

ORIGINAL

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

Alexander S. Macaulay, Circuit Court Judge

Case No. 2012-212693

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

Dan M. Lafoy..... Appellant.

RECORD ON APPEAL

VOLUME II

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SC Court of Appeals

1 THE COURT: Very good. Ask the Jury to join us,
2 please.

3 Oh. I think y'all have seen the verdict form?

4 MR. BRANDT: We've looked at it, yes.

5 THE COURT: Two separate causes of action, one for
6 negligence, one for loss, two verdicts as to each cause
7 of action.

8 (The Jury entered the courtroom at approximately
9 11:03 a.m.)

10 THE COURT: Let the record reflect the Jury and
11 alternate are in the Jury box.

12 We'll now have the conclusion of the trial of the
13 case. There were several things I had to take up
14 earlier that took more time than I anticipated.
15 However, now, as I say, we will have the conclusion of
16 the trial with the argument by counsel; the Plaintiffs,
17 having the burden of proof, go first, and then the
18 Defendant will argue and then the Plaintiff will close
19 on the argument by counsel.

20 Then I will give you the charge on the law that is
21 applicable to this case. And at that time the case will
22 be given to you for your deliberations and your
23 rendering of your verdict on the law and evidence
24 submitted.

25 With that I recognize Mr. Brandt for his closing

1 argument.

2 MR. BRANDT: Thank you, Your Honor.

3 Closing Argument on behalf of the Plaintiff:

4 MR. BRANDT: Again, let me start by saying I sure
5 appreciate your time for coming up and helping us
6 resolve this matter.

7 You have heard a lot, and I'm sure the proceedings
8 have been rather strange to you. Where the lawyers are
9 going sometimes might not have been as clear as we would
10 have liked. But we've done our best, Mr. Moseley and I,
11 to represent our clients and present the facts of this
12 case and gave you a basis for deciding the matter.

13 Now, Mr. and Mrs. Cobb were injured in this
14 accident that happened at Head's Superette back in July
15 of '07. We are here today now that the evidence is in
16 for you to hear closing arguments, and I'll talk to you
17 about the facts and the law that's applicable, and so
18 will Mr. Moseley.

19 But the law, you are to follow the law as given by
20 the Judge. So his charges and instructions when we
21 finish are what you need to really pay attention to.

22 Now, we started out, and of course we start out
23 with the Complaint, and we filed our Complaint and said
24 Mr. LaFoy was guilty of negligence, and he had a duty to
25 drive his car carefully and to keep it under control at

1 all times. And he didn't do that.

2 And as a result he caused a terrible accident. He
3 didn't intend for it to happen, but that doesn't matter
4 whether you intend. That's what negligence is.

5 Mr. Cobb, an innocent party who was standing there
6 fueling his vehicle, and now you have heard what his
7 life is like and what he has lost in terms of medical
8 care or medical costs and impairments and a brain injury
9 that will follow him the rest of his life and prevent
10 him from having and working at his job which he dearly
11 loved.

12 Now, the Defense started and they pled unavoidable
13 accident and a sudden, unforeseeable incapacity to
14 operate a vehicle. And those were affirmative defenses
15 which the burden was on them to prove. You will not
16 hear the Judge charge you that they are entitled to
17 those defenses because as a matter of law he has ruled
18 that they are not.

19 It's sometimes problematic trying to unring a bell,
20 because testimony to try to make out the defense of
21 sudden, unforeseen, unforeseeable incapacity to operate
22 a vehicle was rendered by Dr. Hanke. But even given all
23 that testimony that she rendered, they are not entitled
24 to that defense, the Judge will not charge you that they
25 are. So her entire testimony is irrelevant. I submit

1 to you that you should disregard it in its entirety
2 because she was here just to try to say that he had an
3 episode which would entitle him to that defense, but he
4 didn't.

5 Please do not let it confuse or prejudice you in
6 any way. I submit that you totally disregard it, wipe
7 it out. You have heard it, but it is totally irrelevant
8 to the facts that's left before you.

9 What is left is the claims of the Cobbs'.

10 And Mr. LaFoy's Answer said, Well, it happened, but
11 I'm not responsible. I deny -- he admits he did what he
12 did, he's guilty. But I shouldn't have to pay.

13 To him this case is all about money. To my clients
14 it's about their way of life, their life, their losses.
15 And that's what I'm asking you to do. On that day, how
16 did that happen? Well, there wasn't any skid marks. I
17 submit to you Mr. LaFoy was coming down the street and
18 he probably did have to go to the bathroom badly, and he
19 was in a rush.

20 And as he came down there towards Head's Superette,
21 and since he turned onto 183 he had felt this urge so he
22 had been coming down the street a pretty good ways.

23 If you will put up Plaintiff's 6. We'll do this
24 the best we can with the lights on.

25 But anyways, I think he said the vehicle was here,

1 at this pump here was Mr. Cobb's vehicle. And according
2 to his own testimony, he turned and was gonna go between
3 those tanks -- and if he had to go to the bathroom, pray
4 tell me why he didn't go straight into the front of the
5 building. But he was gonna go between these tanks
6 around the building and come back around the front is
7 what he said.

8 Now, the police officer, he put the speed of the
9 vehicle at 35 miles an hour. I don't know whether we
10 can rely on that or not. But that's the evidence.
11 That's what he said. And if he was going 35 miles an
12 hour and tried to make a right-angle turn, I submit to
13 you that's too fast, way too fast. You can't do it.

14 What happened is when he started to turn in there,
15 he lost that vehicle because he was going too fast, and
16 instead of cutting in between the tanks and the
17 building, it took his arc out wider to the right, and
18 that's why he struck the vehicle.

19 He said, Oh, my, I didn't mean to do this. Well,
20 that's typical. People, we don't like to be at fault
21 and we don't like to know we hurt people. So we
22 rationalize it. "I didn't do this terrible thing."
23 They look for an excuse and they start believing it.

24 Several things could have happened. A lot of
25 things could have happened. It's just a rationalization

1 that "I didn't do bad." We're all guilty of that
2 behavior from time to time. We mess up. Anything to
3 try to justify. Human nature.

4 Another thing that could have happened, you know,
5 is that he doesn't truly remember what happened because
6 he had -- remember, Mr. Cobb got out of the vehicle
7 immediately, coming up with the steering wheel, his eyes
8 wide open, his hands on the wheel. That was when the
9 impact hit (slaps hands) threw his head in, he hit the
10 steering wheel, he had a bloody nose, and he had a
11 concussion. Nobody checked him out till later at the
12 hospital. But he had a lick to the head.

13 And the evidence as I will submit to you to
14 consider maybe what happened to him was altered by
15 Dr. Gardner in relation to Lynn. He talked about, when
16 you have a lick to the head or a slight brain injury, he
17 said mild to moderate. You can have a retrograde or an
18 antegrade amnesia. He had that bloody nose, he hit that
19 steering wheel, but he was alert. I mean, the first
20 people to talk to him said his eyes were open, his hands
21 were on the wheel. He was in control.

22 Maybe it did happen where he blocked it out because
23 it is a bad memory. And he said I don't remember.

24 But they don't have that sudden emergency. But
25 that's not an excuse under the law and the Judge is not

1 gonna tell you that it is.

2 So then we get to the point of should he have to
3 pay for the damage he caused? That's our system. We do
4 wrong, then we have to make it right by our neighbor.
5 Do unto others. There wasn't so much as an apology, or
6 "I'm sorry" issue. Just, I don't want to pay, no matter
7 what the damages.

8 The Judge is gonna instruct you on preponderance of
9 the evidence, he'll tell you about that. And the only
10 claim that's left to be proved by the preponderance of
11 the evidence is our claim for negligence, meaning he
12 found he really has no excuse. The preponderance of the
13 evidence the Judge will tell you -- and some judges do
14 it a lot of different ways -- but my way of explaining
15 it is that you look at the scales. The Plaintiff's on
16 one side and the Defense is on the other. You take all
17 evidence in favor of the Plaintiff, put it on one side;
18 and all the evidence in favor of the Defendant and you
19 put it on the other side. And if the scales tip ever so
20 slightly in favor of the Plaintiff, you find for the
21 Plaintiff. If they tilt ever so slightly in favor of
22 the Defendant, or remain even, you find for the
23 Defendant.

24 I submit to you there is only one way this case can
25 be determined on liability, and that is he ran out of

1 the road, was probably going too fast, and he struck my
2 clients, and that hit so hard that it knocked that truck
3 up into the pump, totally destroyed the pump, and sent
4 Lynn flying with the severe damages and a resulting
5 closed-head injury that debilitates him for the rest of
6 his life.

7 He had a duty to keep his vehicle under control at
8 all times and the Judge will charge you that. Keep a
9 proper lookout. You're not supposed to drive a vehicle
10 in the roadway or out of the roadway.

11 One thing we've proved a hundred percent here.
12 Lynn and Nancy were not negligent in any way. They
13 would have had a right to be. They were just living
14 their life.

15 So, we get to his injuries. And you've heard all
16 the testimony about the broken arm, and how it affects
17 him, his left side, dominant side. His eye socket, you
18 will see in the pictures and you will have those
19 pictures that's been introduced into evidence of the
20 scene, my client, and the damages, at least the medical
21 expense, and some of the expenditures. And then you
22 will have to go back and first make a decision
23 ,regardless. It's still your decision as to liability
24 here.

25 If you find for the Plaintiffs on negligence,

1 meaning the Defendants should compensate them for what
2 he did, then you must turn your attention to damages.
3 And he's going to charge you on these elements of
4 damages as to what my client is entitled to.

5 Now, this is Ernest Cobb's damages. We've got the
6 claim for loss of consortium. That's for the wife, the
7 spouse. It upsets the whole household, it upsets you,
8 it interferes with marital relationships, something this
9 serious, this type of damage.

10 Right now let's talk about what's right here.
11 These are the medical bills that they incurred or will
12 incur as a result of what happened up there at the
13 Head's Superette that day: \$77,303.52 till today.
14 They've had to go to and from doctors all this period of
15 time, and they've stipulated that, and we just
16 calculated mileage according to the IRS rate. It came
17 up \$314.58.

18 Now, he was out of work from about 7-5-2007 to
19 10-15-2007, and Nancy says he lost about \$4,000 in
20 income. If he didn't work, didn't get paid.

21 But then he returned to work. We don't have a
22 person who got hurt and is laying down and said, Hey, I
23 had this happen to me and give me the world. But he
24 went back to work and he tried and he tried and he
25 tried, but he couldn't do it. So, finally Dr. Gardner

1 says, there's nothing else we can do. I got to take him
2 out. He's not safe. He's can't do this with his mental
3 deficits, his emotional state, anxieties, frustrations
4 render him incapacitated. He's totally impaired.

5 And then we had Dr. Thompson come in and give you
6 the computation. The law requires us to do all that.
7 He put some higher numbers on the board and he talked
8 about investments and he talked about discount rates.
9 Then he brought them back and he says, \$175,248 is what,
10 if he could have continued to work, his work life, to
11 age 66 and 4 months, he would have earned enough money
12 that if you reduce it to present value, this is the
13 number.

14 Now, what that means is if he's given that right
15 now and put it in a boat and he's got some invested, so
16 he's got earnings coming in and he's taking out what he
17 would otherwise spend because he needs that money in
18 order to live. What he's saying is that if you put the
19 money in and you take the money out, put money in and
20 taking it out, according to what he's been earning and
21 spending, that at the end of that time, when the period
22 is over, you've got nothing in the bowl. It washes.

23 But again, if you give him money, he gets it now.
24 That's what the judgment is. So, obviously, if he had
25 continued to work, he'd get paid that in the future so

1 that's why you bring it back and you do this
2 computation.

3 So that leaves, that puts \$257,946.10 as his
4 damages for the things that he's actually lost
5 economically. Plus we've got some special damages, like
6 permanent impairment, his pain and suffering, and future
7 medical costs and future pain and suffering. Loss of
8 quality of life. How does that affect him?

9 This is easy. We make a computation, we got
10 numbers.

11 This is difficult, because it's left solely in your
12 hands to determine what that's worth based on what
13 you've heard about their life, about the effect on their
14 life, and what do you think that has to do?

15 Pain and suffering, mental and physical? You can
16 assign a value to that. That's totally up to you all,
17 what you put in there.

18 This future medical cost. He's not gonna have a
19 lot. But he has headaches three times a week, terrible
20 right now; but he's taking over-the-counter stuff.
21 Whatever you think is fair for over-the-counter stuff?

22 And he's still going back to see Dr. Gardner and
23 will be for a while. I understand he's got an
24 appointment with him in six months, he testified to
25 that. And Dr. Gardner I think is charging him about

1 \$179 a visit.

2 But he will have some. And then, of course, is
3 future pain and suffering. He was told I think that
4 24.87 years of his life expectancy. 24.87 or something
5 like that. The Judge will tell you the life expectancy
6 according to the evidence. So we assume that he's gonna
7 live that long, that's what we can reasonably assume.
8 He's gonna have to lot to deal with with these
9 impairments, the fact that he's gonna be frustrated, he
10 can't work, he can't do anything. He's gonna be saddled
11 with that 24 years minimum. Of course, if he lives
12 longer, if he beats the life expectancy table, it's even
13 worse.

14 But y'all get to assign this down here ---

15 (A juror starts coughing.)

16 (Discussion off the record.)

17 A JUROR: I'm okay.

18 THE COURT: Just give her the water, and if she
19 needs it, she can use it.

20 A JUROR: Thank you. It's passing.

21 MR. BRANDT: I suggest -- I can't determine that
22 for you. I know what I would put in there. But I
23 suggest to you this figure down here ought to at least
24 be two or three times that. Then you add that together.
25 To do that you're up to about three-quarters of a

1 million dollars in damage, or more, or a million. But
2 you are not limited by what I say, you are limited by
3 your conscience.

4 Then we have the claim of Mrs. Cobb. And her claim
5 is loss of consortium, how she took time off with her
6 husband and all that to be in the hospital for two
7 weeks, follows him. We haven't told you about that.
8 That's insignificant. We'll deal with that. This is
9 where the real damage is, this household.

10 But she has difficulty now -- they have difficulty
11 in their marriage. They don't talk to each other like
12 they once did. And the Judge will give you the elements
13 that you are to consider in the loss of consortium
14 claim. Loss of society, the services, the disruption in
15 the marital relationship. What's that worth? In a good
16 marriage, I guess it's worth a lot. In a bad marriage,
17 I guess it's not worth a whole lot. Helping someone for
18 a long, long time. And I suggest that that's where a
19 substantial sum goes.

20 The Judge will give you a verdict form. He will
21 explain that verdict form to you, and listen to him as
22 he goes on. Again, I'll submit to you, you listen to
23 the Judge, you listen to his charges on the law, because
24 that's his job. But if that evidence, anything about
25 this sudden emergency, this syncope episode that caused

1 him to do this is out, it's not to be considered. It's
2 no excuse. He didn't make it out.

3 Again, I thank you. I have the burden of proof,
4 the Plaintiff does. Mr. Moseley will address you now
5 and with his argument, and then I'll have a chance to
6 address you for the last time. I thank you again for
7 your kind attention. I appreciate it.

8 Closing Argument on behalf of the Defendants:

9 MR. MOSELEY: The receiver for Wofford College was
10 standing in the end zone when the ball was kicked off
11 and then the ball came to him and he caught it and he
12 forgot to take a knee. He handed the ball to the
13 referee and he walked off the field. The referee didn't
14 blow the whistle and the Northern Iowa defender fell on
15 the ball and got a touchdown and that meant that Wofford
16 lost the game, they lost the game by that touchdown.

17 Now, the reason I'm -- it's not a football story.
18 It involves a referee. The referee was standing there
19 and saw it all happening. The referee, he saw him put
20 the ball down, the receiver brought the ball over to him
21 and the referee didn't blow the whistle because he knew
22 the rules. The rule said the play is still going until
23 he hits a knee or somebody tackles him. And so the ball
24 was live, and the referee knew the rules and he applied
25 the rules. It was very difficult for him because it

1 meant that the game was gonna shift based on this call,
2 but he still made the call based on the rules.

3 Now, the rules here, you're the referee, and you're
4 gonna get some rules and the Judge is gonna tell you
5 what the rules are. And you have already sworn your
6 oath to follow those rules. So you're gonna have your
7 opportunity here in just a little bit to decide this
8 case based on those rules.

9 So that's where you are. You are right where that
10 referee was. And so you've got to filter all the
11 evidence and make decisions based on the rules that the
12 Judge gives you.

13 Now, Mr. Brandt said that there was one innocent
14 party here. I think the evidence says there's two.
15 Because we certainly know that Mr. Cobb was minding his
16 own business, absolutely, and he was injured,
17 absolutely. But you have not heard any evidence from
18 that witness stand that Mr. LaFoy did anything wrong.
19 Mr. LaFoy was driving his vehicle and an accident
20 occurred.

21 Now, Mr. Brandt talked to you like an accident
22 , automatically means that somebody recovers. That's not
23 the law. The judge is gonna tell you that's not the
24 law. There are accidents that happen all the time that
25 don't result in a recovery for somebody. Your house may

1 burn down. Well, just because something happens doesn't
2 mean that you recover for that. You might get injured
3 because a machine hurts you. You were working on a lawn
4 mower or something and something happens. But just
5 because somebody is hurt doesn't mean somebody has to
6 pay.

7 We certainly have that mentality but that's not
8 what the Judge is gonna charge you. And so you've got
9 to find the issue of negligence before you get to the
10 damages that Mr. Brandt has talked about.

11 So just because there is an accident doesn't mean
12 there is a recovery. We certainly have an accident and
13 certainly have injuries, but it doesn't mean that there
14 has to be a recovery.

15 So let's think about the evidence that you heard in
16 this case. You know, Officer Samples got there just
17 minutes after the accident had occurred, and Mr. Brandt
18 gave him a hard time about not being able to remember
19 things that happened five years ago. Well, I can't
20 remember what happened yesterday, much less five years
21 ago.

22 But think about what Officer Samples said. He's
23 just doing his job, he's looking at the scene, he's
24 evaluating all the information that he's gathering at
25 the scene. All right. So think about Officer Samples.

1 Think about Mr. LaFoy.

2 Now, it is a pleasure for me to represent Dan
3 LaFoy. He's here with his family members, and it is a
4 pleasure to represent this gentleman. He, a World War
5 II vet, has just had a remarkable life. He's 81 years
6 old back then, he's driving home. And he tells you he's
7 got to go to the bathroom and then there's an accident.
8 Okay.

9 Now, there's no evidence that he was driving too
10 fast, there's no evidence that -- there was some
11 testimony that he had half a drink at lunch. There's no
12 evidence that he was impaired or in any way affected by
13 that. So all he said is he's got to go to the bathroom.

14 Now, Mr. Brandt said he was gonna try to drive
15 between those gas tanks. I don't think that's what his
16 testimony was. I think his testimony was he was gonna
17 drive around the gas tanks because there was a truck
18 between the gas tanks. But I think his testimony was he
19 was driving around. So I don't think that's a fair
20 thing.

21 But then Mr. Brandt says that this World War II vet
22 in a matter of seconds after the accident made up this
23 story, that he just made it up, like he was in the
24 accident, he's dazed from the accident, and he somehow
25 has the ability within two minutes after the accident to

1 come up with this story.

2 Now, that's not realistic. That's not what
3 happened. That's pure speculation. You heard from
4 Dr. Hanke. Mr. Brandt gave her a hard time, too. And
5 then Mr. Brandt just told you to just wipe it out.
6 Well, he tried to wipe it out then. He gave her a hard
7 time. But the Judge hasn't told you to wipe it out, so
8 you should consider that for whatever issues that you
9 have to decide in this case.

10 You heard from Dr. Wheeler. Now, Dr. Wheeler's
11 deposition was the one we read, and it was very short.
12 But what it said was that there was no medical reason
13 that Dan LaFoy shouldn't have been operating a vehicle.
14 He's as sharp as he can be, he's in excellent health,
15 and there's no reason he shouldn't have been on the
16 road. So that's what Dr. Wheeler said. So again, we've
17 got no evidence of negligence, no evidence of negligence
18 on the part of Dan Wheeler [sic].

19 Now, your verdict will certainly have an effect on
20 the Cobbs and Mr. Brandt is gonna make sure you hear all
21 about that. But he's not the only one in this room
22 that's gonna be affected by your verdict. This also
23 will have long-term effects on Mr. LaFoy one way or the
24 other.

25 You're gonna have a verdict form when the time

1 comes. You're gonna have a form that you fill out where
2 you have two questions to answer, and basically in the
3 first question you will find for the Plaintiff or the
4 Defendant, and the second question you will find for the
5 Plaintiff or the Defendant, and that's as to negligence
6 as to Mr. Cobb, and then you will have the second
7 question on the loss of consortium. So you will have
8 the two opportunities to fill those out.

9 And obviously our position, our contention will be
10 that there are no damages, and consistent with the
11 Judge's charge on damages, that you would check the
12 second box in each question.

13 But if you do get to consider damages, if you do
14 get to that point, then what I would want you to do is
15 what you would do in real life, okay? I live on a farm
16 with my wife and children and we have seven kids, okay?
17 And you probably have immediately reached the conclusion
18 that my wife and I are crazy.

19 But one thing we have to do is when we hear
20 somebody hollering, we figure out, who is that, and then
21 we've got thoughts about, okay, this person has a real
22 high tolerance for pain and this person would tend to
23 whine, okay? So somewhere in that continuum we evaluate
24 how much urgency we need to put in it, okay? I've got
25 one child that has had, has been to the emergency room

1 for two broken bones and stitches in the past year and a
2 half, okay? So when he says he's hurt, we're getting
3 the car warmed up, okay? Because he's got a pretty high
4 tolerance for pain.

5 Now, I've got another child who tends to -- let's
6 just politely say we wouldn't take the same serious
7 approach if that person says they were hurt. And you've
8 got to do the same thing here, okay? You have very
9 little experience as far as this case. You've only seen
10 it for a very short period of time. But you got to look
11 in to what you got. So let's talk about the way the
12 Cobbs' case presents itself.

13 Now, don't get me wrong. The Cobbs are nice folks.
14 But Mr. LaFoy is a nice guy, too, and so we've got to be
15 fair. Now, when Mr. Cobb was testifying, he didn't have
16 any problems answering his lawyer's questions. He had a
17 lot of problems answering my questions. Now, that says
18 one of two things. That says he can turn it on or turn
19 it off, or he had been prepared so well for his lawyer's
20 questions, that he was able to answer them. Now,
21 neither one of those I like. But that's what you heard.
22 He struggled with my questions.

23 Now, you've got to figure out where he fits in that
24 continuum, too. You heard him say that he had a severe
25 brain injury. Those were his words. That's not what

1 Dr. Gardner said. Dr. Gardner said he had mild moderate
2 brain injury. So you're starting to filter these
3 things.

4 As far as his lost earnings. And these are his
5 choices, but he's been underemployed his working life.
6 He was working four hours a day after the accident, he
7 was working less than that before the accident. So,
8 when you start looking at what's gonna start happening
9 10 or 12 years down the road, you are having to decide
10 today what damages well down the road are, and so you've
11 got to look at his history and figure that out.

12 Ms. Cobb, you got to evaluate her, too. Because
13 there's no question that she's a doting, loving wife who
14 loves her husband. But a couple of things that she said
15 you need to look at. She says that the roles are
16 reversed. Well, the roles were reversed before the
17 accident. She was the breadwinner before the accident.

18 You know, she was very involved in his medical
19 treatment. This is before the accident, too, when he
20 had cancer and he had this blood disorder. And don't
21 take this the wrong way, but she was his mom, not his
22 wife, in a lot of respects. But, you know, she would go
23 to the doctors' appointments with her husband, even
24 routine checkups and things like that. Dr. Gardner said
25 she made the appointments. And so she's very invested

1 in her husband and his medical treatment.

2 Now, Dr. Gardner made a point of saying that Mrs.
3 Cobb would argue about what activities he ought to be
4 involved or not involved in. And he could say he could
5 do something and she would say no. So there were some
6 interesting comments. When she was on the stand and we
7 were talking about Dr. Mallick's note about Mr. Cobb
8 being an irritable patient, she said a comment, Well,
9 I'm gonna find out about that. That gives you a little
10 look into where she's coming from.

11 She also said that Dr. Gardner said he would get
12 worse. Now, I don't recall hearing that. I don't
13 recall hearing Dr. Gardner saying he's gonna get any
14 worse. Now, you may have heard that. I didn't hear
15 that.

16 So, you know, she was a little irritated with
17 people trying to do their jobs. She fussed a little bit
18 because the ambulance wouldn't take her to the hospital
19 in the back while they were treating her husband. She
20 complained because her friends couldn't park close to
21 the accident because the police were keeping people
22 away.

23 She said that she has to tell Mr. Cobb how to
24 dress. Well, my wife and my daughters tell me how to
25 dress, too, and they usually don't like the way I choose

1 to dress. Now, that doesn't make them bad people,
2 certainly.

3 But when you are involved in an accident,
4 everything -- you have the tendency to make everything
5 in your life stem from the accident. So everything that
6 happens in your life is now because of the accident.

7 You heard about the preexisting conditions and
8 things that he had before the accident. You heard the
9 economist, Dr. Thompson, come and he testified that the
10 Plaintiff made more money after the accident than he did
11 before the accident. And he also made calculations,
12 this number, the \$175,000 assumes that Mr. Cobb would
13 never work again, will never do anything productive in
14 his entire life, okay?

15 Well, you heard he can cut grass and there are
16 other things that he can certainly do. You saw him.
17 He's able to get around, move around and do all sorts of
18 things. So he can certainly replace \$15,000 a year with
19 whatever he can do.

20 You heard the expert. He had his taxes messed up a
21 couple of times. But it's the logic that he gives you
22 that this, this 5 percent increase per year, I mean, I
23 don't think that's a realistic number, but that's the
24 kind of logic that sells, that causes people to rent TVs
25 by the week, okay? That's where this is coming from.

1 That's that logic. So don't buy into that.

2 As far as these medical expenses, we admit that's
3 what the bills are. The bills are what they are. You
4 may find that some of those aren't related. You've
5 heard the testimony. You heard the treatment he had.

6 The Judge is gonna charge you that to award damages
7 that are reasonably and medically necessary, so you can
8 figure that out.

9 One of the things that you've got is the strategy
10 of somebody like Mr. Brandt -- and Mr. Brandt and I get
11 along great and we have these cases all the time, so I'm
12 not dogging on him -- but one of the strategies here is
13 to try to create as many different pots as you can, and
14 the more pots you create, you as the Jury, you feel
15 obligated to put money in each pot, and at the end of
16 the day you've got a huge number, okay? So that's the
17 way to create a big verdict. Don't fall into that. And
18 make sure at the end of the day you do get into damages,
19 but your number is consistent with what you've heard
20 here in this case.

21 And Mr. Brandt threw out a number. I'll throw out
22 a number. And if you do get into damages, that 80 or a
23 hundred thousand dollars is plenty of money to satisfy
24 this case.

25 Now, I don't get to speak to you again because this

1 is the last time I get to talk. But Mr. Brandt will get
2 to talk to you again because the burden of proof is on
3 him. And so whatever he says, I'll have no opportunity
4 to rebut that. So I thank you for listening and I know
5 that you will have what my response would be as he's
6 talking to you.

7 Now, I've done my best to try to represent Dan
8 LaFoy in this case. And if I've done anything to offend
9 anybody, hold that against me, don't hold it against Dan
10 LaFoy. He's a great guy. You got to meet him for a
11 short period of time. So if I've done something and I
12 made one of you mad, don't hold that against him, hold
13 that against me.

14 I told you about the form that you're gonna have
15 when you get to the Jury room. You'll be able to take
16 these pictures and the evidence back with you. You will
17 have this form to fill out. And at that point you are
18 the referee with the hard decision to make. And so
19 you've got to make the decision that is consistent with
20 the rules that the Judge will give you and the facts
21 that you heard from that witness stand and by
22 deposition. And at the end of that, we're confident
23 that your verdict will be for the Defendant, Dan LaFoy.
24 Thank you.

25

1 Further Closing Argument on behalf of the Plaintiffs:

2 MR. BRANDT: If there is not negligence in this
3 case, then negligence doesn't exist in Oconee County.
4 Dan LaFoy operated his vehicle. He had a duty to
5 operate it safely and not injure others. He drove it
6 straight into that truck and it caused this damage. How
7 can anyone suggest to you that he did nothing wrong?

8 Mr. Cobb did nothing wrong. He was standing there
9 to put some gas in his truck. Wham. This is what's
10 happened.

11 I didn't create pots. He's talking about creating
12 pots. This is just what you lose. These are things
13 that the law says. These are the things that the law
14 says, that these are categories for you to consider and
15 decide if they sustained damages in these categories.
16 And I brought it to your attention right here:

17 Mr. LaFoy's service in World War II, I thank him;
18 being a Vietnam veteran myself, I really thank him. But
19 it doesn't excuse him and it doesn't excuse me anything
20 that I might do.

21 Yes. Mr. LaFoy handing the ball to the referee,
22 the game wasn't over, tried to make an interpretation of
23 the rule for the Defense. It didn't work. Says a
24 Wofford touchdown put him in the position he's in.

25 Mr. Moseley told you to filter all the evidence.

1 Yeah. Filter all that out. Where is the evidence, if
2 he did nothing wrong, that he didn't breach that duty?

3 Yes, the Samples investigation was no
4 investigation. And I've told you, at 35 miles an hour,
5 it could have been more. Samples didn't even check. If
6 he wants to criticize me criticizing Samples, maybe we
7 ought to take 35 miles an hour as Gospel. You try to
8 turn a 90-degree turn into somewhere at 35 miles an
9 hour. I say it makes for a wider arc. He didn't.

10 I've never had a lawyer come in here and tell this
11 Court anything other than, in my whole career, that it
12 was anything other than a pleasure to represent their
13 client. It is a pleasure. Lawyers, we do what we do,
14 some of us really like it. It's getting up in the
15 morning and going to work to a job that you like doing.
16 Mr. Moseley likes doing his job and I like doing mine.
17 And I can say it's a pleasure representing the Cobbs.

18 I didn't mean to tell you that he was trying to go
19 in between those two gas tanks, that he was trying to go
20 through here (pointing). He wasn't. He was trying to
21 go between the building and that gas tank is what I
22 said, right here (pointing). He was gonna turn and go
23 around the building. He wasn't trying to go through
24 here. I didn't mean to, I didn't mean to imply that he
25 was going between those gas tanks. He was going there

1 (pointing). That's what he said.

2 So, when I said around the gas tank, I meant going
3 around the store rather than the gas tanks, between the
4 store.

5 And it doesn't matter whether he imagined he
6 blacked out or not or whatever. He had a duty to keep
7 that vehicle in safe operation. But that's not an issue
8 that the Judge is gonna tell you. He's not gonna tell
9 you this. The defense is gone. You can't excuse it.
10 If you do, then what's the effect of that? If you say
11 that's the law, and that's the way we determine cases in
12 Ocone, when you have an accident, all you need to do is
13 jump out of the car and say "I blacked out," and you're
14 excused.

15 He told you that the verdict would affect
16 Mr. LaFoy, too, and it will. It will really affect the
17 Cobbs. But well, wait. The Cobbs got affected by the
18 accident commencing. Mr. LaFoy will walk out of the
19 courtroom and continue to live his life. Mr. Cobb
20 hasn't been able to live his life that way and Nancy
21 hasn't been able to live her life that way since the
22 accident, the way they used to.

23 A somewhat veiled accusation that maybe Mr. Cobb
24 was well rehearsed by me to answer questions and he
25 could turn it on and off, his ability to answer the

1 questions. Don't pay attention to that.

2 Pay attention to Dr. Gardner. And Dr. Gardner told
3 you the extent of his injuries and how that affected
4 him; and we told you how it's affected Mrs. Cobb and
5 him.

6 We didn't claim a breadwinner reversal here. Nancy
7 Cobb in her employment makes more and was making more
8 than Lynn. But it was income which helped support the
9 household, and it wasn't much. We've got people coming
10 in saying, Hey, he could have gone back into the
11 industry somewhere, to a plant and made \$30,000 a year.
12 He could, but he can't now. And all we asked for was to
13 give him what he would have otherwise earned if he
14 stayed in the employment that he was in, the School
15 District, driving a school bus, a job he dearly loved,
16 and as Dr. Gardner said, he identified with and was
17 proud of.

18 Then, to have these figures up here, right here.
19 You've got all this down here, but I'd submit to you,
20 you put something in there, a lot. It comes out to
21 \$257,946.10, and he has the audacity to tell you that
22 eighty to a hundred thousand dollars would be
23 sufficient. If you say so. Can't do nothing about
24 that. But I submit to you that that is far short of
25 what that verdict ought to be. Thank you.

1 The Court's Charge to the Jury:

2

3 THE COURT: Madam Forelady, ladies and gentlemen of
4 the Jury, it now becomes my duty to charge you, which
5 simply means to instruct you on the law which applies to
6 this case. This is an action in which the Plaintiff
7 claims or alleges or claims that they have suffered
8 damages or injuries for which the Defendant is
9 responsible.

10 By the Constitution and the law of South Carolina
11 you, the Jury, are the sole judges of the facts and
12 evidence in this case. For this reason I am not
13 permitted to suggest any opinion or feeling I may have
14 as to the facts and evidence. Nor am I permitted to
15 indicate how I may feel about the merits of the case or
16 which parties should prevail and I do not do so.

17 Moreover, you are the sole judges of what the
18 testimony was, not the argument of counsel, which is not
19 evidence.

20 In determining what the facts in the case are you
21 must necessarily pass upon the credibility, which simply
22 means the believability of the witnesses and the value
23 or weight to be given their testimony. You alone must
24 decide the force and effect and the truth of their
25 testimony. In making this decision there are many

1 things you should take into consideration. The
2 appearance and manner of a witness on the stand,
3 sometimes referred to as the demeanor of a witness. Was
4 the witness forthright or hesitant? Was the witness's
5 testimony consistent with other testimony and statements
6 of the witness, or did it contain discrepancies? What
7 was the ability of the witness to know the fact about
8 which he or she testified? Did the witness have a cause
9 or reason to be biased and prejudiced in favor of
10 testimony he or she gave? Was the testimony of the
11 witness corroborated or made stronger by other testimony
12 and evidence, or was it made weaker or impeached by such
13 other testimony and evidence?

14 As jurors you have the right to believe a small
15 portion of a witness's testimony and discard the larger
16 or vice versa. You may believe all of a witness's
17 testimony or none. You may believe the testimony of a
18 single witness against that of many witnesses or the
19 other way around. Most certainly, you do not determine
20 the matter of credibility or believability by counting
21 up the number of witnesses who may have testified on
22 behalf of the parties.

23 Now, the rules of evidence ordinarily do not permit
24 witnesses to testify to opinions or conclusions. An
25 exception of this rule exists for witnesses we call

1 expert witnesses, witnesses who by education and
2 experience have become an expert in some art, science,
3 or profession may give an opinion as to the subject the
4 witness claims to be an expert in and also give the
5 reasons for the opinion.

6 You should consider any expert testimony given by a
7 witness, and like any other witness, give it the weight
8 you think is that it should deserve. If you decide that
9 an expert witness's opinion is not based on sufficient
10 education and experience or if you decide that the
11 reasons given in support of the opinion is not sound; or
12 that the opinion is outweighed by other evidence, you
13 may disregard the opinion entirely. An expert witness's
14 testimony is to be given no greater weight than that of
15 any other witness's simply because the witness is an
16 expert. You do not have to accept an expert's opinion
17 even though it is uncontradicted.

18 Now, during the trial of this case we have had
19 testimony by way of depositions of witnesses taken
20 outside of the courtroom. That witness may or may not
21 appear personally before you. The deposition was taken
22 in a manner prescribed by law and you will you consider
23 the testimony from that deposition just as you would if
24 the witness were here, upon the stand and testifying.
25 You may take this deposition testimony in connection

1 with all the other testimony and you assess the
2 credibility of the witness from anything that is in the
3 record that will aid you in doing so. If you consider
4 the deposition evidence along with the testimony of
5 other witnesses who appear in person and determine from
6 all the evidence in the case whether by witnesses
7 present or by deposition or whether by exhibits in the
8 case what the truth of this front controversy is
9 according to the facts which you find them to be, and
10 then apply the law as I give it to you. Through this
11 entire process you have but one single objective, and
12 that is to seek the truth regardless from what witness
13 the testimony may have come.

14 I remind you that during the trial you and I have
15 certain duties to perform. As the Trial Judge it is my
16 responsibility to preside over the trial of this case
17 and I also have the duty to rule on the admissibility of
18 the evidence offered during the trial. You are to
19 consider only the evidence before you. If there is any
20 testimony ordered stricken from the record during the
21 trial, you may disregard that testimony. You are to
22 consider only the testimony which has been presented
23 from the witness stand and exhibits which have been made
24 a part of the record in this case and any stipulations
25 of counsel.

1 I have the additional duty to charge you the law
2 applicable to the case. It is your duty as jurors to
3 accept that law as I state it to you. If you have any
4 idea as to what the law is or what the law ought to be,
5 and it does not agree with what I tell you the law is,
6 you must disregard that idea because you were sworn to
7 accept the law and apply that law exactly as I state it
8 to you.

9 In every case tried in this court before a Jury the
10 Jury becomes the sole and exclusive judge on the facts.
11 A Trial Judge cannot comment on or make any statement
12 about the facts in a case. Since you are the sole
13 judges of the facts do not think by anything I have said
14 during the trial that I have an opinion about the facts
15 of the case. The law does not allow me to have an
16 opinion about the facts.

17 Now, the burden of proof in this case is by a
18 preponderance of the evidence. A preponderance of the
19 evidence simply means that the greater weight of the
20 evidence, it is the evidence which as a whole shows that
21 the facts sought to be proved are more likely to be true
22 than not true. Of course, there is no other way to
23 weigh the evidence except through the exercise of your
24 good common sense and judgment. It is entirely a mental
25 process. The evidence to which you should give the most

1 weight is that which convinces you of its truth
2 regardless of from whom, which source it comes.

3 The preponderance of the evidence is not determined
4 by the number of witnesses. Instead, it must be
5 determined by the greater weight of all of the evidence.

6 There are two types of evidence generally presented
7 during the trial: Direct evidence and circumstantial
8 evidence. Direct evidence is the testimony of a person
9 who claims to have actual knowledge of a fact, such as
10 an eyewitness. It is evidence which immediately
11 establishes the main fact to be proved.

12 Circumstantial evidence is proof of a chain of
13 facts or circumstances indicating the existence of a
14 fact. It is evidence which immediately establishes
15 collateral facts from which the main fact may be
16 inferred. Circumstantial evidence is based on
17 inference, not on personal knowledge or observation. It
18 is proof that does not actually establish the fact in
19 question, but that asserts or describes something else
20 from which you may reasonably infer the truth of a fact
21 or at least reasonably infer an increase in the
22 probability that the fact is true. For circumstantial
23 evidence to be sufficient to warrant the finding of a
24 fact, the circumstances must lead to that fact with
25 reasonable certainty. The facts and circumstances

1 should be considered in light of ordinary experience and
2 common sense. The existence of a fact cannot be based
3 on speculation, surmise, or conjecture. The law makes
4 absolutely no distinction between the weight or value to
5 be given either direct or circumstantial evidence, nor
6 is a greater degree of certainty required in
7 circumstantial evidence than of direct evidence.

8 Now, the Plaintiffs claim the Defendant was
9 negligent and should compensate the Plaintiffs for
10 injuries suffered as a result of the Defendant's
11 negligence. In order to prove the Defendant's
12 negligence, the Plaintiffs must prove by a preponderance
13 or greater weight of the evidence four things.

14 First, the Plaintiffs must prove by preponderance
15 or greater weight of the evidence that the Defendant
16 owed the Plaintiffs a duty of care.

17 Next, the Plaintiffs must prove by a preponderance
18 or greater weight of the evidence that the Defendant
19 breached that duty by a negligent act or omission.

20 Negligence means that a person has done something that a
21 reasonable person would not have done or has failed to
22 do something that a reasonable person would have done in
23 the same situation.

24 Plaintiffs must also prove by a preponderance of
25 the evidence or greater weight thereof that the

1 Plaintiffs suffered damages as a proximate result of the
2 Defendant's breach of duty.

3 Finally, the Plaintiffs must prove by a
4 preponderance or greater weight of the evidence that the
5 damages were proximately caused by the Defendant's
6 breach of duty. Now, proximate cause is something which
7 produces a natural chain of events, which in the end
8 brings about the injury. It is the direct cause of the
9 injury.

10 To prove that the Defendant's negligence
11 proximately caused the Plaintiffs' injury, the
12 Plaintiffs must first prove causation in fact, that is
13 proof showing that the injury would not have occurred
14 but for the Defendant's negligence.

15 The Plaintiffs must also prove legal cause. Legal
16 cause is proven by showing that the injury was
17 foreseeable. This means that the injury occurred as a
18 natural and probable consequence of the Defendant's
19 negligence. The Plaintiffs must prove that some injury
20 from the Defendant's negligence was foreseeable, but not
21 have to prove that the particular injury that occurred
22 was foreseeable. However, the Defendant cannot be held
23 responsible for things which he could not have expected
24 to happen.

25 Proximate cause does not mean the only cause. The

1 Defendant's act must be the proximate cause of the
2 Plaintiffs' injuries if it was at least one of the
3 direct concurring causes of the injury.

4 Now, our common law rules of the road in South
5 Carolina require the operator of a motor vehicle to use
6 the same care that it would have if it was exercised by
7 a person of ordinary reason and prudence if that person
8 was driving the same vehicle same time and place and
9 under the same circumstances and conditions. A person
10 using the public roads in this state owes an urgent duty
11 to keep a proper lookout for other persons or objects on
12 the highways.

13 In exercising reasonable care a person must be -- a
14 person who fails to keep a proper lookout or fails to
15 watch for a person of ordinary care and prudence would
16 have been guilty of negligence. A person operating a
17 motor vehicle on a public highway also owes an urgent
18 duty to keep the vehicle under proper control so as to
19 be able to slow down, stop or turn such vehicle in order
20 to avoid colliding with other vehicles, pedestrians, and
21 objects lawfully where they are. The operator of a
22 motor vehicle is required to use the same care that
23 would be used by a person of ordinary reason and
24 prudence if that person were driving the same vehicle at
25 the same time and place and under the same

1 circumstances.

2 The driver of an automobile also has a duty to keep
3 that automobile under proper control so the driver is
4 able to slow down, stop, and turn the automobile in
5 order to avoid colliding with other vehicles,
6 pedestrians and other objects lawfully where they are.

7 Actual damages are to compensate for the
8 Plaintiffs' injuries or loss and to put the Plaintiffs
9 as near as possible in the same position that the
10 Plaintiffs were in as they were in before the incident
11 occurred. In other words, actual damages would be the
12 actual losses and expenses which the Plaintiffs have
13 suffered because of the Defendant's negligence.

14 The Plaintiffs must establish actual damages by the
15 preponderance of the evidence. Actual damages are
16 compensation for injuries which are the natural or
17 proximate result of the conduct of the Defendant.

18 In determining the amount of compensation for
19 injuries suffered by the Plaintiffs as a result of the
20 Defendant's negligence, it is proper to consider the
21 reasonable expenses incurred for all necessary medical
22 treatment, the loss of time from work and income
23 resulting therefrom, the impairment of the injured
24 person's ability to work and earn a livelihood. The
25 character of the injury and the amount that would be

1 necessary to make the injured person whole as respects
2 permanent injuries. Physical and mental pain and
3 suffering endured by the injured party. Such pain and
4 suffering as it is reasonably certain will or of
5 necessity result in the future from the injury.

6 Now, pain and suffering compensates the Plaintiffs
7 for physical discomfort and emotional response to the
8 sensation of pain caused by the injury itself. There is
9 no definite standard to compensate the Plaintiffs for
10 pain and suffering. You have the authority to determine
11 the amount, if any, to be allowed for pain and
12 suffering, using calm and reasonable judgment to ensure
13 that the damages are just and reasonable in light of the
14 testimony and evidence presented in the case. The loss
15 of enjoyment of life compensates the Plaintiffs for
16 limitations on the Plaintiffs' ability to participate
17 and derive pleasure from the normal activities of daily
18 life. Mental suffering, apprehension, shock, fright,
19 emotional upset, humiliation, and anxiety, either
20 present or expected in the future, can be properly
21 considered as an element of damages. The amount of
22 damages for mental suffering cannot be exactly measured.
23 The Plaintiffs must prove the expenses caused by an
24 injury are necessary and reasonable. Actual damages for
25 a Plaintiff who has been physically injured include the

1 pain and suffering, both past and future, as well as
2 mental anguish, impairment and disfigurement.

3 The Plaintiffs may also claim lost wages due to the
4 absence from work, reduced earning capacity or mobility
5 in the future. To determine the amount of compensation
6 for personal injuries, it is proper to consider past and
7 present aspects of the injury. This would include
8 physical and mental pain and suffering, expenses
9 incurred with necessary medical expenses, loss of time
10 and income resulting from the impairment or the ability
11 to work and earn a livelihood. The loss of enjoyment of
12 life suffered as a result of the injury, and any other
13 losses reflected by the character of the injury.

14 The injured party may recover from those future
15 damages which are reasonably sure to result in damages.
16 The principle underlying compensation for future damages
17 is that only one action can be brought and therefore
18 only one recovery had. It is proper to include in the
19 estimate of future damages compensation for loss of
20 capacity to work or attention to the Plaintiffs'
21 ordinary business, medical expenses, pain and suffering
22 which will with reasonable certainty result. Any future
23 damages must be reasonably calculated to have resulted
24 from the alleged injury or damages sustained in the
25 case. Future damages must be reduced to their present

1 , cash value. Loss or impairment of earning capacity
2 resulting from injuries to the Plaintiffs is a proper
3 element of damages to determine the amount of damages
4 due to the Plaintiffs for loss of impairment or earning
5 capacity.

6 In doing so you must consider the following. One,
7 the loss of future earning power. This requires you to
8 consider all matters that relate to the issue of any
9 impairment. The effect which the impairment will have
10 on the Plaintiff's capacity to work, and the extent to
11 which the impairment would impair the Plaintiff's
12 earning capacity, and the present value of all losses
13 due to the Plaintiff's impaired earning capacity and
14 physical pain and suffering as reasonably certain will
15 result in the future from injuries to the Plaintiff and
16 the evidence of what the Plaintiff has previously earned
17 when employed is a factor on which to base any loss or
18 impairment of earning capacity. In awarding damages for
19 loss of impairment to earning capacity, the Plaintiff
20 must recover for the loss of, or decrease in his earning
21 capacity during his entire life expectancy. In
22 determining loss of earning capacity which may result in
23 the future, the fact that the Plaintiff is making the
24 same or more earnings since the injury is only one
25 factor to be considered. If you determine the Plaintiff

1 is entitled to damages for impairment of earning
2 capacity, you must use the life expectancy table as a
3 guide. If at all -- excuse me -- if you find that the
4 Plaintiff was permanently injured and as a result of
5 Defendant's actions, you must then decide if, at all,
6 that injury, or how that injury will affect the rest of
7 that Plaintiff's life.

8 A person's life expectancy is determined by a life
9 expectancy table in South Carolina as part of the laws
10 of this State. The life expectancy table is only an
11 estimate of the probable average remaining length of
12 life of all persons in our State of a given age.
13 Mr. Cobb is a 56-year-old male with a life expectancy
14 according to the Life Expectancy Table, of 23.94 years.
15 The fact is to be considered by you along with any other
16 facts and circumstances and evidence bearing on
17 Mr. Cobb's life expectancy, including habits and health
18 at the time of the injury, and assigning the amount of
19 damages to be awarded to the Plaintiffs.

20 Now, the Defendant claims that the Plaintiff had a
21 preexisting injury or condition prior to the date that
22 the Plaintiff claims the Defendant injured him. If you
23 find that the Plaintiff received an injury as a result
24 of the negligence of the Defendant and is entitled to
25 recover for that injury, the fact the Plaintiff had a

1 preexisting injury or condition would not prevent the
2 Plaintiff from recovery. The Defendant is responsible
3 for all ill effects which, considering the Plaintiff's
4 condition of health when the Plaintiff was insured,
5 naturally and necessarily follow the injury. The
6 Defendant takes the Plaintiff as the Plaintiff is found,
7 whether the Plaintiff is in perfect health, poor health,
8 or somewhere in between. The Defendant's liability is
9 in no way lessened because of the fact that the injury
10 would not have resulted, or would not have been as
11 serious had the Plaintiff been in good health or the
12 injuries were aggravated and rendered more difficult to
13 cure by reason of the fact the Plaintiff was not in good
14 health.

15 In other words, if the presence of a preexisting
16 injury is aggravated or prolongs the injury and
17 increases the damages, the Plaintiffs should be
18 compensated for the increased or added damages. A
19 person with a preexisting injury or condition is not,
20 however, entitled to compensation for the preexisting
21 injury or condition. If the problems are the result of
22 the natural worsening of a preexisting injury or
23 condition, then the Plaintiff would not be entitled to
24 be compensated for those problems.

25 Now, Mrs. Cobb claims a loss of consortium because

1 of the injuries received by her spouse. The
2 companionship and society of a spouse are not articles
3 of commerce which can be weighed or measured or bought
4 and sold. No expert is competent to testify to their
5 value, the consideration on which they are given is not
6 monetary. But the Plaintiffs are entitled to
7 compensation and money for their loss. The amount in
8 compensation to be determined by you is not from the
9 evidence of value but from your own observation,
10 experience, and knowledge, conscientiously applied to
11 the facts and circumstances of the case. The Plaintiff
12 is entitled to recover the value of those services of
13 her spouse which were lost, including loss of her
14 spouse's society and companionship in the home. The
15 Plaintiff is also entitled to recover any expenses
16 incurred by or care and treatment of a spouse because of
17 illness or bodily harm suffered by spouse and for any
18 medical expenses which the Plaintiff has incurred.

19 Now, a Plaintiff is never entitled to recover
20 conjectural or speculative damages. But if you find the
21 Plaintiff is entitled or the Plaintiffs are entitled to
22 a verdict for actual damages, your verdict should
23 include an amount to recover any past, present, or
24 future damages which are proximately caused by the
25 Defendant. Any future damages must be reasonably

1 certain to occur in the future and as a result of the
2 Defendant's act. Actual damages need not be proven to a
3 mathematical certainty or be based on evidence of the
4 precise amount of damages the Plaintiffs suffer.
5 Instead, the evidence must allow you to determine what
6 amount is fair, just, and reasonable.

7 Now, Madam Forelady, ladies and gentlemen of the
8 Jury, you have been selected as fair jurors sworn to
9 impartially try and determine the facts of this case,
10 and when you comply with your oath to do so, then no one
11 will have the right to criticize your verdict and you
12 will have fully discharged your duty as jurors.

13 You should not be influenced by opinions or
14 expressions of opinions, if any, which you heard on the
15 outside, but you are to decide this case according to
16 the testimony that you have heard from the lips of the
17 sworn witnesses, along with the other evidence that has
18 been introduced. As I said earlier, you are the judges
19 of the facts in this case, and you are to determine
20 whether the burden of proof has been met by the claims
21 of the Plaintiffs based upon the testimony and evidence
22 presented in the trial and after applying the law as
23 I've given it to you. Under the oath you took you swore
24 to try this case based only and solely on the testimony,
25 evidence, and law presented and heard in this courtroom.

1 It is your duty to lay aside all bias or prejudice or
2 sympathy you may have in reaching your verdict. You
3 have no friends to reward or enemies to punish in this
4 case. The word, I might note, "verdict" is taken from
5 the Latin term "*veredicto*" which means to speak the
6 truth. Abide by your oath and return a verdict which
7 does speak the truth.

8 Now, Madam Forelady, I have prepared a verdict form
9 for you to use in your deliberations. Do remember that
10 the verdict of the Jury must be unanimous. That means
11 that all 12 members of you must agree to each verdict.
12 And as you will notice, Madam Forelady, we have on the
13 first cause of action, that being on Ernest L. Cobb's
14 cause of action for negligence, we have two possible
15 verdicts: We, the Jury, unanimously find for the
16 Plaintiff, Ernest L. Cobb against the Defendant, Dan M.
17 LaFoy, actual damages in the amount of blank dollars.
18 Now, if that is your unanimous verdict, you would check
19 the appropriate blank and then fill in the amount of
20 those damages that you unanimously find in words and not
21 figures as you would a check. You can put figures in
22 the parentheses where it's provided.

23 Or: We, the Jury, unanimously find for the
24 Defendant, Dan M. LaFoy. Again, depending on what your
25 verdict is in this case, in this first cause of action,

1 it must be unanimous. Madam Forelady, you are the one
2 that will check on the appropriate box and complete any
3 response that the Jury unanimously reaches.

4 Now, as to the second cause of action on Nancy
5 Cobb's cause of action for loss of consortium: We, the
6 Jury, unanimously find for the Plaintiff, Nancy Cobb,
7 against the Defendant, Dan M. LaFoy, actual damages in
8 the amount of blank dollars. If that is your unanimous
9 verdict, fill in the amount in words and not figures or,
10 but you may also put your figures in parentheses.

11 Or the other verdict would be: We, the Jury,
12 unanimously find for the Defendant, Dan M. LaFoy.
13 Again, as in the first cause of action, whichever
14 verdict it is must be unanimous and you, Madam Forelady,
15 are the one who must check the appropriate box filling
16 in any necessary blanks.

17 Once the verdict form is complete, you will sign
18 your name, knock on the door, and we will return and
19 receive your verdict at that time.

20 Now I'm going to ask you to return the verdict form
21 to the bailiff and retire from the courtroom to the Jury
22 room. However, do not begin your deliberations until
23 I've sent in the verdict form and all of the exhibits in
24 the case. Once I send in the verdict form and exhibits,
25 you may begin your deliberations, and once you have

1 reached a verdict on both causes of actions, knock on
2 the door and we will, as I say, receive your verdict.

3 Once again, I'm going to ask you to retire to your
4 Jury room. Do not start deliberating until I send in
5 verdict form and the exhibits.

6 Madam Alternate, you are to stay with us.

7 But members of the Jury, retire to the Jury room
8 and I will send in the exhibits and you may begin your
9 deliberations.

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

12 THE COURT: Are there any exceptions or requests
13 for further charges from the Plaintiff?

14 MR. BRANDT: Nothing other than what I've
15 already --

16 THE COURT: What has already been done. Rulings in
17 the case?

18 MR. BRANDT: Yes, sir.

19 MR. MOSELEY: Your Honor, you did charge lookout.

20 THE COURT: I did. I apologize. It was in two
21 places and I forgot to mark it out on the first place.
22 I did not spend that much time on it and I trust that --
23 I don't think it will be prejudicial.

24 MR. MOSELEY: Well, the only other thing I'd
25 mention, Judge, was I've seen a charge as part of the

1 normal negligence charge that's kind of a rejection of
2 *res ipsa*, just because something happens doesn't mean
3 someone is negligent, and so I think that charge would
4 be appropriate here, as well.

5 THE COURT: Well, it wasn't requested, and it's not
6 a part of my normal charge. And the reason for it, of
7 course, just as you say, *res ipsa loquitur* is not the
8 law of the State of South Carolina, and I'm not sure if
9 it's a good policy to charge things that are not our --
10 or not, excuse me. I'm going to have to decline to make
11 that additional charge, but I'll note it for the record
12 that it was requested at this time.

13 MR. MOSELEY: Thank you, Your Honor.

14 THE COURT: All right. Anything else?

15 (There was no response.)

16 THE COURT: Very good. All right. Do go over the
17 exhibits to be sure that everything goes back that's
18 supposed to and nothing that's not supposed to goes back
19 there.

20 (Discussion off the record.)

21 (Whereupon, the Alternate Juror was excused.)

22 THE COURT: Thank you, Lieutenant. Just give it to
23 them and tell them they can begin their deliberations.

24 (Whereupon, the Jury started their deliberations at
25 approximately 12:23 p.m.)

1 THE COURT: Gentlemen, I want to thank you for a
2 very well tried case. But I remember the Chinese curse,
3 may you live an interesting life. I'm always waiting
4 for that unusual, like every other case I get.

5 But I do want to thank you. You both did an
6 excellent job and obviously you gave me some points to
7 ponder, and I thank you for your efforts. You worked
8 very effectively as advocates for your positions, and I
9 thank you for doing so in the highest professional way
10 and also for your patience with the Court.

11 However, now it's in the Jury's hands and we'll
12 await a verdict. Thank you very much. We'll stand at
13 ease.

14 (Court stood at ease at approximately 12:25 p.m.,
15 awaiting the verdict of the Jury.)

16 (Whereupon, there was a note from the Jury at
17 approximately 12:40 p.m.)

18 (Marked for identification was Court's Exhibit 4, a
19 note from the Jury.)

20 THE COURT: All right. We're back on the record.
21 I've received a list of inquiries from the Jury. Can we
22 see EMS report and/or police report? Has there already
23 been an insurance settlement? Is Mr. Cobb on disability
24 or applied for? If insurance settlement, how much?
25 Signed, The Forelady.

1 What's your thoughts, Mr. Brandt?

2 MR. BRANDT: I think that they should be instructed
3 that those matters are not within their purview of
4 consideration; that they are to ignore that and to
5 assess the damages fairly based on the evidence, and
6 that ---

7 THE COURT: We still have an opportunity for a
8 Defense verdict, too.

9 MR. BRANDT: Well, they are not to consider that.

10 THE COURT: In other words --

11 MR. BRANDT: That those issues are not relevant to
12 their consideration.

13 MR. MOSELEY: I would agree that there, those
14 issues aren't relevant.

15 THE COURT: The only thing I want to be careful
16 about is that not only are the issues not relevant to
17 them and they should only consider the testimony and
18 evidence that's been introduced, but if anything needs
19 to be addressed, that would be at a different time and
20 place.

21 I mean, I'm just thinking about, you know, when I
22 say not relevant, not relevant to this action. Maybe
23 that's what I'll do. So, I'll leave it at that. The
24 trial that they have been presented. And, but I, I'll
25 just leave it at that because I'm not gonna tell them

1 that they don't have the authority to do whatever they
2 want to because, unfortunately, they might just decide
3 to do that, you know?

4 But anyway, I think that I'll just say it's not
5 relevant and they must make it based on the testimony
6 and evidence in the record.

7 Any other suggestions or objections, Mr. Brandt?

8 MR. BRANDT: No, sir.

9 THE COURT: Mr. Moseley?

10 MR. MOSELEY: No, Your Honor.

11 THE COURT: All right. Very good. Ask the Jury to
12 join us, please.

13 (The Jury entered the courtroom at approximately
14 12:48 p.m.)

15 THE COURT: All right. Let the record reflect that
16 the Jury is in the Jury box.

17 Madam Forelady, I have been provided some inquiries
18 from the Jury: Can we see EMS report and/or police
19 report? Has there already been an insurance settlement?
20 Is he, Mr. Cobb, on disability or applied for it? If
21 insurance settlement, how much?

22 Madam Forelady, this is probably one of the most
23 difficult things for the Court to do, and that is to
24 further instruct you that you must decide the case as
25 presented and based solely on the testimony and the

1 evidence and the issues before you. Anything else would
2 not be relevant to this case. So you make your decision
3 based clearly on the testimony and evidence that have
4 been presented in the trial.

5 With that I'm afraid I'm going to have to ask you
6 to retire to the Jury room and continue your
7 deliberations based on the questions that were presented
8 to you in the verdict form.

9 (Forelady raises hand.)

10 THE COURT: Yes, ma'am.

11 THE FORELADY: Well, I know the police report was
12 talked about at one point, but it was not evidence?

13 THE COURT: Well, the fact is there are certain
14 exhibits, you might say, of evidence, you know,
15 documentary evidence, or documents. Portions of it
16 might be admissible but then portions are not. So,
17 therefore, rather than put something in that would
18 interfere with the proper resolution, then we use the
19 testimony of the witnesses to provide the information
20 that the parties feel is important and relevant and
21 material. So, I mean, that's why documents are
22 sometimes not admitted or produced. And anything else
23 outside of the issues that were presented by and
24 reflected on the verdict form would not be relevant to
25 the questions that you have before you in this case.

1 All right. Thank you very much.

2 THE FORELADY: Well, will we --

3 THE COURT: We are getting lunch for you if that's
4 the question.

5 THE FORELADY: Yes, that's what I was gonna ask
6 for.

7 THE COURT: Yes, ma'am. The Clerk will be up in a
8 few minutes to take your orders.

9 THE FORELADY: Thank you.

10 THE COURT: Okay. Thank you, ma'am.

11 (Whereupon, the Jury left the courtroom at
12 approximately 12:51 p.m.)

13 THE COURT: All right. Any exceptions or requests
14 from the Plaintiffs?

15 MR. BRANDT: None.

16 THE COURT: From the Defendant?

17 MR. MOSELEY: None, Your Honor.

18 THE COURT: All right. Very good. Thank you.

19 (Whereupon, the Jury resumed deliberations at
20 approximately 12:52 p.m.)

21 (Whereupon, there was a verdict of the Jury at
22 approximately 3:35 p.m.)

23 Verdict of the Jury:

24 THE COURT: It is my understanding the Jury has
25 reached a verdict. Is there anything from the

1 Plaintiffs before we bring the Jury back?

2 MR. BRANDT: No, sir.

3 THE COURT: From the Defense?

4 MR. MOSELEY: No, Your Honor.

5 THE COURT: All right. Ask the Jury to join us,
6 please.

7 (The Jury entered the courtroom at approximately
8 3:40 p.m.)

9 THE COURT: Madam Forelady, I understand the Jury
10 has reached a verdict?

11 THE FORELADY: Yes, sir, we have.

12 THE COURT: Do let the record reflect that the Jury
13 is in the Jury box.

14 If you would please pass it up to me.

15 THE FORELADY: (Complies.)

16 THE COURT: Madam Clerk, if you would please
17 publish the verdict.

18 THE CLERK: 2009-CP-37-1058, Ernest L. Cobb and
19 Nancy Cobb versus Dan M. LaFoy. Ernest L. Cobb's cause
20 of action for negligence, we find for the Defendant.
21 Nancy Cobb's cause of action for loss of consortium, we
22 find for the Defendant, Dan LaFoy.

23 Ladies and gentlemen of the Jury, if this was your
24 verdict and it's still your verdict, please signify by
25 raising your right hand.

1 (All jurors raised their right hand.)

2 THE CLERK: The record will reflect that all 12
3 raised their hand. Thank you.

4 THE COURT: Very good. Is there anything from the
5 Plaintiffs before I release the Jury?

6 MR. BRANDT: Yes, sir. I'd like the Jury polled,
7 please.

8 THE COURT: All right. Poll the Jury, please.

9 THE CLERK: Ladies and gentlemen of the Jury, as I
10 call your name and number, if this was your verdict and
11 it's still your verdict say "yes," please.

12 Number 149, [REDACTED]

13 JUROR [REDACTED]: Yes.

14 THE CLERK: Number 63, [REDACTED]

15 (There was a pause in the proceedings.)

16 THE CLERK: Is that right?

17 JUROR [REDACTED]: Yes.

18 THE CLERK: Number 71, [REDACTED]

19 JUROR [REDACTED]: Yes.

20 THE CLERK: Number 56, [REDACTED]

21 JUROR [REDACTED]: Yes.

22 THE CLERK: Number 145, [REDACTED]

23 JUROR [REDACTED]: Yes.

24 THE CLERK: Number 118, [REDACTED]

25 JUROR [REDACTED]: Yes.

1 THE CLERK: Number 68, [REDACTED]
2 JUROR [REDACTED]: Yes.
3 THE CLERK: Number 60, [REDACTED]
4 JUROR [REDACTED]: Yes.
5 THE CLERK: Number 64, [REDACTED]
6 JUROR [REDACTED]: Yes.
7 THE CLERK: 150, [REDACTED]
8 JUROR [REDACTED]: Yes.
9 THE CLERK: Number 140, [REDACTED]
10 JUROR [REDACTED]: Yes.
11 THE CLERK: And Number 5, [REDACTED]
12 JUROR [REDACTED]: Yes.
13 THE CLERK: Thank you.
14 THE COURT: Anything further from the Plaintiffs
15 before I dismiss the Jury?
16 MR. BRANDT: Nothing.
17 THE COURT: Anything from the Defendant before I
18 dismiss the Jury?
19 MR. MOSELEY: No, Your Honor.
20 THE COURT: Madam Forelady, ladies and gentlemen of
21 the Jury, the Court is never interested in a verdict,
22 only how that verdict is reached. Although it looks
23 like I'm doing everything else in the world up here
24 except paying attention, I have noticed that throughout
25 the trial in this case, all of you have paid very

1 careful and close attention as I mentioned to the
2 Alternate before I dismissed her.

3 And I am satisfied that you gave both the
4 Plaintiffs and the Defendant a fair trial. And for that
5 reason you have performed your duties as Jurors in a
6 proper fashion and you are to be commended. And I might
7 note that no one has to -- you have to answer to no one
8 for your verdict.

9 By the way, I should also mention a verdict is a
10 product of 12 people, not just one person. So, you do
11 not have to explain anything to anyone. Now, you can
12 discuss your verdict if you want to, but if you don't
13 want to, you can just tell the individual or the person
14 to stop and that you don't wish to discuss it any
15 further. And if they persist, notify the Clerk and I'll
16 take the appropriate action.

17 Because, as I say, do you remember the other day
18 when we were qualifying the whole Jury panel? I noticed
19 or mentioned that none of you asked to be here. And I'm
20 sure you've had other places you would rather be in the
21 last three days. But there again, our system would not
22 function if it was not for citizen participation, and
23 for that reason not only is Oconee County in your debt,
24 but also the judicial and the system of justice in South
25 Carolina and I want to thank you for that.

1 Now, I wish there was something I could do for you.
2 The only thing I can say is if you remember again on
3 Monday when I qualified the Jury panel, I asked if any
4 member of the Jury panel had served on a Jury in the
5 last three years. Well, at least you won't have to
6 serve for another three years. I do want to thank you,
7 though, for your service. Because without you -- and I
8 hope that it has been some benefit to you. I thank you.
9 And with that you will be excused.

10 Madam Clerk, do you have anything?

11 THE CLERK: The check's in the mail.

12 THE COURT: And also, if you need any work
13 statements?

14 THE CLERK: It will come with your check.

15 THE COURT: Oh, it will? All right.

16 THE CLERK: If for some reason you get back to work
17 tomorrow and your employer needs something by tomorrow,
18 if you would just have them call our office and we can
19 get you something.

20 THE COURT: All right. With that, again, I want to
21 thank you all for your service and I wish you well. I
22 guess you all have seen the weather has changed since
23 this morning, so again, be very careful going home.
24 Thank you very much.

25 Everyone else remain seated while the Jury retires

1 from the courtroom.

2 (Whereupon, the Jury left the courtroom at
3 approximately 3:47 p.m.)

4 THE COURT: I'm going to give the parties ten days
5 as to whether they want to make any post-trial Motions.

6 MR. BRANDT: Thank you.

7 THE COURT: All right. Gentlemen, again, thank you
8 for a very aggressively and well tried case.

9 With that, we'll stand in recess. Actually, we'll
10 recede depending on what comes tomorrow. Thank you.

11 (The trial of Ernest L. Cobb and Nancy Cobb v. Dan
12 M. LaFoy was concluded at approximately 3:48 p.m.)

13 ** End of Requested Certified Transcript of Record **

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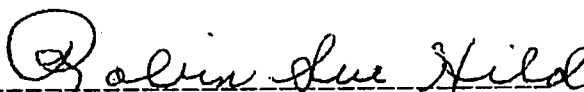
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Certificate of Court Reporter

I, the undersigned, Robin Sue Hild, FCRR, RPR, Official Court Reporter for the Tenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and the evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas for Oconee County, South Carolina, on the 9th day, 11th day, and 12th day of January, 2012.

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

November 15, 2012



Robin Sue Hild, FCRR, RPR
Circuit Court Reporter

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
)
COUNTY OF OCONEE) C.A. NOS.: 2009-CP-37-1058, 1059

ERNEST L. COBB and
NANCY COBB,

Plaintiffs,

v.

DAN M. LAFOY,

Defendant.

DEPOSITION OF:

DR. DAVID WHEELER

On Tuesday, February 22, 2011, commencing at 10:00 a.m., the deposition of Dr. David Wheeler was taken on behalf of the Defendant at the Highlands-Cashiers Hospital, 190 Hospital Drive, Highlands, North Carolina, and was attended by Counsel as follows:

APPEARANCES:

THAD B. BALL, ESQ.
LARRY C. BRANDT, ESQ.
Larry C. Brandt, PA
3691 Blue Ridge Blvd.
Walhalla, South Carolina 29691
on behalf of the Plaintiffs

ROBERT D. MOSELEY, ESQ.
Smith Moore Leatherwood, LLP
300 East McBee Avenue, Ste 500
Greenville, South Carolina 29601
on behalf of the Defendant

REPORTED BY: Mai-Beth Ketch, CVR

1 (Document K1955)

2 Index

3 Stipulations 3

4 Signature (Waived) 3

5 Direct Examination By Mr. Moseley 4

6 Certificate of Notary Public 8

7 EXHIBITS:

8 None marked.

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1 PURSUANT TO NOTICE and/or Agreement to Take
2 Depositions, the within Deposition was taken by me,
3 Mai-Beth Ketch, CVR, a Notary Public as required in
4 Rules 26 and 30 of the North Carolina Rules of Civil
5 Procedure.

6 STIPULATIONS:

7 IT WAS STIPULATED AND AGREED by and between
8 Counsel for the Plaintiff and Counsel for the
9 Defendant that this De Bene Esse Deposition is taken
10 under Rule 30(I) and all objections shall be made at
11 the time of the taking of the deposition.

12 SIGNATURE:

13 The Deponent did agree that both the reading
14 over and signing of the transcript are hereby
15 waived.

16 Dr. David Wheeler, being duly sworn to tell the
17 truth, the whole truth, and nothing but the truth of
18 his own knowledge concerning the within matter,
19 testified as follows:

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1 DIRECT EXAMINATION BY MR. MOSELEY:

2 Q Dr. Wheeler, my name is Rob Moseley and I
3 represent Dan LaFoy in this lawsuit. Mr.
4 LaFoy has been sued for an automobile accident
5 that occurred on July the 5th of 2007 and
6 we're going to be asking you questions about
7 that.

8 A Yes, sir.

9 Q Are you the primary care physician for Mr.
10 LaFoy?

11 A I am.

12 Q Would it be accurate to say that you have
13 treated him for a number of years prior to
14 2007?

15 A Yes.

16 Q Doctor, could you tell the jury what your
17 training is, and maybe begin with your
18 undergraduate degree and take us through the
19 other degrees that you have.

20 A I graduated in 1981 from Georgetown College in
21 Georgetown, Kentucky, with a major in
22 chemistry. I attended the Vanderbilt
23 University School of Medicine from 1981 to
24 1985, graduated with a degree, an M.D. degree.
25 I attended a three-year family medicine

1 specialty program affiliated with the
2 University of North Carolina. That was in
3 Asheville. And finished that program in 1988.
4 In 1988 I became board certified in family
5 medicine. I re-certified every six to seven
6 years and have been board certified, the last
7 time, I believe in 2007. So I've maintained
8 my board certification. I opened a practice
9 in 1988 in Cashiers, North Carolina, and I've
10 been there ever since. I've been the chief of
11 staff at this hospital several times, the last
12 time ending in October of 2010. And have
13 enjoyed a successful practice here now for
14 going on 23 years.

15 Q You said "this hospital"; what hospital are
16 you referring to?

17 A This is the Highlands-Cashiers Hospital in
18 Highlands, North Carolina. It's a JCAHO-
19 accredited hospital and have been on the
20 medical staff here since 1988.

21 Q Since you're on the staff, you have privileges
22 here at this hospital?

23 A Yes. I have continuous admitting privileges,
24 active staff. And I also am an emergency room
25 physician here and have been for 23 years.

1 Q And that's in addition to your duties as a
2 primary care physician?

3 A Yes.

4 BY MR. MOSELEY:

5 At this time I would move Dr. Wheeler as an
6 expert in the field of family medicine.

7 BY MR. BRANDT:

8 No objection.

9 DIRECT EXAMINATION RESUMED BY MR. MOSELEY:

10 Q Dr. Wheeler, how would you describe Mr.
11 LaFoy's health in -- and I'm just going to
12 arbitrarily pick the July 2007 time frame?

13 A I think that Dan was in good health. Dan had
14 some healthcare problems that occur frequently
15 in this country as a result of aging. He had
16 been very compliant with his medication
17 regimen for several years prior to that, and
18 was in, I think, a reasonably good state of
19 health in 2007.

20 Q Would that be true certainly of somebody in
21 their eighties?

22 A Yes.

23 Q Prior to 2007, had Mr. LaFoy ever reported to
24 you having any fainting spells, blacking out,
25 passing out, anything of that nature?

1 A No.

2 Q Had you ever instructed him that he should not
3 drive a motor vehicle?

4 A No.

5 Q Or that you had any concerns whatsoever about
6 his ability to drive a motor vehicle?

7 A No.

8 BY MR. MOSELEY:

9 That's all the questions I have. Thank you,
10 Doctor.

11 (OFF THE RECORD)

12 BY MR. BRANDT:

13 I don't have any questions.

14 BY MR. BALL:

15 No further questions.

16 (PROCEEDINGS IN THE ABOVE-ENTITLED MATTER WERE
17 ADJOURNED AT APPROXIMATELY 10:05 A.M.)

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STATE OF SOUTH CAROLINA
COUNTY OF OCONEE
ERNEST L. COBB,
Plaintiff,
VS
DAN M. LAFOY,
Defendant.
C.A. NO. 2009-CP-37-1058

NANCY COBB,
Plaintiff,
VS
DAN M. LAFOY,
Defendant.
C.A. NO. 2009-CP-37-1059

VIDEOTAPED
DEPOSITION OF: JENNIFER L. HANKE, M.D.
DATE: November 30, 2011
TIME: 1:06 p.m.
LOCATION: Oconee Medical Associates
11082 North Radio Station Road
Seneca, SC
TAKEN BY: Counsel for the Defendant
REPORTED BY: MICHELE E. BECKER,
Registered Professional Reporter

A. WILLIAM ROBERTS, JR., & ASSOCIATES
Fast Accurate & Friendly
Charleston, SC Hilton Head, SC Myrtle Beach, SC
(843) 722-8414 (843) 785-3263 (843) 839-3376
Columbia, SC Greenville, SC Charlotte, NC
(803) 731-5224 (864) 234-7030 (704) 573-3919

1 APPEARANCES OF COUNSEL:

2 ATTORNEY FOR THE PLAINTIFF
3 ERNEST L. COBB AND NANCY COBB:4 LARRY C. BRANDT, ATTORNEY AT LAW
5 BY: LARRY C. BRANDT
6 3691 Blue Ridge Boulevard
7 Wahalla, SC 29691
8 (864) 638-6111
9 lcb@brandtlawfirm.com10 ATTORNEY FOR THE DEFENDANT
11 DAN M. LAFOY12 SMITH, MOORE, LEATHERWOOD, LLP
13 BY: ROBERT D. MOSELEY, JR.
14 300 East McBee Avenue, Suite 500
15 Greenville, SC 29601
16 (864) 242-6440
17 robert.moseley@smithmoorelaw.com18 ALSO PRESENT: CLIFF WILLIAMS, VIDEOGRAPHER
19
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1 P-R-O-C-E-E-D-I-N-G-S

2 THE VIDEOGRAPHER: We're going on the
3 record at camera time 13:06. This is the videotaped
4 deposition of Dr. Jennifer Lynn Hanke taken by the
5 Defendants in the matter of Ernest L. Cobb, the
6 plaintiff, versus Dan M. LaFoy, the Defendant. That
7 Case Number is 2009-CP-37-1058 and Nancy Cobb, the
8 Plaintiff, versus Dan M. LaFoy, the Defendant. That
9 Case Number is 2009-CP-37-1059, in the Court of
10 Common Pleas, Oconee County, South Carolina.

11 Today is Wednesday, November 30th, 2011.
12 We are in Seneca, South Carolina. The court reporter
13 is Michele Becker from the firm -- and the videographer
14 is Cliff Williams. We are both from the firm of A.
15 William Roberts, Jr. & Associates.

16 Will Counsel please introduce themselves
17 for the record.

18 MR. BRANDT: My name is Larry Brandt
19 and I represent the Plaintiffs in this action,
20 Ernest Cobb and Nancy Cobb.

21 MR. MOSELEY: I'm Rob Moseley and I
22 represent Dan LaFoy.

23 THE VIDEOGRAPHER: Will the court
24 reporter please swear in the witness.

25 JENNIFER L. HANKE, M.D.

4

1 being first duly sworn, testified as follows:

2 EXAMINATION

3 BY MR. MOSELEY:

4 Q. Is it Hanke?

5 A. Hanke.

6 Q. Okay. Dr. Hanke, my name is Rob
7 Moseley. I represent Dan LaFoy. He's the gentleman
8 who's been sued in this lawsuit. And I believe
9 you've got some information that may be helpful to
10 us in understanding what happened in this case.

11 So could you give us your full name,
12 please?

13 A. Jennifer Lynn Hanke.

14 Q. And what do you do for a living?

15 A. I'm a family physician.

16 Q. Okay. Who are you employed by?

17 A. Oconee Physician Practices.

18 Q. Okay. And in July of 2007 what was
19 your role?

20 A. I was a family medicine resident for
21 the Seneca Lakes Family Medicine residency program.

22 Q. Okay. And at that time you had
23 completed medical school?

24 A. Yes.

25 Q. Okay. And where did you go to medical

1 school?

2 A. At Chicago Osteopathic in Downers
3 Grove, Illinois.

4 Q. Okay. And then you'd been to
5 undergraduate?

6 A. Yes.

7 Q. What did you do in your undergraduate
8 degree in?

9 A. Biology and psychology.

10 Q. And where did you receive those
11 degrees?

12 A. All of that at Nazarene University in
13 Bourbonnais, Illinois.

14 Q. Okay. And at that time did you have
15 hospital privileges at Ocone Memorial?

16 A. Yes. I did.

17 Q. Okay. And you were working in what
18 department there?

19 A. In the family medicine department.

20 Q. Okay. And as part of that did you
21 do -- spend time in the emergency room?

22 A. Yes.

23 Q. Okay. And is your time in the
24 emergency room, is that how you have connection with
25 Mr. LaFoy?

6

1 A. I wasn't playing the role of the
2 emergency room physician that evening. I had come
3 after the emergency room physician notified me that
4 the patient was there and needed to be admitted --

5 Q. Okay.

6 A. -- for further work-up.

7 Q. Okay. And so he came in through the
8 emergency department --

9 A. Yes.

10 Q. -- but you were not in the emergency
11 department?

12 A. No. Not until I was called after the
13 emergency room evaluation was complete.

14 MR. MOSELEY: At this time I'd move to
15 have Dr. Hanke admitted as an expert in family
16 medicine.

17 MR. BRANDT: I don't have any
18 objection.

19 BY MR. MOSELEY:

20 Q. Okay. So I want to draw your
21 attention to July the 5th of 2007. And I believe
22 that's the one occasion that you had seen Mr. LaFoy,
23 which was the day of this accident. How did you --
24 I think you indicated that you came to interact with
25 him based on a call from the Emergency Department?

1 A. Yes.

2 Q. Okay. And tell the jury what the
3 circumstances of that -- of your treatment of
4 Mr. LaFoy were.

5 A. From -- since it was in 2007, I don't
6 have -- you know, most of what I know is from the
7 history and physical that I performed on Mr. LaFoy.
8 And so, you know, in reading over this, I mean, I do
9 recall some events but, you know, he presented to
10 the emergency room after this car accident where he,
11 you know, from what I recollect and read, you know,
12 he was found at this gas station, you know, mostly
13 unresponsive but came to after the paramedics
14 arrived and were knocking on the window or the
15 police officers were. And he was brought into the
16 emergency department and was found to be lucid at
17 that time. And another acute issue that was found
18 was that he was having sudden onset of this bloody
19 diarrhea that we were concerned about as well.

20 Q. Okay. How did he -- when you met with
21 him, how did he describe how the accident happened?

22 A. He didn't really have that much
23 recollection just because he, you know, stated that
24 he lost consciousness. The only thing that he
25 remembered was having eaten at Applebee's, was

8

1 starting to drive home back to North Carolina, I
2 guess, and was on Highway 28. From what I wrote in
3 my history and physical he became somewhat
4 diaphoretic and then had the sudden urgent need to
5 defecate and was trying to, you know, get somewhere
6 that he could do that, but obviously lost
7 consciousness.

8 Q. All right. And you used a couple of
9 words there that I'm not sure I understand. But you
10 say he became diaphoretic?

11 A. Sweaty.

12 Q. Okay.

13 A. Which can happen for a variety of
14 reasons. You know, anything from, you know, sudden
15 adrenaline response, to heart attack to, you know,
16 change in temperature.

17 Q. Okay. And then he -- you said that he
18 had a need to defecate?

19 A. Uh-huh.

20 Q. And what would that mean?

21 A. Stool. Have a sudden bowel movement.

22 Q. He needed to go number two?

23 A. Right.

24 Q. Okay. All right. Now, and what
25 happened after that? According to what he explained

1 to you in the emergency room, what happened after
2 that?

3 A. Like I had said before, I mean, the
4 next thing he recalled was someone tapping on his
5 window, you know, and transporting him to the
6 emergency department. And so at that point, you
7 know, he was lucid throughout. I had asked him and
8 had documented in my note that he had no postictal
9 state, which means, you know, when someone passes
10 out we worry about seizure activity. And usually
11 after a seizure you -- even though you're aroused,
12 you're not completely lucid. And so but he didn't
13 seem to demonstrate that. He was completely
14 coherent once he got to the emergency department.

15 Q. Okay. And eventually he was admitted
16 to the hospital?

17 A. Yes.

18 Q. And he was kept for observation for a
19 period of time?

20 A. Yeah. From what I can tell it ended
21 up being two days. But I was just involved in his
22 admission, and then another one of our physicians in
23 our office continued to care for him the rest of the
24 stay.

25 Q. Okay. And so the last time you saw

10

1 him would have been -- you would have just seen him
2 on that one occasion?

3 A. Right. July 5th, 2007.

4 Q. Okay. And one of the other physicians
5 in the hospital took his care from that point?

6 A. Right. Dr. Rampey, Dr. Stan Rampey
7 works in our office here, and he's the one that
8 continued to provide care. Since he was our
9 attending physician we kind of switched duty in the
10 hospital. He was the physician that was on call the
11 following two days.

12 Q. Okay. Now, is there any report in
13 your notes one way or the other as to whether he had
14 already soiled himself prior to arriving in the
15 emergency room?

16 A. Just one moment.

17 Yes. I did state in the history of
18 present illness of the history and physical there
19 that he did have diarrhea in the car prior to
20 transport by the EMT.

21 Q. Okay. Is that consistent with someone
22 losing control of their bodily functions?

23 A. Typically. I mean, although
24 there's -- you know, some people that can have
25 incontinence issues. But from what I gathered in my

1 history, he was someone that was completely in
2 control typically of his bodily functions and that
3 this was very abnormal for him.

4 Q. Okay. Would that be consistent with
5 someone who had lost consciousness?

6 A. Typically, yes. We -- you know, one
7 thing that we -- a question that we always ask when
8 someone passes out is if they urinated on themselves
9 or stooled themselves and, you know, that can
10 demonstrate to us that they've had anything from a
11 stroke to a seizure to, you know, a syncopal episode
12 from some other type of neurologic problem.

13 Q. And as a result -- well, strike that.
14 Did you find anything medically that
15 was inconsistent with his explanation that he had
16 passed out prior to the accident?

17 A. No.

18 Q. Okay. Have all of your -- the answers
19 to your questions been to a reasonable degree of
20 medical certainty?

21 A. Yes.

22 MR. MOSELEY: Okay. That's all the
23 questions I've got.

24 EXAMINATION

25 BY MR. BRANDT:

12

1 Q. Doctor, did you find any evidence that
2 he had had a seizure?

3 A. No. We did not.

4 Q. Okay.

5 A. The only way, however, though that you
6 could potentially rule that out is with an EEG. And
7 it does not look like he had an EEG during this
8 hospitalization for any type of seizure activity.

9 Q. And is there any way, any evidence
10 that you found, objective evidence, that would
11 indicate that what he told you occurred, did in fact
12 occur? It happened the way he said it did?

13 A. I'm sorry. Repeat that question?

14 Q. Did you find any objective evidence in
15 your examination of Mr. LaFoy that would support his
16 claim that he, quote, blacked out before the
17 accident occurred?

18 A. I mean, the only thing that I would
19 have, you know, just like anyone that would come
20 with syncope we, you know, usually take their word
21 for it. But, you know, he did sustain some skin
22 abrasions and a bloody nose and then this soiling of
23 himself, you know, that would be consistent with
24 someone, you know, that didn't have control.

25 Q. When did he lose control, after impact

1 or before?

2 A. You know, typically -- I mean, the way
3 he related it, and he did mention that he had a
4 friend here. I don't recall that I -- I think he
5 was alone in the car from what I can gather from my
6 report. I guess, I mean what I'm saying is, I mean,
7 typically in this scenario, you know, with the fact
8 that he had the bloody diarrhea, the sweatiness and
9 everything, you know, and just his story, you know,
10 obviously there wasn't an eye witness in the car
11 from what I can gather. So we can't say a hundred
12 percent. But, you know, all of it added up. We
13 didn't doubt his story at all.

14 Q. But you're basically taking a
15 patient's word for it?

16 A. Right.

17 Q. If the patient had not told you that
18 and you looked at his medical records and your
19 treatment of him that night -- or that day, would
20 you have opined that he had passed out if he had not
21 told you or blacked out before impact?

22 A. Right. Well, I mean, in this case he
23 wouldn't have been admitted to the hospital if it
24 hadn't been an instance. You know, if it had just
25 been a car accident alone and he came in with some

14

1 abrasions and no major injuries, you know, we
2 wouldn't have even been involved. It would have
3 been the ER physician. So I came on the scene after
4 the presumption was made by the ER physician to
5 believe him that everything was authenticated.

6 Q. Okay. I want you to exclude what he
7 told you happened.

8 A. Right.

9 Q. And I want you to tell me what's in
10 that medical record that would tell you that he
11 blacked out before impact?

12 A. Like I mentioned before, unless
13 someone was sitting in the car with him to verify
14 that, just like any episode of loss of consciousness
15 I mean, you know, unless it's witnessed we don't
16 understand, you know, what happened unless there's
17 an eye witness to tell us when.

18 Q. Please be responsive to my question
19 and then you can explain it any way you want you.

20 A. Okay.

21 Q. But what I'm asking you is, I want you
22 to exclude what he told you. Take that out of the
23 formula. Go straight on the medical records, your
24 memory is refreshed by the medical records and
25 anything you remember at the hospital other than

1 what he told you.

2 A. Right.

3 Q. Point to me in the medical records the
4 parts of that record that would support the theory
5 that he blacked out before impact?

6 A. I suppose you can't.

7 Q. Okay.

8 A. I mean, we can only allude to the fact
9 that there was some other precipitating illness.
10 You know, he was evaluated and because of his bloody
11 diarrhea. I mean, like I mentioned, I mean, there's
12 other things going on. So, you know, it wasn't that
13 the accident would have caused him to have this, you
14 know, sudden bloody diarrhea. You know, he had an
15 acute illness that we assume caused him to be
16 involved in this car accident.

17 Q. Did you observe any of his clothes
18 that he had on at the time of impact?

19 A. I honestly cannot tell you that. I
20 did not document in my note whether he was still in
21 street clothes or already in a hospital gown when I
22 saw him.

23 Q. Did you observe any -- his trousers
24 that night or that day?

25 A. I don't recall. And I didn't document

16

1 that in my note.

2 Q. And I think the question was asked
3 about the trousers being soiled. Did you observe
4 soiled trousers that morning?

5 A. I did not. But I did mention
6 there's -- I did review the record, and I did state
7 that the ER physician did notice bloody diarrhea and
8 performed what's called a hemoccult test which was
9 positive for blood --

10 Q. But you don't know --

11 A. -- in the emergency department.

12 Q. Excuse me.

13 A. And that's documented by the ER
14 physician.

15 Q. But you don't know what he did or was
16 looking at when he made that observation?

17 A. No. Because I was not there.

18 Q. That's just something that was in the
19 medical record.

20 A. Right.

21 Q. And certainly as a doctor you go
22 treat -- you like to know the mechanism of injury
23 and hear what the patient -- his explanation of it,
24 obviously?

25 A. Right.

1 Q. And you have to take that into
2 consideration in the way you approach the case, do
3 you not?

4 A. Yes.

5 Q. And I respect that. And then, of
6 course, if one doctor treats and hands to the other,
7 you sort of base your role or whatever you do then
8 based on what that other doctor documents or
9 whatever he writes, correct?

10 A. Right.

11 Q. And you have to assume that what that
12 doctor put in the chart was true.

13 A. Yes.

14 Q. So really today you can't say whether
15 he blacked out prior to impact or not, can you? Of
16 your own knowledge.

17 A. I mean, in this instance it would be a
18 slight assumption. But, you know, 99 percent, you
19 know, I would feel very confident in saying that the
20 syncopal episode occurred before the accident, given
21 the surrounding circumstances being the acute
22 illness, the bloody diarrhea. And then later noted
23 in the record by the nursing staff was the fact that
24 he did have a significant drop in his blood
25 pressure, the systolic blood pressure from I believe

18

1 the 140s to 120s indicating some, what's called
2 orthostatic hypotension which can result from
3 dehydration, which it can also be a contributor to
4 syncopal episodes.

5 Q. It's my understanding that you use
6 that term, but you indicated or defined it as being
7 sweaty. It was a medical --

8 A. The diaphoresis? Yeah.

9 Q. And you said that can be caused by a
10 change in temperature?

11 A. Potentially. I mean, like anyone can
12 sweat, you know, if there's a sudden, you know,
13 increase in temperature.

14 Q. And you said a heart attack.

15 A. Yes.

16 Q. But you ruled out heart attack, didn't
17 you?

18 A. We did. He had an EKG which didn't
19 show any indication of that. And then he had what's
20 called cardiac enzymes which were negative for any
21 type of heart damage.

22 Q. And I believe you said too an
23 adrenaline rush?

24 A. Yes. That can, you know, cause if
25 you're, you know, what we call fight or flight

1 mechanism where all of the sudden, you know, you're
2 scared, frightened, anxious you can break out in a
3 sweat.

4 Q. But adrenaline rush would wake you up,
5 not put you to sleep?

6 A. Well, not always. There -- for
7 instance, hypoglycemia which is a low blood sugar
8 state, you know, which can cause syncope as well.
9 Typically before someone passes out from a low blood
10 pressure event they usually become sweaty,
11 nauseated, vomit and then pass out.

12 Q. Does he have hypoglycemia?

13 A. Let me double check here. But I do
14 not believe that was part of the problem. No. His
15 initial labs in the ER show that his blood sugar was
16 129, which is normal non fasting blood sugar.

17 Q. And that was the day of the accident?

18 A. Yes.

19 Q. So we can rule out the hypoglycemia --

20 A. Right.

21 Q. -- part of it. Okay.

22 And so then we're left with an
23 adrenaline rush which would wake you up.

24 A. Not -- there's other things to
25 consider. You know, what the final diagnosis

20

1 alluded to was that he had what's called a vasovagal
2 syncope episode, which vasovagal syncope can be
3 anything from, you know, someone being afraid of
4 donating blood and getting their blood drawn and
5 pass out, to someone standing in church for a
6 prolonged period of time and all of the sudden get
7 sweaty and pass out. And so in his instance we were
8 under the assumption that he had this sudden urge to
9 defecate, became sweaty because his bowels were
10 about to move and that caused him to be, you know,
11 whether it was anxiety or what, but it caused him to
12 pass out.

13 Q. But he wasn't standing. And I guess
14 what I'm trying to hear is, how do we know that the
15 symptoms that you saw manifested themselves, or
16 whatever you're relying on to support his story,
17 that those symptoms didn't manifest themselves after
18 the accident before as opposed to before the
19 accident?

20 A. Right. You know, the syncope I
21 guess -- the syncopal episode was never questioned
22 just because we saw the bloody diarrhea. You know,
23 typically someone that's in an accident, you know,
24 wasn't having long-standing bloody diarrhea before
25 it happened. They would have, you know, notified

1 his physician. He wouldn't have made this trip, you
2 know. So we took his word for it because of the
3 syncope because he had been having, you know, with
4 this documented bloody diarrhea which, you know, was
5 continued to treat.

6 Q. Did he have any contusions or anything
7 to the abdomen?

8 A. Not that I stated in my note. But let
9 me review again. No. I mentioned that he had some
10 skin tears to his hands and bruising to his
11 forearms, but I did not mention any abdominal
12 lacerations.

13 Q. You talked about excitement, anxiety
14 over an event. Just the accident itself would cause
15 a person by the time he got to you to be anxious
16 or --

17 A. Correct.

18 Q. -- have anxiety --

19 A. Yeah. But typically --

20 Q. -- if he's been involved in an
21 accident?

22 A. Correct.

23 Q. And he was in a vehicle. And do you
24 know whether there were air bags in that vehicle?

25 A. I do not believe that I documented any

22

1 type of air bag deployment.

2 Q. Could a deployed air bag if it struck
3 him in the mid section in the chest area, could that
4 cause bloody stool?

5 A. I have not known the case for that to
6 happen that immediately, no.

7 Q. If he didn't have an air bag and
8 struck the steering wheel, could that cause bloody
9 stool?

10 A. Not typically. The intestines, you
11 know, is protected by, you know, something called
12 the mesentery which, you know, wraps around it and
13 kind of blunts any type of impact. You know, any
14 type of abdominal trauma we worry more about, you
15 know, splenic rupture or kidney problems. We don't
16 really worry about intestinal problems unless
17 there's a penetrating wound.

18 Q. Would his age at all play into the
19 degree of impact it would take to the body to
20 introduce blood into the stool?

21 A. Unless he was on significant blood
22 thinners, you know, that caused his blood to be
23 excessively thin and fragile, his vessels to be
24 fragile then, you know, we wouldn't anticipate that
25 to happen even at 81 years of age.

1 Q. Was he taking blood thinners?

2 A. He was on 325-milligram aspirin. But
3 one thing that's objective evidence against the fact
4 that his blood would have been too thin was the fact
5 that we had checked what's called an I&R, which is
6 something that we commonly measure when people are
7 on a medication called Coumadin to thin their blood
8 for a variety of reasons, and that was normal.

9 Q. Did you take into consideration that
10 in any of your opinions of diagnosis that he did
11 report a period of unconsciousness after the impact?

12 A. The assumption was that he continued
13 to be -- to have a loss of consciousness after the
14 impact, yes, because the first thing that he
15 mentioned that he recalled was someone tapping on
16 his window and telling him to turn off his car.

17 Q. At what -- does your records indicate
18 the time of day that you first encountered him on
19 the day of the accident?

20 A. Let me shuffle through here. The time
21 that I dated my handwritten history and physical
22 before I transcribed or before I dictated it for
23 transcription was 22:00 or 10:00 p.m.

24 Q. The time of transcription was when?

25 A. The time that I dictated it was

24

1 10:00 p.m. on 7/5/2007.

2 Q. Do you know what time the accident
3 occurred?

4 A. It's documented in the ER notes. I
5 just have to look at that. He was registered in the
6 emergency department at 6:33 p.m. And the only
7 thing I have to document the accident was the ER
8 physician's note saying that shortly before arrival
9 to the emergency department this accident occurred.
10 So I'd gather around 6:00 p.m.

11 Q. I want you to assume that the accident
12 occurred at approximately 17:46, be 5:46.

13 A. Okay.

14 Q. Would the -- would that differential
15 in time from the time of the accident to the time
16 you saw him, assuming that time is correct of the
17 accident --

18 A. Right.

19 Q. -- would that have -- have any affect
20 on any of your opinions?

21 A. I do not believe so from what I can --

22 Q. Excuse me. I want you to finish.

23 A. I was just saying, from what I can
24 tell from the ER notes and my notes, there wasn't a
25 significant change or decompensation or anything

1 while he was in the emergency department.

2 Q. So from the time he got to the
3 emergency room until he left, or at least when you
4 saw him, he was pretty well in, let's call it
5 condition one, and he remained in that condition
6 throughout?

7 A. Correct.

8 Q. There wasn't any fluctuations in his
9 status?

10 A. Other than having the continued GI
11 bleeding, it looks like his vital signs remained,
12 you know, pretty much stable, the exact same almost
13 throughout his stay in the emergency department.

14 Q. Did you -- was there ever a
15 determination made as far as you know as to the
16 cause of the internal bleed?

17 A. No. There was not. He did have
18 what's called stool cultures during his
19 hospitalization which typically take about a week to
20 result. And so I believe that they came back after
21 he was discharged but were found to be negative.
22 And since he was from out of state, he was
23 instructed to follow up with his primary care
24 physician for further workup to include potentially
25 a colonoscopy or something of that sort.

26

1 Q. What would have introduced -- if it
2 was just that one time, what would have introduced
3 in your opinion the blood in the stool?

4 A. From his story, although it would --
5 sometimes it does not typically happen that quickly..
6 But, you know, there was a potential of some type of
7 food born illness from Applebee's that he had been
8 at prior to this accident.

9 The most common thing that we all see
10 is, you know, hemorrhoidal bleeding, or it could
11 have been something called diverticulitis.

12 Q. Do you know whether he has
13 diverticulitis or ever been treated for that disease
14 or for that illness?

15 A. From his history and physical I did
16 not mention that in his past medical history that he
17 ever been had -- had ever had that diagnosis.

18 Q. And was there ever any finding that he
19 did, in fact, have some kind of food born illness?

20 A. No. The stool cultures came back
21 negative for the typical organisms that we culture
22 for such as salmonella, ecoli and that sort of
23 thing.

24 Q. Based upon what's in the record do you
25 have an opinion today as to what would have

1 introduced the blood in the stool?

2 A. I do not know for a hundred percent
3 certain, no.

4 MR. BRANDT: Okay. I don't have
5 anything further.

6 DIRECT EXAMINATION

7 BY MR. MOSELEY:

8 Q. Dr. Hanke, Mr. Brandt asked you a lot
9 of questions about things that might have been or
10 kind of trying to get you to flush out your thoughts
11 about this.

12 Is it still your opinion after his
13 questioning that -- that Mr. LaFoy passed out prior
14 to the impact?

15 A. Yes. That's still my belief.

16 Q. And is that your opinion to a
17 reasonable degree of medical certainty?

18 A. Yes.

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

21 DIRECT EXAMINATION

22 BY MR. BRANDT:

23 Q. Then I want you to enumerate for me,
24 give me a laundry list of the reasons why your
25 opinion is that he passed out prior to impact.

28

1 MR. MOSELEY: Object. Asked and
2 answered. Go ahead. You can answer the question.
3 I just put that on the record.

4 THE DEPONENT: Okay. Like I mentioned
5 before, the reason that we believe that is because,
6 you know, someone that seemed to be otherwise in a
7 good state of health at 81 years of age to have lost
8 control of his bowels, to have had this bloody
9 diarrhea, to have had the change in his vital signs
10 you know, from lying to standing, all that,
11 everything kind of added up to support his story.
12 There was no doubt, you know, that he was just
13 trying to cover his tracks from getting in an
14 accident. So, you know, he had other medical
15 reasons to be admitted to the hospital, you know,
16 the syncope plus bloody diarrhea. So that's what
17 we...

18 BY MR. BRANDT:

19 Q. Now, the syncope is his story that he
20 related to you --

21 A. Yes.

22 Q. -- based on purely what he said?

23 A. Correct. Since there wasn't an eye
24 witness in the car.

25 Q. And then you had -- and then you had

1 other problems he would have been admitted to the
2 hospital for anyway?

3 A. More than likely, yes, you know. At
4 81 years of age if someone has, you know, bright red
5 blood in their stool, we typically would not send
6 them home from the emergency department.

7 MR. BRANDT: Okay. Nothing further.

8 MR. MOSELEY: Nothing further. Thank
9 you very much.

10 THE VIDEOGRAPHER: This concludes the
11 deposition of Dr. Jennifer Lynn Hanke. We are going
12 off the record at camera time 13:37.

13 (The Witness, after having been advised
14 of her right to read and sign this transcript, does
15 waive that right.)

16 (Deposition concluded at 1:37 p.m.)
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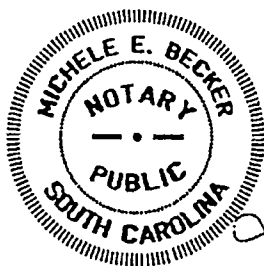
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1 CERTIFICATE OF REPORTER

2
3 I, Michele E. Becker, Registered Professional
4 Reporter and Notary Public for the State of North Carolina at
5 Large, do hereby certify that the foregoing transcript is a
6 true, accurate, and complete record.

7 I further certify that I am neither related to
8 nor counsel for any party to the cause pending or interested
9 in the events thereof.

10 Witness my hand, I have hereunto affixed my
11 official seal this 17th day of December, 2011 at Seneca,
12 Oconee County, South Carolina.



22 Michele E. Becker,
23 Registered Professional Reporter
24 My Commission expires
25 December 21, 2021

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REQUESTED INFORMATION INDEX

(No information was requested.)

EXHIBITS

(No exhibits proffered.)

STATE OF SOUTH CAROLINA

COUNTY OF OCONEE

ERNEST L. COBB,

PLAINTIFF,

vs.

DAN M. LAFOY,

DEFENDANT.

) IN THE COURT OF COMMON PLEAS

) TENTH JUDICIAL CIRCUIT

) CASE NO.: 2009-CP-37-1058

)
)
) DEFENDANT'S
) REQUESTS TO CHARGE

No. 1

UNAVOIDABLE ACCIDENTS

THE DEFENDANT CLAIMS THAT HE SHOULD NOT BE HELD RESPONSIBLE FOR THE PLAINTIFF'S INJURIES BECAUSE THE ACCIDENT WAS UNAVOIDABLE.

THE OPERATOR OF A MOTOR VEHICLE IS NOT RESPONSIBLE FOR UNAVOIDABLE OR INEVITABLE ACCIDENTS. THE MERE FACT THAT AN ACCIDENT OCCURS WHICH RESULTS IN INJURY, DEATH, OR PROPERTY DAMAGE DOES NOT MAKE THE DEFENDANT RESPONSIBLE. THE PLAINTIFF MUST PROVE THAT THE DEFENDANT WAS NEGLIGENT.

AN UNAVOIDABLE ACCIDENT IS AN ACCIDENT WHICH, UNDER THE CIRCUMSTANCES AND CONDITIONS, COULD NOT HAVE BEEN FORESEEN OR ANTICIPATED IN THE EXERCISE OF

ORDINARY CARE AND SKILL. AN UNAVOIDABLE ACCIDENT
HAPPENS FROM NATURAL CAUSES.⁸

⁸ 8 Am. Jur.2d Automobiles & Highway Traffic § 427.

STATE OF SOUTH CAROLINA

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) IN THE COURT OF COMMON PLEAS

) TENTH JUDICIAL CIRCUIT

) CASE NO.: 2009-CP-37-1058

) DEFENDANT'S
) REQUESTS TO CHARGE

) No. 2

SUDDEN EMERGENCY

THE DEFENDANT CLAIMS THAT HE SHOULD NOT BE HELD RESPONSIBLE FOR THE PLAINTIFF'S INJURIES BECAUSE OF A SUDDEN EMERGENCY.

WHEN THE DRIVER OF AN AUTOMOBILE IS CONFRONTED WITH A SUDDEN EMERGENCY AND IS COMPELLED TO ACT INSTANTLY TO AVOID A COLLISION OR AN INJURY, THAT DRIVER IS NOT GUILTY OF NEGLIGENCE IF HE MAKES SUCH A CHOICE AS A PERSON OF ORDINARY PRUDENCE PLACED IN A LIKE POSITION MIGHT MAKE, EVEN THOUGH HE DID NOT MAKE THE WISEST CHOICE.⁹

⁹ Clark v. Cantrell, 339 S.C. 369, 529 S.E.2d 528 (2000).

THUS, IF A DRIVER IS CONFRONTED WITH A SUDDEN EMERGENCY, THE DRIVER IS NOT GUILTY OF NEGLIGENCE. THE DRIVER MUST FIRST SHOW THAT AN ACTUAL OR APPARENT EMERGENCY EXISTED WHICH WAS NOT REASONABLY ANTICIPATED.

NEXT, THE EMERGENCY MUST NOT HAVE BEEN CAUSED BY THE DEFENDANT'S OWN CONDUCT. THE EMERGENCY MUST HAVE BEEN CREATED BY THE NEGLIGENCE OF ANOTHER PERSON.

THE DEFENDANT MUST HAVE BEEN FACED WITH DECIDING BETWEEN TWO OR MORE COURSES OF ACTION BECAUSE OF THE EMERGENCY WITHOUT TIME TO THINK ABOUT WHICH COURSE OF ACTION TO FOLLOW.¹⁰

¹⁰ Clark v. Cantrell, 339 S.C. 369, 529 S.E.2d 528 (2000).

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF OCONEE	)	TENTH JUDICIAL CIRCUIT
ERNEST L. COBB,	)	CASE NO.: 2009-CP-37-1058
	)	
PLAINTIFF,	)	DEFENDANT'S
	)	REQUESTS TO CHARGE
vs.	)	
	)	No. <u>3</u>
DAN M. LAFOY,	)	
	)	
DEFENDANT.	)	

LOSS OF CONSCIOUSNESS

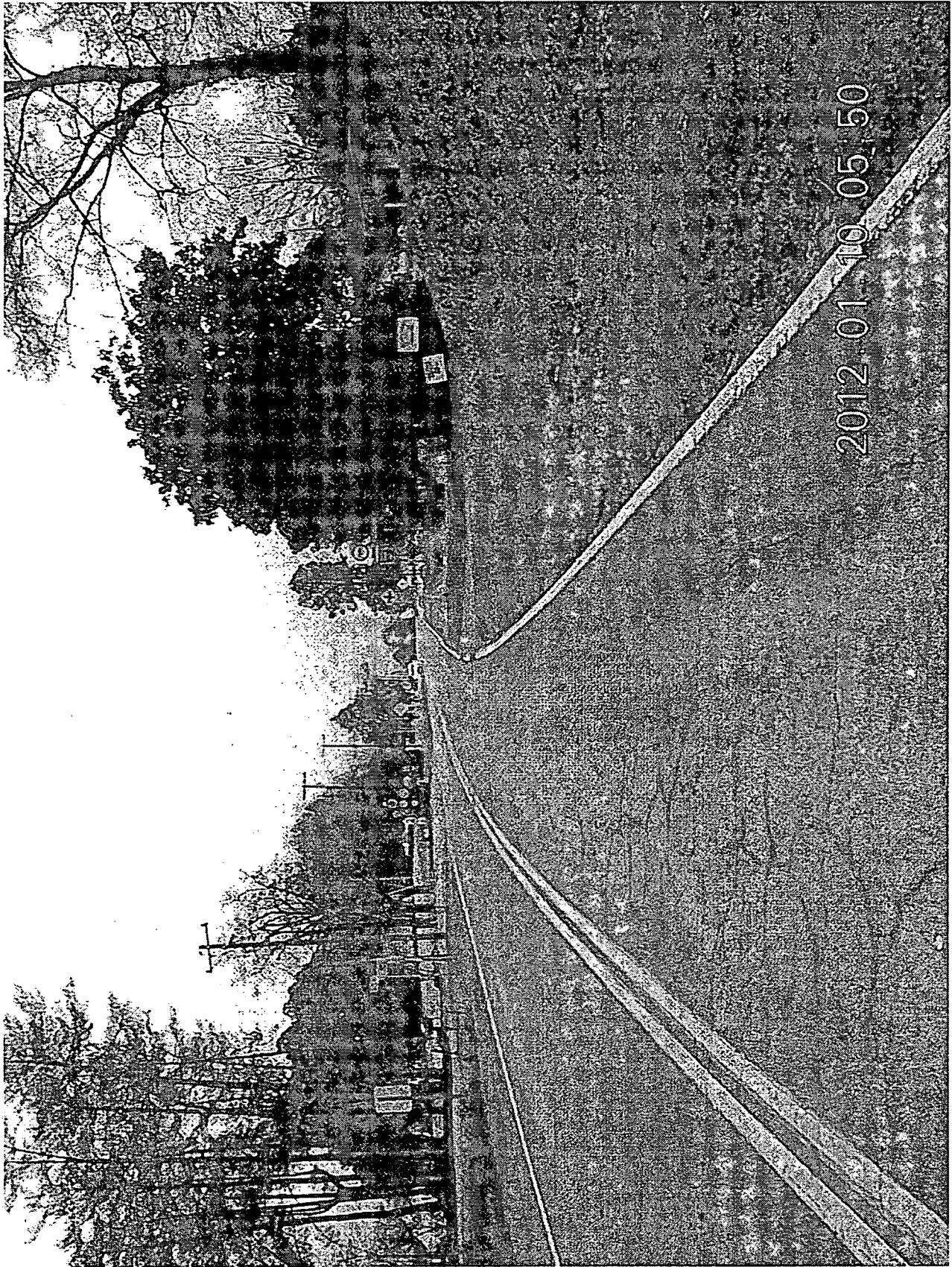
THE DEFENDANT CLAIMS THAT HE SHOULD NOT BE HELD RESPONSIBLE FOR THE PLAINTIFF'S INJURIES BECAUSE HE LOST CONSCIOUSNESS WHILE DRIVING THE VEHICLE.

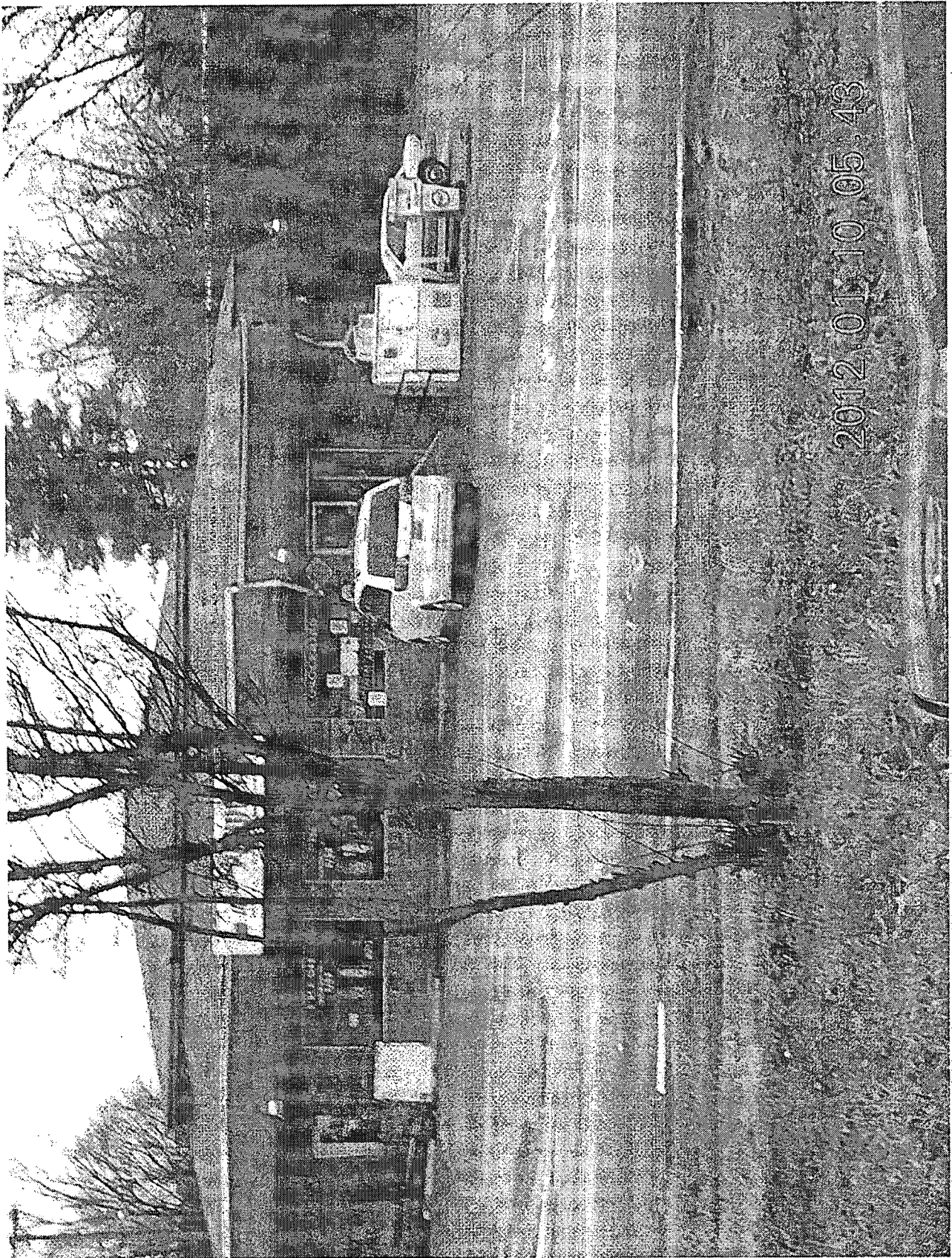
IF A PERSON BECOMES SUDDENLY STRICKEN BY A FAINTING SPELL OR LOSES CONSCIOUSNESS FROM AN UNFORESEEN CAUSE WHILE DRIVING AND IS UNABLE TO CONTROL THE VEHICLE, THAT PERSON IS NOT CONSIDERED TO BE NEGLIGENT.

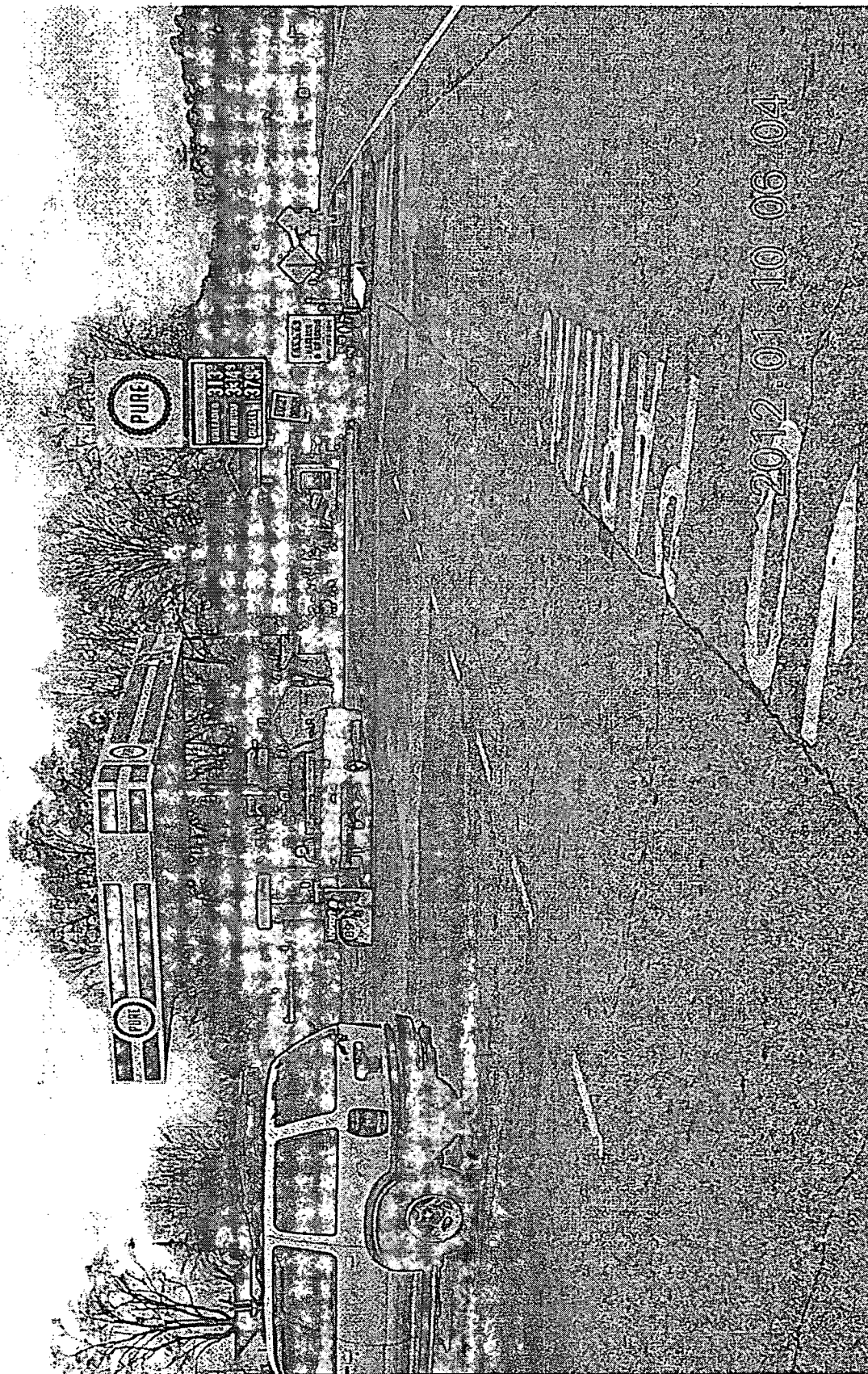
THE DEFENDANT HAS THE BURDEN OF PROVING THE UNFORESEEN SUDDEN LOSS OF CONSCIOUSNESS BY A PREPONDERANCE, OR GREATER WEIGHT, OF THE EVIDENCE.¹¹

¹¹ Boyleston v. Baxley, 243 S.C. 281, 133 S.E.2d 796 (1963).

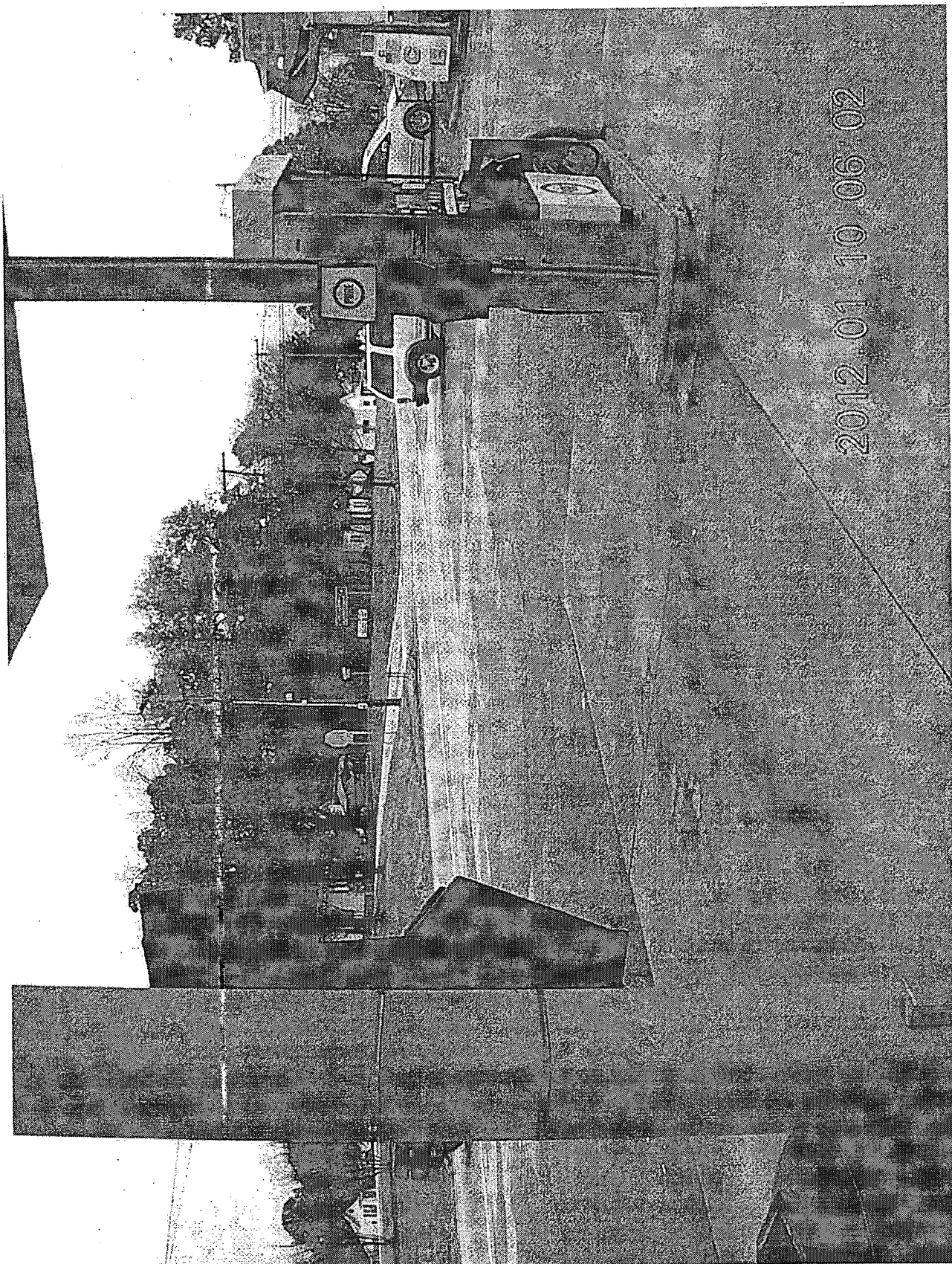




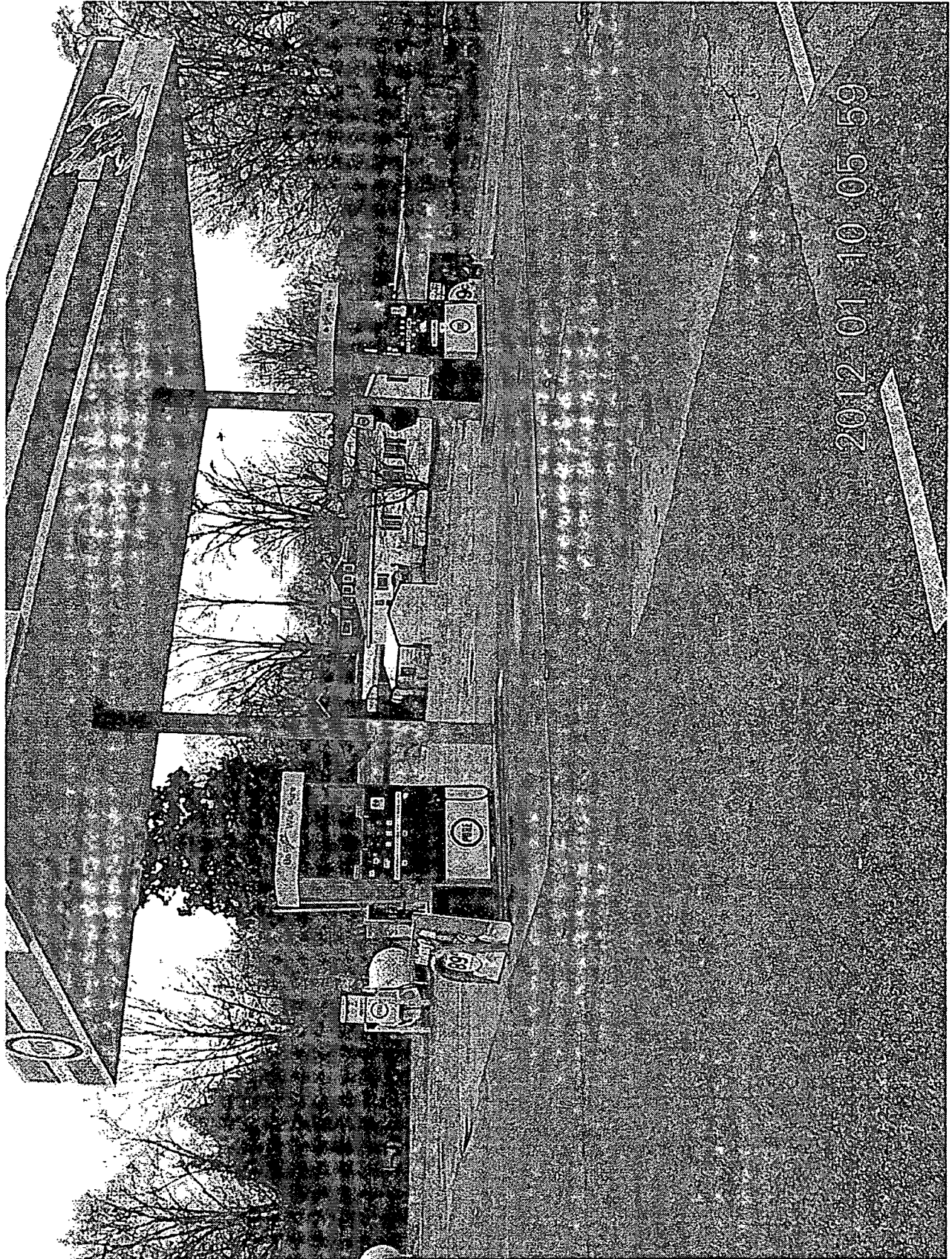




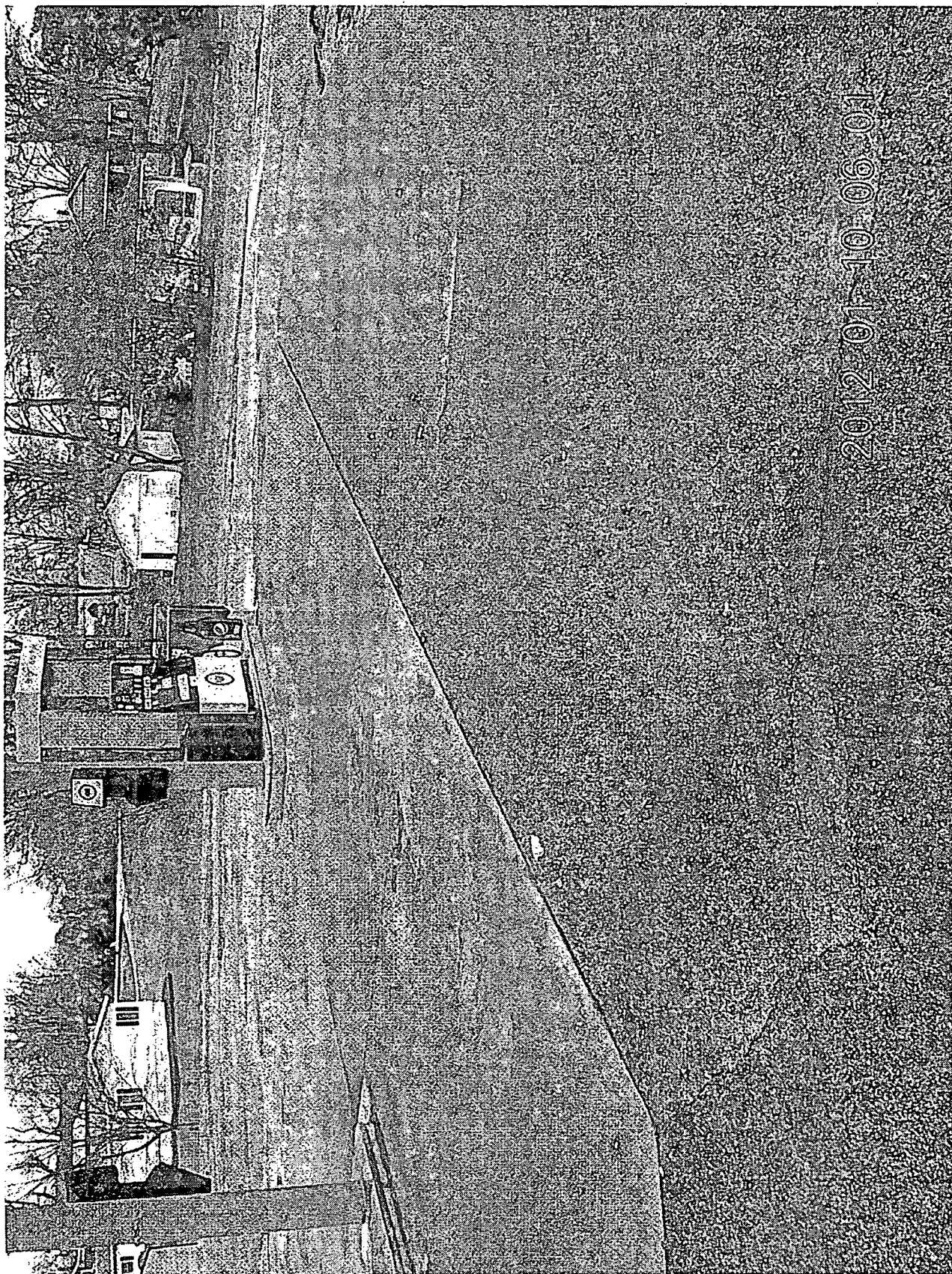
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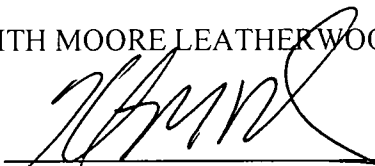


CERTIFICATE OF APPELLANT

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

Respectfully submitted,

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Greenville, South Carolina

Dated: May 1, 2013

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

Alexander S. Macaulay, Circuit Court Judge

Case No. 2012-212693

Ernest L. Cobb and Nancy Cobb Respondents,

Dan M. Lafoy Appellant.

PROOF OF SERVICE

The undersigned counsel for Appellant Dan M. Lafoy hereby certifies that on the
1st day of May, 2013, he caused to be served upon counsel for Respondents **RECORD**

ON APPEAL by United States mail, addressed to:

Larry C. Brandt, Esq.
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Post Office Box 738
Walhalla, South Carolina 29691

Respectfully submitted,

[SIGNATURE PAGE TO FOLLOW]

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SC Court of Appeals

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