

ORIGINAL

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

Alexander S. Macaulay, Circuit Court Judge

Case No. 2012-212693

Ernest L. Cobb and Nancy Cobb..... Respondents,

Dan M. Lafoy..... Appellant.

RECORD ON APPEAL

VOLUME I

Robert D. Moseley, Jr. (#64084)
Joseph W. Rohe (#79313)
Smith Moore Leatherwood LLP
300 East McBee Avenue, Suite 500 (29601)
Post Office Box 87
Greenville, South Carolina 29602-0087
Telephone: (864) 242-6440
Facsimile: (864) 240-2475
rob.moseley@smithmoorelaw.com
joseph.rohe@smithmoorelaw.com

Attorneys for Appellant

Larry C. Brandt (#856)
Larry C. Brandt, P.A.
3691 Blue Ridge Boulevard
Post Office Box 738
Walhalla, South Carolina 29691
Telephone: (864) 638-5406
Facsimile: (864) 630-7873
lcb.brandtlawfirm@att.net

Attorney for Respondents

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SC Court of Appeals

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STATE OF SOUTH CAROLINA)
COUNTY OF OCONEE)

COURT OF COMMON PLEAS

FILED OCONEE, SC
BEVERLY H. WHITEFIELD
CLERK OF COURT
2012 JUL 6 PM 4 48

Ernest L. Cobb, Nancy Cobb)
Plaintiffs,)
vs.)
Dan M. Lafoy,)
Defendant.)

ORDER GRANTING NEW TRIAL
ABSOLUTE ON LIABILITY
AND DAMAGES

Case #2009-CP-37-1058

This matter is before the Court upon the Post-Trial Motion of Plaintiffs filed with the Court on January 20, 2012, wherein they seek relief from the jury verdict in favor of the Defendant rendered on January 12, 2012 and filed of record on January 13, 2012. More specifically, Plaintiffs seek a judgment notwithstanding the verdict on liability and damages or, in the alternative, a judgment notwithstanding the verdict on liability and a new trial on damages only or, in the further alternative, a new trial absolute on both liability and damages. The specific grounds for the Motion are set forth in Plaintiffs' Motion filed of record and arguments of their counsel. The Defendant's counsel has also ably stated and argued his position in opposition thereto. After carefully considering all matters of record, together with the applicable law, it is the opinion of this Court that a new trial absolute is warranted and should be granted. The law is clear that a trial court, pursuant to the thirteenth juror doctrine, may grant a new trial absolute when the evidence does not justify the verdict but cannot grant a new trial nisi or new trial absolute when the verdict is merely inadequate or unduly liberal. Neither can the Trial Court grant a new trial when the jury

1.63


deliberations may appear suspicious, the quality or correctness of the jury verdict is questionable, or when there is concern with what the jury may have based its decision upon [Scroggins v. McClellion, 321 S.C. 264, 468 S.E.2d 12 (Ct. App. 1996); Youmans v. S.C. Dept. of Transportation, 380 S.C. 263, 670 S.E.2d 1 (Ct. App. 2009)]. In other words, the trial court must only concern itself with whether the evidence justifies the verdicts and cannot second guess the jury's actions or motives for its verdict.

It is also established law that the trial court is not required to set forth the specific reasons for its decision or explain it in anyway and its Order granting or denying a new trial upon the facts will not be disturbed unless its decision is wholly unsupported by evidence or the conclusion reached is controlled by error of law [Trivelas v. S.C. Dept. of Transportation, 357 S.C. 545, 593 S.E.2d 504 (Ct. App. 2005); Folkens v. Hunt, 380 S.C. 251, 387 S.E.2d 265 (S.Ct. 1990)].

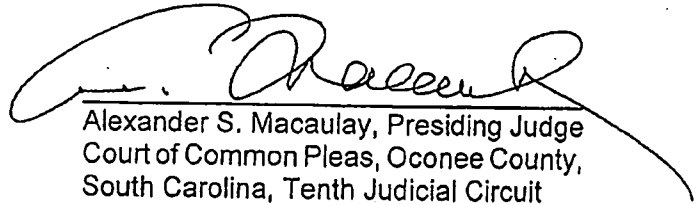
In rendering this decision, the Court has only considered the evidence and has not considered in anyway Plaintiffs' counsel's arguments concerning the jury's motives nor has it attempted to second guess the jury in anyway as to whether it considered or applied the doctrine of unforeseeable capacity to operate a motor vehicle.

It is further the opinion of this Court, and upon request of the attorneys for the parties, that this case shall not be called for trial within ninety (90) days of the date of this Order.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED as follows:

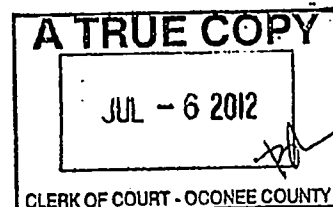
1. Plaintiffs' Motions for Judgment Notwithstanding the Verdict are denied.
2. Plaintiffs' Motion for a New Trial Absolute on Liability and Damages is granted.
3. The case shall be immediately restored to the active trial roster of the Court of Common Pleas for Oconee County, South Carolina; however, the case shall not be called for trial within ninety (90) days of the date of the recording of this Order.

AND IT IS SO ORDERED!


Alexander S. Macaulay, Presiding Judge
Court of Common Pleas, Oconee County,
South Carolina, Tenth Judicial Circuit


June 4, 2012
Waihalla, South Carolina

FILED OCONEE, SC
BEVERLY H. WHITFIELD
CLERK OF COURT
2012 JUL 6 PM 4 48



STATE OF SOUTH CAROLINA)

COUNTY OF OCONEE)

Ernest L. Cobb, Nancy Cobb)

Plaintiffs,)

v.)

Dan M. Lafoy)

Defendant.)

IN THE COURT OF COMMON PLEAS

Civil Action: 2009-CP-37-1058

VERDICT

2012 JAN 13 P 12:57

FILED OCONEE, SC
BEVERLY H. WHITEFIELD
CLERK OF COURT

I) On Ernest L. Cobb's cause of action for NEGLIGENCE,

We, the jury, unanimously find:

_____ For the Plaintiff, Ernest L. Cobb, and against the Defendant, Dan M. Lafoy, actual damages in the amount of:

_____ (\$ _____) Dollars.

OR

☒ For the Defendant Dan M. Lafoy.

II) On Nancy Cobb's cause of action for LOSS OF CONSORTIUM,

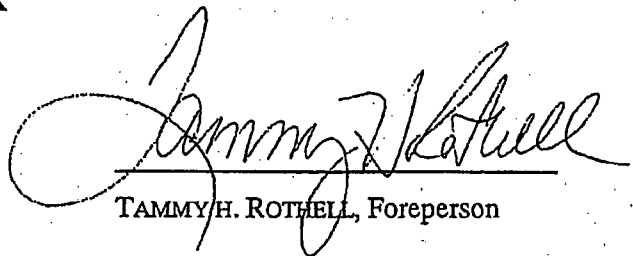
We, the jury, unanimously find:

_____ For the Plaintiff, Nancy Cobb, and against the Defendant, Dan M. Lafoy actual damages in the amount of:

_____ (\$ _____) Dollars.

OR

☒ For the Defendant Dan M. Lafoy.


TAMMY H. ROTHELL, Foreperson

Walhalla, South Carolina
January 12, 2012

STATE OF SOUTH CAROLINA)
)
COUNTY OF OCONEE)

Earnest L. Cobb,)
)
Plaintiff,)
)
vs.)
)
Dan M. Lafoy,)
)
Defendant.)

IN THE COURT OF COMMON PLEAS
TENTH CIRCUIT COURT

"JURY TRIAL"

COMPLAINT

CASE NO: 2009-CP-37-1058

FILED OCONEE, SC
BEVERLY H. WHITEFIELD
CLERK OF COURT
2009 AUG 25 P 12:27

The Plaintiff complaining of the Defendant would respectfully show unto the Court:

1. The Plaintiff is a resident of Oconee County, South Carolina.
2. The Defendant is a resident of Sapphire, North Carolina.
3. The motor vehicle collision and all matters and things hereinafter complained of occurred within Oconee County, South Carolina; therefore, jurisdiction and venue within this Court is proper.

4. On or about July 5, 2007 at approximately 5:46 P.M., Plaintiff stopped to get gas for his 2003 Chevrolet truck at Head's Superette on the corner of Highway 28 and Maple Street in the town of Walhalla, South Carolina. At the same time and place, the Defendant was operating his 2001 Jeep automobile in a westerly direction along Highway 28 and as he approached the location of Heads Superette, he suddenly and without any warning whatsoever, negligently, grossly negligently, willfully, wantonly and carelessly lost control of his vehicle causing it to leave the roadway and strike the vehicle of the Plaintiff which was stopped in front of the gas pumps at Head's Superette with such force that

Plaintiff's vehicle was knocked into Plaintiff as he was standing next to same getting ready to service the vehicle with gasoline. As a result, Plaintiff was severely injured.

5. The injuries suffered by the Plaintiff were directly due and proximately caused by the negligence, heedlessness, willfulness, wantonness, carelessness, and gross negligence of the Defendant, Dan M. Lafoy, in the following particulars to-wit:

- a. Failing to maintain proper control over the vehicle he was operating;
- b. In failing to bring his vehicle to a stop to avoid striking the stopped vehicle next to which the Plaintiff was standing;
- c. In failing to take any evasive action by any means to keep from striking the Plaintiff's vehicle and knocking it into the Plaintiff;
- d. In striking Plaintiff's motor vehicle beside which Plaintiff was standing and violently knocking it into him;
- e. In operating his vehicle in violation of gross disregard of the laws of the State of South Carolina;
- f. In driving the motor vehicle upon the roadways of South Carolina while not equipped with properly operating brakes, or if so equipped, in failing to use or timely apply them in order to avoid striking the Plaintiff's vehicle and injuring the Plaintiff;
- g. In operating his vehicle at an excessive rate of speed and/or at a speed that was too fast for the conditions then and there existing;
- h. In driving his vehicle left of center and off the roadway striking the Plaintiff's vehicle and knocking it into Plaintiff and causing him serious injury;

6. By reason and consequence of the negligent, wreckless, willful, wanton, heedless, careless, and grossly negligent acts and conduct of the Defendant, and as a direct and proximate result thereof, Plaintiff was severely and seriously injured to such an extent that Plaintiff has incurred and will continue to incur future doctor, hospital, and

medicine expenses; has suffered and will continue to suffer extreme physical and emotional pain, discomfort, and inconvenience and has been permanently impaired to such an extent that his quality of life has been and will continue to be significantly reduced and/or affected for the rest of his life.

7. As a result of the aforesaid, Plaintiff is informed and believes that he is entitled to judgment against the Defendant for all actual and consequential damages incurred and such punitive damages as the Court may determine to be appropriate together with all costs and expenses incurred in the prosecution of this action.

WHEREFORE, Plaintiff prays for judgment against the Defendant for all actual and consequential damages incurred, punitive damages in the amount to be determined by the Court, all costs and expenses incurred in the bringing and prosecution of this action and for such other and further relief as to this Court seems just and proper.

Respectfully Submitted,

LARRY C. BRANDT, P.A.
Post Office Box 738
3691 Blue Ridge Boulevard
Walhalla, South Carolina 29691
864/638-5406
864/638-7873 (Facsimile)

Dated: August 25, 2009
Walhalla, South Carolina

By: Larry C. Brandt
Larry C. Brandt, Attorney for Plaintiff

I hereby demand a Jury Trial in this matter.

Dated: August 25, 2009
Walhalla, South Carolina

By: Larry C. Brandt
Larry C. Brandt, Attorney for Plaintiff

STATE OF SOUTH CAROLINA)
COUNTY OF OCONEE)
Nancy Cobb,)
Plaintiff,)
vs.)
Dan M. Lafoy,)
Defendant.)

IN THE COURT OF COMMON PLEAS
TENTH JUDICIAL COURT

"JURY TRIAL"
COMPLAINT

CASE NO: 2009-CP-37-1059

FILED OCONEE SC
CLERK OF COURT
2009 AUG 25 P 12:32

The Plaintiff, Nancy Cobb, complaining of the Defendant would respectfully show unto the Court:

1. The Plaintiff is the wife of Ernest L. Cobb having been married to him on January 27, 1975 in Oconee County, South Carolina and is and, was as at all times complained of herein, residing with her husband, Ernest L. Cobb, in Oconee County, South Carolina.
2. The Defendant is a resident of Sapphire, North Carolina.
3. The motor vehicle collision and all acts, matters, and things hereinafter complained of occurred within Oconee County, South Carolina; therefore, jurisdiction and venue within this Court is proper.
4. On or about July 5, 2007 at approximately 5:46 P.M., Plaintiff's husband stopped to get gas for his 2003 Chevrolet truck at Head's Superette on the corner of Highway 28 and Maple Street in the town of Walhalla, South Carolina. At the same time and place, the Defendant was operating his 2001 Jeep automobile in a westerly direction

along Highway 28 and as he approached the location of Heads Superette, he suddenly and without any warning whatsoever, negligently, grossly negligently, willfully, wantonly and carelessly lost control of his vehicle causing it to leave the roadway and strike the vehicle of the Plaintiff's husband which was stopped in front of the gas pumps at Head's Superette with such force that Plaintiff's husbands vehicle was knocked into Plaintiff's husband as he was standing next to same getting ready to service the vehicle with gasoline. As a result, Plaintiff's husband, Ernest L. Cobb, was severely injured.

5. The injuries suffered by the Plaintiff's husband, Ernest L. Cobb, were directly due and proximately caused by the negligence, heedlessness, willfulness, wantonness, carelessness, and gross negligence of the Defendant, Dan M. Lafoy, in the following particulars to-wit:

- a. Failing to maintain proper control over the vehicle he was operating;
- b. In failing to bring his vehicle to a stop to avoid striking the stopped vehicle next to which the Plaintiff's husband was standing;
- c. In failing to take any evasive action by any means to keep from striking the Plaintiff's husbands vehicle and knocking it into the Plaintiff's husband;
- d. In striking Plaintiff's husbands motor vehicle beside which Plaintiff's husband was standing and violently knocking it into him;
- e. In operating his vehicle in violation of gross disregard of the laws of the State of South Carolina;
- f. In driving the motor vehicle upon the roadways of South Carolina while not equipped with properly operating brakes, or if so equipped, in failing to use or timely apply them in order to avoid striking the Plaintiff's husbands vehicle and injuring the Plaintiff's husband;

- g. In operating his vehicle at an excessive rate of speed and/or at a speed that was too fast for the conditions then and there existing;
- h. In driving his vehicle left of center and off the roadway striking the Plaintiff's husband's vehicle and knocking it into Plaintiff's husband and causing him serious injury;

6. By reason and consequence of the negligent, wreckless, willful, wanton, heedless, careless, and grossly negligent acts and conduct of the Defendant, and as a direct and proximate result thereof, Plaintiff's husband, Ernest L. Cobb, was severely and seriously injured; has incurred and will continue to incur future doctor, hospital, and medicine expenses; has suffered and will continue to suffer extreme physical and emotional pain, discomfort, loss of earnings and inconvenience and has been permanently impaired to such an extent that his quality of life has been and will continue to be significantly reduced and/or affected for the rest of his life. Additionally, the marital relationship of Plaintiff and her husband, Ernest L. Cobb, has been significantly damaged or impaired in the following particulars to-wit:

- a. Ernest L. Cobb is no longer able to work around the house and do the tasks in supporting the family home that he did prior to his injuries;
- b. The Plaintiff and her husband, Ernest L. Cobb, are no longer able to engage in activities which they formerly enjoyed together;
- c. The companionship and society of Plaintiff with her husband, Ernest L. Cobb, has been substantially restricted and their activities are permanently impaired and Mr. Cobb is still suffering tremendous pain and anguish to such an extent that he is precluded from providing to the Plaintiff his advice, affection, assistance, attention, care, fellowship, guidance, love, and protection to the degree that he did prior to his injuries and, as a result, the marital relationship has been and will continue to be substantially stressed and materially disrupted.

7. Based upon the foregoing, Plaintiff, Nancy Cobb, is informed and believes that she is entitled to judgment against the Defendant for all actual damages sustained, punitive damages in such an amount as a jury may determine and all costs and expenses incurred in the prosecution of this action.

WHEREFORE, Plaintiff, Nancy Cobb, prays that she be granted judgment against the Defendant for all actual and compensatory damages sustained for the loss of the marital consortium and both present and future punitive damages in the amount as a jury may determine appropriate, all costs and expenses incurred in the bringing and prosecution of this action and for such other and further relief as to this Court seems just and proper.

Respectfully Submitted,

LARRY C. BRANDT, P.A.
Post Office Box 738
3691 Blue Ridge Boulevard
Walhalla, South Carolina 29691
864/638-5406
864/638-7873 (Facsimile)

Dated: August 25, 2009
Walhalla, South Carolina

By: Larry C. Brandt
Larry C. Brandt, Attorney for Plaintiff

I hereby demand a Jury Trial in this matter.

Dated: August 25, 2009
Walhalla, South Carolina

By: Larry C. Brandt
Larry C. Brandt, Attorney for Plaintiff

FILED OCONEE, SC
CLERK OF COURT
STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

2009 OCT 23 P 12:28

Ernest L. Cobb,

Plaintiff,

vs.

Dan M. Lafoy,

Defendant.

C.A. NO. 2009-CP-37-1058

ANSWER
(Jury Trial Demanded)

Defendant hereby answers the Complaint of the Plaintiff as follows.

FOR A FIRST DEFENSE

Except as herein specifically admitted, each and every allegation in the Complaint is expressly denied.

1. The allegations in paragraph 1 are admitted upon information and belief.

2. Defendant admits the allegations in paragraph 2.

3. The allegations in paragraph 3 are admitted.

4. In response to the allegations contained in paragraph 4 of the Complaint, Defendant admits that an accident occurred between the Plaintiff and the vehicle being driven by Defendant on or about July 5, 2007, on the corner of Highway 28 and Maple Street in the town of Walhalla, South Carolina. The remainder of Paragraph 4 is denied.

5. Defendant denies the allegations of paragraph 5.

6. Defendant denies the allegations of paragraph 6.

7. Defendant denies the allegations of paragraph 7.

8. Defendant denies Plaintiff's prayer for relief.

FOR A SECOND DEFENSE

9. The allegations of the preceding defense are incorporated herein and made a part of this defense by reference.

10. The collision which resulted in the injuries of the Plaintiff was due in no part by the actions of Defendant who was himself presented with a sudden emergency, and that Defendant acted as an ordinary and reasonable person would have under the same or similar circumstances. This defense of sudden emergency is pled as a complete and total bar to the claims of the Plaintiff.

FOR A THIRD DEFENSE

11. The allegations of the preceding defense are incorporated herein and made a part of this defense by reference.

12. The collision between Defendant and Plaintiff, upon information and belief, was merely a continuation of the initial sudden emergency, and as a result an unavoidable accident. This defense of unavoidable accident is pled as a complete and total defense to the claims of the Plaintiff.

FOR A FOURTH DEFENSE

13. Defendant restates the foregoing responses and allegations and incorporates the same herein by reference.

14. Any award of damages for pain and suffering against Defendant will violate the rights guaranteed to Defendant by the Constitution of South Carolina for the following reasons:

(a) Any award of damages for pain and suffering violates the prohibition against excessive fines found in Article 1, § 15 of the Constitution of South Carolina because such awards do not bear a reasonable relationship to the compensatory damages.

(b) Any award of damages for pain and suffering violates the guarantee of due process found in Article 1, § 3 of the Constitution of South Carolina because of the lack of objective guidelines, rational factors, and defined limits on which a jury might base its award, and further, that such guidelines, factors, or limits as due exist are arbitrary and void for vagueness.

FOR A FIFTH DEFENSE

15. Defendant restates the foregoing responses and allegations and incorporates the same herein by reference.

16. Any award of damages for pain and suffering against Defendant will violate rights guaranteed by the Constitution of the United States for the following reasons:

(a) Any award of damages for pain and suffering violates the prohibition against excessive fines found in the Eighth Amendment to the Constitution of the United States as applied to the states by way of the due process clause of the Fourteenth Amendment of the Constitution of the United States because such awards do not bear a reasonable relationship to the compensatory damages.

(b) Any award of damages for pain and suffering violates the guarantee of due process found in the Fourteenth Amendment to the Constitution of the United States because of the lack of objective guidelines, rational factors and defined limits on which a jury might base its award and further that such guidelines, factors or limits that do exist are arbitrary and void for vagueness.

FOR A SIXTH DEFENSE

17. Defendant restates the foregoing responses and allegations and incorporates the same herein by reference.

18. Any award of punitive damages against Defendant will violate the rights guaranteed by the Constitution of the State of South Carolina for the following reasons:

a. Any award of punitive damages violates the prohibition against excessive fines found in Article I, § 15 of the Constitution of the State of South Carolina;

b. Any award of punitive damages violates the guarantee of due process found in Article I, § 3, of the Constitution of the State of South Carolina because of the lack of objective guidelines upon which a jury might base its award; and, further, that such guidelines as do exist are arbitrary and void for vagueness.

FOR A SEVENTH DEFENSE

19. Defendant restates the foregoing responses and allegations and incorporates the same herein by reference.

20. Any award of punitive damages against Defendant will violate rights guaranteed by the Constitution of the United States for the following reasons:

c. Any award of punitive damages violates the prohibition against excessive fines found in the Eighth Amendment to the Constitution of the United States as applied to the states by way of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

d. Any award of punitive damages violates the guarantee of due process found in Fourteenth Amendment to the Constitution of the United States because of the lack of objective guidelines upon which a jury might base its award; and, further, that such guidelines as do exist are arbitrary and void for vagueness.

FOR AN EIGHTH DEFENSE

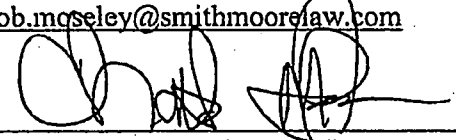
21. Defendant restates the foregoing responses and allegations and incorporates the same herein by reference.

22. Any award of punitive damages against Defendant would be unlawful and would violate the constitutions of the State of South Carolina and of the United States, and the public policy of the State of South Carolina, as the award of punitive damages ultimately payable by an uninsured or underinsured motorist carrier would not serve any punitive purpose, would not further the public policy of deterring future bad acts and punishing the wrongdoer, would lack a rational basis, and would impose a punitive fine on a party who had committed no wrongdoing.

WHEREFORE, having fully answered the Complaint of the Plaintiff, Defendant respectfully prays that the Complaint of the Plaintiff be dismissed with costs, and for such other and further relief as this Court deems just and proper.



Robert D. Moseley, Jr. (SC Bar #64084)
SMITH MOORE LEATHERWOOD LLP
300 East McBee Avenue, Suite 500
Post Office Box 87
Greenville, SC 29602-0087
(864) 242-6440/ (864)240-2475
rob.moseley@smithmoorelaw.com



Charles M. Groves (SC Bar #02236)
Chapman, Harter, Groves, P.A.
1012 E. Washington Street
Post Office Box 10224
Greenville, South Carolina 29603
864-233-4500/FAX 864-232-1710
cmgro@bellsouth.net
ATTORNEYS FOR DEFENDANT DAN M. LAFOY

October 22, 2009

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE
Nancy Cobb,

Plaintiff,

vs.
Dan M. Lafoy,

Defendant.

FILED OCONEE, SC
DEVERLY D. WHITEFIELD
CLERK OF COURT
2009 OCT 23 P 12: 28

C.A. NO. 2009-CP-37-1059

ANSWER
(Jury Trial Demanded)

Defendant hereby answers the Complaint of the Plaintiff.

FOR A FIRST DEFENSE

Except as herein specifically admitted, each and every allegation in the Complaint is expressly denied.

1. The allegations in paragraph 1 are admitted upon information and belief.
2. Defendant admits the allegations in paragraph 2.
3. The allegations in paragraph 3 are admitted upon information and belief.
4. In response to the allegations contained in paragraph 4 of the Complaint, Defendant admits that an accident occurred between the Plaintiff and the vehicle being driven by Defendant on or about July 5, 2007, on the corner of Highway 28 and Maple Street in the town of Walhalla, South Carolina. Defendant is without knowledge or information sufficient to form a belief as to the remaining allegations of paragraph 4, and therefore, denies those allegations.
5. Defendant denies the allegations of paragraph 5.
6. Defendant denies the allegations of paragraph 6.
7. Defendant denies the allegations of paragraph 7.
8. Defendant denies Plaintiff's prayer for relief.

FOR A SECOND DEFENSE

9. The allegations of the preceding defense are incorporated herein and made a part of this defense by reference.

10. The collision which resulted in the injuries of the Plaintiff was due in no part by the actions of Defendant who was himself presented with a sudden emergency, and that Defendant acted as an ordinary and reasonable person would have under the same or similar circumstances. This defense of sudden emergency is pled as a complete and total bar to the claims of the Plaintiff.

FOR A THIRD DEFENSE

11. The allegations of the preceding defense are incorporated herein and made a part of this defense by reference.

12. The collision between Defendant and Plaintiff, upon information and belief, was merely a continuation of the initial sudden emergency, and as a result an unavoidable accident. This defense of unavoidable accident is pled as a complete and total defense to the claims of the Plaintiff.

FOR A FOURTH DEFENSE

13. Defendant restates the foregoing responses and allegations and incorporates the same herein by reference.

14. Any award of damages for pain and suffering against Defendant will violate the rights guaranteed to Defendant by the Constitution of South Carolina for the following reasons:

- (a) Any award of damages for pain and suffering violates the prohibition against excessive fines found in Article 1, § 15 of the Constitution of South Carolina because such awards do not bear a reasonable relationship to the compensatory damages.

(b) Any award of damages for pain and suffering violates the guarantee of due process found in Article 1, § 3 of the Constitution of South Carolina because of the lack of objective guidelines, rational factors, and defined limits on which a jury might base its award, and further, that such guidelines, factors, or limits as due exist are arbitrary and void for vagueness.

FOR A FIFTH DEFENSE

15. Defendant restates the foregoing responses and allegations and incorporates the same herein by reference.

16. Any award of damages for pain and suffering against Defendant will violate rights guaranteed by the Constitution of the United States for the following reasons:

(a) Any award of damages for pain and suffering violates the prohibition against excessive fines found in the Eighth Amendment to the Constitution of the United States as applied to the states by way of the due process clause of the Fourteenth Amendment of the Constitution of the United States because such awards do not bear a reasonable relationship to the compensatory damages.

(b) Any award of damages for pain and suffering violates the guarantee of due process found in the Fourteenth Amendment to the Constitution of the United States because of the lack of objective guidelines, rational factors and defined limits on which a jury might base its award and further that such guidelines, factors or limits that do exist are arbitrary and void for vagueness.

FOR A SIXTH DEFENSE

17. Defendant restates the foregoing responses and allegations and incorporates the same herein by reference.

18. Any award of punitive damages against Defendant will violate the rights guaranteed by the Constitution of the State of South Carolina for the following reasons:

a. Any award of punitive damages violates the prohibition against excessive fines found in Article I, § 15 of the Constitution of the State of South Carolina;

b. Any award of punitive damages violates the guarantee of due process found in Article I, § 3, of the Constitution of the State of South Carolina because of the lack of objective guidelines upon which a jury might base its award; and, further, that such guidelines as do exist are arbitrary and void for vagueness.

FOR A SEVENTH DEFENSE

19. Defendant restates the foregoing responses and allegations and incorporates the same herein by reference.

20. Any award of punitive damages against Defendant will violate rights guaranteed by the Constitution of the United States for the following reasons:

c. Any award of punitive damages violates the prohibition against excessive fines found in the Eighth Amendment to the Constitution of the United States as applied to the states by way of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

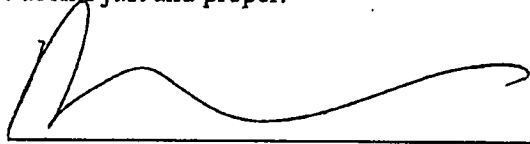
d. Any award of punitive damages violates the guarantee of due process found in Fourteenth Amendment to the Constitution of the United States because of the lack of objective guidelines upon which a jury might base its award; and, further, that such guidelines as do exist are arbitrary and void for vagueness.

FOR AN EIGHTH DEFENSE

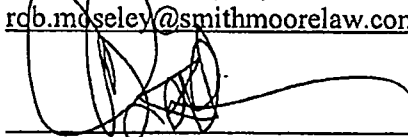
21. Defendant restates the foregoing responses and allegations and incorporates the same herein by reference.

22. Any award of punitive damages against Defendant would be unlawful and would violate the constitutions of the State of South Carolina and of the United States, and the public policy of the State of South Carolina, as the award of punitive damages ultimately payable by an uninsured or underinsured motorist carrier would not serve any punitive purpose, would not further the public policy of deterring future bad acts and punishing the wrongdoer, would lack a rational basis, and would impose a punitive fine on a party who had committed no wrongdoing.

WHEREFORE, having fully answered the Complaint of the Plaintiff, Defendant respectfully prays that the Complaint of the Plaintiff be dismissed with costs, and for such other and further relief as this Court deems just and proper.



Robert D. Moseley, Jr. (SC Bar #64084)
SMITH MOORE LEATHERWOOD LLP
300 East McBee Avenue, Suite 500
Post Office Box 87
Greenville, SC 29602-0087
(864) 242-6440/ (864) 240-2475
rcb.moseley@smithmoorelaw.com



Charles M. Groves (SC Bar #02236)
Chapman, Harter, Groves, P.A.
1012 E. Washington Street
Post Office Box 10224
Greenville, South Carolina 29603
864-233-4500/FAX 864-232-1710
cmgro@bellsouth.net
ATTORNEYS FOR DEFENDANT DAN M. LAFOY

October 22, 2009

STATE OF SOUTH CAROLINA)
COUNTY OF OCONEE)

COURT OF COMMON PLEAS
Case #2009-CP-37-1058

MOTION FOR

Ernest L. Cobb, Nancy Cobb,
Plaintiffs,

v.

Dan M. Lafoy,
Defendant,

1) Judgment Notwithstanding the
Verdict on Liability and Damages;

or, in the alternative,

2) Judgment Notwithstanding the
Verdict on Liability and New
Trial on Damages Only; or

or, in the alternative,

3) New Trial Absolute

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CLERK OF COURT

The Plaintiffs, in the above referenced actions, hereby move for a (1) judgment notwithstanding the verdict on liability and damages; or (2) judgment notwithstanding the verdict on liability and new trial on damages only; or (3) new trial absolute upon the following grounds:

1. The Trial Judge erred in failing to direct a verdict in Plaintiffs' favor at the close of all evidence on the issue of liability when the only competent, relevant and credible evidence was that the Defendant lost control of his automobile and breached his urgent duty to keep the vehicle which he was driving under proper control so as to be able to slow down, stop or turn such vehicle in order to avoid colliding with other vehicles, pedestrians and obstructions and struck the Plaintiff, Ernest Lynn Cobb, while he was standing by his truck at a gas pump, well out of the travelled portion of the roadway, proximately causing

injury and damage to the Plaintiffs. Considering all the relevant evidence, the only verdict that a reasonable jury could reach in this matter was in favor of the Plaintiffs on the issue of liability; therefore, a directed verdict on liability should have been granted to the Plaintiffs.

2. The Trial Judge erred in refusing to grant the Plaintiffs' motion to strike the testimony of Dr. Hanke which was offered for the sole purpose of establishing an underlying cause for the Defendant's claim that he blacked out prior to the accident occurring, rendering him incapacitated to operate a vehicle. The Trial Judge correctly ruled that, even with Dr. Hanke's testimony, the Defendant had not met his burden of proof showing an underlying cause for the alleged syncope event as required by Collins v. Frasier, 378 S.C. 249, 662 S.E.2d 464. Dr. Hanke's testimony was, therefore, irrelevant to any issue before the Court and the prejudicial effect of leaving it before the jury, when the defense had been stricken, outweighed any probative value and merely served to confuse and prejudice the jury in believing that the testimony was significant and that sudden unforeseeable incapacity to operate of motor vehicle was still a defense to Plaintiffs' claims.

3. The Trial Judge's erroneous failure to strike the testimony of Dr. Hanke and to instruct the jury to disregard same, as well as to specifically instruct the jury that it could not consider sudden unforeseeable incapacity to operate a motor vehicle, was tantamount to leaving the defense and the claims of the Defendant before the jury, resulting in the jury's verdicts in favor of the Defendant.

4. The Trial Judge erred in failing to strike the testimony of Dr. Hanke and give appropriate charge or instruction telling the jury to disregard it because once the defense of sudden unforeseeable incapacity to operate a motor vehicle had been stricken, as a matter of law, the testimony was irrelevant and Dr. Hanke's testimony, as well as the Defendant's medical condition, was not relevant to anything that was left for the jury to consider; therefore, the jury was only confused and prejudiced as it was left thinking that the testimony, as well as Defendant's medical condition, was relevant and material to its deliberations and considerations and it obviously based the verdicts on that defense.

5. Once the Trial Judge ruled that the defense of sudden unforeseeable incapacity to operate a motor vehicle was not available as a defense to Plaintiffs' claims, it rendered Dr. Hanke's testimony totally irrelevant on any issues before the Court and, obviously greatly confused and prejudiced the jury and allowed it to apply the defense to Plaintiffs' claims notwithstanding the Trial Judge's prior rulings and the applicable law.

6. The Trial Judge erred in failing to specifically instruct the jury that he had ruled, as a matter of law, that Defendant had not met his burden of proof required in order for him to claim sudden unforeseeable incapacity to operate a motor vehicle and that it could not consider that as a defense to Plaintiffs' claims. The claim had been placed before the jury in opening statement by defense counsel and the testimony of Dr. Hanke was offered solely to establish that defense. In essence, although the Trial Judge ruled that the defense was not in play, his failure to specifically instruct the jury that the defense was not available, especially when he refused to strike the testimony of Dr. Hanke and give an appropriate charge in that regard, effectively left the defense before the jury for its

consideration and the verdicts of the jury clearly show that it did, in fact, consider and apply it in rendering the verdicts for the Defendant.

7. The jury verdicts were solely the result of caprice, passion and prejudice against the Plaintiffs as the only relevant and credible evidence was that Defendant breached his duty to keep control of his vehicle at all times and his breach of that duty resulted in grievous bodily harm to Plaintiff, Ernest Lynn Cobb.

For the foregoing errors, individually as well as collectively, it is respectfully submitted that the verdicts cannot be permitted to stand as a matter of law. It is clear, based upon all the relevant, competent and credible evidence introduced at the trial, that the Plaintiffs were entitled to a verdict in some amount. The evidence established the liability of the Defendant for the injuries and resulting damage to Ernest L. Cobb who incurred uncontested medical bills totalling \$78,698.10 and lost income, past and future, in the present value calculated amount of \$179,248.00 for a total amount of \$257,946.10. This does not even consider the other elements of damage such as future medicals, loss of quality of life, past and future pain and suffering, etc., all of which a jury could have considered and, upon which, Plaintiffs proved damage in some amount and, therefore, was entitled to some compensation for same.

As for Mrs. Cobb's claim for loss of consortium, it is obvious that the injuries to her husband caused damage to the marital relationship and that she is also entitled to a verdict in some amount on her claim.

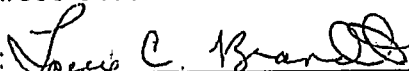
Therefore, Judgment NOV granting to the Plaintiffs judgment against the Defendant and awarding reasonable damages as established by the evidence should be entered notwithstanding that the jury found for the Defendant. Alternatively, if the Trial Court is not

disposed to entering a monetary amount for the damages, it is respectfully submitted that the Court should enter a Judgment NOV on liability in favor of the Plaintiffs and grant to Plaintiffs a new trial on damages only as this is the only issue that should have been submitted to the jury at the trial. It is also an appropriate way to remedy the error of failing to direct a verdict as to liability and return the parties to the process by which the damages should have been determined at this trial. Of course, granting a new trial absolute on liability and damages is an option for the Court to consider as another way of erasing the errors herein set forth, particularly the error of failing to grant a directed verdict as to liability, but such would be a waste of Court resources and could not be expected to yield a different result on the issue of liability if retried. The issue of sudden unforeseeable incapacity to operate a motor vehicle was thoroughly litigated and, based upon the evidence adduced at this trial, there is absolutely no reason to believe that the Defendant will ever be able to show an underlying cause for his "blackout" claim which is required to excuse his failure to control his vehicle in the instant circumstances. Therefore, even upon a retrial of the liability issue, a directed verdict as to liability would be required and the only issue left for a jury determination would be the amount of damages.

Respectfully submitted,

LARRY C. BRANDT, P.A.
P.O. BOX 738
3691 BLUE RIDGE BLVD.
WALHALLA, SC 29691
864/638-5406

BY:



Larry C. Brandt (Bar #856)

Attorney for Plaintiffs

January 20, 2012
Walhalla, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE
ERNEST L COBB and NANCY COBB,
Plaintiffs,
vs.
DAN M. LAFOY,
Defendant.

IN THE COURT OF COMMON PLEAS
TENTH JUDICIAL CIRCUIT
CASE NO.: 2009-CP-37-1058
2009-CP-37-1059
MEMORANDUM IN OPPOSITION TO
PLAINTIFFS' POST-TRIAL MOTIONS

FILED COBB, SC
BEVERLY WHITFIELD
CLERK OF COURT
2012 JAN 31 AM 8 51

COMES NOW the Defendant DAN M. LAFOY ("Defendant") and submits the following Memorandum of Law in opposition to Plaintiffs' Post-trial Motions, to wit: Plaintiffs' Motion for Judgment Notwithstanding the Verdict on Liability and Damages; Plaintiffs' Motion for Judgment Notwithstanding the Verdict on Liability and New Trial on Damages Only; and Plaintiffs' Motion for New Trial Absolute.

RELEVANT BACKGROUND

This matter was tried before the Honorable Alexander S. Macaulay and jury during the January 9, 2012 term of court. Following deliberation, the jury returned a verdict in favor of the Defendant on both Plaintiff Ernest L. Cobb's cause of action for negligence and Plaintiff Nancy Cobb's cause of action for loss of consortium.

Following the conclusion of evidence and before the jury was charged and the case was given to the jury to begin its deliberations, Plaintiffs made a singular Motion for Directed Verdict on the issue of Defendant's defense of sudden incapacitation and/or loss of consciousness. Plaintiffs' Motion for Directed Verdict was granted. Plaintiffs did not make a motion for directed verdict on the matter of liability with respect to either the negligence cause of action or

the loss of consortium cause of action. Plaintiffs have now filed the Post-trial Motions as set forth hereinabove.

ARGUMENT AND CITATIONS OF AUTHORITY

I. **THE ISSUES RAISED IN PLAINTIFFS' MOTIONS FOR JUDGMENT NOTWITHSTANDING THE VERDICT WERE NOT PROPERLY PRESERVED AND THOSE MOTIONS SHOULD ACCORDINGLY BE DENIED.**

A. *Plaintiffs failed to move for directed verdict on the issues of liability and damages at the conclusion of evidence and cannot now be heard to argue the same in a post-trial motion for JNOV.*

It is well established in South Carolina that a directed verdict is a prerequisite for a motion notwithstanding the verdict. See Rule 50(b), *SCRCP*. Moreover and more important to the Post-trial Motions presently before the Court, "[a] motion for judgment notwithstanding the verdict is limited to the grounds stated in the motion for directed verdict." Marsh v. S.C. Dep't of Highways & Public Transp., 298 S.C. 420, 423, 380 S.E.2d 867, 869 (Ct. App. 1989); see also Smith v. Ridgeway Chems., Inc., 302 S.C. 303, 305, 395 S.E.2d 742, 743 (Ct. App. 1990)(holding that a motion for JNOV "is available to one suffering an adverse ruling of the jury only when the same issues were submitted to the judge at the directed verdict stage."). Pursuant to Rule 50(a), *SCRCP*, a motion for directed verdict must specify the grounds for the motion. In deciding a motion for JNOV, an "additional ground [not included in the motion for directed verdict] may not be considered." Southern Ry. Co. v. Wilkinson Trucking Co., 243 S.C. 150, 152, 132 S.E.2d 491, 491-2 (1963). Plaintiffs' only directed verdict motion at the conclusion of evidence was with regard to and on the grounds that the Defendant had not met the evidentiary burden of Collins v. Frasier, 378 S.C. 249, 662 S.E.2d 464, so as to allow the defense of sudden incapacity and/or loss of consciousness to be charged to the jury.

As noted, it is clear that "[i]f a party fails to make a directed verdict motion before the jury retires, the party cannot subsequently move for JNOV." Johnson v. Hoechst Celanese Corp., 317 S.C. 415, 453 S.E.2d 908 (Ct. App. 1995)(citing Ballew v. Liberty Life Ins. Co., 270 S.C. 301, 241 S.E.2d 907 (1978)). At no time prior to jury deliberations did Plaintiffs move for a directed verdict on liability for the negligence claim or the loss of consortium claim. Accordingly and pursuant to the great weight of authority on the subject, Plaintiffs cannot now be heard to raise the issues in their Post-trial Motions for Judgment Notwithstanding the Verdict.

The only liability issue presented to the jury was whether the defendant was negligent. To establish a cause of action for negligence, a plaintiff must prove by a preponderance of evidence the following four elements: (1) a duty of care owed by defendant to plaintiff; (2) a breach of that duty by a negligent act or omission; (3) resulting in damages to the plaintiff; and (4) damages proximately resulted from the breach of duty." Thomasko v. Poole, 349 S.C. 7, 11, 561 S.E.2d 597, 599 (2002). It is the jury's exclusive province to weigh evidence, judge the credibility of witnesses, and arrive at a conclusion as to the facts - and in doing so, determine whether a plaintiff has met his requisite burden of proof. See Fortner v. Carnes, 258 S.C. 455, 461, 189 S.E.2d 24, 27 (1972)("the weight of the evidence and the credibility of the witnesses are matters within the province of the jury."); see also Sauers v. Poulin Bros. Homes, 328 S.C. 601, 605, 493 S.E.2d 503, 505 (Ct. App. 1997)("As a general rule, the jury is free to accept or reject in whole or in part the testimony of any witness.").

Negligence is often defined as "the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation; or doing what such a person, under the existing circumstances, would not have done." Jones v. American Fidelity & Cas. Co., 210 S.C. 470, 478, 43 S.E.2d 355, 359 (1947). Simply put, Defendant did not act or

omit to act in a negligent manner. The jury was free to determine that Defendant did not act negligently and, in doing so, was likewise free to discard or disbelieve whatever evidence was inconsistent with its finding. See Thomas v. Atlantic Coast Line R.R. Co., 221 S.C. 462, 71 S.E.2d 403 (1952).

As a final matter, Plaintiffs were successful in their Motion for Directed Verdict in that it was granted by the Court. Pursuant to the plain language of Rule 50(b), the availability of a motion for JNOV at the post-trial stage is contingent upon and available only where "a motion for directed verdict made at the close of all the evidence is denied or for any reason is not granted..." As noted, Plaintiffs' Motion for Directed Verdict was granted. Pursuant to the *South Carolina Rules of Civil Procedure* and authorities cited herein, Plaintiffs' Motion for JNOV is improper and must be DENIED.

B. *Plaintiffs Motion to Strike the testimony of Dr. Hanke and/or request that the jury be instructed to disregard such testimony was properly denied as a request to have the Court comment on the evidence.*

Plaintiffs, in their Post-trial Motions at Paragraphs 2 through 5, argue that the Trial Court erred in refusing to grant Plaintiffs' motion to strike the testimony of Dr. Hanke. "There are numerous decisions to the effect that the admission of incompetent or irrelevant testimony after objection thereto will not be sufficient ground for setting aside a verdict, unless it appears or may be reasonably inferred that the evidence has prejudiced the complaining party." Globe & Rutgers Fire Ins. Co. v. Foil, 189 S.C. 91, 97, 200 S.E. 97, 100 (1938). Thus, it is Plaintiffs' burden to show both that (1) irrelevant or inadmissible evidence was admitted over objection and (2) that Plaintiffs' have been prejudiced by such admission. Assuming *arguendo* that Dr. Hanke's testimony was rendered inadmissible *in toto* as a result of the granting of Plaintiffs' Motion for Directed Verdict on the defense of sudden incapacitation and/or loss of consciousness, which

Defendant would deny, Plaintiffs neither objected to the admissibility of such testimony nor moved to have it stricken from the record on a contemporaneous basis. Accordingly, Plaintiffs' failure to object or move to strike Dr. Hanke's testimony at trial precludes them from now arguing such was in error at the post-trial stage. Additionally, Plaintiffs have failed to show that they suffered prejudice as a result of the admission of such testimony.

Moreover, this Court refused to strike Dr. Hanke's testimony on the basis that it doing so would constitute an improper and unconstitutional commentary on the facts of the case. It has long since been established that it is in error for the court to comment on evidence so as to impress upon the jury an opinion on the facts of the case. See Stokes v. Murray, 99 S.C. 221, 83 S.E. 33 (1914). In fact, such commentary is violative of section 21, article V., of the South Carolina Constitution, which provides that "[j]udges shall not charge juries in respect to matters of fact, but shall declare the law." "A judge violates this provision when he...intimates his views of the sufficiency or insufficiency of the evidence in whole or in part." Norris v. Clinkscales, 47 S.C. 488, 25 S.E. 797 (1896). In State v. White, 15 S.C. 381, 392 (1881), our Supreme Court stated that a trial judge "should carefully avoid expressing any opinion which he may have formed from the facts, leaving for the jury to draw their own conclusions, unbiased by an impression which the testimony may have made upon the mind of the judge." See also Peay v. Durham Life Ins. Co., 185 S.C. 79, 193 S.E. 199 (1937)("The trial court may not, even unintentionally, intimate to the jury any opinion it may have as to the facts of the case, as this section [former section 26, article V.] in express terms reserves this power to the jurors, uninfluenced by the weight of the judge's views."); State v. Dawkins, 268 S.C. 110, 232 S.E.2d 228 (1977)("A trial judge may not, expressly or by implication, intimate any opinion as to the force and effect of testimony in a case."). In denying the motion to strike Dr. Hanke's testimony,

the Trial Court properly avoided commenting on the evidence and facts of the case and permitted to jury to make the ultimate factual determination.

Accordingly and for the reasons set forth hereinabove, Plaintiffs' Motions for Judgment Notwithstanding the Verdict should be DENIED.

II. PLAINTIFFS HAVE NOT MET THE BURDEN FOR GRANTING A NEW TRIAL ABSOLUTE AND THAT MOTION SHOULD ACCORDINGLY BE DENIED.

"When a party moves for a new trial based on a challenge that the verdict is either excessive or inadequate, the trial judge must distinguish between awards that are merely unduly liberal or conservative and awards that are actuated by passion, caprice, or prejudice." Allstate Ins. Co. v. Durham, 314 S.C. 529, 530, 431 S.E.2d 537, 558 (1993). "The trial court must set aside a verdict only when it is shockingly disproportionate to the injuries suffered and thus indicates that passion, caprice, prejudice, or other considerations not reflected by the evidence affected the amount awarded." Rush v. Blanchard, 310 S.C. 375, 426 S.E.2d 802 (1993); Vinson v. Hartley, 324 S.C. 389, 477 S.E.2d 715 (Ct. App. 1996). "In other words, to warrant a new trial absolute, the verdict reached must be so 'grossly excessive' as to clearly indicate the influence of an improper motive on the jury." Rush, 310 S.C. at 379, 426 S.E.2d at 805. However, "[m]ere undue liberality on the part of the jury does not warrant an inference that the verdict resulted from improper influences." Becker v. Wal-Mart Stores, Inc., 339 S.C. 629, 636, 529 S.E.2d 758, 762 (Ct. App. 2000); Hall v. Palmetto Enters. II, Inc. of Clinton, 282 S.C. 87, 317 S.E.2d 140 (Ct. App. 1984); Hutson v. Cummins Carolinas, Inc., 280 S.C. 552, 314 S.E.2d 19 (Ct. App. 1984).

Plaintiffs argue in their Post-trial Motions that the verdict was "solely the result of caprice, passion and prejudice against the Plaintiffs" because "the only relevant and credible

evidence was that Defendant breached his duty to keep control of his vehicle at all times and his breach of that duty resulted in grievous bodily harm to Plaintiff." It is clearly Plaintiffs' burden to prove each and every element of their causes of action to the requisite evidentiary standard. The jury was free to find that Plaintiffs failed to meet that burden of proof with respect to their claims for negligence and loss of consortium. Simply because the jury found that Plaintiffs failed to meet their burdens of proof does not automatically constitute "caprice, passion and prejudice against the Plaintiffs." Defendant would aver that notwithstanding the defense of sudden incapacitation/loss of consciousness there was evidence, or lack thereof, upon which a jury could have found for the Defendant. Furthermore and in any event, the jury's verdict cannot be considered so "grossly excessive" or "shockingly disproportionate" to meet the standard necessary for the granting of a new trial absolute. Accordingly, Plaintiffs' Post-trial Motion for New Trial Absolute should be DENIED.

Respectfully submitted,

SMITH MOORE LEATHERWOOD, LLP

By: 

Robert D. Moseley, Jr. (Bar No. 64084)
300 East McBee Avenue, Suite 500
P.O. Box 87, Greenville, SC 29602
Telephone: (864) 242-6440
Facsimile: (864) 240-2475
rob.moseley@smithmoorelaw.com
Attorneys for Defendant

Greenville, South Carolina

Dated: Jan 30, 2012

1 STATE OF SOUTH CAROLINA
2 COUNTY OF OCONEE
3 IN THE COURT OF COMMON PLEAS
4 TENTH JUDICIAL CIRCUIT

CASE NO: 2009-CP-37-01058

5 ERNEST L. COBB AND
6 NANCY COBB,

7 PLAINTIFF,

8 -vs-

9 DAN M. LAFOY,

10 DEFENDANT.

)
)
) TRANSCRIPT OF RECORD
) MOTION HEARING
)
)
)
)
)

11
12 MAY 29, 2012
13 WALHALLA, SOUTH CAROLINA

14 B E F O R E:

15 THE HONORABLE ALEXANDER S. MACAULAY, JUDGE.
16

17 A P P E A R A N C E S:

18 LARRY C. BRANDT, ESQ.
19 ATTORNEY FOR THE PLAINTIFF

20 ROBERT D. MOSELEY, JR., ESQ.
21 ATTORNEY FOR THE DEFENDANT

22
23 ROBIN SUE HILD, FCRR, RPR
24 CIRCUIT COURT REPORTER
25 POST OFFICE BOX 9
WALHALLA, SC 29691

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ERNEST L. COBB AND NANCY COBB VS. DAN M. LAFOY

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EXHIBITS

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID/EV</u>
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NO EXHIBITS WERE PROFFERED

1 ** START OF REQUESTED CERTIFIED TRANSCRIPT OF RECORD **

2 May 29, 2012 MOTION HEARING

3 (Whereupon, hearing began at 2:11 P.M.)

4 THE COURT: Thank you very much. You may take your
5 seats, please.

6 All right. We are here on the matter of Ernest and
7 Nancy Cobb versus Dan M. LaFoy. It is my understanding,
8 if I remember correctly, the cases were consolidated for
9 trial; is that correct Mr. Brandt?

10 MR. BRANDT: That's correct, Your Honor.

11 THE COURT: Is that correct Mr. Moseley?

12 MR. MOSELEY: Yes, Your Honor.

13 THE COURT: All right. It's 2009-CP-37-1058. We
14 are here on the Plaintiffs' motions set out in there,
15 which is for judgment notwithstanding the verdict on
16 liability and damages, or in the alternative judgment
17 notwithstanding the verdict on liability and new trial
18 on damages only or in the alternative new trial
19 absolute.

20 All right, Mr. Brandt?

21 MR. BRANDT: Yes, sir. Your Honor, as you can
22 probably recall the case was tried and resulted in a
23 defense verdict. The main thrust of the defense, of
24 course, was the fact that the Defendant was driving down
25 the street in Walhalla and felt a sudden urge to go to

1 the bathroom, started to pull into Head's Grocery and
2 made a wide turn.

3 Anyway, Mr. Cobb and Ms. Cobb were in their vehicle
4 -- she was in the vehicle and he was outside the vehicle
5 gassing his vehicle at the pumps at Head's Superette.
6 And Mr. LaFoy's car ran into the truck, which Mr. Cobb
7 was gassing and which Ms. Cobb was sitting in, knocking
8 Mr. Cobb quite a distance and causing him to incur a
9 closed-head injury with substantial medical bills as a
10 result.

11 Mr. LaFoy basically claimed that he passed out. He
12 doesn't remember anything, and that he passed out and
13 doesn't remember. The next thing he remembers, he make
14 his start to make his turn into Head's Superette and
15 then the next thing he remembers was after the collision
16 and he was coming to.

17 At the trial, of course, we litigated the,
18 basically the principle of amount enunciated and talked
19 about it in Collins versus Frasier, the sudden
20 unforeseeable incapacity to operate a vehicle was a
21 defense in the personal injury action. And, obviously,
22 he drove his vehicle out of the traveled portion of the
23 roadway and didn't keep it under control and he hit a
24 stopped vehicle that was a fairly good distance away
25 from the highway.

1 And the testimony, we say, does not meet the test.
2 And at the trial, Your Honor, you agreed because there
3 was no testimony about the lack of medical testimony or
4 anything about a likely cause of the incapacity. He
5 just said he had never passed out before and he's never
6 passed out since. And they found nothing at the
7 hospital in any of the treatment, his doctors, hospital
8 records, there was nothing in there that would indicate
9 something that would have caused this syncope episode to
10 occur.

11 Dr. Hanke was called to testify and she said she
12 didn't know whether he passed out before. There was
13 nothing in the medical records to show whether he passed
14 out before or after. She didn't know whether he passed
15 out before or after but the fact that he felt this
16 sudden urge to go to the bathroom is some indication of
17 loss of bodily function and capacity. But she did not
18 elaborate and could not elaborate as to how that would
19 affect that except to say that may be some evidence that
20 he had lost some control.

21 He did have soiled pants. Again, that was after
22 the fact when they discovered that. And I think I asked
23 her at one point in time, I'm sure I did, I said, well,
24 what in the medical records would tell us that a syncope
25 episode most likely occurred if, or likely occurred

1 other than the fact that what he told her? And she said
2 well, I don't guess there is anything in there. But she
3 then, her testimony, her crux of her testimony was that
4 she made her diagnosis because she believed him. In
5 essence, if he hadn't have claimed he passed out, there
6 was nothing in the medical records that she saw that she
7 could have based a conclusion that that did, in fact,
8 occur.

9 As a result, at the end of the evidence, I made a
10 motion that the defense, which they had pled, be taken
11 away, basically a directed verdict on that and you
12 struck the defense, didn't -- I moved for directed
13 verdict on liability because there is no other evidence
14 to infer that there was any other excuse for him running
15 into Mr. Cobb's vehicle and there was certainly no
16 evidence Mr. Cobb was negligent himself.

17 You granted that motion, took it away from them. I
18 then asked for a curative of instruction to tell them
19 that the jury could not consider that defense, that the
20 jury could not consider that defense, and that
21 Dr. Hanke's testimony as it was offered for that purpose
22 was that since that was no longer a defense, that they
23 should have been instructed to disregard that and to
24 strike that testimony. At which time, of course, you
25 did not do that, you declined to do that, too.

1 I feel that basically -- and so we are here today
2 with a motion, again, asking the Judge to set aside the
3 verdict on liability and enter a verdict for Mr. Cobb on
4 the liability portion. And, again, my reasons for doing
5 so are succinctly set in the written motion which is
6 attached or which I filed. Obviously, he was standing
7 at the gas pump and the only relevant evidence -- and
8 once you take out the sudden unforeseeable incapacity to
9 operate a vehicle, once that's gone, the only verdict a
10 reasonable jury could reach was in favor of the
11 Plaintiffs on the issue of liability.

12 Another reason is, of course, the failure to strike
13 the testimony of Dr. Hanke. And then, of course, the
14 not telling them that that defense -- I specifically
15 asked that they be instructed that they could not
16 consider that defense at all, they could not consider
17 that.

18 As a result, again, all the things that I've listed
19 in my written motion, and I don't want to take up a lot
20 of time just going over and over what I've written. But
21 basically and effectively left the defense in for the
22 jury to determine, and they made their decision based on
23 that. There was no other reason for the decision.

24 And technically -- I mean, but basically the ink
25 surmised by the jury, just speculation and surmise is

1 that there was some likely cause. And, again, at trial
2 you would agree that that is what the case was, the
3 Collins V. Frazier, and of course Boston V. Baxley
4 that's behind that one. The Boston V. Baxley was, the
5 issue was whether the driver was alive or dead at the
6 time of the collision and the Judge refused to allow
7 them to talk about that and to suggest that. And the
8 court upheld them, said there wasn't any reasonable
9 inference because there wasn't any proof as to whether
10 or not the driver was alive or dead and it was proper
11 for the Judge not to even let them even get into that.

12 So, in a nutshell that's where we're coming from.
13 The -- we feel that, again, it was prejudiced and the
14 jury basically ended up, even though you said lawfully
15 that they couldn't use that defense, the jury did apply
16 it because it was still out there for the jury to
17 consider. Hanke's testimony was still in play, all the
18 testimony of the Defendant was still in play. And,
19 again, Hanke's testimony was merely based on his
20 self-serving statement. And that case says, it clearly
21 says, the Frasier case, says that it's got to be more
22 than his claim that he passed out, you got to have a
23 likely underlying cause.

24 We feel that certainly a judgment on liability
25 should be entered and damages and the Court just to

1 assess the damages based on the record that was there as
2 far as the damages that were presented. In the
3 alternative, the Court would have a, has the alternative
4 to grant a judgment on the verdict on liability granting
5 a new trial on damages only. And then, of course, in
6 the alternative, just a new trial absolute with damages
7 and a liability would both be tried again anew. And so
8 I think those are the three choices we'd ask the Court
9 to take and the ruling that we've asked the Court to
10 give. Thank you.

11 THE COURT: All right, Mr. Moseley?

12 MR. MOSELEY: Your Honor, the motions that are
13 presented before the Court are taken in light most
14 favorable to the Defendant, the non moving party. In
15 the course of the trial you ruled and you struck the
16 defense. There was never a, there was a general motion
17 made for a directed verdict, but there was never a
18 ruling that you were denying the motion on liability as
19 a whole and that you were directing a verdict against us
20 on liability and taking that away from the jury.

21 That issue, having never been ruled upon, has been
22 waived. And also, there was no objection to the jury
23 charges, no objection to the verdict form, that allowed
24 -- and you made it very clear on Page 59 of the
25 transcript that I've got, that there was an opportunity

1 for a defense verdict; that that would remain an option
2 for the jury, that there was no objection to that.

3 So the first point would be that if there is a JNOV
4 as to liability and it's waived because there was no
5 directed verdict motion to rule on during the course of
6 the trial as to the liability and damages -- excuse me,
7 as to a JNOV motion, that would only allow damages to be
8 decided and that liability would be directed. Then the
9 Court wouldn't have necessarily have found that a
10 directed verdict was appropriate at that time. So
11 that's not really an option for the Court. So a JNOV
12 just on damages would not fly.

13 And then, finally, the third option is the new
14 trial absolute, and the standard for that is the verdict
15 shocks the conscience. And normally you would see that
16 in the case of a, you know, a verdict of \$10 million
17 that would shock the conscience or maybe in an admitted
18 liability case, a verdict of, you know, \$25 or something
19 like that, that would shock the conscience.

20 THE COURT: Wouldn't that be a *nisi* motion?

21 MR. MOSELEY: Well and, Your Honor, the new trial
22 absolutely motion is before the Court is a shock the
23 conscience standard. And if it was merely inadequate or
24 merely excessive, then you would have *nisi* motion that
25 you could make that additur remittitur on the case.

1 But our position would be that the new trial
2 absolute motion has been made which should be denied
3 because there is nothing here to shock the conscience.

4 And I would remind the Court that in closing,
5 Mr. Brandt did tell the jury that the Court had taken
6 that defense away from us, he communicated that to the
7 jury. You ruled that you were not going to comment on
8 that because that would be an impermissible comment on
9 the evidence. I believe that ruling was appropriate,
10 should be affirmed.

11 And I would remind the Court that the burden of
12 proof is always on the Plaintiff and the burden of proof
13 in this case the Plaintiff failed to meet the burden.
14 And you instructed the jury that there is a burden of
15 proof and just because there is an accident doesn't
16 necessarily mean someone is negligent. And so we
17 believe that's what the jury found, and we think that
18 the jury's verdict should be upheld.

19 THE COURT: All right, Mr. Brandt?

20 MR. BRANDT: Your Honor, I said I never really
21 pushed for the ruling on the directed verdict. However,
22 I think the rule is that you don't have to specifically
23 push for any kind of ruling if it's obviously fairly
24 encompassed in the discussion in what the Judge was
25 doing. That's not required. And if you look at

1 everything that happened when I moved for a directed
2 verdict you said you would strike it. I kept asking
3 wait a minute, you've got to give them a curative
4 instruction and you did not do that.

5 I don't think the shocks of conscience is the --
6 you talked about additur and remittitur, I don't think
7 that's in play because I didn't have a verdict on
8 liability unless the Court would go back and grant that.
9 And that's why I said well, go back and give me a
10 directed verdict on liability and then you can set the
11 damages yourself.

12 The other thing that's coming, and for the
13 Plaintiff's attorney to tell the jury, that's one thing,
14 but for the Court to tell them, that's another. And I
15 don't think you can equate the two merely by allowing
16 one attorney to argue something without the Court
17 instruction on the matter of law which is confusing to
18 the jury. I don't think that equates.

19 So just those comments in response to Mr. Moseley's
20 arguments is all I care to make. But, again, I think
21 it's clear once -- if you're gonna take it away, not
22 going to direct a verdict, you've gotta tell them,
23 you've gotta tell them that, hey, you can't even
24 consider that defense and you can't consider Dr. Hanke's
25 testimony.

1 THE COURT: Let's take a short break.

2 (A recess was taken.)

3 THE COURT: All right. Anything further from
4 Mr. Brandt?

5 MR. BRANDT: No, sir.

6 THE COURT: Mr. Moseley?

7 MR. MOSELEY: No, Your Honor.

8 THE COURT: Well y'all have a tendency to bring up
9 bad memories. The first time I was reversed was in a
10 case called Scoggins versus McClellion where I granted a
11 new trial *nisi* using the quote, 13th juror. And because
12 I'd come up practice, at the end of the case you always
13 when you had to make your motions for a new trial *nisi*
14 or a new trial absolute. And the point was that that
15 apparently was a policy that had been followed by even a
16 lot of the courts because what they reversed me on was
17 one that the senior judge in the Circuit Court at that
18 time, Judge Peoples, was reversed between the time I
19 tried the case and the time that the decision in my case
20 came out.

21 They reversed him in that little space saying he
22 had made a mistake. He had been on the bench 32 years,
23 so I felt somewhat nonplus that they reached back and
24 got something that a senior judge had been doing for at
25 least 32 years to correct me on. But I stood corrected,

1 and I'm always a little bit concerned about what a new
2 trial absolute and a new trial *nisi* means.

3 And in this case, obviously one of the issues has
4 been sufficiency of the evidence to support the verdict.
5 And I think that was the reason obviously the Court did
6 grant the motion to strike at least the motion as to the
7 defense, affirmative defense, of incapacity, sudden
8 incapacity, emergency.

9 And our courts have held and, for example, *Folkens*
10 *versus Hunt*, 300 S.C. 251: This Court has had the
11 opportunity to reconsider the 13th juror doctrine on
12 several occasions. Each time we have refused to abolish
13 the doctrine. We have also refused to require trial
14 judges to explain the reasons for their ruling. 13th
15 juror doctrine is a vehicle by which the trial court may
16 grant a new trial absolute where he finds the evidence
17 does not justify the verdict.

18 The ruling has also been termed granting a new
19 trial upon the facts. The effect is the same as if the
20 jury failed to reach a verdict. The Judge as a 13th
21 juror hangs the jury panel. When the jury fails to
22 reach a verdict a new trial is ordered. Neither the
23 Judge nor the jury is required to give reasons for this
24 outcome.

25 Similarly because a result of the 13th juror vote

1 by the judge is a new trial rather than an adjustment to
2 the verdict, no purpose would be served by requiring the
3 Judge to make the logical findings.

4 I think the record does reflect -- although I don't
5 have the transcript -- that the Court was somewhat
6 concerned about the facts or at least they support any
7 affirmative defenses. And the motion for new trial
8 absolute, having been raised, then in a timely fashion
9 and this is the first opportunity we have had to hear
10 it, an opportunity to be heard on that motion, I find
11 that the motion should be granted under the 13th juror
12 doctrine.

13 Of course, it goes to liability and damages, if
14 any. I do this because sitting as a 13th juror charged
15 with the duty of seeing that justice is done, I have the
16 authority to grant new trials when I am convinced that a
17 new trial is necessitated on the basis of the facts in
18 the case. And I find that a new trial is necessary and
19 that justice has not prevailed in this case.

20 Very good. New trial absolute on both liability
21 and damages.

22 MR. BRANDT: Thank you, Your Honor.

23 MR. MOSELEY: Your Honor, are you gonna prepare an
24 order?

25 THE COURT: I'll tell you what. Since

1 Mr. Brandt -- but do, and I'll give you the cases to
2 look at. *Yeomans v. South Carolina Department of*
3 *Transportation*, 263 -- excuse me -- 380, 263, 670 S.E.2d
4 1.

5 MR. BRANDT: How much southeast second?

6 THE COURT: 670.

7 MR. BRANDT: Southeast 2d 1?

8 THE COURT: Second, Page 1.

9 MR. BRANDT: Okay.

10 THE COURT: *Travellis versus South Carolina*
11 *Department of Transportation*, 357 S.C. 545 and 593 SE.2d
12 504. And if you must look at *Scoggins v. McClellion*, I
13 sort of put that out of my mind, but I can get it for
14 you. And did I give you *Folkens v. Hunt*?

15 MR. BRANDT: Excuse me?

16 THE COURT: Did I give you *Folkens versus Hunt*?

17 MR. BRANDT: I think you did. Give me the cite on
18 it. I just ---

19 THE COURT: 300 S.C. 251, 387 S.E.2d 265.

20 MR. BRANDT: 255? 300 S.C. what?

21 THE COURT: 300 S.C. 251.

22 MR. BRANDT: 251.

23 THE COURT: 387 S.E.2d 265.

24 MR. BRANDT: Okay.

25 THE COURT: And *Scoggins*, that's S-C-O-G-G-I-N-S v.

1 *McClellion*, and that's Vicky McClellion so that's
2 M-c-C-L-E-L-L-I-O-N.

3 MR. BRANDT: All right.

4 THE COURT: And that is 321 S.C. 264, 468 S.E.2d
5 12.

6 MR. MOSELEY: Your Honor, could we get something
7 included in the order that it won't be retried within 90
8 days?

9 THE COURT: Certainly.

10 MR. BRANDT: It won't be.

11 MR. MOSELEY: Yeah, I agree with you.

12 MR. BRANDT: I agree.

13 THE COURT: Are you gonna put that in
14 there Mr. Brandt?

15 MR. BRANDT: Yes, sir.

16 THE COURT: Gentlemen, thank you.

17 MR. MOSELEY: Thank you, Your Honor.

18 (Whereupon, the Motion for a New Trial was
19 concluded at approximately 2:55 p.m.)

20

21

22 --- THIS ENDS REQUESTED TRANSCRIPT ---

23

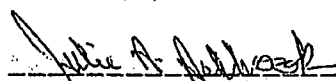
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CERTIFICATE OF REPORTER

I, the undersigned Julie A. Ashbrook, Court Reporter for the Tenth Judicial Circuit Family Court of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record to the best of my ability of all the proceedings and evidence introduced in the hearing and/or trial of the captioned case, relative to appeal, in the Family Court for Anderson County, South Carolina, on the 29th day of May, 2012.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.



Julie A. Ashbrook
Family Court Reporter
Tenth Judicial Circuit

 ORIGINAL

1 State of South) In the Court of Common Pleas
 2 Carolina)
 3 County of Oconee) Case No: 2009-CP-37-01058
 4)

5 Ernest L. Cobb and)
 6 Nancy Cobb,)
 7 Plaintiffs,) Transcript of Record
 8 -vs-) Trial
 9 Dan M. LaFoy,)
 10 Defendant.)

January 9, 11 and 12, 2012
 Walhalla, South Carolina

13 B E F O R E:

14 The Honorable Alexander S. Macaulay, Judge; and a
 15 Jury.

16
 17
 18 A P P E A R A N C E S:

19 Larry C. Brandt, Esq.
 20 Attorney for the Plaintiffs

21 Robert D. Moseley, Jr. Esq.
 22 Attorney For the Defendant

23 Robin Sue Hild, FCRR, RPR
 24 Circuit Court Reporter
 25

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1 ** Start of Requested Certified Transcript of Record **

2 (Whereupon, the trial of Ernest L. Cobb and Nancy
3 Cobb v. Don M. LaFoy commenced, with all parties
4 being present except for the Defendant, Mr. Dan M.
5 LaFoy, on January 11, 2012, at approximately 12:22
6 p.m.)

7 Jury Voir Dire/Selection:

8 THE COURT: Ladies and gentlemen, this is a term of
9 Common Pleas Court, as I said before. It is sometimes
10 called Civil Court. A lawsuit is a civilized method of
11 determining disputes between citizens. Our purpose here
12 is to resolve in an orderly manner disputes between
13 citizens who have cases in this court in a fashion which
14 will ensure that justice under the law is accomplished
15 between the parties to the lawsuit.

16 The trial of a case begins with the selection of a
17 Jury. Because all parties to a lawsuit are entitled to
18 jurors with an open mind, I will be asking certain
19 questions of the petit Jury panel. The trial Jury just
20 be free as humanly possible from any prejudice, bias or
21 sympathy for either side or any party and free from any
22 preconceived ideas on the facts of the case or on the
23 law of the case. The questions which will be asked are
24 designed to assure each side a fair and impartial Jury.

25 If any person should talk with you or attempt to

1 talk with you about any case scheduled for this term of
2 court, it would be your solemn duty to report
3 immediately that matter to the Court so I might take the
4 appropriate action. From this point on you are sworn as
5 jurors for the Court of Common Pleas for Oconee County
6 and no one is to interfere with your service as such.

7 Now we are about to begin the selection of a Jury
8 in the cases of Ernest L. Cobb and Nancy Cobb versus Dan
9 M. LaFoy. That's 2009-CP-37-1058 and '1059. The
10 Plaintiffs are represented by Mr. Brandt.

11 Mr. Brandt, if you would please stand and introduce
12 yourself and your clients.

13 MR. BRANDT: My name is Larry Brandt. I practice
14 law here in Walhalla, have been for some time, and I
15 represent Ernest Cobb and Nancy Cobb.

16 THE COURT: If you would please stand.

17 (Mr. and Mrs. Cobb stand.)

18 THE COURT: Thank you very much.

19 The reason I do that, of course, is in these days
20 and times we seem to have grown and don't always know
21 everybody by name but we might recognize them. So, if I
22 call any names that are going to be introduced to you as
23 the Jury panel, I would like for them to stand and look
24 upon the Jury panel, as we say.

25 Now, the Defendant, Mr. Dan M. LaFoy, is not with

1 us this morning but will be with us during the trial of
2 the case. He is represented by Mr. Moseley.

3 Mr. Moseley, please stand, introduce yourself and
4 your client.

5 MR. MOSELEY: I'm Rob Moseley. I'm with Smith
6 Moore Leatherwood in Greenville. Dan LaFoy, who is a
7 retired gentleman, lives up in Highlands, but we didn't
8 have time to get him down here today so he'll get here
9 when we start the trial.

10 THE COURT: Very good. Thank you.

11 MR. MOSELEY: Your Honor, Frederic Marcinak may
12 appear in some of the depositions.

13 THE COURT: He is with your firm?

14 MR. MOSELEY: Yes, Your Honor.

15 THE COURT: All right. Very good.

16 Now, is there any member of the Jury panel related
17 by blood or marriage or, now or formerly, a close
18 personal friend or business associate of either the
19 Defendant, Dan M. LaFoy, or the Plaintiffs, Ernest L.
20 Cobb or Nancy Cobb? Any member of the Jury panel
21 related by blood or marriage, now or formerly, or close
22 personal friend or business associate of any of the
23 parties to these lawsuits, Ernest L. Cobb, Nancy Cobb,
24 or Dan M. LaFoy? If so, please stand at this time.

25 (There was no response.)

1 THE COURT: Has any member of the Jury panel or
2 members of their immediate families ever been
3 represented by or employees of any of the attorneys
4 involved in this case or their law firms?

5 (Prospective juror stood.)

6 THE COURT: All right. Yes, ma'am. Your name,
7 please?

8 PROSPECTIVE JUROR: Sherri Smith. I used to work
9 for Mr. Brandt.

10 THE COURT: Would that in any way interfere with
11 your ability to give the Plaintiffs and the Defendant a
12 fair and impartial trial?

13 PROSPECTIVE JUROR: But these people here, I used
14 to work with her, my aunt used to work with Nancy and my
15 fiancée's aunt is Jenny.

16 THE COURT: You know, I'll tell you what. I ask
17 that question for two reasons, one is if you can give
18 all the parties a fair and impartial trial. The reason
19 for that is, of course, first, that the parties are
20 entitled to a fair and impartial Jury.

21 But the second reason for that question is that you
22 did not ask to be here, and therefore I want to be sure
23 you don't feel in any way compromised by having some
24 prior knowledge or relationship or something like that
25 with any of the parties because that might make you

1 uncomfortable. So I'm going to excuse you from the
2 trial of this case. But if you would please stay with
3 us, all right?

4 PROSPECTIVE JUROR: Okay. Do I stay?

5 THE COURT: Stay with us until we finish the
6 process. Very good. But thank you for bringing it to
7 my attention.

8 Yes, ma'am. Your name, please?

9 PROSPECTIVE JUROR: Ann Hutchinson. And I have
10 been involved with Mr. Brandt. And I believe Mr. Cobb
11 has done business with the store, Ocone Auto Parts,
12 they do business with him.

13 THE COURT: The same reason I'm going to excuse you
14 on the trial of this case as I have with Ms. Smith.
15 Now, please understand that this is in no way a
16 reflection on your ability to give both the Plaintiffs
17 and Defendant a fair trial, it's just that I just in no
18 way want to put you in a compromising position. But I
19 thank you. So you will be excused as well.

20 Anyone else?

21 (There was no response.)

22 THE COURT: I might note, since Mr. Marcinak is
23 gonna be participating in this trial, he is also a
24 former resident, I think he grew up here in Ocone
25 County. Mr. Fredric C. Marcinak. Anybody related by

1 blood or marriage, or at least been employed by or
2 associated by or with Frederic C. Marcinak, attorney?

3 (There was no response.)

4 THE COURT: Very good. Thank you.

5 Has any member of the Jury panel formed or
6 expressed an opinion about any issue or matter that
7 might be involved in this case? If so, please stand.

8 (There was no response.)

9 THE COURT: All right. I'm gonna call out a list
10 of potential witnesses. When we say potential
11 witnesses, what that means is that these are witnesses
12 who may be called but do not have to be called in the
13 trial of the case. So listen carefully, and if any of
14 them are in the courtroom at the time, if they would
15 please stand and look upon the Jury panel.

16 Dr. Stephen Gardner, Dr. George Thompson, Sergeant
17 Josh Sample, I think of the Walhalla Police Department.
18 And Emergency Medical Technicians, Kent Whitten and Ken
19 Versa. Also, Dr. Jennifer Hanke of the Oconee Medical
20 Center. Dr. David Wheeler of Cashiers, and Dr. Ted
21 Booker and Dr. Ed Booker of Walhalla. Again, is there
22 any member of the Jury panel related by blood or
23 marriage or close personal friends or business
24 associates or former patients of any of the physicians
25 as well as friends of the other potential witnesses?

1 And they are Dr. Stephen Gardner, Dr. George Thompson,
2 Sergeant Josh Sample, EMT Kent Whitten or Ken Versa; or
3 Dr. Jennifer Hanke, David Wheeler, Dr. Ted Booker or
4 Dr. Ed Booker? If so, please stand.

5 (A Prospective Juror stands.)

6 THE COURT: Yes, sir.

7 PROSPECTIVE JUROR: Jeremy Jetton.

8 THE COURT: Yes, sir.

9 PROSPECTIVE JUROR: Josh Sample is gonna be helping
10 me with a hole in my house. We've known each other for
11 a long time.

12 THE COURT: All right. If he were a witness, would
13 that in any way interfere with your ability to give both
14 the Plaintiffs and the Defendant a fair and impartial
15 trial?

16 PROSPECTIVE JUROR: No, sir.

17 THE COURT: Very good. Thank you, sir.

18 Anyone else?

19 (There was no response.)

20 THE COURT: Is any member of the panel aware of any
21 bias or prejudice towards either the Plaintiff or the
22 Defendant in this case? If so, please stand.

23 (There was no response.)

24 THE COURT: Does any member of the panel know of
25 any reason whatever why he or she should not serve as a

1 juror on this case? If so, please stand.

2 (There was no response.)

3 THE COURT: All right. Any additional questions
4 from the Plaintiffs?

5 MR. BRANDT: None from the Plaintiffs.

6 THE COURT: From the Defendant?

7 MR. MOSELEY: None, Your Honor.

8 THE COURT: Ladies and gentlemen of the Jury panel,
9 the way that we select a Jury in Common Pleas Court is
10 the Clerk of Court is going to prepare what is called a
11 strike sheet. It'll be a list of 20 names and then
12 we'll also have one alternate so there will be an
13 additional three names. And from the 20 names each side
14 will strike four, which will leave the 12 who will be
15 the Jury; and then as far as the alternates, the three
16 names, each side will strike one, which will leave us
17 with one alternate. Now, is everything working?

18 (Discussion off the record.)

19 THE COURT: All right. So this is going to take a
20 little bit of time to do this. And then, of course, the
21 attorneys have to have some time to consider the names.
22 Now, when the strike sheet is prepared, and you will
23 hear the names called, or not names called, but numbers,
24 please understand those are the numbers as the names
25 appear on the strike sheet and they have nothing to do

1 with your particular juror number because, as I say,
2 these are randomly drawn.

3 I might note, this is a little bit different from
4 the way we used to do it. When I started out a few
5 years ago, we used to have the strike sheet prepared
6 from a list of all of the jurors and then the names
7 clipped off individually and put in capsules, and then
8 the capsules were put into a drum that was turned and
9 mixed up, and then we had to have either a child who
10 could not read or write or a person who was legally
11 blind reach in and pull out the capsule and from the
12 capsule would take out the name and write it down on
13 paper. Well, now with this modern technology that we
14 have, everything is done by computer, so the computer
15 randomly gives us that list of 20 names and then the
16 other three names.

17 The problem is that technology is wonderful when it
18 works. Sometimes it doesn't and it's not quite as
19 dependable as a child who cannot read or write or
20 someone who is legally blind. But in this case things
21 are kind of working but we will get the list.

22 And also, as far as the time it will take for the
23 attorneys to consider the strike sheet, that will also
24 take a little bit of time. So I'm going to excuse you
25 till 12:00 so the attorneys can consider the Jury list.

1 But I'm gonna excuse you one more time and come back and
2 be in this part of the courtroom at 12:00, 25 minutes,
3 and we'll strike the Jury at that time.

4 Again, as I said earlier, I look forward to working
5 with you, and hopefully we'll get this on the way. I
6 might tell you at this time, we will not start the trial
7 of the case today but at least we'll start it later in
8 the week. But the fact is that we'll strike the Jury
9 today so we'll know who will have to come back.

10 With that I'll excuse you until 12:00.

11 Everyone else remain seated while the Jury retires
12 from the courtroom.

13 (Jury panel excused for break until 12:00 p.m.)

14 THE COURT: Madam Clerk, if you would please give
15 us a Jury.

16 THE CLERK: Plaintiff strikes first, numbers on the
17 left.

18 MR. BRANDT: Plaintiff strikes number 2.

19 THE CLERK: Plaintiff strikes number 2.

20 MR. MOSELEY: Defendant strikes 16.

21 THE CLERK: Defendant strikes number 16.

22 MR. BRANDT: Plaintiff strikes number 11.

23 THE CLERK: Plaintiff strikes number 11.

24 MR. MOSELEY: Defendant strikes 15.

25 THE CLERK: Defendant strikes number 15.

1 MR. BRANDT: Plaintiff strikes number 9.
2 THE CLERK: Plaintiff strikes number 9.
3 MR. MOSELEY: Defendant strikes number 7.
4 THE CLERK: Defendant strikes number 7.
5 MR. BRANDT: Plaintiff strikes number 20.
6 THE CLERK: Plaintiff strikes number 20.
7 MR. MOSELEY: Defendant strikes number 5.
8 THE CLERK: Defendant strikes number 5.
9 And for the alternate?
10 MR. BRANDT: Plaintiff strikes number 21.
11 THE CLERK: Plaintiff strikes number 21.
12 MR. MOSELEY: Defendant strikes 22.
13 THE CLERK: Defendant strikes number 22.
14 And we'll go over the strikes.
15 Plaintiff strikes number 2, number 9, number 11,
16 number 20; and of the alternates, number 21.
17 Defendant strikes number 5, number 7, number 15,
18 number 16, and number 22 of the alternates.
19 Ladies and gentlemen, as I call your name, if you
20 would please come forward bringing your personal
21 belongings and taking a seat in the Jury box.
22 Number 149, [REDACTED] Number 63, [REDACTED]
23 [REDACTED] Number 71, [REDACTED] Number 56, [REDACTED]
24 [REDACTED] Number 145, [REDACTED] Number 118,
25 [REDACTED] Number 68, [REDACTED] Number 60,

1 [REDACTED] Number 64, [REDACTED] Number 150,

2 [REDACTED] Number 140, [REDACTED] Number 5,

3 [REDACTED] And number 37, [REDACTED]

4 THE COURT: Is there any reason this Jury cannot be
5 'sworn for the trial of this case from the Plaintiff?

6 MR. BRANDT: No.

7 THE COURT: From the Defense?

8 MR. MOSELEY: None, Your Honor.

9 THE COURT: Very good. [REDACTED], you are
10 sitting in the foreperson's seat, so I'm going to ask
11 you to serve as foreperson of this Jury.

12 And, [REDACTED] you are the alternate.

13 Those are the only two reserved seats. If you will
14 always sit on the front row on the end and you will
15 always sit on the back row at the end as well. The only
16 thing is we have that one chair at the end that we don't
17 use so we'll be sitting closer -- the seats that you are
18 in now are the ones you will be using so you can see the
19 witness from where you are seated. So, therefore, each
20 time we come back from the Jury room, if you would sit
21 in that seat and if you would sit in the other seat,
22 [REDACTED].

23 I'm going to ask you to go with the bailiff. He
24 will show you the Jury room that we'll be using. I have
25 some other matters I need to take up with the attorneys

1 and the balance of the Jury panel.

2 But my instructions throughout the trial in this
3 case are gonna be the same: Do not undertake discussion
4 of this case among yourselves in any way to include
5 personalities or anything else. The reason for that is
6 a trial follows a certain order. You never know what's
7 gonna be the most important part of the trial. It could
8 be the opening statements by the attorneys, the first
9 witness, or the last witness, or the closing arguments
10 by the attorneys, or the charge on the law which is the
11 last thing that you will receive before the case is
12 given to you. For that reason you are not to in any way
13 discuss the case among yourselves or permit anybody to
14 discuss it with you. I'll go into a little more detail
15 about it later. But even when you go back to the Jury
16 room, please do not undertake discussion of this case in
17 any way.

18 I'll ask you to go with the bailiff and it will be
19 a few minutes and I'll call you back.

20 (Whereupon, the Jury left the courtroom at
21 approximately 12:07 p.m.)

22 THE COURT: All right. Ladies and gentlemen of the
23 Jury panel that were not drawn on the trial of this
24 case, as I said, this is gonna be the first case we try.
25 And I'm going to excuse you for the balance of the day.

1 Now, the only thing is I'm going to ask you to call back
2 this afternoon after 6:00. Your Clerk of Court,
3 Ms. Whitfield, has provided an answering machine that
4 you can call, and there will be a message on that
5 answering machine after 6:00, and it will tell you what
6 you need to do, either call back the next day or come in
7 the next day, or it could say that it would not be
8 necessary. The main thing is for further service. But
9 I do want you to call that number. And I understand the
10 number was on the paper they were given when they
11 reported.

12 Does everybody have the telephone number? Check
13 and see. Anybody that does not have the telephone
14 number, raise their hands and we'll give you a copy. I
15 think we have a gentleman on the back row.

16 All right. There's another gentleman here.

17 There's another one right in the middle there. And
18 on the front row.

19 All right. Now, does everybody have the telephone
20 number? And if not, raise your hand. Very well. Call
21 that number after 6:00. It's an answering machine, so
22 the message will be on there all night. So if you don't
23 get through the first time, keep trying until you do. I
24 regret if you do not get the message from the machine,
25 that you will have to report here at 9:30 in the morning

1 to get the message from me, but I think you would rather
2 have the message from the machine. But just keep
3 calling the number until you finally get through. Now,
4 are there any questions? If you do not have the number,
5 raise your hand. Any questions about what you have to
6 do? Call that number after 6:00 and get the message.

7 Very good. As I said earlier, I look forward to
8 working with you this week and I thank you for your
9 patience with the Court this morning. But you will be
10 excused. Thank you very much.

11 Everyone else remain seated while the Jury retires
12 from the courtroom.

13 (Whereupon, the Jury panel was excused for the day
14 at approximately 12:57 p.m.)

15 THE COURT: All right. A few things just to be
16 sure that the record is clear on this. There are two
17 cases, Ernest L. Cobb versus Dan M. LaFoy,
18 2009-CP-37-1058 and then the companion case, Nancy Cobb
19 versus Dan M. LaFoy, 2009-CP-37-1059. It is my
20 understanding from discussions with the attorneys these
21 cases are consolidated and tried together.

22 Is that correct, Mr. Brandt?

23 MR. BRANDT: Yes, Your Honor.

24 THE COURT: Mr. Moseley?

25 MR. MOSELEY: Yes, sir.

1 THE COURT: We will consolidate the cases under
2 2009-CP-37-1058, which will be the first case filed and
3 will now appear as Ernest L. Cobb and Nancy Cobb versus
4 Dan M. LaFoy.

5 All right. What I plan to do is to excuse the Jury
6 until, well, I'll just excuse them for this evening and
7 tell them to call back Tuesday night. Not tonight, but
8 Tuesday night, with the anticipation that the case is
9 not resolved in some other fashion, that it will be,
10 we'll ask them to report Wednesday morning for the
11 trial. Now, are there any exceptions to that,
12 Mr. Brandt?

13 MR. BRANDT: None.

14 THE COURT: Or any suggestions, as well?

15 MR. BRANDT: No.

16 THE COURT: All right. Mr. Moseley?

17 MR. MOSELEY: No, Your Honor.

18 THE COURT: All right. With that I'll ask the Jury
19 to return and I'll excuse them for the balance of the
20 day. And then I would -- let's plan on about 10:00
21 Wednesday morning. Does that give you enough time,
22 Mr. Moseley?

23 MR. MOSELEY: Yes, Your Honor.

24 THE COURT: All right. If you have exhibits, see
25 if you can't agree on them and then give them to the

1 Court Reporter as soon as possible, and if you can't
2 agree on them, just have them marked for identification.

3 (The Jury entered the courtroom at approximately
4 12:14 p.m.)

5 THE COURT: All right. Let the record reflect the
6 Jury and alternate are in the Jury box.

7 Madam Forelady, ladies and gentlemen of the Jury,
8 we are not going to start the trial of the case today.
9 In fact, I have some other things I have to do tomorrow.
10 So I'm going to ask you to call back tomorrow night, not
11 tonight, but Tuesday night. There's a telephone number
12 that you were given I think when you reported. Does
13 everybody have that telephone number?

14 A JUROR: I didn't get one.

15 THE COURT: All right. We need to get another copy
16 to the gentleman on the back row.

17 A JUROR: Thank you, sir.

18 THE COURT: Does everybody now have the telephone
19 number? (Jurors nod.) All right. That is an answering
20 machine and it'll be on all night, so keep calling it
21 till you finally get through because it will tell you
22 what you need to do. This is tomorrow night, not
23 tonight. But after 6:00 tomorrow night, January the
24 10th, Tuesday evening, if you would call that number and
25 they'll give you a message as to what you need to do.

1 Now, I tell jurors and juries that this is perhaps
2 the most difficult time in your service as a juror.
3 Because you're going home, and somebody will say, "What
4 'are you doing?"

5 And you'll tell them, "I've been drawn on a Jury."

6 And then they'll say, "Well, what's it about?"

7 Now, of course, you haven't heard anything about
8 the case, and you're going to tell them, well,
9 regardless, "I can't discuss it with you."

10 And then they'll say, "Well, why not?"

11 And you will tell them, "Because the Judge said
12 ,so."

13 And more than likely they'll say something to the
14 effect, "Well, that's ridiculous."

15 But the thing is, I think you understand this is an
16 important case to everybody involved, the Plaintiffs as
17 well as the Defendant, and it needs to be resolved in a
18 proper fashion. The only way it can be, as I said
19 earlier, after you heard the whole case, you don't know
20 if it's gonna be the first thing or the last thing
21 presented to you. You do not need to discuss it or
22 particularly let anybody discuss it with you.

23 Also remember, you are the only ones that can
24 decide this case, and your decision has to be made on
25 what you hear in this courtroom in that Jury box and the

1 deliberations you make in this Jury room that you have
2 just been in. So, therefore, please understand that no
3 one can help you that is not in that Jury box with you
4 or will be in that Jury room. They can only confuse the
5 proper resolution of the case, and that needs to be
6 avoided.

7 So, therefore, I'll tell you that if anybody
8 insists on talking to you, I'll be here today and about
9 9:30 or 9:00 in the morning, so I'll be glad to explain
10 it to them. But I think you understand that it does
11 need to be resolved in a proper fashion. With that I'll
12 excuse you. Do call back tomorrow night, Tuesday at
13 6:00, January the 10th, and do what the message says.

14 And I'll say this, though. That if you fail to get
15 through, the message will be on all night. If you do
16 not get the message from the machine Tuesday night, you
17 will have to report regardless 10:00 Wednesday morning,
18 but I think you want to go ahead and see. That might be
19 welcome news. You never know.

20 With that I'll excuse you for the balance of the
21 day. I do look forward to working with you this week.
22 And I do thank you for your patience with the Court
23 today.

24 Everyone else remain seated while the Jury retires
25 from the courtroom.

1 The bailiff will show you how to come back to the
2 Jury room.

3 (Whereupon, the Jury left the courtroom at
4 approximately 12:18 p.m.)

5 THE COURT: All right. Anything else from the
6 Plaintiff?

7 MR. BRANDT: Nothing from the Plaintiff.

8 THE COURT: From the Defense?

9 MR. MOSELEY: No, Your Honor.

10 THE COURT: All right. How about your exhibits?
11 Do you have any?

12 MR. BRANDT: I don't have them with me.

13 THE COURT: Can we get here in the morning by 9:30
14 Wednesday morning if this case goes forward. But do
15 your negotiation or whatever. The reason I say marked
16 for identification, unless there's a challenge to the
17 validity or authenticity or something like that, go
18 ahead and mark them for identification. If you can
19 agree to them, you can go ahead and admit them prior to
20 trial and you can use them in your opening statements.

21 All right. I look forward to working with you and
22 I'll see you at least by 10:00 Wednesday morning.

23 MR. MOSELEY: Thank you, Your Honor.

24 THE COURT: Thank you.

25 (Court adjourned for the day at 12:30 p.m.)

1 JANUARY 11, 2012

2 10:21 a.m.

3

4 THE COURT: Thank you very much. You may take your
5 seats, please.

6 All right. We are beginning the trial of the
7 combined cases of Ernest L. Cobb and Nancy Cobb versus
8 Dan M LaFoy, 2009-CP-37-1058. As I say, they are
9 consolidated, both cases formerly brought individually.

10 Is that correct, Mr. Brandt?

11 MR. BRANDT: That's correct.

12 THE COURT: Is that correct, Mr. Moseley?

13 MR. MOSELEY: Yes, Your Honor.

14 THE COURT: Have counsel had an opportunity to
15 submit their exhibits for identification?

16 MR. BRANDT: Yes.

17 MR. MOSELEY: Your Honor, he's got exhibits 1
18 through 13 and we have no objection.

19 MR. BRANDT: So I move them into evidence now.

20 THE COURT: All right. Plaintiff's Exhibits Number
21 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, and 13 are
22 admitted without objection.

23 (Plaintiff's Ex. # 1, enlarged photo going towards
24 Head's Superette, was previously marked for
25 identification and was received in evidence.)

1 (Plaintiff's Ex. # 2, enlarged photo going in other
2 direction from Head's Superette was previously
3 marked for identification and was received in
4 evidence.)
5 (Plaintiff's Ex. # 3, enlarged photo, Head's, was
6 previously marked for identification and was
7 received in evidence.)
8 (Plaintiff's Ex. # 4, enlarged photo, gas pumps at
9 Head's, was previously marked for identification
10 and was received in evidence.)
11 (Plaintiff's Ex. # 5, enlarged photo, gas pumps at
12 Head's, was previously marked for identification
13 and was received in evidence.)
14 (Plaintiff's Ex. # 6, enlarged photo, gas pumps at
15 Head's, was previously marked for identification
16 and was received in evidence.)
17 (Plaintiff's Ex. # 7, enlarged photo, gas pumps at
18 Head's, was previously marked for identification
19 and was received in evidence.)
20 (Plaintiff's Ex. # 8, enlarged photo, gas pumps at
21 Head's, was previously marked for identification
22 and was received in evidence.)
23 (Plaintiff's Ex. # 9, enlarged photo, has pump at
24 Head's, was previously marked for identification
25 and was received in evidence.)

1 (Plaintiff's Ex. # 10, Plaintiff, was previously
2 marked for identification and was received in
3 evidence.)

4 (Plaintiff's Ex. # 11, Plaintiff, was previously
5 marked for identification and was received in
6 evidence.)

7 (Plaintiff's Ex. # 12, Plaintiff's arm, wrist, was
8 previously marked for identification and was
9 received in evidence.)

10 (Plaintiff's Ex. # 13, Ernest Cobb medicals, was
11 previously marked for identification and was
12 received in evidence.)

13 Does the Defense have any exhibits?

14 MR. MOSELEY: Not at this time, Your Honor.

15 THE COURT: All right. Is there anything before we
16 bring the Jury in to start the trial from the Plaintiff?

17 MR. BRANDT: No, Your Honor. I think we basically
18 have some logistical problems with witnesses and I put
19 on the record I have no objection if Rob wants to call
20 any out of order. I'll have one that I may have to get
21 out of order, the economist, technically it may be a
22 little bit out of order, but I have got to get him in
23 this afternoon because he has a trial tomorrow in North
24 Carolina, and I think Mr. Moseley has agreed.

25 THE COURT: Any objection?

1 MR. MOSELEY: No, Your Honor.

2 THE COURT: Very good, gentlemen. Of course, the
3 Court appreciates any cooperation between counsel in
4 presenting their cases.

5 Anything else from the Plaintiff?

6 MR. BRANDT: Nothing from me.

7 THE COURT: From the Defense?

8 MR. MOSELEY: Your Honor, one Motion *in limine*. My
9 client, Mr. LaFoy, had half of an alcoholic drink at
10 lunch before this accident, and I would, because alcohol
11 by definition can't have anything to do with the wreck,
12 and it does have the potential for prejudicing the Jury,
13 I would request that the Court order that the alcohol
14 not be brought up in the case.

15 THE COURT: Mr. Brandt?

16 MR. BRANDT: Well, they have Dr. Hanke that they're
17 gonna put up by video and I've got Gardner by video. In
18 there she talks about he is claiming a sudden medical
19 emergency which rendered him, incapacitated him from
20 operating the vehicle. But in that she talks about that
21 he has an upset stomach because he I think had a bloody
22 stool, and talked about the stomach problems and she's
23 gonna discuss that.

24 She talks about things that you eat that can upset
25 your stomach. And he, the anticipated testimony from

1 Mr. LaFoy is as he was going down the road he all of a
2 sudden had an urge to go to the bathroom. Well,
3 alcohol, liquid beverages, whatever he's taken would
4 affect the stomach. He can testify he only had a half
5 of a, I think he says maybe a half of a whiskey sour at
6 lunch maybe an hour or so before, but that would be
7 relevant as to a possibility of this sudden urge rather
8 than some other cause.

9 THE COURT: Mr. Moseley?

10 MR. MOSELEY: Your Honor, I think injecting alcohol
11 into this, there's no testimony the alcohol has anything
12 to do with the accident.

13 THE COURT: Well, there's nothing in the
14 specifications alleging alcohol, but he does allege
15 control. Of course, you also allege sudden emergency.
16 I'm going to -- and obviously I'm going to deny your
17 Motion *in limine* at this point. But as we all know,
18 Motions *in limine* are required they be renewed at the
19 appropriate time. And what I intend to do then, of
20 course, is make the final decision as to what testimony
21 tends to be limited, if at all, at the time the motion
22 is made. And I would, and I'm sure both of you
23 understand if you think that you're going there, or you
24 have something that might be involved in it, I think you
25 said you have depositions which obviously were already

1 memorialized so that you know what's coming, if you
2 would be kind enough to let the Court know and I'll try
3 to give you a ruling at that time based on the record.

4 MR. MOSELEY: I don't think there's anything in the
5 depositions that --

6 MR. BRANDT: All he said was he had a half of a
7 whiskey sour, said he had a whiskey sour for lunch, but
8 he didn't drink it, it wasn't that good, and he didn't
9 drink but about half of it. But he had lunch with
10 friends, and then he left and was coming up the road
11 when this accident occurred when he had this sudden urge
12 to go to the bathroom and that kind of stuff. I'm
13 certainly not arguing intoxication.

14 THE COURT: As I say, your Motion has to be renewed
15 regardless even if I granted it.

16 MR. BRANDT: I'm certainly not arguing
17 intoxication.

18 THE COURT: Very well. As I say, we'll rule on it
19 at the time.

20 MR. BRANDT: Yes, sir.

21 THE COURT: -- at the time when any mention is to
22 be made of alcohol.

23 All right. Anything else from the Defendant?

24 MR. MOSELEY: No, Your Honor.

25 THE COURT: Very good. Ask the Jury to join us.

1 (The Jury entered the courtroom at approximately
2 10:29 a.m.)

3 THE COURT: Let the record reflect the Jury and
4 alternate are in the Jury box.

5 (Whereupon, the Jury was sworn by the Deputy Clerk
6 of Court.)

7 THE COURT: Madam Forelady, ladies and gentlemen of
8 the Jury, before the case begins I would like to tell
9 you a little bit about how we will proceed.

10 While the status of Foreperson is the same as any
11 other juror, a Foreperson does act as the spokesperson
12 for the trial Jury. It is the responsibility of the
13 foreperson to reside over the trial jury's deliberations
14 when you retire to reach a decision on the issues of the
15 case. As the Jury deliberates its verdict, the
16 Foreperson has the responsibility to see that each juror
17 has a full and fair opportunity to express his or her
18 opinions and views on all aspects of the case.

19 Now, from time to time it will be necessary to send
20 you out to take care of certain legal matters. When you
21 return to the courtroom, Madam Forelady, please make
22 sure that all members of the Jury are ready to come back
23 together. The reason for that is very simple. From
24 this point forward you need to make your determination
25 based solely on the testimony from this witness stand

1 and exhibits and other evidence introduced in this
2 courtroom. It is absolutely essential that all members
3 of the Jury have the same opportunity to hear and see
4 the same testimony and evidence at the same time. So,
5 if somebody is not quite ready to come back, just wait
6 until everyone is ready to come back at the same time.

7 Now, as far as the trial is concerned the first
8 thing that will happen is that the attorney for the
9 Plaintiffs, the Plaintiffs being the individuals who
10 brought the actions, the Plaintiffs' attorney will make
11 an opening statement followed by a similar statement by
12 the Defendant's attorneys. Now, these opening
13 statements are not arguments. The arguments will come
14 at the conclusion of the case. The purpose of the
15 opening statements is for each party to state the facts
16 they intend to prove the theory of their case.

17 Following the opening statements, each side will
18 present its evidence, with the Plaintiff once again,
19 going first. The evidence may take many forms; it may
20 be testimony, stipulations, documents, models,
21 photographs, and the like. You should pay close
22 attention to all the evidence which is presented by each
23 party because you, the Jury, are the sole finders of the
24 facts in this case and no one else will be permitted to
25 weigh the evidence and render a verdict based upon it

1 except you.

2 After all the evidence has been presented, the
3 attorneys will make closing arguments. Unlike opening
4 statements, these final remarks will be true arguments.
5 That is, each side will emphasize certain portions of
6 the evidence and try to persuade you to agree with their
7 version of the facts.

8 After the arguments are finished, I will explain to
9 you the law which applies to the case. You will then
10 retire to the Jury room to consider the facts and the
11 law, and once you have done so, you will return a
12 verdict in favor of one side or the other.

13 There are a few other additional matters I need to
14 make points of before we begin. First, as I mentioned
15 earlier, although I am the only person who can tell you
16 what the law is, you and you alone are the only ones who
17 can determine the facts. I do not have a right to
18 indicate how I may feel about the evidence presented,
19 and throughout this trial my intention will be to be act
20 impartially towards each party.

21 Now, second, from time to time an attorney may
22 object to some bit of testimony or evidence which the
23 other side is seeking to introduce or present. As in
24 sports or business or any other structured activity,
25 there are certain rules that both sides must obey in

1 presenting evidence. These rules have a definite
2 purpose. They ensure that the information you receive
3 is the most trustworthy and reliable evidence available.
4 An objection is a procedure we use for an attorney to
5 call a possible violation of the Rules to the Court's
6 attention, and for this reason you should not hold an
7 attorney's objection against his client nor conclude
8 from my ruling on the objection that I favor one side or
9 the other.

10 Finally, I would ask that you pay the closest
11 attention possible to the evidence presented to you.
12 And I will ask that you do not take notes, for if the
13 note-taker makes an error, those notes can be more
14 detrimental than helpful during the deliberations. The
15 time-tested system is for each of you to listen
16 carefully, and I am confident that you will do that.

17 Now, the reason I would suggest that you do not
18 take notes, it's been my experience that when we take
19 notes we have a tendency to concentrate on the note to
20 be sure we accurately put down or note what we think we
21 hear, or sometimes we look as far as semantics or
22 grammar or spelling or something like that. All of that
23 distracts you from what you are trying to do at the
24 time, which is watch and see as the witnesses testify,
25 and also to consider the evidence produced. As I said,

1 also, if you make an error in those notes, those notes
2 can be more detrimental than helpful.

3 I use an example, if you miss a word, one single
4 word, it changes entirely the meaning of the note. I
5 use the word "not". In other words, you are writing
6 down what you think you hear and you missed the word
7 "not", it changes the note altogether. And then when
8 you have it back in the Jury room, you say, Well, I have
9 it written down here. We have a tendency to put more
10 emphasis on something that is recorded rather than what
11 our recollections might be. My suggestion is, of
12 course, that you use the collective recollection if
13 there is some question about what the testimony was, is
14 that you use your collective memory as to what the
15 testimony was and by that way resolve what the actual
16 question might have been.

17 Now, having said all that, I do take notes. Please
18 understand, it's not do as I say and not as I do. We
19 have entirely different purposes in this courtroom. As
20 I said earlier, you are the only ones that can decide
21 the facts in this case. I have no authority, in fact
22 I'm prohibited from even considering the actual
23 testimony and evidence other than what is done. So you
24 are the ones that weigh and evaluate the testimony and
25 evidence. I'm only concerned about what occurs. So I'm

1 just jotting down what happens, not the significance of
2 it. That is for you and you alone.

3 All right. With that I'll recognize Mr. Brandt for
4 his opening statement.

5 MR. BRANDT: Thank you, Your Honor.

6 Opening Statement on behalf of the Plaintiffs:

7 MR. BRANDT: Ladies and gentlemen, again, my name
8 is Larry Brandt. I'm from Walhalla, I practice here,
9 and I've been here a long time.

10 But this is my client you met earlier, Mr. Ernest
11 Cobb and his wife, Nancy. Now, this case is an
12 automobile accident case. It happened up here on Main
13 Street, the upper end of town. But it happened back on
14 July 5th, 2007.

15 You're gonna hear the evidence today of how the
16 accident occurred. And the real matter is not gonna be
17 how the accident happened, everybody is pretty clear the
18 facts bear that out. Why did the accident occur? And
19 that's what you will be ultimately called to determine.
20 And then you will be ultimately called to determine the
21 damage that Mr. and Mrs. Cobb suffered as a result of
22 the accident.

23 Well, the damages in this case are great. You will
24 hear figures in excess of a quarter of a million dollars
25 because he suffered injuries to his body, a closed-head

1 injury which is affecting him and will affect him for
2 the rest of his life.

3 As the Judge told you, all of us have a role in
4 this courtroom. The Judge has his role and I have my
5 role, and Mr. Moseley has his role to protect his client
6 and present his facts and argue them in the light most
7 favorable to him. But the most awesome is your role
8 because it is an awesome responsibility and duty.

9 When we finish, you will be called on to make a
10 decision that you know is going to affect the lives of
11 the people in this courtroom. It will affect Mr. LaFoy,
12 and it will affect my clients, the Cobbs.

13 Now, it has been said, you know, and I agree with
14 it a hundred percent, that the most solemn duty that any
15 citizen can render to his or her country in peacetime --
16 we're not really at peace right now -- but is Jury
17 service, because we have invaded your lives and invited
18 you here on a day today that I'll bet all of us would
19 have voted, Hey, I'd like to sleep in. Nice day for it.
20 But we can't because we have a duty and responsibilities
21 and you all have to assume one that is probably strange
22 to you. I'm not sure if any of you have ever served
23 Jury duty before, but you are getting a taste of it now.
24 And you are participating in democracy, you're
25 participating our way of life and our freedoms and it's

1 because of people like you that we have the country that
2 we have. Juries. I believe in them. I believe in you.

3 I'll tell you a little bit about how this accident
4 happened to sort of orient you. On July 5th, 2007
5 Mr. LaFoy had been to lunch with friends in Seneca and
6 done a little shopping. Now, he's from Highlands, North
7 Carolina --

8 Cashiers?

9 MR. MOSELEY: Sapphire.

10 MR. BRANDT: Sapphire. Anyway, North Carolina.
11 And he came down here to do a little shopping and to
12 visit some friends, had lunch, and was on his way home
13 and was coming back through Walhalla to the, down Main
14 Street and as he went down Main Street -- put up number
15 1.

16 As you see, this is a view looking toward the
17 mountains and the way that he was traveling.

18 (Discussion off the record.)

19 MR. BRANDT: And as he travels that way, and
20 anybody who is familiar with it -- if you could give me
21 number 3 -- this is what is known as Head's Superette.
22 It's been there for a long time and there's the Pure
23 sign down there. And Mr. LaFoy is approaching in this
24 direction, you will hear testimony that he has this
25 urge, sudden urge to go to the bathroom.

1 Well, at that time -- if you would put up -- and as
2 he approaches Head's Superette, Mr. Cobb is there
3 fueling his vehicle.

4 If you could put up number 6.

5 And there's the tanks. And as you look, Head's
6 Superette is to your left and the tanks are to the
7 right. And his vehicle, truck, is at this pump. And he
8 gets out to start to pump gas.

9 And Mr. LaFoy comes out of the highway -- he was
10 driving -- comes all the way across and strikes
11 Mr. Cobb's vehicle here. He's standing on the other
12 side. It hits the vehicle, knocking Mr. Cobb's vehicle
13 into him and knocking him some distance on the other
14 side of that pump, and he went between here and landed
15 out some distance on the concrete. Striking his head,
16 the man hit the pole but he had damages, and you're
17 gonna hear that, a broken arm and you will see pictures
18 of Mr. Cobb as they took him in to the hospital
19 afterwards, and you will hear Dr. Gardner talk about his
20 injuries and damages. And certainly he was rendered
21 unconscious.

22 So that's sort of an overview of where when and how
23 it happened. When I say how it happened, he's coming
24 down, as I said, Mr. LaFoy is coming down the road, and
25 all of a sudden his vehicle goes over and strikes the

1 vehicle that Mr. Cobb, it's his personal vehicle, truck.
2 He didn't strike Mr. Cobb directly. He's standing next
3 to his vehicle, and the vehicle was struck so hard it
4 knocks his vehicle into Mr. Cobb and he goes flying
5 through the air.

6 Mrs. Cobb is sitting in the vehicle, and she sees
7 her husband, goes out there and he's lying in pools of
8 blood. The EMTs are called they go to the hospital and
9 we proceed from there.

10 Now, as we told you, I think when we selected you,
11 they called out a list of witnesses. We would
12 anticipate at this time you would hear from Mr. Cobb.
13 And then Nancy Cobb, of course. Dr. Stephen Gardner,
14 the neurosurgeon in Greenville who has been treating and
15 following Mr. Cobb for his closed-head injury.

16 You will hear from Dr. G. Richard Thompson, who is
17 a Ph.D. from Clemson, who will talk about future medical
18 business or future lost income, and our Rules say that
19 you have to put him out and bring them back to present
20 value and he does that. Computation, he will explain
21 that to you as he testifies this afternoon.

22 And other witnesses could be called. Mr. Josh
23 Sample from the Walhalla Police Department who was at
24 the scene, and I'm sure Mr. LaFoy will testify and you
25 will hear testimony of Dr. Hanke that is anticipated

1 that the Defense would call.

2 Now, the depositions are -- the testimony of
3 Dr. Gardner and Dr. Hanke will be presented to you by
4 video. It's kind of expensive to get these doctors to
5 take the day off to come to court to testify so we try
6 to cut corners and save costs. And so we go down there
7 and it's the same as if he were here in the courtroom
8 testifying. So when you see those video depositions,
9 you will see their faces, you will see them testify, and
10 you will have their testimony that you will listen to
11 and hear. There may be a deposition of another doctor
12 the Defense may call that is read into the record,
13 although there is no video. Those testimonies will be
14 the same as if the witness is present and testifying in
15 person.

16 As the Judge told you, you are to make your
17 decision at the end of the day based on what you hear
18 from that witness stand and the documents that's entered
19 into evidence. That's what you are to consider.

20 The Judge will tell you what the law is and the
21 relevant law that may be considered by you, and then you
22 are to apply the law to the facts and render your
23 verdict. I thank you for your attention and I thank you
24 for taking time out of your day to spend time with us
25 and helping make this system work. I look forward to

1 ,working with each and every one of you.

2 I anticipate this case will go into tomorrow, we
3 won't finish today. So again, I thank you. I somewhat
4 apologize for interrupting your lives, but not really,
5 because we need you and you help make the system work
6 and we appreciate it. Thank you very much.

7 THE COURT: Mr. Moseley?

8 Opening Statement on behalf of Defendant:

9 MR. MOSELEY: Ladies and gentlemen of the Jury,
10 this is Dan LaFoy. Dan LaFoy is 85 years old, he'll be
11 86 next month. World War II veteran, Anderson native,
12 husband, father, employee. That's Dan LaFoy. He would
13 rather me call him Dan, but I don't feel right. I'll
14 call him Mr. LaFoy. But it is a pleasure for me to
15 represent him. My name is Rob Moseley. I'm a lawyer
16 from Greenville. I live in Traveler's Rest, South
17 Carolina.

18 You're gonna hear a lot today, a lot of evidence
19 coming from the box, coming from the videos, about
20 things that you probably have never spent a lot of time
21 thinking about. But you're gonna hear about how this
22 accident happened. And one of the things that has to
23 happen is that in order for you to return a verdict, the
24 Plaintiffs, the Cobbs, have to show that Mr. LaFoy did
25 something wrong, and so the evidence that you hear today

1 will be towards trying to come up with something that
2 Mr. LaFoy did wrong. And so as you listen to the
3 evidence, try to see if you can find something that
4 Mr. LaFoy did wrong.

5 You are also gonna hear a little bit about the
6 medical side of the testimony. You're gonna hear about
7 the fact that Mr. LaFoy lost control, blacked out as he
8 was trying to pull into the gas station. You will hear
9 that he not only lost control of the vehicle, he lost
10 control of his bowels. Now, that's not something we
11 like to talk about and nobody likes to think about that.
12 But that's what happened and you will hear the testimony
13 from the doctors that that's a sign that he had lost
14 control and that so he had passed out prior to the
15 accident. So you will listen to the evidence and you
16 will be able to judge whether he did or did not pass out
17 prior to the accident.

18 Now we're gonna talk a little bit about damages,
19 and obviously our position is that Dan LaFoy did nothing
20 wrong. But you're gonna hear testimony about damages so
21 I need to address that. You're gonna hear Mr. Cobb was
22 injured. Absolutely he was injured. He had a broken
23 arm, and had a knock on the head.

24 But the main thing you're gonna hear about is he
25 claims complete total disability. And you're gonna hear

1 the evidence. You're gonna hear from Mr. Cobb. And you
2 will get to decide whether you think Mr. Cobb will never
3 return to work again. You're gonna hear some things
4 that Mr. Cobb may blame on the accident that he had
5 before. You're gonna hear -- and you may hear, and a
6 witness that you see on the witness stand, you may be
7 convinced that there's no way he can't return to work,
8 he can certainly return to work.

9 So, as you listen to the evidence, process that.
10 You are not told to leave your common sense at the door.
11 So process that, and at the end of the day or at the end
12 of the trial, the Judge will tell you what the law is
13 and you will apply what you see to the law of the case.

14 And so, like Mr. Brandt, I'll thank you for being
15 here and I look forward to working with you.

16 THE COURT: You may call your first witness.

17 MR. BRANDT: I would call Mr. Cobb to the stand,
18 please.

19 Whereupon,

20 Ernest L. Cobb

21 after first having been duly sworn, testified as
22 follows:

23 Direct Examination by Mr. Brandt:

24 Q. Mr. Cobb, can you hear me okay?

25 A. Yes.

1 Q. Speak into the microphone because it's imperative
2 that the Jurors hear you and the Judge hears you and the
3 Court Reporter hears you to make sure we understand your
4 testimony and get everything correctly on the record.
5 'Okay?

6 A. Yes, sir.

7 Q. State your name in full.

8 A. Ernest Lynn Cobb.

9 Q. How old are you?

10 A. 55. I'll be 56 this month.

11 Q. And when is your birthday?

12 A. [REDACTED]

13 Q. And what year were you born?

14 A. '56.

15 Q. And where do you presently reside?

16 A. [REDACTED]

17 Q. And how long have you lived at that address?

18 A. We've probably been out there about 20 years now.

19 Q. Have you lived anywhere other than Oconee County
20 during your life?

21 A. No.

22 Q. And you are married?

23 A. Yes.

24 Q. Your wife's name?

25 A. Nancy.

1 Q. And this is the lady seated here?

2 A. Yes, it is.

3 Q. How long have you been married to Ms. Cobb?

4 A. About 36 years.

5 Q. And do you have any children?

6 A. Yes. I have one stepson and we have one that's
7 deceased.

8 Q. And how old was that son when he died?

9 A. He was three and a half.

10 Q. And do you have any children, natural children of
11 your own now living?

12 A. No.

13 Q. How far in school did you go?

14 A. I finished Westminster High School in '74 and in
15 the eighties I went on to Tri-County Tech and took
16 automotive technology.

17 Q. And what kind of jobs have you had during your
18 life?

19 A. Well, I had some machinist jobs and some auto
20 repair jobs.

21 Q. And at the time of this accident, who was your
22 employer?

23 A. The School District of Oconee County.

24 Q. What did you do for the School District of Oconee
25 County?

1 A. I drove a school bus.

2 Q. And did you do any other kind of jobs with Oconee
3 County other than school bus?

4 A. Yes. During the summer months I drove a dump
5 truck.

6 Q. All for the Oconee County School District?

7 A. Yes.

8 Q. And, Mr. Cobb, tell us the date, July the 5th,
9 2007, tell us about what occurred to you up at Head's
10 Superette.

11 A. I don't understand.

12 Q. Okay. Tell us how the accident happened. What you
13 were doing at the time you were struck?

14 A. I had got out of the truck.

15 Q. Why did you pull in to Head's Superette?

16 A. Well, I was working at the new -- let me think --
17 it was at that new school there they were building over
18 there on Westminster Highway, and I was, they had me
19 over there working, and I had to do lockup, I had to go
20 check all the doors and windows and lock up, and they
21 had told me that I needed to go back over there before
22 6:00 the next morning to open up for the construction
23 workers to get in.

24 And I came home, and me and wife had supper, and I
25 told her that I needed to stop to get gas so I could be

1 back over there and I didn't have time to get gas the
2 next morning and be over there the next morning. And we
3 ate supper and asked if she wanted to ride up to the
4 store with me to get the gas. And we loaded up -- okay.

5 Q. Do you recall approximately what time of day it
6 was?

7 A. It was, it was probably after 5:00.

8 Q. And, as you got up there, and you pulled in to
9 Head's there at the pump -- would you put up exhibit
10 number ---

11 A. Well, see, I don't remember any of that now.

12 Q. I understand that.

13 A. Okay.

14 Q. -- if you would put up the exhibits showing the two
15 tanks, I believe it's Exhibit Number 6.

16 If you all would dim the lights just a little bit.

17 Mr. Cobb, do you remember pulling up to the pump?

18 A. No, I do not.

19 Q. That day you talk about going to Head's, what is
20 the last memory you had that day?

21 A. Pulling out of my driveway at home.

22 Q. Do you remember traveling to Head's?

23 A. No, I do not.

24 Q. Do you remember getting struck or hit at all?

25 A. No, I do not.

1 Q. What is the first memory you have after you pulled
2 out of your driveway that day?

3 A. Okay. Okay. What are you asking me now?

4 Q. What's the first thing you remember? You stated
5 that you remember leaving your home that day.

6 A. Okay.

7 Q. What's the next thing that you can recall happened
8 to you that day?

9 A. Waking up in Greenville three days later.

10 Q. Three days later in Greenville?

11 A. That's all I can remember. They told me it was
12 three days later.

13 Q. Now, do you remember being at Oconee Hospital?

14 A. No, I do not.

15 Q. Do you remember the transport to Greenville?

16 A. No, I do not.

17 Q. How long were you in Greenville Hospital?

18 A. About two weeks, I think.

19 Q. And after that, tell us what you understand your
20 injuries were resulting from this accident.

21 A. Um, well, it broke my arm and I had a severe
22 closed-head injury.

23 Q. What was the, which arm did it break?

24 A. My left arm.

25 Q. Your left arm?

1 A. Yes, sir.

2 Q. Did you have to have any kind of surgery or
3 anything for that arm?

4 A. Yes. They had to go in and put it back together,
5 put a plate in there.

6 Q. Okay. I would show you Plaintiff's Exhibit Number
7 12 that's in evidence. And is that a picture showing
8 the surgical scar on your arm after they fixed it?

9 A. Yes, it is.

10 MR. BRANDT: Would you put up 12.

11 By Mr. Brandt:

12 Q. What other injuries did you have?

13 A. The brain injury. Well, okay. All right.

14 Q. Just take your time. Don't get excited.

15 A. All right. Well, it fractured my skull at six
16 different places.

17 Q. I show you Exhibit Number 11.

18 Would you put up 11, please.

19 A. Broke my number 4 vertebra in my neck, broke my eye
20 socket, ruptured my eardrums, internal ear damage;
21 knocked my jaws loose, too, knocked my bottom jaw loose.

22 Q. I would show you exhibit 11 and ask you -- is that
23 you in the picture?

24 A. That's me in Greenville, yes.

25 Q. And do you know who took the picture?

- 1 A. No, I do not.
- 2 Q. But that is you?
- 3 A. That's me.
- 4 Q. And that shows the abrasions, cuts, bruises to your
- 5 head and face?
- 6 A. Yes.
- 7 Q. Were there any other lacerations to your head
- 8 that's not shown on this photograph?
- 9 A. Not that I know of.
- 10 Q. Who were your doctors over there? Do you recall
- 11 any of them?
- 12 A. Dr. Gardner.
- 13 Q. Was he the neurosurgeon who treated you over in
- 14 Greenville while you were there --
- 15 A. Yes.
- 16 Q. -- afterwards?
- 17 Are you still under his care?
- 18 A. Yes, I am.
- 19 Q. For what reason are you still under his care?
- 20 A. He's...
- 21 Q. What is he treating you for?
- 22 A. The closed-head injury, or the brain damage.
- 23 Q. Were you able to go back to work after you were
- 24 released from the hospital?
- 25 A. I went back for a brief period. Well, no. It

- 1 was... No, I was out of work for several months.
- 2 Q. Could not work at all?
- 3 A. Could not work at all for several months.
- 4 Q. Do you recall when you went back to work with the
- 5 School District?
- 6 A. I don't recall the exact date, no.
- 7 Q. And during that period of time did you lose income
- 8 from your employment?
- 9 A. Yes.
- 10 Q. When you went back to work, did you return to your
- 11 regular job?
- 12 A. Yeah. My bus route.
- 13 Q. How did you fare in running your bus route when you
- 14 went back?
- 15 A. Not very well.
- 16 Q. Tell us what problems you had.
- 17 A. Memory problems. Sometimes I have problems
- 18 processing thought and understanding.
- 19 Q. Just take your time.
- 20 A. I can't think right now exactly. Just remembering
- 21 stuff.
- 22 Q. What kind of problems do you have or what kind of
- 23 things do you have trouble remembering?
- 24 A. Everyday things.
- 25 Q. Like what?

1 A. Short-term stuff. Anything that's short-term.

2 Q. How about people that you know?

3 A. Oh, yes. Very, very much. People that I work with
4 and I don't know who they are.

5 Q. When you went back to work, how long were you able
6 to continue working with the School District?

7 A. Well, I worked for as long as I could because I was
8 trying to -- okay. Say that again, now?

9 Q. How long did you work -- you stated you returned to
10 work.

11 A. Okay.

12 Q. And you returned to work a few months after the
13 accident, correct?

14 A. Uh-huh.

15 Q. And you worked up until when? When's the last day
16 you worked for the School District?

17 A. Probably about six months ago.

18 Q. Was that approximately in May of last year?

19 A. Somewhat, yeah.

20 Q. Are you able to drive the school bus now?

21 A. Well, I don't understand what you are asking me
22 , now. Okay.

23 Q. Can you work now?

24 A. No.

25 Q. Why?

1 A. I can't remember what I -- I got to where I was
2 having -- see, my route was changing. And as long as I
3 was driving my old route, I was doing okay. But it got
4 to where as time went on I was having difficulties
5 remembering where the children went and instructions.
6 They would give me written instructions. Sometimes I
7 would have to bring them home and get my wife to read
8 them and we would go over, I would have to do them
9 several times before I could understand what the
10 instructions was telling me because of my interpretation
11 problem.

12 Q. What other problems are you having as a result of
13 this head injury?

14 A. Just processing thought.

15 Q. Do you have any problems on the emotional side of
16 things?

17 A. Oh, yes, sir, I've been depressed.

18 Q. Are you taking any kind of medication?

19 A. I take some stuff for my headaches and to help me
20 rest.

21 Q. What do you take?

22 A. I don't know what the name of it is.

23 Q. How about for any kind of depression?

24 A. Not at this time.

25 Q. Have you had problems with depression prior to this

1 accident?

2 A. Not that I can recall.

3 Q. What other doctors have treated you in the last
4 several years? Do you recall their names?

5 A. Well, there was a Dr. Sally (phonetic) that I did
6 that physical therapy with on my ears from the accident
7 where I... Okay. Say that question again?

8 Q. Okay. Any other doctors that have treated you in
9 the last few years as a result of these injuries?

10 A. Dr. Sally for my ears. I had the equilibrium
11 problem. That's what it was.

12 Q. How about hearing?

13 A. Yes, I'm pretty much deaf.

14 Q. Did you have hearing problems prior to the
15 accident?

16 A. Somewhat.

17 Q. In relation to the hearing problem you had prior to
18 the day you were injured and now, compare those two and
19 tell us whether it's worse, better, same?

20 A. Far, far worse. They done a hearing test and they
21 had a percentage on it, but I don't remember what the
22 percentage of the test before and after this accident.

23 Q. Did you wear a hearing aid before this accident?

24 A. No.

25 Q. Do you wear one now?

- 1 A. No.
- 2 Q. Had anyone advised you surgery or anything to
3 correct the hearing loss?
- 4 A. No. They said I could use some tuneable hearing
5 aids, but they're about \$3,000 apiece.
- 6 Q. And have you purchased those hearing aids?
- 7 A. No.
- 8 Q. Would you like to have them?
- 9 A. It would be nice.
- 10 Q. And have you worked at all since May of 2011 with
11 the School District?
- 12 A. No.
- 13 Q. Have you done any kind of employment for anyone
14 since May of 2011?
- 15 A. No. Okay. Say that again, now?
- 16 Q. Have you worked for anyone?
- 17 A. Anyone?
- 18 Q. Had any jobs?
- 19 A. No, huh-uh.
- 20 Q. Since that time, since May of 2011, since you quit
21 with the School District?
- 22 A. No.
- 23 Q. Do you think that you can work at something?
- 24 A. No, huh-uh.
- 25 Q. Why not?

1 A. 'Cause it's pretty much documented the problems
2 that I have, and I don't know anybody that would want to
3 take on the responsibilities of hiring me.

4 Q. And has Dr. Gardner been treating you for those
5 problems?

6 A. Yes.

7 Q. Mr. Cobb, did you have any problems with memory
8 prior to the accident?

9 A. No, sir.

10 Q. Did you have any problems with processing thought?

11 A. No. Sharp as they come.

12 Q. Did you have any kind of hobbies prior to this
13 accident?

14 A. Yes.

15 Q. Things you enjoyed doing?

16 A. Yes. We'd done several things over the years.

17 Q. What things did you all do?

18 A. We used to do horseback riding, we did that. And,
19 well, we done several things over the years that we
20 enjoyed doing.

21 Q. Did you have a business at your home that you kind
22 of played with?

23 A. Yes, I did.

24 Q. And what kind of business was that?

25 A. It was an auto repair business.

1 Q. And are you able to do that now?

2 A. No, sir, I'm not.

3 Q. What kind of difficulties did you experience that
4 caused you to quit doing that?

5 A. Well, originally it was my hand that was giving me
6 so much trouble.

7 Q. The one that was broken?

8 A. Broken hand. Yes, I'm left-handed.

9 Q. What was your understanding what they did to your
10 wrist when they went in there?

11 A. They had to fix it and put it back together put a
12 plate in it to hold it.

13 Q. Do you still have a plate?

14 A. Yes, I do. I've had ongoing problems with it, and
15 they said I needed two to three more surgeries, maybe
16 even take the plate out, but he said that the scar
17 tissue is so bad that if they operated on it again, it
18 would probably be worse than what it is now, so I'm just
19 kind of stuck with that.

20 Q. You haven't had that done?

21 A. No.

22 Q. Okay. And does your wrist hurt you today?

23 A. Yes, it does.

24 Q. Tell us about the pain, how it bothers you.

25 A. I'd describe it as a toothache.

1 Q. On a scale of zero to ten with zero being no pain
2 and ten being the worst you could imagine, how would you
3 put the pain on that scale?

4 A. Probably about a four or five. If I start using
5 it, it gets worse, and then it stays sore for days after
6 that.

7 Q. Does that injury to that wrist limit your ability
8 to use that hand at all? Can you use it like you did
9 before?

10 A. Not like I did before, no.

11 Q. What kind of problems are you having with your
12 hands?

13 A. Strength problems.

14 Q. You told us you'd had a closed-head, and the
15 memory, those kind of things, depression, your eye.

16 Tell us about your eye. What happened to that eye?

17 A. It just broke the eye socket out is what it did,
18 but it healed up pretty nicely.

19 Q. Are you having any problems with your eyes?

20 A. Not with the seeing part, no.

21 Q. That healed pretty well?

22 A. Yes.

23 Q. So any other problems you have? You've got your
24 wrist, you got your head, you got your hearing.

25 Anything else that you are having difficulty with at the

1 present time?

2 A. Well, sometimes the depression bothers me when I
3 get to sitting around thinking about stuff, about how I
4 used to do, being the typical southern male going out
5 and bringing home the money and stuff like that. That's
6 very detrimental to me.

7 Q. Tell us the things that you and your wife used to
8 do to enjoy life together that you can't do now because
9 of these injuries?

10 A. Well, we can still do those things, just not to the
11 magnitude that we did. You know, we don't have the
12 money that I had when I was working. That's been pretty
13 rough.

14 Q. And your truck that was up there by the tanks, was
15 it, what was the extent of damage to your vehicle in
16 this accident?

17 A. It was \$9,800 worth.

18 Q. Took to repair it?

19 A. Uh-huh.

20 Q. I want to show you another photograph of the
21 accident scene. There's one there that's Plaintiff's
22 Exhibit 4. There's a vehicle parked here. That's not
23 your truck, though, is it?

24 A. No.

25 Q. And was that somewhat similar to where your truck

1 was on the date of the accident?

2 A. Thereabout.

3 Q. You think that's where it was?

4 A. That's what everybody told me now. Personally I
5 don't remember any of it. But that's where I normally
6 stop to pump gas even today.

7 Q. When did you go up there -- how soon after your
8 accident did you ever return to Head's Superette? Do
9 you recall?

10 A. Oh, it was months. I don't recall the day exactly.

11 Q. I want to show you exhibit 13. Can you tell the
12 Court what that is?

13 A. That's the medical...

14 Q. Charges?

15 A. Medical charges, yes.

16 Q. And this is what you've had to date for your health
17 care?

18 A. To the best of my knowledge, yes.

19 Q. As a result of this accident?

20 A. Yes.

21 MR. BRANDT: If you could put that up, please.

22 By Mr. Brandt:

23 Q. Now, are you under the care of any other doctors at
24 the present time other than Dr. Gardner for the injuries
25 that you have received, constant care where you go back

1 on a regular basis?

2 A. No. No. I still go to Dr. Sally every so often.

3 Q. How often do you go to see him?

4 A. Probably about once or twice a year.

5 Q. And he's the one that did what?

6 A. The equilibrium problems.

7 Q. The ear?

8 A. Yeah, the inner ear problems. I had to go to that

9 Rogers -- let's see, hang on a minute -- I had to go to
10 the hospital and they did physical therapy on my ears.

11 Q. Did they do any physical therapy on your wrist?

12 A. No. They wasn't concerned about that. They was
13 more concerned about the head injury.

14 Q. There is a Southeastern Neurosurgical and Spine.

15 That's Gardner, correct? This is Dr. Gardner right
16 here? This is what Dr. Gardner is charging you so far?

17 A. Yes.

18 Q. Okay.

19 A. That's what he says.

20 Q. And have you had any kind of neuropsychological
21 testing done?

22 A. Yes, I did. I went to the Roger C. Peace Institute
23 and they did an all-day testing.

24 Q. Were you there all day?

25 A. All day long.

1 Q. And that was -- was that ordered by Dr. Gardner?

2 A. Yes. Him and -- let me see -- well, there was a
3 mix-up of some sort and they sent us to another doctor,
4 but they made some kind of mistake or something, but he
5 recommended me too, but I can't remember what his name
6 was.

7 Q. I would show you -- put up number 10 -- this is
8 picture number 10. Do you know who that is?

9 A. That's me.

10 Q. And do you know when it was done?

11 A. No, I do not.

12 Q. And do you know where it was taken?

13 A. They told me either going into the ambulance or
14 coming out of the ambulance or something like that.

15 Q. On the day of the accident?

16 A. On the day of the accident. That's what I've been
17 told.

18 Q. Mr. Cobb, has this caused, this accident and the
19 injuries that you received, has this affected your
20 marriage with your wife, your relationship in any way?

21 A. It probably has. But she's been good to me,
22 though.

23 Q. Who has been your primary care attendant since this
24 accident?

25 A. My wife.

1 Q. And who takes care of the money matters and
2 business records and things in your family?

3 A. She pretty much does it.

4 Q. Did she do it prior?

5 A. Well, I usually done all the monthly bills and
6 stuff like that, but sometimes I do stuff now I have to
7 make a lot of notes and I have to make sure I write down
8 on paper what I've done to really keep up with it. I
9 , can't keep up with it memory-wise, I just have to make
10 sure I document all of it, and we have to put everything
11 to where I can find it.

12 Q. And has that changed, the way you all handle your
13 business affairs, has that changed from the time of the
14 accident to now?

15 A. Yes.

16 Q. In what way?

17 A. I have to check with her with a lot of stuff and
18 get her to go behind me on my figures and check, stuff
19 like that.

20 Q. Do you have an appointment or a scheduled
21 appointment to see Dr. Gardner again?

22 A. Yes, I do.

23 Q. When do you know, approximately when?

24 A. Sometime this year. She knows -- we got it wrote
25 on the calendar at home.

1 Q. Does she have to keep up with your appointments and
2 medications?

3 A. Yes. Oh, yes, yes, pretty much.

4 Q. Can you keep up with that clearly?

5 A. No. I have to write it down. I can't keep up with
6 it, no. I have to write everything on the calendar. We
7 have a calendar that sits at the house and I have to
8 write everything on it so I can remember stuff. I have
9 to do a lot of notes.

10 Q. Just for the record, did you know Mr. LaFoy prior
11 to this accident?

12 A. No.

13 MR. BRANDT: I don't have anything further,
14 Mr. Moseley.

15 THE COURT: Cross-examine.

16 Cross-Examination by Mr. Moseley:

17 Q. You don't recall anything about the accident,
18 right?

19 A. No.

20 Q. So you never saw Mr. LaFoy and whether he was
21 conscious coming into the parking lot or not?

22 A. If I do, I don't remember it.

23 Q. Okay. Now, you said just a second ago your wife
24 helps you with medical appointments and things like
25 that?

- 1 A. Yeah.
- 2 Q. Is that right?
- 3 A. Yes.
- 4 Q. Okay. She was involved in your medical condition
- 5 before the accident, though, wasn't she?
- 6 A. What do you mean, medical condition?
- 7 Q. Well, she went to your doctors' appointments before
- 8 the accident, right?
- 9 A. Well, I never went to the doctor until after the
- 10 accident.
- 11 Q. You had cancer in 2006, right?
- 12 A. Yes.
- 13 Q. Okay. And you had bladder surgery as a result of
- 14 that cancer?
- 15 A. Yes.
- 16 Q. Okay. And your wife went with you to all those
- 17 appointments, right?
- 18 A. Well, I don't remember it. I can't say for sure if
- 19 she went to all of them. I don't know.
- 20 Q. Okay. You do recall her going to some of your
- 21 doctors' appointments, right?
- 22 A. Well, I remember at the time of surgery, now, I can
- 23 remember that.
- 24 Q. You don't remember her sitting in Dr. Mallick's
- 25 office four or five times?

1 A. Well, I didn't go to Dr. Mallick, I don't think,
2 for cancer surgery.

3 Q. After the cancer, you started having some more
4 problems, right?

5 A. Yes.

6 Q. Okay. Because that's why you went to see
7 Dr. Mallick?

8 A. Yes.

9 Q. Okay. And you went to see Dr. Mallick because you
10 were so weak you could not work?

11 A. No. I don't reckon. I was working.

12 Q. But if Dr. Mallick ---

13 A. You got to do it slow now.

14 Q. All right. You went to see Dr. Mallick because of
15 a blood disorder; is that right?

16 A. Yes.

17 Q. And I don't know how to pronounce it, but --

18 A. I don't either.

19 Q. A problem with your red blood cells?

20 A. Yes.

21 Q. Okay. And he was treating you, and the reason you
22 thought it was a problem is because you were having
23 trouble working because you were so weak?

24 A. Well, I don't remember.

25 Q. Okay.

- 1 A. Okay.
- 2 Q. You don't recall that?
- 3 A. I remember, I remember he was, they was pulling
4 blood off, I remember that. That was before the
5 accident. Yeah, that was before the accident. I
6 remember them pulling blood off, but I was still working
7 every day.
- 8 Q. All right. But you were having trouble working.
9 Do you remember telling Dr. Mallick that you were having
10 severe trouble making it through the day?
- 11 A. I don't remember telling him that, no.
- 12 Q. Okay. And when you had -- you had the cancer
13 surgery in 2006?
- 14 A. I don't remember the date of the year.
- 15 Q. Approximately?
- 16 A. It's documented, whatever the date was.
- 17 Q. Okay. So whatever your records say?
- 18 A. That's what I had done, yes.
- 19 Q. All right. As part of that, you had a resection of
20 your bladder? You had bladder surgery?
- 21 A. Bladder surgery, yes.
- 22 Q. Okay. And then they followed that up with
23 chemotherapy?
- 24 A. One thing of chemo at the time of the accident.
25 Wait a minute. Okay. You got me messed up here. What

1 are you asking again now?

2 Q. You had chemo after your bladder surgery?

3 A. During the bladder surgery.

4 Q. Okay. And all that was before the accident?

5 A. Yes. That was the year before.

6 Q. Okay.

7 A. I never missed any work. I done it during the
8 Christmas break, we was off for two weeks, I did the
9 bladder surgery and returned back to work after the two
10 weeks. They didn't cut me open, they just done like
11 they went through my urethra that way and took the
12 cancer out.

13 Q. Okay. Now, you, in response to your lawyer's
14 question, you did not recall having depression prior to
15 the accident? Do you recall being on medication for
16 depression prior to the accident?

17 A. Dr. Booker gave me some stuff once years before.

18 Q. For depression?

19 A. He said I was depressed, but I was not aware of it.
20 Not to the magnitude it is now. Which I'm doing fine
21 today.

22 Q. Okay. You are doing fine with your depression
23 today?

24 A. Today, yes. There's times that I get depressed,
25 though.

- 1 Q. All right. Do you get irritable?
- 2 A. I get frustrated.
- 3 Q. Okay. Did you ever have problems with getting
- 4 irritable prior to the accident?
- 5 A. Not to the magnitude that I get now.
- 6 Q. So if doctor ---
- 7 A. Everybody gets upset from time to time.
- 8 Q. Would there have been any particular reason why you
- 9 would have been irritable in Dr. Mallick's treatment?
- 10 A. I don't know what you are asking me.
- 11 Q. If his records reflect that you were irritable in
- 12 his office, that would be before the accident, right?
- 13 A. Okay. I don't understand what you're asking me.
- 14 Q. Okay. Dr. Mallick's treatment was before the
- 15 accident?
- 16 A. Well, he still treats me today.
- 17 Q. Okay. For the blood disorder?
- 18 A. Well, it's to my lymph nodes now.
- 19 Q. All right. If you saw Dr. Mallick and he
- 20 documented that you were irritable prior to the
- 21 accident, would you disagree with that?
- 22 A. I don't understand what you are asking me.
- 23 Q. Okay. If Dr. Mallick, prior to the accident,
- 24 documented that you were an irritable patient, would you
- 25 disagree with that?

1 A. Yes. I don't know why he would document that.

2 Q. But your wife was present -- well, you didn't
3 recall.

4 A. When I go see Dr. Mallick, we're all the time
5 talking and laughing about, you know, when I was driving
6 a school bus and stuff like that. I don't think I had
7 no irritable times with him. If I did, I don't remember
8 it.

9 MR. MOSELEY: Beg the Court's indulgence.

10 That's all the questions I have, Your Honor.

11 THE COURT: Re-exam?

12 MR. BRANDT: No Redirect, Your Honor.

13 THE COURT: All right. You may step down, thank
14 you, sir.

15 (Whereupon, the Witness, Ernest L. Cobb, left the
16 witness stand.)

17 THE COURT: Madam Forelady, I'm gonna suggest we
18 take a very short break at this time. When you are
19 ready to come back, just knock on the door and we'll
20 come back. But we've been here about a little more than
21 an hour. If there are any refreshments, go ahead and do
22 that. When you are ready to come back, as I say, just
23 knock on the door and we'll return. Again, as has been
24 my instructions throughout and will be my instructions
25 throughout the trial, do not undertake discussion of

1 ' this case among yourselves in any way. Very good.

2 Thank you.

3 Everyone else remain seated while the Jury retires
4 from the courtroom.

5 (Whereupon, the Jury left the courtroom at
6 approximately 11:22 a.m.)

7 THE COURT: Anything from the Plaintiff before we
8 take a break?

9 MR. BRANDT: No.

10 THE COURT: From the Defendant?

11 MR. MOSELEY: No, Your Honor.

12 THE COURT: All right. Very good.

13 (A recess was taken.)

14 THE COURT: All right. Anything from the Plaintiff
15 before I bring the Jury back?

16 MR. BRANDT: No, Your Honor.

17 THE COURT: From the Defense?

18 MR. MOSELEY: No, Your Honor.

19 THE COURT: It is my understanding you're going to
20 have a video deposition?

21 MR. BRANDT: Yes. It's Dr. Gardner's deposition.

22 I hand you the video, if you can hand it up to the
23 Judge, as well as the hard copy that's sealed.

24 (Discussion off the record.)

25 MR. BRANDT: I think the Rule says you have to open

1 it.

2 THE COURT: The original has to be sealed.

3 (Discussion off the record.)

4 THE COURT: Anything from the Defense before we
5 bring the Jury back?

6 MR. MOSELEY: No, Your Honor.

7 THE COURT: Do you want me to tell them what a
8 video deposition is?

9 MR. BRANDT: Yes. I kind of explained it to them,
10 but I'll do it again if you don't mind.

11 THE COURT: That would be fine.

12 MR. MOSELEY: Judge, I would rather you tell them
13 what the video is as opposed to just giving Larry...

14 THE COURT: All right. The Court will explain to
15 the Jury panel what the video deposition is.

16 And it is a physician?

17 MR. BRANDT: Yes, Your Honor. It was taken for use
18 at trial.

19 THE COURT: *De bene esse.*

20 (The Jury entered the courtroom at approximately
21 11:45 a.m.)

22 THE COURT: Let the record reflect the Jury and
23 alternate are in the Jury box.

24 Madam Forelady, ladies and gentlemen of the Jury,
25 we will now proceed with the trial of the case. It is

1 my understanding that the next testimony will be by
2 video deposition; in other words, this will be a
3 deposition taken out of the courtroom, and I understand
4 it's in the physician's office; is that correct?

5 MR. BRANDT: Yes, sir.

6 THE COURT: So it's taken in his office at his
7 convenience so he doesn't have to be here. However,
8 it's done under the same formality as his testimony in
9 the courtroom. In other words, not only are both
10 parties are represented by their counsel, but also the
11 physician is under oath, and so you take his testimony
12 or the deposition as you would if he was here in person.

13 Is there anything else from the Plaintiff?

14 MR. BRANDT: No, sir, Your Honor.

15 THE COURT: Anything from the Defendant?

16 MR. MOSELEY: No, Your Honor.

17 THE COURT: All right. Very good. We'll now play
18 the deposition. It is introduced as to who the witness
19 is?

20 MR. BRANDT: Excuse me?

21 THE COURT: The video introduces the witness?

22 MR. BRANDT: Yes. It will go all through that.

23 It's Dr. Stephen Gardner taken November 14th, 2011.

24 (Court's Ex. # 1, DVD Deposition of Dr. Stephen R.
25 Gardner, was marked for identification and received

1 in Court's Evidence.)

2 (Court's Exhibit # 1.1, Original Transcript of
3 videotaped Deposition of Dr. Stephen R. Gardner,
4 was marked for identification and received in
5 Court's Evidence.)

6 (Whereupon, the videotaped deposition of
7 Dr. Stephen Gardner was played for the Jury from
8 11:52 p.m. until approximately 12:22 p.m.)

9 THE COURT: Anything else on this witness?

10 MR. BRANDT: Nothing else on this witness.

11 THE COURT: Ladies and gentlemen of the Jury, Madam
12 Forelady, I suggest we take lunch at this time. It's
13 about 12:30.

14 Do we have another witness that's going to be
15 available at 1:30?

16 MR. BRANDT: He'll be available at 1:30.

17 THE COURT: Would that give you enough time for
18 lunch? An hour? Well, of course, without you we can't
19 continue, so just try to be back within an hour and then
20 we'll continue with the trial at that time.

21 I understand that the Clerk of Court has vouchers
22 for you for lunch at different places here in Walhalla.

23 Again, as I've said throughout, please do not
24 undertake discussion among yourselves or permit anyone
25 to discuss it with you. If they should attempt to do

1 so, report them to me so that I might take the
2 appropriate action, because as you can see now, this is
3 a very serious case and it needs to be resolved in the
4 proper fashion.

5 All right. Very good. I'll see you back at 1:30.

6 Everyone else remain seated while the Jury retires
7 from the courtroom.

8 (Whereupon, the Jury left the courtroom at
9 approximately 12:25 p.m.)

10 THE COURT: All right. Is there anything further
11 from the Plaintiff before we take a lunch break?

12 MR. BRANDT: No, sir.

13 THE COURT: From the Defendants?

14 MR. MOSELEY: No, Your Honor.

15 THE COURT: Very good. I'll see you back at 1:30.

16 (A luncheon recess occurred.)
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1 AFTERNOON PROCEEDINGS

2 1:39 p.m.

3
4 THE COURT: All right. There anything from the
5 Plaintiff before we ask the Jury to join us?

6 MR. BRANDT: No, Your Honor.

7 THE COURT: From the Defense?

8 MR. MOSELEY: No, Your Honor.

9 THE COURT: Very good. If you would please ask the
10 Jury to join us.11 (The Jury entered the courtroom at approximately
12 1:38 p.m.)13 THE COURT: Let the record reflect the Jury and
14 alternate are in the Jury box.15 Madam Forelady, ladies and gentlemen of the Jury,
16 we will now continue with the Plaintiff's case.

17 Mr. Brandt, you can call your next witness.

18 MR. BRANDT: I'd call Dr. G. Richard Thompson to
19 the stand.20 (Whereupon, the Witness, Dr. G. Richard Thompson,
21 was sworn by the Clerk of Court.)22 THE COURT: All right. You may proceed.
23
24
25

1 Whereupon,

2 G. Richard Thompson,

3 after first having been duly sworn, testified as
4 follows:

5 Direct Examination by Mr. Brandt:

6 Q. Dr. Thompson, please state your name and address
7 , for the Court.

8 A. G. Richard Thompson, Clemson South Carolina. I'm
9 Professor Emeritus of Economics at Clemson University.

10 Q. Would you please give us a brief description of
11 your educational background?

12 A. Yes, sir. I have an undergraduate degree which I
13 received in 1966 from the University of South Florida
14 Tampa in economics; a Ph.D. I received in 1972 in
15 economics from the University of Virginia.

16 Q. And how about your experience as a professor of
17 economics?

18 A. Well, I started teaching at what is now University
19 of Central Florida in Orlando as assistant professor of
20 economics and taught there until 1975 and moved to the
21 University of South Alabama in Mobile as an associate
22 professor of economics.

23 I had a year's leave of absence, I believe it was
24 ' in 1979, for a visiting professorship at Arizona State
25 University in Tempe, Arizona. I came back to Selma,

1 Alabama, as Professor of Economics and Director of
2 Graduate Studies for the University. And came to
3 Clemson in 1982 as Associate Dean of the College of
4 Business and Professor of Economics and have been here
5 ever since.

6 Q. Have you ever written books or articles in
7 economics?

8 A. I've written 30-something articles on various
9 topics in economics.

10 Q. Have you written any articles pertaining to the
11 type of testimony that you are going to give here today?

12 A. Yes, sir, I've written several articles on what
13 economists do in cases of this nature and how we go
14 about doing it. Most of those have been published in
15 legal publications.

16 MR. BRANDT: I would offer Dr. Thompson as an
17 expert witness in the field of economics.

18 THE COURT: Any Voir Dire?

19 MR. MOSELEY: No, Your Honor. No objection.

20 THE COURT: All right. Without objection the
21 witness will be qualified as an expert in the area of
22 economics, the field of economics.

23 Madam Forelady, ladies and gentlemen of the Jury,
24 as you will note, by reason of background, training or
25 experience, then they are permitted to give opinions as

1 ,well as what they might know of their direct knowledge
2 as to that area of expertise. Now, always remember,
3 every witness's testimony is for your determination and
4 evaluation of that testimony. You may proceed.

5 By Mr. Brandt:

6 Q. Dr. Thompson, I want you to please to assume the
7 following facts. Ernest Cobb, the Plaintiff in this
8 case, was born on [REDACTED] And he is
9 disabled from injuries he received in an automobile
10 accident that occurred on July the 5th, 2007. However,
11 he was able to work afterwards there for a little while
12 but has been unable to work since May 16, 2011.

13 Please further assume had it not been for these
14 injuries, that he would have continued in the workplace
15 and would have expected to have worked to his normal
16 retirement age and could have been expected to have
17 lived for his normal life expectancy of all persons of
18 the same age and sex. Based upon these assumptions, and
19 based upon further assumptions that Mr. Cobb was earning
20 \$15,672.76 at his job in the Oconee County School
21 District at the time that he became disabled, have you
22 performed any functions or formed any opinions or
23 calculations based upon a reasonable degree of economic
24 certainty as to the future earnings of Mr. Cobb had he
25 not been injured?

1 A. Yes, sir.

2 Q. And what is that opinion?

3 A. He had been able to continue working full-time up
4 until his retirement age, Social Security Administration
5 retirement age of 66 years and four months, he would
6 have earned a total of approximately \$242,602 over all
7 those years, adding up all those years that he would
8 have continued working.

9 Q. And why is that important?

10 A. That's important because one of the things that
11 we're trying to seek is how much he would have to have
12 today to invest in a minimum investment to be able to
13 withdraw amounts equal at what he would have earned if
14 he had been able to continue working.

15 Q. Based on all those assumptions, have you formed an
16 opinion as to the present value of the future earnings?

17 A. Yes, sir, I have.

18 Q. And what is that opinion?

19 A. If we take out the income taxes that he would have
20 paid, both State and Federal income taxes that he would
21 have paid during his lifetime and asked him a very
22 simple question, how much money would he have to have
23 today in order to invest it in a safe, risk-free
24 investment, so that he could withdraw amounts equal to
25 what he would have earned each year over the rest of his

1 life, you would need \$175,248. The \$175,248 is commonly
2 referred to as the present value of that stream of
3 earnings that he would have been capable of earning.

4 Q. Would you please explain in full the numbers you
5 used and how you went about making your calculation and
6 forming that opinion?

7 A. Yes, sir. Basically the first thing that we do in
8 trying to make a calculation is we look at some
9 demographic biographical information about the person we
10 are trying to estimate the earnings. We know that based
11 on his date of birth and the South Carolina mortality
12 tables that he should have or would have been expected
13 to continue living approximately 25 years after the time
14 that he quit working.

15 We call that the person's life expectancy. And the
16 Federal Government publishes these tables, the State of
17 South Carolina publishes them. And the State of South
18 Carolina said that from his birthday preceding the date
19 of the accident he should have lived another 24.79
20 years. Kind of an interesting sideline to all of that,
21 one of the things that we are currently seeing is that
22 people are typically living longer than their life
23 expectancy. We have better health, we're living longer
24 now. Unfortunately, I tell my students you'll have to
25 work longer now, which doesn't make them all that happy.

1 We know that he would have been able to retire at
2 the age of 66 and four months with full Social Security
3 and full retirement benefits, so it would be important
4 then to calculate his earnings from the time that he was
5 last able to work up until the time that he would or
6 could retire, whether or not, and that's a question of
7 whether he could have continued working, he could have
8 retired at that point in time.

9 We know from his last W-2 that he earned \$15,662.72
10 in 2010.

11 Q. That was his W-2 furnished by the School District?

12 A. That was his W-2 furnished by the School District.
13 If we take that amount of money, \$15,662.72 and increase
14 it at a known growth rate -- and we'll come back to this
15 in a minute, using the consumer price index which would
16 say we are compensating him for goods and services he
17 could buy, we are doing it for, we are increasing it for
18 the consumer price index plus increases in productivity
19 which all of us tend to get if we work longer.

20 If you go back to 1960 and calculate what the
21 average earnings increase for all people in the economy
22 were for that period of time, it was right at five and a
23 quarter percent. Right now that sounds kind of high for
24 most of that, but we'll come back to that in a minute
25 and find out it's not that high after all.

1 If we simply take his earnings and increase it at
2 five and a quarter percent a year, we get the 242,662
3 dollars -- I'm sorry, the \$242,602. We know that he
4 would have to pay taxes on anything he earned. If you
5 take his tax returns for the last year that he filed a
6 'tax return with full earnings, he paid, he and his wife
7 paid together, an averaged tax at 4.7 percent. That's
8 comprised of both Federal income tax and State income
9 tax. In we subtract that from his earnings, it leaves
10 us \$217,760 that he would have had to spend to live on
11 over his ---

12 Q. Let me stop you right there. You gave a paid tax
13 of how much on average?

14 A. An average tax of 4.7 percent.

15 Q. That seems small to a lot of us here as far as the
16 number because we see something else printed on the tax
17 tables. How does that derive? How do you get down to
18 4?

19 A. You take his tax return, you take the total tax he
20 paid divided by the total income. That's what he paid,
21 4.7 percent -- I'm sorry. I misspoke myself. 14.7
22 percent.

23 Q. 14, okay. I was wondering.

24 A. 4.7 sounded good to me, too. I like that. I'm
25 sorry. It's 14.7 percent. He paid 10.24 percent in

1 Federal income tax and 3.2 percent in State income tax.

2 At 14.7 percent. Sorry about that.

3 Q. But you used the 14.7?

4 A. I used the 14.7. I counted this up too fast last
5 night. Sorry about that.

6 Q. That's all right.

7 A. Subtracting the 14.7 percent -- I thought that was
8 a lot of money I was taking out at 4 percent. The 14.7
9 percent reduces it \$217,760.

10 The next question to ask is, okay, how much could
11 we invest his money at in order to replicate the amount
12 of money that he would earn over his lifetime? It's
13 important that we take -- and we call that the discount
14 rate, the inflation, the interest rate that he could
15 earn, we call that the discount rate, or sometimes the
16 investment rate. And it's kind of interesting if you
17 look at a person's growth rate in earnings which would
18 be what he would earn, continue to earn each year
19 increases each year. We find that the thing that
20 influenced the growth rate and earnings are basically
21 productivity, which is pretty small at 1.8 percent or
22 something like that with the national economy, plus
23 inflation. You know, we get interest on our earnings
24 because of inflation.

25 So if you look at interest rates that banks charge

1 you or investment rates that investments pay, it's
2 comprised of two things, too. It's comprised of
3 inflation because banks won't lend you money and only
4 get paid back in dollars less than they lend you, so
5 banks have that anticipated inflation, plus they have
6 some sort of real interest rate, we economists call it
7 the real yield on capital.

8 Interestingly enough, the long-term investment
9 rate, the long-term discount rate is almost exactly the
10 same with the long run growth rate and earnings. The,
11 from 1960 to 1910 [sic] the growth rate in earnings was
12 5.25 percent, from 1960 to 1910 [sic] the investment
13 rate or discount rate was 5.24 percent, I think that's
14 one/one hundredth of one percent difference.

15 So, therefore, basically we're just adding up the
16 earnings if you look at it that way, less his taxes.

17 One thing that we have to do is that in order to --
18 we are basing our calculations on his earnings after
19 taxes. If he was to get some award or get some money,
20 he would have to pay taxes on the interest he would earn
21 on the investment. So one of the things we have to do
22 is to compensate for the interest earned on the
23 investment, and we could do that several ways, by adding
24 the taxes back in that he would pay on interest, we can
25 do it by adjusting the discount rate, it doesn't matter

1 ' which way we do it. I did it by adjusting the discount
2 rate.

3 And that gave us \$175,248. Basically that's saying
4 that you think about it in terms of a pure wash, that's
5 saying the taxes he would paying would be a little over
6 \$25,000 over his lifetime on just his earnings.

7 Q. The methodology that you used to make this
8 calculation of the numbers, is this widely accepted in
9 the economics profession as a valid, legitimate
10 methodology for making this calculation?

11 A. It is.

12 Q. And are there any variables in there that -- I
13 think you've talked about them -- but the growth rate in
14 earnings, is that variable between economists?

15 A. Well, sure. You can say, sure, I took it from 1960
16 to 2010 and I took the investment from 1960 to 2010,
17 too. The reason you take them both from the same time
18 period is because inflation affects both of them. You
19 take them from different time periods, you get different
20 rates of inflation and you can come up with any kind of
21 answer you want.

22 You could take it from 1950 to 2010, and if you
23 did, the rates would fall a little bit, I think about
24 4.8 percent or 4.9 percent, but they would fall the
25 same. And so while the future earnings may be bigger,

1 the present value is still gonna be the same.

2 Q. And how about your discount rate that you use?

3 A. Oh, the discount rate would fall accordingly.

4 Q. And, again, what is your opinion to a reasonable
5 degree of professional certainty of the present value of
6 his net earnings if he were able to continue to work for
7 the School District in the capacity that he was
8 employed?

9 A. It would be \$175,248.

10 MR. BRANDT: Thank you, sir.

11 Answer any questions Mr. Moseley would have for you
12 if you would.

13 Cross-Examination by Mr. Moseley:

14 Q. Good afternoon, Dr. Thompson.

15 A. Good afternoon, sir.

16 Q. I think you are still a little off on the taxes.

17 You said -- I think you said it was some figure before
18 and then you changed it to 14 percent?

19 A. Right. If you look at the report. I made some
20 notes here so that I could, to answer the questions. Is
21 it all right if I look at the report?

22 Q. Sure.

23 A. If you go back to the report, it says 10.24
24 percent, 3 point percent, which would be, I'm sorry,
25 would be 13.44 percent. There you go.

1 Q. Okay. Now, but that's not your calculation. Your
2 calculation is about 10 percent. If you look at your
3 numbers, you reduce the top number --

4 A. 217.

5 Q. -- down to 217. And that's ten percent?

6 A. Exactly.

7 Q. Okay. But you just said 14 percent, close to 13
8 percent.

9 A. 13.44 percent.

10 Q. Okay. So that number needs to be reduced more. If
11 you only reduced it 10 percent ---

12 A. I haven't made the calculation yet. Have you made
13 the calculation that said exactly 10 percent?

14 Q. It's 10.24 percent.

15 A. Okay. So that was -- I apologize. That was just
16 taking out Federal taxes. Reduce us 3 percent more and
17 we're gonna be there.

18 Q. All right. So your number is not correct, it needs
19 to be reduced a bit more?

20 A. Three percent.

21 Q. Okay.

22 A. I'll give you the 3 percent.

23 Q. Okay. Now, you were asked to assume that Mr. Cobb
24 would never work again?

25 A. Sure.

1 Q. And so that's built into your calculation ---

2 A. No. Actually, I wasn't assuming that. I assumed to
3 calculate his earnings, whether he worked or not, to
4 calculate what his earnings would have been had he
5 worked.

6 Q. Okay. Your role ---

7 A. I'm making no assumption about whether he could go
8 back to work or not.

9 Q. Your role as an economist doesn't consider that?

10 A. That's correct.

11 Q. Okay. Now, and obviously if Mr. Cobb has a
12 productive role in society and he's able to do some sort
13 of job, that would reduce the amount you've got in front
14 of you there?

15 A. It would reduce the amount I've got. You can make
16 the argument it should, but it wouldn't reduce the
17 amount because that would still be what his gross
18 earnings would have been and present value thereof.

19 Q. Right. But if he was able to go back to work
20 earning the same thing he was making before, then that
21 would completely wipe out the losses that you described?

22 A. I haven't used the word "loss."

23 Q. Okay.

24 A. You are using the word "loss," which is fine. I
25 have no problem with that if you're saying that you're

1 going to take this as a loss if he can't go back to
2 work. I didn't say that. I just said this is per the
3 value of his earnings, period.

4 Q. Okay. Well, I just think that Mr. Brandt is gonna
5 tell the Jury that that's what he's lost.

6 A. That's completely up to Mr. Brandt.

7 Q. Okay. So if Mr. Cobb is able to earn income that
8 would offset the earnings calculations that you had?

9 A. That would offset the number that Mr. Brandt is
10 going to talk about.

11 Q. Okay. You've assumed a five and a half percent
12 increase on his earnings every year, correct?

13 A. Sure.

14 Q. In 2022, what would the bus driver make? What
15 would that \$15,000 figure ---

16 A. Two thousand what?

17 Q. In 2022, which is what you have got him calculated
18 out to, what does a bus driver make in 2022? How does
19 this 15,000 calculate in 2022?

20 A. I have no idea. I didn't make that calculation.
21 Probably not quite double or something.

22 Q. Okay. So twenty-eight, thirty thousand dollars is
23 what --

24 A. 20 wouldn't be quite double. It would be less than
25 that.

1 Q. Okay.

2 A. But if you go back that same number in years past
3 what would bus drivers make, and you'll find you've got
4 the same problem.

5 Q. Your five and a half percent increase every year,
6 what -- let me make sure I understand what you're
7 saying.

8 You're assuming that he would have gotten a five
9 and a half percent increase every year from 2010 to
10 2022?

11 A. Correct.

12 Q. All right. Now, that doesn't take into account any
13 statistics with regard to what bus drivers make?

14 A. If you go back, I know for a fact that a friend of
15 mine drove a school bus in the sixties and he got less
16 than a thousand dollars a year. You'll probably find
17 out it's about the same thing.

18 Q. Okay. Well, your statistics come from the report
19 of the President, right?

20 A. Yes.

21 Q. And those consider all occupations?

22 A. Sure.

23 Q. And it considers all areas of the United States?

24 A. Sure.

25 Q. Okay. It doesn't consider South Carolina

1 specifically?

2 A. Specifically, no.

3 Q. And it doesn't consider bus drivers specifically?

4 A. That's correct.

5 Q. Okay. And it doesn't consider the fact that he's a
6 government employee?

7 A. Correct. They probably get more increases in
8 earnings.

9 Q. Okay. And it doesn't consider, it doesn't consider
10 what's happened in the past three years more heavily
11 than it does 1950?

12 A. No. But we could do that. And here's what you are
13 trying to get at, and let me see if I can explain it so
14 it makes sense. Let's suppose that we increase in
15 earnings at of the 2010 growth rate and earnings in the
16 economy, zero, actually like point 2 or something, less
17 than 1 percent. Let's increase it to that. What's the
18 discount rate for that period? It was a negative
19 number, 1.9, which would make the final present value
20 higher. You have to take the growth rate and the
21 earning and the discount rate for the same time period.
22 2010, the growth rate is less than 1 percent. Discount
23 rate, negative.

24 Q. So your testimony is it doesn't matter where you
25 take the number from, as long as you take both numbers

1 from the same period?

2 A. That's correct.

3 Q. But your calculation is five and a half percent per
4 year increase in earnings every year?

5 A. Correct. And if you have five and a quarter
6 percent increase, you have a five and a quarter percent
7 discount rate.

8 Q. Okay.

9 A. It's a complete wash.

10 Q. Okay. Now, you talk about taxes and you considered
11 the taxes on the interest that would have to be earned
12 on this, on the present value.

13 A. Correct.

14 Q. All right. But the principal is not taxed?

15 A. It is not.

16 Q. Okay. So the amount this Jury may or may not award
17 would be taxed?

18 A. No, no. That's certainly, that's true.

19 Q. Okay.

20 A. But the point is that he's trying to replicate
21 242,000 with 175,000, he's gonna have to invest it in
22 something, and that interest is taxed all the way.

23 Q. Okay. I want to show you his tax returns. This is
24 both Nancy and Ernest Cobb's tax returns for 2005-2006,
25 which were the last two years prior to the accident.

1 And you won't see a W-2 there because he wasn't working
2 for the department. But if you would look at the
3 schedule, I think it's Schedule C, which would represent
4 the earnings, the profit that Mr. Cobb had. Do you see
5 that?

6 A. Sure.

7 Q. What were his profits on his Schedule C?

8 A. \$8,763.

9 Q. And that was in what year?

10 A. 2005.

11 Q. Okay. Now if you would look at 2006 for that same
12 number.

13 A. It would be \$3,680, and he did have a W-2 for
14 another 2,000, so it would be 6,000.

15 Q. 6,000. Okay. So that's before the accident?

16 A. Yes.

17 Q. All right. So he made 6,000 one year, 8,000 the
18 next. And then after the accident he makes 15,000?

19 A. That's correct.

20 Q. All right. So he makes more money after the
21 accident than before the accident?

22 A. He did.

23 MR. MOSELEY: That's all the questions I have.

24 Redirect Examination by Mr. Brandt:

25 Q. Doctor, after the Cross, do you need to make an

1 amendment or a change in that calculation, the final
2 number?

3 A. I'm pretty sure they came directly off the
4 computer. I think my write-up would be incorrect.

5 Q. So you still say that the present value of
6 earnings --

7 A. I still trust my computer.

8 Q. -- the present value of his earnings is \$175,248?

9 A. Yes, sir, that's correct.

10 Q. Were you furnished any tax returns to look at of
11 Mr. Cobb?

12 A. Yes, sir. I think that was furnished through what
13 Mr. Moseley had. Plus I was also furnished 2009-2010.
14 The earnings for 2010 was the \$15,000.

15 Q. And that income came from?

16 A. The School District.

17 Q. The School District. And did you observe any tax
18 returns for any years in which he had a loss in his
19 mechanic business at home?

20 A. Sure.

21 Q. And that was a negative figure. That was negative
22 earnings; was it not?

23 A. That would be correct.

24 Q. Did you calculate anything at all in your
25 calculations concerning the loss of income from the fact

1 that he did the mechanic work?

2 A. No, sir, I did not.

3 MR. BRANDT: I don't have anything further.

4 THE COURT: Recross?

5 MR. MOSELEY: Nothing further.

6 THE COURT: Very well. You may step down.

7 THE WITNESS: Thank you, sir.

8 (Whereupon, the Witness was excused.)

9 (Discussion at sidebar.)

10 THE COURT: Madam Forelady, ladies and gentlemen of
11 the Jury, I suggest we take a very short break at this
12 time. I need to take up some matters. It will just
13 take a few minutes. But if you would please retire to
14 the Jury room. Do not undertake any discussion of this
15 case among yourselves. And if you are ready to come
16 back, just knock on the door. Very good. Thank you.

17 (Whereupon, the Jury left the courtroom at
18 approximately 2:06 p.m.)

19 THE COURT: All right. Anything from the
20 Plaintiff?

21 MR. BRANDT: No.

22 THE COURT: From the Defendant?

23 MR. MOSELEY: No, Your Honor.

24 THE COURT: We'll take a short break.

25 (A recess was taken.)

1 THE COURT: Is the Plaintiff ready to go forward?
2 MR. BRANDT: We're ready.
3 THE COURT: Defense ready?
4 MR. MOSELEY: Yes, Your Honor.
5 THE COURT: All right. Ask the Jury to join us.
6 (The Jury entered the courtroom at approximately
7 2:18 p.m.)
8 THE COURT: All right. Let the record reflect the
9 Jury and alternate are in the Jury box.
10 Mr. Brandt, you may call your next witness..
11 MR. BRANDT: Nancy Cobb.
12 Whereupon,
13 Nancy Jane Cobb,
14 after first having been duly sworn, testified as
15 follows:
16 Direct Examination by Mr. Brandt:
17 Q. Nancy, state your name in full for the Court,
18 please.
19 A. Nancy Jane Cobb.
20 Q. And are you the wife of Ernest Cobb?
21 A. Yes, I am.
22 Q. Did he get the years of marriage right?
23 A. 37; his birthday, [REDACTED]
24 Q. And do you and Mr. Cobb have any children together?
25 A. No. We have -- our son is deceased.

1 Q. And hold your voice up so we can make sure
2 everybody hears. You're kind of soft-spoken.

3 A. Okay.

4 Q. Anyway, were you with Mr. Cobb on July the 5th,
5 2007, when this accident occurred?

6 A. Yes, sir.

7 Q. Tell us what you remember about that trip to Head's
8 Superette that evening.

9 A. I had fixed supper and he had come home and we ate
10 supper and he asked me to ride to the store to get some
11 gas. So we went to the gas station and --

12 Q. What kind of vehicle were you in?

13 A. His truck.

14 Q. What kind of truck was that? Do you remember?

15 A. A blue one.

16 Q. Okay. Ford?

17 A. Chevrolet. Chevrolet.

18 Q. Okay. And this was a full-sized pickup truck?

19 A. Yes, sir.

20 Q. Was it a dually? It didn't have big wheels on the
21 back or anything, just a regular full-sized pickup?

22 A. It's got a cab on it, I mean a back seat thing,
23 with...

24 Q. Go on and tell us what happened as you went to the
25 store.

1 A. He had gave me a check to fill out for his gas. He
2 has a big company checkbook, and so he had tore it out
3 and gave it to me, and whenever we got to the gas
4 station he handed it to me and said, "You fill this
5 check out while I pump the gas."

6 (Pauses).

7 He got out of the truck, and I had his little thing
8 between the seats closed down so, I couldn't fill out
9 the check there, so I had undone my seat belt to put it
10 up on the sun visor to fill the amount out, and he had
11 just got out of the truck.

12 And I heard this noise, and it shook the whole
13 truck. And I -- it was like, What happened? You know.
14 I knew there had been an accident but I didn't think
15 about, you know, it just kind of shook me up good
16 because I didn't have my seat belt on.

17 So I opened the car door. And when I looked back,
18 I seen Mr. LaFoy in his car. And he had his hands up on
19 the steering wheel and was raising up, you know, I
20 could, me and him made eye contact. So I was still kind
21 of shook up. And I thought, Lynn didn't have time to
22 get to the store, you know, and I had to check. So I
23 walked around in front of the truck. And that's when I
24 seen him laying on the ground. He was in a puddle of
25 blood.

1 So I went screaming to him. I thought he was dead
2 because there was just blood coming out of his mouth and
3 his ears and his nose. So I was screaming. There was
4 people all over, and I, I guess I just didn't understand
5 why nobody would come, nobody would come and help us. I
6 just wanted somebody to come and help us.

7 Q. Did you notice as to whether or not when you first
8 observed him as to whether or not he was breathing or
9 moving at all?

10 A. He wasn't moving at all. I could see his eye was
11 already black and he had blood all over his teeth and
12 his teeth was broke out.

13 Q. And did you go -- how close did you get to him?

14 A. I laid my hand on his back.

15 Q. Which way was he laying? Was he face down, face
16 up?

17 A. He was face down. And --

18 Q. The pump -- let's stop there just a minute.

19 We have a picture, it would be Exhibit Number 4 --
20 and, of course, this is not -- Lynn has already
21 testified this is not the truck there.

22 A. No. When Mr. LaFoy hit --

23 Q. Just a minute. Let's get it up.

24 Extend it just a little bit. (Lights off.)

25 MR. BRANDT: We need a little more light. Cut it

- 1 'down and let's use the picture here, okay?
- 2 THE WITNESS: That will be fine.
- 3 By Mr. Brandt:
- 4 Q. There's a truck there. That's not Lynn's truck, is
- 5 it?
- 6 A. No, sir.
- 7 Q. Is that a truck that's similar to what y'all were
- 8 in?
- 9 A. Yes.
- 10 Q. And is that the pump that you pulled up to to get
- 11 the gas?
- 12 A. Yes, it is.
- 13 Q. Now, if we put up exhibit number 6, then this is
- 14 the same pump without a truck in front of it, correct?
- 15 A. Yes. This is the newer pump because the other pump
- 16 was destroyed.
- 17 Q. Did you observe the damage to that other pump?
- 18 A. Yes.
- 19 Q. Was it substantial?
- 20 A. Yes.
- 21 Q. How about the damage to Lynn's truck? Do you
- 22 recall how much the repair bill was?
- 23 A. It was over \$9,000.
- 24 Q. And where was the damage to that truck, do you
- 25 recall?

1 A. On the passenger's side at the back of the wheel,
2 , kind of at the wheel.

3 Q. Over the wheel?

4 A. Yeah.

5 Q. So it would be the right rear?

6 A. Uh-huh.

7 Q. And this is the pump, if this was the pump, do
8 you -- can you come down here, step down here and point
9 to the area where you think you recall him lying when
10 you got, got to him?

11 A. (Witness leaves stand.) Yes, sir.

12 Q. We don't have a microphone down here, so when you
13 speak, you need to keep your voice up.

14 A. Yes, sir. He was about over this way, right here
15 (pointing).

16 Q. Okay. You don't know where he was standing when
17 you got hit?

18 A. No.

19 (Counsel confer.)

20 (Witness returns to stand)

21 By Mr. Brandt:

22 Q. So he started off here and he ended up back there
23 somewhere?

24 A. Yes.

25 Q. Do you recall approximately from the pump when he

- 1 was laying on the pavement?
- 2 A. They said 28 feet. I'm not good on distance. Or
- 3 14 feet. I don't really know.
- 4 Q. But it was not right next to the pump?
- 5 A. No. He was pretty close.
- 6 Q. And did you ever speak to Mr. LaFoy?
- 7 A. No, sir.
- 8 Q. When you first got out of the truck and you made
- 9 eye contact with him, did it look like that he was, knew
- 10 where he was?
- 11 A. Yes. He looked straight at me.
- 12 Q. Did it appear that he was groggy or unconscious?
- 13 A. His eyes were open when he looked at me.
- 14 Q. Did you notice any injuries to him?
- 15 A. No, sir. I didn't get close enough to him. I was
- 16 worried about Lynn.
- 17 Q. And while you were there at the scene how long was
- 18 it before the ambulance arrived?
- 19 A. I don't know. It seemed forever to me. I had time
- 20 to -- I left Lynn because I guess everybody thought he
- 21 was dead, so nobody would come to him. And the blood,
- 22 everybody was afraid. Jill, that runs the store, I went
- 23 inside. She is kin to me and she knows my family. She,
- 24 I went to her but she had customers in the store. She
- 25 couldn't come to me. And she said she had done called

1 my mother and my sisters to come. And when I looked
2 through the window, she's got a big window so that she
3 can tell when the gas pumps, somebody drives to the gas
4 pumps. I seen through that window where he was trying
5 to raise up.

6 Q. Who was trying to raise up?

7 A. Lynn. He had come to, and he was trying to push up
8 with that one arm.

9 Q. Do you know how long it was from the time that you
10 went over to him to start with until you saw him moving?

11 A. No, sir, I don't.

12 Q. Had the EMTs arrived at the time you saw that
13 movement?

14 A. Nobody was there.

15 Q. Cops wasn't there?

16 A. There was people everywhere.

17 Q. Cops anywhere?

18 A. No. I didn't ever see a cop until after EMS got
19 there. And when I went back outside to see Lynn, I put
20 my hand on his back, and I said, "Honey, don't get up.
21 Don't get up." And by the time I got back out there was
22 a paramedic there that lived right down the road from
23 Head's Superette and had seen it and also heard it on
24 the scanner and came because he knew us. And he had
25 came. And he said, "Just back off, Nancy, and let me

1 take care of him."

2 Q. And did you do that?

3 A. Yes, I did. And when I left Lynn, Lynn had gave me
4 that check and I thought, I got to get that check
5 because I couldn't remember whether I signed that check
6 or put my name on it. Anybody could get ahold of it and
7 put any amount they wanted to on it. So there was
8 police officers standing there, and he was asking people
9 questions. And I said, "Well, I was in the truck."

10 And he said, "You was in the truck?"

11 And I said "Yes, I was. I'm Lynn's wife. I'm his
12 wife." And then I said, "I've got to go get that check
13 out of the truck." And Lynn has a concealed weapon
14 permit, and I said, "There may be a gun in the truck.
15 If you find one, it's his."

16 So I went and they gave me the check.

17 Q. So then what happened after that? Did you go to
18 the hospital with Lynn?

19 A. Yes, I did. They wouldn't let me ride in the
20 ambulance with him.

21 Q. They would not?

22 A. No.

23 Q. How did you get to the hospital?

24 A. Jill had called my sister, Sandra, and Sandra had
25 came and she had to park all the way on the other side

1 of the road even to get close to the store 'cause there
2 was so many people there. And she came and took me to
3 Ocone.

4 Q. Do you know -- did you arrive about the same time
5 the ambulance did or was it after when they took him to
6 the hospital?

7 A. It was after. They had left way before I did,
8 because we couldn't get out for so many people.

9 Q. How long were you at Ocone Hospital? Do you
10 remember?

11 A. No. It just seemed, seemed like a bad dream to me.

12 Q. And were you allowed -- when they took Lynn back,
13 were you allowed to go back with him?

14 A. By the time that I had got there, there was people
15 that we knew that had heard about the accident all over.
16 And my nephew's wife works at Ocone and my sister had
17 called her on the way and she was already down in the
18 E.R. and she came and talked to me and told me they was
19 gonna let me go back as soon as they had him stable and
20 I could see him. But I had got sick, just upset sick,
21 and so I had to wait a little while.

22 Q. And then what happened to Lynn? Was he admitted to
23 the hospital at Ocone?

24 A. No, sir. When they got him stable they
25 transferred -- they let me go back and they transferred

1 him to Greenville because of his head injury.

2 Q. And did you go to Greenville?

3 A. Yes, I did.

4 Q. And do you recall approximately what time this
5 accident happened?

6 A. It had to be after 5:00. I don't, I don't really
7 know what time it was.

8 Q. Do you recall at what time you arrived at the
9 Greenville Hospital that night?

10 A. It was during the morning.

11 Q. After midnight?

12 A. Probably so.

13 Q. What did you do when you got to Greenville? Were
14 you allowed to see him?

15 A. Yes. I rode with him.

16 Q. They let you go to Greenville with him?

17 A. Yes. And to Greenville in the ambulance with him.
18 And they told me, you know, they showed me where the
19 waiting room was and I had to go there until they got
20 him admitted and, you know, done all the tests and stuff
21 and let me go back.

22 MR. BRANDT: Put up exhibit 10 again, please.

23 By Mr. Brandt:

24 Q. What's this picture show?

25 A. It shows how he looked when he left Oconee Hospital

1 when I seen him.

2 Q. At the point in time that picture was taken was he
3 able to speak to you?

4 A. He was, he was talking, but it was just ram, you
5 know, wanting to know what happened, wanting to know,
6 wanting to, you know, just on and on. He was talking to
7 me when I talked to him.

8 Q. After you got to Greenville, tell us what you did
9 when you arrived in Greenville. I guess Greenville
10 Memorial is where they took him?

11 A. Yes, sir.

12 Q. What did you do there?

13 A. We had to go to the waiting room and wait until
14 they told us that I could go see him. So they had him
15 in an outpatient surgery thing to get him ready for
16 surgery for his arm. They was gonna try to fix his arm
17 because it was just broke and dangling.

18 Q. Did you notice how it looked?

19 A. I never seen it until I got to Greenville.

20 Q. And what did it look like then? Did they have it
21 splinted and straightened?

22 A. They had -- yeah. They had splints and stuff on
23 it. And two doctors, two little old young doctors tried
24 to set it. And they're little old bitty things, little
25 old tiny boys. And they crossed over his arm, straddled

1 'it trying to pull it back in place, and it just popped
2 out, the bone would just pop. And they said, This ain't
3 working. He's gonna have to have surgery. So they --

4 Q. Now, this was on which arm?

5 A. The left arm.

6 Q. Which is Lynn's dominant side? Is his left arm the
7 one he writes with and works with?

8 A. He's left-handed.

9 Q. And this break was on that side?

10 A. Left arm.

11 Q. Did they take him to surgery that night for that
12 arm, or do you recall?

13 A. All my days and nights got mixed, run together. I
14 believe they did -- well, that day. Because everything
15 was -- you know, by the time we arrived and they had him
16 admitted, they was still running tests to find out, you
17 know, what was going on with the brain injury and his
18 arm and all. And they were still doing this test and
19 that test. And they would come out and say we got to
20 take him here or we got to take him to x-ray or, you
21 know...

22 Q. How long did you stay at Greenville Hospital with
23 Lynn before you came home?

24 A. 14 days. I never left.

25 Q. You never came back to get clothes or anything?

1 You just stayed there with him?

2 A. No. My son and my daughter-in-law brought me
3 clothes every day.

4 Q. Did you ever take a break, leave the hospital, and
5 stay somewhere else to rest?

6 A. No, sir. Whenever my son would come down, they
7 would stay and I would go downstairs and get something
8 to eat and come back up there.

9 Q. As long as he was at the hospital, you were there,
10 too?

11 A. Yes, sir.

12 Q. And when you brought him home on I guess I think
13 we've heard the 14th, I believe he stayed from the 5th
14 to the 14th, about nine days, how did he get home?

15 A. I brought him home.

16 Q. Did you bring him home in your personal vehicle?

17 A. Me and my son did.

18 Q. The pictures to, I believe it's maybe 11 and 12 --
19 let's see what it is. 11.

20 (11 appears on overhead screen.)

21 That picture there, where was that taken? Do you
22 know?

23 A. He was in Greenville. I don't know how many days
24 we had been there.

25 Q. Had you been there a few days before that picture

- 1 was taken --
- 2 A. Yes.
- 3 Q. -- or was it right away?
- 4 A. It was a few days.
- 5 Q. And when you were at the, back at the store and he
- 6 was on the ground, did you ever go over close enough to
- 7 examine him and look and see where else he was cut,
- 8 bleeding, anything other than just a general view of
- 9 where the blood was coming from?
- 10 A. No, sir. All I was doing was screaming for
- 11 somebody to come and help. Somebody to help me.
- 12 Q. Keep your voice up.
- 13 A. Okay.
- 14 Q. When you brought Lynn home, were you employed?
- 15 A. Yes, sir, I was.
- 16 Q. And are you employed now?
- 17 A. Yes, sir, I am.
- 18 Q. The same job?
- 19 A. Yes, sir.
- 20 Q. And you were there at the hospital for those nine
- 21 days. What did you do about work?
- 22 A. Our plant was shut down for 4th of July for two
- 23 weeks.
- 24 Q. So it happened during vacation time?
- 25 A. Yes. And when I went back to work, our son works

1 third shift, I worked first. I worked. He come at
2 seven, he gets off at seven. He would come and stay
3 with his daddy until I got home. And then he would go
4 home, go to bed, get ready for work, and then till he
5 got better where he could walk.

6 Q. How long did that last?

7 A. We done it for about a month.

8 Q. And during that month did he have to go to and from
9 any doctors to be checked?

10 A. Yes, sir.

11 Q. How did he get to the doctors?

12 A. I took him. I took vacation time when he would
13 have to go or my boss man would let me work a different
14 shift so I could get off during the day so that I could
15 go with him.

16 Q. And when you went to -- were these doctors -- where
17 were they located?

18 A. Greenville.

19 Q. And was one of them Dr. Gardner?

20 A. Yes, sir.

21 Q. Do you recall any other doctors you took him to by
22 name?

23 A. For his head or for his hand?

24 Q. Over to Greenville. Anything, yes.

25 A. The Greenville orthopedic doctor, his ear doctor,

1 his physical therapy doctors, I had to take him to all,
2 or our son took him.

3 Q. And how long did that last that you had to drive
4 him to and from his doctor appointments?

5 A. I still take him till today.

6 Q. And what doctors is he seeing today?

7 A. He sees Dr. Sally for his ears, he sees Dr.
8 Gardner, he sees Dr. Mallick for his blood disorder. He
9 sees Dr. McAlpine for the cancer. He sees him once a
10 year.

11 Q. Let's talk about the cancer for a minute. When did
12 he have the cancer in relation to this accident? The
13 year before, two years before?

14 A. Years before.

15 Q. Excuse me?

16 A. He had it several years before the accident.

17 Q. And at that point in time, what did they do for him
18 in the way of treatment?

19 A. He had a, they went up his urethra and took the
20 cancer out of his bladder. That day they put a catheter
21 in, clipped the catheter, done a chemo treatment, and he
22 stayed till that evening. They released the chemo and
23 we come home and he sees them once a year.

24 Q. And he had no continuous treatments as most cancer
25 patients do? He had the one treatment?

1 A. Yes. And the cancer was gone.

2 Q. So he had the surgery and one treatment. And then
3 did he have a problem subsequently with his blood for
4 which he continued to see a doctor?

5 A. Yes, he did.

6 Q. And what was that problem?

7 A. It's called polycythemia. It's red blood cells.
8 His body makes too many red blood cells. At the time of
9 the accident they found out that he had five pints of
10 blood too much. We had went to Anderson Hospital and
11 had three took out. He lost two pints of blood on the
12 scene at the accident. If he hadn't had those two pints
13 too many, he would have bled to death on the scene.

14 Q. And has he continued to have any problem with his
15 blood since that time?

16 A. No, he hasn't.

17 Q. And at what time did the blood problem clear up?

18 A. The day of the accident he lost two pints on the
19 scene and he hasn't had to have any took out since.

20 Q. And none of that cancer or anything, that's not
21 been affected by this accident in any way, has it?

22 A. No, sir.

23 Q. The -- how long was Lynn out of work from the date
24 of the accident till he first returned?

25 A. He was out about three months.

1 Q. And his job with the School District, did he lose
2 income during that period of time?

3 A. Yes, sir, he did.

4 Q. And how much was that?

5 A. I guess it was about \$4,000. I don't really, you
6 know...

7 Q. But he didn't get paid?

8 A. No, sir. I was working, and we, we survived.

9 Q. Did he return to work with the School District
10 driving his bus at a point in time?

11 A. Yes, sir, he did.

12 Q. And at the time that this accident occurred was he
13 still doing any kind of mechanic work in his shop?

14 A. Yes, sir, he was.

15 Q. When -- after this accident, has he been able to
16 work, continue to work in his shop and automotive
17 business?

18 A. No, sir.

19 Q. Why not?

20 A. He's not able to remember how to put stuff back
21 together or how to do a lot. Or even the strength. He
22 can't, he can't grip stuff with his arm because that's
23 his main arm, his left arm. And he can't, he can't
24 acknowledge what he's trying to --

25 MR. BRANDT: You can turn the lights back up now,

1 please.

2 By Mr. Brandt:

3 Q. He continued to work with the School District,
4 though, did he not --

5 A. Yes, he did.

6 Q. -- until May, around May 16 of 2011?

7 And during that period of time did he have
8 difficulty doing that job and driving his bus?

9 A. Yes, sir, he did.

10 Q. What kind of problems did he have?

11 A. He couldn't remember his route. And if they put
12 him on a, add a new child that come into the County, he
13 couldn't remember to pick that child up because he
14 wasn't used to them. I mean, he wasn't used to picking
15 that child up. He would have to write his self notes,
16 you know, to pick that child up and when to let him off
17 or who to let him off to. And he just, you know, he
18 just got frustrated because he couldn't remember. You
19 know, he can't be like he used to be.

20 Q. And tell us what effect this accident has had on
21 your marital relationship.

22 A. To me, the man is the man of the house, the woman
23 is the woman of the house. Our role has changed. Lynn
24 has tried to -- he knows he has problems and he's trying
25 to teach me how to take care of myself when he can't

1 'remember for me to do it. So I have to learn the man's
2 place, you know, things, you know, we go camping, and
3 how to set up a camper, you know, what you have to do to
4 pull it out of the driveway, you know, and stuff that
5 I've never had to do. When we go on vacation he can't
6 remember how to get to Pigeon Forge. We went there to
7 car shows for years and years, but he can't remember how
8 to get there.

9 Q. Has he had any other instances specifically when
10 he's had difficulty remembering how to get from one
11 place to another?

12 A. Yes, he has. That's the reason he's not working
13 now.

14 Q. Tell us about that.

15 A. The last day he worked, he had tried to call me on
16 the phone. He forgot to pick up a child or forgot how,
17 you know, he forgot to pick up a child. And they really
18 get upset at school if you forget their child. So he
19 had come to try to work at Itron, Sangamo. He used to
20 work at Sangamo. He could not find his way to Sangamo.
21 He had to pull over on the side of the road and he could
22 not get a hold of me. And he just lost it there, you
23 know, he just fell apart because he couldn't find me.

24 Q. How did he finally get hold of you?

25 A. Finally he got hold of me. I called my boss man.

1 I told him, I said, "I've got to leave work. Lynn can't
2 find his way home." So I left.

3 Q. Where did you find him?

4 A. I went home and he had rode around until he found
5 his way home.

6 Q. Tell us about the roles -- you say the man of the
7 house. Prior to this accident who took care of the
8 money matters and keeping up with the books and the
9 money?

10 A. He did.

11 Q. Excuse me?

12 A. That's a man's place to me. I'm an old-fashioned
13 girl. If we need anything, I depended on him to see
14 that my needs was met, whatever.

15 Q. Who takes care of the money matters and books and
16 bills now?

17 A. I do.

18 Q. Why do you do it now?

19 A. Because he cannot remember. If I don't write it
20 down on the calendar and put the amount, the day it's
21 due, where it's supposed to go, everything, it don't get
22 done, and, you know, the power company wants you to pay
23 the power bill or whatever bills is due.

24 Q. Tell us about Lynn's emotional state from the time
25 this accident happened, how it's developed, progressed,

1 the state it's in and now from the time of the accident
2 till now, and his personality or character or anything
3 , you noticed that's changed, if any.

4 A. Well, before, he had got saved in November as a new
5 Christian. He was happy, smiled. We was happy, we was
6 happier than we ever had been. You know, our kids,
7 child was married. We got three grandkids. You know,
8 he -- I mean, we was on top of the world.

9 But now, when I try to sit down and have a
10 conversation with him, he gets agitated, and a lot of
11 times you can't make him understand. You know, he's
12 like a little child. You have to sit down and talk to
13 him like a child and say, Now, Lynn, you need to do this
14 or you need to do that. Or what you got on don't match.
15 This don't go with this.

16 Or we've got to rake the leaves today. Where do
17 you want me to rake the leaves at? In the yard? You
18 know, outside. Or, you know, the lawn mower won't crank
19 or something. You tell him.

20 Or when we're going somewhere, he can't make up his
21 mind what he wants to eat. He'll say, You go ahead and
22 order whatever you think I want to eat. He can't even
23 make a decision like that.

24 Q. What effect has all this had on you?

25 A. Well, I'm on high blood pressure medicine.

1 Q. Were you on high blood pressure medicine before?

2 A. Not on as high dose as I take now. Under a lot of
3 stress. I worry about him. Our grandson has come to
4 live with us. I work first shift, he works third, so
5 he's never there. If he needs something, one of us is
6 there for him, you know, or the son that lives over the
7 road, he can get to him as soon as possible, you know,
8 in case he forgets.

9 So far he hasn't left anything on the stove when
10 he's cooking, but he knows if he's cooking, he has to
11 stay there in the kitchen. He can't go to the bathroom
12 and come back.

13 Q. Why?

14 A. Because he'll forget that he's left it on.

15 Q. Was he always like this?

16 A. No, no.

17 Q. How has this affected yours and Ernest's personal
18 relationship, has it had any effect on that?

19 A. Yes. We just, you know -- you have to adjust your
20 life-style as -- you build a marriage on friendship,
21 companionship, and we don't have the companionship like
22 we used to. He's tired. He has busting headaches all
23 the time. And I call it wandering. He gets up. He
24 can't sleep. And he gets something on his mind and
25 it's, you know, over and over. He don't just tell you

1 one time. He'll tell you something a hundred times.

2 But it's not his fault, you know. We have had

3 marriage -- and I had considered, you know, I just can't

4 take it no more. But it's not his fault and it's

5 marriage people for better for worse, sickness and

6 health.

7 Q. You stated that he gets up. Does he get up

8 frequently in the night?

9 A. He sleeps about two hours, two or three or four

10 hours a night.

11 Q. And then what does he do?

12 A. I call it roaming. He gets on the computer, or

13 he's doing clothes, or he's watching some T.V., or

14 sometimes he will just be sitting in there thinking.

15 Q. What effect does that have on you?

16 A. Well, I don't sleep good because I'm worried about

17 him, you know. It's not that I'm afraid that he will do

18 something, you know, because he gets so agitated with

19 his self because he can't be there for me. But that's

20 the way our life is gonna be. Except Dr. Gardner said

21 it will get worse.

22 Q. And if we tried to grade what you would consider

23 your marital relationship on a scale of zero to ten with

24 ten being the most wonderful, zero being terrible,

25 awful, where would you put your relationship, your

1 marital relationship with Lynn on that scale prior to
2 this accident?

3 A. Oh, it was ten. As they say, we had it all: Good
4 family, good relationship. He enjoyed his job, I
5 enjoyed my job. I mean, you know, you had it all as
6 our, as we have it.

7 Q. And how would you score it now on that scale?

8 A. I would say about a two. But we have adjusted.
9 You know, we adjust our life to him.

10 Q. Is Lynn on any medications today?

11 A. Yes, he is.

12 Q. What's he on? Do you know?

13 A. I don't have the name of it.

14 Q. Does he take anything for pain?

15 A. He will take Aleve if his head, as he said, is a
16 busting. When he was a bus driver, they done random
17 drug tests. He would not take any kind of any medicine,
18 anything that would show up or anything. He's never
19 been one to take medicine. But if his head is a hurting
20 where he's just about nauseated or woozy, woozy headed
21 he calls it, he will take something then.

22 Q. How often does that happen, that he gets woozy
23 headed, bad headaches, so bad that he takes Aleve or
24 some over the counter --

25 A. About three times a week it gets real bad.

1 Q. Did he ever have a problem with headaches before
2 this accident?

3 A. No.

4 Q. How about his hearing?

5 A. That gets aggravating, too. When I'm in bed and
6 I'm trying to go to sleep, it's like Grand Central
7 Station, you're at the movie theater.

8 Q. Why?

9 A. It's because he can't hear.

10 Q. So he turns the T.V. up?

11 A. Wide open. Even with the bedroom door shut you can
12 still hear the T.V.

13 Q. I believe Dr. Gardner said he had -- the damage in
14 the picture shows his eye. What was your understanding
15 of the injury to the eye or that socket?

16 A. It was the eye socket down here. I think he's on
17 his third pair of glasses.

18 Q. Since this accident?

19 A. Uh-huh.

20 Q. You have to say "yes" or "no."

21 A. Yes.

22 Q. And his hearing, has it gotten --

23 A. He hears very little. Usually you have to be on
24 the left side so that he can understand what you said,
25 or you look straight at him so that he can read your

1 mouth.

2 Q. Has Lynn had prior to this accident any real
3 problems with depression?

4 A. He has had some, but it's been so long ago, I don't
5 know what it was for. But I know that they said
6 Dr. Booker had had it on record, but it must have been
7 so far I can't remember it.

8 Q. And how about frustration level? Was he easily
9 frustrated prior to the accident?

10 A. No. You could talk to him. I mean, he would
11 laugh. Our granddaughter says, "Why does Papa not laugh
12 no more?"

13 Q. The typical day now that -- you're still working?

14 A. Yes, sir.

15 Q. And Lynn is not employed?

16 A. No, sir.

17 Q. Were there any activities that he used to do, other
18 than his work and his mechanics stuff, that he used to
19 do that he has difficulties with today?

20 A. At...

21 Q. How about household chores, does he perform some?

22 A. He does, he does the household chores. He tries to
23 make it as easy on me as he can because he's not able to
24 work. He feels guilty because he's not able to work and
25 I do.

1 Q. And does he do those chores with the same speed and
2 efficiency that he did prior?

3 A. No.

4 Q. But he still tries to help you?

5 A. Yes.

6 Q. And when I say household chores, what are we
7 talking about here?

8 A. He washes clothes, he does the dishes, whatever
9 needs to be done.

10 Q. Vacuuming?

11 A. No. We've got hardwood floors. But, no, that's
12 about the limit of it. He will make the bed every once
13 in a while.

14 Q. How about the grass cutting?

15 A. Yeah, he cuts the grass.

16 Q. How big a place do you have?

17 A. I think we only got two acres for the house.

18 Q. Do you have a riding mower and he can operate that?

19 A. Yes, sir.

20 Q. And how about, did he have any hobbies prior to
21 this accident that the accident has prevented him from
22 doing?

23 A. Yeah. We, as he said, we rode horses, we camped,
24 we went on trips.

25 Q. Have you tried to do any of that since this

1 accident occurred?

2 A. We have went to Pigeon Forge one time.

3 Q. And how did that work out?

4 A. That was okay. We got GPS. It tells you how to
5 go.

6 Q. Does he still try to ride horses?

7 A. No, sir.

8 Q. Why not?

9 A. I wouldn't let him ride no horse because he cannot
10 jar his head at all.

11 MR. BRANDT: Answer any questions that Mr. Moseley
12 would have for you, please.

13 THE WITNESS: Okay.

14 THE COURT: Cross-examine.

15 Cross-Examination by Mr. Moseley:

16 Q. Mrs. Cobb?

17 A. Yes.

18 Q. You work full-time, correct?

19 A. Yes, sir.

20 Q. And you've worked full-time for years?

21 A. 35 years.

22 Q. 35 years?

23 A. Same place.

24 Q. And during a lot of that time, when Mr. Cobb was
25 driving the bus, that was about four hours a day?

1 A. Yes.

2 Q. Okay.

3 A. He would drive two hours in the morning and two
4 hours in the evening. But since he got tired, when he
5 come home for lunch, I would tell him to lay down and
6 take a nap and then he would kind of be like refreshed
7 that evening and would remember stuff better.

8 Q. And he drove the bus before the accident?

9 A. Yes.

10 Q. Okay.

11 A. Yes. He was driving a dump truck for the School
12 District the day of the accident.

13 Q. Okay. Because that was July and there weren't any
14 buses?

15 A. Yes. School was out.

16 Q. So before the accident he would drive the bus for
17 four hours a day or he would drive the dump truck?

18 A. He only drove the dump truck while it was shut
19 down.

20 Q. In the summer?

21 A. In the summer.

22 Q. Okay. Now, when you got out of the vehicle and you
23 said you turned around and you saw Mr. LaFoy raise his
24 head up?

25 A. Yes. Both hands like this (indicating).

1 Q. Okay. All right. His head was down when you first
2 saw it and you saw him raise his head, right?

3 A. Whenever I seen him, the hand was here, and he was
4 looking at me straight in the eye just like me and you.

5 Q. All right. Well, your testimony is that you saw
6 him raise his head up?

7 A. Yes, this way (demonstrating).

8 Q. His head had to be down before he raised it up,
9 right?

10 A. Well, yeah. Or against his hands.

11 Q. His head was against his hands?

12 A. Like here (demonstrating).

13 Q. All right. And his air bag had not gone off?

14 A. Right. I didn't get close enough to him.

15 Q. Okay. Well, there wasn't an air bag between you
16 and him?

17 A. No. I didn't even go to his vehicle. I got out of
18 our truck. I didn't go to his vehicle. There was a man
19 there pecking on the window, like the thing said. I
20 don't know who he was, don't know if he was a police
21 officer, I don't know anything about -- the only thing I
22 knew was there was somebody with him but there was
23 nobody with Lynn.

24 Q. Okay. There was somebody banging on Mr. LaFoy's
25 window?

1 A. Yes.

2 Q. Okay. All right.

3 A. Telling him -- well, I don't know what they was
4 telling him. But I read what they said, but I don't
5 know.

6 Q. Okay. Now, you normally will go with your husband
7 to doctors' appointments?

8 A. I go with my husband just about everywhere he goes.

9 Q. Okay. Well, even before the accident you were
10 ,going with him to his doctors' appointments?

11 A. Everywhere he goes.

12 Q. Okay.

13 A. That's a wife's place.

14 Q. When he was seeing the cancer doctor, you were with
15 him?

16 A. Yes, sir.

17 Q. When he was with Dr. Mallick --

18 A. Yes.

19 Q. -- about the blood disorder --

20 A. Uh-huh.

21 Q. -- you were there?

22 A. Yes.

23 Q. Okay. And so during all of his treatment you've
24 been an active part of it?

25 A. Yes, I have.

1 Q. Okay. Do you know, do you have any reason to -- do
2 you know why Dr. Mallick would have described your
3 husband as being an irritable patient?

4 A. No, sir. But I will find out.

5 MR. MOSELEY: Okay. All right. I think that's all
6 I've got. Thank you, Your Honor.

7 MR. BRANDT: I don't have anything further.

8 THE COURT: All right. You may step down.

9 (Witness leaves stand.)

10 THE COURT: May I see Counsel?

11 (Discussion at sidebar.)

12 THE COURT: All right. Madam Forelady, I'm gonna
13 suggest we take another break. The next two witnesses
14 are gonna be depositions so we need to set them up to
15 play them. I think one is a video and one is a reading.
16 But, in other words, we do need to set up the equipment.
17 So let's take this as an afternoon break and when you
18 are ready to come back, just knock on the door.

19 Again, do not undertake discussion among yourselves
20 in any way.

21 (Whereupon, the Jury left the courtroom at
22 approximately 3:07 p.m.)

23 THE COURT: All right. Anything from the Plaintiff
24 before we take a break?

25 MR. BRANDT: No.

1 THE COURT: From the Defense?

2 MR. MOSELEY: Have you rested?

3 MR. BRANDT: We're taking a break but I'm gonna
4 rest. If you want it on the record, the Plaintiff
5 rests.

6 THE COURT: All right. What we'll do then, do you
7 want to be heard on your Motions?

8 MR. MOSELEY: Yes, Your Honor.

9 THE COURT: Do you want it now or do you want to
10 wait?

11 MR. MOSELEY: At your...

12 THE COURT: I'm with you.

13 MR. MOSELEY: We can go ahead and do it now, Judge.

14 THE COURT: All right. The Defense [sic] rests.
15 Anything else, Mr. Brandt?

16 MR. BRANDT: No.

17 Defense Motion for Directed Verdict:

18 MR. MOSELEY: Your Honor, we would move for a
19 directed verdict at this time on the grounds that there
20 has been no evidence of any negligence on the part of
21 Mr. LaFoy.

22 THE COURT: Mr. Brandt?

23 MR. BRANDT: Came down the road and he ran out of
24 road and ran into him. I mean, that speaks for itself.
25 That's a *prima facie* act of negligence. The burden is

1 on them to prove that unavoidable or whatever, and they
2 have offered no testimony whatsoever to show that
3 anything was wrong with him. And, as I said, the burden
4 is with them to prove that by a preponderance of the
5 evidence, that excuse.

6 THE COURT: All right. Mr. Moseley, anything else?

7 MR. MOSELEY: Your Honor, the defense that he
8 mentions of sudden emergency, unavoidable accident, we
9 do bear the burden of proof on that. However, I do
10 believe that he's got to come up with some form of
11 evidence of negligence beyond the *res ipsa*.

12 THE COURT: Well, I think the testimony was that it
13 took place under a ---

14 MR. BRANDT: Out of the highway.

15 THE COURT: ---under a shed where the gas pumps
16 were, and I don't remember that being a traveled portion
17 of the highway.

18 Taking the evidence in the light most favorable to
19 the non moving party, it would seem that at least the
20 Plaintiff was where he was supposed to be and the
21 Defendant wasn't. And I have heard no testimony as to
22 any reason why he was in the position he was, but
23 obviously he was --

24 What was it, left of center?

25 MR. BRANDT: He was out of highway. Yeah, he was

1 way left of center.

2 THE COURT: I'm not being facetious at all. But
3 the main thing is I think there's sufficient grounds for
4 it to go to the Jury on the question of negligence.

5 MR. MOSELEY: Thank you, Your Honor.

6 THE COURT: The Motion is denied. And I use the
7 left of center because I think you pled that.

8 MR. BRANDT: Sir?

9 THE COURT: I think you pled the left of center.

10 MR. BRANDT: I did.

11 THE COURT: Very good. All right. Then what we'll
12 do, if it's all right, Mr. Moseley, when we bring the
13 Jury back, Mr. Brandt will rest on the record and then
14 we'll go straight forward, noting that your Motion has
15 already been heard; I mean, we're noting it now so it
16 wouldn't be necessary for us to send the Jury back out
17 if that's okay.

18 MR. MOSELEY: Yes, Your Honor.

19 THE COURT: Very good. So, in other words, be
20 prepared to go forward at that time.

21 MR. MOSELEY: Yes, Your Honor.

22 THE COURT: All right. Let's take a break.

23 (A recess was taken.)

24 THE COURT: All right. Is there anything from the
25 Plaintiff before I bring the Jury back?

1 MR. BRANDT: No, Your Honor.

2 THE COURT: From the Defense?

3 MR. MOSELEY: No, Your Honor.

4 THE COURT: Very good. Ask the Jury to join us,
5 please.

6 (The Jury entered the courtroom at approximately
7 3:28 p.m.)

8 THE COURT: Let the record reflect the Jury and
9 alternate are in the Jury box.

10 All right. We will now recognize Mr. Brandt.

11 MR. BRANDT: The Plaintiff has rested.

12 THE COURT: The Plaintiff rests.

13 Madam Forelady, ladies and gentlemen of the Jury,
14 the Plaintiff has completed their case. Now the Defense
15 will go forward.

16 Mr. Moseley?

17 MR. MOSELEY: Thank you, Your Honor. At this time
18 we'd call Officer Sample to the stand.
19 Whereupon,

20 Joshua L. Sample,
21 after first having been duly sworn, testified as
22 follows:

23 THE COURT: You may proceed.

24 Direct Examination by Mr. Moseley:

25 Q. Would you state your full name, please.

- 1 A. Joshua L. Sample.
- 2 Q. And your uniform says you do something in law
3 enforcement. How about telling us what it is.
- 4 A. I'm a Walhalla City Police Officer.
- 5 Q. Okay. And how long have you been doing that?
- 6 A. A total of six years.
- 7 Q. Okay. And in that job, as part of your job, do you
8 investigate accident cases?
- 9 A. Yes, sir, I do.
- 10 Q. Okay. Did you have an occasion in July of 2007 to
11 investigate an accident involving Mr. Cobb and
12 Mr. LaFoy?
- 13 A. Yes, sir, I did.
- 14 Q. Okay. And feel free -- I realize it was five years
15 ago, so if you need to refer to your report for
16 anything, please do that.
- 17 A. Yes, sir.
- 18 Q. Can you tell the Jury how long it was after the
19 accident was reported that you were at the scene?
- 20 A. Um, I was notified at 5:47 and I arrived at 5:49
21 according to the accident report.
- 22 Q. So two minutes, roughly?
- 23 A. Yes, sir.
- 24 Q. Okay. Can you tell the Jury what you found when
25 you got there?

1 A. Um, as far as what I recall, I mean, I know the gas
2 pump was knocked over was one of the first things I saw.
3 I did see somebody land in the, land in the parking lot,
4 and the vehicle was pinned and that's the only thing I
5 actually recall as of today.

6 Q. Okay. Do you recall if EMTs were on scene when you
7 got there?

8 A. No, sir, I sure don't.

9 Q. Okay. Now, from the -- I'm sorry. So you had --
10 there were vehicles, there were vehicles involved in
11 this accident?

12 A. Yes, sir.

13 Q. Okay. Do you recall where they were, how they were
14 positioned?

15 A. No, sir, not exactly.

16 Q. Okay. And were you able to communicate about the
17 accident with Mr. Cobb who was laying on the ground?

18 A. No, sir. I don't recall. I do not recall talking
19 to him.

20 Q. Okay. And then were you able to communicate with
21 Mr. LaFoy?

22 A. As of that, according to the accident report I did
23 talk to him and he stated he passed out.

24 Q. Okay. And that was what he explained to you at the
25 scene?

1 A. Yes, sir.

2 Q. And you got there two minutes after it was called
3 'in?

4 A. Roughly two minutes, sir.

5 MR. MOSELEY: That's all the questions I have for
6 this witness. Thank you.

7 THE COURT: Cross-examine?

8 Cross-Examination by Mr. Brandt:

9 Q. When you got to the scene, was Mr. LaFoy cognizant
10 and responsive to your questions or your conversation?

11 A. I do not recall, sir.

12 Q. And when he, you say he made a statement to you,
13 did he say he passed out before or after? Do you
14 recall?

15 A. I do not recall.

16 Q. Did he have any injuries, visible injuries?

17 A. No, sir. I do not recall any visible injuries.

18 Q. And again, though, you don't recall him being
19 unconscious at the scene, do you?

20 A. No, sir.

21 Q. You don't recall him -- do you recall him
22 complaining or asking you to go to the bathroom?

23 A. No, sir.

24 Q. Do you recall him saying anything at all about him
25 hurting or where he was hurting?

1 A. No, sir.

2 Q. Did you ask him for his driver's license?

3 A. I'm sure I did, sir.

4 Q. Did you fill out this accident report?

5 A. Yes, sir, I sure did.

6 Q. And where do you normally get that information?

7 A. I get it from the driver's license.

8 Q. He readily rendered his driver's license and wallet
9 to you, did he, or did you have to take it from him?

10 A. I'm sure he just rendered it to me.

11 Q. So, in essence, whatever you asked him there, any
12 conversation, although you don't have a great
13 recollection, that he was responsive to what you asked,
14 what you said, and at least he responded with his
15 driver's license when asked for it?

16 A. No, sir.

17 Q. And there was no indication to you that he was
18 unconscious or had had a period of blacking out, was
19 there?

20 A. No, sir.

21 Q. None at all?

22 A. No, sir.

23 Q. Did you talk to any other witnesses at the scene?

24 A. I talked to an Ashley Cothran and I do not recall
25 what she said.

1 Q. Did you talk to Jill Smith?

2 A. She was -- I talked to her and she said the
3 property damage that they assessed was approximately,
4 she estimated about \$12,000 worth of property damage to
5 the gas pump.

6 Q. And that was her gas pump?

7 A. That was her gas pump.

8 Q. In fact, this collision occurred out of the
9 traveled portion of the roadway, didn't it?

10 A. It was private property.

11 Q. And how far out -- it was off the right-of-way
12 even, wasn't it?

13 A. No, sir.

14 Q. And when you say the vehicle was pinned against the
15 gas pump, whose vehicle was pinned?

16 A. That would be the Plaintiffs'.

17 MR. BRANDT: Put up exhibit number 6.

18 By Mr. Brandt:

19 Q. Officer, was it this gas pump the vehicle was
20 pinned against?

21 A. Yes, sir. Well, I mean, that's obviously a new
22 one, but that's --

23 Q. But that was the same spot?

24 A. Yes, sir.

25 Q. And there's a mark here on this pole right here.

1 Do you see that?

2 A. I can see a spot. I'm not sure exactly what it is.

3 Q. All right. And, in fact, the wheel of my client's
4 vehicle was pinned up against that pole, wasn't it?

5 A. I don't recollect that, sir.

6 Q. Well, was it touching the pole or touching the
7 pump?

8 A. I know for a fact it was touching the pump.

9 Q. And there was extensive damage to the pump?

10 A. Yes, sir.

11 Q. Did you see any black marks or anything from
12 anybody trying to stop the vehicle to keep from a
13 collision?

14 A. No, sir.

15 Q. Did you see -- did you talk to any of the EMTs
16 after they arrived at the scene?

17 A. I probably did, but I don't recollect, sir.

18 Q. Did you talk to Mrs. Cobb at the scene?

19 A. I don't believe I did.

20 Q. Do you recall seeing her?

21 A. I, I can't say that, a hundred percent if I recall
22 seeing her.

23 Q. Did you make any determination as to which
24 direction the LaFoy vehicle was traveling before it left
25 the roadway?

1 A. It was heading up the mountain, which is west.

2 Q. So it would have been going in the, as you go up
3 Main Street, it would have been in the right-hand lane;
4 the lane of travel it would have been in would have been
5 the lane of travel opposite the pumps?

6 A. Yes, sir, westbound.

7 Q. So then the one closest to the pumps is eastbound?

8 A. Yes, sir.

9 Q. And did you, other than Ashley Cothran and Jill,
10 did you talk to anyone else?

11 A. I don't recollect, sir.

12 Q. Okay. So you received a call at 5:47 and you got
13 there within two minutes. And Mr. LaFoy, when you got
14 there, Mr. LaFoy was wide awake, wasn't he?

15 A. Yes, sir.

16 Q. He was responsive to everything you asked him. And
17 you saw no evidence of anybody passing out, did you?

18 A. No, sir.

19 MR. BRANDT: I don't have anything further.

20 THE COURT: Re-exam?

21 Redirect Examination by Mr. Moseley:

22 Q. Officer Sample, when he was asking you questions,
23 you said you didn't, you don't know whether he passed
24 out or whether he told you he passed out before he left
25 the roadway or after at the scene. But you indicated

1 that he was traveling -- that he indicated to you he was
2 traveling on the roadway and passed out, causing the
3 accident, that he passed out when he was still on the
4 roadway.

5 A. Yes, sir.

6 Q. Okay. And, in fact, you noted that it was a
7 medical -- it was ---

8 MR. BRANDT: Objection, Your Honor.

9 THE COURT: All right.

10 MR. MOSELEY: Approach?

11 THE COURT: All right.

12 (Discussion at sidebar.)

13 MR. BRANDT: Do we want to put everything on the
14 record after?

15 THE COURT: Yes, sir. The Motion and also the
16 ruling.

17 Subject to the Court's ruling, you may proceed.

18 MR. MOSELEY: Thank you, Your Honor.

19 By Mr. Moseley:

20 Q. Based on your conversation with Mr. LaFoy, he
21 indicated to you that he passed out before the accident?

22 A. Passed out causing unit 1 to veer, yes, sir.

23 Q. Okay. Let me ask you this. If one of the
24 witnesses would have told you that, "I saw him; he was
25 bright eyed and bushy tailed as he was driving down the

1 road and looked over and smiled at me as he ran into the
2 pump," you would have written that down, right?

3 A. I'm sure I would have, sir.

4 Q. If somebody would have given you any ---

5 MR. BRANDT: Objection, leading.

6 THE COURT: Let's do.

7 Madam Forelady, leading is when a lawyer asks a
8 question that suggests an answer. In other words, what
9 the lawyer is doing is asking the witness to agree with
10 him. And, of course, we want to hear the witness, what
11 the witness knows, not what the lawyer wants the witness
12 to say. So when it's your witness, and this witness was
13 called by the Defendant, you can't lead.

14 Now, on Cross-Examination you can lead because it's
15 the other side's witnesses. But these rules apply to
16 both the Plaintiff and the Defendant.

17 Now with that, restate your question.

18 MR. MOSELEY: Thank you, Your Honor.

19 By Mr. Moseley:

20 Q. Did anybody give you any, anything inconsistent,
21 any information inconsistent with Mr. LaFoy's
22 explanation that he passed out?

23 A. No, sir.

24 MR. MOSELEY: That's all.

25

1 Recross Examination by Mr. Brandt:

2 Q. How many people did you interview or question about
3 any allegation that he passed out?

4 A. It was just the, I'm assuming the driver and Ashley
5 Cothran.

6 Q. And Ashley didn't tell you that, did she?

7 A. No, sir.

8 Q. She didn't even see except for all of a sudden a
9 bang out there? Isn't that all she saw?

10 A. I don't recollect exactly.

11 Q. What did she see? What did she tell you she saw?

12 A. I do not recollect.

13 Q. In fact, you don't even remember the statement you
14 said that Mr. LaFoy made to you, any statements he made
15 to you?

16 A. I do not recollect. All this is listed on the
17 accident report.

18 Q. And you don't know whether it's a general statement
19 about being unconscious or passed out and you just made
20 an assumption, didn't you?

21 A. I do not recall.

22 Q. You could have just assumed it, couldn't you?

23 A. That's a possibility.

24 Q. Yeah. Because you had no proof at all. And did
25 you check into his story at all, if that was what he

1 said to you, that he passed out and ran off the roadway?
2 Did you try to run that down and determine whether that
3 was true or not?

4 A. I do not recall, sir.

5 Q. You don't recall doing your investigation?

6 A. It was five years ago, sir. I've investigated a
7 hundred or so accidents.

8 Q. Does your investigative report have anything in
9 there that says you tried to run that down and determine
10 whether that was true or not?

11 A. No, sir.

12 Q. What does your investigation -- what does your file
13 include?

14 A. I found --

15 Q. You've got the accident report in it and what else?

16 A. I mean, that's all I've got.

17 Q. That's all you've got?

18 A. That's all I've got, sir.

19 Q. No notes, no statements of witnesses?

20 A. No, sir.

21 Q. One thing was, did you even try to make a
22 determination as to the rate of speed that Mr. LaFoy was
23 traveling as he came down the road?

24 A. Um, the only speed I guessed, I guessed 35 roughly.

25 Q. What is the speed limit there?

1 A. It's 35.

2 Q. So you just wrote down 35?

3 A. That was my best assumption.

4 Q. And you are not accident reconstruction qualified,
5 are you?

6 A. No, sir, I'm sure not.

7 Q. Did you check his brakes in his car?

8 A. No, sir.

9 Q. To see if they worked?

10 A. No, sir.

11 Q. But he was certainly left of the centerline of the
12 roadway that he was traveling and on to private property
13 when the accident occurred?

14 A. Yes, sir, it was definitely on private property.

15 Q. And his car was to the roadside, meaning that that
16 truck was at that pump first, wasn't it? He struck the
17 truck and knocked it into the pump?

18 A. Yes, sir.

19 Q. Not the other way around?

20 A. No, sir. It struck the truck causing the truck to
21 strike the pump.

22 MR. BRANDT: Okay. Nothing further.

23 MR. MOSELEY: Nothing further, Your Honor.

24 THE COURT: Very good. All right. You may step
25 down.

1 MR. MOSELEY: May he be excused, Your Honor?

2 THE COURT: Without any objection the Witness may
3 be excused. Thank you, sir.

4 THE WITNESS: Thank you, Your Honor.

5 (Whereupon, the Witness was excused.)

6 MR. MOSELEY: Your Honor, at this time we propose
7 to read the deposition of Dr. David Wheeler.

8 THE COURT: All right. Madam Forelady, ladies and
9 gentlemen of the Jury, apparently this -- not
10 , apparently, but it is a transcribed deposition, in other
11 words, not videotaped, but the testimony was taken down,
12 an examination was taken down by a court reporter under
13 oath just as you saw in the video. The law clerk who is
14 my lawyer, Mr. Couvillion, will read the testimony of
15 the doctor. Is that correct?

16 MR. MOSELEY: Yes, Your Honor.

17 THE COURT: All right. Do you want to tell the
18 Jury what the location and the situation is?

19 MR. MOSELEY: Yes, Your Honor. This is the
20 Deposition of Dr. David Wheeler that was taken on
21 February 22nd, 2011, at the Highlands, North Carolina,
22 Hospital.

23 THE COURT: All right. Do you have the original?

24 MR. MOSELEY: No, Your Honor. Apparently in North
25 Carolina they don't ---

1 MR. BRANDT: I don't have any objection to him --

2 THE COURT: Well, the thing is, let's do provide
3 the court reporter with a copy of it.

4 MR. BRANDT: Here's a copy. I've got an extra
5 copy.

6 THE COURT REPORTER: Thank you.

7 (Court's Exhibit # 2, Deposition of Dr. David
8 Wheeler, was marked for identification and received
9 into Court's Evidence.)

10 MR. BRANDT: Do you wish one?

11 THE COURT: No, thank you.

12 (Whereupon, the Deposition of Dr. David Wheeler was
13 read to Jury by Robert D. Moseley, Esq., and
14 Matthew Couvillion, Esq, from approximately 3:46
15 until approximately 3:51 p.m., which was marked and
16 received in Court's Evidence as Court's Exhibit
17 Number 2, after which the following occurred.)

18 MR. MOSELEY: Your Honor, we would call Dan LaFoy
19 to the stand.

20 Whereupon,

21 Dan M. LaFoy

22 after first having been duly sworn, testified as
23 follows:

24 Direct Examination by Mr. Moseley:

25 Q. Would you state your full name, please?

- 1 A. Dan M. LaFoy.
- 2 Q. Okay. And where do you live?
- 3 A. I live in Sapphire Valley.
- 4 Q. Okay. And tell me, are you married? I'll speak
- 5 up. Are you married?
- 6 A. No. I'm a widower.
- 7 Q. Okay. How long were you married?
- 8 A. It's been 11 years.
- 9 Q. And how long were you married when your wife died?
- 10 A. Almost 50 years. 49, 49 years and 12 months we'll
- 11 say.
- 12 Q. Okay. And how long have you been living as a
- 13 widower?
- 14 A. 20, I've been living up there for about 24 years
- 15 now.
- 16 Q. Okay. And let me ask you this. Do you have
- 17 children? Did you and your wife have children?
- 18 A. Two girls.
- 19 Q. All right. And is one of them in the courtroom
- 20 with us today?
- 21 A. I'm sorry?
- 22 Q. Is one of your daughters in the courtroom with us?
- 23 A. Yeah, she's here today.
- 24 Q. Okay. And this is Nancy?
- 25 A. That's Nancy, right.

- 1 Q. And you have another daughter?
- 2 A. Named Cathy, and she's in Atlanta.
- 3 Q. And you have some grandchildren?
- 4 A. Two grandchildren.
- 5 Q. All right.
- 6 A. Catherine and Haley.
- 7 Q. All right. Now, where did you grow up?
- 8 A. I grew up in Anderson, South Carolina.
- 9 Q. Where did you go to high school?
- 10 A. Boys High School.
- 11 Q. And after you graduated from Boys High School in
- 12 Anderson, where did you go?
- 13 A. Went in the Service.
- 14 Q. Okay. What ---
- 15 A. United States Navy.
- 16 Q. What was happening at that time?
- 17 A. That was World War II.
- 18 Q. Okay. And then after World War II, did you come
- 19 home?
- 20 A. I came home, yes.
- 21 Q. And where did you go to work?
- 22 A. I went back to work at the Chevrolet dealership in
- 23 Anderson.
- 24 Q. Okay. How long did you work there?
- 25 A. About 15 years.

- 1 Q. And then where did you go?
- 2 A. Then I went to Greenville and I went to work for
- 3 Thaxton Chevrolet.
- 4 Q. Okay. And how long did you work there?
- 5 A. About, let's see, five years.
- 6 Q. Okay. And then where did you go?
- 7 A. Then I went to Sitton Buick in Greenville.
- 8 Q. After that, were you tired of the automotive
- 9 industry?
- 10 A. Yeah. I went to -- decided I'd move to Florida.
- 11 Q. Okay. And where did you go, where did you work
- 12 then?
- 13 A. I worked at Pratt & Whitney.
- 14 Q. And what's Pratt & Whitney?
- 15 A. That was a research and development center for jet
- 16 engines and rocket engines.
- 17 Q. Okay. And what did you do there?
- 18 A. I was a lead technician.
- 19 Q. Were you on the line?
- 20 A. Sir?
- 21 Q. Were you on the assembly line?
- 22 A. No, no, no. They didn't have an assembly line *per*
- 23 *se.*
- 24 Q. Okay. Did you build engines?
- 25 A. It was a development for government projects.

1 Q. Okay. And did you build engines?

2 A. I didn't, I did not myself, no.

3 Q. Okay. And then after -- how long did you work
4 there?

5 A. Um, about 27 and a half years.

6 Q. And then what did you do, you retired?

7 A. I retired in 1987.

8 Q. Okay. And is that when you came back to this area?

9 A. I stayed in Florida for about a year, and I had a
10 house being built in '88, and then stayed in Atlanta for
11 six months till the house was finished up in the
12 mountains.

13 Q. Okay. And then you have been here ever since?

14 A. Same place.

15 Q. Okay. Now I want you to tell the Jury what
16 happened on July the 5th, 2007? And let me start you
17 off at your lunch. You had lunch in Seneca?

18 A. Had lunch with a lady and her daughter in
19 Atlanta -- in Seneca. And after we had dinner, we sat
20 there and chatted a little bit. And I would say that it
21 was about 2:00 or 2:30 we finally finished up and still
22 doing some talking. And went out to the car. And she
23 had gotten me some things that I needed, and they went
24 back to Anderson and I left and went to Seneca and did a
25 little bit of shopping. And then went back towards the

1 mountains.

2 Q. All right. When you got to Walhalla --

3 A. Yeah, Walhalla.

4 Q. -- tell the Jury what happened when you got back to
5 Walhalla.

6 A. I left Seneca and came up 130, all the way to
7 Keowee and then 183 that I came up on. And I decided
8 that I hadn't been through Walhalla in a long time. So
9 I came up 183 all the way to the Main Street in
10 Walhalla, and when I stopped at the red light, two
11 police officers pulled up beside me in their car and I
12 spoke to them, and the light changed and I went to the
13 right and they went to the left.

14 And I, just a short time after I made that turn I
15 had the extreme urge to go to the bathroom. And it was
16 getting so bad I figured, well, I would find some place
17 where I could go, and I did find a convenience store
18 there at the Pure oil station, I think it is. And that
19 was when the highway went into two lanes. And I slowed
20 down and made my left-hand turn, and when I made the
21 turn to go in, I passed out, I fainted.

22 And the next thing I know was a policeman, I came
23 to, and a policeman was banging on my window and telling
24 me to please turn the ignition switch off because they'd
25 had a gas spill. So he reached in and started reaching

1 and threw the keys up on the dash. And shortly, and he
2 was asking me a lot of questions about, Well, what's
3 your name?

4 And I gave him my name.

5 He says, Where do you live?

6 I told him.

7 He wanted to know how old I was, and I told him.

8 And a few minutes later the EMS people got there
9 and they started treating me, stabilized my neck and put
10 me on a stretcher. And the next thing I know I'm on my
11 way to the hospital.

12 Q. Okay. Did your air bag go off in your vehicle?

13 A. No air bags came on at all. None at all.

14 Q. Okay.

15 A. Damage to my -- do you want...

16 Q. No, sir. I think that's all the questions I have
17 for you. Thank you.

18 MR. MOSELEY: Please answer any questions that they
19 may have.

20 THE WITNESS: All right.

21 THE COURT: Cross-exam.

22 Cross-Examination by Mr. Brandt:

23 Q. Mr. LaFoy, what kind of vehicle were you driving?

24 A. A 2007 Jeep Grand Cherokee Laredo.

25 Q. Did it have a gearshift in the floor or in the

1 column?

2 A. Yeah, in the floor, right.

3 Q. In the floor?

4 A. That's right.

5 Q. When you say this cop or whoever it was reached in,
6 did they reach, did they do anything other than just
7 reach in and get the keys and pull them out?

8 A. No. Well, he -- I rolled the window down and he
9 reached in grabbed the keys and turned it off. He
10 wanted me to, but he got there first, and threw the keys
11 up on the dash.

12 Q. And the car was still running when he got there?

13 A. Evidently it was 'cause that's the reason he wanted
14 to shut the engine off.

15 Q. Okay. You understood every question and every
16 statement that police officer or whoever it was said to
17 you, didn't you?

18 A. Yes, sir. He asked for my driver's license and
19 everything.

20 Q. And you responded appropriately to everything?

21 A. That's true.

22 Q. Did you have any injuries?

23 A. I think I bumped my nose and it was bleeding a
24 little bit but not real bad.

25 Q. And are you a diabetic?

1 A. No, sir.

2 Q. You stated that you were at lunch --

3 MR. BRANDT: And I guess we need to approach before
4 we ask this question.

5 (Discussion at sidebar.)

6 THE COURT: I'll note the objection.

7 All right. You may proceed.

8 By Mr. Brandt:

9 Q. Mr. LaFoy, I understood you say that you had been
10 at lunch that day with friends?

11 A. Yes.

12 Q. And what had you had to eat that day?

13 A. I think I had chicken strips, or chicken fingers,
14 honey mustard, cole slaw, and french fries, a cup of
15 coffee, and also a small whiskey sour drink.

16 Q. Okay. And you just have one?

17 A. Just not even the whole one, yes, that's right.

18 Q. And how long was it after you ate that meal did the
19 accident happen?

20 A. Well, I figured by the time I had the accident I'd
21 say it had to have been at least three hours.

22 Q. And you had gone on and had some, did some shopping
23 after the lunch?

24 A. That's right.

25 Q. I think I asked you, you stated you have never been

1 diagnosed with diabetes, have you?

2 A. I'm sorry?

3 Q. You don't have diabetes, do you?

4 A. No, huh-uh.

5 Q. And have you ever been diagnosed with any
6 condition, either before or after, that caused you to
7 black out or lose consciousness without warning?

8 A. The only thing that I can figure would be, I have
9 good health, high blood pressure, and I have a prostate
10 problem and I'm taking medicine for that.

11 Q. And had you taken the blood pressure medication
12 that morning?

13 A. This morning?

14 Q. That morning. The last --

15 A. Yes, I had.

16 Q. And had you taken anything else, any other
17 medication?

18 A. Only Ecotrin, which is an aspirin. I take one of
19 those every morning.

20 Q. Now, has any doctor in the last ten years, have you
21 sought care or treatment for any spells of dizziness or
22 faintness?

23 A. Um, offhand, I can't think of anything that I would
24 have to go for. No, I -- okay.

25 Q. You've never gone to the doctor complaining of

1 dizziness, have you?

2 A. No, no.

3 Q. And you haven't gone to the doctor and complained
4 that you just fainted for no reason, have you?

5 A. No, no.

6 Q. And that was before the accident?

7 A. That's right.

8 Q. And since the accident you haven't?

9 A. No problems.

10 Q. Haven't had any problems, have you?

11 A. (Shook head.)

12 Q. And when they got to the hospital -- they took you
13 to the hospital, too, didn't they?

14 A. Oh, yeah.

15 Q. And when they got there, they ran tests on you,
16 didn't they?

17 A. They ran all kinds of tests.

18 Q. And the doctors that you talked to there told you
19 they couldn't find any problems that you had, didn't
20 they?

21 A. No. That's true.

22 Q. And they did all these tests and checked you out to
23 try to find the cause for you, your claim that you
24 blacked out, didn't they?

25 A. Yes.

1 Q. They didn't find any cause, did they?

2 A. No.

3 Q. And it's not happened to you since?

4 A. No.

5 Q. And it hasn't happened to you before?

6 A. No.

7 Q. Have you traveled that roadway before?

8 A. I never have been on 183 all the way to Walhalla,

9 no, but I've been from Walhalla up to the mountains

10 quite often.

11 Q. Yes. You didn't come in to Walhalla that way, but

12 you went -- you had been by Head's Superette on that

13 part of the road before?

14 A. Oh, yes.

15 Q. And when you were going to turn in to the Head's

16 Superette, that store is on a corner, isn't it?

17 A. It's not on a corner, more or less. It's a street

18 that goes down before you get to it, but the station is

19 right close to the highway.

20 Q. Yeah. But it's, what I'm saying is, there's

21 nothing between that street to the left -- I believe

22 that might be Maple Street, is that -- no. That goes

23 out toward Coffee Road, there's nothing between that

24 street and the property of the station or the thing?

25 A. That's true.

1 Q. And you were going to turn in to that street?

2 A. No. Into the station.

3 Q. And you were going to turn into the front of the
4 station?

5 A. Yeah. And I was gonna go around the pumps and come
6 back to find a parking space.

7 Q. So you intended to drive around the pumps?

8 A. That's right.

9 Q. Now, did you see that truck at that pump?

10 A. When I started, when I was slowing down getting
11 ready, I had looked that way to see what was there, and
12 I did see the truck sitting there at that pump.

13 Q. Did you see any people about that truck?

14 A. I saw no one around the, around the truck.

15 Q. Did you ever see Mr. Cobb on the ground at the --

16 A. No.

17 Q. Are you being treated by any doctor today other
18 than Dr. Wheeler?

19 A. No, sir.

20 MR. BRANDT: I don't have anything further.

21 THE COURT: Re-exam?

22 MR. MOSELEY: Nothing, Your Honor.

23 THE COURT: All right. You may step down.

24 (Witness leaves stand.)

25 THE COURT: Do you have the original of the

1 transcript as well as the video?

2 MR. MOSELEY: I have the original of the
3 transcript. This is the only video.

4 THE COURT: Very good. Just give the original to
5 the Court Reporter. Just a second while she marks it.

6 (Court's Ex. # 3, Original Deposition transcript of
7 Jennifer L. Hanke, M.D., taken on November 30,
8 2011, was marked for identification and received in
9 Court's Evidence.)

10 (Court's Ex. # 3.1, DVD of the Deposition of
11 Jennifer L. Hanke, M.D., taken on November 30,
12 2011, was marked for identification and received in
13 Court's Evidence.)

14 (Court's Exhibit # 3.1 DVD of the videotaped
15 Deposition of Jennifer L. Hanke, M.D., taken on
16 November 30, 2011, was played for the Jury from
17 approximately 4:10 p.m. until approximately 4:40
18 p.m., after which the following occurred.)

19 MR. MOSELEY: Your Honor, the Defense rests.

20 THE COURT: Any reply?

21 MR. BRANDT: Your Honor, I may have one reply
22 witness, but they won't be available until in the
23 morning.

24 THE COURT: Very well. All right. Ladies and
25 gentlemen of the Jury, that appears to be as much as we

1 , can do today. With the Defense resting, then, of
2 course, if the Plaintiff has a reply to what the Defense
3 said, it has to be something, not something that was
4 brought up before but something in reply to the Defense
5 testimony. It will not be extensive testimony because
6 that's not the testimony you have in your case-in-chief.
7 But the only thing is we can't continue until we do hear
8 the reply testimony. So, therefore, we're going to
9 recess for the evening.

10 But that should complete the trial of the case as
11 far as the testimony and evidence, and so this case will
12 probably go to you in the morning. And so, again, you
13 have not heard the reply testimony, nor have you heard
14 the argument by counsel on the charge or the law that
15 I'll be giving you before you actually begin your
16 deliberations; so again, please do not undertake
17 discussions of the case amongst yourselves or permit
18 anybody to discuss it with you.

19 What time -- Madam Forelady, if you would check
20 with your Jury and see what time you would like to start
21 in the morning. This is just a consensus, not a
22 unanimous verdict, but just what time do you think the
23 Jury -- you know what you have to do before you get here
24 and how long it takes and all. So just check with them
25 in the box there. I'd say either 9:30, 10:00, something

1 of that nature.

2 THE FORELADY: 9:30.

3 THE COURT: 9:30? Very well. All right. At 9:30
4 come back to the Jury room that you have been using and
5 then we will commence the trial of the case at that
6 time.

7 Again, everyone else remain seated while the Jury
8 retires from the courtroom.

9 (Whereupon, the Jury left the courtroom at
10 approximately 4:42 p.m.)

11 THE COURT: All right. Anything further from the
12 Plaintiff?

13 MR. BRANDT: Not -- the only thing I guess we need
14 to do before we break is put those objections on the
15 record we had at the sidebar.

16 THE COURT: All right. Which -- give me your
17 objections again. The last one on the lunch, I'm afraid
18 the Defendant took care of, he sort of volunteered what
19 his menu was.

20 MR. BRANDT: I just want to put on there basically
21 they got in some evidence that I was a little late on.
22 And then they started asking without any medical reason
23 on the back, but I don't think he even asked the
24 question.

25 MR. MOSELEY: I didn't ask him the question, Your

1 Honor.

2 MR. BRANDT: So we probably are ---

3 THE COURT: I think I will overrule the objection
4 at the time, and that's gonna be my ruling.

5 And then I'll note your objection to my ruling, and
6 then I'll note your objection to my not instructing the
7 question of the lunch. All right.

8 MR. BRANDT: But I think really the record
9 cleared -- I mean, it cured itself. But, anyway, I just
10 want to make sure out of an abundance of caution.

11 THE COURT: Well, we've got whatever we need on the
12 record for that purpose. All right.

13 I'm going to wait to hear the reply. But I would
14 hope to go to the Jury in the morning.

15 MR. BRANDT: Maybe it would be a brief reply, It
16 won't be anything real repetitive.

17 THE COURT: So do I have all of the requests?

18 MR. MOSELEY: Yes, Your Honor.

19 THE COURT: All right. I'll wait until I get your
20 final Motions and all that. Very good. All right.
21 I'll see you in the morning at 9:30.

22 (Court adjourned at 5:00 p.m. on January 11, 2012,
23 to resume on January 12, 2012, at approximately
24 9:30 a.m.)

25

1 January 12, 2012

2 9:37 a.m.

3 THE COURT: Plaintiff ready to proceed?

4 MR. BRANDT: The Plaintiff is ready.

5 THE COURT: Is the Plaintiff gonna put up any
6 witnesses?

7 MR. BRANDT: No, sir.

8 THE COURT: Anything from the Defendant before we
9 proceed?

10 MR. MOSELEY: No, Your Honor.

11 THE COURT: All right. I understand the Plaintiff
12 has a Motion?

13 MR. BRANDT: Yes.

14 Plaintiffs' Motion for Directed Verdict:

15 MR. BRANDT: I'd move for a directed verdict on
16 liability in favor of the Plaintiffs inasmuch as the
17 only evidence that's shown, that it's basically based on
18 a self-serving statement from the Defendant of his
19 defense. The elements of negligence have been firmly
20 established, leaving only one reasonable decision to be
21 made by the Jury factually in that regard.

22 I think there was a case that has been handed up
23 and it's gonna be a charge --

24 THE COURT: Which one is that case?

25 MR. BRANDT: *Collins v. Frasier*. On the sudden

1 incapacity or unforeseeable incapacity to operate a
2 vehicle.

3 THE COURT: You say it's been handed up?

4 MR. BRANDT: Yes, sir.

5 MR. MOSELEY: Yesterday I handed it up, Your Honor.

6 THE COURT: Oh, is that the *Collins* case?

7 MR. MOSELEY: Yes, sir.

8 THE COURT: Oh, I've seen that one.

9 MR. BRANDT: Yes, sir. And that case clearly
10 states that a Defendant's own self-serving testimony is
11 insufficient by itself to create a question of fact --

12 THE COURT: Give me a cite number on it. I mean, I
13 got the case. Where are we talking about in the case?

14 MR. BRANDT: The, out of the body of the case,
15 written by Kittredge, it's over on the last page of it,
16 on page 3 of that opinion, item 3.

17 THE COURT: All right. Headnote 3?

18 MR. BRANDT: Uh-huh.

19 THE COURT: (Reads document.)

20 All right. Anything else on that, Mr. Brandt?

21 MR. BRANDT: Yes. What you have is, of course, his
22 claim standing alone. So then you have to turn to
23 Dr. Hanke's testimony. And basically this case, the
24 *Collins* case, they found that the, it was entitled to go
25 to the Jury on that because there was an underlying

1 medical cause. In essence they found that the testimony
2 was that he did, in fact, have hypoglycemia, a medical
3 condition which would cause this. The testimony here
4 does not show any underlying medical condition which
5 would cause it. Everything they looked for was ruled
6 out.

7 I specifically asked for the doctor to point in the
8 medical records to any evidence, objective evidence that
9 would support the theory that he blacked out before
10 impact, and she said, I suppose you can't. That was her
11 testimony.

12 He said, she said, We can only allude to the fact
13 that there was some other precipitating illness.

14 Well, allude means to indirectly; to get to what
15 allude means you play into that. But all through that
16 she says that she's just made assumptions. And she
17 said, So, you know, he had an acute illness that we
18 assume caused him to be in this car accident. But they
19 looked for that acute illness. They never found any
20 evidence of it whatsoever. And the testimony is that he
21 says he started his turn and he maybe traveled just over
22 to the gas pumps, he had already started into his turn,
23 and he says, I didn't -- that's the last I remember.

24 He hit the car. The first witness that sees him,
25 the only witness we had that observed him immediately

1 was Ms. Cobb, and she said, He had his hands on the
2 wheel, it looked like he was down this way but he was
3 raising up and his eyes were wide open. All the
4 evidence at the scene says that he was in charge of all
5 his mental faculties and everything at the time.

6 The police officer, well, for what it was worth he
7 didn't say anything. But Mr. LaFoy admitted that when
8 the police officer was questioning him, asking for his
9 wallet, he knew where it was, he gave it to him. So,
10 there's no evidence, there's no witness that says they
11 saw him slumped at the wheel, or that he wasn't
12 coherent, he wasn't in charge of his full faculties.

13 Dr. Hanke saw him some hours or an hour or so, two
14 hours, maybe, after he got to the hospital. She said
15 she dictated her note at 10:00, she doesn't know when
16 she exactly saw him. But she used -- so in this
17 instance we were under the assumption he had -- under
18 the assumption -- that he had this sudden urge to
19 defecate that caused him to pass out. Under the
20 assumption.

21 And the assumption, what does assumption mean?
22 Assumption says, We accept it as fact without proof.
23 We're gonna operate on that. We're just gonna accept
24 that as being true. But she used that word assume or
25 assumption I think five or six times throughout her

1 testimony relating back to this condition that they just
2 made the assumption that it did exist. And again, the
3 assumption is there's no proof and that she didn't go on
4 and back it up with any kind of proof of an underlying
5 condition.

6 In the *Collins* case the doctor did because
7 hypoglycemia can cause that, and he had it. Mr. LaFoy
8 testified that prior to the accident he had never had
9 one, since the accident never had one, some five years
10 out. He never had any questions of dizziness, balance
11 problems or anything.

12 So, when you take her testimony, which is no proof
13 at all, or anything, you are left with hers, her opinion
14 based on his allegation, his statement, and that's it,
15 without any other evidence. And so I submit that he's
16 not even entitled on a charge on that, and if you take
17 that defense away, then we have proved our case
18 certainly by a preponderance of the evidence on
19 liability, and there's only one reasonable inference
20 that can be drawn from the evidence, and that is that
21 the verdict is, the Plaintiffs are entitled to a verdict
22 on liability. Thank you.

23 THE COURT: All right. Mr. Moseley, what do you
24 say?

25 MR. MOSELEY: Your Honor, I think the, Mr. Brandt

1 makes the test a little too difficult. The test is not
2 that we have to prove sudden loss of consciousness.
3 We'll have to prove the cause of the loss of
4 consciousness, and so --

5 THE COURT: Well, then, without a cause you are
6 left with (reading): Self-serving testimony is
7 insufficient by itself to create a question of fact as
8 to the defense.

9 MR. MOSELEY: Well, Your Honor, we do have an
10 expert who says he passed out before the accident. I
11 think that's the test we have to meet.

12 THE COURT: Except that was a deposition, was it
13 not?

14 MR. MOSELEY: That was her trial testimony here
15 yesterday.

16 THE COURT: But her deposition, not trial
17 testimony, not in court. She hadn't heard any testimony
18 of the witnesses here.

19 MR. MOSELEY: That's true.

20 THE COURT: And did she not also testify that the
21 reason she was comfortable with that assumption, she
22 even said to a 99 percent, was because there were no
23 other eyewitnesses?

24 MR. MOSELEY: She said that she could not find
25 anything to the contrary because there were no

1 eyewitnesses.

2 THE COURT: That's right.

3 MR. MOSELEY: But she also more importantly relied
4 on physical evidence of --

5 THE COURT: But she also said no evidence of
6 seizure, either objective or otherwise.

7 MR. MOSELEY: That's what she said, that's correct.

8 THE COURT: So, what you have really, her whole
9 testimony was based on a single self-serving statement.

10 MR. MOSELEY: I disagree, Your Honor.

11 THE COURT: What do you say about the wife's
12 testimony?

13 MR. MOSELEY: I mean, she says -- her testimony was
14 that his hands were on the wheel and he raised his head
15 up, okay?

16 THE COURT: Immediately after the collision.

17 MR. MOSELEY: Okay. Well, it's clear that --

18 THE COURT: So, I mean, if you are in a seizure,
19 you are blacked out. You would think that if you are
20 out before, you would be out afterwards.

21 MR. MOSELEY: Your Honor, I'm --

22 THE COURT: I'm just, I mean, all I'm saying is I
23 agree with you, as did Judge Kittredge, that if there is
24 testimony based on evidence that would support the
25 finding that there would be, you know, incapacity, then

1 it goes to the Jury. But here, even the doctor's
2 statement is that her opinion was based on the absence
3 of testimony.

4 MR. MOSELEY: Her opinion was also based on the
5 physical evidence of --

6 THE COURT: Again, what was the physical evidence?
7 I understood that she did all the tests and everything
8 and they could find nothing.

9 MR. MOSELEY: Your Honor, she said that he had
10 bloody diarrhea, which was consistent with his passing
11 out prior to the accident. So, I think her, Mrs. Cobb's
12 testimony, she sees him raising his head up. There's no
13 requirement that he be passed out for a certain amount
14 of time after the accident.

15 THE COURT: It's a requirement he be passed out at
16 the time of the accident.

17 MR. MOSELEY: He has to be passed out before the
18 accident occurred.

19 THE COURT: No, at the time.

20 MR. MOSELEY: And so --

21 THE COURT: I mean, he probably took a nap sometime
22 in the day before or something. But we're talking about
23 at the event, and there is no testimony that he was,
24 other than his own.

25 MR. MOSELEY: And, Your Honor, I think Dr. Hanke

1 clearly says he passed --

2 THE COURT: In the absence of any eyewitness
3 testimony. She was very careful about that. So, I
4 mean, I'm not saying -- I'm just saying that Dr. Hanke
5 was very forthright. She was using her best judgment,
6 and based on what the emergency room physician said, the
7 fellow shows up with bloody diarrhea, that he's going to
8 admit him. So based on that. But again, her whole
9 testimony was that in the absence of eyewitness
10 testimony, of course, she was talking about a passenger.
11 But she didn't have the benefit of the eyewitness
12 testimony looking at -- I mean, that was it. I don't
13 know -- you know, you can talk about the credibility of
14 it. But when she says she looked and he made eye
15 contact, I think was what the testimony was.

16 MR. MOSELEY: Well, Your Honor, she testified --

17 THE COURT: And then, of course, the officer said
18 he got there within two minutes and he was giving him
19 his address and his license.

20 I don't know. Just tell me again. Now, what is
21 her testimony based on.

22 MR. MOSELEY: Her testimony is based on his bloody
23 diarrhea, which he was reported to have had, that she
24 testified that he had it in the car, not on the way, and
25 that's what the emergency room report documented, that

1 he had, he had bloody diarrhea while he was still in the
2 car. So, that would be --

3 THE COURT: What would that be based on?

4 MR. MOSELEY: That was the emergency room report.

5 THE COURT: Well, the emergency room wasn't in the
6 car with him before the accident.

7 MR. MOSELEY: Your Honor, I think --

8 THE COURT: Well, I'm just curious. I understand
9 that the history is considered not hearsay.

10 MR. MOSELEY: Right.

11 THE COURT: But the only thing is, it's an awfully
12 close question, particularly in the light of Dr. Hanke's
13 testimony that her whole assumption was based on no
14 eyewitness. And, of course, she hasn't heard the one
15 eyewitness. And you would say she was an eyewitness.
16 She was there before the accident, she was there during
17 the accident and she was there after the accident.

18 MR. MOSELEY: Your Honor, Counsel had her
19 deposition at that time and could have easily -- that
20 she gave the same testimony, that he raised his head up
21 after the accident. That's what she said in her
22 deposition.

23 THE COURT: Well, unfortunately, the burden of
24 proof on this defense is not on the Plaintiff.

25 MR. MOSELEY: Well, Your Honor, I think the

1 physical evidence that --

2 THE COURT: I know what you think. I'm just
3 asking, why didn't you ask her? Would your testimony be
4 the same if the only eyewitness to the event said that
5 there was no lapse and immediately after the accident he
6 made eye contact?

7 MR. MOSELEY: Well, Your Honor, I don't think her
8 testimony is that clear. In fact, her testimony is that
9 he raises his head up which means his head was down. So
10 I think that's consistent with her opinion that he
11 passed out prior to the accident.

12 MR. BRANDT: Your Honor, there was one place that
13 talked about those bloody defecations.

14 THE COURT: Just a moment. Let me be sure that I
15 have what I want.

16 All right. My notes, and I think they were made at
17 the time of the testimony, so I guess they have some
18 reliability. Undid the seatbelt. Plaintiff gave her a
19 check for gas. Filled it out while he went out to pump
20 gas. She undid the seat belt to write the check.

21 Heard noise. Shook whole truck. Opened door,
22 looked out, saw Defendant, made eye contact.
23 Defendant's hands were on wheel.

24 I mean, that was her testimony, that she hears a
25 noise, looks up, and then makes immediate eye contact.

1 MR. MOSELEY: Your Honor, there was also
2 independent testimony from the doctor about the changes
3 in his blood pressure that were consistent with him
4 passing out at the time of the accident. So I think
5 that's objective and it doesn't depend on the statement,
6 it doesn't depend on the self-serving statement.

7 MR. BRANDT: The changes --

8 THE COURT: Wait a minute, Mr. Brandt. I want to
9 make sure Mr. Moseley is completely heard because I've
10 got problems with it myself. I'm looking for something
11 other than a 99-percent assumption.

12 MR. MOSELEY: She used that term, which again, I
13 don't think her testimony is that she's depending on
14 him. She says that he had bloody diarrhea, which is
15 consistent with somebody passing out. He had the urge
16 to defecate, which was consistent with somebody passing
17 out. He had the sweatiness, which was consistent with
18 somebody passing out. I guess taken in the light most
19 favorable to the Plaintiff, maybe the sweating is
20 something that would depend on his statement, I was
21 sweating. All right?

22 But the bloody diarrhea is objective. That is
23 independent of the statement. And so somebody, she
24 testified that the bloody diarrhea could not have
25 developed after the accident in such a short period of

1 time. It had to preexist the accident.

2 So, that doesn't depend on this statement. The
3 changes in the blood pressure levels, that doesn't
4 depend on the statement. So, all of those things are
5 independent of a self-serving statement, and so I think
6 they meet the test in *Collins*.

7 THE COURT: All right.

8 MR. BRANDT: She also goes through all that and
9 takes every one of those things, bloody stool and
10 everything else, and she says that can be caused by a
11 lot of things other than -- and it doesn't necessarily
12 indicate syncope. She says again -- I was asking her
13 basically (reading):

14 Well, when did he lose control? Tell me everything
15 before impact or after.

16 And she goes back and says, The bloody diarrhea,
17 the sweatiness, and just his story.

18 She also says -- so I said (reading):

19 So basically you are taking the patient's word for
20 it?

21 Right.

22 The blood pressure change, she alluded to it
23 indirectly, but said a nurse in the hospital, she said a
24 nurse put that in the record. Well, that was after he
25 got to the hospital. It doesn't even relate back to the

1 time of the accident.

2 And then she says his vitals when he was in the
3 hospital, he was lucid, he was very coherent, and the
4 whole time he was there his vitals didn't change
5 significantly, they were stable.

6 I said, condition one and he stayed condition one
7 all the way through?

8 And she said, Yes.

9 So, the blood pressure, even though she was kind of
10 fighting for it, she kind of throws it in there --

11 THE COURT: Just a moment. Let me -- I do need a
12 copy of her deposition.

13 MR. BRANDT: Of her deposition? Certainly.

14 THE COURT: Which I should have got. Obviously
15 that would be a little more reliable than my notes.

16 MR. BRANDT: Here is her deposition. And if you
17 need reference to any of these pages, I think I can get
18 you, I think, pretty close.

19 THE COURT: Let me start with my notes and see.

20 MR. BRANDT: And on page 15, which is where when I
21 ask her point to the medical reports that would support
22 the theory that he blacked out before impact.

23 She says, I suppose you can't.

24 I don't have the lines, but it's supposedly on page
25 15 according to my notes.

1 She talks about diaphoresis, a sudden change in
2 temperature, and she says that it could be caused by a
3 lot of things.

4 She says the blood pressure -- was probably
5 somewhere around page 16 -- said it could be a
6 contributor, but blood pressure drops up and down
7 anyway. And she even said basically people being
8 excited, when they get excited, it changes things. She
9 talked about adrenaline rush. But she never found that
10 any of those things attributed to it? No. There was no
11 underlying cause for any of that stuff to happen? No.
12 Never talks about it.

13 Again used assumption. Assume or assumption was
14 used something like five or six times.

15 I think around page 20 and 21 she says, So, in this
16 instance, or words to the effect that in that instance
17 they were under the assumption that he had this sudden
18 urge to defecate that caused him to pass out. Again,
19 assume, the common meaning is you just take it without
20 proof.

21 (There was a pause in the proceedings.)

22 THE COURT: All right. Anything else, Mr. Brandt?

23 MR. BRANDT: No, sir, Your Honor. I think my
24 Motion and the grounds therefor are plain.

25 THE COURT: Mr. Moseley?

1 MR. MOSELEY: Your Honor, we would also throw out
2 the fact there was no skid marks or anything like that a
3 person who was conscious would have made trying to avoid
4 the accident.

5 MR. BRANDT: Your Honor, if I may, our response,
6 just to put on the record in response to the blood
7 pressure thing. She said it was done at the hospital.
8 And, she said, If someone passes out from a low blood
9 pressure event, they usually become sweaty, nauseated,
10 vomit, then pass out.

11 There was no nausea, there was no vomiting.

12 THE COURT: Well, also, if I'm not mistaken, the
13 blood pressure as well as with the bloody diarrhea were
14 bases for admitting him for observation --

15 MR. BRANDT: Yes, sir.

16 THE COURT: -- part of the medical treatment rather
17 than anything.

18 MR. BRANDT: Right.

19 THE COURT: All right. Anything else, Mr. Moseley?

20 MR. MOSELEY: No, Your Honor.

21 THE COURT: All right. I, as I say, it's a very
22 close question, particularly with what Justice Kittredge
23 noted. On page 12, lines, beginning with line 14 of
24 Dr. Hanke's testimony, I think this is
25 Cross-Examination, (reading):

1 Do you find any objective evidence in your
2 examination of Mr. LaFoy that would support his claim
3 that he, quote, blacked out before the accident
4 occurred?

5 Answer: I mean, the only thing that I would have,
6 you know, just like anyone that would come, that's
7 incontinent, we, you know, usually take their word for
8 it. But, you know, he did sustain some skin abrasions
9 and a bloody nose and then the soiling of himself. You
10 know, that would be consistent with someone, you know,
11 who didn't have control.

12 Why did he lose control? After impact or -- excuse
13 me -- When did he lose control? After impact or before?

14 You know, typically, I mean, the way he related it,
15 and he did mention that he had a friend here. I don't
16 recall that, but I think he was alone in the car from
17 what I can gather from my report. I guess, I mean, what
18 I'm saying is, I mean, typically in this scenario, you
19 know, the fact that he had bloody diarrhea, the
20 sweatiness and everything, you know, and just his story.
21 Obviously there wasn't an eyewitness in the car from
22 what I can gather. So we can't say a hundred percent,
23 you know, all of this added up. We didn't doubt his
24 story at all.

25 But you are basically taking the patient's word for

1 it?

2 Right. (End of reading.)

3 And, of course, at the conclusion of the testimony
4 on Re, Recross-Examination, Mr. Brandt asks on page 27,
5 lines 22, beginning with line 21 (Reading):

6 And I want you to enumerate for me, give me a
7 laundry list of the reasons why your opinion is that he
8 passed out prior to impact.

9 The objection, of course, by the Defendant.

10 And then on line 4 she answers the question:

11 (Reading): Okay. Like I mentioned before, the
12 reason that we believe that is because, you know,
13 someone who would seem to be otherwise in a good state
14 of health at 81 years of age, to have lost control of
15 his bowels, to have had this bloody diarrhea, to have
16 had this change in his vital signs, you know, from lying
17 to standing, all that, every kind -- everything kind of
18 added up to support his story. There was no doubt, you
19 know, that he was just trying to cover his tracks from
20 getting in an accident. So, you know, he had other
21 medical reasons to be admitted to the hospital, the
22 syncope plus bloody diarrhea. That's what we --

23 So, the syncope is his story that he related to
24 you --

25 Yes.

1 -- based on what he said to you?

2 Correct. Because there wasn't an eyewitness in the
3 car. (Reading stopped.)

4 Again, reading from *Collins v. Frasier* (Reading):

5 We agree with the Collinses. The Defendant's own
6 self-serving testimony is insufficient by itself to
7 create a question of fact as to the defense. However,
8 this is simply not the case here. Frasier did not
9 merely testify he blacked out. In addition to Frasier's
10 testimony regarding the event, the record includes
11 Dr. Richey's testimony about a likely cause of the
12 incapacity. There is no testimony here about the cause
13 of incapacity. In fact, his treating physician,
14 continuing treating physician said he's never had a
15 blackout. In fact, he even said that he would recommend
16 him to continue driving. Frasier's lack of history with
17 this illness and making of the symptoms by Frasier's
18 other medications, there is no testimony as to any sort
19 of medications that he was on that would create such a
20 situation. Frasier's lack of history with the illness
21 is a potential masking of the symptoms by Frasier's
22 other medications. (Reading stopped.)

23 In the absence of any supporting testimony -- and
24 again, I don't criticize Dr. Hanke. She did the best
25 that she had with what she had, but at the time of her

1 deposition, it was based entirely on there being no
2 eyewitness testimony to the contrary. And then she said
3 she accepted the unrefuted or uncontradicted testimony
4 or statement by the Defendant.

5 It's a very close question, but I can't find
6 anything other than the statement by the Defendant that
7 he blacked out. Or the high blood pressure or change in
8 the blood pressure reflects a time from going from
9 sitting to standing to -- it's all noted at the hospital
10 after the accident.

11 All right. I'm going to grant your Motion as to
12 the defense of unavoidable accident. Your objection
13 obviously is noted to his Motion.

14 (Clarification question off the record by court
15 reporter to the Court.)

16 THE COURT: As to the defense of unavoidable
17 accident. That's the defense made by the Defendant.

18 THE COURT REPORTER: Okay.

19 THE COURT: Who had the burden of proof. But it's
20 Mr. Brandt's Motion.

21 MR. BRANDT: Yes, sir. And that was the -- again,
22 I think he's asked for charges under unavoidable
23 accident. That's a little bit different than the charge
24 under that, what he relied on. But I take it that
25 that's what you're doing, you are knocking all that out?

1 THE COURT: I am dismissing that ---

2 MR. MOSELEY: Sir?

3 THE COURT: I am dismissing that defense from the
4 action.

5 All right. Let's take a few minutes.

6 By the way, we haven't had a charge conference.

7 All right.

8 And also, Mr. Moseley, do you have any Motions? Do
9 you want to renew your directed verdict?

10 MR. MOSELEY: Your Honor, given there are no
11 rebuttal witnesses, yes, I renew my Motion for directed
12 verdict on the close of all the evidence.

13 THE COURT: I do feel there is sufficient evidence
14 to go forward on the questions of the negligent cause of
15 action as well as the consortium cause of action. So
16 I'll deny your Motion. Noted for the record.

17 Charge Conference:

18 THE COURT: All right. As far as the charge, I'll
19 do expert witness, of course.

20 Negligence definition.

21 Then, as far as I'll charge common law rules, of
22 statutes of ordinary care, maintain proper control, and
23 lookout. I haven't had any particular request, because
24 I don't know if there's anything. The most significant
25 testimony we've heard so far is 35 miles an hour and

1 that was the speed limit. So I don't find any excessive
2 speed, except, of course, when you hit a parked car,
3 that's kind of excessive. I don't know if there is a
4 reasonable speed to run into a car. But the point is
5 that, no, I don't find the statute itself, 56-5-25 or
6 15-10 -- well, of course, I'll do the duty of care of
7 proper lookout and to keep under control.

8 Unavoidable accident will be out.

9 Sudden emergency, I'll charge that.

10 MR. BRANDT: What was the sudden emergency?

11 THE COURT: You haven't moved to strike.

12 MR. BRANDT: I move to strike that. I thought it
13 was included, because basically what, all of his charges
14 I don't think are applicable; the first two weren't to
15 start with applicable to the case. Because it wasn't a
16 sudden emergency, nothing presented in the roadway that
17 caused him to take any kind of evasive action by
18 operation of the car, and that's what sudden emergency
19 implies.

20 What his defense was the *Collins* case, one of the
21 basically unforeseen incapacity, sudden incapacity to
22 operate a motor vehicle. And if you granted my Motion
23 there, now if that's out, you don't have a sudden
24 emergency and you don't have unavoidable accident.
25 Because if it's unavoidable, it doesn't, that's usually

1 where, you know, he's saying that there was no way I
2 could have dodged him. I couldn't have done anything, I
3 couldn't have applied my brakes, I couldn't have made a
4 swerving motion or manipulated my car in a way that I
5 could have avoided hitting him.

6 He didn't say that. He says, I saw him, I started
7 my turn. At 35 miles an hour, a 90-degree angle turn at
8 35, you can't do it. That's the evidence. I don't know
9 how fast he was going, he knows how fast he was going.

10 THE COURT: All right, Mr. Moseley, what do you
11 say?

12 MR. MOSELEY: Your Honor, I think sudden emergency
13 deals with drivers who are faced with decisions that
14 they have to make, and here he was faced with a sudden
15 urge to go to the bathroom, and as he decided to make
16 his turn into that, the issue was he was deciding
17 whether he was gonna go straight to go to the bathroom
18 or what he could possibly do to take care of this
19 emergency situation. So, I think that sudden emergency
20 would continue to apply.

21 MR. BRANDT: Well, I think sudden emergency is
22 things that appear in the roadway that causes you to
23 have to alter the operation of the vehicle. It doesn't
24 cause -- it's not talking about your bodily functions.
25 Just because he needs to go to the bathroom really

1 quickly doesn't mean he can drive recklessly or just
2 drive into people. That's not sudden emergency to
3 justify that. I mean...

4 THE COURT: All right. The charge I will give is
5 'from *Clark v. Cantrell*, 339 SC 369, that the emergency
6 must not have been caused by the Defendant's own
7 conduct, that the emergency must have been created by
8 the negligence of another person. Which is consistent
9 with the other charges which say that the sudden
10 emergency doctrine is intended to protect a driver who
11 while acting in due care suddenly finds himself in an
12 emergency situation due to the negligent or wrongful
13 acts of another. The doctrine does not apply when the
14 party's own negligence creates the very emergency in
15 which he finds himself. Again, I'm gonna strike the
16 defense of sudden emergency, as well.

17 All right. So we're back to our negligence action.

18 Then the loss of consortium.

19 Actual damages. As I understand, the Plaintiffs
20 are not pursuing punitive damages?

21 MR. BRANDT: No, sir.

22 THE COURT: Very well. So we'll go only on actual
23 damages.

24 And the elements in this case would be reasonable
25 and necessary medical expenses, loss of time from work

1 and the resulting income, the impairment of an injured
2 person's ability to work in the future because the
3 doctor said he was permanently impaired. The character
4 of the injury, physical pain, and mental pain and
5 suffering. And pain and suffering as it is reasonably
6 'certain of necessity will result in the future.

7 Loss of enjoyment of life.

8 And, now, there's been some testimony to
9 preexisting injuries, so I'm going to charge
10 preexisting.

11 Loss of earning capacity. We have testimony as to
12 what his earning capacity was before and then obviously
13 afterwards.

14 Mental suffering or apprehension.

15 And let's see. Life expectancy. We have
16 testimony, although I'll probably not agree with the
17 calculation, the only testimony was that it would be
18 twenty- -- the testimony was that he was 55 years of age
19 and that would have a 24.79-year life expectancy. That
20 was the testimony.

21 Loss of consortium, the companionship and society
22 of a spouse.

23 And then punitive damages are out.

24 All right. Anything else?

25 MR. BRANDT: No, sir, Your Honor.

1 THE COURT: All right. Anything else, Mr. Moseley?

2 MR. MOSELEY: Your Honor, I would think that the
3 charge of lookout. You said you were gonna charge
4 lookout and duty of control. I don't think there's a
5 lookout issue here.

6 THE COURT: Well, perhaps not. Okay. I won't
7 charge the duty of keeping an automobile under proper
8 control, able to slow down, stop, and turn to be able to
9 avoid colliding with other vehicles. Apparently he
10 didn't see. So, but the thing is he didn't. The fact
11 that the vehicle was where it was was not the causative
12 action, so I will not charge lookout.

13 But I will control, I will charge that, of course.
14 And I'm not charging any particular statute.

15 MR. BRANDT: Your Honor, one other thing is this
16 case the way it was tried and Dr. Hanke and a few of the
17 other rulings, I think that the Jury needs to be told
18 that the testimony of Dr. Hanke does need not to be
19 considered, and ask them to strike that testimony and is
20 not be considered in any way by the Jury in making its
21 decision.

22 THE COURT: No. Expert testimony is for the
23 benefit of the Jury. And I think that it is perhaps
24 beneficial that the Jury know that, what the testimony
25 was, I think as far as your obstructor defense, but it

1 still comes down to credibility as to the other matters.
2 If there was any sort of defense or could have been.

3 And again, I'm going to just deny it. I think that
4 her testimony went further than anything else. In fact,
5 it's up to the Jury to determine what the value of the
6 testimony was. And, in fact, if we have to get
7 particular about it, even when expert testimony is
8 contradictory of itself, it's admissible, and it's for
9 the Jury to determine because it all comes down to
10 credibility. *Hoxit v. Michelin Tire Corporation*.

11 MR. BRANDT: Well, I realize that. I've been
12 dealing with that for years.

13 THE COURT: Well, that's just it. I think that
14 we've heard argument as to, and they've had the benefit
15 of the expert testimony, and so I think that they can
16 decide the relevance of it, but I'm not charging --

17 MR. BRANDT: Well, are you going to tell them the
18 defenses were raised but as a matter of law they are not
19 entitled to the defenses?

20 THE COURT: They will follow the law as I give it
21 to them even if they don't agree with it.

22 MR. BRANDT: Can I argue, then, to the Jury that
23 you have...

24 THE COURT: You can argue all you want to.

25 MR. BRANDT: -- stricken those defenses and they

1 are not to consider that?

2 (There was no response.)

3 MR. BRANDT: I don't want to get out here and start
4 something and then --

5 THE COURT: Well, the thing is, I think you -- my
6 thoughts are that I would just go ahead and argue your
7 case and then see what Mr. Moseley does. He'll argue
8 his case. You will have a reply or response to his
9 argument. But I don't know that -- the fact is the
10 Court, I'm charged with giving them the law and I'm
11 charged with instructing them that they will have to
12 accept the law as I give it. If I don't charge
13 something, then that's not to be considered by them.
14 But you can argue it, I guess. But the main thing, I
15 just, I don't want to --

16 MR. BRANDT: I know.

17 THE COURT: -- if you will forgive me, I'm trying
18 to get this case down so the Jury can --

19 MR. BRANDT: Well, obviously, we argue before your
20 charge, and you told us you're taking those out and
21 you're not gonna charge those things. And what I want
22 to make sure of is, and understand and have you rule,
23 that, I want to talk about the fact that he pled those,
24 and the Judge will not charge that he's entitled to
25 those defenses and you struck it.

1 THE COURT: Again, I differ with you, because that
2 becomes a charge on the facts.

3 MR. BRANDT: Say what?

4 THE COURT: That becomes a charge on the facts, but
5 the fact that it is not sufficient to support those
6 defenses. And obviously I can't do that under the
7 Constitution, so I can't instruct them that they are not
8 to consider something. Now, you can argue it.

9 MR. BRANDT: Okay.

10 THE COURT: I mean, that, I can't in any way
11 suggest. You can argue what you would. But the main
12 thing is, I don't think that the Court is in a position
13 to tell, well, this is a good defense, this is a bad
14 defense, you ought to listen more to this one than to
15 the other one. The fact is, you can argue, you just
16 listen to the law the Judge charges you, not what you,
17 the lawyers state. Because I will tell them also that
18 your argument is not testimony.

19 MR. BRANDT: Well, I'm still not real clear. Let
20 them -- we'll go from there. But I --

21 THE COURT: Mr. Brandt, I have given you the
22 benefit of my thoughts.

23 MR. BRANDT: I know.

24 THE COURT: And I'm not going to charge that this
25 defense or that defense is not applicable to this case.

1 And I'm not going to charge that this cause of action or
2 that cause of action is not applicable to this case.

3 MR. BRANDT: Okay.

4 THE COURT: Because obviously it's a charge on the
5 law. Because what is applicable is what the facts have
6 sustained or support.

7 All right. So let's do take a short break.

8 Anything from you, though, Mr. Moseley?

9 MR. MOSELEY: Not at this time, Your Honor.

10 THE COURT: All right. Very good.

11 (A recess was taken.)

12 THE COURT: Is there anything from the Plaintiff
13 before we go to the Jury?

14 MR. BRANDT: Your Honor, I don't want to belabor
15 the point, but I do want to make clearer on the record
16 my position on the last issue we discussed, if I may?
17 Just to put it on the record?

18 THE COURT: Certainly.

19 MR. BRANDT: I have asked that Hanke's testimony be
20 stricken and the Jury so instructed. That would make
21 the expert testimony charge inapplicable. But in order
22 for the Jury to consider any evidence, it has to be
23 relevant. But during the ruling the only thing that was
24 offered on was the self-defense of sudden, unforeseeable
25 incapacity to operate a vehicle. So, now his medical

1 condition, her testimony is not relevant to anything
2 that's left, and to leave it in without some instruction
3 from the Court more than my argument would be only to
4 confuse and prejudice the Jury. It may be left, and the
5 likelihood they could be left to thinking it means
6 something. So, I just wanted to put that down and
7 clarify it.

8 THE COURT: Mr. Moseley, anything you would like to
9 say?

10 MR. MOSELEY: Your Honor, I think the evidence is
11 in, and if it needed to be stricken, it needed to be
12 stricken a long time ago. And I agree with your
13 preliminary ruling.

14 THE COURT: Well, the thing is, and I'm not saying
15 this was a blatant violation of the rules about
16 openings, but it should indicate one of the dangers of
17 the rule of opening. When you open on the facts rather
18 than on the law and try to argue your case, because
19 sometimes you argue something that can't be established
20 during the trial.

21 Having said that, also, if you look at my rulings
22 or any judge's rulings on the law as to defenses or
23 causes of action, it's based on whether or not there are
24 facts sufficient to sustain or establish those defenses
25 or causes of action. And for me to say that in any

1 particular instance there is not sufficient facts to
2 constitute this defense or this cause of action would by
3 definition be a charge on the facts which is prohibited
4 by our Constitution.

5 So, no, I think that when you decide to push the
6 envelope -- is that what we say now -- as to opening
7 statements and all rather than rely on the testimony and
8 the evidence and the rulings of the Court on what would
9 be admissible or that would be relevant, that we take it
10 at our own peril.

11 Having said that, I'm going to deny your Motion.

12 MR. BRANDT: Yes, sir. Thank you.

13 THE COURT: I'm going to give them the law, I'm
14 going to instruct them they have to accept the law as I
15 give it to them. And if their verdict would be
16 something that would be unsupported by the law and the
17 evidence in the case, then, of course, that would be
18 subject to post-trial Motions.

19 All right. Anything further from the Plaintiff?

20 MR. BRANDT: No, sir.

21 THE COURT: All right. Again, Plaintiff opens
22 fully on the law and evidence and facts and then the
23 Defendant will argue and then the Plaintiff will close.

24 All right. Do you need any time to get organized?

25 (Discussion off the record.)