly correct.

24 Q. Okay. Now, do you -- in your training in
25 reading MRIs, what -- was that training focused on the

1 entire body or just the spine?

2 A. Spine and brain, the neurological systems.

3 Q. From head to toe?

4 A. Well, the spine sort of ends at the tail. So
5 we'll say head to tail.

6 Q. So your -- your experience was divided
7 between various parts of the body; right?

8 A. Those parts, yes.

9 Q. And the -- did you have occasion to gain
10 experience in reviewing MRIs of patients that had
11 constructs?

12 A. Yes.

13 Q. Constructs like the one you installed?

14 A. Yes.

15 Q. And have you had any experience in reviewing
16 constructs where the MRI showed evidence that a pedicle
17 screw was loose?

18 A. MRI would not be the best test for that.

19 Q. How about an X ray?

20 A. An X ray or a CAT scan, depending on the
21 nature of the clinical forces at play, meaning the
22 symptoms and other information.

23 Q. And are -- physicians such as yourselves, are
24 you trained to look for -- what to look for in medical
25 imaging to see if a pedicle screw has come loose?

1 A. That's one thing we might look for, yes.

2 Q. Okay. And pedicle screws come loose for all
3 kind of reasons; right?

4 A. Possibly.

5 Q. I mean, reasons other than a substandard
6 surgery; right?

7 A. Yes.

8 Q. I mean, you can do the surgery as well as can
9 be expected, as well as required by the standard of
10 care, and, for whatever reason, it's just a recognized
11 complication that sometimes pedicle screws come loose;
12 right?

13 A. Uncommonly, but yes.

14 Q. And, in fact, there's been studies as to
15 approximately what percentage of pedicle screws come
16 loose?

17 A. Well, I'm not sure which studies you're
18 referring to, so I'm not sure I can answer.

19 Q. Are you familiar with the scientific and
20 medical literature about this subject?

21 A. Well, that's extremely broad. I'm not sure I
22 can answer as to having read every textbook and every
23 paper out there. I think that would be unfair.

24 But I'm reasonably familiar, as a spinal
25 expert would be, in the knowledge base in this area.

1 Q. And one of the telltale signs of a loosening
2 pedicle screw is the radiolucent halo?

3 A. That is a -- a sign, yes.

4 Q. All right. And do -- have there been
5 scientific research, scientific studies that pedicle
6 screws that exhibit this halo effect develop less
7 affixing torque or ability to secure than ones that
8 don't?

9 A. Yes. With the understanding this halo is
10 something on a -- a radiologic study, not an MRI.

11 MR. STRASSBURG: Thank you, Doctor.

12 THE WITNESS: You're welcome.

13 THE COURT: Anything else, Mr. Roberts?

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

15

16 REDIRECT EXAMINATION

17 BY MR. ROBERTS:

18 Q. Do you need a CAT scan in order to determine
19 if Ms. Garcia has a pseudarthrosis?

20 A. No.

21 Q. Have you seen enough evidence to make that
22 determination?

23 A. Much more than enough.

24 Q. Okay. And to a reasonable degree of medical
25 probability, does she have one?

1 A. To a reasonable degree of medical
2 probability, she has a solid fusion. She does not have
3 a pseudarthrosis.

4 Q. Thank you, Doctor.

5 Now, Mr. Mazzeo asked you about the offset
6 in -- in the rod?

7 A. Yes.

8 Q. To a reasonable degree of medical
9 probability, is that offset the cause of any pain to
10 Ms. Garcia?

11 A. No.

12 Q. Can you explain why not?

13 A. Because she got about a 75 percent benefit
14 from the surgery in regards to her lower back pain with
15 the -- those rods being not perfectly parallel to begin
16 with. In fact, I knew it at the time of surgery and
17 made light of it in my report.

18 Q. Thank you, Doctor.

19 THE COURT: Mr. Mazzeo?

20 MR. MAZZEO: Yes.

21

22 RECROSS-EXAMINATION

23 BY MR. MAZZEO:

24 Q. Doctor, would you agree that there have been
25 challenges in identifying Ms. Garcia's pain generator

1 following the surgery?

2 A. For a while. But when they were ascertained,
3 the challenge was over.

4 Q. Well, such that -- do you agree that there
5 were challenges in identifying the pain generator --
6 well, withdrawn.

7 Do you agree that Ms. Garcia did not have an
8 ideal outcome in terms of anticipated relief from the
9 surgery within 6 to 12 months after the surgery?

10 MR. ROBERTS: Objection. Beyond the scope of
11 redirect.

12 THE COURT: Overruled.

13 THE WITNESS: I would disagree with that
14 statement.

15 BY MR. MAZZEO:

16 Q. Well, do you recall asking Dr. Kidwell in
17 2015 to inject -- and I think you just testified to it
18 on direct examination by plaintiff's counsel.

19 In 2015, you had asked Dr. Kidwell to inject
20 the facet joints, the disk at the L3-4 level, and the
21 hardware blocks; right?

22 A. At different times, yes.

23 Q. Well, not at different times. You had -- do
24 you recall asking Dr. Kidwell to perform an injection
25 in September of 2015 of the facet joints, the L3-4

1 level, and hardware blocks?

2 A. The reason I answered the way I did -- and
3 I'll just help you here.

4 L3-4 level is -- is vague. You said "disk"
5 in your first question. And the answer is the facet
6 joint at the L3-4 level, in addition to the hardware
7 and the SI joints. Those were the postfusion pain
8 generators. They were not pain generators before or
9 around the time of her fusion; therefore, her ideal
10 outcome was achieved, and then she had this
11 retrogression in pain, which is in a different area,
12 somewhat accelerated by her fusion. It puts more
13 stress at those other areas.

14 Q. And thank you for correcting me. That was
15 correct -- yes, I was -- I made a misreference.

16 You had asked Dr. Kidwell to inject the facet
17 joint at the L3-4 level, the sacroiliac joint, and the
18 hardware block?

19 A. Right.

20 Q. Now, when you asked him to do that, you were
21 asking him to do that in -- in one procedure; correct?

22 A. Right.

23 Q. Okay. And -- and at the time that you asked
24 him to do that, presumably you didn't know whether the
25 pain was at the sacroiliac joint level or whether it

1 was from the facet joint, L3-4 level, or at the
2 hardware blocks, or a combination of any of those;
3 right?

4 A. Well, I had some clinical suspicions on the
5 exam, which is why I asked for the injection.

6 Q. Of course. You had suspicions that pain
7 might be emanating from the facet joint at L3-4 level,
8 possibly the sacroiliac joint, and possibly from the
9 hardware blocks, possibly from two of those
10 combinations or all three.

11 A. Well, she had tender spots in all those
12 areas. So we were attacking them all to give her the
13 best result.

14 Q. And the tender spots doesn't necessarily mean
15 that that -- the tender spots at those areas doesn't
16 necessarily mean that those were the pain generator for
17 the pain that Ms. Garcia was reporting?

18 A. Tenderness by itself does not mean that, but
19 it is one clue to support it.

20 Q. And -- and, Doctor, you agree, you know, as a
21 surgeon, you and most any surgeon or doctor takes --
22 you take pride in your work; right?

23 A. Yes.

24 Q. Of course. And would you -- would you -- was
25 it correct to say you would probably not be inclined to

1 admit if there was a screw loose at the L5 level on the
2 right side?

3 A. No. I would be happy if it were true to
4 admit it so I could get her the proper care for it. It
5 just doesn't exist.

6 Q. It doesn't exist, but, nonetheless, you
7 suspected that as a potential pain generator for
8 Ms. Garcia? The hardware block, I mean.

9 A. Not for a loosened screw. Again, hardware
10 block is for the presence of scaffolding in the --
11 pressing up into the muscles, not -- not for any
12 loosening.

13 Q. Not for -- and maybe I misstated -- didn't
14 state it correctly or clearly enough.

15 But you -- you asked that a hardware block be
16 performed because of your suspicion that some pain that
17 Ms. Garcia might be feeling could be coming from the
18 hardware that was inserted as a result of the fusion?

19 A. Yes.

20 Q. Okay. And -- and if there was pain -- if she
21 did in fact have pain in the location where the
22 hardware was placed, wouldn't that also be known as a
23 form of pseudarthrosis?

24 A. No.

25 Q. Isn't it a fact, Doctor, that pseudarthrosis

1 is a term that's used to refer to pain that -- pain
2 complaints that result from a fusion surgery and
3 following a fusion surgery?

4 A. That's too general a definition. That's not
5 what pseudarthrosis means.

6 Q. What's your definition for pseudarthrosis?

7 A. Well, my definition, and the definition that
8 spine surgeons use when they're correct, is the literal
9 one, which is pseudo means fake and arthrosis means
10 joint or fusion. So if you have a pseudarthrosis, you
11 have a fake fusion or -- or a failed fusion. So a
12 failed fusion is pseudarthrosis.

13 Pain from hardware, although it can be
14 related to pseudarthrosis, is separate in the endeavor
15 I was taking when we asked to have her hardware
16 injected.

17 Q. And, by the way, you didn't ask Dr. Oliveri
18 to perform flexion and extension X rays, did you?

19 A. No.

20 Q. He did -- and you didn't perform or direct
21 any person to perform a CT scan or flexion and
22 extension X rays; correct?

23 A. I did not.

24 Q. Even though those would be -- those two tests
25 would be the accepted -- as you testified to, the

1 accepted diagnostic tests for identifying a
2 pseudarthrosis and micromotion?

3 A. They would be.

4 MR. MAZZEO: Thank you. Nothing further.

5 THE COURT: Mr. Strassburg?

6 MR. STRASSBURG: Thank you.

7

8 RECROSS-EXAMINATION

9 BY MR. STRASSBURG:

10 Q. Doctor, you've testified that the current
11 pain generator for the current pain are the -- the --
12 there's several. One is --

13 A. Yes.

14 Q. -- the SI joint on the right; true?

15 A. Yes.

16 Q. One is the facet at -- was it L3-4?

17 A. Yes.

18 Q. And what was the other one?

19 A. The medial branches to the hardware.

20 Q. And prior to surgery, she was not complaining
21 of pain that would have the SI on the right as the
22 generator?

23 A. Correct.

24 Q. She was not complaining of pain that would
25 have the medial branch to the hardware as the

1 generator?

2 A. There was no hardware before surgery.

3 Q. She wasn't complaining of pain that would
4 have the facets at L3-4 as the generator?

5 A. Correct.

6 Q. Now, if -- if I could ask you, is it -- in
7 your experience, have -- have you personally
8 experienced, as part of your clinical practice, where
9 pedicle screws shift over time?

10 A. No.

11 Q. Do you agree that other physicians have?

12 A. I can't speculate as to what other physicians
13 have or have not seen.

14 Q. Fair enough.

15 Would you agree that the literature contains
16 reports of pedicle screws that have shifted?

17 A. Only if there's a loosening, fracture, or
18 pseudarthrosis.

19 Q. Okay. And when the bone grafts do not fuse,
20 these grains of rice that you've indicated you packed
21 in there in -- in a putty, a mastic, when they do not
22 fuse, does the body not treat them as a foreign
23 substance -- a foreign object that it reacts to?

24 A. No.

25 Q. Well, what causes bone fusions not to fuse?

1 I mean, how does that biologically work?

2 A. Well, the biology of bone fusion requires
3 good blood flow, healthy cellular activity, someone in
4 decent health. It can be adversely affected by such
5 things as uncontrolled diabetes. Smoking is a risk
6 factor that can affect the blood vessels and the
7 healing.

8 Q. Okay. That's a little general. I mean -- I
9 mean as to the putty and the grains of rice, pieces of
10 bone in a construct like hers. I mean, there's no
11 blood flow into the putty; right? Obviously.

12 A. Not -- not at first. But we expose the --
13 the bone cortex and expose the marrow of the
14 surrounding bones. In an operative report, we call
15 that decortication, opening up the bone marrow, so
16 these stem cells and healing blood cells come in and
17 start to lay down bone architecture and blood vessels
18 and what have you.

19 Q. And -- and how many -- can -- can one grain
20 of rice, this bone particle, can that be enough to
21 start the process that leads to a pseudarthrosis over
22 enough time?

23 A. No. I mean, if you have, you know, a
24 reasonable amount of that bone incorporated and some of
25 it doesn't fuse in or heal in, you can still have a

1 solid construct.

2 Q. Uh-huh. And on the other hand, then, if the
3 bone does not fuse, you would have a situation in which
4 all of the resistance force has to be generated by the
5 rods and screws; right?

6 A. True.

7 Q. And the rods and screws really aren't
8 designed to do that, are they?

9 A. Not over long term.

10 Q. In fact, the point of the rods and screws is
11 so -- I mean, is it -- like, back in the old days, you
12 used to put them in body casts?

13 A. Yes.

14 Q. And nobody really likes six months in a body
15 cast, so you devise the rods and screws as kind of an
16 internal cast?

17 A. That's correct.

18 Q. And -- and the whole point of the rods and
19 screws is to just keep everything stable long enough
20 for the bone fusion to take effect?

21 A. I agree.

22 Q. Okay. And if it doesn't, then a revision
23 surgery is necessary to correct that situation. True?

24 A. Yes, unless someone has what's called a
25 stable pseudarthrosis, meaning they're not doing poorly

1 even though they're not fully fused.

2 Q. Uh-huh. And is one of the ways -- one of the
3 recognized symptoms of a loose pedicle screw in a
4 two-level fusion like this one pain?

5 A. Vaguely. Yes.

6 Q. Okay. Do you have -- well, you know, I think
7 that's enough from me. I appreciate --

8 A. I agree. I agree.

9 Q. We've found something we agree on.

10 A. Correct.

11 Q. All right. Thank you, Doctor.

12 A. Thank you.

13 THE COURT: Mr. Roberts?

14 MR. ROBERTS: Nothing further, Your Honor.

15 THE COURT: Mr. Mazzeo?

16 MR. MAZZEO: No, Your Honor.

17 THE COURT: Ladies and gentlemen, any
18 questions? Not seeing any hands.

19 Thank you, Doctor.

20 THE WITNESS: Thank you, Your Honor. Thank
21 you, everyone.

22 THE COURT: Come on up for a minute, Counsel.

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

25 THE COURT: Good to go? Okay. Who is the

1 plaintiff's next witness? Back to the plaintiff's
2 case.

3 MR. ROBERTS: Okay. Your Honor, the
4 plaintiff calls Andrea Awerbach.

5 THE COURT: Okay.

6 MR. MAZZEO: Judge, I will just need a moment
7 to set this up, to move some things.

8 THE COURT: Thank you.

9 Go ahead. Remain standing, if you would,
10 ma'am. Raise your right hand.

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

15 THE WITNESS: I do.

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

18 THE WITNESS: Andrea Awerbach. A-n-d-r-e-a
19 A-w-e-r-b-a-c-h.

20 THE COURT: Thank you, ma'am. Go ahead and
21 be seated. Try to talk into the microphone if you
22 would.

23 All yours.

24

25 /////

1 DIRECT EXAMINATION

2 BY MR. ROBERTS:

3 Q. Thank you, Your Honor. Ms. Awerbach, I
4 wanted to talk to you about 2011.

5 A. Okay.

6 Q. You recall the crash that we've been talking
7 about that happened back on January 2nd, 2011?

8 A. Yes, I do.

9 Q. Okay. And do you remember having a
10 conversation and giving a statement about the crash on
11 January 17th, 2011, 15 days after the crash?

12 A. I remember being asked questions and
13 answering them, yes.

14 Q. Okay. And when you were being asked
15 questions and answering them, did you acknowledge that
16 you knew Jared Awerbach, your son, had used your
17 vehicle in the past?

18 A. I don't know if I used the word "used" or
19 "taken" during the conversation.

20 MR. ROBERTS: Your Honor, permission to
21 approach?

22 THE COURT: That's fine.

23 BY MR. ROBERTS:

24 Q. I'm going to show you some notes of the
25 conversation for you to review. And I would call your

1 attention to the third sentence, beginning with "OPAC."

2 Do you see that?

3 A. Yes.

4 Q. Does that refresh your recollection that your
5 statement was that Jared Awerbach had used your vehicle
6 in the past?

7 A. Okay. The sentence is, "OPAC has used her
8 vehicle"? Okay.

9 So in that statement, it doesn't say that I
10 said "used." That's -- this is a paraphrase. It's not
11 a quote of a narrative. So, again, I don't remember
12 if, when she asked me the question, if I said "used" or
13 "taken," but that's what she wrote.

14 Q. Okay. But you don't remember whether you
15 said "used" or "taken"?

16 A. No, I don't.

17 Q. So you're not denying you said "used"; you
18 just don't recall?

19 A. Correct.

20 Q. Okay. And did you say --

21 A. I'm sorry. Can I clarify something?

22 Q. Yes, ma'am.

23 A. I know myself -- and it was more in -- in my
24 way to say "taken," but I can't promise you that.

25 Q. And did you say that he had used the vehicle

1 in the past to practice for his permit?

2 A. I said that he had driven with me to practice
3 for his permit.

4 Q. That's not what the note says, does it?

5 A. Which sentence are we --

6 Q. Same one. Just the rest of it.

7 A. No. That's not how she wrote it, no.

8 Q. And you admitted that you had let Jared
9 Awerbach have the keys to your vehicle earlier in the
10 day of January 2nd of 2011. Correct?

11 MR. MAZZEO: That's out of the context,
12 Judge. It's not a complete statement.

13 MR. ROBERTS: She can explain why.

14 THE COURT: I'll let her answer.

15 THE WITNESS: Okay. Can you ask me again?
16 because now I'm confused.

17 BY MR. ROBERTS:

18 Q. Sure. Did you acknowledge in your statement
19 that you had let Jared have the keys to your car
20 earlier in the day?

21 A. Again, I probably said I gave him the keys to
22 get something out of the car.

23 Q. Okay. And did he give the keys back to you?

24 A. I thought that he had.

25 Q. But he hadn't; correct?

1 A. I don't know that to be true.

2 Q. Okay. If you could look on to about the
3 middle of the page. And do you see what you said about
4 whether he had actually returned the keys?

5 A. "She thought OPAC had returned the keys, but
6 he didn't."

7 Q. And that's what you told her at the time;
8 right?

9 A. Again, this is a -- her notes from a
10 conversation. I can't tell you what I said exactly.

11 Q. Did you tell her in your statement that you
12 usually keep the car keys on the mantel?

13 A. I don't believe I used the word "usually,"
14 because that wasn't true.

15 MR. ROBERTS: All right. Your Honor, may we
16 approach?

17 THE COURT: Sure.

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

20 THE COURT: Bear with us for a minute, folks.

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

23 THE COURT: Go ahead, Mr. Roberts.

24 MR. ROBERTS: Thank you, Your Honor.

25 /////

1 BY MR. ROBERTS:

2 Q. Do you still have a copy of -- of the
3 recorded statement?

4 A. Yes, I do.

5 Q. Okay. And I'm going to draw your attention
6 to the place where the representative recorded that you
7 said, "She had let Jared have the keys earlier that day
8 to get something out of her car. She usually keeps the
9 car keys on the mantel."

10 Does that accurately record a statement that
11 you made to your representative on that day?

12 A. On -- you're asking me if that reflects
13 what's -- the statement I made? Yes.

14 Q. Yes.

15 A. Yes.

16 Q. Okay. Thank you. That's --

17 A. Thank you. I'm sorry. I misunderstood.

18 Q. And did you know that Jared was going to
19 drive your vehicle that afternoon?

20 A. No.

21 Q. Had he asked you to drive your vehicle that
22 afternoon?

23 A. I don't remember if he asked me that
24 afternoon. Had he asked me other times? Yes.

25 Q. And you had let him drive at other times?

1 A. No. No. Because he asked for something
2 doesn't mean I agreed to it.

3 Q. So it's your testimony that Jared never took
4 your car to the grocery store without you in it?

5 A. Without me in it or without a licensed driver
6 with permission? Is that what you're asking me?

7 Q. I'm asking if you ever gave Jared, in the
8 past on a regular basis, permission to drive your car.
9 I don't -- doesn't matter to me whether you thought
10 there was a licensed driver with him or whether you
11 were with him.

12 I am asking just this: In the past on a
13 regular basis, had you given Jared permission to drive
14 your car?

15 A. Not on a regular basis.

16 Q. Had you given him permission at least two to
17 three times a month to go to the grocery store?

18 A. I -- I don't know that it was two or three
19 times a month. And, again, you're asking me, without
20 clarification about me in the car, a licensed driver,
21 just had he ever been in the car to go -- for grocery
22 shopping?

23 Q. Yes.

24 A. It -- it had happened. I doubt it was two to
25 three times a month. I couldn't give him the money to

1 go do that.

2 Q. In addition to the grocery store, had you
3 given him permission to drive the car to run other
4 errands?

5 A. I want to word this respectfully to all
6 involved. At the time of the accident, I couldn't
7 trust Jared. So it was not in my habit to give him,
8 not only our car, but money or any important
9 information about the house. I ran the house. I paid
10 the bills. I ran the errands.

11 Q. Okay. Jared had crashed your car in the
12 past; right?

13 A. Jared crashed a car in 2008.

14 Q. And you knew Jared smoked marijuana on a
15 regular basis; right?

16 A. I -- I knew.

17 Q. Okay. And you knew it was dangerous to let
18 him drive your car; right?

19 A. Yes.

20 MR. ROBERTS: Nothing further, Your Honor.

21 THE COURT: You guys want to cross now or
22 save it for your --

23 MR. MAZZEO: Cross now and save it for our
24 case.

25 THE COURT: Okay. That's fine.

1 MR. MAZZEO: Thank you, Judge.

2

3 CROSS-EXAMINATION

4 BY MR. MAZZEO:

5 Q. Andrea, now, with regard to Mr. Roberts'
6 questioning of you about the statement a few minutes
7 ago --

8 A. Yes.

9 Q. -- and it states, as he asked you, that you
10 let Jared have the keys earlier that day to get
11 something out of the car; right?

12 A. Yes.

13 Q. Now, when you -- the understanding was for --
14 was for Jared to go into the car and get a personal
15 item out of the car?

16 A. Yes.

17 MR. ROBERTS: Objection. Leading.

18 MR. MAZZEO: Yeah, it is. This is
19 cross-examination.

20 THE COURT: It's your client.

21 MR. MAZZEO: It's my client, and it's also
22 cross-examination. It's -- they called my client.

23 MR. ROBERTS: It's redirect, and it's not an
24 adverse witness.

25 THE COURT: I'm not going to let you ask

1 leading questions of your own client. Sorry.

2 MR. MAZZEO: Any questions?

3 THE COURT: You can ask questions. You just
4 can't ask leading questions.

5 MR. MAZZEO: Oh. Leading questions. Okay.

6 BY MR. MAZZEO:

7 Q. And --

8 THE COURT: You can't treat her as a hostile
9 witness or an adverse witness because it's your client.

10 MR. MAZZEO: Well, no, I'm not. But
11 generally, when an attorney comes second, it's cross,
12 but okay.

13 BY MR. MAZZEO:

14 Q. Did you -- when you had given Jared keys to
15 get something out of your car, did you have any
16 discussion with him about operating the car?

17 A. On -- on that day?

18 Q. On that day, that morning when -- or whenever
19 you gave him the keys to get something out of the car.

20 A. It was my nature to probably say, "Give them
21 right back to me. Put them right in my hand."

22 Q. Okay. Did you give Jared permission to drive
23 the car at the time that you gave him the keys to get
24 something out of the car?

25 A. No.

1 Q. And when was the first time that you learned
2 that Jared had driven the car on the day of the
3 accident?

4 A. When I got a call from the police.

5 Q. Which was when?

6 A. Right when the accident happened.

7 Q. Okay. And you were asked about an accident
8 that occurred in 2008 --

9 A. Yes.

10 Q. -- right?

11 And when -- what were the circumstances
12 concerning the accident that Jared was involved in in
13 2008?

14 A. We were at my school. I was in my classroom.
15 I was working. Jared was taking stuff to and from the
16 car, taking stuff to and from the garbage. My
17 classroom was on the back end. I gave him the keys to
18 come back in. I kept at that time all of my keys -- my
19 classroom keys, my home keys, my mailbox key -- on one
20 ring.

21 I was not -- I was not in a position where I
22 could wear a lanyard like many teachers do because I
23 had students who were violent and would grab at that.
24 So I kept all my keys in a ring. So I when gave him to
25 the keys to come back into the building, the car keys

1 were on that.

2 Q. When you asked Jared to get -- in 2008, when
3 you gave him the keys to go to your vehicle, did you
4 give him permission to start the vehicle up and operate
5 the vehicle?

6 A. No.

7 Q. Okay. And did -- when you gave him the keys
8 in 2008 to get something from the car, did you observe
9 Jared to be under the influence of marijuana?

10 A. No.

11 Q. On the day of the accident, when you
12 observed -- when you gave Jared the keys to the car to
13 get something out of it, when was that? In the morning
14 or afternoon?

15 A. I believe it was afternoon.

16 Q. Okay. And -- and when you gave Jared the
17 keys to get something out of your car on the day of the
18 accident, did you observe Jared to be under the
19 influence of marijuana?

20 A. No.

21 Q. And when you had the conversation with the --
22 this person on January 17th of 2011, how many days
23 after the accident was that?

24 A. 15.

25 Q. Okay. And -- and did you have -- was -- when

1 you placed the keys in your -- you know, somewhere in
2 your house, when you weren't yourself using the car,
3 would you place them in the same location or different
4 locations?

5 A. No. At that time, I had multiple
6 locations --

7 Q. Why is that?

8 A. -- for the keys.

9 Because Jared's behavior at that time was --
10 he was acting out. I was not in a position to say, you
11 have to move or I have to move. I was contemplating
12 what to do, because his child had just been born, my
13 first grandchild. So I was just in survival mode,
14 protective mode while I figured out what to do.

15 So I always -- I hid everything. I hid the
16 keys. I hid my wallet. I hid my grade book. I hid
17 bills. Anything that was central that I needed to know
18 where it was or there would be repercussions, I kind of
19 had to know where everything was all of the time.

20 Q. Why did you feel you had a need to do this,
21 to hide the keys, your wallet, and various other
22 articles?

23 A. Because I had had the experience with him
24 that he was stealing, that he was not telling me the
25 truth. Now his child had been born. He was in -- in a

1 different position. I was more vulnerable. There's
2 not a manual to parenting, and there's certainly not a
3 manual to parenting a child with behavioral problems
4 and drug problems. You learn as you go. Like, I was
5 involved in Al-Anon support groups. I was doing what I
6 knew to do until I knew the next thing to do.

7 Q. Okay. And had there been occasions prior to
8 the accident where -- when Jared had taken the keys to
9 your car without permission which necessitated your
10 need to have multiple places for placing the keys?

11 A. Yes.

12 Q. Okay.

13 MR. MAZZEO: Nothing further, Your Honor.

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

15

16 CROSS-EXAMINATION

17 BY MR. STRASSBURG:

18 Q. Good afternoon, ma'am.

19 A. Good afternoon.

20 Q. Do you know where Jared is living now?

21 A. Yes.

22 Q. Where?

23 MR. ROBERTS: Objection. Beyond the scope.

24 THE COURT: It is beyond the scope of what he
25 was asking.

1 MR. STRASSBURG: Just trying to save time,
2 Judge. I can bring her back.

3 THE COURT: Well, sounds like he was going to
4 bring her back. So let's just keep it to the scope of
5 the -- what Mr. Roberts asked this time.

6 MR. STRASSBURG: Well, that shortens this up
7 a lot.

8 Thank you, Judge.

9 THE COURT: Since we know she's going to be
10 recalled, I think --

11 MR. STRASSBURG: I'm fine with that, Judge.

12 THE COURT: Mr. Roberts?

13 MR. ROBERTS: Thank you.

14

15 REDIRECT EXAMINATION

16 BY MR. ROBERTS:

17 Q. Ms. Awerbach, you're saying now that you
18 usually hid your keys because you knew it was dangerous
19 for Jared to drive your car; right?

20 A. I have said it before now, but, yes, I'm
21 saying it now.

22 Q. Okay. And you're saying that, because you've
23 admitted that the representative -- that your
24 representative accurately transcribed your
25 conversation, the only thing I'm left with is, did you

1 lie to the representative when you said you usually
2 left your keys on the mantel?

3 A. No, I did not lie.

4 Q. And, in fact, you -- you told Mr. Mazzeo that
5 you found out that he had your car when you got a call
6 after the accident; right? You talked to the police
7 officer?

8 A. Yes.

9 Q. Okay. And in that conversation, what you
10 said to the police officer, "Is he high or is he
11 drunk?" Right?

12 A. I said, "Is he under the influence?" I may
13 have said it your way. I'm not going to -- it was five
14 years ago. But I -- I asked if he was DUI.

15 Q. Okay. Would you like to see your deposition
16 to refresh your recollection?

17 A. No. I -- no.

18 Q. Okay. So you --

19 A. Yeah.

20 Q. More likely than not you said, "Is he high or
21 is he drunk?" Right?

22 A. Uh-huh.

23 Q. Okay. Thank you, ma'am.

24 MR. ROBERTS: Nothing further, Your Honor.

25 THE COURT: Mr. Mazzeo?

1 MR. MAZZEO: Yes, Judge.

2

3 RECROSS-EXAMINATION

4 BY MR. MAZZEO:

5 Q. So when you spoke to the representative --
6 this person on January 17th of 2011, which was -- we
7 established was 15 days after the accident.

8 A. Yes.

9 Q. -- with this reference to where you usually
10 placed your keys, did you have a clear idea where you
11 actually placed the keys on the day of the incident
12 prior to the accident when you were speaking with this
13 person on January 17th?

14 A. No. At that time I was trying to piece
15 together what had happened.

16 Q. Okay. And did you have any -- was there any
17 reason for you to remember where you placed the keys
18 earlier in the day since you didn't know -- since you
19 didn't give Jared permission to use the car and didn't
20 learn of the accident -- that he used the car until
21 after the accident?

22 A. No, there wasn't a particular reason. When
23 she called me -- when she called me, I was in my
24 classroom. I was finishing up work. It was two weeks
25 after the accident. I believe Jared was in jail. I

1 was figuring out what happened, figuring out what to do
2 now.

3 Q. I didn't catch that. In what?

4 A. I believe Jared was in jail.

5 Q. Oh.

6 A. I'm guessing.

7 Q. All right.

8 A. I may be wrong about that -- that time. She
9 was asking me questions; I was answering them.

10 Q. Okay. All right. So -- so this -- when
11 you -- you -- you acknowledged that this statement here
12 with the word "usually," what -- what does that mean to
13 you when you conveyed this statement to the person on
14 January 17th? You seemed like you qualified it with
15 the word "usually." What -- so what does that mean to
16 you?

17 A. When I would come home -- first of all, I
18 want to explain. The mantel is not like a fireplace
19 mantel. It's a kitchen mantel. We lived in an
20 apartment. The distance from the mantel to the couch
21 where -- the recliner where -- it was probably from
22 here to the legal tables. I don't know if I'm using
23 the right term.

24 I would put my things down if I was sitting
25 there. If I had my keys in my hand and my books,

1 and -- if you've ever seen how much teachers carry,
2 it's like a gym membership, how much we walk with. I
3 may have put my books down, the keys down, and then if
4 I left the room, if I went out, if I was in the
5 kitchen, the keys were with me. If the keys were on
6 the mantel, I was in the living room.

7 Q. And who initiated this conversation that
8 occurred on January 17th? Was it yourself or the other
9 person?

10 A. She called.

11 Q. Okay. Okay. And -- and at the time that you
12 had this conversation on January 17th, what -- what
13 information did you have about the circumstances with
14 regard to how Jared obtained or got your keys to use
15 the -- the vehicle?

16 A. At that time, I didn't have much information.
17 But I -- am I answering your question?

18 Q. Yes. That's fine. Is that your answer?

19 A. Yes.

20 Q. Okay.

21 MR. MAZZEO: And one second, Your Honor.

22 BY MR. MAZZEO:

23 Q. And you said a moment ago that you were
24 piecing information together. Why did you make that --
25 what's the significance of that reference "piecing

1 information together," and -- and Jared's incarceration
2 in jail?

3 A. Because I was at home. I got a phone call
4 from a police officer, "Your car -- your son has your
5 car. He's been arrested for DUI. There's been an
6 accident."

7 I'm thrown. I have -- how am I getting to
8 work? What's going to happen? What do I do now?
9 Because things have escalated. What do I do about
10 Kalia? That's my oldest granddaughter. Jared's not
11 telling me what's happened. Jared's not telling me the
12 truth.

13 So I'm trying to make sense from my
14 reasonable position. I'm not -- that was five years
15 ago. So I was a 48-year-old nonaddict at home, you
16 know, a responsible adult. I'm not thinking -- I've
17 learned a lot about not making assumptions, because how
18 other people live isn't necessarily how I live.

19 Does that answer your question?

20 Q. And since the accident and since the
21 conversation with this person on January 17th, have you
22 since learned how Jared got the keys to the car?

23 MR. ROBERTS: Objection. Hearsay.

24 THE COURT: Didn't ask for hearsay yet.
25 Statement might be.

1 BY MR. MAZZEO:

2 Q. Go ahead.

3 A. I have read answers in the depositions.

4 MR. ROBERTS: Objection. Foundation.
5 Hearsay.

6 THE COURT: That's probably hearsay.

7 MR. MAZZEO: Okay.

8 BY MR. MAZZEO:

9 Q. Well, do you have any personal knowledge as
10 to after the day of the incident, and do you have any
11 personal knowledge as to how Jared obtained the keys to
12 the car?

13 A. Yeah. It's my understanding that while I was
14 in the shower --

15 MR. ROBERTS: Objection. Hearsay. You
16 sustained it.

17 THE COURT: Come on up.

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

20 MR. MAZZEO: Judge, I will withdraw the
21 question.

22 And thank you, Andrea.

23 THE COURT: There's a mess.

24 THE WITNESS: I just spilled some water.

25 THE COURT: Do you have any other questions?

1 MR. MAZZEO: No, Judge.
2 THE COURT: Mr. Strassburg?
3 MR. STRASSBURG: No.
4 THE COURT: Mr. Roberts?
5 MR. ROBERTS: No, Your Honor.
6 THE COURT: Anybody else have any questions
7 for Ms. Awerbach at that point? No questions? Okay.
8 Thank you, ma'am.
9 THE WITNESS: Thank you.
10 MR. ROBERTS: Your Honor, the plaintiff calls
11 Jared Awerbach.
12 THE COURT: Come on up, sir. Once you get
13 there, please remain standing and raise your right hand
14 to be sworn.
15 THE CLERK: You do solemnly swear the
16 testimony you're about to give in this action shall be
17 the truth, the whole truth, and nothing but the truth,
18 so help you God.
19 THE WITNESS: I do.
20 THE CLERK: Please state your name and spell
21 it for the record, please.
22 THE WITNESS: My name is Jared Emmanuel
23 Awerbach. J-a-r-e-d, E-m-m-a-n-u-e-l, A-w-e-r-b-a-c-h.
24 THE COURT: Thank you. Go ahead be seated.
25 Try to talk into that microphone as much as you can.

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DIRECT EXAMINATION

BY MR. ROBERTS:

Q. Good afternoon, Mr. Awerbach.

A. Good afternoon, sir.

Q. Ms. Garcia, Ms. Emilia Garcia, was on the stand earlier today and was cross-examined by your counsel, Mr. Strassburg.

Were -- were you here for that?

A. No, sir.

Q. Okay. Mr. Strassburg asked Ms. Garcia if you had expressed your concern for her well-being at the scene of the crash right after it occurred.

A. Yes, sir.

Q. Okay. Is that your testimony? Did you do that?

A. I did indeed. I got out of my car and ran over to her. She told me to get back in my car and wait for the police.

Q. Okay. Now, before you got out of your car and went over to her to ask about her well-being, did you try to hit your accelerator and leave the scene without checking on her?

A. Yeah.

Q. And the only reason you didn't leave the

1 scene was because your car was too disabled to drive;
2 correct?

3 A. No.

4 Q. What happened when you hit the accelerator to
5 leave the scene?

6 A. My engine started smoking.

7 Q. Okay. Now, at the time of the accident, you
8 did not have a driver's license; correct?

9 A. No, sir.

10 Q. You did not have a learner's permit; correct?

11 A. I was under the impression that I did. No,
12 sir.

13 Q. First of all, just get to my question. Did
14 you have a learner's permit at the time of the crash?

15 A. No.

16 Q. Had you ever actually had a learner's permit
17 at the time of the crash?

18 A. No.

19 Q. And you understand that the Court has found
20 that the crash was your fault?

21 A. Yes.

22 Q. And you understand that the Court has found
23 that you were legally impaired at the time of the
24 crash?

25 A. Yes.

1 Q. Is it your understanding that Ms. Garcia was
2 injured in the crash?

3 A. It is now.

4 Q. Is it your understanding that she had to
5 receive medical care because of the crash?

6 A. It is now.

7 Q. Is it your understanding that all of the
8 medical care that you have heard about in court was
9 caused by the crash?

10 A. No.

11 Q. You never said you're sorry to Ms. Garcia,
12 have you?

13 A. Have not had the opportunity to.

14 Q. And you know that your lawyer has spent the
15 last four weeks trying to keep you from having to pay
16 for Ms. Garcia's medical care; right?

17 MR. MAZZEO: Objection, Your Honor.

18 THE COURT: What's the objection?

19 MR. MAZZEO: That's a misstatement. That's
20 what it is.

21 MR. ROBERTS: I'm sorry. Do we have a
22 stipulation that they're going to pay for all medical
23 care?

24 MR. MAZZEO: For the injuries that --

25 THE COURT: Hold on. Hold on. Hold on. You

1 guys don't get to argue.

2 I'm going to allow it the way he asked it.

3 THE WITNESS: Sir, can you ask me the
4 question again, please?

5 MR. ROBERTS: And, Kristy, it's --

6 THE COURT: The question is, "You know that
7 your lawyer spent the last four weeks trying to keep
8 you from having to pay for Ms. Garcia's medical care;
9 right?"

10 THE WITNESS: I do not know that.

11 BY MR. ROBERTS:

12 Q. On the -- excuse me just a second.

13 When we first started picking the jury in
14 this case, back on February 8th, were you here?

15 A. Yes, sir.

16 Q. And you -- you were here with your mother,
17 Andrea Awerbach?

18 A. Yes.

19 Q. And on that first day that you were here, did
20 you have a driver's license?

21 A. No.

22 Q. Did you have a learner's permit?

23 A. No.

24 Q. Did you get in your mother's car and drive it
25 home after court that week before you got your driver's

1 license?

2 A. Not alone.

3 Q. Were you behind the wheel?

4 A. Yes.

5 Q. Okay. And you were driving?

6 A. Yes, sir.

7 Q. Without a license?

8 A. Yes, sir.

9 Q. And your mother was with you?

10 A. Yes, sir.

11 Q. And she knew that you were driving?

12 A. She was in the car next to me, yeah.

13 MR. ROBERTS: That's all I have, Your Honor.

14 No further questions.

15 Oh, hold on just a second. Mr. Smith might

16 have a question.

17 BY MR. ROBERTS:

18 Q. Now, were you here when your attorney,

19 Mr. Strassburg, during opening statements said that you

20 had been punished enough by, among other things,

21 spending time at the Las Vegas Rescue Mission?

22 A. Yes.

23 Q. Was this crash or your marijuana use the only

24 reason you went to the Las Vegas Rescue Mission?

25 A. No.

1 Q. So if the jury's asked to determine whether
2 your time at the Rescue Mission was sufficient
3 punishment for this crash, they really don't know
4 enough about why you were there to make that
5 determination, do they?

6 A. I don't think they've had the opportunity to
7 know enough. My answer's no.

8 MR. ROBERTS: Thank you.

9 Thank you, Your Honor.

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

11 MR. STRASSBURG: No questions.

12 THE COURT: Mr. Mazzeo?

13 MR. MAZZEO: One second, Judge.

14

15 CROSS-EXAMINATION

16 BY MR. MAZZEO:

17 Q. Jared, good afternoon.

18 A. Good afternoon.

19 Q. You -- Mr. Roberts asked you if you said
20 sorry to Ms. Garcia after the accident. Do you
21 remember that?

22 A. Yes.

23 Q. And you said you had no opportunity to say
24 you were sorry; right?

25 A. Uh-huh.

1 Q. Why did you not have an opportunity to say
2 you were sorry?

3 A. From my understanding, I'm not allowed to
4 communicate with her by any means.

5 Q. Okay.

6 MR. MAZZEO: Nothing further.

7 THE COURT: Mr. Roberts? Anything else?

8

9 REDIRECT EXAMINATION

10 BY MR. ROBERTS:

11 Q. Did you have -- exchange information at the
12 scene?

13 A. No.

14 Q. No? Did you know her name before she filed
15 this lawsuit?

16 A. No.

17 Q. Did you ever try find out her name from the
18 police?

19 A. I don't think -- I don't think I was in a
20 position to do so. My answer's no.

21 Q. You were able to talk to your attorney;
22 right?

23 A. Yes.

24 Q. Did you ever say, "Mr. Strassburg,
25 Mr. Tindall, could you please tell Ms. Garcia I'm