

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

SC Court of Appeals The Hon. Deadra L. Jefferson, Circuit Court Judge

Case No.: 2010-CP-08-1801

Levern McCray, ... Respondent,

vs.

Jose W. Valle, ... Appellant,

RECORD ON APPEAL
VOLUME I OF II

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Turner Padgett Graham & Laney, P.A.
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Columbia, SC 29202
(803) 254-2200

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Mullis Law Firm
Post Office Box 7757
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Attorneys for Respondents

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Turner Padgett Graham & Laney P.A.
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Charleston, SC 29413
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STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY
IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2010-CP-08-1801

Levern McCray
PLAINTIFF(S)

Jose W. Valle
DEFENDANT(S)

Submitted by: _____

Attorney for : ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☒ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(b), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRCP; ☐ Bankruptcy ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

This Negligence cause of action came before the Court for a trial by jury on August 13-16, 2012. All issues have been tried and a verdict rendered in favor of the Plaintiff in the amount of Five Hundred Thousand and 00/100 (\$500,000.00) Dollars actual damages and One Hundred Forty-Seven Thousand and 0/100 (\$147,000.00) Dollars punitive damages. The Court required post-trial motions. Post-trial motions were heard and respectfully denied. The Court conducted a B.M.W. of North America, Inc. v. Gore, 517 U.S. 559, 116 S. Ct. 1589 (1996) analysis and will be submitting a supplemental order conducting a post-trial review of the jury's punitive damages award.

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.
Additional Information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
Levern McCray	Jose W. Valle	\$ 647,000.00
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest

SCRC Form 4C (12/2011)

Page 1

or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

DR Jaffer
Circuit Court Judge

2128
Judge Code

8/16/12
Date

For Clerk of Court Office Use Only

This judgment was entered on the 16th day of August, 2012 and a copy mailed first class or placed in the appropriate attorney's box on this 16 day of Aug, 2012 to attorneys of record or to parties (when appearing pro se) as follows:

Pamela Mullis, Esq.
Joseph Epting, Esq.

ATTORNEY(S) FOR THE PLAINTIFF(S)

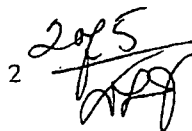
Julian Allen, Esq.
Emily Sheets, Esq.

ATTORNEY(S) FOR THE DEFENDANT(S)
Donna P. Beatty
CLERK OF COURT

Court Reporter: Melissa Singletary

or potential harm suffered by the plaintiff and the amount of the punitive damages award, and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. Mitchell v. Fortis Ins. Co., 385 S.C. 570, 686 S.E.2d 176 (2009); B.M.W. of North America, Inc. v. Gore, 517 U.S. 559, 116 S. Ct. 1589 (1996). In addition, the eight Gamble factors are relevant insofar as they add substance to the three Gore guideposts. Mitchell, 385 S.C. 570, 686 S.E.2d 176; Gamble v. Stevenson, 305 S.C. 104, 406 S.E.2d 350 (1991). The eight Gamble considerations are as follows: (1) the defendant's degree of culpability; (2) the duration of the conduct; (3) the defendant's awareness or concealment; (4) the existence of similar past conduct; (5) the likelihood the award will deter the defendant or others from like conduct; (6) whether the award is reasonably related to the harm likely to result from such conduct; (7) the defendant's ability to pay; and (8) any other factors deemed appropriate. Gamble, 305 S.C. at 111–12, 406 S.E.2d at 354.

As to the reprehensibility of the Defendant's conduct, the Court should consider whether: (i) the harm caused was physical as opposed to economic; (ii) the tortious conduct evinced an indifference to or a reckless disregard for the health or safety of others; (iii) the target of the conduct had financial vulnerability; (iv) the conduct involved repeated actions or was an isolated incident; and (v) the harm was the result of intentional malice, trickery, or deceit, rather than mere accident. State Farm v. Campbell, 538 U.S. 408, 419, 123 S. Ct. 1513 (2003). Here, the first three State Farm factors are particularly relevant. First, Defendant's actions clearly caused physical harm to Plaintiff. The evidence showed that the Plaintiff suffered injuries to his left leg, left foot, left knee, left ankle, neck, right shoulder, low back, right thumb, chest, and brain as a direct result of the accident caused by the Defendant's negligence. Plaintiff's ankle required orthopedic surgery during which hardware was inserted—some of which still remains to this day.

2015
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The evidence further showed that Plaintiff's health has significantly deteriorated since the accident and that Plaintiff has suffered a significant harm. Testimony from the Plaintiff, his co-workers, and personal friends showed that since the accident, he has trouble walking and bending over, walks with a pronounced limp, is unable to assist with certain family services, and has difficulty operating heavy equipment that requires a lot of leg and foot work. Further, he has difficulty fully performing his job as a result of his inability and difficulty using his feet and ankles as a result of the injury. The accident has also affected Plaintiff by causing a marked deterioration of his memory. Further, the physical limitations caused by the accident have affected his relationship with his wife. Second, the evidence showed that the Defendant was driving while under the influence of alcohol with a blood alcohol concentration of .103, that he crossed the center line of the roadway into Plaintiff's lane of traffic, and collided with the front of Plaintiff's vehicle despite the Plaintiff's attempts to avoid the accident, causing a serious collision. Moreover, driving while under the influence of alcohol clearly evinces an indifference to or a reckless disregard for the health or safety of others. As to the degree of reprehensibility, driving under the influence rates at approximately a nine on a scale ranging from zero to ten. The public policy of this state clearly reflects that driving under the influence is considered reprehensible conduct. Lastly, the target of the conduct had financial vulnerability. The evidence showed the Plaintiff was out of work for six months with lost wages exceeding \$25,000.00. Plaintiff testified he earned \$26.40 per hour in December 2008 and earns \$24.00 per hour today. The record reflects Plaintiff had the potential to work as a foreman which earns approximately \$5.00 more an hour than working as an operator. Further, if he were able to operate a crane, he could potentially earn between \$26.00 and \$27.00 per hour. He also lost his licensing on many of the machines necessary to perform his livelihood as a direct result of the

3025
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[Signature]

injury. Expert economist Oliver Wood testified that Plaintiff's approximate loss in earning capacity is \$5,000.00 per year.

As to the second Gore guidepost, the ratio of actual or potential harm to the punitive damages award is reasonable in this case. The Supreme Court has remarked that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." Campbell, 538 U.S. 408, 123 S.Ct. 1513. Further, when determining the reasonableness of a ratio, the Court may consider: the likelihood that the award will deter the defendant from like conduct; whether the award is reasonably related to the harm likely to result from such conduct; and the defendant's ability to pay. Mitchell, 385 S.C. 570, 686 S.E.2d 176. Here, the ratio of punitive damages to actual damages is 1 punitive: 3.4 actual. This ratio does not exceed a single-digit ratio and is clearly reasonably related to the Plaintiff's harm and the Defendant's ability to pay.

As to the third factor, which is the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases, this Court finds that this factor has been satisfied as well. This Court has examined several comparable cases and finds that the punitive damages awarded in the present case are similar to civil penalties imposed in these comparable cases. See Wilkes v. Moses, 291 S.C. 504, 354 S.E.2d 403 (Ct. App. 1987) (upholding a jury award of \$700,000 actual damages and \$300,000 punitive damages on a negligence cause of action); Durham v. Clements, 295 S.C. 90, 367 S.E.2d 174 (Ct. App. 1988) (holding that an award of \$150,000 punitive damages, where a defendant crossed over the center line and struck the victim's vehicle head-on, was "no[t] out of line with damages awarded in cases of this sort."); Austin v. Specialty Transp. Services, Inc., 358 S.C. 298, 594 S.E.2d 867 (Ct. App. 2004) (upholding that a jury verdict for \$850,000 actual damages and \$2,158,000

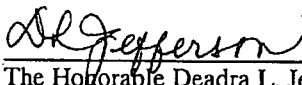
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RJR

punitive damages on a negligence cause of action were not excessive). Thus, this Court finds that the third Gore guidepost has been met.

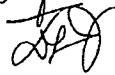
IT IS THEREFORE ORDERED that the punitive damages award in this case is reasonable and not grossly excessive or unduly liberal, was not actuated by passion, caprice, or prejudice, or some other influence outside of the evidence, does not violate due process, and is hereby upheld as a result of this Court's post-trial analysis.

AND IT IS SO ORDERED this 31st day of August, 2012.

Charleston, South Carolina
At chambers



The Honorable Deadra L. Jefferson
Presiding Judge, Ninth Judicial Circuit

5045
5 

STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

Levern McCray

Plaintiff(s)

vs.

Jose W. Valle,

Defendant(s)

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2010-CP-

2010-CP-08-1801
FILED
MAY 21 PM 3:53
CLERK OF COURT
BERKELEY COUNTY

(Please Print)

Submitted By: Pamela R. Mullis

Address: Mullis Law Firm

P.O. Box 7757

Columbia, SC 29202-7757

SC Bar #: 13503

Telephone #: 803-799-9577

Fax #: 803-254-8956

Other:

E-mail: prnullis@mullislawfirm.com

NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

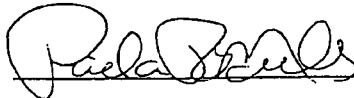
*If Action is Judgment/Settlement do not complete

- ☒ JURY TRIAL demanded in complaint. ☐ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☒ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

- | | | | |
|--|--|--|--|
| Contracts
☐ Constructions (100)
☐ Debt Collection (110)
☐ Employment (120)
☐ General (130)
☐ Breach of Contract (140)
☐ Other (199) | Torts - Professional Malpractice
☐ Dental Malpractice (200)
☐ Legal Malpractice (210)
☐ Medical Malpractice (220)
Previous Notice of Intent Case #
20-CP-
☐ Notice/ File Med Mal (230)
☐ Other (299) | Torts - Personal Injury
☐ Assault/Slander/Libel (300)
☐ Conversion (310)
☐ Motor Vehicle Accident (320)
☐ Premises Liability (330)
☐ Products Liability (340)
☒ Personal Injury (350)
☐ Other (399) | Real Property
☐ Claim & Delivery (400)
☐ Condemnation (410)
☐ Foreclosure (420)
☐ Mechanic's Lien (430)
☐ Partition (440)
☐ Possession (450)
☐ Other (399) |
| Inmate Petitions
☐ PCR (500)
☐ Mandamus (520)
☐ Habeas Corpus (530)
☐ Other (599) | Judgments/Settlements
☐ Death Settlement (700)
☐ Foreign Judgment (710)
☐ Magistrate's Judgment (720)
☐ Minor Settlement (730)
☐ Transcript Judgment (740)
☐ Lis Pendens (750)
☐ Transfer of Structured Settlement Payment Rights Application (760)
☐ Other (799) | Administrative Law/Relief
☐ Reinstatement Driver's License (800)
☐ Judicial Review (810)
☐ Relief (820)
☐ Permanent Injunction (830)
☐ Forfeiture-Petition (840)
☐ Forfeiture-Consent Order (850)
☐ Other (899) | Appeals
☐ Arbitration (900)
☐ Magistrate-Civil (910)
☐ Magistrate-Criminal (920)
☐ Municipal (930)
☐ Probate Court (940)
☐ SCDOT (950)
☐ Worker's Comp (960)
☐ Zoning Board (970)
☐ Administrative Law Judge (980)
☐ Public Service Commission (990)
☐ Employment Security Comm (991)
☐ Other (999) |
| Special/Complex/Other
☐ Environmental (600)
☐ Automobile Arb. (610)
☐ Medical (620)
☐ Other (699) | ☐ Pharmaceuticals (630)
☐ Unfair Trade Practices (640)
☐ Out-of State Depositions (650)
☐ Sexual Predator (510) | | |

Submitting Party Signature:



Date:

5/12/10

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRPC, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

FOR MANDATED ADR COUNTIES ONLY

Allendale, Anderson, Beaufort, Colleton, Florence, Greenville,
Hampton, Horry, Jasper, Lexington, Pickens (Family Court Only), and Richland

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

You are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)
4. Cases are exempt from ADR only upon the following grounds:
 - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
 - b. Requests for temporary relief;
 - c. Appeals
 - d. Post Conviction relief matters;
 - e. Contempt of Court proceedings;
 - f. Forfeiture proceedings brought by governmental entities;
 - g. Mortgage foreclosures; and
 - h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.
5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.
6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

Please Note: You must comply with the Supreme Court Rules regarding ADR.
Failure to do so may affect your case or may result in sanctions.

STATE OF SOUTH CAROLINA)

COUNTY OF BERKELEY)

Levern McCray,)

Plaintiff,)

vs.)

Jose W. Valle,)

Defendant.)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

20 10 -CP-08-1801

SUMMONS
(Personal Injury)
(JURY TRIAL REQUEST)

FILED
2010 MAY 21 PM 3:53
CLERK OF COURT
NINTH JUDICIAL CIRCUIT
COLUMBIA, SOUTH CAROLINA

TO THE DEFENDANT ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your Answer to said Complaint on the subscribed, Mullis Law Firm, 1229 Elmwood Avenue, Post Office Box 7757, Columbia, South Carolina 29202, within thirty (30) days after the service hereof, exclusive of the date of such service; and if you fail to answer the Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in the Complaint.



J. Marvin Mullis, Jr.

Pamela R. Mullis

MULLIS LAW FIRM

Post Office Box 7757

Columbia, South Carolina 29202

(803) 799-9577

Columbia, South Carolina

May 12, 2010

JURY TRIAL REQUESTED

STATE OF SOUTH CAROLINA)
)
COUNTY OF BERKELEY)
)
Levern McCray,)
)
Plaintiff,)
)
vs.)
)
Jose W. Valle,)
)
Defendant.)
)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

2010-08-1801

COMPLAINT
(Personal Injury)
(JURY TRIAL REQUESTED)

FILED
2010 MAY 21 PM 3:53
MARY E. BROWN
CLERK OF COURT
CLERK OF COURT

The Plaintiff above named, complaining of the Defendant herein, would respectfully show unto the Court:

1. The Plaintiff, Levern McCray, is a citizen and resident of the Kershaw County, State of South Carolina.

2. The Defendant, Jose W. Valle, is upon information and belief, a citizen and resident of the Berkeley County, State of South Carolina.

3. On or about December 20, 2008, the Plaintiff was traveling east on 5-8-748 in or about Moncks Comer, South Carolina. The Defendant, who was driving under the influence, was traveling west on 5-8-748 and crossed the center line into the eastbound lane and struck Plaintiff's vehicle causing a collision between the two vehicles and the damages of the Plaintiff.

4. The aforementioned collision was a direct and proximate result of the negligence and the recklessness of the Defendant as follows:

- a. In driving under the influence;
- b. in pulling into the Plaintiff's lane of travel;

- c. in speeding;
- d. in failing to maintain a proper lookout;
- e. in operating his vehicle in an unsafe manner;
- f. in failing to use the degree of care and caution a reasonable and prudent person would have used under the same or similar circumstances;
- g. and in such other particulars as the evidence at trial may show.

5. As a direct and proximate result of the negligence and recklessness of the Defendant, the Plaintiff was injured as follows:

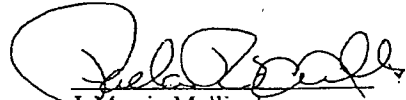
- a. suffered traumatic and permanent injury to his left ankle at the fibular and tibia, right thumb, left shoulder, left knee, left foot, left leg and left hip;
- b. incurred substantial medical expenses and will continue to incur such expenses in the future;
- c. suffered severe pain and mental anguish and will continue to so suffer in the future;
- d. suffered an impairment in his ability to enjoy life; and
- e. suffered a loss of wages and an impairment in her ability to earn wages in the future.

6. As a result of the negligence and recklessness of the Defendant which injured the Plaintiff, he is informed and believes he is entitled to recover actual and punitive damages against the Defendant.

WHEREFORE, the Plaintiff prays for judgment against the Defendant in an amount in excess of Twenty-Five Thousand (\$25,000.00) Dollars, actual and punitive damages, for the costs of this action, and for such other and further relief as the Court may deem just and proper.

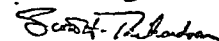
Columbia, South Carolina
May 12, 2010

JURY TRIAL REQUESTED.



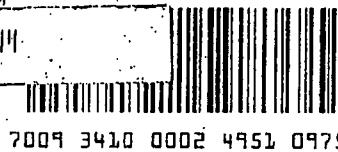
J. Marvin Mullis, Jr.
Pamela R. Mullis
MULLIS LAW FIRM
Post Office Box 7757
Columbia, South Carolina 29202
(803) 799-9577

Summons and complaint of
within entitled cause received at
this office and service accepted
in accordance with law
this 27 day of August


Director of Insurance
and Attorney to Accept Service
Columbia, SC

P.O. BOX 100105
COLUMBIA, S.C. 29202-3105

CERTIFIED MAIL



Hasler

016H26507584
\$06.150
08/27/2010
Mailed From 29223
US POSTAGE

CERTIFIED MAIL
RETURN RECEIPT REQUESTED
SERVICE OF PROCESS

ALLSTATE INS CO
c/o CT Corporation System
2 Office Park Court, Suite 103
Columbia, SC 29223-0000

015

STATE OF SOUTH CAROLINA)
COUNTY OF BERKELEY)
Levern McCray,)
Plaintiff,)
v.)
Jose W. Valle,)
Defendant.)

IN THE COURT OF COMMON PLEAS
Docket No.: 2010-CP-08-1801

ANSWER
(Jury Trial Demand)

FILED
2010 OCT 20 PM 3:19
MARY P. BRUNN
CLERK OF COURT, SC
BERKELEY COUNTY

Allstate Insurance Company appears in this action pursuant to S.C. Code Ann. § 38-77-150 and respectfully shows unto the Court:

FOR A FIRST DEFENSE

- 1 Except as specifically admitted, qualified, or explained, Defendant denies the allegations and demands strict proof of each allegation.
2. Upon information and belief, Defendant admits the allegations of Paragraphs 1-2.
3. Defendant admits only so much of the allegations of Paragraphs 3-6 as alleged an automobile accident occurred on December 20, 2008 between vehicles driven by Plaintiff and Defendant near Moncks Corner, South Carolina. Defendant admits simple negligence for the accident, but lacks sufficient knowledge or information to form a belief about the truth of the remaining allegations at this time; therefore, the Defendant denies the allegations and demands strict proof of each allegation.

FOR A SECOND DEFENSE
(Punitive Damages)

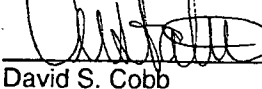
4. FURTHER ANSWERING, this party alleges that any award of punitive damages would violate the constitutional safeguards provided this party by the Due Process Clause of the Fourteenth Amendment of the United States Constitution and under the Due Process Clause of Article I, Section 3 of the South Carolina Constitution because the determination of punitive damages does not bear any reasonable relationship to the amount of actual damages, if any, suffered by or awarded.

FOR A THIRD DEFENSE
(Reservation of Rights)

5. FURTHER ANSWERING, this party has not had an opportunity to conduct a sufficient investigation or engage in adequate discovery touching on the circumstances of these allegations. This party intends to act as best it can to inform itself as to the pertinent facts and prevailing circumstances surrounding any reported injury or damage and gives notice of its intent to assert any further affirmative defenses that its information-gathering process may indicate is supported by fact and law, including but not limited to, defense that the action is barred in whole or in part by any applicable statute, contract, release, covenant, or the doctrine of laches. Thus, this party reserves its right to amend this pleading to assert any such defenses.

WHEREFORE, having answered, Defendant asks this Court to dismiss the Amended Complaint and grant them such relief as the Court deems just and proper.

TURNER PADGET

 for DSC

David S. Cobb
Post Office Box 22129
Charleston, South Carolina 29413-2129
Direct: (843) 576-2803
Fax: (843) 577-1629
DCobb@TurnerPadget.com

Charleston, South Carolina

October 19, 2010

ATTORNEYS FOR DEFENDANT

STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY

Levern McCray,

Plaintiff,

v.

Jose W. Valle,

Defendant.

IN THE COURT OF COMMON PLEAS

Docket No.: 2010-CP-08-1801

CERTIFICATE OF SERVICE

FILED
2010 OCT 20 PM 3:19
MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, SC

On October 19, 2010, I mailed a copy of Answer, Interrogatories to Plaintiff, and Requests for Production to Plaintiff to:

J. Marvin Mullis, Jr.
MULLIS LAW FIRM
Post Office Box 7757
Columbia, South Carolina 29202

James Creel

STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY

COURT OF COMMON PLEAS

LEVERN MCCRAY,

PLAINTIFF,

v.

JOSE W. VALLE,

DEFENDANT.

TRANSCRIPT OF HEARING
C/A #: 2010-CP-18-00911

SUMTER COUNTY COURTHOUSE
Monday, August 13, 2012-
Thursday, August 16, 2012

VOLUME ONE

BEFORE:

HONORABLE DEIDRE JEFFERSON, PRESIDING JUDGE.

APPEARANCES:

Pamela R. Mullis, Esquire
Joe Epting, Esquire
Attorneys for Plaintiff

Julian K. Allen, Esquire
Emily C. Sheets, Esquire
Attorney for Defendant

TAKEN BY MELISSA R. SINGLETARY
CERTIFIED VERBATIM REPORTER

1 The Court: Ladies and gentleman we are going to select
2 the jury for Levern McCray vs Jose Valle. How do you
3 pronounce the clients last name?

4 Mr Allen: Valle.

5 The Court: Valle, I wanted to make sure I pronounce it
6 correctly, 2010-CP-08-1801. An automobile accident which
7 took place on December 20 of 2008. I think it's Highway
8 748 in Moncks Corner, it's 5-8-748. We are going to go
9 through a process that's called voir dire. Where, which is
10 just a legal term meaning I'm going to ask you some
11 questions so that the attorneys can more effectively
12 exercise there appropriate challenges. If the question
13 applies to you please stand, and then in a loud and clear
14 voice give us your name, your juror number, and an answer
15 to the question and remain standing until the court has
16 completed questioning you. I'm going to have the lawyers
17 introduce themselves anyone who will be assisting them in
18 the trial of their cases as well as telling us the names of
19 the members of their law firms. Before we begin that
20 process and I apologize I'm Dedra Jefferson I'm one of your
21 resident circuit judges for the ninth circuit. The ninth
22 circuit is made up of Charleston and Berkeley counties. The
23 state is divided into judicial circuits and ours is the
24 ninth circuit. If council for the plaintiff will introduce
25 themselves as well as have your client stand and face the

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1 panel and also tell us the names of the members of your law
2 firm and if counsel to the defense will provide us with the
3 same information.

4 Mrs. Mullis: My name is Pamela Mullis and I'm with the
5 Mullis Law Firm in Columbia, SC. My law partner is James
6 Marvin Mullis Jr. With me today is my client, my name is
7 Levern McCray and his wife, my name is Ollie McCray.

8 Mr. Epting: And I'm Joe Epting, I'm an attorney in
9 Columbia, SC and I practice with my father who is also Joe
10 Epting.

11 Mr. Allen: My name is Julian Allen and I'm here on
12 behalf of the defendant. I practice in Charleston at Turner
13 Pagett Law Firm we have offices in Greenville, Myrtle
14 Beach, Columbia, Florence, Charleston. With me is Emily
15 Sheets.

16 Mrs. Sheets: Good morning Emily Sheets my office is in
17 Mt. Pleasant, Columbia, Greenville, Myrtle Beach, Raleigh,
18 and Charlotte. I work with some individuals by the name of
19 James D. Smith, Carl Edwards, Ben Davis, Blake Key, Robert
20 Sandsberry and that's it.

21 The Court: Again ladies and gentleman if a question
22 applies to you please stand and in a loud and clear voice
23 give us your name, your juror number, and an answer to the
24 question if applicable and remain standing until I have
25 completed questioning you. Is there any member of the panel

1 The Court: Now I was looking at the motions in limine,
2 you all do not have a certified copy of the conviction.

3 Mrs. Ellis: We do now

4 The Court: Ok, and where is that, what court is that
5 from.

6 Mrs. Ellis: It is from the county, City of Berkeley
7 central criminal traffic court. That was quite a contest.

8 The Court: And also did you all have any exhibits you
9 all need to pre-mark? Which you all can agree upon. That
10 would help the court reporter tremendously. If you have any
11 you all might want to start looking at them so that you can
12 all get that together for her. Now I've looked at your
13 motions in limine and I can tell you that almost, that all
14 of them pretty much I would not rule on in advance of
15 trial. I would have to look at the evidence as it is
16 developed and determine admissibility, relevance and
17 otherwise, but I would instruct you not to bring it up
18 during the case and advise the court you have a matter of
19 law so I can create a proffer if I need to. So that I can
20 create a proper in the event that I rule it is
21 inadmissible, but I can tell you preliminary regarding only
22 the officers, I guess you don't need any of this stuff on
23 chain of custody since you have. Well yeah you would need
24 if you are seeking to go into what his blood alcohol level
25 was. I can tell you preliminary there is nothing in the

1 case law that would allow me to exempt you from having you
2 establish a chain of custody. You have to prove that as far
3 as practicable. Which means that you have to prove it to
4 the extent, you don't have to negate all evidence of
5 tampering but you are going to need to bring the chain of
6 witnesses unless they agree to it and if they don't agree
7 to it then you are going to have to establish it. If
8 they're going to be testifying as to his results as a
9 record, as a business records and not testifying any
10 subjective opinions. If you have a supervisor they can
11 testify as to that it's done all the time. It's done in
12 criminal court all the time, people come and go from SLED
13 routinely and sometimes that are just not available and
14 they send a supervisor, but they can't testify to any
15 subjective opinions or testify, they can testify as an
16 expert as to what particular blood alcohol result is. How
17 quickly the body metabolizes alcohol and other things that
18 would be within the scope of the expertise. But they can't
19 testify to any subjective opinions that particular person
20 that analyzed it would breached. So that pretty much
21 covers. Now Mr. Allen's was, his motion in limine is about
22 DUI charged or blood alcohol level and the chain of custody
23 as per testimony and relevance. Whether his blood alcohol
24 rose to a level of impairment is a jury question and the
25 law provides a presumption you don't need expert testimony

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1 for that. All you need is, the jury determine whether
2 someone was impaired. The law establishes a barometer for
3 that, that being a threshold of point 08 where you can
4 infer that someone was impaired or you cannot infer someone
5 was impaired but it's just benchmark. I don't think you
6 have to have an expert testify to that, and again in
7 criminal cases where it comes up all the time you never
8 have a expert testify to someones impairment in fact you
9 can't. It's factual issue for the jury to determine. They
10 can talk about in general what impairment is but they can't
11 say what a particular persons impairment was. They can say
12 whatever their blood alcohol level was and what the affect.
13 Normally what a SLED witness will testify again will be
14 again at certain levels of blood alcohol this is what a
15 person would be. In other words, their speech would be
16 slurred, their eyes would be blurry, they would be
17 incapable of certain motor functions, but they can't say
18 specifically as to a particular person whose the subject of
19 it. They can only talk about it in general, because whether
20 a person is impaired or not is a jury issue. And that's for
21 them to judge based on the facts of the case. Now based on
22 the fact that they've now gotten a certified conviction
23 that would fall in the nature of admission against interest
24 I would imagine.

25 Mr. Allen: Well ...

1 The Court: Like I said I would have to take it up,
2 otherwise there wouldn't be that whole body and case law
3 and we wouldn't be so careful as to not letting people
4 plead nolo contendere other things or under Alford with
5 their civil case pending

6 Mr. Allen: I guess that's my concern is there has been
7 somewhat of a distorted history trying to get this, a
8 certified disposition. Summary court I think operates a
9 little bit different obviously than circuit court.

10 The Court: Well they're not a court of reference.

11 Mr. Allen: Right, so when I sent down a request their
12 response to my disposition was guilty-bench trial and when
13 I talked to Shamieka Guthry who is the one who signed all
14 these things. I said what I'm trying to figure out, was
15 there actually an admission of guilt on behalf of the
16 defendant or was it merely a forfeiture of bond and she
17 couldn't really give me a definitive answer. I would submit
18 the forfeiture of bond or a nolle contendere plea is not an
19 admission of guilt. And is not an admission of ...

20 The Court: Actually it has the effect of an admission
21 of guilt on his record. We treat it as a guilty plead, but
22 I just as a matter of personal, most judges just as a
23 matter of, philosophically we don't let people do it for
24 this very reason because they may come back later and say
25 I really didn't do it. And if there is going to be a civil

1 case pending and you're going to be responsible I'm not
2 going to run the risk that you are going to come back later
3 and say I really wasn't driving impaired when you were, or
4 if there is going to be even if it was something. Lets just
5 take alcohol out of the equations lets just say somebody
6 hit somebody with their car deliberately and they are
7 charged with assault and battery with attempt to kill or
8 assault and battery at a high and aggravated nature and
9 they plead under Alford of nolle contendere which they
10 couldn't actually that's not a good example because those
11 are felonies. I think you get the gist just of what I'm
12 saying, I mean we always ask is there a civil case pending,
13 because we're just not going to let you play those kind of
14 games later on because then it gets to be like this
15 spitting contest later. I agree with you forfeiture of bond
16 is a different situation then somebody who'd be guilty, but
17 this says defendant plead guilty bench trial nine hundred
18 ninety seven dollars or thirty days in jail. If he had not
19 shown up they wouldn't have given him the either-or they
20 would have issued a bench warrant for his arrest.

21 Mr. Allen: Well, I can, when I spoke with her she was
22 kind of reading notes off of some system.

23 The Court: Yeah they do it by computer, they enter it.

24 Mr. Allen: Right, so like I said I'm not convinced, I
25 don't think this letter rises to a level that should

1 persuade the court if I've got another competing thing that
2 says guilty by virtue of a bench trial. You know where.

3 The Court: It's the same thing it doesn't matter. It's
4 still a determination of guilty whether it's by the court
5 or his own admission. It doesn't matter it's a conviction.

6 Mr. Allen: Well I think under 56-5-660, 6160, the
7 admission of a conviction is improper under title 56.

8 The Court: Well I'm going to have to read that because
9 that would determine precedent on its ear. Then he would
10 never be able to admit that convictions. Convictions have
11 the same peremptory as an admission against interest. Yeah
12 but those deal with there is a whole other body of law that
13 deals with that. I mean convictions come in all the time on
14 DUI, but they come in especially if your client is going to
15 testify.

16 Mr. Allen: I think that the statute says that a
17 conviction does not come in.

18 The Court: I'm going to research it but there is a
19 whole body of law that deal with convictions whether it be
20 DUI, whether it be ABWIT, whether it be ABHAN, whether it
21 be criminal sexual conduct. They come in for a myriad of
22 various reasons especially if they seek impunity it's going
23 to come in as a violation of a safety statute.

24 Mr. Allen: Well, I'm not a criminal lawyer but some of
25 those crimes you just referenced I think would rise to a

1 level of a felony and I agree that felony convictions.

2 The Court: Doesn't matter, not if there is a
3 misdemeanor. South Carolina is a strange place we have that
4 carry ten years that are still misdemeanors and they still
5 coming because of how much time they carry. I don't know
6 why, how, I don't know what the mystery is to how we
7 classify offenses but CDVM which is criminal domestic
8 violence of a high and aggravated nature which carries zero
9 to ten is a misdemeanor under South Carolina law ain't that
10 strange. Don't test my knowledge much further than that.
11 There is so much in criminal court that you almost have to
12 memorize the table when you are doing guilty pleas
13 otherwise you will get off track, but I mean I'm not making
14 a ruling about it until I hear it.

15 Mr. Allen: The other thing is and I understand you are
16 not making a ruling right now as to blood alcohol content.
17 The thing that I bring to the courts attention is my
18 understanding based upon the toxicologist deposition was
19 that there was a deployment of public safety chain of
20 custody record which we've got, but there is also an
21 additional SLED chain of custody of what happened once it
22 got to SLED and that records never been produced. We don't
23 know who those folks were at SLED that touched this stuff.

24 The Court: I'm sure she is going to call them all.
25 There's a way it has to be handled and they do it the same

1 way every single time. I pretty much can tell you off the
2 top of my head who handled that blood alcohol, who handled
3 that blood from the time it got, because I hear too many of
4 them. It's the same people, there is a lady at the desk she
5 checks it in, she puts it in a refrigerator. There's
6 another lady that comes and gets it, takes it from that
7 refrigerator and takes it to the toxicology department.
8 There's another person that touches it that spins out that
9 separates it out and test it. Then it goes back into the
10 refrigerator and then they do another quality control test
11 on it. Then after that they put it in the throw away bin.
12 That's basically what happens for ninety days and if nobody
13 else wants it, it gets thrown away with everything else. I
14 forget the little, the term it starts with an 'A' where
15 they spin out the, I forget what it's called it will come
16 back to me, but I would suspect depending on the date of
17 this, the event which was 2008 that those same people are
18 there. It's the same three or four folks that handle all
19 those and depending on the department, the police
20 department. Whether it be Charleston, Berkeley, North
21 Charleston, the Sheriff's Department pretty much the same
22 people run it up to SLED everyday. Now I don't know how it
23 was handled from when they drew it. Whether it was drawn at
24 the hospital or whether he did a PDA you know fluid, did a
25 Breathalyzer I don't, I don't have a clue so I don't

1 because I haven't heard the evidence but I would assume if
2 it went to SLED they tested his blood right.

3 Mr. Allen: Right

4 The Court: Did he have to get medical treatment?

5 Mr. Allen: Yes, and it was drawn at ...

6 The Court: By a nurse.

7 Mr. Allen: Correct, but what I'm saying is we've got it
8 up to the intake person at SLED and we've got the
9 toxicologist but we don't have those days in between and
10 the names of those individual and a I presume ...

11 The Court: She is going to have to call them.

12 Mrs. Mullis: We have testimony from the SLED
13 toxicologist who can verify who handled the blood which
14 reasonably ...

15 The Court: There are people who are there who handled
16 it and they're still there. I'm not aware of any of them
17 having left or have been fired or have went some place
18 else.

19 Mrs. Mullis: Right and then Wilson and Kimberly Davis
20 we can't verify where they are.

21 The Court: Yeah but the ladies who are there who take
22 it in they still work there.

23 Mrs. Mullis: Right and we have verified who they are
24 and can verify who they are.

25 The Court: Yeah but that's not enough to establish a

1 chain. He's entitled to know everybody that touched it. As
2 far as practical, so you need to identify those folks. It's
3 no different than a criminal case establishing a chain. Per
4 the admissibility of blood alcohol. What was the blood
5 alcohol in this case?

6 Mrs. Mullis: Point one-zero-three. They took the
7 toxicologist testimony by video deposition on Friday, and
8 she testified in regard to the internal individuals that
9 handled the blood within SLED on the intake that were
10 verified with the initials and the individuals that moved
11 the blood around.

12 The Court: There is a scat, a rule of procedure that
13 allows you to skip all of that, but they have to agree to
14 it and if they don't agree to it then you have to call all
15 those folks.

16 Mrs. Mullis: Your honor we would like to address the
17 courts attention to *State vs Hatcher*.

18 The Court: I'm familiar with all the cases on chain you
19 have to prove it as far as practical.

20 Mrs. Mullis: And *State vs Taylor* that says that we
21 don't actually have to testify to each and every single
22 individual as long as we can bring ...

23 The Court: As long as we can bring. I'm going to tell
24 you who needs to --- not toward you personal, but the cop
25 gave it to a SLED then he put it in a refrigerator. It's

1 no different than a criminal case when you're proving the
2 chain and those cases don't stand for the proposition that
3 eliminate you having to do that, and those people are there
4 they come to Charleston all the time. They have to deal
5 with it but they're here, and they have a computer print
6 out that tells you every place that bloods been at SLED and
7 you should be able to produce. They keep a computer record
8 every thing, every place that blood went at SLED and
9 everybody's badge who went by that refrigerator that took
10 it out.

11 Mrs. Mullis: Fourier the information out of SLED that
12 never and not been produced.

13 The Court: Not a Fourier report.

14 Mrs. Mullis: We've done those.

15 The Court: And they didn't send you the print out?

16 Mrs. Mullis: They haven't.

17 The Court: Well somebody should have it in their file.
18 They keep it, they're meticulous about records.

19 Mrs. Mullis: Right, we've got ...

20 The Court: Because they have to do this all the time.

21 Mrs. Mullis: We've got the trooper from when he drew
22 the blood. He stood there and witnessed it. We've got
23 highway patrolman that he handed it to that one, the one
24 that took it to SLED. Then she can verify the initials of
25 the individual that it came into hands.

1 The Court: The person who go it, she's there.

2 Mrs. Mullis: The only person that we don't have is the
3 person that moved it from the refrigerator in evidence up
4 to the lab where Heather Daily tested it.

5 The Court: They should have that to because if it was
6 a criminal case they definitely have it, because they might
7 of had to come to court and testify to it and it's routine.
8 They know that they, they don't skip those steps. They
9 don't just bring one or two people. They bring everybody,
10 because the defense lawyer never consents to the chain. So
11 they bring everybody and they are used to it. Like I said
12 they hate it because it takes up, eats up a whole day of
13 their time and it is a little ridiculous, but usually you
14 have. Some lawyers will consent to it when they have the
15 print out. So you should be able to get that print out from
16 SLED. That has every place that blood, because they have a
17 computer system and that is a part of their protocol. When
18 they get that blood in they have to, there is a specific
19 way it has to be handled. Every time it goes in or out of
20 a refrigerator they have to document it. It is documented
21 by a card they use that is specifically assigned to them.
22 So they have a specific computer program for that process
23 and it document every place that blood has been. Except at
24 the end once it gets into the lab for testing that is
25 considered a secure environment and they don't swipe out

1 every time it goes in and out of the refrigerator once it
2 goes into the toxicology lab, because they know it's the
3 control of that specific toxicologist. Then for the quality
4 controls they don't do all that either, because for every
5 test they have quality control. So once that person ran
6 that, the test and did --- there's a person that's going to
7 come behind them double check it. For quality control which
8 is a part of their standard operating procedure and then it
9 will tell you where it went after that it's going. They
10 don't call it a throw away bin but that's essentially
11 that's what it is. It's where they discard stuff once
12 they've tested it and they keep it for a certain amount of
13 time just in case somebody, a defense lawyer wants to, to
14 have their own expert test or they feel they need for
15 quality control purposes that they need to test it again.
16 They keep it for a certain amount of time and then they I
17 don't know if they destroy it, discard it, I don't know
18 what they do with it after so many days. You should be
19 able, the person who you, if their able to, if she was able
20 to tell you everybody that had it then they're still at
21 SLED.

22 Mrs. Mullis: She was able to tell us who checked it
23 into evidence and she could not verify who took it from
24 evidence to the lab, because she did not have SLED's
25 internal chain of evidence.

1 The Court: And why, is that because she is not employed
2 there anymore?

3 Mrs. Mullis: She's not employed there anymore.

4 The Court: But the person that's employed there has it.
5 It's in there computer. So you need to ask them. You
6 actually could ask the person who, you just need to ask the
7 head of the department it's not. I'm going to tell you
8 exactly who it was, but unless there has been some turnover
9 in their employment it's the same three folk. Ok, is there
10 anything else? Can we break for lunch then for one, well
11 one thirty? Now that we've broken into a little bit of our
12 time. Getting an hour and fifteen minutes. Is that
13 acceptable to everybody? Let me give you back your
14 certified ...

15 Mrs. Mullis: So, I can end my opening.

16 The Court: No, you're to mention nothing that is
17 subject to the motion lending in your opening. Either one
18 of you.

19 Mrs. Mullis: So I can't discuss the, his plea.

20 The Court: Nope, not until I rule on it and I'm not
21 going to rule on it until I hear it in its entirety because
22 I don't know what you all know. I need to hear it.

23 Mrs. Mullis: The plea?

24 The Court: I need to hear everything in its context and
25 so where there is motion in limine, because my ruling isn't

1 final anyway. Once you get to the issue. You need to advise
2 me there is a matter of law. I'm going to take it up in
3 camera. I'm hear all the testimony myself. I'm making a
4 ruling to fact and conclusions of law and then we'll go
5 from there. So that if I exclude it you have a --- and if
6 it's admissible no harm no foul, but I don't make rulings
7 where I haven't heard everything because I can't rely of
8 what you all tell me. No offense, but you all are advocates
9 you are suppose to put polish on it and I have to hear it
10 myself objectively to make a ruling. And I find that's the
11 best way to do it because then nobody has to eat crow
12 later.

13 Mrs. Mullis: So I can't address the drunk, I mean this
14 case is about a drunk driver that hit my client and I'm not
15 really sure how to address that.

16 The Court: I understand that, I'm not going to try it
17 twice. I'm not going to have the bench pile in. You're not
18 prejudice in any way by doing that.

19 Mrs. Mullis: By not addressing the fact that a drunk
20 driver hit my client in opening argument?

21 The Court: You wouldn't be able to say that he was
22 drunk anyway in your opening argument.

23 Mrs. Mullis: If he plead to it, it's an admission of a
24 party opponent. We're asking the court to take judicial
25 notice of his plea. With a certified copy from the lower

1 court and the testimony.

2 The Court: But he could --- he says as a matter of law
3 it's not admissible.

4 Mrs. Mullis: And I understand that and the testimony of
5 the police officer which I'll be happy to present to the
6 court in deposition. That he in fact did plead guilty to
7 DUI.

8 The Court: I understand but I still haven't. I need to
9 email, I got some of this on Friday and I had a chance to
10 look at some of it but I haven't had a full opportunity to
11 digest it and look at statute that Mr. Allen has referenced.
12 So until I rule on it there's to be no reference to it and
13 again there's no prejudice because you still. If I had, if
14 I move that it's admissible you still would be allowed the
15 opportunity to admit that testimony. So we'll go from there
16 after lunch, but I'm going research at lunch and see and if
17 I make a ruling prior to then I'll make you aware of that
18 but if not anything that's subject to the motion in limine
19 and that includes anything that Mr. Allen which is your
20 motions in limine regarding the chain of custody or
21 otherwise are off limits to him as well. As well as him
22 making any reference to. Your SLED person are they going,
23 what are they going to testify to.

24 Mrs. Mullis: The person.

25 The Court: Tested the sample.

1 Mrs. Mullis: Toxicologist, that she tested the blood
2 and that it tested at point one-zero-three and her report
3 that she signed.

4 The Court: But she's not going to testify as to how it
5 affects the body.

6 Mrs. Mullis: Impairment, intoxication, not giving
7 opinion in regard to that because she is no longer with
8 SLED, no longer a certified forensic toxicologist. So
9 really just verifying her report that she did at the time
10 that it was done and that's being offered by video
11 deposition as well.

12 The Court: What were the amount of damages in this
13 case?

14 Mrs. Mullis: My client has got forty seven thousand in
15 medicals, he has seventy, let me see if I can put my hands
16 on it.

17 Mr. Allen: I think about twenty six or twenty seven in
18 past lost wages and then Dr. Wood gives a total economic
19 loss of seventy five base on some future.

20 The Court: I'm sorry I can't hear you Mr. Allen.

21 Mr. Allen: Forty seven in past medicals, twenty six in
22 past loss wages, and including that past loss wages Dr.
23 Wood gives a total economic loss of about seventy five I
24 think.

25 Mrs. Mullis: Seventy five thousand in economics?

1 Mr. Allen: Based on some future loss of earnings.

2 The Court: Does he have some future in pending?

3 Mrs. Mullis: He does.

4 The Court: What's the nature of that in pending?

5 Mrs. Mullis: Around twenty percent to the ankle,
6 basically that's in and up to the leg. Is that
7 understanding?

8 The Court: You all made any offers in this case Mr.
9 Allen?

10 Mr. Allen: There's two UM carriers your honor. Liberty
11 Mutuels offered ten because he's being represented by Emily
12 Sheets. I represent Allstate we offered one fifty.

13 The Court: So you have all had, already have primary
14 worked out.

15 Mrs. Mullis: We have not.

16 The Court: OK

17 Mr. Allen: UM uninsured...

18 The Court: OK

19 Mr Allen: Mr. Valle has another issue that you may want
20 to be aware of is Mr. Valle was served through publication
21 no one has ever found him, talked to him.

22 The Court: Do we have NCIC sheets that might be very
23 good.

24 Mr. Allen: I know he didn't have a drivers license on
25 assault. I know.

1 The Court: You said he had a drivers, he did not have
2 a drivers license.

3 Mr. Allen: He did not have a drivers license.

4 Mrs. Mullis: He did not have a drivers license.

5 The Court: Yeah he might become ...

6 Mrs. Mullis: And he's a frequent flier in the DUI
7 court.

8 The Court: When you say frequent flier what do you
9 mean?

10 Mrs. Mullis: That, this isn't his only one.

11 The Court: Then why was he just charged with a first if
12 it's not his only one.

13 Mrs. Mullis: I don't know. We don't know if it was
14 after that. Our information coming from our investigator
15 was that, that wasn't the only time.

16 Mr. Allen: I don't know if I've seen any of that.

17 Mrs. Mullis: That may have been later.

18 Mr. Allen: I don't know, that might be the first time
19 I'm hearing this.

20 The Court: And what did you all request from the
21 defendants?

22 Mrs. Mullis: We filed an offer of judgement three
23 hundred thousand and came down off that to two ninety.

24 The Court: So you all have no middle ground basically
25 is what you are telling me?

1 Mrs. Mullis: I don't think that that's true.

2 The Court: You don't think that's true.

3 Mrs. Mullis: I don't think that's true.

4 The Court: You think you all got some middle ground?

5 Mr. Allen: I think so but it's going to come down more
6 than ten thousand dollars off what the demands has been for
7 the past year and a half.

8 The Court: What's your middle ground?

9 Mrs. Mullis: I don't know my clients and I would have
10 to have a conversation about that. Since Mr. Allen's offer
11 increased fifteen thousand in two years despite.

12 The Court: Do you know the bottom line? You want to ask
13 him right quick?

14 Mrs. Mullis: Well I mean, I don't know if they can come
15 up with that.

16 The Court: I know but I think those people know what
17 their bottom line is. Have you asked them?

18 Mrs. Mullis: No.

19 The Court: Why don't you ask and find out what their
20 bottom line is and then tell Mr. Allen what their bottom
21 line is. Let me see if it makes a difference. He can't bid
22 against himself. He has to know what your bottom line.

23 Mrs. Mullis: That's our problem is that it's his offer.
24 He is sitting with two ninety on the table and it's his
25 turn to make an offer and he won't do that.

1 The Court: Well, because I think he has told you his
2 offer is one sixty but I think he. Is there a reason you
3 haven't responded to their demand of two ninety?

4 Mr. Allen: I sent Pam an email last week saying give me
5 your bottom dollar so we can try to get the case resolved
6 and the response was two ninety. I can't jump a hundred and
7 forty thousand dollars.

8 The Court: But you could have made a counter offer or
9 a counter, what would that be classified as. You could've
10 replied.

11 Mrs. Mullis: We tried to keep communications open and
12 I was informed by Liberty that they weren't going to
13 continue talk anymore and then I was informed that they
14 were and we just ...

15 The Court: What exactly was the nature of your client,
16 was it a head on collision.

17 Mrs. Mullis: It was a head on collision, he had
18 multiple broken bones in his leg, he had an injured left
19 knee, he had a laceration to his thumb, he had an injured
20 right shoulder, he hit his head, he had an injury to his
21 neck.

22 The Court: How bad was the car?

23 (Counsel approaches bench)

24 Mrs. Mullis: That's the good looking car out of the two
25 because Mr. Valle's car flipped upside down over it we

1 think.

2 The Court: That's your client's car?

3 Mrs. Mullis: Yes ma'am

4 The Court: I'm assuming the car was totaled.

5 Mrs. Mullis: Well it's a convertible now at least.

6 Mr. Allen: Property damage has been resolved your
7 honor.

8 Mrs. Mullis: This is my clients ankle, now.

9 The Court: Do you want to call your client, do you want
10 to talk to your client and see what their counter, what
11 their response would be to two ninety Mr. Allen? Because it
12 is kind of hard, it's kind of hard to be against yourself.
13 You kind of have to know where somebody is at with it.

14 Mr. Allen: I understand, I think my point was if we
15 could just cut to the chase. I mean we could come back to
16 one fifty two or one fifty five we could just get to the
17 chase of what's it going to take to get the case resolved.
18 I could call my client and see if they could make that
19 jump.

20 Mrs. Mullis: I have to tell you that I really think
21 that the hand up is the admissibility of the DUI which is
22 why we filed that motion.

23 The Court: Yeah I gotta research that a little bit
24 because I, my gut feeling and I rarely, sometimes I do but
25 generally I wouldn't pretend that I'm a walking legal

1 encyclopedia and I know everything. That would be totally
2 irrational. My gut feeling is that it's probably going to
3 come in as an admission against interest. I have let in
4 especially on, because it goes to power of conduct. It's
5 goes to repetition of the conduct, potential to harm, the
6 other values that couldn't consider in punitive damages but
7 at the same time it is a conviction and admission against
8 interest. I can tell you based on my experience with the
9 magistrates court having handled many of their appeals and
10 having to deal with their computer system in bond court.
11 They're not a court of record. They don't have right to
12 examine, they notate everything in that computer. If it
13 were a forfeiture of bond it would say forfeiture of bond.
14 It would not say bench trial defendant plead guilty. It
15 would have said forfeiture of bond. That is how it would be
16 notated. Whether it was a bench trial or whether he plead
17 guilty irregardless the net result is he was found guilty.
18 Whether it's by his own admission or by court having,
19 either way he's guilty. But if he forfeited bond it would
20 say that. It would say forfeiture of bond and if he
21 forfeited his bond they also would have. If he had, it just
22 depends on how he whether he would of had to post it in
23 cash. If he forfeited bond they just would have taken the
24 cash and would of said the amount, wouldn't of said the
25 amount of the fine or thirty days. You'll see when they do

1 that, that means either you are going to pay the money or
2 if you don't pay it within a certain amount of time that
3 the magistrate gives you they issue a bench warrant and you
4 have to come serve thirty days.

5 Mr. Allen: Well that's the other thing. I don't know if
6 he came to the day of the trial or he posted bond got out
7 and came.

8 The Court: Doesn't matter.

9 Mr. Allen: And I don't know how much time he served.
10 That's what I'm saying, the records are incomplete at best.

11 The Court: Doesn't matter whether he spent thirty days
12 in jail or he spent five days in jail. It is unlikely, he
13 probably bonded out almost immediately after or it would
14 not have said, well it may have. He could of come from jail
15 and it may have said, it would have said the fine or thirty
16 days because they always give you the option it's either -
17 or. We have the money which makes me think that he had
18 maybe not posted. Where was he arrested exactly?

19 Mrs. Mullis: Laying in the middle of the street.

20 The Court: I mean where was he, where did they, they
21 took him to the hospital.

22 Mrs. Mullis: Trident

23 The Court: It was Berkeley County I assume.

24 Mr. Allen: It is.

25 The Court: So they still have the records. They will

1 know when he was there and when he wasn't. They'll tell you
2 exactly when he came in and when he posted bond and
3 everything else.

4 Mrs. Mullis: I have a certified copy from the court
5 that indicates that he plead to the plea of the testimony
6 of the police officer.

7 The Court: Well it says bench trial/guilty plea.

8 Mrs. Mullis: I have the testimony of the police officer
9 that says he plead to the DUI. I can put up the testimony
10 of Mrs. McCray that says she sat there and witnessed him
11 pleading to the DUI.

12 Mr. Allen: My understanding was that they had an
13 interpreter there.

14 The Court: The rules require a certified copy of the
15 conviction.

16 Mrs. Mullis: That's what the interpreter does is
17 interpret what he says into English so everybody else can
18 understand him. So she would understand what the
19 interpreter says.

20 The Court: It doesn't really matter if a officer
21 testifies that he plead guilty or whatever. The rules
22 require a certified copy of the conviction and the purpose
23 of that is for the person either admitted or denied that
24 they did it, and then the impeach basically with extrinsic
25 evidence of their conviction. If they put bench

1 trial/guilty plea he may of requested a bench trial and
2 then got there and decided he wanted to plea guilty, but
3 the jails going. The only place they put him is over here.
4 They will know when he came in and whether he bonded out.

5 Mr. Allen: That's a possibility but I think it's
6 important to know one way or the other, because my
7 opposition is a conviction by a judge or jury is not
8 admissible. I think 56-5-6160 speaks to that. I think had
9 he stood before the court and said I admit to doing this
10 that would surely be admission of a party, but I just don't
11 think we've got that evidence.

12 The Court: I don't know. I'd haveto think about it and
13 we would have to argue it at the appropriate time because
14 I haven't really. To be honest with you I haven't
15 researched it as much as I would like to.

16 Mr. Allen: One thirty

17 The Court: Yeah at this point. Get the jury for me I
18 should have already sent them to lunch.

19 Mrs. Mullis: The SLED supervisor will not

20 The Court: The jury is coming.

21 (Jury enters courtroom at 12:30)

22 The Court: Ladies and gentlemen we appreciate your
23 patience. We've been dealing with some matters of law that
24 we need to resolve prior to going forward and I got a
25 little caught up in that. So please don't think I take your

1 time for granted. We're going to break for lunch until a
2 quarter of two. That gives you about an hour and fifteen
3 minutes. During the break please do not speculate about
4 what you think this case may or could be about. Please do
5 not allow yourself to be exposed to any information outside
6 of these proceedings. That includes anything that could be
7 found on the internet, radio, television, or in the
8 newspaper. You will return directly to your jury room after
9 lunch and the bailiffs are going to show you how to do that
10 and please don't have any contact with anyone in or about
11 the court house we would not want an innocent conversation
12 to be observed and misinterpreted. I hope that you all have
13 a great lunch and we will see you at a quarter of two. You
14 can go with the bailiffs.

15 (Jury excused for lunch 12:33)

16 The Court: Ok what were you going to ask?

17 Mrs. Mullis: So in clarification for our purposes and
18 subpoenas. The forensic toxicologist can testify based on
19 the SLED records who took the evidence into her possession
20 at SLED. It is an individual by the name of Doris
21 Yarborough based on her initials and you want Doris
22 Yarborough here to testify that she took possession and
23 verify.

24 The Court: You need to try your case and I've told you
25 what the case law requires. Which is to prove the chain as

1 far as practical and the way that it is generally done is
2 you call all those people. Unless the other side consents
3 to it. It seems to be an incredible waste of time, but
4 never the less in the long run it actually helps you. Then
5 they can't argue somehow it was hypothecated, messed with,
6 diluted, whatever. In the grand scheme of things and it
7 eliminates an issue and like I said they are used to doing
8 it. They go all over the state and do it. Generally for
9 criminal court and simple court they are used to having to
10 do it. Now I would suggest that you ask Mrs. Yarborough or
11 either the supervisor of the lab to do the print out for
12 you because they have a print out that shows every place
13 that samples been in this lab. It's a part of their I
14 forget what the name of that program is but they have a
15 program that governs every sample that comes into that
16 building and there's a specific way that they do it and
17 they keep meticulous computer records of everybody that's
18 touched any sample whether it's gunshot residue, whether
19 it's blood, whether it's a finger print, so they should be
20 able to provide you with that print out. Now having said
21 that Mr. Allen I would imagine that if you look at that.
22 You all should be able to come to some resolution about the
23 chain of custody of the sample, but if not I would, I would
24 go ahead up and find as a caution and call the person who
25 took it from Mrs. Yarborough to the toxicology

1 refrigerator. Ok, is there anything else we need to pick up
2 before lunch from the plaintiff?

3 Mrs. Mullis: None your honor.

4 The Court: From the defense?

5 Mr. Allen: None your honor, thank you.

6 The Court: See you all at quarter of two have a good
7 lunch.

8 (Court released for lunch)

9 (Court returns)

10 Mrs. Mullis: The defendant had come into court from
11 incarceration from jail.

12 The Court: I'm just curious to know what his history
13 was.

14 Mrs. Mullis: He was released after the arrest with an
15 ankle bracelet. On electronic monitoring and reported back
16 to court and plead because my clients were there.

17 The Court: I researched over the lunch and break and I
18 think that Mr. Allen is correct that that statute precludes
19 the admissibility of the conviction however and there's
20 several cases that stand for that proposition. However
21 there's certain exceptions to that statute. One of which is
22 it comes into impeach the credibility of the witness if it
23 meets the elements of rule 609. The other exception is,
24 well actually that's the only exception. However there's
25 another statute directly on point that deals. That's why I'm

1 having them research for me exactly what his situation was
2 incase while interpreting that statue that if it was in
3 fact a bond forfeiture it does not come in as an admission
4 at all. There's case law and statue that precludes that,
5 says any forfeiture of bond does not come in as an
6 admission. However there is case law that supports that
7 Mrs. Mullis does have the right to present evidence that he
8 was tested. That his blood alcohol was what it was and she
9 can, but there can be no mention of him being arrested or
10 him being convicted. Then it's for the jury to decide
11 whether the fact that he was impaired and whether that
12 impairment made him breach the standard of care and whether
13 he then of course was approximate cause of the injuries,
14 but anything beyond that I think is precluded by case law
15 based on what I've been able and there are only three cases
16 that deal with it.

17 Mrs. Mullis: And we would like to direct the courts
18 attention to Rule 401, the admissibility or inadmissibility
19 of pleas, plea discussion, and related statements and the
20 rule specifically states except as otherwise noted in the
21 rule evidence of the following is not any similar criminal
22 preceding admissible against the defendant who may plea or
23 was a participant in the plea discussion. When a plea of
24 guilty which was later withdrawn. We don't think the
25 wording of, which was later withdrawn.

1 The Court: It was completely inapplicable. There is no
2 evidence that he plead.

3 Mrs. Mullis: Right, would have been included in Rule
4 410, four ten if that hadn't been relevant. So we think
5 that it comes in as a plea under Collateral Estoppel and
6 Res Judicata because he can...

7 The Court: If he gets on the stand and testifies you
8 can use it to impeach him if it meets the elements of Rule
9 609 dealing with time and everything else, which I don't
10 think it would because it's less than thirty days and it
11 doesn't deal with Moral turpitude and it doesn't deal with
12 dishonesty. So I don't think you can meet the hurdle of
13 Rule 609. The case law is very clear that if his bond was
14 forfeited it doesn't come in under any circumstances and
15 the case law interpreting 56-5-6160, 56-5-6160 is very
16 clear. It says shall not come in which is mandatory. The
17 Supreme Court has interpreted that to mean that that is an
18 exception and it cannot come in. However it does not
19 preclude you in the case that. The case that the Supreme
20 Court ruled one deals with somebody crossing the center
21 line and hitting someone. Did not preclude the Highway
22 Patrolman from testifying the person crossed the center
23 line. Did not preclude him from testifying what happened
24 subsequently, just can't talk about it being a conviction.
25 You can't talk about him being charged and to some extent

1 I see the logic of it because it's a factual issue for the
2 jury to determine whether in fact he was impaired and what
3 I would instruct if we go that far is that I would instruct
4 the DUI statute because that's a violation of statute which
5 would be negligence per se and a violation of standard care
6 and I would instruct on the inference .08 which is still an
7 evidentiary issue for the jury to determine and I think
8 that's where it leave us with it, but I don't think you can
9 mention he was convicted, I don't think you can even
10 mention he was arrested because that would be a prior bad
11 act not subject of a conviction which would go to his
12 character.

13 Mrs. Mullis: That would be a prior bad act but ...

14 The Court: Well it would be subject of a conviction but
15 it would be, I'm sorry my brain was thinking about
16 something else. I don't think you can mention he was
17 arrested based on this case law, interpreting the statute.
18 I don't think you can arrest, I don't think you can mention
19 he was convicted, but there's nothing that precludes you
20 from talking about the facts and circumstances surrounding.
21 In other words you can say he had his blood drawn at the
22 hospital after he was injured and it was sent to SLED and
23 it was tested. You can even have the officer testify as to
24 what he observed at the scene, which that he had a strong
25 odor of alcohol about him, that he couldn't pass the field

1 sobriety test. You can get all of that in, he just can't
2 say he was convicted. He just can't say he was arrested.

3 Mr. Allen: And that's because it was a bond forfeiture.

4 The Court: No that's because of 56-5-6160.

5 Mrs. Mullis: And that's only related to a conviction.

6 The Court: No, South Carolina Supreme Court says shall
7 not be admissible that is one of the exceptions.

8 Mrs. Mullis: A conviction is that correct.

9 The Court: No no it says any infraction of a traffic.
10 I mean 51. I'm going to look exactly what the statue says.
11 It says conviction I believe is the wording that it uses.

12 Mrs. Mullis: 56-5-6160 is that correct?

13 The Court: 56-5-6160 no evidence of conviction of any
14 person for any violation of this chapter shall be
15 admissible in any court in any civil action.

16 Mrs. Mullis: Yes your honor and again the certified
17 document from the court below states he plead to it.

18 The Court: Case law says whether it's conviction,
19 whether it's an admission of guilt, irregardless it has the
20 same import as if a court convicted him and there's a
21 statue on point that says if it's nolo contendere, if you
22 plead guilty it has the same affect as if a court found you
23 guilty. It's all the same thing, it's a conviction. The
24 plea of guilty is a conviction and that's how it reflects
25 on the NCIC which is his criminal rap sheet, but the case

1 law is very. This gentleman was charged with crossing the
2 center line and the Supreme Court said, and that's why I'm
3 trying to figure out exactly what happened, because if it
4 was a forfeiture of his bond it doesn't come in. Case law
5 says it does not come in, but if it is an admission.
6 Actually there's several different levels to this issue.
7 There is a case on point which deals with the fact that
8 while a criminal conviction is not a binding adjudication
9 in a subsequent civil action based on the same facts,
10 judgement on plea of guilty may be received into evidence
11 as an admission and subject to explanation or rebuttal. The
12 subsequent case interpreting it makes 56-5-6160 an
13 exception to that, which says it cannot come in. However,
14 and there is another exception that says. Now if he
15 testifies and says I've never been in trouble, of course
16 you can use that to impeach him or if he says but you know
17 the rules on impeachment are still subject too or still
18 governed by rule 609. However, I need to look at this
19 another quick second. What the preliminary, the reason I
20 have been looking, I need to know. It's going to take them
21 an hour to find it though, they got to dig the records out
22 of our separate.

23 Mr. Allen: The preliminary was a forfeiture your honor,
24 because that makes a difference.

25 The Court: Because what different, that makes a big

1 difference. If it was a forfeiture the case law says that,
2 the fact a person has forfeited bond cannot be received
3 into evidence either as an admission or for impeachment
4 purposes in subsequent civil trial. Versus him pleading
5 guilty, which is an admission against interest.

6 Mr. Allen: And if it was a forfeiture it wouldn't say
7 that on the, not typically.

8 The Court: It depends, we've tried to access those
9 records normally we can, but we've not been able to. So I
10 had Rhonda call over to the central court to see what they
11 could tell us. The jail has only been able to determine
12 that he was arrested on December 20th and then he posted
13 bond on December 24th 2008. Then he posted bond in the
14 amount of nine hundred ninety seven dollars. They have no
15 indication of a monitor or otherwise in their system and
16 they would normally because you can't leave without a
17 monitor being put on you. So normally that is something
18 that they would have noted. Now, I am not doubting that it
19 was ordered. I don't know whether subsequently it was
20 modified or something. I have no idea, because that can
21 happen between bond court and solicitor being assigned to
22 a case and a person being released. They can always agree
23 by consent in order to eliminate, because the monitor is
24 eight hundred and ninety dollars a month and so lots of
25 time they agree to modify it.

1 Mr. Allen: So but absent evidence, absent that jail
2 being able to figure out for us it was otherwise.

3 The Court: I don't know you all have the burden I'm
4 just doing the leg work for you to challenge if it,
5 really. I'm curious now, I'm on a scent. I want to know
6 what happened.

7 Mr. Epting: I guess that's what I was thinking. I
8 thought that they had the burden once we put up the
9 certified copy of the conviction.

10 The Court: I don't know because it's such a convoluted.

11 Mr. Epting: I think, I thought they used the right
12 language in currently otherwise.

13 The Court: I don't know. No normally it just would say,
14 I don't know. I don't, you know I stopped trying to figure
15 out reports of record duty, because everybody does it
16 differently. They all put it in a system differently. They
17 all, it depends on who's putting it in a computer. It also
18 depends on how they normally do it. Every magistrate court
19 does is differently. The municipal courts do it
20 differently. I would assume based on what has been
21 presented that he plead guilty, but I'm sort of conflicted
22 by the fact that they put bench trial slash. I would like
23 to know what that means. That's why I had them call over
24 there.

25 Mr. Allen: Would it be helpful to your honor to have

1 proper testimony if we could put up the highway patrol
2 officer, the client who witnessed the plea.

3 The Court: No, I want to hear it from the people who
4 are in charge ministerially with keeping the records,
5 because they are the only objective folk who's word I can
6 take on it. Everybody else has an interest in it. So the
7 folk who are charged with keeping the records need to be
8 able to tell me what happened and they should be able to
9 tell me what happened. So we called over there and they are
10 going to find what.

11 Mr. Allen: My concern is that they can't. I see what
12 you're saying judge.

13 The Court: Well I don't know, I would think they might
14 considering the fact that we just called over there. They
15 should be able to tell me what happened. The young lady at
16 the jail says that the records are in a separate area
17 outside. She has to go pull the box or something and then
18 it's going to take her about an hour. She's going to let
19 us, because those records should also reflect. You see once
20 it happens at court it still has to go back to them to know
21 what to do. So, if he had to go back over there to serve
22 there thirty days. It'll be in their record, but they say
23 they have no record of him serving any time. So I don't
24 know whether, since he had already posted bond and he plead
25 guilty if they just took his money right there in court,

1 but there's still. If he had a monitor that bondsmen would
2 of, somebody would of had to of processed him out and took
3 that monitor off his leg because it's large.

4 Mr. Allen: Yeah sure.

5 The Court: And it's expensive and they're not just
6 going to let you float around with it on your leg. So they
7 going to have to get it back. Now I'm preaching. So I don't
8 know and I'd like to know what happened.

9 Mr. Allen: What is that?

10 Mrs. Mullis: Your documents you faxed to me from the
11 summary court.

12 The Court: Are those bond forms?

13 Mrs. Mullis: The bottom of it says alcohol monitoring
14 device.

15 The Court: Yeah but that still doesn't change the fact
16 though that the solicitor and the, they may have modified
17 it. They do it all the time, because like I said that
18 monitor is eight hundred and ninety dollars a month. Of
19 which I think you have to pay the first month up front
20 before they'll put the monitor on your leg.

21 Mrs. Mullis: It's got a surety bondsmen signature on it
22 and the judges signature on it.

23 The Court: But that doesn't mean it might not have been
24 changed subsequently.

25 Mr. Allen: I'm just trying to figure out with witnesses

1 and how long it's going to take them if we've got the
2 witnesses coming up.

3 The Court: It doesn't stop you from trying the case,
4 but I need to know whether he forfeited bond or what
5 happened. It looks like from what you all received that he
6 plead guilty, but I'd like to know. I don't know, I don't
7 know why they had to go back and recreate the record that's
8 a little troubling to me too. Because they have a central
9 live system as well that their suppose to use. They're
10 suppose to put all that information on it, but
11 preliminarily at this point until I know whether it was a
12 forfeiture and he's correct Mr. Allen it is your burden to
13 prove that your client forfeited bond, not theirs. Although
14 the only thing they have to bring me is a certified copy of
15 his conviction. Which they preliminarily met that burden
16 and then of course it shifts back to you. To prove that
17 somehow that's invalid. So you can't just simply say
18 forfeited, he may have forfeited his bond to get around
19 that being admission against interest.

20 Mr. Allen: Well I'll just say that based on the way I
21 read it 56-5-6220 the title of that provision says entry of
22 guilty plea, forfeiture of bail, or entry of plea of nolle
23 contendere to have the same affect as conviction. So if all
24 those three things have the same affect as conviction then
25 you go back to 6160 it says a conviction ain't coming in.

1 I don't see what difference it makes.

2 The Court: And he is, and again we're still back to the
3 original point which is the Supreme Court has and this is
4 from 2001 case they have interpreted that convictions are
5 an admission against interest but we note their exceptions
6 to this rule 56-5-6160. No evidence of conviction of any
7 person for any violation of the chapter entitled Uniform
8 Act Regulating Traffic on Highways shall be admissible in
9 any court in any civil action and that is an exception to
10 the rule. So I don't think you're precluded from talking
11 about what happened in the surrounding circumstances and me
12 instructing the jury on the elements of DUI. As well as the
13 inference they can draw from a person being more than .08,
14 but I don't think based on the statute that the conviction
15 would be admissible because it's an exception created
16 statutorily and it says shall which is mandatory.

17 Mr. Allen: Just so we're clear. Her introduction of
18 testimony regarding the BAC and ...

19 The Court: And there's a distinction between the
20 others, the other sorts of like CSC, Lewd Act, ABHAN,
21 ABWIT, none of those are subject to a statute that says they
22 are not admissible, but I'm still curious as to what
23 happened and they should be able to dig that out for me.

24 Mr. Allen: And just so I'm clear she can talk about the
25 BAC and go give an instruction on DUI statute, but this is

1 all premise on the fact that she is able to establish
2 proper chain, right.

3 The Court: I would imagine she would be able to. Those
4 people who are out there at SLED would be glad to appear.

5 Mr. Allen: But until she does that we're not suppose to
6 talk about it, right.

7 The Court: She can still say what the evidence will
8 show.

9 Mr. Allen: Well my concern is what happens if she
10 doesn't establish a chain we've already ...

11 The Court: Then she'll just have to figure out how
12 she's going to eat crow with the jury.

13 Mr. Allen: Well I'm afraid that the jury. It's one of
14 those things once the bell has been rung it's kind of hard
15 to un-ring it.

16 The Court: She can argue what the evidence will show.
17 I would assume she has established. Those folk, they get
18 off at the Jedburg exit it don't take them but an hour and
19 fifteen minutes to get here. They are used to doing it and
20 it's the same three ladies. Believe me they might even be
21 coming here for criminal court this week. They might be
22 heading down this way, down the highway anyway. They come
23 to Charleston at least twice a week. I just can't remember,
24 I knew it was Mrs. Yarborough I just can't remember the
25 other two ladies names but they've been at SLED. One of

1 them has been there for twelve years I think and I don't
2 anticipate and the other two have been there I think over
3 ten years, but they do this everyday of the week all over
4 the state that's their job. They are evidence custodians
5 and that's what they do, they are used to doing that. So I
6 would imagined she's been able to subpoena them and absent
7 them being some. They probably will, well I guess they
8 probably are required to be subpoena, but I don't know.
9 Whether if you asked them they would just come I would
10 imagine they would have to be subpoenaed, but absent them
11 being in some other court somewhere. I would imagine they
12 would come up here and testify for the two minutes it takes
13 for them to establish that they signed whatever, swiped
14 whatever and they took it. I assume that you sent them
15 notice that they needed to be here. She can always argue
16 with the evidence will show. I don't think there is
17 anything and that's the danger of arguing things that you
18 may not be able to prove that's at your parol. As long as
19 she, I have no indication that she is not going to be able
20 to produce witnesses that are going to show the chain of
21 evidence on the blood sample.

22 Mrs. Mullis: So I'm permitted to argue that?

23 The Court: You can argue what you believe the evidence
24 will show. Just make sure you can prove it. If it turns out
25 that it's inadmissible that's on you. Alright, we ready to

1 get started?

2 Mrs. Mullis: Plaintiff's ready your honor.

3 The Court: Defense ready?

4 Mr. Allen: Ready your honor.

5 The Court: Please bring in the jury for me and bring in
6 number 124 as the core person. That's Mr. McEleveen.

7 (Jury enters courtroom 2:33)

8 The Court: Ladies and gentlemen we appreciate your
9 patience bear with us just one moment. Ladies and gentlemen
10 if you'd bear with us just one moment, we apologize. We've
11 been trying to walk through some matters of law so that we
12 could go through the proceedings without having to stop as
13 much as possible. So please know we don't take your time
14 for granite and we appreciate your patience. We're going to
15 get some notebooks for you if you just bear with us while
16 we get those and some pens and then we'll proceed with me
17 giving you some preliminary instructions so that you will
18 know how we will be proceeding. Then we will begin opening
19 arguments from the attorneys and then we'll proceed with
20 witnesses.

21 The Court: Do we got everybody situated? Everybody got
22 a notebook and a pencil.

23 Bailiff: We had to get some more pencils, Your Honor.

24 The Court: On the first page of your notebook if you
25 would write your juror number so that you would be able to

1 Mrs. Mullis: None from the plaintiff.

2 The Court: From the defense?

3 Mr. Allen: No your honor.

4 The Court: Ok ladies and gentlemen I would ask that you
5 give the attorneys your undivided attention. Mrs. Mullis
6 you may proceed.

7 (Plaintiff's opening statement)

8 Mrs. Mullis: Good afternoon, I'm Pamela Mullis this is
9 Joe Epting and we represent Levern McCray, thank you for
10 your attention. There are rules that we all have to follow
11 when we drive cars in the state of South Carolina and we
12 have drivers licenses and follow those rules and when we
13 don't follow those rules people are injured. Some of those
14 rules include that when we operate a motor vehicle that we
15 have to keep the vehicle under proper control and be able
16 to slow down and turn the vehicle in order to avoid
17 colliding with other vehicles. You can't run your car into
18 other cars, that's a simple rule. There are rules that
19 require right of ways. If the roads divided into two lanes
20 you have to stay on the right side of the road and you
21 can't drive your car on the other side of the road and the
22 law in South Carolina is specific. A vehicle shall be
23 driven as nearly as practical entirely within a lane and
24 shall not be moved from the lane until the driver has first
25 ascertained that such movement can be made with safety.

1 Again, stay in your own lane. Any person who drives a
2 vehicle in such a manner as to indicate either a willful or
3 wanton disregard for the safety of persons is guilty of
4 reckless driving. That's a statute in the state of South
5 Carolina. You have to drive your car carefully and safely
6 so that you don't injure other individuals and you can't
7 drink and drive your car. You cannot drink alcohol and
8 drive a car in the state of South Carolina with alcohol
9 concentration above point zero eight. When a driver
10 violates these rules and operates a car in the state of
11 South Carolina and harms someone that driver is responsible
12 for the harm to the other individual and today we're here
13 because we're holding someone responsible for the harm to
14 another individual. Now let me tell you the story about
15 what happened in this case. On December 20th, 2008 Jose
16 Valle who is not here in the courtroom today and you will
17 not hear from him. We do not know where he was going or
18 where he was coming from, but sometime about 5:30 AM he was
19 in his car on Harbor Lake Drive in Goose Creek and he came
20 around a curb and he crossed over the centerline and he
21 came out of his own lane and he hit another vehicle head
22 on. The vehicle tried to avoid him so far that it came off
23 the road and tried to avoid by pulling at least two of it's
24 tires off the road but it could not avoid being hit head on
25 and the cars collided head on. Mr. Valle's car was going so

1 fast that it flipped over on to the hood of it's own car
2 and this is what the other vehicle looked like. So the
3 other individual was trapped in their car and what did Mr.
4 Valle do, he got out of his car he wondered around a little
5 bit. As far as we know he never checked on the other
6 individual in the other car, he never checked to see if the
7 other guy was alive and he laid down in the street and just
8 waited for people to show up. We still to this day don't
9 know where he was going and we're in court today because
10 Jose Valle got in his vehicle after he had been drinking,
11 because he failed to pay attention to where he was going
12 and stay in his own lane because he crossed the center line
13 into someone else's lane and hit them head on. He drove his
14 car into the on coming lane of Levern McCray and because he
15 was intoxicated and he was driving on the wrong side of the
16 road. If he had done none of those things we would not be
17 here today. Mr. Valle has here today attorneys that are
18 representing him that you are going to hear from and
19 they're going to tell you things like, well he might not
20 have been that drunk. Well that's up to you to decide or
21 well Mr. McCray isn't that injured or Mr. McCray got
22 better. Well Mr. McCray was trapped in his vehicle for a
23 couple of hours before the jaws of life and the EMS workers
24 came and cut him out of his car and the first thing he did
25 at 5:30 AM in the morning was call his supervisor to tell

1 him he was going to be late for work, late for work six
2 months late for work but still late for work at the time.
3 He was complaining about pain in his leg and sure enough
4 the pain in his leg resulted in two broken bones in his leg
5 and a plate in his leg that is still there today. It
6 involves multiple screws because the bones in his leg had
7 to be screwed back together and ligaments had to be screwed
8 back onto the bone because his leg was broken that bad and
9 that's just one of his injuries. These two broken bones
10 were repaired with this plate and these screws but that
11 leg, that ankle is really where it is because it goes from
12 right above the leg all the way down to the ankle and the
13 screw that screwed through to both bones prohibit the ankle
14 from moving so that the bones could heal and it immobilized
15 his foot for six months so that it could heal. It kept him
16 out of work for six months because for twenty something
17 years Levern McCray was heavy equipment operator. Before he
18 operated heavy equipment could operate any piece of heavy
19 equipment on any job site. You'll hear from folks that he's
20 worked with. You'll hear from his supervisors that he's
21 worked with. He could operate pretty much anything, trained
22 people on how to operate heavy equipment but he couldn't
23 operate the heavy equipment with his left foot broken like
24 that and with those rods in his foot. So he was out of work
25 for six months while his foot healed and today it still

1 hurts him. It still hurts him every single day. He was
2 fifty five years old when this accident happened and this
3 is going to hurt him until he dies, because the pain in his
4 leg and that piece of equipment will probably never come
5 out. It doesn't generally make any since orthopedically to
6 remove that type of equipment because it generally involves
7 another surgery and they don't know whether or not it will
8 make it better. So he's going to live with the pain in his
9 leg because of decisions that Jose Valle made in December
10 20th, 2008 in his left leg. It also injured his left knee
11 and it caused nerve damage that goes from his left knee all
12 the way up to his left thigh and that pain doesn't bother
13 him every single day but it bothers him. It causes him pain
14 and it causes him pain a couple times a week. It doesn't
15 prevent him from working because he's a hard worker and a
16 dedicated worker and all of the people that work with him
17 and his supervisors will tell you that he is a fabulous
18 worker and that they love working with him and he's very
19 good at his job and he's never stopped doing his job but
20 they are accommodating him and they have continued to
21 accommodate him. With his experience, at his experience
22 level he should be a supervisor on his work sites that he
23 is on but he can't do that because he can't walk around the
24 job site like he should be able to do but he can't do
25 because he's got hardware in his leg and a hurt knee. The

1 day he was cut out of that car he had injuries to his ankle
2 multiple fractures, his knee, nerve damage up his leg, he
3 reported cervical pain in his neck, he had a head injury,
4 and a laceration to his thumb. Now the primary treatment
5 that was going on at the time was the major break because
6 it involved them bringing in an orthopedic surgeon who had
7 to perform surgery on the leg and then it involved them
8 casting or dealing with the immobilizing the leg and
9 installing hardware in it. They also had to adjust his
10 thumb at that point. He spent a couple days in the hospital
11 from there, but there were other injuries that also
12 resulted from the accident. You can't get head on, hit with
13 a car head on that's going so fast that it flips the car
14 over without suffering other injuries. Hit his head, we
15 don't know whether he was knocked unconscious. We know they
16 did a CT scan in the emergency room. It was negative, but
17 it's a CT scan. We know that he's reporting issues with
18 memory we know with his wife. We know that he forgets
19 things that he should remember not what you're trying to
20 get at the grocery store, like your suppose to go to the
21 grocery store and get five things but how to get home from
22 the grocery store. He recently forgot how to get to his own
23 doctor's office and he had been going to that same doctor
24 since 1980. That's a long time to go to the same place and
25 forget how to get home from there or forget how to get

1 there. So there are concerns with his memory and there are
2 concerns with his leg and there are concerns with what's
3 going to happen in the future, and today is the only day
4 that we have the opportunity to hold Jose Valle responsible
5 for the actions and his conduct on December 20th, 2008. He
6 isn't here to tell you where he was going, or what he was
7 doing, or what he was drinking, or why he was drinking, or
8 why he was on the wrong side of the road. So you're here to
9 help us determine what the value of the harm that did to
10 Levern McCray and this is our only shot to do it, and we're
11 going to ask you at the end of this trial. After you've
12 heard the evidence from the troopers who investigated the
13 accident scene who's going to tell you about what Mr. Valle
14 was doing at the scene and the doctors that treated Mr.
15 McCray and performed surgery on him. When they installed
16 the plate in his leg and the orthopedic surgeon that
17 removed the screw and the doctor that's been treating him
18 almost all of his life and at the end of this we are going
19 to ask for money because that's all we can do at this
20 point. We can't turn back time and we can't undo what has
21 been done. All we can do now is hold Mr. Valle responsible
22 for what he's done and try and fix the harm that he's done
23 to Mr. McCray with a verdict from you. That speaks the
24 truth and is full justice because anything less than full
25 justice for Mr. McCray would be injustice, thank you.

JUDICIAL CIRCUIT

(803) 436-2150

1 The Court: Mr. Allen you may proceed.

2 Mr. Allen: Thank you judge. This case is about
3 reasonableness. As Judge Jefferson mentioned to you today
4 your job is to listen to the evidence and come to a fair
5 and just verdict. That's all I'm going to ask of you. Now
6 this trial may take a couple of days but all I ask is that
7 you listen to the evidence and at the end of it you come up
8 with a fair and just reasonable verdict. That's all this
9 case is about. The plaintiff's lawyer just told you that
10 your job is to determine the value of the harm done to Mr.
11 McCray, I agree that is your job. My name is Julian Allen,
12 Mrs. Emily Sheets and I are here on behalf of the defendant
13 and as you know he is not sitting next to me, he is not
14 here. He doesn't know about this lawsuit, he doesn't know
15 this trial is taking place. He doesn't know any of this is
16 happening, but a law in South Carolina still allows you to
17 proceed against even if he's not here. Now even if he was
18 here he wouldn't bring any substitutive real evidence or
19 testimony that we've got issues with. You know they say
20 lawsuits are about disagreements, that's the cliché term
21 they use about people fighting over things. So what are we
22 fighting about, what don't we agree about, what evidence
23 are you going to hear. You're going to hear from people,
24 you're going to hear from the plaintiff he's going to get
25 on the witness stand and he's going to tell you that he was

1 on his way to work at five o'clock in the morning and a car
2 crossed the centerline and hit him head on and he's going
3 to tell you about some of the pains that he's having in his
4 ankle due to the injury to it. I agree, I will agree to all
5 of that but you're also going to see pictures that you've
6 already seen of the vehicles. Looks like a pretty severe
7 impact, I agree. He went to Trident Medical Center and was
8 operated on by Dr. Spearman. you're going to hear him by
9 video. He's going to testify that the surgery that he did
10 was to correct an injury to his left ankle and only his
11 left ankle that he worked on and laceration to a cut to his
12 thumb. That he believes is directly related to this
13 accident, I agree. You then are going to hear from Dr.
14 Moore, Dr. Moore is in Columbia we took his deposition by
15 video too. The plaintiff is from Columbia so he got his
16 follow up there with a doctor in Columbia so it's closer to
17 home, I've got no problem with that. Dr. Moore took out one
18 of his screws saw him for a little follow up released him
19 from his care, end of May 2009 beginning of June 2009 when
20 the plaintiff went back to work and started working his
21 construction job, working over fifty hours a week. I agree
22 with everything Dr. Moore said. He's got twenty six
23 thousand dollars in past lost wages from the day of this
24 accident until he went back to work in June. Started work
25 fifty hours, sixty hours a week as a heavy equipment

1 operator. I have no issues with those wages. He's got about
2 forty five thousand dollars in medical bills related to the
3 foot and the ankle, and the cut on his finger. I have no
4 problem with those medical bills. You're looking at me
5 saying well if you agree to all of this stuff, you have no
6 problem will all of this stuff, why are we here. We are
7 here because at the end of this trial the plaintiff's
8 lawyer is going to ask you for a lot of money. I don't know
9 how much, we'll find out but it's going to be a lot. We've
10 got issues with that. We want a reasonable fair number that
11 the law prescribes and that you all will bring back. What
12 other issues do we have? You're going to hear from Dr. Wood
13 he's an economist that's his job. He goes around the state
14 testifying in court about numbers, he's a numbers guy. He's
15 provided numbers and he spits out another number of what
16 that is worth. So he's going to talk about the past loss
17 wages, he's going to talk about this future loss of five
18 thousand dollars a year that the plaintiff would have made
19 as a foreman, but for this accident. We have issues with
20 that. He's also going to ask you to award him money for
21 personal services which I don't know who gets paid for but
22 he's going to ask money for that. We have issues with that.
23 We got issues with some of the stuff that the plaintiff's
24 lawyer just mentioned. A head injury if this was over ankle
25 that's fine, but when you say that includes head injury and

1 there is no neurologist, no neurosurgeon that's ever
2 diagnosed nor treated him for that and there is on evidence
3 of any closed head injury at the scene or otherwise, we got
4 a problem with that. You're also going to hear from some
5 family and friends. I have not met them I have not deposed
6 them, they are people that love and care for the plaintiff
7 and they are probably going to get on the stand although
8 again I don't know what they are going to say, but I
9 presume they are going to get up there and they are going
10 to say I knew Mr. McCray before this accident, he's a
11 different guy now. I say why don't we look at the actual
12 evidence and see if that's really true. Is it really that
13 much different than it was before the accident I'll submit
14 to you that the evidence says that it's not. The
15 plaintiff's lawyer just said that my defenses are going to
16 be that the defendant wasn't that drunk and that wasn't
17 that serious of an injury, that's not true. I think he was
18 drunk and I think that he, these are serious injuries, but
19 again what we disagree about is a fair number to compensate
20 the plaintiff for the injury that he had as a result of
21 this accident. At the end of this case I'm going to stand
22 right here before you again and I'm going to ask you what
23 I just talked to you about and that is a fair, just
24 reasonable number to compensate the plaintiff. I'm going to
25 ask that you award him money which is odd because typically

1 defense lawyers don't say that but I'm going to tell you to
2 give him but it's got to be reasonable, thank you.

3 The Court: Mrs. Mullis you may proceed.

4 Mrs. Mullis: The plaintiff calls trooper Thomas.

5 Deputy Clerk: Please raise your right hand and place
6 your left hand on the bible. Do you solemnly swear or
7 affirm the testimony you should give to the Court in the
8 trial of this case is the truth the whole truth and nothing
9 but the truth so help you God?

10 Mr. Thomas: I do

11 Deputy Clerk: Please be seated and state your name,
12 spelling your last name for the record.

13 Mr. Thomas: My name is Reginald E. Thomas last name
14 spelling T-H-O-M-A-S.

15 The Court: You may proceed.

16 (Reginald E. Thomas - Examined by Mullis)

17 Q: Mr. Thomas what were you doing in December of 2008 for
18 a living?

19 A: I was working for South Carolina Highway Patrol.

20 Q: And how long had you been working for the South Carolina
21 Highway Patrol?

22 A: On that day, I would say roughly twenty one years.

23 Q: And what did work with Highway Patrol involve?

24 A: Basically enforcing the laws of the state of South
25 Carolina and investigating traffic accidents.

1 Q: And when you investigate traffic accidents. What all
2 does that involve?

3 A: Collecting the facts on what happened and who was
4 involved. Identifying the persons involved.

5 Q: And when you went to work for the Highway Patrol what
6 kind of training did you have?

7 A: Basically for twelve weeks you receive training at the
8 Criminal Justice Academy on traffic accidents and so forth.

9 Q: So you had a twelve week at the Criminal Justice
10 Academy?

11 A: Yes ma'am.

12 Q: Was that full time?

13 A: Full time eight hours a day.

14 Q: And after that time of twelve week training. Did you
15 then have to have regular certifications or training
16 through out your time with the Highway Patrol?

17 A: Yes, roughly twice a year.

18 Q: And what did that involve?

19 A: Normally it could be anything from certain classes to
20 update you on certain things regarding the laws and the
21 techniques on how you do investigations, to firing your
22 weapons, to driving, re-certifying on how do you drive your
23 vehicle.

24 Q: And what rank did you achieve with the Highway Patrol?

25 A: Lance Corporal

1 Q: And in your work with Highway Patrol did you have any
2 kind of special training or were you certified in any
3 special area.

4 A: No ma'am.

5 Q: And in your investigation of accident scenes, how many
6 accident scenes do you believe that you've investigated in
7 your twenty one years with the highway patrol?

8 A: Roughly, I would say investigating some where between a
9 hundred, hundred fifty a year maybe more depends.

10 Q: So a hundred, a hundred to a hundred and fifty accident
11 scenes a year for twenty one years is that correct?

12 A: Yes ma'am.

13 Q: And in investigating those scenes was it your
14 responsibility to make a determination about how the
15 accident occurred?

16 A: Yes ma'am.

17 Q: And to investigate the circumstances of the accident
18 itself?

19 A: Yes .

20 Q: And did you then prosecute and pursue those actions in
21 court when necessary?

22 A: Yes I do.

23 Q: And were you qualified to do that in court?

24 A: Yes ma'am.

25 Mrs. Mullis: We're going to offer the trooper as a

1 expert in accidents and investigation and reporting there
2 of.

3 The Court: Any question or objections?

4 Mr. Allen: I don't think he's qualified as an expert.

5 The Court: I didn't ask for speaking objections. Is
6 there an objection?

7 Mr. Allen: Yes

8 The Court: Ladies and gentlemen I have a very brief
9 matter of law to take up outside your presence during the
10 break please do not discuss the case. If you would go with
11 the bailiff for me please.

12 (Jury break 3:06 p.m.)

13 The Court: What is the bases of your objection Mr.
14 Allen?

15 Mr. Allen: Permission to voir dire the witness. My
16 objection is that I don't think he is an expert in accident
17 reconstruction of.

18 The Court: I don't think she's offering him for that.
19 Clarify what exactly are you seeking to have him admitted.
20 What areas?

21 Mrs. Mullis: In his investigation of the accident
22 itself.

23 The Court: Do you have to be an expert to investigate
24 an accident? That would be in scope and parameters of his
25 duties as an officer. I'm not aware of any area of

1 expertise designated as such. Either accident experience
2 reconstruction they're either if they are part of the
3 fatality team that's a whole different level of expertise
4 that they have achieved. Which he, but I'm not aware the he
5 would be qualified as an expert in the investigation of
6 accidents. I don't know that requires specialized training
7 or experience.

8 Ms. Mullis: We're going to ask for his opinion within
9 a reasonable degree of certainty as an officer as to the
10 cause of the collision. He interviewed witnesses and...

11 The Court: That's hearsay. They can't cross examine
12 those witnesses. Are you going to have those witnesses come
13 here and testify as to what they saw?

14 Mrs. Mullis: There are no other witnesses.

15 The Court: There are no eye witnesses to the accident?

16 Mrs. Mullis: There are not.

17 The Court: What else are you going to elicit from him?
18 So what would he be testifying to? That he talked to
19 everybody and he crossed the centerline. That's not
20 generally how it's done. You'd have somebody come out there
21 and measure skid marks, the gouge marks and from that they
22 could say he crossed the centerline. You can't come in here
23 and say he told him somebody crossed the centerline. You
24 have to have some objective proof from the scene and
25 normally you would have an accident of this magnitude you

1 would have a team of officers go out and investigate the
2 scene. Do markers, mark off, take measurement. Did they do
3 that?

4 Mrs. Mullis: They did not.

5 The Court: Because it wasn't a fatality?

6 Mrs. Mullis: Right, there was no MAIT investigation of
7 the scene, but there were two vehicle on the wrong side of
8 the road and interviewed two witnesses.

9 The Court: He could testify to what he saw upon him
10 arriving. What he rationally perceived.

11 Mrs. Mullis: But he can't testify that the defendant
12 crossed the centerline?

13 The Court: How does he know that if there is not
14 independent knowledge?

15 Mr. Mullis: I'll be happy to..

16 The Court: That's a trick question I wouldn't even know
17 it was independent knowledge if he saw it. It was
18 rhetorical. Ask the questions you are going to ask him I
19 need to hear them. Let's see what he has to say.

20 (Reginald E. Thomas - Proffer Testimony Examined by Mullis)

21 Q: Officer Thomas do you have independent recollection of
22 the actual event, in order to testify to the event?

23 A: No I don't.

24 Q: Do you have to refer to the accident report in order to
25 or the notes of the event in order to be able to testify to

1 it?

2 A: Ma'am I have the accident report that's what I would
3 use.

4 Q: Ok, and that accident report or the notes that you're
5 referring to. Did you prepare those reports?

6 A: Yes I did.

7 Q: Did you prepare them shortly there after or close in
8 time to this event?

9 A: Yes.

10 Q: In fact when did you prepare that report?

11 A: Our supervisor gives us roughly forty eight hours to
12 turn these reports in.

13 Q: Ok, and is that report that you're referring to written
14 in your own hand writing?

15 A: Yes it is.

16 Q: And is it a report of the events and your investigation
17 of this event on December 20th of 2008?

18 A: Yes it is.

19 Q: And when you prepared that report. Did you talk to both
20 of the, Mr. McCray and Mr. Valle?

21 A: To my recollection I would have to, to draw a conclusion
22 on what happened onto the report.

23 Q: Ok, and did you, were you present on the scene at the
24 time?

25 A: Yes I was.

1 Q: So would you have seen the position of vehicles at the
2 time?

3 A: Yes

4 Q: And would you have seen the position in relation to the
5 roadway?

6 A: Yes

7 Q: And were there any other witnesses that were available
8 to tell you how the incident occurred?

9 A: No

10 Q: And what was your conclusion from on in regard to how
11 the accident happened or how the two cars collided?

12 A: Based on the report from the positions of the vehicle
13 and the report. Both was on the right side of the roadway
14 on Mr. McCray's side of the roadway off of the road.

15 Q: Ok, so if they were both on Mr. McCray's side of the road
16 necessarily what would of had to of happened?

17 A: That the vehicle driven by Mr. Valle crossed the
18 centerline and struck his vehicle.

19 Q: Ok, and where was the impact between the two vehicles?

20 A: As far as on the roadway?

21 Q: The impact physically on each vehicle.

22 A: Head on.

23 The Court: Do you have any other questions for...

24 Mr. Allen: I do, Officer Thomas good to see you again.

25 (Reginald E. Thomas - Proffer Testimony Cross Examination

1 by Allen)
2 Q: Do you remember this accident?
3 A: No I don't.
4 Q: Alright, after having taken a look at the police report.
5 Do you remember the accident?
6 A: No I don't.
7 Q: You saw Mr. McCray over, you don't recognize him do you?
8 A: No I don't.
9 Q: Mr. Valle if he walked through this room would you
10 recognize him?
11 A: No I wouldn't.
12 Q: The ticket that you issued, did he ever appear at that
13 court hearing to your recollection?
14 A: I don't remember him appearing.
15 Mr. Allen: Judge I asked that his testimony be excluded
16 he has no personal knowledge.
17 The Court: I didn't ask for argument. Do you have other
18 questions of the witness?
19 Q: You are not an accident reconstructionist?
20 A: No I'm not.
21 Q: You didn't do any additional other than what required by
22 the academy?
23 A: Yes.
24 Mr. Allen: No more questions Your Honor.
25 The Court: Any redirect?

1 Mrs. Mullis: None Your Honor.

2 The Court: What area again are you offering him as a
3 expert?

4 Mrs. Mullis: In the investigation of the accident and
5 the determination of fault or the determination of how the
6 accident occurred.

7 The Court: I don't think you can do that either. You
8 can have point of impact experts, you can have fatality
9 experts. I don't think you can have somebody that's an
10 expert on the determination of fault. That's the same as
11 admitting he was charged with the accident. Which is
12 violation of the statute. Sir what do you do know? How are
13 you employed now?

14 Mr. Thomas: I'm employed with the Lexus of Charleston
15 Your Honor and the Sheriff's Department.

16 The Court: Are you retired from the Highway Patrol?

17 Mr. Thomas: Yes ma'am February of 2009.

18 The Court: Ok, Lexus of Charleston.

19 Mr. Allen: 56-5-1340 says no such reports shall be used
20 as evidence in a trial.

21 The Court: They haven't used the report. He can use the
22 report to refresh his memory. They haven't sought to admit
23 it. I think they know that uniform traffic report is
24 inadmissible. If the objections over then base on rule 701
25 I'm also denying the request to qualify him as an expert.

1 I do not believe he needs to be an expert to testify to, if
2 the testimony follows along the lines of what has just been
3 elicited from the witness. His testimony does not require
4 scientific, technical, or specialized knowledge. He has not
5 testified he employed any methods or measurement or
6 otherwise or any other technical specialized knowledge to,
7 for his testimony. His testimony comes within Rule 701
8 which is the opinion of a lay witness. Clearly it is based,
9 although he has extensive experience as a Highway
10 Patrolman. What he has, it really wouldn't matter whether
11 he had been on the job a year and then had the training
12 from SLED or ten years. It really wouldn't what he is
13 testifying to is not based necessarily on that training,
14 but what he is basically testifying to is an opinion or an
15 inference which is rationally based on his perception. Is
16 helpful to a clear understanding of the witnesses testimony
17 or determination of a fact in issue and it does not require
18 special knowledge, skill, experience, or training. The case
19 law is very clear. It articulates the difference between
20 one's specialized knowledge, skill, experience, or training
21 as required and what comes within the Rule 701. Our courts
22 have provided that some statements are not mere opinions
23 but are impression drawn from collected observed facts. A
24 natural inference based on stated facts is not opinion
25 evidence and that is basically what he is testifying to. He

1 is testifying to a natural inference based on stated facts.
2 In other words this is where the cars landed up and based
3 on my rational perception of that I perceive in my
4 investigating this accident that somebody had to cross the
5 centerline. He is not saying I drew, I went out there I
6 measure gouge marks. I tried to determine the trajectory of
7 the vehicles. Which of course would be specialized, that
8 would be scientific knowledge. That would be employing some
9 technical sort of assistance or methodology in coming to
10 that and that would be an opinion. Which would require
11 specialized knowledge or training, but a natural inference
12 based on stated facts is not opinion evidence and in this
13 instance the fact and opinion is not blurred. So, but even
14 in that instance it's best left to the discretion of the
15 trial judge. I would find for the record that he is
16 testifying to an impression drawn from collected observed
17 facts. Which would come with opinion, within Rule 701 so
18 your objection is noted and overruled. Are we ready to
19 proceed? Please don't make any reference to the Uniform
20 Traffic Accident Report because the next question is can we
21 see the report and it is inadmissible.

22 Mr. Allen: Judge I would just move that his testimony
23 entirety be struck. He has no personal knowledge or
24 recollection of this accident. I understand the report can
25 be used to jog and refresh his recollection but even after

1 looking at the report he still doesn't remember it. So in
2 essence he would be reading his report which is
3 inadmissible.

4 The Court: That goes to weight. You can use the report
5 to refresh his memory. There are people that use reports.
6 That's why we have a rule. Some people they're involved in
7 so many different things so many times. There's no, for
8 example me. Although I have an impeccable memory I have a
9 memory almost like an elephant to a certain extent. There's
10 some things my memories not jogged until I read it. Once I
11 read it one or two lines it comes back to me immediately,
12 but if you ask me about such and such. I mean sometimes
13 I'll forget but it's because the amount of information
14 that's absorbed. No different from a doctor, an ER
15 physician, an officer. It would be, it would really be
16 implausible to think that they could remember. Even if he
17 was still on the job I doubt that he would remember
18 something happening two weeks ago. There is just too many
19 people that they deal with. He can use the report to
20 refresh his memory. He just can't make, they can't make any
21 reference to the report, because again the jury would want
22 to know where it is and they would want to see it and as
23 lay people they would want to know who was charged with the
24 accident and that's why those reports are not admissible
25 because they rely on subjective opinions. They rely on

1 information gathered by hearsay for the officer to come to
2 that conclusion. However there's nothing that eliminates
3 his ability to reflect on it to refresh his memory and he's
4 allowed to do that.

5 Mr. Allen: To the extent his memories being refreshed,
6 but I think even after looking at the report he still
7 doesn't remember it.

8 The Court: Then you argue that goes to weight and then
9 you argue that he really doesn't remember what happened
10 then they shouldn't give any weight to his testimony. I
11 don't think there is any bases to exclude it.

12 Mr. Allen: Ok

13 The Court: We ready?

14 (Jury returns to courtroom at 3:24 p.m.)

15 The Court: Ladies and gentlemen we appreciate your
16 patience. We'll now resume the witnesses testimony. You may
17 proceed.

18 (Reginald E. Thomas - Examined by Mullis)

19 Q: Officer Thomas did you have occasion to appear at an
20 accident on December 20th of 2008 to, as a trooper for the
21 Highway Patrol?

22 A: Yes I did.

23 Q: Ok, and do you have notes that you are referring to from
24 that accident in December 20th of 2008?

25 A: No I don't.

1 Q: Do you have a report that you would have written up at
2 that time?

3 A: Yes I do.

4 The Court: Sustained, I've instructed you to make no
5 reference as the question. If he has the document he can
6 use it to refresh his memory.

7 Q: Can you tell the jury where that incident occurred?

8 A: This accident occurred in Berkeley County on Secondary
9 Road 748.

10 Q: And who were the individuals that were involved in the
11 accident?

12 A: One driver was one of Mr. McCray and the other driver
13 was Mr. Valle.

14 Q: And the accident, what lane did it occur in?

15 A: It occurred in the East bound lane.

16 Q: So whose lane would that have been?

17 A: That would be in Mr. McCray's lane.

18 Q: So was Mr. McCray's vehicle in its proper lane?

19 A: Yes it was.

20 Q: And when you arrived on the scene was Mr. Valle's
21 vehicle in the incorrect lane?

22 A: Yes it was.

23 Q: Did you talk to both of the drivers at the scene?

24 A: Yes I did.

25 Q: And was it a severe impact?

1 A: Yes it was.

2 Q: Do you recall where the defendant's car was located?

3 A: No I don't.

4 Q: Ok or what about the damage to the vehicles?

5 A: No I don't.

6 Q: Do your notes indicate any kind of damage to the
7 vehicle?

8 A: I don't have those notes with me.

9 Q: Ok, was Mr. Valle operating his vehicle on the wrong
10 side of the roadway?

11 A: Yes he was.

12 Q: As far as you can tell?

13 A: Yes he was.

14 Q: Ok and when you spoke with Mr. Valle what were your
15 observations of him other than where his vehicle were
16 located?

17 A: That it was on the wrong side of the roadway.

18 Q: Ok did you notice whether or not he smelled like
19 alcohol?

20 A: Yes he did.

21 Q: Whether he was stable on his feet or locate or oriented
22 to his current location?

23 A: I don't remember that.

24 Q: Ok did you go with him to the hospital when he sought
25 medical treatment?

1 A: Yes I did.

2 Q: And is that a copy of your signature there on the bottom
3 of that document?

4 A: Yes it is.

5 Q: And as a law enforcement officer is it your
6 responsibility when a blood sample is taken to be present
7 for that blood sample to be taken?

8 A: Yes it is.

9 Q: Ok and why would you have a blood sample taken from an
10 individual that had been involved in an accident?

11 A: To determine whether or not he, that he was drinking
12 alcohol prior to the accident.

13 Q: And in order for you to have a blood sample taken from
14 an individual that had been --- that you were trying to
15 determine whether or not that they've been drinking. What
16 necessarily would you have to suspect or what would you
17 ;have to know?

18 A: He smelled of alcohol.

19 Q: Ok would just smelling of alcohol do it or would he have
20 to have more that just the odor of alcohol?

21 A: Right and his appearance. How he reacts to questions.

22 Q: Ok would you of necessarily had to of performed a field
23 sobriety test?

24 A: That's according to his injuries, according to what kind
25 of medical treatment is being conducted at that time.

1 Q: Ok so on December 20th of 2008 you would have gone with
2 him to the hospital is that correct?

3 A: Yes ma'am.

4 Q: Ok and in front of you is a document that is dated
5 12/20/2008 and you said that was your signature at the
6 bottom of it.

7 A: Yes it is.

8 Q: And did you stand while a sample or a collection was
9 taken under your direct supervision from Jose Valle?

10 A: Yes I was.

11 Q: And what kind of sample was that?

12 A: A blood sample.

13 Q: And was that sample labeled by you?

14 A: Yes it was.

15 Q: And did it have Mr. Valle's name on it.

16 A: Yes it did.

17 Q: And the time that is was collected?

18 A: Yes it did.

19 Q: And you would have personally done that?

20 A: Yes I did.

21 Q: And you would have sealed that?

22 A: Yes I did.

23 Q: And then you would have transported that sample to
24 where?

25 A: To the Highway Patrol Headquarters here in Charleston.

1 Q: Ok and at that point on December 20th.

2 Mrs. Mullis: We're going to submit that this is
3 Plaintiff's exhibit five.

4 The Court: Show the counsel.

5 Mr. Allen: You're going to admit this. I have an
6 objection.

7 The Court: Please approach. Marked the ID on here at
8 this time?

9 Mrs. Mullis: And this is a South Carolina Department of
10 Public Safety chain of evident, custody of evidence
11 destruction.

12 (Reginald E. Thomas - Examination continued by Mullis)

13 Q: Do you recognize that form?

14 A: Yes I do.

15 Q: And what is that?

16 A: It's form that we fill out and we submit that blood at
17 the headquarters. Then normally a supervisor would check it
18 in and he also has to submit his, his name and signature.

19 Q: And what is the date on that form?

20 A: December 20th, 2008.

21 Q: And what is the blood sample that is in, that is being
22 transported on that form? Whose blood sample is being
23 transported on that form?

24 A: Mr. Valle.

25 Q: Ok, and what's the purpose of that form?

1 A: To be sent off to SLED headquarters and determine how
2 much alcohol was in the person's blood.

3 Q: And when you have that blood sample. You took that blood
4 sample and what did you do with it?

5 A: I turned it over to my supervisor that morning.

6 Q: Ok, and what supervisor did you turn it over to?

7 A: First Sergeant George Williams.

8 Q: And you turned it over to him and did he sign for it
9 then?

10 A: Yes he did.

11 Q: And that date was on, that was when?

12 A: December 20th, 2008.

13 Q: Ok, and he then did what with that blood sample?

14 A: He secured it..

15 Mr. Allen: Objection.

16 The Court: Bases?

17 Mr. Allen: Personal knowledge.

18 The Court: The appropriate foundation as to his personal
19 knowledge.

20 Q: The policies and procedures at the South Carolina
21 Department of Safety require your supervisor to then do
22 what with that blood sample?

23 A: To secure it in a secured area and to refrigerate it in
24 a storage facility.

25 Q: And when he signs for that blood sample is he, does he

1 then take possession of the blood sample.

2 A: Yes he does.

3 Q: And takes custody of the blood sample?

4 A: Yes he does.

5 Q: And he's then responsible for the blood sample?

6 A: Yes he is.

7 Q: And then do you know who the next person based on this
8 chain of custody that took possession of the blood sample
9 would have been?

10 Mr. Allen: Objection.

11 Mr. Allen: Personal knowledge, hear say.

12 The Court: You plan to call this witness?

13 Mrs. Mullis: I am.

14 Mrs. Mullis: We're going to mark that for our
15 identification purposes at this point. And I apologize.
16 (Plaintiff's Exhibit Number 5 was marked for
17 identification)

18 Q: Plaintiff's exhibit five the bottom of that marked for
19 identification at this point. The South Carolina Law
20 Enforcement urine blood collection report. The bottom of
21 that is signed by who? Under your signature.

22 A: By Mr. Valle.

23 Q: So the subject, the individual whose blood is taken they
24 have to sign that form?

25 A: Yes ma'am and he's given a copy of this report also.

1 Q: Thank you. Do you know how long after the collision
2 occurred the blood was taken from Mr. Valle?
3 A: As far as from the headquarters here to Columbia?
4 Q: No sir. What time did the accident occur?
5 A: At 5:40 in the morning.
6 Q: Do you know what time the blood sample was taken from
7 Mr. Valle.
8 A: I don't have recollection of that but it typically no
9 more that two hours.
10 Q: So his date of test was what?
11 A: 12-20-2008.
12 Q: So the time of test would have been when?
13 A: 5:45
14 Q: And what time did the accident occur?
15 A: 5:40
16 Q: Is that a typo? What time would the blood have been
17 taken?
18 A: Well from this report it says 5:45.
19 Mr. Allen: Can I see what you are showing him?
20 Mrs. Mullis: I'm sorry.
21 A: This report is showing that it was drawn at 8:45AM.
22 Q: So could that five be an eight?
23 A: Yes
24 Q: Ok, could you tell when you arrived at the accident.
25 From the placement of the cars and that Mr. McCray did

1 anything to cause the accident?

2 A: No ma'am

3 Mrs. Mullis: I don't have any other questions.

4 The Court: Mr. Allen.

5 Mr. Allen: Thank you Judge.

6 Reginald E. Thomas - Cross Examination by Allen

7 Q: Officer do you remember this accident?

8 A: No sir I don't.

9 Q: You've been provided a bunch of document to look at to
10 help jog your memory. Even after looking at those, anything
11 ring a bell?

12 A: No sir.

13 Q: Mr. McCray is sitting over here to my right. You
14 recognized him?

15 A: No sir.

16 Q: If Mr. Valle walked through the door would you recognize
17 him?

18 A: No sir.

19 Q: You don't remember having any conversations with him at
20 the scene?

21 A: No sir but what would have been taking.

22 Q: Sir, I know you may have talked to him but as you sit
23 here you can't testify to anything he said, correct?

24 A: No sir.

25 Q: And same thing for the hospital. Can you testify as to

1 any conversations you had with him at the hospital?

2 A: No sir.

3 Q: Am I correct that you do not have an independent
4 recollection of the nurse actually drawing blood from Mr.
5 Valle.

6 A: No sir but we are trained to be inside when the blood is
7 drawn.

8 Q: I understand that's your standard operating procedure to
9 be there in case someone resist or anything like that,
10 correct?

11 A: No it's to be a witness that his blood, his actual blood
12 is being drawn.

13 Q: But you don't remember in your mind right now that
14 happening do you?

15 A: No sir.

16 Q: Am I correct that in terms of the best person to testify
17 as to how the blood was actually drawn was following proper
18 protocols and procedures that would be the nurse that
19 actually did it?

20 A: Again we are trained to be in the room. As far as my
21 memory, no sir, yes we are trained to be inside that room
22 when blood is being drawn or any sort of physical evidence
23 is being taken from a witness.

24 Q: And I understand that's your procedure but my question
25 is you agree with me that the nurse would probably be the

1 best person to sit in your chair and talk about actually
2 drawing the blood from the persons arm?

3 A: Yes.

4 Q: Am I correct you don't as you sit here now specifically
5 recall smelling alcohol on Mr. Valle?

6 A: No sir.

7 Q: You don't specifically recall whether he was unstable on
8 his feet?

9 A: No sir.

10 Q: And exhibit five which has been marked for
11 identification purposes only is that your handwriting at
12 the top of that form?

13 A: Which one is it, exhibit five yeah that's my
14 handwriting.

15 Q: That's your handwriting?

16 A: Yes sir.

17 Q: And in your handwriting on date of test and time of test
18 you have 5:45 AM written correct?

19 A: Yes sir.

20 Mr. Allen: That's all I have, thank you.

21 The Court: Any redirect?

22 Mrs. Mullis: Yes Your Honor.

23 Reginald E. Thomas - Redirect by Mullis

24 Q: You've worked nearly thousands of accident scenes. Is
25 that fair to say?

1 A: Yes ma'am.

2 Q: And do you know how many times that nurse has drawn
3 blood?

4 A: No ma'am

5 Q: You would not have ordered a blood test be drawn from
6 Mr. Valle if you didn't think he was drunk?

7 Mr. Allen: Objection leading.

8 The Court: Sustain leading rephrase.

9 Q: Would you have ordered a blood test from Mr. Valle if
10 you did not believe that he was intoxicated?

11 A: No I would not.

12 Mrs. Mullis: Thank you, I don't have any other
13 questions.

14 The Court: Any objections to the witness being excused
15 from the plaintiff.

16 Mrs. Mullis: Please excuse him.

17 The Court: From the defense?

18 Mr. Allen: No objection Your Honor.

19 The Court: Sir you're excused.

20 Mr. Thomas: Thank you Judge.

21 The Court: You're welcome sir. You may call your next
22 witness.

23 Mrs. Mullis: Plaintiff calls George Williams to the
24 stand.

25 Deputy Clerk: Raise you right hand and place your left

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1 hand on the Bible. Do you solemnly swear or affirm the
2 testimony you should give to the Court in the trial of this
3 case is the truth the whole truth and nothing but the truth
4 so help you God?

5 Mr. Williams: I swear.

6 Deputy Clerk: Please be seated and state your name.
7 Spelling your last name for the record.

8 Mr. Williams: My name is George Lee Williams,
9 W-I-L-L-I-A-M-S.

10 The Court: You may proceed.

11 (George Williams - Examined by Ms. Mullis)

12 Q: Mr. Williams in December 20th 2008 what did you do for a
13 living?

14 A: I was a South Carolina State Trooper.

15 Q: And how long had you been a South Carolina Trooper at
16 that point?

17 A: 2008 would have been twenty six years.

18 Q: Twenty six years and what rank were you at that point?

19 A: I was the First Sergeant force command.

20 Q: Ok, so you were in charge of how many individuals?

21 A: Approximately thirty two troopers at that particular
22 time.

23 Q: And where were you stationed? Is that the correct
24 question?

25 A: Yes, we were in Troop 6 which is Berkeley and Charleston

1 County. Post A and our office is located in Otranto in
2 North Charleston.

3 Q: And did Reginald Thomas work with you?

4 A: He sure did.

5 Q: And do you recall Mr. Thomas?

6 A: Yes.

7 Q: And on December 20th 2008. I'm going to hand you an South
8 Carolina Chain of Evidence form. Do you recognize that
9 form?

10 A: Yes I recognize this form. Chain of Custody form.

11 Q: And what is that form used for?

12 A: This is called a Chain of Custody Evidence form. It's
13 when you transfer evidence from one person to the other.
14 This is what this form is used for.

15 Q: And who's specimen is that form transporting?

16 A: According to this is it Jose Valle?

17 Q: Close enough. And did you take possession of that
18 specimen?

19 A: According to this report I sure did.

20 Q: And how do you know that?

21 A: Because this is my signature on this form, my initials.
22 This is my writing.

23 Q: And the policy and the protocol at the Department of
24 Public Safety at that time would have required you to do
25 what with the specimen when you took possession of it?

1 A: Once I took possession of the specimen then I am to put
2 it in the control evidence room.

3 Q: And do what with it?

4 A: I would put it in the evidence room and it would stay
5 there until this evidence could be transported to SLED
6 that's located in Columbia.

7 Q: Is it your responsibility when you take possession of it
8 to make sure it hadn't been tampered with, altered with, or
9 switched with any other evidence?

10 A: This specimen which is blood it comes in a kit. So once
11 I've retrieved this blood from, it would have been Officer
12 Thomas at that particular time. That kits already sealed.
13 Even I can't open it because it has a tamper resistant seal
14 on it. So once he gives it to me because it has to be
15 refrigerated and my refrigerator is located inside the
16 Otranto office inside of the lock storage room inside of a
17 locked refrigerator. Now the only person who has the keys,
18 accessibility to those storage areas are their supervisors.
19 Which would have been myself. I had two sergeants and four
20 corporals. On this particular time I was. This particular
21 morning I guess. I was the supervisor on duty which would
22 make common sense because I'm usually the first supervisor
23 there. So I took control of the evidence from Sergeant from
24 Lance Corporal Thomas. I logged it in my log book that's
25 kept inside the evidence room and in turn signed the Chain

1 of Custody form and put that blood inside my refrigerator
2 until it can be transported to SLED which is located in
3 Columbia.

4 Q: And you would have verified at that point that it hadn't
5 been tampered with.

6 A: Absolutely absolutely.

7 Q: And it hadn't been switched with any other sample?

8 A: Absolutely.

9 Q: And it was actually the sample that is says that it was?

10 A: The names on the box and everything, yes.

11 Mrs. Mullis: Great those are all the questions that I
12 have.

13 The Court: Any questions for the witness?

14 Mr. Allen: Very briefly Your Honor.

15 George Williams - Cross Examination by Allen

16 Q: I see your name is listed next to Officer Thomas's name.

17 A: Right beneath Officer Thomas's name, yes.

18 Q: What about the name to the right of Thomas's name?

19 A: That's me First Sergeant GL William that's me.

20 Q: And is that your initials next to it?

21 A: Yes.

22 Q: What about under that?

23 A: GL Williams

24 Q: Correct, and under that?

25 A: That's the evidence room.

1 Q: Is that your handwriting?

2 A: For evidence room?

3 Q: Yeah.

4 A: No, that would've been the supervisor that retrieved it
5 from the evidence room. Which would have been Corporal Tim
6 Craven.

7 Q: Who put it in the evidence room.

8 A: I did originally, I did.

9 Q: And where is that notated on this form?

10 A: Right beside my name where you see G. The first line is
11 Officer Thomas who got the blood and next to his name is my
12 name. He gave it to me and right below the second line
13 which would be my name on the same date. Then across from
14 my name you will see E room, evidence room refrigerator.
15 That's where I locked it up in the refrigerator.

16 Q: And that E room is that your handwriting?

17 A: Yes that's my handwriting, evidence room.

18 Q: Do you know what time Officer Thomas gave you this
19 sample?

20 A: No doesn't, it only indicates a date not a time.

21 Q: And is it important for this sample to be kept cool?

22 A: That's why it's refrigerated.

23 Q: And when it's brought from the evidence to Columbia. Is
24 it kept cool in someone's car?

25 A: No it's not necessarily have to be cooled. It wouldn't

1 because it's in a sealed box and that's the reason why it's
2 in a sealed box.

3 Q: So you don't know what time Officer Thomas gave it to
4 you on December 20th 2008?

5 A: No just the date not the time.

6 Mr. Allen: That's all I have, thanks.

7 The Court: Any redirect?

8 Mrs. Mullis: None Your Honor.

9 The Court: Any objections of the witness being excused
10 from the plaintiff?

11 Mrs. Mullis: None Your Honor.

12 The Court: From the defense?

13 Mr. Allen: No Your Honor.

14 The Court: Sir you're excused.

15 Mr. Williams: Thank you very much.

16 The Court: You're welcome sir. You may call your next
17 witness. You can just leave that right there. Yes sir,
18 thank you.

19 Mrs. Mullis: Plaintiff calls Officer Tim Craven.

20 Deputy Clerk: Raise you right hand and place your left
21 hand on the Bible. Do you solemnly swear or affirm the
22 testimony you should give to the Court in the trial of this
23 case is the truth the whole truth and nothing but the truth
24 so help you God?

25 Mr. Craven: I do.

1 Deputy Clerk: Please be seated and state your name.
2 Spelling your last name for the record.

3 Mr. Craven: Timothy S. Craven, C-R-A-V-E-N.

4 The Court: You may proceed.

5 Timothy Craven - Examined by Mullis

6 Q: Officer Craven in December 20th of 2008 where were you
7 employed?

8 A: With the South Carolina Highway Patrol.

9 Q: Do you recognize the document in front of you?

10 A: I do

11 Q: What is that document?

12 A: It's the Chain of Custody form.

13 Q: And what is that Chain of Custody form used for?

14 A: To transfer evidence from one person to another.

15 Q: And what evidence is this transferring from one person
16 to another?

17 A: It's one Sled blood kit.

18 Q: Of who, do you know that subjects name?

19 A: Jose W. Valle.

20 Q: Close enough.

21 A: V-A-L-L-E

22 Q: Valle, and the date of incident?

23 A: December 20th 2008.

24 Q: And the time of incident?

25 A: 0540.

1 Q: Is that 5:40 AM?
2 A: Yes it is.
3 Q: For those of use that don't speak military, thank you.
4 In December 20th 2008 is that your signature on the line, is
5 it the third line down?
6 A: Third line down second row, yes ma'am.
7 Q: And why would you have signed that for?
8 A: On the third line that is my handwriting. My name and my
9 initials. To indicate that I did receive the evidence.
10 Q: And why would you have signed and initialed that to say
11 that you've received the evidence? What were you doing with
12 the evidence?
13 A: I was, I had taken it from the evidence room
14 refrigerator which I have signed out and then I also sign
15 here where I have given it to Lance Corporal Cochrane.
16 Q: And when you remove it from the refrigerator to give to
17 Lance Corporal Cochrane. Do you verify that the sample has
18 been not tampered with?
19 A: That's correct it's in a sealed box.
20 Q: And you verify that the sample hasn't been altered in
21 any manner?
22 A: That's correct.
23 Q: And it hasn't been switched with any other sample, is
24 that correct?
25 A: That's correct.

1 Q: And you sign here in order to go back later so that in
2 case you need to testify is that correct?

3 A: That's correct.

4 Mrs. Mullis: That's all the question I have.

5 The Court: Any cross examination of the witness?

6 Mr. Allen: None Your Honor.

7 The Court: Any objection to the witness being excused
8 from the plaintiff?

9 Mrs. Mullis: None Your Honor.

10 The Court: From the defense?

11 Mr. Allen: No Your Honor.

12 The Court: Sir you're excused.

13 Mr. Craven: Thank you Your Honor.

14 The Court: Your welcome, you may call your next
15 witness.

16 Mrs. Mullis: Lance Corporal Cochrane.

17 Deputy Clerk: Raise you right hand and place your left
18 hand on the Bible. Do you solemnly swear or affirm the
19 testimony you should give to the Court in the trial of this
20 case is the truth the whole truth and nothing but the truth
21 so help you God?

22 Mr. Cochrane:

23 Deputy Clerk: Please be seated and state your name.
24 Spelling your last name for the record.

25 Mr. Cochrane: Clyde Ray Cochrane, C-O-C-H-R-A-N-E.

1 Clyde R. Cochrane - Examined by Mullis

2 Q: And what rank are you with the Highway Patrol?

3 A: I'm a Lance Corporal.

4 Q: Lance Corporal Cochrane in December 20th 2008 were you
5 employed with the Highway Patrol?

6 A: Yes I was.

7 Q: Do you recognize this Chain of Custody and Evidence
8 form?

9 A: Yes I do.

10 Q: Is that your signature on the line, fourth line down?

11 A: Yes it is.

12 Q: And that is what?

13 A: That is, I signed that the Corporal handed me the sealed
14 box.

15 Q: And it was the sealed box that contained what in it?

16 A: Those evidence boxes are sealed with usually they'll
17 contain blood or urine and the documents from looking at
18 that. It just said it was a blood kit instead of a urine
19 kit, it had blood kit.

20 Q: So you were only aware that it was a blood kit?

21 A: That is correct.

22 Q: And that it was in a sealed box?

23 A: Right.

24 Q: And did the box appear to be unaltered?

25 A: It was sealed.

1 Q: And hadn't been tampered with?

2 A: No ma'am.

3 Q: And did you verify that the sealed box that you had was
4 consistent with the Chain of Evidence Custody form which you
5 were signing?

6 A: Before I sign I look and make sure it's got the same
7 name.

8 Q: And what was the name on the sealed box and Chain of
9 Custody form that you signed?

10 A: It was Valle.

11 Q: Jose Valle?

12 A: Valle.

13 Q: And that's your signature on the line?

14 A: That's my signature on the line.

15 Q: And so what did you then do with that blood kit that you
16 took possession of?

17 A: Once it's given to me it was. I guess I didn't have to
18 much going on that day. So they elected me to be the one to
19 drive up to Columbia and take it up and drop it off at SLED.

20 Q: And do you put it in some kind of container to transport
21 it?

22 A: No we go straight from the office straight up to SLED.

23 Q: And how often do you transport samples from Highway
24 Patrol. Where are you based out of?

25 A: We're based out of Charleston right there on Otranto.

1 Q: How often do you transport from Charleston to Columbia
2 blood samples?

3 A: Different officers do it different days. We only keep it
4 for so long at the refrigerator and within so many hours it
5 has to be taken up to Columbia.. So they just if nobody is
6 working a wreck or they may have to say you're the guy going
7 to Columbia today.

8 Q: So based on this form and your signature you would have
9 transported it to SLED that day.

10 A: That is correct.

11 Q: And what would you have done with it when you got to
12 SLED?

13 A: I would take it to SLED. They have a room when ever we
14 have to sign in and come in and then we hand it to a
15 technician. Turn it over to them basically.

16 Q: And based on this form did you actually deliver it to
17 SLED?

18 A: Yes I did.

19 Q: On what day?

20 A: It would be on 12-23 and I believe that's '08.

21 Q: And who at SLED did you deliver this to.

22 A: I don't know their name.

23 Q: Did someone initial by receipt of that received it at
24 SLED?

25 A: Yes Ma'am.

1 Q: And what are those initials?

2 A: E-Y.

3 Mrs. Mullis: I don't have any further questions.

4 The Court: Any cross examination of the witness?

5 Mr. Allen: None Your Honor.

6 The Court: Any objection to the witness being excused
7 from the plaintiff?

8 Mrs. Mullis: None Your Honor.

9 The Court: From the defense?

10 Mr. Allen: None Your Honor.

11 The Court: Sir you're excused.

12 Mr. Cochrane: Thank you.

13 The Court: Your welcome. Mr. Foreman, ladies and
14 gentleman we're going to take a very brief restroom break.
15 During the break please do not discuss the case and please
16 leave your note pads in your seats. We'll be out about ten
17 minutes.

18 (Jury break)

19 The Court: You may be seated. Plaintiff ready to
20 proceed?

21 Mrs. Mullis: Yes Your Honor.

22 The Court: Defense ready to proceed?

23 Mr. Allen: Yes.

24 The Court: You can get them.

25 Mr. Allen: Judge.

1 (Jury in)

2 Mrs. Mullis: Plaintiff calls Marvin Mosley to the stand.

3 The Court: If the witness will come forward please to be
4 sworn.

5 Deputy Clerk: Raise you right hand and place your left
6 hand on the Bible. Do you solemnly swear or affirm the
7 testimony you should give to the Court in the trial of this
8 case is the truth the whole truth and nothing but the truth
9 so help you God?

10 Mr. Mosley: Yes ma'am.

11 Deputy Clerk: Please be seated and state your name.
12 Spelling your last name for the record.

13 Mr. Mosley: My name is Marvin Mosley.

14 The Court: Sir I need you to speak directly into the
15 microphone.

16 Mr. Mosely: My name is Marvin Mosley, last name M-O-S-L-
17 E-Y.

18 The Court: Thank you sir. You may proceed.

19 Marvin Mosley - Examined by Mullis)

20 Q: Mr. Mosely what's your current address?

21 A: PO Box 534 Thomasville, Alabama 36784.

22 Q: Where are you from originally?

23 A: Thomasville, Alabama.

24 Q: You grew up in Alabama.

25 A: Yes ma'am.

1 Q: And how old are you?

2 A: Thirty four.

3 Q: What do you do for a living?

4 A: Heavy equipment operator.

5 Q: And how long have you been a heavy equipment operator?

6 A: Eleven years.

7 Q: Eleven years. What kind of heavy equipment do you
8 operate?

9 A: Trackhoe, Backhoe, Front end loader, Bulldozer, Bobcat.

10 Q: Slow down, what's the first one?

11 A: Trackhoe.

12 Q: What's a trackhoe?

13 A: Excavator it moves dirt from dirt, that's all.

14 Q: And does that involve special knowledge or skill that you
15 have to be trained to do that.

16 A: Yes ma'am.

17 Q: Do you have to have a special license?

18 A: Yes ma'am, NCCER.

19 Q: What is that.

20 A: It's a test that we have to take it's certified
21 nationally. All construction companies go to this. We don't
22 have to get certified no more. Once you get the NCCER
23 because it's a lot of training, classes you have to take on
24 your own time.

25 Q: How long does it take to become certified to be a heavy

1 equipment operator?

2 A: It depends on the individual. A while I guess, nobodies
3 perfect you get better over the years.

4 Q: And once your certified to operate one piece of heavy
5 equipment are you certified to operate all heavy equipment
6 of do you have to certify on each piece?

7 A: No ma'am you got to get certified on each individual
8 piece.

9 Q: Ok so how many pieces are you certified on?

10 A: Nine, Ten I don't know. All dirt equipment.

11 Q: Dirt equipment?

12 A: Yes ma'am.

13 Q: So where do you work right now, currently?

14 A: Juliet, Georgia KBR at the Silver Company.

15 Q: Juliet, Georgia?

16 A: Yes ma'am.

17 Q: What work site is that?

18 A: Power plant in Macon. Juliet, Georgia. Right outside of
19 Macon about twelve miles.

20 Q: So you all are building a power plant in, right outside
21 of Macon, Georgia.

22 A: Yes ma'am they putting in some of the filtration and
23 stuff that goes in the air, to clean the air.

24 Q: And how did you learn to operate heavy equipment?

25 A: Levern McCray. Yes ma'am all of the equipment that I can

1 run, heat, sweat and time he taught me.

2 Q: He taught you how to operate the heavy equipment?

3 A: Yes.

4 Q: So how long have you known Levern?

5 A: What am I thirty four, twenty something years. Since I
6 was about four or five. He taught me how to tie my shoes.

7 Q: He taught you how to tie your shows?

8 A: Yes ma'am

9 Q: And operate heavy equipment?

10 A: Yes ma'am.

11 Q: Well that's handy. What do you call him?

12 A: Well on the job they call him Superman, because he run so
13 much equipment. From dirt equipment to crane. You know when
14 he could but know since he's been in this accident he hurt
15 his feet he can do the climbing the way he used to could do.
16 So he's done lost a lot of his certifications and they done
17 got to --- I'm certified on the backhoe out there. That's my
18 job title to run the backhoe and I have to give it to him
19 because he can't you know maneuver around as much as he can
20 because they got him on the dump truck and it's a standard
21 shift. He can't press the pedal. So I have to run that and
22 let him do my job.

23 Q: So when you're on the job site that you're in Macon
24 Georgia now. You're suppose to operating the dump truck is
25 that right?

1 A: I'm classified as the backhoe operator.
2 Q: So your assigned a piece of heavy equipment to operate?
3 A: Yes ma'am.
4 Q: And you're suppose to operating the backhoe.
5 A: Yes ma'am.
6 Q: Would you rather operate the backhoe or the dump truck.
7 A: I'd rather be in the backhoe because it's air
8 conditioned.
9 Q: What does the backhoe involve?
10 A: Mostly hand and every now and then you have to use your
11 foot but not as much as you would in a dump truck.
12 Q: Ok and so was is operating the dump truck involve?
13 A: Shifting gears and pushing in the clutch.
14 Q: So what is Levern now operating?
15 A: The backhoe and I'm assigned to it.
16 Q: Ok and so he's in the air conditioned backhoe that your
17 assigned to.
18 A: That's right. Yes ma'am.
19 Q: And you're operating the dump truck.
20 A: Yes ma'am.
21 Q: I got it because the dump truck requires?
22 A: For him to use his feet.
23 Q: Which foot does it require him to use?
24 A: All of them. To press the clutch in you know it's spring
25 loaded so you got to put some pressure down on it and get it

1 down there.

2 Q: And how do you know he has trouble operating the dump
3 truck?

4 A: I've been knowing him all my life pretty much and him
5 from when I been knowing him and prior to the accident
6 there's a big change in him. He can get along. You know he
7 gets along differently around different you know walking
8 period. It's a problem.

9 Q: Ok so before this accident you've seen him walk around
10 job sites?

11 A: Yes ma'am. Get around better than a whole lot of young
12 people, quicker.

13 Q: Did you, did you ever hear him complain about his leg or
14 his ankle hurting him?

15 A: All the time you know all the time. Like we stand up in
16 the safety meeting and you know sometimes he had to sit down
17 from standing. Like when he just try to take off you know he
18 stumbling you know you might have to catch him because his
19 feet bother him and I know it bothers him a lot because we
20 stay together now. I try to, I get this and I'll do this for
21 you but I know he cant do it and they offered him and even
22 tried to give him the foremans position out here where we at
23 now. He couldn't take that because it consist of him walking
24 over the job. It's a big job site and it might be twenty
25 thirty operators you know with us and for him to go check on

1 all those people it consist of a lot of walking. They have
2 buggies but you can only drive the buggies so far and then
3 you got to get off and maneuver your way through the plant.
4 You know to get to where ever the operators at because the
5 supervisor got to come around every so often to check on
6 individuals.

7 Q: So as a supervisor he'd be required to do a lot of
8 walking?

9 A: Yes ma'am.

10 Q: Then he does when he's operating the backhoe?

11 A: Yes ma'am because on the backhoe you can drive everywhere
12 you got to go.

13 Q: And you saw him before this accident happened in December
14 of 2008 and he didn't have any trouble moving around the
15 work site?

16 A: No.

17 Q: Is he a dedicated worker?

18 A: They call him Superman. He love what he do. You know when
19 Jay told me when he had that accident you know that called
20 us. That was the first thing he did was call in and say he
21 going to be late and come to find out he had to go a little
22 further than what he did you know because he broke his foot.
23 I guess he didn't think it was as bad as it was.

24 Mrs. Mullis: I don't have any further questions.

25 The Court: Any questions for the witness.

1 Mr. Allen: Just very briefly.
2 (Marvin Mosely - Cross Examination by Allen)
3 Q: Mr. Mosely you've know Mr. McCray thirty years?
4 A: Twenty something odd years.
5 Q: Did he get you the job with KBR?
6 A: No sir.
7 Q: Was he work at KBR when you started working there?
8 A: Well yes sir it was the B and K before it was KBR.
9 Q: My understanding is Mr. McCray has been at KBR for twenty
10 something years.
11 A: Its was B and K at first the KBR bought it, bought out B
12 and K so now it's KBR.
13 Q: What pieces of equipment do Mr. McCray operate?
14 A: Now.
15 Q: Right.
16 A: The Backhoe.
17 Q: And the backhoe has got pedals on it?
18 A: Well hand controls. It has pedals or extended but you
19 don't have to use it as much.
20 Q: It does have pedals?
21 A: One pedal or a gas pedal too.
22 Q: To your knowledge has Mr. McCray ever been a supervisor?
23 A: Yes.
24 Q: When was that?
25 A: Some years back he was.

1 Q: How long ago?

2 A: I'd say four five year well no six years back I guess.

3 You know he wasn't my supervisor because with him but I know

4 he was a supervisor on the job.

5 Q: You were never there when he was a supervisor?

6 A: No sir.

7 Q: Alright who told you he was.

8 A: You know I've been working with the company some odd

9 years too and there be several jobs and we all talk. We stay

10 in contact.

11 Q: My question was who told you that he was a supervisor?

12 A: He told me and I knew the superintendent.

13 Q: Was he a supervisor before or after 2000?

14 A: I want to say before no after after after.

15 Q: Do you know how long he was a supervisor?

16 A: No sir.

17 Q: More or less that a year?

18 A: I guess the duration of the job. I don't know how long

19 the job lasted.

20 Q: What job was that?

21 A: I couldn't tell you what job he was on at the time.

22 Q: Do you remember who his supervisor was when he was

23 supervisor?

24 A: Frank, I don't know.

25 Q: Don't know?

1 A: No sir.
2 Mr. Allen: Thanks.
3 The Court: Any redirect?
4 Mrs. Mullis: Just briefly.
5 (Marvin Mosely - Redirect by Mullis)
6 Q: How long have you been with the company that you're
7 working with now?
8 A: Ten, Eleven years.
9 Q: And the name of the company is KBR is that correct?
10 A: Yes ma'am.
11 Q: And what was it when you started working there?
12 A: B and K.
13 Q: B and K?
14 A: Yes ma'am.
15 Q: And what do you know why it changed names?
16 A: KBR bought B and K and they just changed it over to KBR.
17 Q: But you've been working with same company it just changed
18 names.
19 A: It just changed names.
20 Q: And you've been there eleven years you said?
21 A: Yes when they sent out a piece of paper the other day you
22 know combining all our years and KBR and you know they were
23 going to combine the one we had with B and K and on the
24 paper it say twelve years but I know I was working with them
25 back in '95 so they didn't put them on there I don't know

1 why.

2 Q: So almost twelve years then?

3 A: Yes ma'am.

4 Q: Alright, do you know how many pieces of heavy equipment
5 you're certified to operate?

6 A: Me?

7 Q: Yeah

8 A: I have a card in my pocket you know that list them all.
9 There is about eight or nine on there.

10 Q: Do you know how many Leverns ...

11 A: Now it ain't as many as there used to be I know that you
12 know because the crane he can't climb so he done lost them
13 certifications.

14 Q: So he's lost certifications because he can't climb?

15 A: A lot of them because he was running a lot of different
16 cranes and the cranes you know they consistent you climbing
17 up high. You know they sit so high and he can't climb up
18 because you know he got to put pressure on his feet to get
19 up there and getting down off it you know you always have to
20 keep a three point contact at all time with the machine.

21 Q: Would his not being certified on some of the equipment
22 that he isn't certified on anymore limit his ability to get
23 other jobs in the future when this job ends?

24 Mr. Allen: Objection.

25 The Court: Sustained make the foundation outside of his

1 personal knowledge.

2 Mrs. Mullis: We have no further questions.

3 The Court: Any objections to the witness being excused

4 from the plaintiff?

5 Mrs. Mullis: None Your Honor.

6 The Court: From the defense?

7 Mr. Allen: None Your Honor.

8 The Court: Sir you're excused. You may call your next

9 witness.

10 Mrs. Mullis: Plaintiff calls Leon Goodman.

11 The Court: The witness may come to the stand to be

12 sworn.

13 Deputy Clerk: Raise your right hand and place your left

14 hand on the Bible. Do you solemnly swear or affirm the

15 testimony you should give to the Court in the trial of this

16 case is the truth the whole truth and nothing but the truth

17 so help you God?

18 Mr. Goodman: I do.

19 Deputy Clerk: Please be seated and state your name.

20 Spelling your last name for the record.

21 Mr. Goodman: My name is Leon Goodman, G-O-O-D-M-A-N.

22 The Court: You may proceed.

23 (Leon Goodman - Examined by Mullis)

24 Q: Mr. Goodman what's your address?

25 A: 1351 Atkins Avenue Lynchburg SC.

1 Q: Are you from Lynchburg originally?

2 A: Yes, yes ma'am.

3 Q: Did you grow up there?

4 A: Pretty much.

5 Q: How old are you?

6 A: Sixty nine.

7 Q: Sixty nine?

8 A: Sixty nine.

9 Q: Ok and what do you do for a living?

10 A: I'm retired now.

11 Q: Congratulations. What are you retired from?

12 A: From construction.

13 Q: What did you do before you retired?

14 A: Civil superintendent.

15 Q: A civil superintendent?

16 A: Yes.

17 Q: What is a civil superintendent?

18 A: A civil superintendent is a guy who is responsible for
19 common work, labor work, concrete work, all of it.

20 Q: Ok so about how many people when you were a civil
21 superintendent did you --- were you responsible for
22 supervising or directing?

23 A: Under my supervision at one time I had three hundred
24 people.

25 Q: Three hundred workers?

1 A: Yes ma'am.

2 Q: And what site was that, what construction site?

3 A: That was Plummer North Carolina.

4 Q: And what were you all building in Plummer North Carolina?

5 A: We were building a paper machine, bleach plant for

6 Warehouse.

7 Q: For warehouses?

8 A: That's the main result the warehouse.

9 Q: Warehouse.

10 A: Paper company.

11 Q: Right so that was the company that you were building the.

12 A: That was the company.

13 Q: And you were a civil superintendent for what company?

14 A: B and K Construction.

15 Q: B and K which is the predecessor to KBR?

16 A: Right.

17 Q: Right, so that's the same company that Marvin worked for.

18 A: Same one and Levern.

19 Q: And the one the Levern worked for. Did you ever work with

20 Levern?

21 A: Yeah.

22 Q: How long did you work with Levern?

23 A: About twenty something years.

24 Q: And when did you first work with Levern?

25 A: 1983 he come out of the military out of the Marine Corp

1 and he got up with me in 1983 I think it was Pinehill
2 Alabama if I'm not mistaken '82 '83 somewhere along in
3 there.

4 Q: Did you hire him?

5 A: I got him hired.

6 Q: You did. How did you know him?

7 A: From home.

8 Q: From home, ok. So you knew him before you hired him in
9 Alabama?

10 A: Yeah I knew him from we all come out of the community you
11 know we wasn't a couple miles apart.

12 Q: And what did you hire him to do in the Pinehill Alabama
13 site?

14 A: At the time was labor.

15 Q: So what did that involve?

16 A: Just labor work shovels, you know digging stuff like
17 that.

18 Q: So he wasn't operating heavy equipment?

19 A: Not at that time. Not for me.

20 Q: Was he a good worker?

21 A: Yeah.

22 Q: Did he do a good job?

23 A: He did.

24 Q: And did you learn to operate heavy equipment under your
25 supervision?

1 A: He had already had some prior experience from another
2 company before he went to the military and when he come back
3 from the military he was working for me as a laborer and we
4 had operators and stuff working. I talked with the guy that
5 was over operators and give him a chance at running a piece
6 of equipment and the guy did and he went from there.

7 Q: So he started learning how to operate the heavy equipment
8 on the site with you, is that correct?

9 A: Yes.

10 Q: And in order to operate the heavy equipment do you know
11 what he started operating first.

12 A: Started out, start him out with a dump truck. He ended up
13 with a rubber tire backhoe. Went from a rubber tire backhoe
14 to a dozer and into a front end loader trackhoe.

15 Q: And did he have to get certified on each one of those
16 pieces of equipment?

17 A: At that time they wasn't doing certifications back in the
18 80's.

19 Q: Ok you just had to learn how to operate?

20 A: That's all we were looking for operators.

21 Q: Ok and how long did he work for you total?

22 A: He worked for me from then until 2001.

23 Q: And why did he stop working for you?

24 A: Everybody wanted him to work for them. He was I don't
25 know I just think it was a gift because they don't come

1 along like that to often. I've seen to many been around a
2 lot of them and after he went to working and everybody you
3 know see how he would do and everybody would want him to
4 work and pull him away from me.

5 Q: So he worked for you a total of how long?

6 A: 1983 to 2001.

7 Q: Wow that's a long time. So were you aware that he was
8 involved in a car accident or injured in December of 2008?

9 A: Yeah.

10 Q: How did you find out about that?

11 A: He called the job. I was still working. He called the job
12 that morning and told me.

13 Q: So you were down working on Dupont site.

14 A: He was on. No I was is in Macon. I was where they is now.
15 Working and the supervisor called the job and told me.

16 Mr. Allen: Objection.

17 The Court: Bases?

18 Mr. Allen: Hearsay.

19 The Court: Sustained you may continue.

20 Q: You found out when they told you, I'm sorry. You were
21 informed that he was in a accident?

22 Mr. Allen: Objection.

23 The Court: Bases?

24 Mr. Allen: Hearsay.

25 The Court: She didn't elicit that someone told him. He

1 said he learned that he was in an accident..... You may
2 proceed.

3 A: The way they do with the job is somebody, when somebody
4 get hurt, somebody pass away, somebody get in an accident or
5 whatever. They email the superintendents on the job.

6 Q: How many superintendents are there at KBR?

7 A: KBR has a lot of people employed with them. I don't know
8 I don't know how many they got up there now because back
9 when I was out there we must of had between the neighborhood
10 in the position I was in there was about ten or twelve.

11 Q: Ten or twelve civil superintendents?

12 A: Civil superintendent will handle the civil then they got
13 an iron superintendent, then they got pipe superintendent,
14 then they have incident superintendent, superintendent on
15 and on. Each responsible with certain lot of people.

16 Q: So you found out that he was in an accident and when is
17 the first time you saw him after December 20th 2008?

18 A: I didn't see him no more then until. It was after he got
19 out of the hospital.

20 Q: Do you recall the first time you saw him when you got out
21 of the hospital?

22 A: Yeah.

23 Q: Can you describe his condition?

24 A: He wasn't the same boy I knew.

25 Q: What appeared to be injured on him?

1 A: His foot, he had a lot of problems with his foot. I
2 talked with him one of the times he was in the hospital and
3 all that but when he got out his foot, he had problems with
4 his foot.

5 Q: And did he return to work?

6 A: He didn't. When he returned to work he didn't come back
7 to work till next ...

8 Q: So he's never returned and come back to work for you?

9 A: No I retired in 2010.

10 Q: So are you aware of his physical condition now?

11 A: Yeah.

12 Q: And what are you know about his physical condition now?
13 How often do you see him?

14 A: I see him at least once sometimes twice a month.

15 Q: When do you see him?

16 A: Mostly on the weekends when he ain't working.

17 Q: And what do you know about his physical condition now?

18 A: I know he's still having problems.

19 Q: With what?

20 A: With his feet, limping he ain't use to limp you know he
21 use to be pretty swift, get along pretty swift. Now you know
22 he get up he limps and he move and he limps. Whatever
23 happened to him I don't know but sure took something thick
24 on him. His lifestyle the way he was living.

25 Q: And at what point did you learn that a drunk driver

1 caused the accident.

2 The Court: Watch the characterization Mrs. Mullis.

3 Mr. Goodman: Answer her.

4 The Court: Yes sir you can answer her.

5 A: Later on I found that out later on probably about a
6 couple of weeks or so after it happened.

7 Q: Would you have expected Levern with his experience
8 operating heavy equipment to become a supervisor?

9 A: Yeah, he had the skill he had the know how he had
10 everything to be a supervisor.

11 Q: Did he actually help train other individuals in heavy
12 equipment?

13 A: You got one right there, one just left. There's a whole
14 lot more out there.

15 Mrs. Mullis: I don't have any other questions.

16 The Court: Any questions for the witness.

17 Mr. Allen: Very briefly.

18 (Leon Goodman - Cross Examined by Allen)

19 Q: The last time you worked with Mr. McCray was 2001?

20 A: Yeah.

21 Q: And he worked with you about seventeen or eighteen years?

22 A: '83 to 2001 something like that yeah.

23 Q: And in that time was Mr. McCray ever a supervisor.

24 A: I offered it to him. I tried to get him to take it at
25 that time but he wouldn't take it. I didn't really wanted

1 him to take it because he more value to me as a operator
2 than he was a supervisor.

3 Q: Is the answer to my question no? He was never a
4 supervisor between 1983 and 2001.

5 A: No he wasn't.

6 Mr. Allen: Alright, thank you.

7 The Court: Any redirect?

8 Mrs. Mullis: I don't have any other questions.

9 The Court: Any objection to the witness being excused
10 from the plaintiff?

11 Mrs. Mullis: None from the plaintiff.

12 The Court: From the defense?

13 Mr. Allen: None Your Honor.

14 The Court: Sir you're excused. The next witness is by
15 video correct?

16 Mrs. Mullis: It is and it's a twenty minute and it would
17 take us ten to setup. We're talking...

18 (Counsel approach bench)

19 The Court: Mr. Foreman, ladies and gentlemen we're going
20 to take advantage of this break in testimony to take our
21 evening recess. You all had a long day. We're use to this
22 schedule you all are not so you all are probably happy you
23 get to go home. We're going to resume in the morning at nine
24 thirty. During the break please do not discuss the case
25 among yourselves or with anyone else. Please do not do any

1 Mrs. Mullis: Jay Welch.

2 The Court: Oh I'm sorry I should've remembered that.
3 When do you plan to play Mrs. Dailey's deposition?

4 Mrs. Mullis: After I get..

5 The Court: All of the chain witnesses.

6 Mrs. Mullis: Yes Your Honor because she's going to
7 testify..

8 The Court: So when you all huddle up you all think you
9 all are going to be able to resolve them?

10 Mr. Allen: I think we'll be able to resolve most of
11 them. They were actually taken by another lawyer in our
12 Columbia office. I need to re-read it. I read it initially
13 but I got to re-read it.

14 The Court: Ok, alright is there anything else we need to
15 deal with before. You all might want to set that equipment
16 up before you leave because we're going to want to test it
17 if you can.

18 Mrs. Mullis: We can.

19 The Court: Or get here early in the morning and do it.
20 Which do you all prefer?

21 Security: We'll be here at eight thirty.

22 Mr. Allen: It's up to you. Really it's up to you all.

23 Security: Eight thirty sounds good to me. Reason why
24 because I got to escort the Judge out. We got to get some
25 stuff done in here first before we can leave, but we're here

1 (Doris Yarborough - Examined by Mullis)

2 Q: Mrs. Yarborough where are you employed?

3 A: I'm employed with the South Carolina Law Enforcement
4 Division also know as SLED.

5 Q: And what do you do for SLED?

6 A: I'm a forensic technician in the evidence control
7 department.

8 Q: And what does that involve?

9 A: That means I log in the evidence from agencies throughout
10 the State of South Carolina that need a forensic analysis.

11 Q: And how long have you performed that function for SLED?

12 A: Just over four years.

13 Q: And when you're logging in evidence for the evidence
14 room, who do you take evidence from?

15 A: We take it from officers from any South Carolina agency
16 that needs to bring it in for forensic analysis.

17 Q: And are you responsible for insuring that the evidence
18 has been secured in a manner that is hasn't been tampered
19 with or altered?

20 A: Once it comes to us. We take our evidence on a said to
21 contain bases.

22 Q: So what does that mean?

23 A: Their paper work may say one thing and there may possibly
24 be something else in the container. I take what they present
25 to me, as what is presented on paper. Most of the time, I

1 don't always see the exact evidence but what I take, I take
2 and reseal it. It could be in a envelope, it could be in a
3 box, it could be in a heat sealed pouch. That evidence is
4 resealed and then the officer initials and dates those seals
5 at the time that it's being submitted.

6 Q: So when you take the evidence into the evidence room at
7 SLED. Do you remove it from the container that it came in
8 from the Highway Patrol?

9 A: No

10 Q: But you reseal it?

11 A: We typically and it can come in several different ways.
12 It can come in what we call a biological specimen kit, it's
13 a box and that box is sealed and we also write on the box.
14 If it was or was not sealed. I don't open it to inspect it
15 but I do write on that box or it could be in one of their
16 evidence bags. What they call tamper evident that's sealed
17 and then I will reseal it into the SLED evidence container.

18 Q: So on, there's a document in front of you. Marked for
19 identification purposes as Plaintiffs exhibit 6 on December
20 20th 2008. Do you know what that document is?

21 A: This is a the Highway Patrol's chain of custody.

22 Q: And that's again dated December 20th 2008 and what is that
23 document?

24 A: Ok this is the Highway Patrol's chain of custody and I
25 took possession of the evidence presented on December 23rd

1 2008.

2 Q: Ok and you know that how?

3 A: Well I have a SLED chain of custody that shows that. I
4 also have the day that it was logged into our system.
5 Showing that day and my initials are on the bottom of their
6 chain of custody with that date that they brought it to
7 SLED.

8 Q: So on the bottom of this form right by SLED on the fifth
9 line down. Are those your initials?

10 A: My initial are DPY and the date is 12-23-08.

11 Q: And that is the evidence that came into you from Highway
12 Patrol, correct?

13 A: Correct.

14 Q: Of and individual by the name of who?

15 A: According to my chain of custody it would be Lance
16 Corporal C.R. Cochcrane and signed South Carolina Highway
17 Patrol number six.

18 Mrs. Mullis: So we're going to know submit this
19 Plaintiff's exhibit 6.

20 The Court: Any objections?

21 Mr. Allen: No Your Honor.

22 The Court: Marked to admittible without objection.

23 Mrs. Mullis: Thank you.

24 The Court: What number is that your now holding?

25 (Plaintiff's Exhibit Number Six was marked)

1 Mrs. Yarborough: Six Your Honor.

2 Q: So the second document that you have is a South Carolina
3 Law Enforcement Division, identify that document for the
4 jury.

5 A: That is the South Carolina, that's the SLED chain of
6 custody.

7 Q: So what chain of custody is that now tracking?

8 A: Ok once the evidence is submitted into our system. It is
9 given an electronic barcode label to go on the paper and
10 also the evidence itself. From that day forward that
11 evidence is tracked electronically throughout the SLED
12 building.

13 Q: Ok and so was, did you apply the barcode to this blood
14 specimen?

15 A: I did.

16 Q: And it was the blood specimen labeled as what?

17 A: Jose W. Valle, V-A-L-L-E.

18 Q: Ok and it was submitted to you by whom?

19 A: Lance Corporal Cochrane of the South Carolina Highway
20 Patrol?

21 Q: What date?

22 A: On 12-23-08 at 12:27 PM.

23 Q: And you then would've put a barcode on it, it that
24 correct?

25 A: That's correct.

1 Q: And the barcode number was what?

2 A: It was L08-18272.

3 Q: And that barcode allows you to track the movement, is
4 that correct?

5 A: That is correct. I took custody of it and twelve twenty
6 seven and then at twelve thirty three it was placed into the
7 evidence room. Which is the toxicology intake refrigerator
8 and that is located in a secure evidence room at SLED.

9 Q: Is that a locked area?

10 A: The room is, the refrigerator is not locked.

11 Q: And when you took control of it and put it in the evidence
12 room would you've assured that it had not been tampered with
13 and that it was sealed?

14 A: Correct.

15 Q: And hadn't been switched with any other samples?

16 A: No.

17 Q: And at that point how are you tracking, how is SLED then
18 track the movement of the blood specimen through SLED?

19 A: We all have a barcoded tag and because it was on my
20 computer under my ID it's logged in that way. Then I scan
21 the barcode that says toxicology evidence intake
22 refrigerator. Then I will scan the barcode on the evidence
23 and that places it in that refrigerator and then it's
24 transferred physically to that refrigerator.

25 Q: And is that, would that have been the last time that you

1 physically handled that piece of evidence?

2 A: Correct.

3 Q: And as far as you know was it in the same condition that
4 it was in when it was handed off to you by Officer Cochrane?

5 A: As far as I know yes.

6 Mrs. Mullis: And we're going to mark that, oh I'm sorry.

7 Q: Page two of that chain of custody, is that your signature
8 at the bottom?

9 A: I think that's our the receipt that is generated, I don't
10 have that. Those are mine.

11 Q: Page two sorry. Is that not part of that same?

12 A: No this is ok this goes together. A receipt, electronic
13 receipt is generated to go back to the person who submits
14 the evidence and what it does is it show the agency
15 submitting it. All their agency information, the item, the
16 name on the item, the person who submitted it, the date and
17 time as well as my signature.

18 Q: So the chain of custody is a two page document that
19 tracks it through all of SLED starting on December 23rd 2008?

20 A: That's correct.

21 Q: And it has your name on it so that's how you know you're
22 the forensic technician?

23 A: Initials.

24 Mrs. Mullis: And we're going to mark that as Plaintiff's
25 exhibit eight for identification purposes at this point.

1 That's a two page document.

2 (Plaintiff's Exhibit Number Eight was marked)

3 Q: And you said the second exhibit was a ...

4 A: This is the electronic receipts generated by SLED by our
5 evidence log in system. That goes back with the officer who
6 submitted the evidence.

7 Q: And it does what for the officer?

8 A: It gives him other agency information the date, the town,
9 the time, the county, who submitted it as well as the
10 signatures for that person.

11 Q: Ok and that has your signature on it?

12 A: Correct.

13 Q: As well as the submitting police agency officer that
14 delivered it?

15 A: Correct.

16 Q: And what's the date on that?

17 A: 12-23-2008.

18 Mrs. Mullis: That's all the questions I have for this
19 witness.

20 The Court: Any cross examination for the witness?

21 Mr. Allen: Just briefly.

22 (Doris Yarborough - Cross Examined by Allen)

23 Q: At the bottom of exhibit number eight which as been
24 marked for identification purposes. I see a new container
25 number. What does that mean?

1 A: Once it has finished it's analysis within the lab. It is
2 returned to our evidence room and that item is returned back
3 to the agency that submitted it. So and this is what we call
4 a bulk container. Highway Patrol, things have changed since
5 2008. Typically we saw officers throughout the state
6 numerous times a day. Different officers but now what they
7 do, they talk all their evidence to the central evidence in
8 Columbia and there are three, four different people from
9 central evidence who will come once or twice a week and they
10 bring as many as forty six cases at one time to submit. So
11 once they no longer, we no longer because of the Evidence
12 Preservation Act SLED no longer dispose of biological
13 specimens. They are returned back down to us as well as any
14 other evidence. We take in and we return evidence to
15 agencies. So what happened with this is it was put in what
16 we call a bulk container. Not just one case but it could
17 have been as many as fifteen cases in one box and that box
18 is identified as a container. So when they come in and their
19 picking up that's going back to their agency. They may have
20 a box with fifteen different things in it but its all still
21 got their individual labels on it.

22 Q: The SLED documents themselves you all keep like original
23 manilla envelopes and what not that the samples came in?

24 A: I don't know because once it leaves me I don't know
25 what's done with those pages when they go back up.

1 Q: Have you seen original documents related to Mr. Valle's
2 sample since December of 2008?

3 A: I don't know what you are referring to. I had a copy of
4 the log in sheet that was presented to me with the item.
5 That was presented for analysis and then I brought a copy of
6 the receipt that was generated by SLED.

7 Q: The test results, the labels, those types of things.
8 There are original documents somewhere?

9 A: We log everything they bring in it's scanned into our
10 system. So everything, we're paperless we give all the
11 paperwork back. So everything we have in our system. I mean
12 I can pull up the system and make copies of what I scan in
13 at the time.

14 Q: For example, you didn't bring any original documents with
15 you today.

16 A: Oh no.

17 Mr. Allen: Ok thank you.

18 The Court: Any redirect to the witness.

19 (Doris Yarborough - Reexamined by Mullis)

20 Q: The bin that you're referring to and the number that he
21 asked you about at the end. That container number. Was that
22 after the specimen had been tested?

23 A: Oh yes this didn't take place until 1-23-09.

24 Q: So that is a bin, a storage bin for the purposes of
25 storing the biological specimen after the testing has been

1 done, is that correct?

2 A: That was a container that those items were placed in to
3 be returned to the agencies.

4 Mrs. Mullis: And if we can just mark the forensic
5 services lab receipt for identification purposes.

6 The Court: What page was that? Would that be nine?

7 Mrs. Yarborough: Yes ma'am.

8 Mrs. Mullis: Yes ma'am. I don't have any other
9 questions.

10 Mr. Allen: Nothing further your honor.

11 The Court: Do you have any objections to the witness
12 being excused?

13 Mrs. Mullis: None from the plaintiff.

14 The Court: Any from the defense?

15 Mr. Allen: No Your Honor.

16 The Court: Mrs. Yarborough you're excused.

17 Mrs. Yarborough: Thank you

18 The Court: Have a good day. You may call your next
19 witness.

20 Mrs. Mullis: The plaintiff calls Patricia Crooks.

21 Deputy Clerk: Please raise your right hand and place
22 your left hand on the bible. Do you solemnly swear or affirm
23 the testimony you should give to the Court in the trial of
24 this case is the truth the whole truth and nothing but the
25 truth so help you God?

1 Mrs. Crooks: I do.

2 Deputy Clerk: Please be seated and state your name.
3 Spelling your last name for the record.

4 Mrs. Crooks: My name is Patricia Crooks, C-R-O-O-K-S.

5 (Patricia Crooks - Examined by Mulllis)

6 Q: And Mrs. Crooks where are you employed?

7 A: I'm employed by the South Carolina Law Enforcement
8 Division also know as SLED.

9 Q: And what do you do for SLED?

10 A: I'm a forensic technician in the evidence control
11 department and I work strictly in the evidence room.

12 Q: And what does that involve?

13 A: That involves pulling evidence for forensic technicians
14 or forensic scientist when it's requested. Also once the
15 evidence has been examined and returned to the evidence room
16 I take custody of it again and each time an agency comes in
17 to submit evidence. I check to see if they have any evidence
18 that's already been examined and is ready for return and
19 then I return that evidence to them.

20 Q: So you work in the evidence control room?

21 A: Just strictly in the evidence room.

22 Q: And this is a document dated December 23rd of 2008 that
23 you have a copy of, that works and did you take possession
24 or did you take possession of the pouch containing blood on
25 12-29-2008?

1 A: Yes I did.

2 Q: And how do you know that?

3 A: Because I have the electronic chain and when I took
4 possession of that evidence it was in the toxicology intake
5 storage refrigerator in the evidence room and I removed it
6 from that area. I scanned my barcode, this is for me
7 individually and then I scanned the barcode on the evidence.
8 Then once I was ready to transfer it to the, in this case
9 was forensic technician Kimberly Meares. I scanned her
10 barcode and then scanned the barcode on the evidence
11 tracking it to her and she had to sign for that.

12 Q: So does that, what does that do in the chain of evidence?
13 What are you assuring with the scanning?

14 A: It's an electronic chain that tracks the actual evidence.

15 Q: And when you're pulling the evidence out of the
16 refrigerator in the evidence intake storage area. Do you
17 assure that it has not been tampered with or altered?

18 A: Yes I do, I check to see that it's sealed and initialed
19 and dated.

20 Mrs. Mullis: That's all the questions I have.

21 The Court: Any questions for the witness?

22 Mr. Allen: No Your Honor.

23 The Court: Any objection to the witness being excused,
24 from the plaintiff?

25 Mrs. Mullis: None from the plaintiff.

1 The Court: From the defense?

2 Mr. Allen: No Your Honor.

3 The Court: Mrs. Crooks you're excused.

4 Mrs. Crooks: Thank you.

5 The Court: You're welcome ma'am. You may call your next
6 witness.

7 Mrs. Mullis: Plaintiff calls Kimberly Meares to the
8 stand.

9 Deputy Clerk: Please raise your right hand and place
10 your left hand on the bible. Do you solemnly swear or affirm
11 the testimony you should give to the Court in the trial of
12 this case is the truth the whole truth and nothing but the
13 truth so help you God?

14 Mrs. Meares: I do.

15 Deputy Clerk: Please be seated and state your name.
16 Spelling your last name for the record.

17 Mrs. Meares: My name is Kimberly Meares, M-E-A-R-S.

18 The Court: You may proceed.

19 (Kimberly Meares - Examined by Mullis)

20 Q: And Mrs. Meares what do you do for a living?

21 A: I am currently a Special Agent with the Latent Print
22 Crime Scene Department. However at the time of this case I
23 was a forensic technician at SLED.

24 Q: In December of 2008?

25 A: Yes.

1 Q: And what did you do as a forensic technician for SLED in
2 December of 2008?

3 A: My main duties were to collect evidence assigned to the
4 toxicology department on a daily bases. From the login
5 department bring it to the toxicology department and
6 disburse it to the analysis assigned to those cases. As well
7 as helping the analysis as needed.

8 Q: And do you recognize the document marked as plaintiff's
9 exhibit eight?

10 A: Yes I do.

11 Q: What is that document?

12 A: That is the SLED chain of custody.

13 Q: Labeled what?

14 A: Labeled plaintiff's exhibit or.

15 Q: What item is on that chain of custody?

16 A: It's for item one which is a heat sealed pouch containing
17 blood, labeled Jose W. Valle.

18 Q: Thank you and what would you have done with this pouch?

19 A: In this case I took custody of it from Patricia Crooks
20 and then took it upstairs to the toxicology department and
21 scanned it into the custody of the toxicology departments
22 refrigerator.

23 Q: And how do you know that you did that.

24 A: As has been discussed we have the bar codes and each
25 person has a barcode and each evidence storage area has a

1 barcode and on this chain of custody you can see that it
2 came into my custody from Patricia Crooks and then it went
3 into the custody of the toxicology department's
4 refrigerator.

5 Q: And from the toxicology department's refrigerator what
6 forensic scientist would it have been assigned to there?

7 A: Heather Dailey.

8 Q: And how do you know that?

9 A: She is the scientist that took custody of it from the
10 refrigerator.

11 Q: And is that on the chain of custody in front of you
12 marked as plaintiff's exhibit eight as well?

13 A: Yes.

14 Mrs. Mullis: I don't have any other questions.

15 The Court: Any questions for the witness?

16 Mr. Allen: Very briefly.

17 (Kimberly Meares - Cross Examination by Allen).

18 Q: Mrs. Meares I understand your personal knowledge or
19 direct handling of this sample was simply taking it from Ms.
20 Crooks and putting it in a refrigerator in the toxicology
21 department?

22 A: That's correct.

23 Q: That's twenty two minutes?

24 A: Yes.

25 Q: You don't know what happened to it, you don't have any

1 personal knowledge of what happened to it after you put it
2 in the refrigerator correct?

3 A: No I do not.

4 Mr. Allen: That's all I have thanks.

5 (Kimberly Meares - Redirect by Mullis)

6 Q: Is that refrigerator secure in the toxicology department?

7 A: Yes it is a large walk in refrigerator that you have to
8 have a key code access to get in.

9 Q: And when you put it, place the sample in the refrigerator
10 would you have assured that it was, that it had not been
11 tampered with?

12 A: Yes I check the heat seal that Mrs. Yarborough was
13 explaining to make sure that it is still intact when I do
14 put it in the refrigerator.

15 Q: And do you verify that it's the sample that your moving
16 around with the bar codes?

17 A: Yes I just check the barcode. I don't actually look at
18 the evidence inside the bag.

19 Q: Other than insuring that it hasn't been tampered with?

20 A: Correct.

21 Mrs. Mullis: I don't have any further questions.

22 The Court: Any with exception to the witness being
23 excused, from the plaintiff?

24 Mrs. Mullis: None Your Honor.

25 The Court: From the defense?

1 Mr. Allen: No Your Honor.

2 The Court: Ma'am you're excused.

3 Mrs. Mullis: And we'll submit plaintiff's exhibit eight
4 as..

5 The Court: Please show it to opposing attorney.

6 Mr. Allen: Objection.

7 The Court: I'll take it under advisory.

8 The Court: Plaintiff may proceed.

9 Mrs. Mullis: Plaintiff is going to present the video
10 deposition of Jay Welch.

11 (Video deposition of Jay Welch was played for jury and
12 court)

13 The Court: Plaintiff may proceed.

14 Mrs. Mullis: Plaintiff calls Harry White to the stand.

15 Deputy Clerk: Please raise your right hand and place
16 your left hand on the bible. Do you solemnly swear or affirm
17 the testimony you should give to the Court in the trial of
18 this case is the truth the whole truth and nothing but the
19 truth so help you God?

20 Mr. White: I do.

21 Deputy Clerk: Please be seated and state your name.
22 Spelling your last name for the record.

23 Mr. White: My name is Harry James White Sr.

24 The Court: Sir please spell your last name.

25 Mr. White: W-H-I-T-E.

1 The Court: You may proceed.

2 (Harry White - Examined by Mullis)

3 Q: Mr. White where do you live?

4 A: 10245 Nero Circle Lynchburg South Carolina.

5 Q: And where is Lynchburg?

6 A: About half way between Florence and Sumter. Most people
7 is believed as Florence and Sumter so we call it half way
8 between right of I-95.

9 Q: And how big of a town is Lynchburg?

10 A: I think it's population about eight hundred. That
11 includes surrounding areas.

12 Q: Is it a farming community?

13 A: Farming mostly.

14 Q: And did you grow up in Lynchburg?

15 A: I grew up actual about seven miles out of town on
16 originally out in the country. Near where our houses, my
17 home Levern home, we all kind of neighbors pretty much in a
18 one mile area.

19 Q: Did you, did your family farm?

20 A: My family farmed after I grew up. I actually got into the
21 industry. I worked that full press steel plant over in
22 Florence for a lot of years and I retired there after twenty
23 three years and after a short retirement I went into
24 construction and I was doing some construction welding. I'm
25 still welding.

1 Q: So now you're working doing what?

2 A: I'm welding again at Aluminum Latice at plant over in
3 Darlington about six seven miles out of Florence.

4 Q: But as a younger man growing up in Lynchburg. How did you
5 know Levern?

6 A: Well I knew the Levern from family all of our lives. Our
7 families were you know in the same area. His mother father
8 we all went to the same churches and even know we still in
9 the same church. After I left, I got into construction like
10 I said for a while and Levern into construction and I guess
11 by him being real knowledgeable about that area. I started
12 talking with him about different things and he would help me
13 out you know in certain areas. So he and I you know we got
14 closer and closer we became you know friends. He would help
15 me out with certain things you know in certain areas.

16 Q: And before December of 2008 would you see him? How often
17 would you see him?

18 A: Well almost every time he would come home because he
19 worked out of town a lot and about every time he came home
20 he and I we'd do different little odds and ends together you
21 know kind of you know we were close.

22 Q: What kind of things did you all do together?

23 A: Well we actually work on a tractor or try to get some
24 barn equipment you know something because we both still
25 lived on the farm and you know we would do certain little

1 things you know I was welding if he needed something weld he
2 would call me I would do whatever he needed cutting and
3 welding. You know just odd jobs.

4 Q: And did you become aware at some point that he was
5 involved in an automobile accident in December 20th of 2008?

6 A: Well yes ma'am I heard it I think before I saw him you
7 know his mother.

8 Q: You found out from his mother.

9 A: Yes ma'am.

10 Q: I understand and when's the first time you saw him after
11 the accident?

12 A: I didn't see him until after he got out of the hospital.
13 Maybe I don't know exactly how long it was a while he got
14 out the hospital before I saw him.

15 Q: Did you ever see him when he was still in his cast?

16 A: He had that, yes ma'am. He had this brace...

17 Q: And how often do you see him now in 2012.

18 A: Pretty often like I said we go to that same church he
19 comes to church pretty regular when he's home and sometimes
20 if he's over at his mother house you know he'll call or
21 he'll come by my house sometimes. You know pretty often.

22 Q: And do you see any difference in him today in the way he
23 moves than you do, then you did in December of 2008 before
24 this accident occurred?

25 A: Yes ma'am it's very noticeable. I think everyone that be

1 around him or look you going to tell there's a major
2 difference.

3 Q: And what difference do you notice?

4 A: Well the way he walk. The pain in that he express you
5 know sometimes we standing up talking or he's walking around
6 doing something you know. Sometimes he may take a step and
7 catch his leg or sometime he'll you know puts up with that
8 pain or agony or you know those type things and lots of
9 times I would just ask him what's wrong. He say they give me
10 a fit. You know it was a quite a few things you know that
11 give. I even have one of his tractors over at my house know.
12 I guess he don't feel like driving it quite as much you know
13 climbing up on it or whatever. I keep the tractor and I use
14 it from time to time but I also have a tractor of my own so
15 I didn't just have to have it. He wasn't using it I guess he
16 can't use it. I have it over at my house now.

17 Q: So what kind of, do you know why he wouldn't be using the
18 tractor anymore?

19 A: I guess those, most peoples believe because the tractor
20 you know have a clutch and two brakes you know right brake
21 left brake and you know to make a tractor go you have to put
22 it in gear and release the clutch. You got to mash the
23 clutch every time you stop and start it's not like a car
24 with an automatic transmission. So I guess you know to use
25 that tractor you know it probably bothers him. You know he

1 gets tired you know he don't feel like using it I guess.

2 That's my opinion.

3 Q: And so the tractors over at your house now?

4 A: Yes ma'am it's at my house today.

5 Q: Do you not see him drive the tractor anymore?

6 A: No ma'am I haven't. I know he hadn't drove it anymore
7 because it at my house ever since the accident really.

8 Mrs. Mullis: I don't have any further questions.

9 The Court: Any questions for the witness?

10 Mr. Allen: None from me Your Honor.

11 The Court: Any objection to the witness being excused,
12 from the plaintiff?

13 Mrs. Mullis: None from the plaintiff.

14 The Court: From the defense?

15 Mr. Allen: No Your Honor.

16 The Court: Sir you're excused.

17 Mr. White: Thank you.

18 The Court: You're welcome. You may call your next
19 witness.

20 Mrs. Mullis: May we approach?

21 The Court: You may.

22 Mrs. Mullis: We call Levern McCray to the stand.

23 Deputy Clerk: Please raise your right hand and place
24 your left hand on the bible. Do you solemnly swear or affirm
25 the testimony you should give to the Court in the trial of

1 this case is the truth the whole truth and nothing but the
2 truth so help you God?

3 Mr. McCray: I do.

4 Deputy Clerk: Please be seated and state your name.
5 Spelling your last name for the record.

6 Mr. McCray: My name is Levern McCray, M-C-C-R-A-Y.

7 The Court: You may proceed.

8 (Levern McCray - Examined by Mullis)

9 Q: And what's your current address Mr. McCray?

10 A: My current address is 605 Session Road, Colleton, South
11 Carolina.

12 Q: So you make your home near Columbia, is that correct?

13 A: Yes ma'am.

14 Q: And how old are you?

15 A: Fifty nine.

16 Q: What's your date of birth?

17 A: February 9 1953

18 Q: And where did you grow up?

19 A: Lynchburg South Carolina. It's Lynchburg it's a community
20 they call Lynchburg.

21 Q: And who did you live in Lynchburg South Carolina?

22 A: My mother and father, and Arthur McCray.

23 Q: Did you have any other folks that lived in the house with
24 you there?

25 A: Yes ma'am.

1 Q: Who lived in the house with you there?
2 A: My brothers, my sisters.
3 Q: How many brothers and sisters did you have?
4 A: I have mostly a whole family ten of us.
5 Q: Ten of you total?
6 A: Yes ma'am.
7 Q: That's a big family.
8 A: Yes ma'am because there's five that lived with us all my
9 life. Sorry not five, we all brother and sisters. We all
10 lived and grew up at the same time.
11 Q: So five of those ten individuals were not blood siblings,
12 is that correct?
13 A: Yes ma'am.
14 Q: But grew up with you?
15 A: Yes ma'am we all grew up at the same house at the same
16 time.
17 Q: And you refer to them as brothers and sisters?
18 A: Yes ma'am.
19 Q: And growing up in Lynchburg, you heard Mr. Wright talk
20 about being in a farm area. Was it a farm?
21 A: Yes, ma'am. We grew up on a farm.
22 Q: Ok what kind of farm was it?
23 A: We plant cotton, corn, tobacco a regular farm.
24 Q: How big of a farm was it?
25 A: It was consisted of one section of it was eighty acres

1 and another section of it was fifty acres so it like. My
2 grandfather had it be split but my father was farming it.

3 Q: Did you assist in the farming.

4 A: Yes ma'am I was a kid until I left in 1973.

5 Q: Did your brothers and sisters help with the farming as
6 well?

7 A: Yes ma'am.

8 Q: So you grew up on the farm?

9 A: Yes ma'am.

10 Q: And where did you go to high school?

11 A: Maywood High School, Sumter, South Carolina.

12 Q: And when you graduated from high school did you continue
13 to work on the farm?

14 A: I think I stayed about a year and then I moved to
15 Florida.

16 Q: You moved to Florida?

17 A: Yes ma'am.

18 Q: To do what?

19 A: Some work, truck. Actually when I first got out of high
20 school I got a road job in Florence South Carolina. I was
21 working for Sharp Construction Company but then I decided
22 since everybody else was going to leave town I probably
23 better go to so I went to Florida and I work down there in
24 Florida with Pixel Construction Company. We were doing
25 landscaping and I stayed down there for a while. Then I

1 decided I was on a farm all my life I decided to --- heavy
2 equipment school thing came up. I got into that about three
3 four months or something like that. When I got out of that
4 I moved back to Florida and a job didn't pan out. I moved
5 back to South Carolina.

6 Q: So you initially were doing some road work, is that what
7 you said?

8 A: Yes ma'am.

9 Q: So when you started out doing road work in construction.
10 What were you doing?

11 A: I started out as a flagger. About a couple of weeks later
12 I started operating a pan which is a scrapper pick up dirt.
13 It scrapped up material and haul it to another place and
14 fill in these areas that was low.

15 Q: So you were, were you operating heavy equipment at that
16 point?

17 A: Yes ma'am, scrapper.

18 Q: Did you have to be certified to do that type of heavy
19 equipment?

20 A: No ma'am back in the day you didn't have to be certified..
21 A guy showed me how to operate it and I just took it and
22 went. The guy that was in charge of the job he let me keep
23 it and he sent that guy to another job.

24 Q: They just gave you piece of heavy equipment to operate?

25 A: Yes ma'am.

1 Q: So you did some road construction for a while after you
2 graduated from high school and that would of been about what
3 year?

4 A: Seventy two until later part about around December. I
5 think it was around December. I got out of high school in
6 May and I think I did it I got in around December I think.

7 Q: And after doing that construction work, going to Florida,
8 coming back. Then what did you decide to do?

9 A: I started working for Sharp Construction again and this
10 time they. I had worked with guys I worked with and the
11 started to run a motor grader. And then job got a little
12 light so I decided to go into the military so I went into
13 the United States Marine Corp for about seven years.

14 Q: What year did you join the Marine Corp?

15 A: 29 December 1975.

16 Q: And what was the rank that you achieved in the Marine
17 Corp?

18 A: Sergeant E-5.

19 Q: You were a Sergeant in the Marine Corp for how long?

20 A: I stayed in seven years.

21 Q: Where were you stationed?

22 A: Camp Lejeune North Carolina, Japan, and Albany Georgia.

23 Q: Japan and Georgia.

24 A: Yes ma'am.

25 Q: What did you do in the military? What kind of work did

1 you do?

2 A: I was a motor transport we transport troops and cargo and
3 stuff from various places in the field, around to the base.
4 And when I moved to Albany I got out of I was still in the
5 motor transport but instead of transporting material stuff
6 like that. We transport people around the base and from base
7 to base if we had to. So I stayed in motor transport my
8 entire career.

9 Q: And when you were in the Marine Corp were you required to
10 meet a certain level of physical fitness?

11 A: Oh yes ma'am.

12 Q: Were you give physical fitness test?

13 A: Yes ma'am.

14 Q: And did you, go ahead.

15 A: PFT.

16 Q: PFT, what does that stand for?

17 A: PFT, you have to run three miles in eighteen minutes. You
18 have to do seventy sit ups and you have to do twenty
19 pullups.

20 Q: And could you complete that physical fitness test?

21 A: Yes ma'am.

22 Q: Throughout the seven years that you were in the Marine
23 Corp?

24 A: Yes ma'am.

25 Q: And when you were released from the Marine Corp is there

1 a test or some kind of release that you receive?

2 A: No ma'am when I was released I had like three months
3 stored. I took terminal leave to go see if I can find a job
4 on the outside world and instead of going back I just found
5 a job in construction. So I stayed with that.

6 Q: Were you then honorably discharged from the US Marine
7 Corp?

8 A: Yes ma'am.

9 Q: And what year would that have been?

10 A: 29 December 1982.

11 Q: 1982 you said?

12 A: Yes ma'am.

13 Q: And what job did you find in construction in 1982?

14 A: I went to work in 1983 for BE and K Construction Company
15 as a laborer.

16 Q: Who did you go to work for in 1983?

17 A: I went to work for BE and K Construction with Junior
18 Goodman, Leon Goodman.

19 Q: Junior Goodman, the individual that came in a testified
20 the other day?

21 A: Yes ma'am.

22 Q: And you were doing what job for Junior?

23 A: I was a laborer at that time. I was jack hammering and
24 placing concrete with a wheel barrow. What ever odd stuff
25 that they did. And then when we left that job I went to the

1 next one I got on a backhoe with them. Then when we left job
2 which was up in Virginia I got another backhoe so.

3 Q: Did Junior train you on how to operate a backhoe?

4 A: Well he gave me the opportunity but for the training
5 part. You just back then you could just get on a piece of
6 equipment and go. And now you can't do that you got to go to
7 schooling for it so they won't let you get on a backhoe.

8 Q: So you didn't have to be certified to operate a backhoe
9 in 1983-84.

10 A: No ma'am.

11 Q: And where was that job site?

12 A: The first one was in Pine Hill Alabama and the next was
13 in Mobile Alabama and the next one was in Virginia.

14 Q: So with when you were working with BE and K you would
15 move from job site to job site is that correct?

16 A: Yes ma'am.

17 Q: And when would you move from the job site to the job
18 site?

19 A: If they get this job completed down to so low they have
20 to start deduction of force. They'll ROF you, you can go to
21 the next they'll send you to the next job if they got one
22 open.

23 Q: Would you have to reapply to a job every time?

24 A: No ma'am I never had to reapply for a job. I just when I
25 got ROF in my job they had another job we just move over

1 there. I only stayed out of work maybe a couple of two or
2 three months between you know. They send him to a job and
3 he'd take me with him.

4 Q: So you worked for Leon for, from sometime in 1983-84
5 until when?

6 A: We stayed together until 2001 in Oregon.

7 Q: 2001 where?

8 A: Oregon.

9 Q: Oregon?

10 A: Yes ma'am Washington state in Oregon.

11 Q: Ok that's what I thought you said.

12 A: I worked in Oregon and I lived in Washington State was
13 just right across the Columbia River about I guess the
14 bridge was about a mile long.

15 Q: And what were you doing in Oregon? Were still operating
16 a backhoe up there?

17 A: Well I was operating a backhoe, a front end loader, and
18 a forklift.

19 Q: And did you have to be certified to operate any of that
20 heavy equipment?

21 A: It was just beginning to start the certification.

22 Q: And what did the certification entail?

23 A: Certification you'd have to go to class and you'd have
24 somebody that give you the instructions on. You have to know
25 what the weight of the piece of equipment that you're going

1 to pick up. You going to have to know how a fork can scope
2 out to pick up the equipment without turning it over. So
3 basically you have to go to class work.

4 Q: So would you have been trained on the job site by another
5 individual that operated the heavy equipment?

6 A: Well they, mostly they got a vendor that, when I was in
7 Oregon they had a vendor that the equipment belonged to. He
8 came out and he give tests. Most of the knowledge and stuff
9 you picked up during the time you were working and operating
10 the equipment.

11 Q: So when you were in Oregon in 2001. You were starting to
12 certify to operate heavy equipment, is that correct?

13 A: Yes ma'am.

14 Q: Ok and operating about three pieces at that point.

15 A: Yes ma'am I had three of them operating. I missed one I
16 had a bulldozer I was operating too.

17 Q: So then from the Oregon site where did you go?

18 A: Decatur Alabama.

19 Q: And what were you building in Decatur Alabama?

20 A: A power plant.

21 Q: And were you continuing to operate heavy equipment there?

22 A: Yes ma'am.

23 Q: So did you add any heavy equipment to the heavy equipment
24 that you were certified to operate.

25 A: Yes ma'am I started operating cranes when I got to

1 Decatur because I mean they pay more.
2 Q: It pays more to operate a crane?
3 A: Yes ma'am.
4 Q: And what kind of cranes do you operate?
5 A: I was operating a hydraulic. I was up to an eighty ton
6 then I got hurt but I can also run lattices.
7 Q: What's a lattice?
8 A: It got tracks.
9 Q: One that's got tracks?
10 A: It's got, it's actually got tracks on both sides plus
11 it's got instead of a hydraulic slide boom it's got a
12 lattice that you have to pin together.
13 Q: So when you talk about operating an eighty ton crane. How
14 big do cranes get?
15 A: In the field, in the heavy hydraulics get up to about
16 five hundred tons or more.
17 Q: And the highest level of crane you can operate or could
18 operate when you could operate the highest level of cranes
19 would have been what?
20 A: I could, I had license for lattices.
21 Q: Alright so what's below the lattice?
22 A: Once you get license through NCCCO it gives you. It don't
23 give a specification of how. It says heavy, it says large
24 and small hydraulics. Small is from fifteen tons down. Large
25 is from fifteen to twenty two tons up. So it don't give you

1 a specification on what you can be in. If you can run an
2 eighty ton you can run eighty ton. If you can run eighty you
3 can a hundred so but they only had the eighty on the job.

4 Q: And you said if you get licensed to with NCCO?

5 A: NCCCO.

6 Q: Okay what is NCCCO?

7 A: National Commission for Certification for Crane
8 Operators.

9 Q: So you're a certified crane operator is that correct?

10 A: No ma'am my license expired.

11 Q: In 2001-2002 you were a certified crane operator at that
12 point?

13 A: No ma'am that started the certifications, BE and K had
14 their own certifier. In 2004, I think they sent a man to
15 school and he came back to the company and he started
16 certifying operators from there.

17 Q: So when did you first become certified?

18 A: I then became certified I think it was in 2004-2005.

19 Q: And when did you become certified to operate the heaviest
20 equipment that you were certified to operate?

21 A: 2004-2005.

22 Q: And we're talking about you working for BE and K. At what
23 point did you start working with KBR? And there's some
24 confusion about all the initials.

25 A: Kellogg, Brown and Root acquired BE and K in 2007. They

1 bought them out.

2 Q: So KBR bought BE and K?

3 A: Yes ma'am.

4 Q: But you've essentially worked for the same company, is

5 that correct?

6 A: Yes ma'am I did.

7 Q: They were bought by another one or you've worked with the

8 same people is that fair to say?

9 A: I started out with BE and K yes ma'am and KBR bought them

10 out so KBR rolled over. Supposedly they rolled over the

11 people that was working for BE and K but they lost a lot of

12 them because of they pay practice or whatever they just

13 couldn't, they really didn't care about their employees. So

14 a lot of the people quit left and went to other companies.

15 Q: But you continued to work with the company?

16 A: Yes ma'am it's sort of hard to move from a company when

17 you spend twenty something years and move from one to

18 another that nobody don't know you. They don't want to give

19 you a piece or they don't want to give you a high dollar

20 piece of equipment and don't have an idea who you is.

21 Q: So being assigned the big cranes involve some trust

22 between you and the supervisor?

23 A: Between you the supervisor and the company that going to.

24 Q: Have you ever been a supervisor on a work site?

25 A: Yes ma'am I was a supervisor back in 2005 I think when I

1 was in Rincon Georgia. I had five people and two pieces of
2 equipment.
3 Q: What pieces of equipment.
4 A: It was a many excavator and a skid steer.
5 Q: So how long were you a supervisor?
6 A: About between two and three months I was at the closing
7 end of a job. We did fine grade work they finish it up for
8 final grade.
9 Q: So why did you quit being a supervisor?
10 A: They sent me to another job.
11 Q: And when you went to the next job. What did you start
12 doing?
13 A: I got a boom truck started operating.
14 Q: What is the longest time between jobs that you had
15 working at BE and K or KBR?
16 A: When I got hurt.
17 Q: And how long was that?
18 A: About six months.
19 Q: And other than that between job assignments. What's the
20 longest time that you've had a space between assignments.
21 A: Probably maybe a month or two is about basically the
22 longest I ever been off.
23 Q: And when you're working on a job site. How many hours a
24 day would you generally work?
25 A: Well before the government made changes you could work

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1 all night long get up and go home be up all night long. I
2 have stayed on a job from seven o'clock this morning till
3 five o'clock the next afternoon.

4 Q: When did the law change?

5 A: They changed back in up around in the 2000. They won't
6 let you stay on the job longer that about sixteen hours and
7 then you got to go home.

8 Q: So after sixteen hours they make you go home is that
9 correct?

10 A: Yes ma'am whether you complete or not.

11 Q: And on average what kind of hours would you work in 2008?

12 A: In 2008 I was working it's basically about eleven.

13 Q: So about eleven hours a day?

14 A: Yes ma'am.

15 Q: How many days a week?

16 A: Five, six, seven it varies on whatever they had to get
17 done.

18 Q: What do you mean by what they had to get done?

19 A: Well some days some people be on if you only have a job
20 that you got to completed. They got to get a pipe across a
21 road or something like that. You have to get four or five
22 people to come in and they have to do that before other
23 people come in the next from the weekend work. So if you got
24 to get something done that you got to have done before the
25 rest of them get back to work because it shut the job down

1 where they can't get in. You just have to come in and do it.

2 Q: So you did what you had to do to get the job done?

3 A: Yes ma'am.

4 Q: Tell the jury what happened on December 20, 2008.

5 A: On the December 20, 2008 I got up to go to work that
6 morning and when I pulled out of the parking lot. Where the
7 apartment complex was I turned left and I noticed this
8 vehicle it was coming it was coming around curb and as it
9 came around the curb. It just didn't seem to where it was
10 gonna straighten up to be on it's side of the road so as it
11 kept coming around. I kept going to the right and it kept
12 following me to the right and the next thing I know it
13 slammed into me.

14 Q: Where did, how did the cars hit?

15 A: I think from where I'm sitting in the car that it appears
16 to me that half of the two drivers sides on the cars. It's
17 just that two halves of the sides of the drivers car slammed
18 into each other.

19 Q: And you remember seeing headlights coming towards you, is
20 that correct?

21 A: Yes ma'am.

22 Q: And you believe the collision was head on, is that
23 correct?

24 A: Yes ma'am.

25 Q: And you attempted to avoid the collision, is that

1 correct?
2 A: Yes ma'am.
3 Q: By getting at least, by coming of the side of the road.
4 Did you try to pull your car off the side of the road to
5 avoid the accident?
6 A: Oh yes ma'am I was off the side of the road.
7 Q: Did you slow your car down?
8 A: Yes ma'am I was slowing it down as I was getting off to
9 the side.
10 Q: And were you, you weren't able to avoid the accident?
11 A: No, ma'am.
12 Q: And after the accident where was your car?
13 A: It was sitting out on the side of the road there.
14 Q: And where was Mr. Valle's car?
15 A: It was flipped upside down beside my car.
16 Q: So upon impact what was your recollection?
17 A: I don't have any recollection. I just know that we hit
18 and after that the next thing I remember is he was walking
19 around the car. I thought he was walking around his truck.
20 I could see his foots on the other side of the truck
21 walking.
22 Q: You could see his feet?
23 A: Yes ma'am I could see his feet walking by the car and he
24 walks around the car and then he walk around for awhile and
25 the he just came and laid down like this behind his vehicle

1 on the road there.

2 Q: He laid in the road?

3 A: Yes ma'am he just kind of laid down behind his truck on
4 the road.

5 Q: Did Mr. Valle ever come over and speak to you or check on
6 you?

7 A: No ma'am.

8 Q: Never came to see if you were okay?

9 A: No ma'am not that I remember. I mean he just never came,
10 ever since I could see him walking around he never came.

11 Q: And why didn't you get out of your vehicle?

12 A: I couldn't get out.

13 Q: Why?

14 A: The doors were jammed up. His vehicle was laying right
15 beside mine. I couldn't get out but I think the door was
16 jammed I couldn't open the door. I tried to push myself up
17 I just, my leg went out on me I couldn't. I just couldn't
18 move to get out of the car.

19 Q: What do you mean your leg went out on you?

20 A: Well when I come to my senses I thought I was gonna push
21 myself up and then try to slid out the back of the car but
22 when I tried to get up and push myself. I just my ankle, it
23 just it was like it was numb and it was just hurting. So I
24 just, I mean I just sat there and waited till they come. I
25 just couldn't get out of it. I couldn't open the door so

1 there wasn't no other way I could get out.

2 Q: And you said your ankle was numb at that point.

3 A: It just felt like it was numb. It felt like something was
4 wrong with it and then, I mean my leg was hurting me a
5 little bit but I did I really didn't pay no whole lot
6 attention but then as the time went on it the pain went to
7 growing and growing so.

8 Q: So it was initially numb?

9 A: Yes ma'am it just felt numb felt different.

10 Q: And then it started to hurt?

11 A: Yes ma'am.

12 Q: How bad did it hurt?

13 A: I felt in my life. I couldn't everybody say pain come up
14 to a ten. You could have brought that up to a twenty and by
15 the time they were wheeling me to do operation on it was
16 really hurting.

17 Q: What did you do on the scene after saw Mr. Valle wondered
18 around and lay down behind his car? What did you do next?

19 A: I didn't do anything I just stayed in the car but I think
20 I called, I don't know if I called the police officer or I
21 don't how they got called but I know that they arrived and
22 somebody. I think another car came by and they must of did
23 but anyway I thought. Everybody start talking at the
24 accident. I called my supervisor and let him know I wasn't
25 going to be able to make it work because they got a call in

1 system.
2 Q: So you called into work?
3 A: Yes ma'am.
4 Q: Do you think that's the first phone call you made?
5 A: I don't know I kind of thought will I call my wife first
6 or will I call the job site first. I don't know I really
7 can't remember which one I called first.
8 Q: Ok well you know at some point you also called your wife?
9 A: Yes ma'am I called wife and then sometime later I called
10 my brother.
11 Q: And is this your lovely wife sitting on the front row
12 beside me?
13 A: Yes ma'am.
14 Q: And what is her name?
15 A: Ollie.
16 Q: Alright and how long have you and Ollie been married?
17 A: About seven years.
18 Q: So you called Ollie and called into work and then what
19 happened?
20 A: The came and cut me out the car. They took me to the
21 hospital and they x-rayed me or whatever and then they fixed
22 my leg. They repaired my leg.
23 Q: Do you know if you lost consciousness in the accident?
24 A: I said I didn't but as I look on I don't really remember
25 whether I did or not because I don't, I never seen that guy

1 open the door and get out of the truck and I don't, I know
2 all I could do is see him walking around like can't figure
3 out how he got out. So I don't remember whether I did or
4 not.

5 Q: You don't know how he got out of his truck?

6 A: No ma'am I don't, I don't know.

7 Q: Do you know how long it took for them to cut you out of
8 the car?

9 A: We must of stayed there till about, I know it was getting
10 daylight so it had to been a couple hours before we got out.

11 Q: So you were trapped in your vehicle for a couple of
12 hours?

13 A: I believe so.

14 Q: With your leg hurting?

15 A: Yes ma'am.

16 Q: Was it hurting at that point?

17 A: Not really that bad but it was just beginning to start
18 hurting. By the time daylight come it was beginning to hurt
19 more and more. By the time I got to the hospital it was
20 beginning to hurt more and more and then by the time they
21 rolled me into surgery it was getting unbearable.

22 Q: How did they get you out of the car?

23 A: They jaws of life cut the top off of the car and they put
24 me on a board or something and then lift me out.

25 Q: And when they pulled you out of --- We've already talked

1 about what the car looked like. This is Plaintiff's exhibit
2 one and Plaintiff's exhibit two. What is that?

3 (Plaintiff's Exhibit Numbers One and Two were marked)

4 A: That use to be my Subaru.

5 Q: That use to be your Subaru. Is that what it looked like
6 after they cut you out of it?

7 A: Yes ma'am.

8 Q: So from there what happened? Did they put you in an
9 ambulance?

10 A: Oh yes ma'am they put me in an ambulance and took me to
11 the hospital.

12 Q: Who else was in the ambulance?

13 A: Mr. Valle.

14 Q: Did you talk to Mr. Valle in the ambulance at all?

15 A: No ma'am. There was another man that sitting, he was in
16 there between us. Mr. Valle he was on the other side over
17 there he just, I think he went back to sleep again.

18 Q: And when you got to the hospital was Ollie at the
19 hospital yet?

20 A: No ma'am. She came afterwards.

21 Q: And when you got to the hospital. What did they do at the
22 hospital for you?

23 A: They x-rayed my leg and they prepped me up for IVs and
24 whatever and they. Dr. Spearman came in and check on me and
25 then said that they have to take me to the operating room.

1 She was trying to get to the hospital to where I was at but
2 they said they couldn't wait no longer. They went to
3 wheeling me into the room and she came in.

4 Q: So you got to see her before you went into surgery?

5 A: Yes ma'am briefly.

6 Q: Do you remember what all they x-rayed when you were at
7 the hospital?

8 A: They said they did x-rays on my neck, my leg, my
9 shoulder, and my arm I think my hands.

10 Q: What was wrong with your hand?

11 A: My hand got it, got it in the accident I don't remember
12 how it got that.

13 Q: Did they fix your hand as well?

14 A: Yes ma'am they fixed it.

15 Q: So they had to perform surgery on you is that correct?

16 A: Yes ma'am.

17 Q: And do you know what doctor did that?

18 A: I think Dr. Spearman.

19 Q: And what kind of surgery did he perform on you?

20 A: He said orthopedic surgery or something like that.

21 Q: Well what did they do to fix your ankle?

22 A: They put screws and a plate in there. Screws and a pin or
23 plate. Yes ma'am that's it.

24 Q: That's your ankle.

25 A: Yes ma'am.

1 Q: How many screws are in there? Can you tell?

2 A: Two, four, six, there is six in here and one missing.

3 There's seven in there ma'am. Two, four, six, seven.

4 Q: So initially they put seven screws in your ankle?

5 A: Yes ma'am.

6 Q: And one of them is a long screw?

7 A: Yes ma'am. In my leg.

8 Q: What's the long screw do, do you know?

9 A: I think they said it kept the bottom from slipping side
10 to side it helped to stabilize.

11 Mrs. Morris: We're gonna offer this as plaintiff's
12 exhibit ten.

13 The Court: Any objection?

14 Mr. Allen: No ma'am I think of those have already been
15 marked and admitted in one of the doctor's deposition
16 anyway.

17 The Court: Marked in lieu without objection plaintiff
18 ten.

19 (Plaintiff's Number Ten was marked)

20 Q: So after they performed that surgery. What did you do?
21 How long were you in the hospital?

22 A: I think I stayed in the hospital about two or three days.

23 Q: And what were, were they giving you any medication in the
24 hospital?

25 A: Yes ma'am they were giving me some kind of pain killer

1 because every now and then it would wear off and then I'd
2 have to call the nurse and tell her she need to do something
3 else. She just come back and give me something else.

4 Q: Because what kind of pain were you having?

5 A: Oh I was having severe pain in my leg, it was just
6 severe.

7 Q: Where in your leg?

8 A: My ankle.

9 Q: Is it only your ankle that was hurting?

10 A: From what I remember when I talked to the doctors before
11 I went into the surgery it apparently my leg was hurting
12 just below the knee and my knee was hurting and my leg right
13 up in my thigh part right here and my right shoulder. It was
14 something in here.

15 Q: And you think you were in the hospital for about two
16 days?

17 A: It was two or three days I was in there.

18 Q: So after you were released from the hospital where did
19 you go?

20 A: I went back to my house.

21 Q: Did Ollie take you home?

22 A: Yes ma'am.

23 Q: And how long were you out of work?

24 A: From December to June.

25 Q: Did you follow back up with Spearman? Come back to

1 Charleston and see him again for treatment on your ankle?

2 A: Yes ma'am I think I seen him a couple of times.

3 Q: And did he do anything else with your ankle?

4 A: No ma'am he talked to me about it. He took the cast off
5 and he told me I had to go to therapy but when I got to
6 Columbia they told me I wasn't ready for therapy yet.

7 Q: Did you transfer your treatment from Dr. Spearman to
8 another orthopedic up in Columbia?

9 A: Yes ma'am.

10 Q: Okay, why did you do that?

11 A: It was, I mean from Columbia to Charleston is about a
12 hundred and something miles. It just to far to travel
13 backward and forward.

14 Q: So did Dr. Spearman transfer your records up to Columbia?

15 A: Yes ma'am he had to send them up.

16 Q: And he referred you to another orthopedic surgeon up
17 here.

18 A: He referred me to Columbia over there and then I think my
19 wife found one.

20 Q: Do you know what orthopedic surgeon you saw up here in
21 Columbia.

22 A: Moore Orthopedic.

23 Q: Do you now what doctor.

24 A: I think it was Dr. Smith.

25 Q: And what did Dr. Smith do for you?

1 A: Dr. Smith when I went to him he x-rayed it, he looked at
2 it and they still had that long screw in it. So he told me
3 it was gonna be a while longer before they decide to take
4 that screw out and he wanted me. He gave me a boot so I zip
5 my leg up in an ankle boot. It comes from my foot all the
6 way to the top of my knee. He kept on the boot for a long
7 time and they took the boot off and then they took a screw
8 out of my leg.

9 Q: So at a certain point, well they did a surgery on the day
10 of the accident and put the plates and seven screws in your
11 ankle, is that right?

12 A: Yes.

13 Q: Your left ankle?

14 A: Yes ma'am.

15 Q: And then do you know when they took the long screw out?

16 A: Some where around March or April somewhere in that
17 general vicinity that they took it out.

18 Q: This is dated March 29, 2012 but is this an accurate
19 representation of what your ankle looks like now it's
20 plaintiff's exhibit three?

21 A: Yes ma'am.

22 Q: So you no longer have seven screws, you have six screws?

23 A: Yes ma'am.

24 Q: Because they had to take the long one out?

25 A: Yes ma'am.

1 Q: Were you able to move your ankle better when moved, when
2 they took that long screw out?

3 A: No ma'am it seems like, it don't seem like it moves, it
4 didn't at that time move a whole lot better but as time went
5 on when I would do the therapy with it then it started
6 moving.

7 Q: So after they removed the screw you were able to
8 participate in physical therapy?

9 A: Yes ma'am.

10 Q: And how did you participate in physical therapy?

11 A: Therapy it was six weeks or two months something like
12 that.

13 Q: And who recommended or prescribed that physical therapy?

14 A: Dr. Moore who did the Moore Clinics, Dr. Smith.

15 Q: Dr. Smith?

16 A: Yes ma'am.

17 Q: And did you do everything that they told you physical
18 therapy and participate in it like you were suppose to?

19 A: Yes ma'am.

20 Q: And what kind of things did they have you do in physical
21 therapy?

22 A: They put you in some kind of thing you have to sit in and
23 you stretch it and you lay up in it and you pick up things
24 with your leg and they had like you put on the foot you pull
25 your foot down. They just give you various exercises that

1 pull on your foot.

2 Q: And during that time what other problems were you
3 reporting to the doctors?

4 A: I was having problems with my knee and my hip and my
5 shoulder and neck.

6 Q: Which shoulder?

7 A: My right.

8 Q: Did you ever get any treatment for your right shoulder.

9 A: The doctor said he'd order it but I didn't never get into
10 it so no ma'am I didn't get the treatment for it. It still
11 bothers me.

12 Q: By bothers you still have pain in your right shoulder?

13 A: Yes ma'am.

14 Q: And before this accident in December 20th of 2008 did you
15 have pain in your right shoulder?

16 A: No ma'am.

17 Q: And you said your neck?

18 A: Yes ma'am.

19 Q: And before this accident did you have pain in your neck.

20 A: Some.

21 Q: When did you have pain in your neck.

22 A: I think I hit my neck in - I went to a chiropractor when
23 I was in Oregon. My neck had some pains.

24 Q: What was the cause of the pain in your neck in Oregon?

25 A: I got into a truck and I hit the top of my head in a

1 truck and it started bothering my neck and I went to the
2 chiropractor and had it adjusted out.

3 Q: And did it resolve?

4 A: Yes ma'am it was doing good.

5 Q: And that was Oregon in about 2001?

6 A: Yes ma'am.

7 Q: So in 2008 before this accident what kind of neck had you
8 been having?

9 A: I wasn't having any.

10 Q: And after this accident in 2009 what kind of neck pain
11 are you having?

12 A: I have pains in my neck now that's bothering me when I
13 sit riding in a backhoe or something like that. It just
14 really bothers so it still aches and hurts.

15 Q: And when you went into the emergency room what other
16 reports do you recall were you having problems with?

17 A: Just my ankle, my knee, my chest, my shoulder, my neck,
18 my hand that's all basically.

19 Q: What was wrong with your chest?

20 A: Apparently I got, I must have got hit or something I
21 don't know but it hurts. It comes and it goes and hurts now.
22 It just pick a time when it gets ready and it just right in
23 this general vicinity I just get a hurt.

24 Q: Is that right about where your seat belt would have run
25 across.

1 A: I reckon but it seem like the seatbelt would have come
2 across here but I'm having it right in here so it's a little
3 bit lower. It must of got hit on something.

4 Q: Did the Subaru have air bags?

5 A: I don't know.

6 Q: Do you know if you hit on something inside the car?

7 A: I'm thinking I must have did but I don't know for sure
8 but anyway it wasn't bothering me before I went to the
9 hospital but it's bothering me now.

10 The Court: Let me interrupt you. Madam Forelady, Mr.
11 Foreman ladies and gentlemen we're going to take a brief
12 recess to give you all a little break to stretch your legs
13 and to go to the restroom. During the break please do not
14 discuss the case and please leave your note pads in your
15 seats.

16 (Jury Break 3:59 p.m.)

17 The Court: We'll be at ease for about ten minutes. Sir,
18 during the break please do not discuss your testimony with
19 anyone.

20 (Jury In)

21 (Levern McCray - Examination by Mullis Continued)

22 Q: Who actually owned the Subaru that you were driving on
23 the day of the accident?

24 A: My wife actually owned the Subaru. I was driving it.

25 Q: And we were just talking about medicals. When you got in

1 the ambulance on December 20, 2008 and they took you to
2 Trident Medical Center, in front of you is a list of the
3 medicals. Are those the medical bills that you received or
4 the medicals bills that are as of result of this accident?

5 A: Yes ma'am.

6 Q: And how much was the Berkeley County EMS bill?

7 A: Berkeley County EMS bill was \$400.00.

8 Q: And when you went to Trident Medical Center you said you
9 spent a couple days there?

10 A: Yes ma'am.

11 Q: And were treated by Dr. Spearman, is that correct?

12 A: Yes ma'am.

13 Q: And Dr.. Spearman also works with Lowcountry Orthopedics,
14 is that correct?

15 A: Yes ma'am.

16 Q: What was the Trident Medical Center bill?

17 A: \$37,324.00

18 Q: And the Lowcountry Orthopedic Association bill was how
19 much?

20 A: \$720.00

21 Q: And the, they did x-rays and CT scans at the hospital, is
22 that correct?

23 A: Yes ma'am.

24 Q: And how much was the Charleston Radiology bill?

25 A: Charleston Radiology bill was \$1372.00.

1 Q: And you transferred up from Dr. Spearman's care to Moore
2 Orthopedic. Was that Bret Smith?

3 A: Yes ma'am.

4 Q: And how much his bill?

5 A: \$3975.50

6 Q: Did that, that includes the physical therapy?

7 A: No ma'am.

8 Q: You don't think it does? I think it does.

9 Mr. Allen: Objection.

10 The Court: Bases.

11 Mr. Allen: She's testifying.

12 The Court: Sustained, please watch the commentary and the
13 leading.

14 Q: Did you, when you had your surgery in Columbia were there
15 anesthesiologists involved in the surgery?

16 A: Yes ma'am.

17 Q: So what was the bill from the anesthesiologist in
18 Columbia?

19 A: \$854.00

20 Q: And throughout your time and your injury did Dr. Spearman
21 and Dr. Smith prescribe pain medication for you?

22 A: Yes ma'am I used some of them.

23 Q: And did you fill those prescriptions at Wal-Mart?

24 A: Yes ma'am.

25 Q: And was the total amount of that prescription?

1 A: \$430.40
2 Q: And what's the total amount of the medical bills that you
3 have to date?
4 A: \$47,195.70
5 Mrs. Mullis: Thank you and we're going to submit that as
6 plaintiff's exhibit eleven.
7 Mr. Allen: Without objection.
8 The Court: Marked admitted without objection.
9 (Plaintiff's Exhibit Number Eleven was marked)
10 Q: So lets see we were talking before the break about you
11 returning home. When you returned home immediately after the
12 accident, Ollie took you back to, did you say Elgin?
13 A: Yes ma'am.
14 Q: And you call Elgin home?
15 A: Yes ma'am.
16 Q: Were you able to take care of yourself, get around?
17 A: No ma'am.
18 Q: How, who was helping take care of you?
19 A: My wife and her sister.
20 Q: And what's her sister's name?
21 A: Sherby.
22 Q: Sherby, where does Sherby live?
23 A: Sherby's right in Timmonsville.
24 Q: Timmonsville?
25 A: Yes ma'am.

1 Q: And Sherby came from Timmons ville to stay with you and
2 Ollie?

3 A: Yes ma'am.

4 Q: And what was Sherby doing with you and Ollie in Elgin?

5 A: She'd come over and cook, take care of the house while
6 she was at work.

7 Q: So Ollie returned to work and Sherby was staying with you
8 all?

9 A: Yes ma'am.

10 Q: And what was Sherby doing for you other than cooking?

11 A: She helped me get around the house..

12 Q: How long did Sherby stay with you and Ollie?

13 A: I think off and on she stayed about a month and a half.

14 Q: That was nice of her.

15 A: Yes ma'am.

16 Q: And during that time in January and February of 2009. How
17 was your ankle feeling?

18 A: It still hurt.

19 Q: And after the second surgery when they removed the screw.
20 Did that improve the pain in your ankle?

21 A: No ma'am.

22 Q: Were you able to get around better?

23 A: After I went to some of these therapies I went to moving
24 around a little better.

25 Q: And today how often does you ankle hurt?

1 A: All the time it's worse than others
2 Q: When is it generally worse?
3 A: It picks it's own time. Somebody said it does it when
4 it's cloudy but mine hurts when the sun shines.
5 Q: Are there certain things that you do that make it worse?
6 A: No ma'am not that I know of.
7 Q: Are there certain times of day that it's worse than
8 others?
9 A: Like I said when it pick a time. It just still hurts me
10 all the time but some times I have pain that just run up my
11 leg they just occur when they get ready.
12 Q: So some times you have sharp pain?
13 A: Yes ma'am just like sharp pain it just like pain just run
14 up my leg.
15 Q: And they go from where?
16 A: Right down my leg up almost to my knee and they stop in
17 that general vicinity and my foot have they got the same.
18 They go around the side of my foot and around my heel and I
19 don't understand why they do that.
20 Q: And what kind of pain is that?
21 A: It's just like a sharp pain that just go down in it. Go
22 down my leg and it bring around my foot and it just come
23 out.
24 Q: And if you take pain medication. Can you make the pain go
25 away?

1 A: I doubt it, I quit taking pain medication because of the
2 effect of you. You can't take over the counter anything that
3 got ATA, what it's APAP or something like that they won't
4 let you operate heavy equipment or use. That's OSHA
5 regulation.

6 Q: So you stop taking prescription pain medication?

7 A: Yes ma'am.

8 Q: Because why?

9 A: If you take prescription pain medications you can't
10 operate heavy equipment on them. It's just a rule they don't
11 let you operate heavy equipment.

12 Q: When you returned to work in. When did you return to
13 work?

14 A: I returned to work in June of 2009.

15 Q: Do you know what day you returned to work?

16 A: First day of June.

17 Q: And in order to return to work you had to stop taking the
18 pain medication.

19 Mr. Allen: Objection.

20 The Court: Bases.

21 Mr. Allen: Leading.

22 The Court: Please repeat the question. Before you stated
23 it completely your voice muttered down.

24 Q: In order to return to work you had to stop taking the
25 pain medication?

1 The Court: Sustained leading. Rephrase.

2 Q: In order to return to operate the heavy equipment could
3 you continue to take the pain medication?

4 A: No ma'am.

5 Q: Why?

6 A: It's something to due with the job rule or they say if
7 you're on pain medication it's just like I guess some
8 medication you riding down the highway. You can't take
9 certain medications and drive down the highway. So it' the
10 same way on a construction site. You can't take pain killers
11 and operate heavy equipment.

12 Q: When you get on a crane or piece of heavy equipment is
13 there a safety checklist that you have to follow in order to
14 get on that equipment each day?

15 A: Yes ma'am they got a safety, the job have us they put of
16 safety objectives that you have to check it off before you
17 operate.

18 Q: And if you're on prescription pain medication can you
19 operate the heavy equipment?

20 A: They won't let you. If they know you on it they won't let
21 you have it.

22 Q: You heard Jay Welch testify earlier about you operating
23 cranes on the job site?

24 A: Yes ma'am.

25 Q: Why would you prefer to operate a crane on a job site

1 rather than a dump truck?

2 A: Cranes pay more and it's not as much work in them. You
3 operate that crane you may make sometimes two, four or five
4 lifts. Sometimes if you swinging iron you make work all day
5 but other than that you just pick up say a fifty thousand
6 pound thing and set it in place. You sit there and hold
7 until these guys bolt it up or whatever. You just sit there
8 like that all day but if you operating dirt equipment you
9 sitting there steady digging all day.

10 Q: Are there some cranes that you can't operate anymore?

11 A: Yes ma'am.

12 Q: Which ones?

13 A: The hydraulics.

14 Q: And does it pay more when you're operating those
15 hydraulic cranes than when you're operating other heavy
16 equipment?

17 A: Yes ma'am.

18 Q: So as a result of this accident, this injury. Are you not
19 able to operate those cranes?

20 A: Yes ma'am.

21 Q: And have you suffered a loss of income based on that?

22 A: Yes ma'am.

23 Q: What were you making in December, on December 20, 2008
24 per hour?

25 A: I was making \$26.40 a hour.

1 Q: And how many hours a week on average were you working?

2 A: Anywhere I think I was making anywhere from ten to
3 eleven. Five to six days a week.

4 Q: And how long were you out of work from this accident?

5 A: From December to June.

6 Q: Do you know an average of how many hours you were out of
7 work?

8 A: The average of hours I was out of work?

9 Q: The total missed hours as a result of the accident?

10 A: 1137 hours.

11 Q: So as a result of the accident what were your lost wages
12 from December 20, 2008 to June 1, 2009.

13 A: \$25,198.80.

14 Q: And when you returned to work on June 1, 2009 where did
15 you, did you return back to work at that Dupont plant?

16 A: No ma'am I returned, I went from, I left. They sent me to
17 Hamlet North Carolina.

18 Q: And what were you doing in Hamlet North Carolina?

19 A: They hired me on in Hamlet to run a heavy crane so and
20 the project superintendent decided that I was going to be
21 his supervisor there doing backfilling and stuff around the
22 jobsite.

23 Q: And how long were you the supervisor?

24 A: I really didn't accept the job as a supervisor because me
25 and him was walking the job the day and I told him I'd be

1 the supervisor when I came in the next morning. I told him
2 I couldn't make it my ankle was hurting me to bad when I
3 went home that night.

4 Q: Who was the supervisor on the site in Hamlet North
5 Carolina?

6 A: David Byrd.

7 Q: David Byrd?

8 A: Yes ma'am.

9 Q: So you and David Byrd walked the Hamlet North Carolina
10 site?

11 A: Yes ma'am.

12 Q: And how big was that site?

13 A: It's a good about a good ten acre site.

14 Q: And after you all walked around that site. What happened
15 that night?

16 A: When I got home that night my ankle was hurting me I mean
17 it really didn't hurt that bad before, but that night for
18 some reason or another it was just hurting me to bad when I
19 got up the next morning I just told him I wouldn't handle
20 it. It's just to much walking involved.

21 Q: So after you couldn't do the job on the Hamlet North
22 Carolina site did you continue to do construction work?

23 A: Yes ma'am.

24 Q: And have you continued to do construction work?

25 A: Yes ma'am.

1 Q: And work with is it still BK&E? I can't keep it straight.
2 A: It's Kellogg, Brown and Root ma'am.
3 Q: Okay KBR?
4 A: KBR
5 Q: So you've continued to work with KBR, is that correct?
6 A: Yes ma'am.
7 Q: And currently today you're on a site where?
8 A: In Macon Georgia.
9 Q: And what kind of work are you doing there?
10 A: What they call an upgrade on the filter system for a coal
11 burner for a power plant. They're putting in filter systems
12 to filter out the impurities out of the air. To take some of
13 the coal, smoke, and dust out of the air.
14 Q: And are you operating equipment on that site?
15 A: Yes ma'am.
16 Q: What kind of equipment are you operating?
17 A: I was suppose to be operating a forklift and a dump truck
18 but one of the guys we switched out so I'm working his
19 backhoe.
20 Q: So you're operating a backhoe?
21 A: Yes ma'am.
22 Q: Does that involve you using your left foot.
23 A: For the backhoe?
24 Q: Yes sir.
25 A: No I use it on occasion. The pedal for the gas is on the

1 right and the brakes are right there in the center so
2 occasionally I use my foot to hold the brake if I'm on a
3 steep incline but it's not that often.

4 Q: Does a dump truck require you to use your left foot more?

5 A: Yes ma'am a dump truck has a standard clutch in it. The
6 clutch is on the left hand side you mash the clutch and the
7 gas is on the right the brake is in the center. So to shift
8 gears you have to mash the clutch in.

9 Q: So are you being accommodated on the work site?

10 A: Yes ma'am.

11 Q: They're accommodating your injury?

12 A: Yes ma'am.

13 Q: And what are you making per hour now?

14 A: \$24.00

15 Q: And you were making how much?

16 A: \$26.40

17 Q: So you're making less an hour today than you were before
18 is that correct?

19 A: Yes ma'am.

20 Q: If you could operate a crane on that work site. What
21 would you be making?

22 A: Probably about twenty six, twenty seven. Some of them
23 make twenty seven.

24 Q: Because you've been working with this company for how
25 long?

1 A: About twenty nine years.

2 Q: And the wages that we testified earlier that you lost
3 those were only the wages from the date of accident until
4 you returned to work on June 1, 2008, is that correct?

5 A: Yes ma'am.

6 Mrs. Mullis: And we're going to submit those a
7 plaintiff's exhibit 12.

8 Mr. Allen: No objection Your Honor.

9 The Court: Marked and admitted without objection.

10 (Plaintiff's Exhibit Number 12 was marked)

11 Mrs. Mullis: I don't have any further questions.

12 The Court: Any questions for the witness?

13 Mr. Allen: Yes Your Honor.

14 The Court: You may proceed.

15 (Levern McCray - Cross Examination by Allen)

16 Q: Mr. McCray this accident happened on December 20, 2008?

17 A: Yes sir.

18 Q: And you went back to full duty with work June 1, 2009?

19 A: Yes sir.

20 Q: You worked ten hours that day?

21 A: Yes sir.

22 Q: That week you worked over fifty hours, correct?

23 A: I don't think I worked over fifty hours that first week
24 back.

25 Mr. Allen: Permission to approach Your Honor?

1 The Court: You may.

2 Q: I'm going to show you a document it's not hard but is
3 that your personal calender?

4 A: Yes.

5 Q: That's for the month of June 2009?

6 A: Yes.

7 Q: That first week do agree with me that you worked over
8 fifty hours?

9 A: Yes.

10 Q: And you've consistently been working fifty to sixty hours
11 a week since this accident?

12 A: Yes.

13 Q: You were out of work based on what we've been told so far
14 for right around five or six months, correct?

15 A: Can you repeat that?

16 Q: Sure, this accident was December 20, 2008 you been back
17 to work June 1, 2009?

18 A: Yes.

19 Q: Maybe five or six months out of work, correct?

20 A: Yes.

21 Q: And you went back to your previous position, which was a
22 heavy equipment operator?

23 A: Yes.

24 Q: You've been doing that consistently for about twenty
25 five. Twenty six years?

1 A: Yes.

2 Q: Ed Nero was your supervisor when you returned?

3 A: When I returned to?

4 Q: When you came back to work June 1, 2009?

5 A: No.

6 Q: Jay Welch?

7 A: No.

8 Q: Who was your supervisor when you came back to work?

9 A: Eddie Byrd probably took over because I was going to be
10 his supervisor.

11 Q: And at the time of this accident was Dr. Gurm your family
12 doctor? G-U-R-M.

13 A: Dr. Neal was my at the time the accident. At the time of
14 the accident?

15 Q: Correct.

16 A: Dr. Neal., Green B. Neal he retired when I was getting
17 ready to go back to work he retired so that when he referred
18 me to Dr. Gurm.

19 Q: Was Dr. Gurm your family doctor sometime around 2010-
20 2011?

21 A: Yes.

22 Q: Did you ever see him for any problems related to this
23 accident?

24 A: No I explained to him when I was at his office for other
25 visits. I explained to him about the accident and ask him

1 about my leg and my knee and he said he'd do something when
2 I got back the next time but he never did.

3 Q: Is it fair for me to assume or you tell me. Should we be
4 talking to Dr. Smith and Dr. Spearman about your ankle and
5 your leg problems?

6 A: Should we be talking to them about it?

7 Q: Right if we want to know about that injury who should we
8 talk to?

9 A: Dr. Spearman.

10 Q: Spearman did the surgery, correct?

11 A: Yes.

12 Q: And then you followed up with Dr. Smith at Moore
13 Orthopedics up in Columbia after that?

14 A: Yes sir.

15 Q: And Dr. Smith removed the screw in your foot that we were
16 talking about earlier correct?

17 A: Yes.

18 Q: And you had not seen him from I guess May of 2009 when he
19 released you to go back to work until a couple months ago,
20 correct?

21 A: Yes sir.

22 Q: So you went about three years without seeing any
23 specialist, orthopedics, or anyone that specializes in foot
24 or ankle surgery, correct?

25 A: I saw another doctor between, when I left Dr. Gurm I went

1 to see a lady doctor then. She was treating me she said that
2 I need to see a doctor about my ankle.

3 Q: Did you ever follow up with any other doctors other than
4 Smith or Spearman about your ankle?

5 A: No sir.

6 Q: Ok and you didn't see Smith or Spearman for about three
7 years. In between when you were released and then until
8 about a couple months ago?

9 A: Right.

10 Q: Earlier today your lawyer was asking some of the problem
11 that you were having and you mentioned your neck and your
12 back and your shoulder, remember that testimony?

13 A: Yes

14 Q: Is it your testimony that you hurt your neck, back, and
15 shoulder as a result of this accident?

16 A: Yes sir.

17 Q: Have you ever told me that before?

18 A: No sir.

19 Q: You remember when I deposed you last year. I'd asked you
20 that question you did not tell me that, you agree? Yes. No
21 sir or yes sir.

22 A: You asked me did I did depose you I tell you no sir I
23 didn't.

24 Q: And when I deposed you, you agree with me that you just
25 told me about your ankle and leg, right?

1 A: Ankle and my leg.

2 Q: I'm learning about this stuff about shoulder and neck for
3 the first time today.

4 A: Think so.

5 Q: And we talked about your wages. You agree with me that I
6 was provided copies of your tax returns?

7 A: Yes sir.

8 Q: You agree that you made about \$90,000 in 2010?

9 A: I think so.

10 Q: And in 2006 for example you made \$50,000 does that sound
11 about right?

12 A: Possibly.

13 Q: If the records showed it would you have any reason to
14 disagree with it?

15 A: No sir.

16 Mr. Allen: That's all I have, thank you.

17 The Court: Any redirect for the witness?

18 (Levern McCray - Redirect by Mullis)

19 Q: Do you know how many hours you were working in a week in
20 2010?

21 A: My job varies I work sometimes ten hours a day, sometimes
22 I work twelve hours a day, sometimes I work sixteen hours a
23 day so it's just it's varied.

24 Q: So you could work as many as sixteen hours a day?

25 A: Yes ma'am.

1 Q: How many days in a week?
2 A: They just work four or five days of sixteen hours a day
3 but you couldn't go over that and then at the end of I think
4 the company had a rule it's thirteen. I think you work
5 thirteen days straight then you'd have to take a day off.
6 Q: So you could work as many as sixteen hours a day for how
7 many days straight?
8 A: The whole week.
9 Q: And during 2010 could you have been working that many
10 hours that many days?
11 A: Ten, twelve, thirteen; five or six, seven days a week.
12 Q: And when you go over forty hours in a week are you paid
13 overtime?
14 A: Yes ma'am time and a half.
15 Q: So that adds up pretty quick?
16 A: Yes ma'am.
17 Q: But any way you cut it you're making what an hour now?
18 A: I'm making \$24.00 and hours now.
19 Q: And before this accident you were making what?
20 A: \$26.40
21 Q: So no matter what you're making now you're making \$1.40
22 less an hour?
23 A: Two
24 Q: Two dollars less an hour?
25 A: Yes ma'am.

1 Q: Mr. Allen asked you about your treatment with Dr. Smith.
2 Did you go back to see Dr. Smith the beginning of this year?
3 A: Yes ma'am I think I did.
4 Q: Why?
5 A: Because my ankle was bothering me. He told me if I ever
6 have a problem to come see him.
7 Q: And what did he do for you?
8 A: He gave me a shot and he gave me a brace. He said I was
9 having build up of what did he call it dead cartilage or
10 something building up in my ankle. He gave me a shot so that
11 it was suppose to help relieve some of it and then he gave
12 me this ankle brace to help cinch my leg up.
13 Q: So what kind of ankle brace did he give you? Do you have
14 it on?
15 A: Yes ma'am.
16 Q: Can you show the jury the ankle brace that he gave you?
17 So he gave you brace. Does it help when you wear the brace?
18 A: It helps some. It really don't help the pain it just help
19 my ankle it stay up.
20 Q: Does it, what do you mean it helps your ankle to stay up?
21 A: Well it just helps to keep my ankle up like straight but
22 it don't the pain part it don't do anything for the pain it
23 just helps reinforce my ankle.
24 Q: And you said he gave you a shot. What do you mean he gave
25 you a shot?

1 A: He injected something in my ankle and said it was suppose
2 to help clear up the dead cartilage or something. I don't
3 have a clue of what it is but he injected it in.

4 Q: So he put a needle in your ankle?

5 A: Yes ma'am.

6 Q: How did that feel?

7 A: It hurts.

8 Mrs. Mullis: That's all the questions I have.

9 The Court: Sir you may step down. Mr. Foreman, ladies
10 and gentlemen we're going to take advantage of this break in
11 testimony to take our lunch recess. We're going to break
12 until quarter of two which gives you a hour and fifteen
13 minutes for lunch. During the break please do not discuss
14 the case among yourselves or with anyone else. Please don't
15 have any contact with anyone in or about the court house and
16 don't do any independent research regarding any issue or
17 matter involved in this case on the internet or otherwise.
18 Please leave you notepads in your seats and when we resume
19 you'll return directly to your jury room. Look forward to
20 seeing you at that time, have a good lunch. Is there
21 anything before we adjourn for lunch from the plaintiff?

22 Mrs. Mullis: None from the plaintiff.

23 The Court: From the defense?

24 Mr. Allen: No Your Honor.

25 The Court: See you all at quarter to two.

1 (Court dismissed for lunch)

2 (Court returns from lunch)

3 Mrs. Mullis: We have some issues that opposing counsel
4 wants to raise in the record to the video deposition of
5 Heather Dailey. So do we want to address those now or do we
6 want to do Oliver Wood and then address those?

7 The Court: Why don't we do Oliver Wood and then you all
8 give me a copy of the deposition with the parts to the
9 objection.

10 Mr. Allen: Okay.

11 The Court: So you all were not able to work that out?

12 Mr. Allen: No judge frankly I think we need to figure
13 out whether the plaintiff has established everything they
14 need to before the BAC stuff comes in.

15 The Court: I'm sorry I can't hear you.

16 Mr. Allen: I think that at this point we need to figure
17 out whether the plaintiff has done all that she needs to do
18 to get the BAC properly admitted.

19 The Court: What do you mean?

20 Mr. Allen: Well we got issues with personal knowledge,
21 some hearsay documents.

22 The Court: Who provided that?

23 Mr. Allen: Heather Dailey.

24 The Court: She's the person who is testifying?

25 Mr. Allen: Yes

1 The Court: How could it be hearsay if she performed the
2 test?

3 Mr. Allen: Some of the exhibits that were attempted to
4 be admitted through her deposition transcript contained
5 hearsay.

6 The Court: What exhibits are you referring to?

7 Mr. Allen: Which documents?

8 The Court: Yeah

9 Mr. Allen: Just as an example document that was
10 previously marked as exhibit five for identification
11 purposes. Which is a document that was referenced in the
12 officers testimony. It's got the nurses signature and what
13 not on it.

14 The Court: You all plan to call the nurse?

15 Mrs. Mullis: We don't.

16 The Court: You need to call the nurse. You need to call
17 the person that --- I thought you were going to list it so
18 I didn't address it. You told me when I asked you, you said
19 you were calling everybody that was on your list.

20 Mrs. Mullis: We have the trooper verify that he was
21 present when the blood sample was taken.

22 The Court: He didn't draw the blood. That's the first
23 step in your chain. First step in your chain. Even in a
24 criminal case they call the person who drew blood. You need
25 to find the nurse. Is the nurse unavailable?

1 Mrs. Mullis: We can't find the nurse?

2 The Court: You can't find the nurse?

3 Mrs. Mullis: We looked for her and couldn't verify
4 whether or not she was still an employee at the hospital.

5 The Court: They don't have her records or supervisor
6 that can testify to her records?

7 Mrs. Mullis: We didn't get any further that couldn't
8 verify whether or not she was still an employee at the
9 hospital.

10 The Court: And you didn't see the hospitals records
11 about the draw, about the blood draw?

12 Mrs. Mullis: We didn't attempt to do that, no.

13 The Court: You might need to do a little labor work
14 while you talking to Mr. Wood. Then I'll take it all up
15 later. Alright we ready to proceed is Dr. Wood here?

16 Mrs. Mullis: He is Your Honor.

17 The Court: Alright you can get the jury
18 (Jury In)

19 The Court: You may be seated. Ladies and gentlemen I
20 hope that you all had a pleasant lunch recess. We're now
21 going to resume with testimony. We've been trying to work on
22 the temperature, funny thing about government buildings
23 they're either hot, or they're cold. There is never any in
24 between and I've been probably in more court houses that I
25 care to really recall, but it's the same everywhere. So

1 Q: And what's your educational background?

2 A: I have a Bachelor Science Degree in Business
3 Administration from the University of South Carolina and a
4 Masters Degree in Economics from the University of South
5 Carolina.

6 The Court: Dr. Wood excuse us for one second we're
7 trying to figure out if the mics are working. Okay if you
8 could speak directly into the mic for us.

9 Mr. Wood: One two three four five.

10 The Court: Okay can you all hear okay? Okay you may
11 proceed.

12 A: I have a Bachelor Science Degree in Business
13 Administration from the University of South Carolina and a
14 Masters Degree in Economics from the University of South
15 Carolina and Doctorate in Economics for the University of
16 Florida.

17 Q: And you professional background?

18 A: I was hired by the University of South Carolina in 1965
19 to teach economics and banking finance courses. I taught
20 there for twenty nine years and then I'm Distinguished
21 Professor Emeritus which translated means I retired of
22 teaching.

23 Q: Have you ever served in the military?

24 A: Yes, I served on active duty in the United States Navy
25 from 1959 to 1961.

1 Q: And have you served in the reserves as well?

2 A: I did serve in the Naval Reserve from 1961 to 1987.

3 Q: And what was your rank in the Naval Reserve when you
4 retired?

5 A: Captain.

6 Q: What practical experience have you had in the business
7 world?

8 A: I've helped to start eleven banks and two savings and
9 loan associations. Served on the board of directors for
10 Republic National Bank for about ten years and sold that
11 bank. Went on the advisory board for the Lexington State
12 Bank, we then merged that bank with the BB&T. Then went on
13 the advisory board for South Bank. I then went on the board
14 of directors of Bank Meridian. I served on the board of
15 directors at Edisto Farm Credit in Orangeburg. We made farm
16 loans in the lower part of the state. I served on the Agg
17 First Retirement Committee in Columbia that's the old
18 Federal Land Bank. That committee set the investment policy
19 for active and retired employees and lastly I own several
20 farms in Tennessee which are businesses.

21 Q: What special experience have you had in the field of
22 investments?

23 A: University of South Carolina I taught a graduate course
24 on capital markets, I taught bank management. I directed
25 the MBA meeting studies in the summer.

1 Q: Have you written any books in the field of economics or
2 finance?

3 A: Yes I've authored and co-authored seven books.

4 Q: What is your experience in estimating the economic loss
5 in personal loss, wrongful death, and business loss cases?

6 A: The last forty three years I've made studies involving
7 economic aspects of wrongful death cases, personal injury
8 cases, employment termination cases. That means someone who
9 has been fired from their job for either age, race, or
10 gender discrimination. I've also worked on business loss
11 cases which deal with all sorts of problems disruptive
12 business in their operation.

13 Q: What experience have you had in instructing lawyers in
14 the areas of economic loss?

15 A: Various bar association groups had asked to appear at
16 their seminars about twenty five times since 1972. Around
17 1970 to about 2004 I was a guests lecture of the damages
18 course at the University of South Carolina Law School. Since
19 2004 I have served as the guest lecture in the Manages
20 course at the Charleston School of Law and approximately
21 five years ago they named me their Economist in residence.

22 Q: What is the methodology you use to evaluate the economic
23 loss accepted among economist?

24 A: Yes methodology is accepted.

25 Mrs. Mullis: Your Honor, we're going to submit Dr.

1 Oliver Wood as a economic expert in the evaluation of
2 economic loss in personal injury cases.

3 The Court: Any questions or objections?

4 Mr. Allen: No objections.

5 The Court: Show admitted without objection.

6 Mrs. Mullis: Thank you.

7 Q: Were you hired by my firm to make study of the economic
8 loss in this case?

9 A: Yes.

10 Q: What facts have you considered?

11 A: In this Mr. McCray was born on February 9, 1953. He was
12 injured on December 20, 2008 at that point in time he was
13 55.86 years of age. According to the South Carolina Code of
14 Section 19-1-150 the average life expectancy for a male that
15 age is an additional 23.94 years. Which would have Mr.
16 McCray to age 79.80. At the time of his injury Mr. McCray
17 had no reason to expect less than a normal life expectancy.
18 According to Mr. McCray he intended to work to age sixty
19 six, age sixty six is his normal social security retirement
20 age. The law was changed a few years ago and if you were
21 born before 1937 your retirement age is sixty five, but if
22 you were born after that retirement age creeps up and for
23 him being born in 1953 he's kind of in the middle so his
24 normal social security retirement age is sixty six. The time
25 of his injury he was employed as a heavy equipment operator

1 with BE&K. According to Mr. McCray he began there at
2 approximately 1983. According to Mr. McCray he was earning
3 approximately 26.40 a hour. According to Mr. McCray on about
4 June 1, 2009 he returned to work. According to plaintiff's
5 answers to interrogatories loss of earnings from the time of
6 his injury to May 29, 2009 was 25,198.99. According to the
7 plaintiff's answers to defendants interrogatories Mr. McCray
8 is qualified as a foreman but cannot work because the
9 foreman due the amount of time it requires for him to be on
10 his feet. He is estimating he is losing about 5,000 annually
11 as a result. I would assume that the above numbers are a
12 reasonable estimate of his loss in earnings. Before he was
13 injured Mr. McCray performed an average of about six hours
14 per month of personal or family services chore activities.
15 This includes such things as washing dishes, laundry,
16 cleaning bathrooms, and yard care. According to Mr. McCray
17 he's now able to do about four hours per month, which means
18 his loss is two hours per month of family services. I
19 evaluated that at eight dollars per hour, I assume thats
20 minimum match you'd have to pay someone to do chores around
21 your house. Those are the facts that I've taken into
22 account.

23 Q: And based on those facts do you have an opinion based on
24 a reasonable economic certainty as to the pass and future
25 economic loss to Mr. McCray in this case?

1 A: Yes.

2 Q: Have you prepared charts to illustrate this loss?

3 A: Yes.

4 Q: And would you walk us through those charts?

5 A: Yes. Can everyone see these charts? This first chart
6 looks at the period from December 21, 2008 through August
7 13, 2012 its been a period of 3.65 years. For the balance of
8 2008 and I put in zero, then from January 1 to May 29, 2009,
9 25,198.99. This is the amount that's been stipulated to as
10 his loss for that period. Now from the point forward at five
11 thousand dollars a year his loss for the balance would
12 \$2,950, \$5,000 in 2010-11, and so far this year \$3,100, that
13 total \$41,249. With respect to his chore activity he was
14 doing six hours a month. The loss for the balance six
15 dollars at two hours per month, since then \$192 a year to
16 fund that two hour per month loss for 2012 \$119, that totals
17 \$701. So his loss to date is \$41,249 plus \$701 means \$41,950
18 as his loss of \$41,950. Now with respect to his loss at his
19 job they estimate that he's lost \$5,000 a year because of
20 various things he cannot do. From now through 2019-11 that
21 totals \$34,800. Our court system requires that if we're to
22 look at the money flows now but with money flows taken place
23 in the future they have to be discounted to what is known as
24 the present cash value. The discounted value of his future
25 loss is \$29,009. That's the loss in his earning capacity

1 through his age sixty six. His loss in chore activity
2 \$2,660, so that makes his after trial loss \$29,009 plus
3 \$2,660 our a total of \$31,669. This is the last chart his
4 loss to date from the first one is \$41,950, his loss in the
5 future is \$31,669 making his total estimated financial loss
6 \$73,619. That's the sum of the before trial and after trial
7 losses.

8 Q: So your total is, I'm sorry.

9 A: \$73,619

10 Q: And do those figures include anything for past or future
11 medical care cost?

12 A: No.

13 Q: What about loss of enjoyment of life?

14 A: No.

15 Q: Pain and suffering?

16 A: No.

17 Q: No anguish?

18 A: No, this is financial or economic.

19 Q: Only loss wages?

20 A: And earning capacity.

21 Mrs. Mullis: Your Honor we're going to identify.

22 Q: Dr. Wood what are these documents in my hand?

23 A: This is a aided cabinet.

24 Q: Sorry

25 A: This is an 8 1/2 by 11 copy of those charts over there on

1 Q: Dr. Wood the charts that we've submitted is that a
2 conservative estimate of the future losses of the plaintiff?

3 A: I don't generally like to style my work as conservative
4 or whatever. I think it's an accurate statement based on the
5 information that I have.

6 Q: And the bases for the future losses of his inability to
7 work as a supervisor are a loss of \$5,000 a year is that
8 correct?

9 A: Correct.

10 Q: And are you, you're familiar with the testimony of Jay
11 Welch his supervisor who said that loss could be as much as
12 five dollars an hour, is that correct?

13 A: Right he said on page sixteen that it could be five
14 dollars a hour and he was asked about how many hours a week
15 and he said I would go with an average of sixty. Well sixty
16 hours at five dollars that \$300 a week and fifty weeks a
17 year is \$15,000.

18 Q: So the five thousand dollar a year loss of earning
19 capacity for Mr. McCray to be a supervisor is conservative
20 compared to the estimate given by his superintendent Jay
21 Welch, is that correct?

22 A: Yes it's 1/3 of what he estimated on page sixteen.

23 Mrs. Mullis: Those are all the questions I have.

24 The Court: Any questions for the witness?

25 Mr. Allen: Yes thank you Judge.

1 The Court: You may proceed.

2 Oliver Wood - Cross Examined by Allen

3 Q: Dr. Wood you were hired by the plaintiff's lawyer?

4 A: Yes

5 Q: Generally, is it fair to say that you are retained by
6 plaintiffs versus defendants?

7 A: Generally they have the burden of proof as you know in
8 our court system.

9 Q: And for example you have a deposition today here in
10 Moncks Corner?

11 A: I thought I might but right now I don't know the status
12 of that.

13 Q: Fair enough but you were hired by a plaintiff's lawyer
14 for that case?

15 A: Yes.

16 Q: What is your hourly rate for today?

17 A: \$350.

18 Q: You were not offering any opinions as to any future
19 medical care?

20 A: Correct.

21 Q: You were not offering any opinions as to plaintiff's
22 ability to work, you're not a vocational rehab guy?

23 A: Correct.

24 Q: You are an economist that is provided numbers and then
25 you come up with formulas and come up with a total financial

1 lost is that fair?

2 A: Correct.

3 Q: You're a numbers person?

4 A: Correct.

5 Q: Good numbers in good numbers out right?

6 A: I don't know what you mean.

7 Q: Well you take certain assumptions as you talked about
8 earlier in formulating your opinions correct?

9 A: Correct.

10 Q: So if the opinions that you were given or the assumptions
11 or facts that you were given are bad some of your
12 conclusions would be bad right?

13 A: Right I'd have to adjust my number.

14 Q: And you're not making any opinions regarding a lot of
15 those numbers? For example, \$5,000 additional per year to be
16 a supervisor. You don't know one way or the other whether
17 the plaintiff would in fact been hired as a foreman or not
18 correct?

19 A: No, I'm not a witness on that.

20 Q: Do you have any knowledge that the plaintiff has been a
21 foreman in the past?

22 A: No, I'm not a witness on his job per say.

23 Q: You don't know how long the plaintiff may have been
24 qualified for a foreman but just not been given that
25 opportunity correct?

1 A: No. I think he had been working there something like
2 twenty six years.

3 Q: Looking at, do you understand that I sent a subpoena for
4 your file?

5 A: Yes.

6 Q: You responded around June of this year?

7 A: Yes.

8 Q: One of the documents in there is a questionnaire. Your
9 familiar with your general information sheet?

10 A: Yes.

11 Q: That's typically filled out by the plaintiff's lawyer?

12 A: Yes.

13 Q: On that sheet on page four, you agree with me that the
14 question was at what age did the injured man in this case
15 plan to retire. The number that you were original provided
16 was sixty years old. Do you agree with that?

17 A: Yes, what I do is take this form and interview in this
18 case Mr. McCray and after that interview he said and agreed
19 it would be normal social security retirement age which for
20 him would be sixty six.

21 Q: The additional six years would create a larger net
22 financial loss for the plaintiff correct?

23 A: About \$30,000.

24 Q: Well it would be his average salary for an additional six
25 years right?

1 A: Well the number we had was five thousand a year so five
2 thousand a year times six is \$30,000.

3 Q: Also in your file I saw some documents from his employer
4 BE&K. Did you rely on these documents in any way formulating
5 your opinions?

6 A: No.

7 Q: You also testified and you discussed what you called
8 personal services?

9 A: Yes.

10 Q: That would be doing laundry dishes that type of thing.

11 A: Yes.

12 Q: What some of us call honey do list.

13 A: Yes.

14 Q: Most people do not get paid for those task, do you agree?

15 A: No but they have economic value and if you don't do them
16 you'll find you're in the hole.

17 Q: Any reason to believe that plaintiff has spent any money
18 to have those services performed in the past three years?

19 A: I don't know the answer to that but in terms of average
20 men. Average man does about ten hours a week, he did six
21 hours a month so he's well under average. I didn't ask him
22 how he got away with doing just six hours a month.

23 Q: I understand that but my question was a little more
24 simple. Do you have any knowledge, yes or no, that the
25 plaintiff has spent any money for those services that he has

1 been unable to perform.

2 A: No it wouldn't matter whether he did or didn't.

3 Mr. Allen: Thanks

4 The Court: Any redirect?

5 Mrs. Mullis: None Your Honor.

6 The Court: Any objection to the witness being excused
7 from the plaintiff?

8 Mrs. Mullis: None from the plaintiff.

9 The Court: From the defense?

10 Mr. Allen: No Your Honor.

11 The Court: Dr. Wood you're excused.

12 Mr. Wood: Thank you.

13 The Court: Your welcome sir. Plaintiff may proceed.

14 Mrs. Mullis: The plaintiff calls Nathan Washington to
15 the stand.

16 The Court: Sir if you would come forward to be sworn.

17 Deputy Clerk: Please raise your right hand and place
18 your left hand on the bible. Do you solemnly swear or affirm
19 the testimony you should give to the Court in the trial of
20 this case is the truth the whole truth and nothing but the
21 truth so help you God?

22 Mr. Washington: Yes I do.

23 Deputy Clerk: Please be seated and state your name.
24 Spelling your last name for the record.

25 Mr. Washington: My name is Nathan Washington,

1 W-A-S-H-I-N-G-T-O-N.

2 The Court: You may proceed.

3 Nathan Washington - Examined by Mullis

4 Q: Mr. Washington what's your address?

5 A: 4145 Narrowpay Road Lynchburg South Carolina.

6 Q: So you're from Lynchburg South Carolina as well?

7 A: Yes ma'am.

8 Q: What do you do for a living?

9 A: I'm a school bus driver right now.

10 Q: You're a school bus driver?

11 A: Yes ma'am.

12 Q: Are you retired from some other occupation?

13 A: Santee Print Work.

14 Q: What is that?

15 A: We make, we're making bed spread, bed sheets, pillow
16 case, a textile mill.

17 Q: So you worked in a textile mill, is that in Lynchburg?

18 A: Sumter South Carolina.

19 Q: In Sumter and how old are you?

20 A: Fifty eight.

21 Q: How long have you known Levern?

22 A: Practically all my life.

23 Q: And how do you know him?

24 A: Well our family kind of community we kind combine
25 together. My mother and his grandmother was close. So we was

1 kind of combined together.

2 Q: So you saw him as children?

3 A: Coming through school.

4 Q: You all went to school together?

5 A: Yes ma'am.

6 Q: High school?

7 A: Yes ma'am.

8 Q: Did you graduate together?

9 A: He was a year in front of me.

10 Q: He's older?

11 A: Yes ma'am.

12 Q: How often do you see, do you have occasion to see him
13 now?

14 A: When he come home, church.

15 Q: And how often does he generally come home?

16 A: Probably I usually see him home once a month. He comes to
17 church, come to church. We go to one church and I go to the
18 next one, the sister church. If I ain't at church he'll come
19 by the house.

20 Q: What church do you all go to?

21 A: He's a member of St. John United Methodist Church. I'm a
22 member of Asburg United Methodist Church. A mile and half
23 apart.

24 Q: When did you first find out that he was involved in a
25 automobile accident in December 2008?

- 1 A: On the 24th of December.
- 2 Q: And how did you find out?
- 3 A: His niece Tasha Bradley. I went to see him that Saturday
- 4 that Christmas he was at his mother house. I went by to see
- 5 him.
- 6 Q: So you went to visit him at his mother's house?
- 7 A: Yes ma'am. He came there for Christmas holiday.
- 8 Q: And what was he doing at his mother's house?
- 9 A: Laying in bed.
- 10 Q: How did he appear to you?
- 11 A: He was beat up the way he was laying up in there, I know.
- 12 Q: What appeared to be injured?
- 13 A: His left leg, his left leg was in a cast.
- 14 Q: Did you stay and talk with him for a while?
- 15 A: I stayed there about two hours with him.
- 16 Q: Did he appear to be in pain?
- 17 A: Yes ma'am.
- 18 Q: How could you tell?
- 19 A: You could tell by the expression on his face. From the
- 20 way his leg looked he had to be in pain. A broken, broken
- 21 lower part of his ankle.
- 22 Q: Before this accident do you know whether or not Levern
- 23 was very active?
- 24 A: Yes ma'am.
- 25 Q: How do you know he was active?

1 A: We were coming through school the old people to young
2 people say we were road dogs together but he was in the
3 Marines. When he came home he would run three miles each
4 day. I was good for a mile but I wasn't no three mile run.
5 He run that three miles each day, each morning he run that
6 three miles. He come by the house he say I make my run I say
7 well you go ahead make your run I ain't no three mile run.
8 He run that three mile and back.

9 Q: And after the accident have you seen him running three
10 miles?

11 A: No ma'am.

12 Q: Have you seen him running at all?

13 A: No ma'am.

14 Q: Today, how can you tell what effects have the accident
15 had on him?

16 A: The way walk, he walks with that limp on that left leg.

17 Q: Anything else?

18 A: No I talk to him about I think it was March February last
19 time he came by the house one Sunday and he got out the car.
20 I said man you walk like you in bad shape than I is. He said
21 I'm hurting pretty good, I said well you got broken bones
22 they gonna hurt they ain't gonna quit hurting.

23 Mrs. Mullis: I don't have any other questions.

24 The Court: Any question for the witness?

25 Mr. Allen: No Your Honor.

1 actually redact the whole line that says offense.

2 Ms. Mullis: And that is why I was previously ...

3 The Court: The only thing you all can redact, number
4 eight doesn't have any references to any thing except who it
5 was received by and everybody who handled it at SLED. Unless
6 I'm missing something I don't see anything that says, it
7 says one heat sealed pouch containing blood toxicology
8 described as labeled Jose W. Valle. Then it has the chain
9 from SLED. Is there any exception to that document?

10 Mr. Allen: I don't have any copies.

11 The Court: Yeah this looks like the receipt that she
12 testified is generated once they receive the blood sample.

13 Mr. Allen: Yeah I've got no problem with nine assuming
14 that we redact the offense line, the offense to eight.

15 The Court: Ok, can you all do that Mrs. Mullis?

16 Mrs. Mullis: We're redacting?

17 The Court: Where is says offense, DUI.

18 Mr. Allen: And then my concern with number eight is I do
19 have an objection to it.

20 The Court: What would be the bases of that objection?

21 Mr. Allen: There hasn't been a records custodian to
22 authenticate that it's a proper accurate copy from SLED.

23 The Court: I think the witnesses have testified that
24 it's an internal document kept in the ordinary course of
25 business as a result of their computer system.

1 Mr. Allen: My other concern is Heather Dailey in her
2 deposition transcript did not say where she got the sample
3 from. Her testimony as you'll see it if you'll end up
4 reading over her transcript, is that she received it from
5 Brandon Williams or Kenya Davis.

6 The Court: It says that in the chain.

7 Mr. Allen: There is no Kenya Davis.

8 The Court: There's a Bryan what's his name?

9 Mr. Allen: Brandon Williams after the test was done.

10 The Court: He's a control person that test the ... Let
11 me see the ...

12 Mr. Allen: The test was done around December 31, 2008
13 where according to that document Heather Dailey got it from
14 the refrigerator and she did not have that document and to
15 testify that she did in fact get it from the refrigerator.

16 The Court: Where else would she have gotten it?

17 Mr. Allen: Her testimony is she got it from a technician
18 name Brandon Williams or Kenya Davis.

19 The Court: But he's in the chain, that's the person that
20 would have taken it out of the refrigerator.

21 Mr. Allen: After the test.

22 The Court: Not necessarily.

23 Mr. Allen: According to that chain document looks like
24 Brandon Williams is the one that took it and then put it in
25 the storage bin to be destroyed at some later date. Brandon

1 Williams never touched it before the test was done.

2 The Court: If Brandon Williams is the person that runs
3 the quality control, he's the person that runs the second
4 test to make sure they comply with whatever the variables
5 are. I forget the numbers they use and he would have put it
6 like I said before to hold them. I knew it was terminology
7 that he used.

8 Mr. Allen: And I'm not disputing that and frankly I
9 don't think it necessarily matters to me that much what
10 happened to it after the test was done. My concern is she
11 didn't and she wasn't able to confirm that she actually got
12 it from the refrigerator on that date at that time.

13 The Court: I'll listen to her testimony but just in
14 terms of how it's done. There's only one refrigerator in
15 that department. There's only one way she would have gotten
16 it. Either a tech gave it to her or she got it. It's
17 controlled nobody else has access to that refrigerator
18 except those people who are in that department who have
19 access. So that goes to whether you think it was tampered
20 with but you got another problem. You've got an estoppel
21 problem to some extent because you cannot take a position
22 that's going to be inconsistent with the fact that he was
23 convicted. You've got to be able, I mean that he, you can
24 argue the issue of and I got to think through this a little
25 bit because I'm thinking through it as I'm listening as the

1 testimony has developed. You always, you of course can
2 always argue as to the weight to be accorded the testing the
3 sample or otherwise. You can always argue I guess against
4 the inference but the problem I have and that I'm trying to
5 sort out is I'm not going to allow you to create a leak of
6 fiction in this court room. When your client admitted to his
7 guilt about being impaired. I don't think you can come in
8 this court room and argue that he wasn't just, that statue
9 but I don't know I got to sort that out a little bit.

10 Mrs. Mullis: As a matter of fact he said in opening
11 argument that they admitted that the defendant was drunk.

12 The Court: I have to go back and listen to it

13 Mr. Allen: Well first of all what I say isn't evidence.
14 Second of all...

15 The Court: It's not evidence but you're controlled to
16 some extent by what you said in terms of what you believe
17 the evidence is going to show and what legal posture you're
18 going to take in the case. Of course that changes and people
19 change their posture and their positions but the purpose of
20 that statue is so that jury will not give undo weight to foe
21 too, but I guess the better way would be to look at some
22 other offense some other traffic offense. In other words, so
23 that jury would not give undo weight to a police official
24 charging someone with an offense in terms of establishing
25 liability. It almost similar to a lack of seatbelt in

1 establishing you know whether somebody their injury was
2 either, could have been prevented or it was exacerbated, but
3 it's legal fiction for you to come here and say something
4 different and I don't know, it's almost it quarters to me,
5 I don't know I got to think through it.

6 Mr. Allen: Is the court ready to make a ruling one way
7 or the other whether the conviction is going to come in?

8 The Court: I've already ruled about that.

9 Mr. Allen: That it's not coming in.

10 The Court: I've already ruled on it. I've already deal
11 with the statue but that doesn't mean that she still can't
12 argue to the jury that she's met the presumption that he was
13 in fact impaired and it contributed to him being the cause
14 of this accident and that in fact there entitled to punitive
15 damages of violation of the statue. It all goes into that
16 whole punitive formula and I guess as I listened, I was
17 listening to see whether you were going to admit negligence
18 but I don't even know how you really could get around for
19 approximate cost thing, but I'll continue listening. We'll
20 see where we are at directed verdict. But I'm struggling
21 with you being able to argue something opposite to what the
22 facts are and what someone has because then you start
23 getting into judicial estoppel. You can't take a position in
24 one proceeding and as opposite position in another
25 proceeding. The law doesn't allow you to create that kind of

1 legal fiction. You don't get to have it one way in this
2 proceeding and another in the other proceeding, which it's
3 never been invest by a court who knows this might be the
4 first case, we'll see how it goes. Now number eight is an
5 internal, it's been established by the chain of witnesses
6 that this is an internal document kept in the ordinary
7 course of business by SLED and it is generated by the, their
8 internal computer system which is part of their standard
9 operating procedure. I'll leave it for ID in the mean time
10 until I hear the toxicologist testimony but my initial
11 impression at this point is that it's going to come in with
12 the objection but I want to hear the testimony before I deal
13 with that. Now was there an exception to number five as
14 well? Which is the SLED urine blood collection report.

15 Mr. Allen: Yes.

16 The Court: And what was the exception to that?

17 Mr. Allen: Hearsay, personal knowledge, you have
18 someone's signature on there namely a nurse who has never
19 authenticated that is her signature and it's pretty much a
20 statement of her saying that she did it in compliance with
21 the statue, that's a huge issue.

22 Mrs. Mullis: It's a statutory document.

23 The Court: So there are authentication issue. I'll think
24 about it. We'll see what you all get done for the remainder
25 of the afternoon. You all ready to proceed? Is this, whose

1 deposition is this?

2 Mrs. Mullis: I'm sorry are we in agreement on that?

3 The Court: Yeah he had agree to that as long as you
4 remove the DUI redact that comment at the top of the form.

5 Mrs. Mullis: So nine is in?

6 The Court: Was it redacted?

7 Mrs. Mullis: It was Your Honor.

8 The Court: Okay you showed Mr. Allen?

9 Mrs. Mullis: I did Your Honor.

10 Mr. Allen: Without objection.

11 The Court: Okay be marked in that's number nine right,
12 without objection.

13 (Plaintiff's Exhibit Number Nine was marked)

14 The Court: Now that the courts work has been
15 completed. Whose deposition is this?

16 Mrs. Mullis: This is Dr. Spearman, Lowcountry
17 Orthopedics.

18 The Court: And his deposition you all told me was 45
19 minutes.

20 Mrs. Mullis: Yes ma'am.

21 The Court: Are we ready to proceed from the plaintiff?

22 Mrs. Mullis: We are Your Honor.

23 The Court: From the defense?

24 Mr. Allen: Yes.

25 The Court: Please bring in the jury.

1 (Jury In)

2 The Court: Ladies and gentlemen we appreciate your
3 patience and hope you enjoyed your break. We are now going
4 to hear testimony again by deposition and I would remind you
5 of my previous instructions. Mrs. Mullis you may proceed
6 when you're ready. If you all have any difficulty hearing
7 please let me know so that we can address it.

8 James D. Spearman, M.D. Video Deposition played for jury

9 Mrs. Mullis: At this time the plaintiff moves to mark
10 exhibit for Spearman.

11 The Court: Marked and admitted without objection.
12 Ladies and gentlemen why don't you stand up and get your
13 blood circulating a little bit. I know you've been sitting
14 in the dark. Does anybody need to go to the restroom? Are
15 you ready to proceed. Call your next witness.

16 Mrs. Mullis: At this time we'll call Michael Lewis to
17 the stand.

18 Deputy Clerk: Please raise your right hand and place
19 your left hand on the bible. Do you solemnly swear or affirm
20 the testimony you should give to the Court in the trial of
21 this case is the truth the whole truth and nothing but the
22 truth so help you God?

23 Mr. Lewis: I do.

24 Deputy Clerk: Please be seated and state your name.
25 Spelling your last name for the record.

1 Mr. Lewis: My name is Michael Odel Lewis Sr., L-E-W-I-S.

2 The Court: Sir could you please repeat your first and
3 middle name?

4 Mr. Lewis: Michael Odel Lewis Sr, L-E-W-I-S.

5 The Court: Thank you, you may proceed.

6 **Michael Lewis - Examined by Mullis**

7 Q: Mr. Lewis where do you live?

8 A: I live inn Sumter South Carolina.

9 Q: What's your address?

10 A: 4660 --- Sumter South Carolina.

11 Q: And what do you do for a living?

12 A: Maintenance Tech.

13 Q: What is that?

14 A: A maintenance that do work on machinery and stuff.

15 Q: You're going to have to speak up because I can't hear
16 you.

17 A: Maintenance Tech.

18 Q: What factory do you work at?

19 A: Carolina Filters.

20 Q: And how do you know Levern?

21 A: His mother and father raised me.

22 Q: So how long have you known him?

23 A: All my life.

24 Q: What do you mean by his mother and father raised you?

25 A: Well his grandma raised me and because she passed on I

1 stayed with mother and father.
2 Q: So how old were you when you were living with Levern?
3 A: Five or six or younger.
4 Q: Do you recall when Levern got in a automobile wreck on
5 December 20, 2008?
6 A: Yes I do.
7 Q: And how did you learn about that?
8 A: He called me.
9 Q: He called you?
10 A: Yes.
11 Q: How did he call you?
12 A: A cell phone.
13 Q: And where was he when he called you?
14 A: In the hospital.
15 Q: Why did he call you?
16 A: Because he wanted me pick some stuff from out of his
17 vehicle.
18 Q: So he called you to come get some stuff out of the
19 vehicle?
20 A: Yes.
21 Q: Do you know what it was you were coming to get?
22 A: Just stuff out.
23 Q: And did you travel from your home in Sumter down here to
24 Moncks Corner or to Goose Creek?
25 A: Yes I did.

1 Q: And did you see the automobile?
2 A: Yes I did.
3 Q: And go and collect his things?
4 A: Yes.
5 Q: Out of this Subaru?
6 A: Yes I did.
7 Q: And then where did you go?
8 A: First I went to the hospital, I didn't get to see him but
9 I came back to the hospital then went to the car and got the
10 stuff.
11 Q: When you first went to the hospital, where was he?
12 A: He was in ER.
13 Q: He was in the emergency room?
14 A: Yes.
15 Q: Or he was in the OR?
16 A: The O.R. yes.
17 Q: He was in having surgery?
18 A: I didn't see him.
19 Q: And you went to his car?
20 A: Not right then later on I did.
21 Q: And then when did you get to see him?
22 A: See him later on that afternoon.
23 Q: Can you describe to the jury his physical condition when
24 you first saw him in the hospital?
25 A: When I walked in the room he was laying with his foot

1 bandaged up and stuff. He had a lot of bruises to the side
2 of his face.

3 Q: Could he talk to you?

4 A: Yes he could talk to me.

5 Q: And how did he appear to you?

6 A: He was still alright but he was a little dizzy you know
7 a little out of it.

8 Q: Had he already completed surgery at that point?

9 A: Yes.

10 Q: And when's the next time you saw him after that?

11 A: When he came out the hospital.

12 Q: A couple days later?

13 A: Yes.

14 Q: Were you there when he and Ollie came home?

15 A: Yes.

16 Q: Did you come with them from the hospital back to the
17 house?

18 A: No I met at him at his house.

19 Q: Why did you meet him at his house?

20 A: So I could help get him inside the house.

21 Q: So you helped Ollie get him inside the house?

22 A: Yes.

23 Q: And what other assistance have you provided to Levern and
24 Ollie after this accident?

25 A: I cut his grass and keep his yard up.

1 Q: Cut his grass?
2 A: Yes.
3 Q: What about during January and February when he was unable
4 to move around, did you provide any other assistance to him?
5 A: Yes I helped him get around and he came to the doctor and
6 stuff like that I'd drive for him and drop him off.
7 Q: Helped him drive?
8 A: I'd drive for him.
9 Q: Drove for him?
10 A: Yes..
11 Q: And you've known him for fifty something years.
12 A: Yes.
13 Q: Because you're how old?
14 A: Fifty six.
15 Q: And what other differences can you tell in Levern now
16 then before the accident?
17 A: He don't have the motivation to move around and do things
18 like he used to do.
19 Q: Is there anything specific that you can think of that he
20 doesn't do now that he used to do before this accident?
21 A: He would help me to do things and work on things like
22 that. Lifting and carrying he can't do it because he can't
23 put much weight on that foot.
24 Q: Do you assist him in doing those types of things around
25 the house?

1 A: Yes.

2 Q: And go help him you said mow his grass?

3 A: Yes

4 Mrs. Mullis: That's all the questions I have.

5 The Court: Any questions for the witness?

6 Mr. Allen: No Your Honor.

7 The Court: Sir you may step down. Plaintiff may proceed.

8 Mrs. Mullis: We have a video and a witness coming in at
9 four. The video is a hour.

10 The Court: How longs the video? Is that Dr. Smith?

11 Mrs. Mullis: It is.

12 The Court: Why don't we take a little break. Mr. Foreman
13 ladies and gentlemen we're going to take our afternoon
14 break. During the break please do not discuss the case and
15 please leave your notepads in your seats. We'll be out about
16 ten minutes which will take us to four o'clock.

17 **(Jury Break at 3:47)**

18 The Court: Who's the next witness?

19 Mrs. Mullis: Jennifer Stayton.

20 The Court: Bring in the jury.

21 **(Jury In at 4:03)**

22 The Court: You may be seated, ladies and gentlemen bear
23 with me one second. Ladies and gentlemen I hope you enjoyed
24 your break we'll now resume testimony. Plaintiff may
25 proceed.

1 Mrs. Mullis: Your Honor we've got one house keeping
2 matter. This is the video deposition of James Spearman.
3 Submitting is plaintiff's exhibit seventeen.

4 The Court: Marked as courts exhibit.

5 Mrs. Mullis: Plaintiff calls Jennifer Stayton to the
6 stand.

7 Deputy Clerk: Please raise your right hand and place
8 your left hand on the bible. Do you solemnly swear or affirm
9 the testimony you should give to the Court in the trial of
10 this case is the truth the whole truth and nothing but the
11 truth so help you God?

12 Mrs. Stayton: Yes, ma'am.

13 Deputy Clerk: Please be seated and state your name.
14 Spelling your last name for the record.

15 Mrs. Stayton: Jennifer Stayton, S-T-A-Y-T-O-N.

16 The Court: Please spell your last again for me.

17 Mrs. Stayton: S-T-A-Y-T-O-N

18 The Court: You may proceed.

19 (Jennifer Stayton - Examined by Mullis)

20 Q: And Mrs. Stayton where do you live just locally.

21 A: I live in Moncks Corner.

22 Q: You're from the area?

23 A: I am.

24 Q: And where do you work?

25 A: At Trident Emergency Room.

1 Q: And what do you do at Trident Emergency Room?

2 A: I'm a Registered Nurse.

3 Q: And what do you do as a Registered Nurse at Trident in
4 relation to collecting blood specimens?

5 A: I do so on a routine bases, on 80% of the patients that
6 come in, if officers come in requesting a blood sample after
7 consent of defendant we would draw the blood as well.

8 Q: So you draw blood at the request of an officer, is that
9 correct?

10 A: If they do request it.

11 Q: Are there specific protocols required when you're drawing
12 blood for a specimen or a sample?

13 A: For an officer there are, they bring in an evidence
14 collection box. We have to make sure that it's sealed and
15 that it's not out of expiration range. We cannot use an
16 alcohol prep when we draw blood for officers. Just in case
17 it would interfere with the blood that was being drawn. We
18 use a non ethanol prep on every patient. There's a provided
19 needle and a collection device provided tube provided
20 labels. We do all of that label the tubes keep them in our
21 possession and give them directly to the officer when were
22 done.

23 Q: I'm going to hand you plaintiff's exhibit five marked it
24 for identification purposes. Do you recognize that document?

25 A: I do, I printed my name and signed.

1 Q: And what is the date on that document?

2 A: The date is 12-20-2008.

3 Q: And you said you printed and signed your name so that's
4 your signature at the bottom of the document?

5 A: Yes I've signed twice.

6 Q: And what did you sign having done?

7 A: I signed that a blood sample was taken after consent was
8 given by the officer. I also signed that I used a non
9 ethanol prep and the collection container that the officer
10 provided.

11 Q: And what kind of sample was taken?

12 A: A blood sample.

13 Q: And who was the sample taken from?

14 A: It was taken from Jose Valle, V-A-L-L-E.

15 Q: At Trident Hospital is that correct?

16 A: Yes ma'am.

17 Q: And what did you then do with that sample?

18 A: Directly after the sample was taken it was labeled with
19 the patient's name and the date, my signature it was given
20 to the officer.

21 Q: Also going to hand you a second document. Do you
22 recognize that document?

23 A: Yes.

24 Q: We're going to mark that for as plaintiff's exhibit
25 seventeen for identification purposes at this point. What is

1 that document that you're looking at?
2 A: I'm looking at a copy of the seal, the label that we put
3 on the blood tube. I have dated, timed, and signed the seal.
4 Q: And is that your signature at the bottom?
5 A: It is.
6 Q: And you're verifying that you are the collector of the
7 sample?
8 A: Right.
9 Q: And it is a what?
10 A: A blood sample.
11 Q: Of who?
12 A: Jose Valle.
13 Q: Collected on what day?
14 A: 12-20-2008 at 8:28 AM.
15 Q: 8:28 AM?
16 A: Yes.
17 Q: I see drawn time 8:45 AM?
18 A: I timed it 8:28 on the label.
19 Q: And who was the arresting officer?
20 A: Thomas.
21 Q: And did you then release the sample over to officer
22 Thomas?
23 A: Correct as soon as I was done with the sample labeled it
24 and handed it directly to the officer.
25 Q: And you had sealed that sample?

1 A: Yes.

2 Q: To prevent it from being tampered with or altered in any
3 manner?

4 A: Correct we actually take the label it tapes from one side
5 of the tube around the stopper on the tube to the other side
6 so that you can see if the label was broken in any way.

7 Q: Did you follow all the protocol that you were required to
8 follow by the Highway Patrol in collecting and preserving
9 the sample?

10 A: I did.

11 Mrs. Mullis: I don't have any further questions with
12 this witness.

13 The Court: Any cross examination of the witness?

14 Mr. Allen: Just very briefly.

15 The Court: You may proceed.

16 Mr. Allen: Thank you Judge.

17 (Jennifer Stayton - Cross Examined by Allen)

18 Q: Am I to assume that you do not have any independent
19 recollection of taking the sample as you sit here?

20 A: I don't I follow the same process for every that I do do
21 for the Highway Patrol.

22 Q: How many vials do you typically pull?

23 A: Two.

24 Q: And do you recall whether Mr. Valle had any injuries when
25 he came to the emergency room?

1 A: I do not recall this case and I was unable to review any
2 records before I came.

3 Q: Before you give testimony like you're doing now about
4 chain of custody. Do you typically review medical records
5 resulting related to the defendant?

6 A: If I can refresh my memory of who the patient is I would
7 yes.

8 Q: Those medical records would have information about
9 whether the defendant was given medication or anything like
10 that prior to you drawing sample?

11 A: Generally patients come in if they're in this case they
12 would be drawn pretty much immediately upon arrival before
13 any type of medication or fluid was given, because if you
14 give them large amount of fluid or something like that it
15 would dilute their blood alcohol.

16 Q: If someone's seriously injured a paramedic may give
17 someone IV bag or something before you get there right?

18 A: They could yes.

19 Q: You don't recall whether that happened in this case or
20 not?

21 A: I do not.

22 Mr. Allen: That's all I have thanks.

23 The Court: Any redirect?

24 (Jennifer Stayton - Redirect by Mullis)

25 Q: Any question in your mind whether or not that's your

1 Mrs. Mullis: I think we're trying to figure out
2 everything to redact out of it referring to the arrest and
3 the statue in the seventeen.

4 The Court: You're moving in number seventeen?

5 Mrs. Mullis: I am.

6 The Court: Showed Mr. Allen?

7 Mrs. Mullis: I did.

8 The Court: Is there any exception to number seventeen?

9 Mr. Allen: Just the same problems were having with the
10 documents in front of you which is eluding to the arrest the
11 charge that type of stuff.

12 The Court: Let me see it please. This can redacted
13 though can it not?

14 Mrs. Mullis: I believe it can your honor.

15 The Court: Number seventeen.

16 Mr. Allen: I think it can.

17 The Court: Well what purpose are you offering it?

18 Mrs. Mullis: To verify that she collected it, signed for
19 it, handed it over to Officer Thomas in the, as part of our
20 chain of custody.

21 The Court: Where does it show that?

22 Mrs. Mullis: Her signature at the bottom.

23 The Court: Doesn't this other form say the same thing?

24 Mrs. Mullis: Does the other form say the same thing. No
25 it's not the same as the seal that she's looking at...

1 The Court: It says she seals it on ... Says she used a
2 non ethanol prep. I guess my question becomes about number
3 five. Why do you need these both witnesses to testified to
4 it and the document is replete with the fact that he's
5 arrested, he's been in a car accident, is informed of his
6 consent rights. It just seems to me unnecessary when they
7 have their testimony has been exactly what's on this form.

8 Mrs. Mullis: Because opposing counsel is challenging the
9 weight of the evidence and a officer signed at the bottom of
10 the form that the collection was under his direct
11 supervision.

12 The Court: He testified to that so why do you need the
13 form?

14 Mrs. Mullis: Because the jury is going to take it back
15 to the jury room and they'll have it in front of them to
16 look at. They've had now six, twelve.

17 The Court: You have a form though that is replete with
18 references prohibited by statue.

19 Mrs. Mullis: It's a document produced within the normal
20 course of business.

21 The Court: Issue it's a violent under the statue it
22 makes replete references to him being arrested, being
23 suspect, being under arrest, being informed of his consent
24 rights.

25 Mrs. Mullis: But not of a conviction Your Honor.

1 The Court: There's a difference. The whole purposes of
2 it not being admissible is so that there is no reference to
3 a criminal action. It defeats the entire purpose of having
4 a statue otherwise you could get a conviction. I'll think
5 about it. Now what's your objection to number seventeen?
6 Other than the fact there's a reference to DUI which could
7 be redacted.

8 Mr. Allen: I just kind of going off what you just said
9 it's kind of cumulative I don't understand the point of why
10 we need it.

11 The Court: Because you're arguing that and I assume your
12 arguments going to be the blood sample wasn't taken but I
13 think I'm going to prohibit you from doing any of that
14 frankly. Cause in your answer you admit negligence. You're
15 bound by that, the only thing you can test is proximate
16 cause of the injury and the reasonableness of the treatment.
17 The answer admits that he was negligent.

18 Mr. Allen: We do not admit recklessness or willful
19 conduct or punitive exposure. Simple negligence does not
20 rise to a level of repudiative.

21 The Court: But negligence per se is evidence of
22 willfulness, wantonness and recklessness, which is violation
23 of the statue.

24 Mr. Allen: I never, we never admitted to a violation of
25 the statue.

1 The Court: You admitted to negligence which is violation
2 of duty. Which is violation of either the common law or
3 statue. So either he felt he controlled his vehicle he
4 crossed the center line which is violation of statue of
5 ordinance. He was driving while impaired which included his
6 ability to understand nature and control of his vehicle. So
7 you've admitted all of that your stopped now from saying
8 anything other than that and we went back and looked at your
9 opening argument and you can see that you client was
10 impaired in your argument, but I'm going to go back and
11 listen to it again tonight. If you're going to contest that
12 these samples were drawn and that they were drawn
13 appropriately and based on your questions that you asked to
14 the last witness. Gives me the impression that somehow
15 you're going to try to argue although there's no substance
16 of evidence to support it or by inference that he received
17 some other liquids or otherwise or something to dilute the
18 sample which actually would work to his benefit because if
19 he got some fluids to diluted his sample. That means he was
20 much higher than a .10 when he was tested. So I don't know
21 how that really is to your benefit, but if you're going to
22 take that posture contesting the collection of the sample
23 then it is relevant and the. I'm trying to figure out why
24 did you all, has it already been destroyed is that what
25 happened?

1 Mrs. Mullis: We have the other side of it.

2 The Court: No was the sample already destroyed, was the
3 evidence bag was it gone? I guess by creative later it's
4 gone.

5 Mrs. Mullis: I have no idea.

6 The Court: Probably once this case was disposed of they
7 destroyed it once the thirty day period passed with the
8 appeal.

9 Mr. Allen: Presumably they pulled the copy from
10 somewhere.

11 The Court: Where did you get a copy in fact? Where is
12 that located?

13 Mrs. Mullis: SLED's file.

14 The Court: So they kept a copy.

15 Mrs. Mullis: They did. It's an exhibit of Heather
16 Dailey's deposition as well. That same exact evidence bag
17 because those are her initials on the upper left hand corner
18 of that document. That verifies.

19 The Court: Who authenticated the document?

20 Mrs. Mullis: Now it's been authenticated by Jennifer
21 Stayton.

22 The Court: The only thing Jennifer Stayton can
23 authenticate is her signature. She can't authenticate a SLED
24 document, you have to have a records custodian or somebody
25 testify that SLED keeps this in ordinary course of business,

1 that they keep it in the archives, that it's a part of their
2 record.

3 Mrs. Mullis: Heather Dailey.

4 The Court: Mrs. Dailey now testify to that. Well then
5 I'll take it under advisement until I hear what she actually
6 testifies to. Did somebody from SLED testify that this was
7 a document that they, I'm referring to number five, this is
8 a document they kept in ordinary course of business.

9 Mrs. Mullis: The entire file?

10 The Court: Just number five.

11 Mrs. Mullis: The entire file was verified by Heather
12 Dailey and testified to.

13 The Court: --- her file?

14 Mrs. Mullis: Document number five and I'm, are you
15 looking at?

16 The Court: I'm looking at number five.

17 Mrs. Mullis: I don't have number five in my hand so I'm
18 not quite sure which one you're looking at. The one that was
19 signed by Heather Stayton? Yes Your Honor it's initialed in
20 the bottom right hand corner by Heather Dailey.

21 The Court: She's not testified yet?

22 Mrs. Mullis: She is.

23 The Court: Then I'll take that under advisement until I
24 hear the testimony. Now what the problem with her
25 deposition?

1 Mr. Allen: Well that's the problem is that we're trying
2 to get in these document through Heather Dailey and she
3 raised the same concerns you did in her testimony which is
4 that's not the original. The original is out there and can
5 be obtained. Her testimony I believe was that the documents
6 were sent to a document depository called Iron Mountain and
7 that they are accessible. She's no longer an employee at
8 SLED so I don't understand how she could be designated as a
9 record ...

10 The Court: The only place Mrs. Mullis would have gotten
11 it is from SLED. Where else would she have gotten these
12 documents?

13 Mr. Allen: It came from SLED Piedmont based on the fax
14 stamp. I don't know what SLED Piedmont is I don't know who
15 sent the fax I don't know, I have not heard from anyone that
16 they can say that this is a full and complete file.

17 The Court: You have a good faith argument that these are
18 not the authentic documents that came out of SLED file or
19 some good faith bases that these are not those documents and
20 that they weren't kept in the regular course of business. I
21 don't know what Mrs. Dailey's testimony is because I haven't
22 read it.

23 Mr. Allen: I guess I don't have any independent evidence
24 that it's not but I don't know if that's necessarily what I
25 need to show for the court to determine.

1 The Court: You're telling me it's not. The burdens on me
2 to say it isn't. She is prima facie given me documents that
3 I deal with on a daily basis that look authentic to me. I've
4 had people testify that this is in fact their signatures on
5 those documents and that they did them in compliance with
6 state law and that these documents were kept in the ordinary
7 course of business. The burden then shifts to you to provide
8 me with some good faith bases that they are not what they
9 report to be and of course I have the disproportionate
10 experience because I deal with these documents every single
11 day that I have criminal court because they are a regular
12 course of what is used. They're required to be done a
13 certain way by statute, they're in the code book and in the
14 regulations and there is nothing in those forms that
15 indicate to me their not the forms that are normally used.
16 Whether it's somehow they've been hypothecated or that
17 somehow they have been forged or that somehow they are not
18 what they report to be. Both Mrs. Stayton as well as Officer
19 Thomas who's now retired testified that these are their
20 signatures. That they filled this out contemporaneously with
21 the draw and I'm referring to number five and I have note
22 Mrs. Mullis has represented to the court as an officer of
23 the court that number seventeen she procured as part of the
24 foyer request for the file. It is reasonable to me that SLED
25 because of the volume of samples that they deal with and

1 based again on my experience with them. That once something
2 is tested, once the quality control is run that it goes in
3 that hole and they keep it for a certain amount of time and
4 it's different for certain things but I think it's like, I
5 don't know whether it's six months I don't know whether it's
6 a year I can't remember but they give it a chance to run
7 it's course in litigation in case somebody wants to have an
8 independent evaluation of whatever is remaining of the
9 sample. If they don't get that request they destroy it. It
10 would be unreasonable for me that SLED keeps all it's
11 original kits, they wouldn't have the room. They run
12 thousand of these, not even giving the DNA and all the other
13 things gun powder all the GSR all the other test they run on
14 a daily bases. So it is reasonable for me to believe what is
15 being represented to court which is that they keep these
16 probably on micro film because that's what these little
17 notations look like on the side and for those to have been
18 provided as they probably are provided on a daily bases in
19 request and subpoenas, court orders, and as well foyer
20 request. So the question becomes is there some good faith
21 bases that these are not what they report to be. I have no
22 idea why it was sent from the Piedmont it's a (864) number
23 which leads me to believe it came from the upstate
24 somewhere. I don't know whether they have an office that
25 that's there job to reply to foyer request and subpoenas I

1 have no clue. I would imagine it wouldn't be hard to get a
2 certified, I don't know I haven't heard the witnesses
3 testimony however, but it would seem to me that it would not
4 be difficult to get a certification that this is in fact
5 what it reports to show which is a copy of their records.
6 But I do have concern about the offense being listed on
7 there because it's not, it shouldn't be listed as DUI and
8 his reports to show the specimens sealed on the evidence bag
9 where or the box where the sample was placed after it was
10 drawn consistent with the nurses testimony. But the burden
11 is on you Mrs. Mullis to prove that's a business record and
12 Stayton however her name is pronounced can't, the only thing
13 she can verify is that and authenticate is that's her
14 signature. She can't that that's a SLED record she doesn't
15 work there anymore, she doesn't know where they keep them,
16 she doesn't know what their policies are but again I haven't
17 heard Mrs. Dailey's testimony so I don't what she is going
18 to testify to. When the sent you the foyer request they
19 didn't stamp it as authenticated or anything they didn't put
20 any kind of notation on that file when they produced the
21 record?

22 Mrs. Mullis: I don't know let me see what I've got. We
23 took the original one apart.

24 The Court: What are the objections to the deposition?

25 Mr. Allen: There's a few, a lot of them is personal

1 knowledge, hearsay, documents that are in the SLED file that
2 she cannot authenticate.

3 The Court: Was she qualified as an expert?

4 Mr. Allen: She was qualified as an expert and agreed to
5 that she can testify as to the results she came up with the
6 blood. She cannot give any testimony regarding the effects
7 of alcohol, impairment level or anything like that.

8 The Court: Yes she can, they're trained in that, that's
9 what they do.

10 Mr. Allen: I'm not going to dispute that they could but
11 she wasn't tendered as and didn't offer any testimony in
12 that regard.

13 The Court: She didn't?

14 Mr. Allen: Correct.

15 The Court: or she did?

16 Mr. Allen: She did not offer any testimony...

17 The Court: Ok then why is that an issue?

18 Mr. Allen: That's not an issue.

19 The Court: I misunderstood what you were saying.

20 Mr. Allen: I don't have any issue with what she was
21 qualified as an expert in or the testimony she gave
22 regarding the blood alcohol in her scope as an expert.

23 The Court: Ok so then you lost me.

24 Mr. Allen: My issue is with a lot of the documents that
25 she can't authenticate and have hearsay on them. A big

1 package of about fourteen pages, I kind of got to go through
2 and see which ones have already been admitted and which ones
3 are not, but...

4 The Court: Are you planning to offer any of her
5 exhibits. I need the deposition I'm in the dark to tell you
6 the truth and it's a little frustrating.

7 Mrs. Mullis: We'll refer the court to page 41 where she
8 authenticates the records.

9 The Court: I'm going to read the whole deposition.

10 Mrs. Mullis: Yes ma'am.

11 The Court: A lot of these documents, all right some of
12 them are controlled documents in otherwise a jury wouldn't
13 understand because they don't have the specialized knowledge
14 to understand it. It is the other documents that have
15 already been marked by ID, so what is it that you will be
16 seeking to introduce?

17 Mrs. Mullis: We'll just submit the entire file it's now
18 authenticated by Mrs. Dailey.

19 The Court: It still has to be relevant it doesn't just
20 come in, especially where it concerns some stuff that has
21 potential to confuse the jury. So I need to know exactly
22 what it is you are asking to submit and for what purpose you
23 will be seeking to submit it.

24 Mrs. Mullis: Your Honor it's directly relevant to the
25 matter at hand.

1 The Court: That was not my question. My question was
2 more pointed. I need to know exactly what documents you're
3 seeking to introduce and what purpose each document. They're
4 not a collective group of documents, they'll all report ____
5 different things.

6 Mrs. Mullis: The first page of plaintiff's exhibit one
7 shows the sticker that was tested by two by the three
8 individuals that came from SLED to identify the chain of
9 custody.

10 The Court: Is there any objection to that document?
11 That's number one to the deposition which shows a barcode,
12 it was placed I assume on the sample.

13 Mr. Allen: I don't recall any of the officers ever being
14 shown this document and whether they've seen it or not.

15 The Court: Is she going to testify to this document?

16 Mrs. Mullis: She's not the one that testified to the
17 document. Well I'm sorry she authenticated ...

18 The Court: --- would not generated this label, SLED
19 would have generated this label.

20 Mrs. Mullis: And SLED testified to it.

21 The Court: Who in SLED testified to it?

22 Mrs. Mullis: Yarborough, Mrs., I have to get there names
23 and ...

24 Mr. Allen: The three ladies that testified this morning.

25 Mrs. Mullis: Each testified that they swiped their

1 badges and put the label on the sample and that they logged
2 the label and sample into the computer each time they moved
3 it from person to person. And this is the label that matches
4 the chain of custody document that was testified to by Doris
5 Yarborough, Patricia Cooks, and Kimberly Mears.

6 The Court: And why did you show them this document to
7 have them authenticate it and show that it was kept in
8 ordinary course of their business and that this was in fact
9 the label that they generated for the sample?

10 Mrs. Mullis: Because it was authenticated by Heather
11 Dailey.

12 The Court: Did she authenticate it?

13 Mrs. Mullis: She did.

14 The Court: It's deeper than that she doesn't just get to
15 say it was part of my file. She needs to say that she in
16 fact created this label. That she used it as a part and it
17 was kept in ordinary course of business. You don't just get
18 to say this is my file, it's like a doctor coming to court
19 and saying this is my file and somebody moving it in. It
20 doesn't come in it contains subjective thing and other
21 things that are not admissible. It's just not a blanket sort
22 of because it's been produced that it comes in. So my
23 question becomes is Mrs. Dailey going to say that she, Mrs.
24 Dailey is she going to testify that she created this label
25 and this was a label that she utilized in moving the sample?

1 Mrs. Mullis: On page 41 of her deposition I asked her if
2 the document in front of her was the entire SLED case file
3 and the records that were kept within SLED within the normal
4 course of business at SLED and she identified each document
5 individually and her initials on the bottom right hand
6 corner of the ones that were initialed. She said they
7 were...

8 The Court: She didn't initial this one.

9 Mrs. Mullis: She identified that as the front page of
10 the file and the back of the jacket of the file that
11 contained all of the documents and that's how she knew what
12 documents were inside and could cross reference them.

13 The Court: So this is the label from the file not the
14 sample.

15 Mrs. Mullis: It is, these are records that were kept...

16 The Court: So number one is the label that was on her
17 file not the label that was on the sample?

18 Mrs. Mullis: That's correct.

19 The Court: So why would the label on the file be
20 relevant?

21 Mrs. Mullis: Because it is the file that contains all
22 the other documents that cross reference with the blood
23 sample that opposing counsel is challenging the chain of
24 custody on. That we've brought in seven witnesses to testify
25 to.

1 The Court: I'll think about that one. I'm just trying to
2 figure out how that's relevant. You've already had the other
3 document marked you didn't have the front of the box marked
4 but you had the seal. I'm referring to number I guess it was
5 a part of number three since it was two pages.

6 Mrs. Mullis: That's correct Your Honor.

7 The Court: And that's already been marked so we don't
8 need to go over that again. So the other is the table of
9 content that wouldn't be relevant for any purpose that's
10 number five. Number six is a forensic services request, why
11 would that need to be admitted?

12 Mrs. Mullis: And five Your Honor the table on contents
13 is relevant because she was questioned about whether or not
14 her file included the internal chain of custody at SLED and
15 it did not. Which is why we had to then bring in those other
16 witnesses and another chain of custody internally in SLED
17 because that chain of custody was not within SLED's file
18 that Heather Dailey had.

19 The Court: Ok you lost me I don't understand what you're
20 saying.

21 Mrs. Mullis: The table of contents from the file that
22 was relied on by Heather Dailey and her testimony and
23 verification of the toxicology report of defendant does not
24 have an internal SLED chain of custody document that was
25 challenged by opposing counsel. That we then had to bring

1 the other three witnesses and a second chain of custody
2 document from SLED so we think the table of contents in
3 relevant because he's challenging the weight of the
4 evidence. We discuss it in our deposition it won't make any
5 since.

6 The Court: I'll read it and see but I just don't see how
7 a table of contents at this moment subject to me reading
8 something in the deposition that changes that opinion. You
9 would of had to bring those witnesses anyway. I would have
10 never allowed the sample without the chain of witnesses. Her
11 testimony in and of itself would have never been sufficient.
12 So you're going to have to bring those witnesses anyway.

13 Mr. Allen: Unless he consented like you said.

14 The Court: Unless he consented pursuing to the statue
15 which really actually would have allowed the report without
16 anybody coming, but you have to consent to it and he didn't.
17 So blood and urine are different than drugs and other items,
18 DSR. I'm trying to think of something else, they're a little
19 different and the court has a different, I wouldn't say a
20 different standard but it has a heightened standard to some
21 extent regarding those type of items. So the chain without
22 beating a dead horse has been established. So I really don't
23 feel that that would be relevant at this point. I'm trying
24 to figure out why number six would be relevant to anything.

25 Mrs. Mullis: Identifies the officers name, identifies

1 the defendants name, it's signed by Officer Cochrane.

2 The Court: That's not contested, they won't testify to
3 that there's not contest that he is who did what he did.

4 Mrs. Mullis: It's her file she relied on within the
5 normal course of business in her determination at SLED. She
6 brought her entire file we went through her file we
7 discussed her file. She initialed the bottom right hand
8 corner of each page, included an entire copy of her file, we
9 marked the entire thing.

10 The Court: Number seven.

11 Mrs. Mullis: Seven has been.

12 The Court: Isn't that merely cumulative to the chain of
13 custody that I've already admitted?

14 Mrs. Mullis: Testified to plaintiff's exhibit six, it
15 is.

16 The Court: That's cumulative is it not?

17 Mrs. Mullis: It is.

18 The Court: Number eight, that's already been marked as
19 number five.

20 Mrs. Mullis: It has. It's verified as a business record
21 by Mrs. Dailey and then by Mrs. Stayton and Officer Thomas
22 at this point.

23 The Court: Nine, ten, eleven, twelve, thirteen.

24 Mrs. Mullis: She testifies to in her deposition on the
25 chemical lab results from her toxicology forensic evaluation

1 of the blood alcohol in the evidence.

2 The Court: She testifies to it doesn't she?

3 Mrs. Mullis: She does.

4 The Court: Number fourteen.

5 Mrs. Mullis: Is her results.

6 The Court: Is there an exception to fourteen?

7 Mr. Allen: Judge frankly I don't think I have an
8 exception to nine through thirteen other than the fact that
9 I think it would confuse the jury as to why they're looking
10 at these graphs, but fourteen assuming the court finds that
11 the chain of custody was proper I've got no problem with
12 fourteen coming in.

13 Mrs. Mullis: And we submitted fourteen individually on
14 it's own as exhibit number.

15 The Court: Fourteen is a duplicates, there two of them.

16 Mrs. Mullis: It is because we submitted, the first thing
17 is her entire file and then we submitted those two
18 individual pages individually incase the entire wasn't
19 submitted as a single exhibit.

20 The Court: But they're the same thing aren't they.

21 Mrs. Mullis: They are the same.

22 The Court: I have two of the same thing.

23 Mrs. Mullis: They're yes.

24 The Court: So you wouldn't need both of them.

25 Mrs. Mullis: I would not need both of them.

1 The Court: There is not exception to number fourteen
2 correct?

3 Mr. Allen: Again just with the exception that if the
4 courts find improper chain of custody no.

5 The Court: Do you have an extra copy so it can be marked
6 for ID? And where are we?

7 Mrs. Mullis: It's number eighteen and then plaintiff's
8 exhibit three again is another duplicate it's the front and
9 back of the actual evidence.

10 The Court: Other than those exhibits are there
11 exceptions to Mrs. Dailey's testimony?

12 Mr. Allen: Just to the extent that there is testimony
13 about those exhibits.

14 The Court: You have to be more specific than that Mr.
15 Allen. You have to tell me what pages you object to. Any
16 questions, pages and why.

17 Mr. Allen: For example page 16.

18 The Court: I need to know the list. You're required to
19 submit it. They're required to submit their designations and
20 you're required to submit your objection and since you all
21 didn't do it that way I need you to tell me specifically
22 each of your objections.

23 Mr. Allen: I never got designations.

24 The Court: I think I made that observation already,
25 next. I need to know what page and line. I don't need to

1 know for example I need to know exactly what page and lines
2 and you of course are required to make contemporary
3 objections to the testimony at the time of the deposition,
4 so I need to know which ...

5 Mr. Allen: Well and in that regard some of this does not
6 have a contemporaneous objection but what I'd argue judge is
7 that this wasn't a mini essay deposition of a treating
8 physician where it would be automatically admissible. The
9 only reason it's being presented in front of the jury is
10 because the witness is outside of a hundred miles and
11 unavailable.

12 The Court: Considering the lengthy discussion that you
13 all had with my staff several time during the course before
14 this deposition was taken I think it's disingenuous to say
15 that you didn't know it was going to be used in trial.
16 That's the whole reason you took it. You all had a large
17 discussion about it in which I had to become involved and I
18 think everybody knew it was going to used in trial. That's
19 the purpose for which it was taken so now I need to know
20 your pages and your lines that you have interposed
21 objections to the testimony.

22 Mr. Allen: Page 12 line 11 through page 13 line 11.

23 The Court: Is that your only objection?

24 Mr. Allen: I'm sorry I thought you were going to take
25 them one at a time. Page 19 and again I believe we already

1 talked about that but that's the objection of whole packet
2 coming in.

3 The Court: I need to know page and line Mr. Allen.

4 Mr. Allen: 19 - 6, 24 line 5 through 25 line 7.

5 The Court: Page 24 line what?

6 Mr. Allen: 5

7 The Court: Through?

8 Mr. Allen: 25 line 7, page 46 line 20 to line 22, and
9 then page 48 line 17 through page 49 line 2.

10 The Court: All of them?

11 Mr. Allen: Yes Your Honor.

12 The Court: Ok did you have any exceptions I assumed you
13 offered the whole deposition Mrs. Mullis:

14 Mrs. Mullis: I offered the entire deposition.

15 The Court: Have you had any opportunity to review any of
16 these exceptions that Mr. Allen has just given to the court.

17 Mrs. Mullis: That's the first time I've heard the
18 exceptions so no Your Honor.

19 The Court: Okay. Why don't we go ahead and let the jury
20 go and then I'm going to read and then we can deal with this
21 first thing in the morning. And then if you need to have any
22 redactions made to the video I would suggest that you make
23 preparations for that and that we be prepared to listen to
24 Mr. Bret Smith's deposition or Dr. Neal or whomever you plan
25 to have here in the morning. Just in the event that you

1 have to make some changes to the deposition, to the video I
2 mean I guess you'd have to have, you have to have somebody
3 here to do the redactions for you I would assume. Unless you
4 can stop and start it.

5 Mrs. Mullis: I'm going to have to stop it and start it.

6 The Court: Please bring in the jury. Where is Mrs.
7 Dailey currently living?

8 Mrs. Mullis: Columbia.

9 The Court: What's she doing now?

10 Mrs. Mullis: She has a two year old and a three year old
11 so she's a stay at home mom.

12 (Jury In 4:55 p.m.)

13 The Court: Mr. Foreman ladies and gentlemen we have some
14 matters of law that we need to deal with that are going to
15 take a little longer than I anticipated so I'm going to
16 allow you all to go for the afternoon. We'll resume in the
17 morning at 9:30. During the break please do not discuss the
18 case among yourselves or with anyone else. Please don't do
19 any independent research of any type that includes anything
20 that could be found on the internet or otherwise and when
21 you return to the court house in the morning please don't
22 have any contact with anyone again I would not want an
23 innocent conversation to be misinterpreted. I hope you all
24 have a wonderful evening you've been incredibly patient with
25 us and we appreciate how very kind you all have been to us